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Tracie K. Lindeman  
Clerk of Supreme Court

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

IN THE MATTER OF FREI  
IRREVOCABLE TRUST DATED  
OCTOBER 29, 1996.

Supreme Court No. 68029  
District Court Case No. P065257

STEPHEN BROCK

Appellants,

v.

PREMIER TRUST, INC.; LAWRENCE  
HOWE; AND ELIZABETH MARY  
FREI,

Respondents.

**APPEAL**

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**APPELLANT'S APPENDIX OF EXHIBITS  
VOLUME IV  
FIT 00544 – 00729**

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## TABLE OF CONTENTS FOR EXHIBITS

Exhibit No.	Document Title	Bates No.
<b>VOL. I</b>		
1	Petition to Construe Terms of Trust, To Compel Compliance with Terms of Trust, To Confirm Removal of Trustee, To Compel Redress of Breach of Fiduciary Duties, and to Release Jurisdiction of the Trust	FIT00001- FIT00012
1.A	Order Granting Probate Commissioner's Report and Recommendation Regarding Petition for Order Reforming Terms of Trust	FIT00013- FIT00025
1.B	Demand Letter, Dated September 8, 2014, from the Trustees of the Emil Frei Trust to Premier Trust	FIT00026- FIT00027
1.C	Order Approving Settlement Agreement	FIT00028- FIT00064
1.D	Notice of Removal of Trustee of the Frei Irrevocable Trust, dated October 29, 1996	FIT00065- FIT00067
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3	Notice of Election to Have Matter Heard by the Probate Judge	FIT00073
4	Notice of Appearance (Premier Trust, Inc.)	FIT00074- FIT00075
5	Notice of Appearance (Lawrence Howe and Elizabeth Frei)	FIT00076- FIT00077
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Exhibit No.	Document Title	Bates No.
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14.D	Copies of the Communications Sent by Premier Trust to the Trust Beneficiaries and the Attachments Therewith	FIT00525-FIT00537
14.E	Affidavit of Heather St. John in Support of Premier Trust's Supplement to Opposition to Petition to Construe Terms of Trust, To Compel Compliance with Terms of Trust, To Confirm Removal of Trustee, To Compel Redress of Breach of Fiduciary Duties, and to Release Jurisdiction of the Trust	FIT00538-FIT00540
14.F	Affidavit of Beth Marchiano in Support of Premier Trust's Supplement to Opposition to Petition to Construe Terms of Trust, To Compel Compliance with Terms of Trust, To Confirm Removal of Trustee, To Compel Redress of Breach of Fiduciary Duties, and to Release Jurisdiction of the Trust	FIT00541-FIT00543
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Exhibit No.	Document Title	Bates No.
	Terms of Trust, To Compel Compliance with Terms of Trust, To Confirm Removal of Trustee, To Compel Redress of Breach of Fiduciary Duties, and to Release Jurisdiction of the Trust (Stephen Brock)	
18	Transcript of Proceedings 1/26/15	FIT00599-FIT00703
19	Findings of Fact and Conclusions of Law	FIT00704-FIT00713
20	Notice of Entry of Findings of Fact and Conclusions of Law	FIT00714-FIT00715
20.A	Findings of Fact and Conclusions of Law	FIT00716-FIT00726
21	Notice of Appeal	FIT00727-FIT00729

### **CERTIFICATE OF SERVICE**

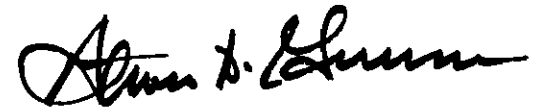
I HEREBY CERTIFY that on the 23<sup>rd</sup> day of December, 2015, I served and hand delivered a true and correct copy of the foregoing **APPELLANT'S APPENDIX OF EXHIBITS, VOLUME IV**, to:

RICHARD CHATWIN, Esq.  
2450 St. Rose Pkwy., Suite 200  
Henderson, Nevada 89074  
*Attorney for Respondent, Premier Trust, Inc.*

MICHAEL WALL, Esq.  
10080 W. Alta Drive, Suite 200  
Las Vegas, NV 89145  
*Attorney for Respondents,  
Lawrence Howe and Elizabeth*

/s/ Amanda Abril

An employee of the Law Office of Mike Beede



CLERK OF THE COURT

**SUPP**  
Todd L. Moody (5430)  
Russel J. Geist (9030)  
HUTCHISON & STEFFEN, LLC.  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145  
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*Attorneys for Lawrence Howe and  
Elizabeth Mary Frei*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

IN THE MATTER OF

) Case No. P-09-065257-T

) Dept No. 26

FREI IRREVOCABLE TRUST,  
dated October 29, 1996.

)

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**SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION TO CONSTRUE TERMS  
OF TRUST, TO COMPEL COMPLIANCE WITH TERMS OF TRUST, TO CONFIRM  
REMOVAL OF TRUSTEE, TO COMPEL REDRESS OF BREACH OF FIDUCIARY  
DUTIES, AND TO RELEASE JURISDICTION OF THE TRUST**

Lawrence Howe and Elizabeth Mary Frei, Trustees of the EMIL FREI III TRUST, by  
and through their attorneys, Todd L. Moody and Russel J. Geist of the law firm of Hutchison &  
Steffen, LLC, hereby file this Supplemental Brief as requested by the Court on January 26,  
2015, at the hearing held on Stephen Brock's Petition to Construe Terms of Trust, etc.  
regarding the FREI IRREVOCABLE TRUST, dated October 29, 1996 ("Trust") and states as  
follows:

This Court requested the parties file supplemental briefs regarding the following issues:

- 1) Can a settlor and a beneficiary of an irrevocable trust modify the terms of an irrevocable trust by agreement, despite the existence of a clause preventing a beneficiary from alienating his interest ("spendthrift clause") in the trust?
- 2) What effect did the reformation of the Trust by the Order entered on June 12, 2009 in case no. P-09-065257 which specifically addressed the dispositive provisions of Article VII have on Article XIII of the Trust which contained the spendthrift clause?

**HUTCHISON & STEFFEN**

A PROFESSIONAL LLC

PECCOLE PROFESSIONAL PARK  
10080 WEST ALTA DRIVE, SUITE 200  
LAS VEGAS, NV 89145

1 This Court also requested that the parties file proof of notices provided from Premier Trust to  
2 Stephen Brock and the other beneficiaries regarding the payments made from Stephen Brock's  
3 beneficial interest in the Trust pursuant to the March 2010 Settlement and the June 2010 Order.  
4 Attached as **Exhibit A** are affidavits of the beneficiaries who have received the notices from  
5 Premier Trust regarding the Trust distributions including the distribution of Stephen Brock's  
6 interest.

### 7 POINTS AND AUTHORITIES

#### 8 A. Can a Settlor and Beneficiary Agree to Modify an Irrevocable Trust?

9 The Restatement (Second) of Trusts § 338 (1959) explicitly provides that a settlor and  
10 beneficiary can "compel modification or termination" of a trust by agreement. "If the settlor and  
11 all of the beneficiaries of a trust consent and none of them is under an incapacity, they can  
12 compel the termination or modification of the trust, although the purposes of the trust have not  
13 been accomplished." *Id.* at (1). Even if all of the beneficiaries don't consent, "the other  
14 beneficiaries with the consent of the settlor can compel a modification or a partial termination  
15 of the trust if the interests of the beneficiaries who do not consent or are under an incapacity are  
16 not prejudiced thereby." *Id.* at (2). Comment *a.* to § 338 makes it clear that this rule "is  
17 applicable although the settlor does not reserve a power of revocation, and even though it is  
18 provided in specific words by the terms of the trust that the trust shall be irrevocable."

19 The consent of the settlor in the modification or a termination of a spendthrift trust is  
20 significant. The beneficiary(ies) of a spendthrift trust alone cannot compel modification or  
21 termination of the trust. Restatement (Second) of Trusts § 337 cmt. 1. However, with the  
22 consent of the settlor, all of the beneficiaries, or other beneficiaries who are not under an  
23 incapacity can compel termination of a trust "if the interests of the beneficiaries who do not  
24 consent or are under an incapacity are not prejudiced thereby." Restatement (Second) of Trusts  
25 § 338. Even if the trust is a spendthrift trust, the settlor and beneficiary(ies) can consent to its  
26 termination and modification. *Id.* at comment a, d and h.

27 The fact that a trust is a spendthrift trust does not prevent a settlor and beneficiary from  
28 consenting to modification of a trust. Unless specifically proscribed by law, trust principles

1 “generally appl[y] to that type of trust characterized as spendthrift trusts. There is no reason in  
2 logic or law to create distinctions. The word ‘spendthrift’ merely describes its nature, as would  
3 the words ‘charitable’, ‘educational’ or other similar words employed in the field of trusts.”  
4 *Preston v. City Nat. Bank*, 294 So.2d 11, 14 (Fla. Dist. Ct. App. 1974).

5 Courts have therefore respected the rule that a settlor and beneficiary can modify or  
6 terminate a trust by consent, notwithstanding the existence of a spendthrift provision. *Id.* (“The  
7 terms of a trust may be modified if the settlor and all the beneficiaries consent. Having the  
8 power to terminate, they obviously have the power to create a new trust or to modify or change  
9 the old.”); *See also Peck v. Peck*, 133 So.3d 587, 591 (Fla. Dist. Ct. App. 2014) (The court held  
10 that termination of trust containing spendthrift provision with consent of settlor and  
11 beneficiaries was proper despite objection of co-trustee); *Musick v. Reynolds*, 798 S.W.2d 626,  
12 629 (Tex.App.1990)(An irrevocable spendthrift trust can be modified with the consent of the  
13 settlor and beneficiaries); and *Hein v. Hein*, 543 N.W.2d 19, 21 (Mich. App. Ct. 1995)  
14 (Judgment terminating an irrevocable spendthrift trust with consent of settlor and beneficiaries  
15 was proper despite objection of trustee.)

16 The facts in the *Hein* case are significant because the settlors and lifetime beneficiaries  
17 of an irrevocable spendthrift trust sought to remove the trustee, who was their son and a  
18 residual beneficiary, and compel him to pay restitution to the trust and the settlors for alleged  
19 breaches of fiduciary duties. *Hein* at 19. The parties agreed to settle the matter by terminating  
20 the trust in exchange for dismissing all remaining issues except the trustee’s duty to account.  
21 *Id.* at 20. The residual beneficiary/trustee was not present at the hearing on the settlement, but  
22 his attorney represented that he had authority to bind his client, and consented to the settlement  
23 agreement on behalf of the residual beneficiary/trustee. However, the attorney objected to the  
24 trustee’s duty to provide an accounting. The court entered a consent judgment and terminated  
25 the spendthrift trust. On appeal, the court noted that the residual beneficiary/trustee only  
26 objected to the proposed duty to account upon termination of the trust, but agreed with the rest  
27 of the settlement including termination of the trust. In short, he agreed to the modification as  
28 beneficiary, but objected as trustee. The court held that an irrevocable spendthrift trust may be



1 terminated “without the consent of the trustee where the settlor and all the beneficiaries consent  
2 to its termination.” *Id.* The settlement agreement effectively terminated the trust, and the  
3 beneficiary could not rely on the spendthrift provision to prevent such termination. *Id.*

4 In the case of the Trust before this Court, under facts strikingly similar to those under  
5 *Hein*, the Settlor, Dr. Emil Frei, III and the beneficiary whose interest would be affected by the  
6 modification, Stephen Brock, agreed in May 2010 to permit Stephen Brock to pledge interest in  
7 the Trust as security for payments from Stephen Brock to Dr. Frei under the settlement  
8 agreement. Here, however, instead of petitioning the court to terminate the Trust altogether, the  
9 parties agreed to allow Stephen Brock pledge his interest in the Trust as security for payments  
10 to Dr. Frei under the settlement and the court entered an order ratifying the agreement. If Dr.  
11 Frei were not a party to the settlement and had not consented to the modification of Stephen  
12 Brock’s rights under the Trust, the pledge would have been ineffective. The consent of the  
13 other beneficiaries under the Trust was not required for the modification to be effective,  
14 because the other beneficiaries were not prejudiced by permitting Stephen Brock to pledge his  
15 interest in the Trust despite the spendthrift clause.

16 The settlement agreement entered into by Dr. Frei and Stephen Brock in May 2010 and  
17 reduced to an order in June 2010 effectively modified the Trust permitting Stephen Brock to  
18 pledge his interest in the Trust as security for his payments to Dr. Frei under the settlement  
19 agreement. Stephen Brock is therefore not a spendthrift beneficiary with respect to his  
20 obligation to Dr. Frei and his trust under the settlement agreement. Stephen Brock was  
21 represented by counsel to advise him of the consequences of his agreement and consent to the  
22 pledge. Any claim that he was unaware that he lacked the ability to pledge his interest is a red  
23 herring; he had the ability to pledge his interest with the consent of the settlor, Dr. Frei.  
24 Stephen Brock cannot block the trustee of the Trust from carrying out the terms of the  
25 settlement agreement by distributing his interest under the Trust to the Emil Frei III Trust  
26 pursuant to the settlement.

27 **B. What Effect Did the 2009 Reformation Have on the Spendthrift Trust?**

28 Dr. Frei and Stephen Brock agreed in 2010 to permit Stephen to pledge his interest in

1 the Trust as security for his payments to Dr. Frei under the settlement agreement in spite of the  
2 spendthrift provision. Therefore, the issue of whether the 2009 reformation affected the  
3 spendthrift clause does not necessarily need to be examined from the perspective of whether or  
4 not the spendthrift clause was in effect in 2010 at the time of the settlement agreement.  
5 Assuming the spendthrift clause was unaffected by the 2009 reformation order, Dr. Frei and  
6 Stephen Brock still had the ability to subsequently modify the terms of the trust by mutual  
7 consent, including the modifying applicability of the spendthrift clause as they did in 2010  
8 when entering into the settlement agreement.

9 Ultimately, Premier Trust properly carried out the settlor's intent by following the terms  
10 of the settlement agreement with respect to Stephen's interest as security for his failure to pay  
11 as agreed to the Emil Frei III Trust. Under the terms of the Trust, Stephen Brock may not  
12 unilaterally remove Premier Trust as the trustee. There has been no breach of trustee duties by  
13 Premier Trust, and it would be inappropriate for the Court to grant Stephen Brock's petition to  
14 remove Premier Trust.

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## CONCLUSION

This Court should deny Stephen Brock's Petition to Construe Terms of the Trust. Stephen Brock cannot hide behind a spendthrift clause in the Trust when he and the settlor, Dr. Frei, agreed to permit Stephen's pledge of his beneficial interest in the trust as security for payments to Dr. Frei under the 2010 settlement agreement, effectively eliminating the spendthrift provision with respect to Dr. Frei as Stephen's creditor. Accordingly, Premier Trust has violated no fiduciary duties and should remain as the trustee of the Trust to fulfill its purpose as intended by the settlor, Dr. Frei. Further the Court should order that Premier Trust is permitted to carry out the terms of the settlement agreement and Order of 2010 and distribute Stephen Brock's interest in the Trust to the Emil Frei III Trust for his failure to make the agreed-upon payments under the settlement.

Dated February 13, 2015.

HUTCHISON & STEFFEN, LLC



Todd L. Moody (5430)  
Russel J. Geist (9030)  
10080 West Alta Drive, Suite 200  
Las Vegas, Nevada 89145  
(702) 385-2500  
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*Attorneys for Lawrence Howe and  
Elizabeth Mary Frei*

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this 13<sup>th</sup> day of February, 2015, I caused the above and foregoing document entitled **SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION TO CONSTRUCT TERMS OF TRUST, TO COMPEL COMPLIANCE WITH TERMS OF TRUST, TO CONFIRM REMOVAL OF TRUSTEE, TO COMPEL REDRESS OF BREACH OF FIDUCIARY DUTIES, AND TO RELEASE JURISDICTION OF THE TRUST** to be served as follows:

- ☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☐ to be served via facsimile; and/or
- ☒ pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or
- ☐ to be hand-delivered;

to the attorneys and/or parties listed below at the address and/or facsimile number indicated below:

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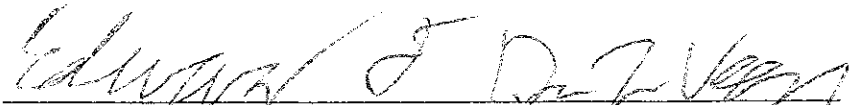
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Bedford Hills, NY 10057

  
An employee of Hutchison & Steffen, LLC

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EXHIBIT PAGE ONLY

## EXHIBIT A

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

AFFIDAVIT OF ELIZABETH MARY FREI

STATE OF New York )  
COUNTY OF Rochester ) ss.

I, Elizabeth Mary Frei, being first duly sworn under penalty of perjury, hereby deposes and say as follows:

1. I am the daughter of Emil Frei, III, and the step-daughter of Adoria B. Frei, both deceased. I am also a beneficiary under the Frei Irrevocable Trust, also known as the Frei Joint Irrevocable Trust ("Trust"), dated October 29, 1996.


2. On or about August 6, 2013, I received an email from Heather St. John of Premier Trust, which contained a letter dated the same date, from Mark Dreschler, President of Premier Trust, who was the Trustee of the Trust at the time. The letter contained an explanation of the process of distribution and a spreadsheet of trust share division. The copy of the email and letter attached to this Affidavit as Exhibit 1 is the same email and correspondence which I received on August 6, 2013.

3. On or about October 24, 2013, I received an email from Beth Marchiano of Premier Trust, which contained a letter dated October 23, 2014, from Mark Dreschler, President of Premier Trust, who was the Trustee of the Trust at the time. The letter contained an explanation of the coordination with the probate process. The copy of the email and letter attached to this Affidavit as Exhibit 2 is the same email and correspondence which I received on October 24, 2013.

4. On or about May 12, 2014, I received an email which contained a letter dated May 12, 2014, from Mark Dreschler, President of Premier Trust, who was the Trustee of the Trust at the time. The letter contained an update on the coordination with the probate process and an updated allocation of trust shares. The copy of the email and letter attached to this Affidavit as Exhibit 3 is the same email and correspondence which I received on May 12, 2014.

5. I received these emails at the time that they were sent by Premier Trust based on the date indicated in the email header.

DATED February 13, 2015.

  
Elizabeth Mary Frei

STATE OF New York )  
COUNTY OF Rochester ) ss.

SUBSCRIBED AND SWORN TO before me by  
Denise Lindeman  
this 13th day of February, 2015.

Donna L. Smith  
Notary Public

2019-05-15 15:00:00  
 2019-05-15 15:00:00  
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 2019-05-15 15:00:00  
 2019-05-15 15:00:00

**AFFIDAVIT OF EMIL FREI, IV**

STATE OF \_\_\_\_\_ )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

I, Emil Frei, IV, being first duly sworn under penalty of perjury, hereby deposes and say as follows:

1. I am the son of Emil Frei, III, and the step-son of Adoria B. Frei, both deceased. I am also a beneficiary under the Frei Irrevocable Trust, also known as the Frei Joint Irrevocable Trust ("Trust"), dated October 29, 1996.

2. On or about August 6, 2013, I received an email from Heather St. John of Premier Trust, which contained a letter dated the same date, from Mark Dreschler, President of Premier Trust, who was the Trustee of the Trust at the time. The letter contained an explanation of the process of distribution and a spreadsheet of trust share division. The copy of the email and letter attached to this Affidavit as Exhibit 1 is the same email and correspondence which I received on August 6, 2013.


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5. I received these emails at the time that they were sent by Premier Trust based on the date indicated in the email header.

DATED February 8, 2015.

  
Emil Frei, IV

STATE OF Mississippi )  
 ) ss.  
COUNTY OF Ashtabula )

SUBSCRIBED AND SWORN TO before me by  
this 12 day of February, 2015.

Notary Public

## 1

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5. I received these emails at the time that they were sent by Premier Trust based on the date indicated in the email header.

DATED February 10, 2015.

*Judith Frei-Howe*  
Judith Frei-Howe

STATE OF \_\_\_\_\_ )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

SUBSCRIBED AND SWORN TO before me by

this \_\_\_\_\_ day of February, 2015.

Notary Public

AFFIDAVIT OF NANCY FREI

STATE OF \_\_\_\_\_ )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

I, Nancy Frei, being first duly sworn under penalty of perjury, hereby deposes and say as follows:

1. I am the daughter of Emil Frei, III, and the step-daughter of Adoria B. Frei, both deceased. I am also a beneficiary under the Frei Irrevocable Trust, also known as the Frei Joint Irrevocable Trust ("Trust"), dated October 29, 1996.

2. On or about August 6, 2013, I received an email from Heather St. John of Premier Trust, which contained a letter dated the same date, from Mark Dreschler, President of Premier Trust, who was the Trustee of the Trust at the time. The letter contained an explanation of the process of distribution and a spreadsheet of trust share division. The copy of the email and letter attached to this Affidavit as Exhibit 1 is the same email and correspondence which I received on August 6, 2013.

3. On or about October 24, 2013, I received an email from Beth Marchiano of Premier Trust, which contained a letter dated October 23, 2014, from Mark Dreschler, President of Premier Trust, who was the Trustee of the Trust at the time. The letter contained an explanation of the coordination with the probate process. The copy of the email and letter attached to this Affidavit as Exhibit 2 is the same email and correspondence which I received on October 24, 2013.

4. On or about May 12, 2014, I received an email which contained a letter dated May 12, 2014, from Mark Dreschler, President of Premier Trust, who was the Trustee of the Trust at the time. The letter contained an update on the coordination with the probate process and an updated allocation of trust shares. The copy of the email and letter attached to this Affidavit as Exhibit 3 is the same email and correspondence which I received on May 12, 2014.

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5. I received these emails at the time that they were sent by Premier Trust based on the date indicated in the email header.

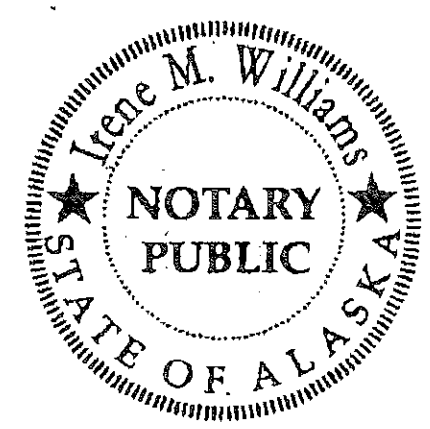
DATED February 10, 2015.

Nancy Frei  
Nancy Frei

STATE OF Alaska )  
COUNTY OF Nash Star Borough ) ss.

SUBSCRIBED AND SWORN TO before me by  
Nancy Frei  
this 10 day of February, 2015

Irene M. Williams  
Notary Public Irene M. Williams  
commission expires 4 July 2018



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EXHIBIT PAGE ONLY

## EXHIBIT 1

HUTCHISON & STEFFEN  
A PROFESSIONAL LLC

## Richard Chatwin

---

**From:** Heather St. John <IMCEAEX-\_O=FIRST+20ORGANIZATION\_OU=EXCHANGE+20ADMINISTRATIVE+20GROUP+20+28FYDIBOHF23SPDLT+29\_CN=RECIPIENTS\_CN=HSTJOHN@namprd02.prod.outlook.com>  
**Sent:** Tuesday, August 06, 2013 11:55 AM  
**To:** Brock, Francis; Brock, John Claver; Brock, Peter; Brock, Stephen; Brock, Vincent; Frei, Alice; Frei, Elizabeth Mary; Frei, Emil; Frei, Nancy; Frei-Howe, Judith  
**Cc:** Mark Dreschler; Mark Dreschler; Jodi McKenzie  
**Subject:** RE: Emil Frei, III and Adoria B. Frei Joint Irrevocable Trust  
**Attachments:** image001.jpg; Ltr to Beneficiaries 08.06.13.pdf; Beneficiary Split of Trust.pdf; Stephen Brock Loans.pdf

Dear Beneficiaries,

Attached you will find a letter from Mr. Dreschler explaining the process of distributing the trust outright, a spreadsheet showing how the trust funds are to be divided and a spreadsheet of what we have calculated to be owed by Stephen Brock.

Please read/review the attached. Once you done so, please sign, date and return the "Beneficiary Split of Trust" form and instruct as to how you wish to receive your distribution. If you wish for us to mail you a check, please verify the address you want it sent to. If you wish for us to send to your bank, we need following information:

Bank Name  
ABA/Routing Number  
Account Number  
Name on Account (Account Title)

All of this can be done via e-mail, fax or regular mail.

Sincerely,

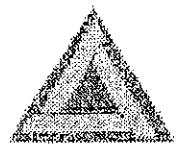
*Heather St. John*  
*Trust Assistant*



4465 South Jones Boulevard  
Las Vegas, Nevada 89103  
Phone (702) 507-0750 - Fax (702) 507-0755  
[hstjohn@premiertrust.com](mailto:hstjohn@premiertrust.com)

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Click 'Edit HTML' to insert an HTML disclaimer



**PREMIER TRUST**

*"It's a Matter of Trust"*™

Mark Dreschler  
President

August 6, 2013

Dear Beneficiaries of the Emil Frei III and Adoria B. Frei Joint Trust

We are advising you as to the status of the administration of this irrevocable trust. As we have told several of you, this is not a simple insurance death benefit claim situation. As Trustees we have to follow and abide by the terms of the Trust document.

The Trust's only asset was a life insurance policy and we have received the net death benefit of the insurance policy. However, there are several administrative issues we must follow before we can terminate this Trust and make the distributions to each of you.

In typical estate and trust situations, an irrevocable trust that is used to hold life insurance as an asset is part of an overall plan created for the trust creators. There is language in the trust (Article Five, Section 1) that allows the Trust to work with the probate estate to provide assistance if there may be a need by the estate to borrow or sell its illiquid assets.

Also, should any of the irrevocable trust (Article Five, Section 2) be included in the Decedent's federal estate tax calculation, the trust would be required to pay a prorated share of any estate taxes attributable to those assets. The intent of these irrevocable life insurance trusts is to keep those insurance proceeds out of the decedent's estate for estate tax purposes. However, if an estate tax return is prepared and filed, it is a requirement to report this irrevocable life insurance trust on the return.

As all estate tax returns are audited, many times the IRS will audit the irrevocable life insurance trust. The IRS reviews to make sure the trust was administered properly, especially the process regarding the Right of Withdrawal (Crummey) letters. If they feel the process was not followed they may disallow or discredit the irrevocable life insurance trust thereby including all or portions of the death benefit in the estate of the decedent. Then it becomes a negotiating game with the IRS. Does this happen? Rarely, but as you can imagine, these irrevocable life insurance trusts are not well liked by the IRS and if they can find flaws in the administrative process they will pursue to have assets added to decedent's estate. Since we were not involved in this Trust's administration, it is difficult for us to determine if the process was followed.



However, if the probate estate does not file an estate tax return, the odds of an audit diminish greatly. As the probate estate has yet to be opened, we will have to wait for the personal representatives to be appointed so they can confirm in their fiduciary capacities on these two issues.

In the May 1, 2009 Court Order the trust dispositive provisions were reformed, and stated that each beneficiary is required to advise the trustees in writing of their intent to take their 1/10<sup>th</sup> share outright. We have prepared and enclosed a distribution allocation chart showing the net death benefits received (after paying off the loan) and the amounts to be repaid to each individual beneficiary for their contributions to the annual premium financing. This chart includes a place for you to sign authorizing the outright distribution of your trust share. Please sign and return to our office.

At this time there has been a request for a partial distribution of \$100,000 to each beneficiary until we can resolve the above stated issues. Currently the death benefit proceeds are held at Transamerica in one of their money market vehicles that pays a high rate of interest. We have no problem making this distribution and can have these funds distributed once we have received them from Transamerica.

Please be advised, we will not be distributing any funds to Stephen due to the amounts owed from the Settlement Agreement and we are providing our calculations on what is owed. Again, we will request the personal representatives to agree upon these obligations and will then distribute those funds to the probate estate in satisfaction of that Agreement.

Sincerely,



Copy to: Peter Brock, Co-Trustee

**Emil Frei, III and Adoria B. Frei Joint Irrevocable Trust**

Death Benefit Payout:	\$7,541,195.65	6/12/2013
Money Market Fund Balance:	\$4,851.78	6/24/2013
Reimbursement from First Ins Funding:	\$51.08	6/24/2013
<b>Total:</b>	<b>\$7,546,098.51</b>	

**Fees:**

Premier Trust Annual Fee for 2013:	\$750.00
Premier Trust Extraordinary Fees:	\$6,750.00
Peter Brock Co-TTEE Fees:	\$0.00
<b>Total Fees:</b>	<b>\$7,500.00</b>

Funds Available:	\$7,546,098.51
Minus Fees:	\$7,500.00
Return of Premium Payments:	\$33,739.87
<b>Total Net:</b>	<b>\$7,504,858.64</b>

	Elizabeth Mary Frei	Emil Frei, IV	Alice C. Frei	Nancy Frei	Judith Frei-Howe
Premium Payments	\$6,717.97	\$6,717.98	\$6,717.98	\$6,867.97	\$6,717.97
1/10 of Net Total	\$750,485.86	\$750,485.86	\$750,485.86	\$750,485.86	\$750,485.86
<b>Total To Beneficiary</b>	<b>\$757,203.83</b>	<b>\$757,203.84</b>	<b>\$757,203.84</b>	<b>\$757,353.83</b>	<b>\$757,203.83</b>

	Francis Christopher Brock	Peter Augustine Brock	Vincent dePaul Brock	John Claver Brock	Stephen Martin Brock
Premium Payments	\$6,972.97	\$6,972.98	\$6,972.97	\$6,972.97	\$7,042.62
1/10 of Net Total	\$750,485.86	\$750,485.86	\$750,485.86	\$750,485.86	\$750,485.86
<b>Total To Beneficiary</b>	<b>\$757,458.83</b>	<b>\$757,458.84</b>	<b>\$757,458.83</b>	<b>\$757,458.83</b>	<b>\$757,528.48</b>

\* Final dollar amount could change based on processing of the Estate

I hereby provide my written request per court order to take my 1/10 interest outright and free of trust.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Print: \_\_\_\_\_

Funds owed by Stephen Brock per court order dtd 06.04.2010

Principal Balance: \$415,000.00

Pmt Due Date	Outstanding Principal Balance	Accrued Interest	Accrued Penalty	Principal Payment	Interest Payment	Ending Loan Balance
06.01.2010	\$415,000.00	\$1,272.67	\$0.00	\$5,000.00	\$0.00	\$411,272.67
07.01.2010	\$411,272.67	\$1,261.24	\$0.00	\$0.00	\$0.00	\$412,533.90
08.01.2010	\$412,533.90	\$1,265.10	\$1,718.89	\$0.00	\$0.00	\$415,517.90
09.01.2010	\$415,517.90	\$1,274.25	\$1,731.32	\$0.00	\$0.00	\$418,523.48
10.01.2010	\$418,523.48	\$1,283.47	\$1,743.85	\$0.00	\$0.00	\$421,550.80
11.01.2010	\$421,550.80	\$1,292.76	\$1,756.46	\$0.00	\$0.00	\$424,600.01
12.01.2010	\$424,600.01	\$1,302.11	\$1,769.17	\$0.00	\$0.00	\$427,671.29
01.01.2011	\$427,671.29	\$1,311.53	\$1,781.96	\$0.00	\$0.00	\$430,764.78
02.01.2011	\$430,764.78	\$1,321.01	\$1,794.85	\$0.00	\$0.00	\$433,880.64
03.01.2011	\$433,880.64	\$1,330.57	\$1,807.84	\$0.00	\$0.00	\$437,019.05
04.01.2011	\$437,019.05	\$1,340.19	\$1,820.91	\$0.00	\$0.00	\$440,180.15
05.01.2011	\$440,180.15	\$1,349.89	\$1,834.08	\$0.00	\$0.00	\$443,364.12
06.01.2011	\$443,364.12	\$1,359.65	\$1,847.35	\$0.00	\$0.00	\$446,571.12
07.01.2011	\$446,571.12	\$1,369.48	\$1,860.71	\$0.00	\$0.00	\$449,801.32
08.01.2011	\$449,801.32	\$1,379.39	\$1,874.17	\$0.00	\$0.00	\$453,054.88
09.01.2011	\$453,054.88	\$1,389.37	\$1,887.73	\$0.00	\$0.00	\$456,331.98
10.01.2011	\$456,331.98	\$1,399.42	\$1,901.38	\$0.00	\$0.00	\$459,632.78
11.01.2011	\$459,632.78	\$1,409.54	\$1,915.14	\$0.00	\$0.00	\$462,957.46
12.01.2011	\$462,957.46	\$1,419.74	\$1,928.99	\$0.00	\$0.00	\$466,306.18
01.01.2012	\$466,306.18	\$1,430.01	\$1,942.94	\$0.00	\$0.00	\$469,679.13
02.01.2012	\$469,679.13	\$1,440.35	\$1,957.00	\$0.00	\$0.00	\$473,076.48
03.01.2012	\$473,076.48	\$1,450.77	\$1,971.15	\$0.00	\$0.00	\$476,498.40
04.01.2012	\$476,498.40	\$1,461.26	\$1,985.41	\$0.00	\$0.00	\$479,945.07
05.01.2012	\$479,945.07	\$1,471.83	\$1,999.77	\$0.00	\$0.00	\$483,416.67
06.01.2012	\$483,416.67	\$1,482.48	\$2,014.24	\$0.00	\$0.00	\$486,913.38
07.01.2012	\$486,913.38	\$1,493.20	\$2,028.81	\$0.00	\$0.00	\$490,435.39
08.01.2012	\$490,435.39	\$1,504.00	\$2,043.48	\$0.00	\$0.00	\$493,982.87
09.01.2012	\$493,982.87	\$1,514.88	\$2,058.26	\$0.00	\$0.00	\$497,556.02
10.01.2012	\$497,556.02	\$1,525.84	\$2,073.15	\$0.00	\$0.00	\$501,155.00
11.01.2012	\$501,155.00	\$1,536.88	\$2,088.15	\$0.00	\$0.00	\$504,780.03
12.01.2012	\$504,780.03	\$1,547.99	\$2,103.25	\$0.00	\$0.00	\$508,431.27
01.01.2013	\$508,431.27	\$1,559.19	\$2,118.46	\$0.00	\$0.00	\$512,108.92
02.01.2013	\$512,108.92	\$1,570.47	\$2,133.79	\$0.00	\$0.00	\$515,813.18
03.01.2013	\$515,813.18	\$1,581.83	\$2,149.22	\$0.00	\$0.00	\$519,544.22
04.01.2013	\$519,544.22	\$1,593.27	\$2,164.77	\$0.00	\$0.00	\$523,302.26
05.01.2013	\$523,302.26	\$1,604.79	\$2,180.43	\$0.00	\$0.00	\$527,087.48
06.01.2013	\$527,087.48	\$1,616.40	\$2,196.20	\$0.00	\$0.00	\$530,900.08
07.01.2013	\$530,900.08	\$1,628.09	\$2,212.08	\$0.00	\$0.00	\$534,740.26
08.01.2013	\$534,740.26	\$1,639.87	\$2,228.08	\$0.00	\$0.00	\$538,608.21

Accrued Interest Rate based on 2010 AFR for Midterm Loans 2.68% +1% = 3.68% Late Penalty Rate 5%

Loan Period June 1st, 2010 to May 31, 2013

Terms per court order dated June 4th, 2010

Funds owed by Stephen Brock per court order dtd 06.04.2010
--

Principal Balance: \$100,000

Pmt Due Date	Principal Balance	Accrued Interest	Accrued Penalty	Principal Payment	Interest Payment	Ending Loan Balance
06.01.2013	\$100,000.00	\$500.00	\$0.00	\$0.00	\$0.00	\$100,500.00
07.01.2013	\$100,500.00	\$502.50	\$418.75	\$0.00	\$0.00	\$101,421.25
08.01.2013	\$101,421.25	\$507.11	\$422.59	\$0.00	\$0.00	\$102,350.94

Terms outlined in Court Order: \$100,000 to be paid in \$5000/mo payments starting June 1st, 2013 - May 31st, 2014  
 Accrued Interest Rate 6%    Penalty Rate 5%

Funds owed by Stephen Brock per court order dtd 06.04.2010

Principal Balance: \$100,000

	Outstanding			Principal	Interest	Ending Loan
Pmt Due Date	Principal Balance	Accrued Interest	Accrued Penalty	Payment	Payment	Balance
06.01.2014	\$100,000.00	\$0.00	\$0.00	\$0.00	\$0.00	\$100,000.00

Terms outlined in Court Order: \$100,000 to be paid in \$5000/mo payments starting June 1st, 2014 - May 31st, 2015

Accrued Interest Rate 6% Penalty Rate 5%

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## EXHIBIT 2

HUTCHISON & STEFFEN  
A PROFESSIONAL LLC

## Richard Chatwin

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**From:** Beth Marchiano  
**Sent:** Thursday, October 24, 2013 8:28 AM  
**Subject:** Partial Distribution  
**Attachments:** Oct 23 2013 status letter to frei beneficiaries.docx.pdf

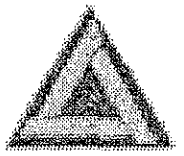
Attached is Mark Dreschler's October 23, 2013 letter.

Please review. -

The partial distribution will be sent out today.

Those receiving checks will also receive a copy of this letter.

*Beth Marchiano*  
*Trust Assistant*



**PREMIER TRUST**

4465 South Jones Boulevard  
Las Vegas, Nevada 89103  
Phone (702)-507-0750 - Fax (702)-507-0755  
[bmarchiano@premiertrust.com](mailto:bmarchiano@premiertrust.com)



**PREMIER TRUST**

*"It's a Matter of Trust"™*

Mark Dreschler  
President

October 23, 2013

Dear Beneficiaries of the Emil Frei III and Adoria B. Frei Joint Trust

We want to provide you the status of the administration of this irrevocable trust. As we advised you with our August 6<sup>th</sup> letter, this is not a simple insurance death benefit claim situation. As Trustees we have to follow and abide by the terms of the Trust document and prudent trust administration.

In typical estate and trust situations, an irrevocable trust that is used to hold life insurance as an asset is part of an overall plan created for the trust creators. There is language in the trust (Article Five, Section 1) that allows the Trust to work with the probate estate to provide assistance if there may be a need by the estate to borrow or sell its illiquid assets.

Also, should any of the irrevocable trust (Article Five, Section 2) be included in the Decedent's federal estate tax calculation, the trust would be required to pay a prorated share of any estate taxes attributable to those assets. The intent of these irrevocable life insurance trusts is to keep those insurance proceeds out of the decedent's estate for estate tax purposes. However, if an estate tax return is prepared and filed, it is a requirement to report this irrevocable life insurance trust on the return.

As all estate tax returns are audited, many times the IRS will audit the irrevocable life insurance trust. The IRS reviews to make sure the trust was administered properly, especially the process regarding the Right of Withdrawal (Crummey) letters. If they feel the process was not followed they may disallow or discredit the irrevocable life insurance trust thereby including all or portions of the death benefit in the estate of the decedent. Then it becomes a negotiating game with the IRS. Does this happen? Rarely, but as you can imagine, these irrevocable life insurance trusts are not well liked by the IRS and if they can find flaws in the administrative process they will pursue to have assets added to decedent's estate. Since we were not involved in the prior Trust's administration, it is difficult for us to determine if the process was followed.



Page 2

However, if the probate estate does not file an estate tax return, the odds of an audit diminish greatly. We will have to wait for the personal representatives of the probate estate to be appointed so they can confirm in their fiduciary capacities how they will handle these two issues.

We have been in communication with the Personal Representatives of the probate estate and to date the administration is not opened. We will need to have them confirm as fiduciaries the lack of need for liquid funds and a Federal Estate Tax Return will not be filed.

We have received confirmation from the Trustees of Dr. Frei 's Trust as to the balance owed by Steven from the Settlement agreement. This will be paid from his allocation as we showed on the allocation chart you all agreed that we included with our August letter.

As the probate administration may take longer to begin, we have been requested due to this delay to make another partial distribution of \$100,000 to each beneficiary until we can resolve the above stated issues.

Therefore, the Trustees in their discretionary authority will make this distribution today and use the same instructions we have on file for each of you.

Sincerely,

A handwritten signature in black ink, appearing to be "April Q" followed by a long horizontal stroke.

Copy to: Peter Brock, Co-Trustee

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EXHIBIT PAGE ONLY

## EXHIBIT 3

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

## Richard Chatwin

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**From:** Mark Dreschler <MDreschler@premiertrust.com>  
**Sent:** Tuesday, May 13, 2014 5:03 PM  
**To:** Brock, Francis; Brock, John Claver; Brock, Peter; Brock, Stephen; Brock, Vincent; Frei, Alice; Frei, Elizabeth Mary; Frei, Emil; Frei, Nancy; Frei-Howe, Judith  
**Subject:** May 12, 2014 status letter to close trust  
**Attachments:** frei 2014 Distributee receipt.doc; 2014.05.12 Status letter to Benes.pdf; Beneficiary Payouts Frei 05.01.14.xlsx

Attached is our letter outlining the intention to distribute and close this Trust and attached is the Distribution Allocation Chart showing the amount credited and disbursements made to the beneficiaries.

Also, attached is our Distributees' Receipt. We have not personalize them and will do so when we mail the originals tomorrow. However, we wanted to give you an example of how they will look.

For your information, we are still working with Dr. Frei's probate estate on the balance owed from Stephen's Settlement Agreement. The \$300,000 distributed to date did go to the estate as payment toward the obligation.

*Mark Dreschler*  
*President/CEO*

4465 South Jones Boulevard  
Las Vegas, Nevada 89103  
Phone (702)-507-0750 - Fax (702)-507-0755  
Direct Marketing Line (702) 577-1777  
[mdreschler@premiertrust.com](mailto:mdreschler@premiertrust.com)



# **PREMIER TRUST**

*"It's a Matter of Trust"™*

Mark Dreschler  
President

May 12, 2014

Dear Beneficiaries of the Emil Frei III and Adoria B. Frei Joint Trust

We want to provide you the status of the administration of this irrevocable trust. As we advised you in our previous two (2) letters, we were waiting for the Probate Estate to be created and would be working with the Probate Estate to follow the terms of the Trust. One of the provisions allowed the Trust to provide assistance if there may be a need by the estate to borrow or sell its illiquid assets.

It has been determined by the Personal Representatives this is not necessary.

Also, should any of the irrevocable trust (Article Five, Section 2) be included in the Decedent's federal estate tax calculation, the trust would be required to pay a prorated share of any estate taxes attributable to those assets.

Again, it has been determined that a Federal Estate Tax Return, Form 706 will not be filed.

Therefore, as the probate estate is not filing an estate tax return, the odds of an audit of the probate estate or of this Irrevocable life insurance trust diminish greatly.

However, this does not preclude the IRS from examining either entity, should they so choose. We will be filing, the same as the probate estate, Fiduciary Income Tax Returns which are always subject to audit.

Enclosed is an updated allocation chart to include the interest earned from the insurance proceeds held at Transamerica and the amounts each of you paid to advance funds for the payment of the annual premium financing. You will note this shows the net balance we will distribute to you for your ten percentage (10%) of the Trust. We are also withholding \$5,000 from each beneficiary in which we anticipate disbursing in a couple of months, once we make sure all potential claims are settled.

In addition, we are enclosing our standard Distributee's Receipt for you and you will note, as a beneficiary, you will be responsible should any claims be directed to the Trust due to distributions. We are requesting you sign and return this Receipt to our office. We would advise you to seek legal counsel if you do not understand what you are signing.

Sincerely,

Copy to: Peter Brock, Co-Trustee

## DISTRIBUTEES RECEIPT

The undersigned hereby acknowledges receipt from PREMIER TRUST, INC. and Peter Brock, as Co-Trustees for the Emil Frei III and the Adoria B. Frei Joint Trust, for the Final Distribution, in accordance with the provisions of Court Order Dated May 14, 2009, Reforming the Trust, Article Seven, Section 1.a, based on the written direction of the beneficiaries.

CHECKS already paid:	\$100,000
	\$100,000
	\$100,000
Check to be paid	\$ , less \$5,000

The undersigned further releases the Co-Trustees from any and all future claims and liabilities associated with this distribution received and acknowledge the above as distribution in accordance with the provisions of the Trust Agreement. The undersigned, as a named remainder beneficiary of the Trust, does hereby acknowledge that in the event any and all tax liabilities are found to be due after final distribution of the trust assets has been made, the undersigned will make payment as such representative of the pro rata share of any state and/or federal taxes determined to be due.

---

DATED



THIS RECEIPT IS BEING DELIVERED CONCURRENTLY WITH THE DISTRIBUTION. IF THIS DOCUMENT IS NOT EXECUTED AND RETURNED TO PREMIER TRUST, INC., THE NEGOTIATION OF THE DISTRIBUTION CHECK OR ANY USE OF THE FUNDS WIRED OR TRANSFERRED TO YOUR ACCOUNT WILL BE DEEMED AS KNOWLEDGE AND ACCEPTANCE OF THE ABOVE REFERENCED FACTS AND OBLIGATIONS.

Emil Frei, III and Adoria B. Frei Joint Irrevocable Trust

Death Benefit Payout:	\$7,601,195.65	5/1/2014
Interest Earned:	\$30,173.44	5/1/2014
Total Withdrawals for Distributions made:	\$3,000,000.00	5/1/2014
Money Market Fund Balance:	\$4,536.59	5/1/2014
Total:	\$4,635,905.68	

Fees:

Premier Trust Annual Fee for 2013 & 2014:	\$1,500.00
Premier Trust Extraordinary Fees:	\$6,750.00
Peter Brock Co-TTEE Fees:	\$0.00
CPA Fees for Final Return:	\$400.00
Total Fees:	\$8,650.00

Funds Available:	\$4,635,905.68
Minus Fees:	\$8,650.00
Return of Premium Payments:	\$33,739.87
Total Net:	\$4,593,515.81

	Elizabeth Mary Frei	Emil Frei, IV	Alice C. Frei	Nancy Frei	Judith Frei-Howe
Premium Payments	\$6,717.97	\$6,717.98		\$6,867.97	\$6,717.97
1/10 of Net Total	\$459,351.58	\$459,351.58		\$459,351.58	\$459,351.58
Remaining Balance Owed To Beneficiary	\$466,069.55	\$466,069.56		\$466,219.55	\$466,069.55
Initial disbursement**	\$100,000.00	\$100,000.00		\$100,000.00	\$100,000.00
Oct '13 disbursement	\$100,000.00	\$100,000.00		\$100,000.00	\$100,000.00
Jan '14 disbursement	\$100,000.00	\$100,000.00		\$100,000.00	\$100,000.00
Beneficiary's Total Share	\$766,069.55	\$766,069.56		\$766,219.55	\$766,069.55

	Francis Christopher Brock	Peter Augustine Brock	Vincent dePaul Brock	John Claver Brock	Stephen Martin Brock***
Premium Payments	\$6,972.97	\$6,972.98		\$6,972.97	\$7,042.62
1/10 of Net Total	\$459,351.58	\$459,351.58		\$459,351.58	\$459,351.58
Remaining Balance Owed To Beneficiary	\$466,324.55	\$466,324.56		\$466,324.55	\$466,394.20
Initial disbursement**	\$100,000.00	\$100,000.00		\$100,000.00	\$100,000.00
Oct '13 disbursement	\$100,000.00	\$100,000.00		\$100,000.00	\$100,000.00
Jan '14 disbursement	\$100,000.00	\$100,000.00		\$100,000.00	\$100,000.00
Beneficiary's Total Share	\$766,324.55	\$766,324.56		\$766,324.55	\$766,394.20

\* Final dollar amount could change based on processing of the Estate  
\*\* Initial disbursement occurred Aug, Sept or Oct upon receipt of Beneficiary's instruction.  
\*\*\* Stephen's share distributed to Estate until outstanding debt is paid

I hereby provide my written request per court order to take my 1/10 interest outright and free of trust.

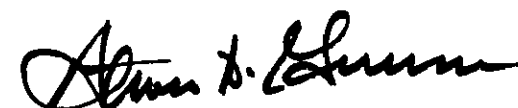
Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Print: \_\_\_\_\_

**ERR**  
 Todd L. Moody (5430)  
 Russel J. Geist (9030)  
 HUTCHISON & STEFFEN, LLC.  
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*Attorneys for Lawrence Howe and  
 Elizabeth Mary Frei*

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CLERK OF THE COURT

**DISTRICT COURT  
 CLARK COUNTY, NEVADA**

IN THE MATTER OF ) Case No. P-09-065257-T  
 ) Dept No. 26  
 FREI IRREVOCABLE TRUST, )  
 dated October 29, 1996. )  
 )  
 )

**ERRATA TO SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION TO  
 CONSTRUE TERMS OF TRUST, TO COMPEL COMPLIANCE WITH TERMS OF  
 TRUST, TO CONFIRM REMOVAL OF TRUSTEE, TO COMPEL REDRESS OF  
 BREACH OF FIDUCIARY DUTIES, AND TO RELEASE JURISDICTION OF THE  
 TRUST**

Respondents, Lawrence Howe and Elizabeth Mary Frei, hereby submit this Errata to  
 Supplemental Brief in Opposition to Petition to Construe Terms of Trust, to Compel  
 Compliance with Terms of Trust, to Confirm Removal of Trustee, to Compel Redress of  
 Breach of Fiduciary Duties, and to Release Jurisdiction of the Trust, to include the attached  
 Affidavit of Alice Frei, as a part of Exhibit A to the Supplemental Brief. The Affidavit was not  
 available at the time the Supplemental Brief was filed.

.../

.../

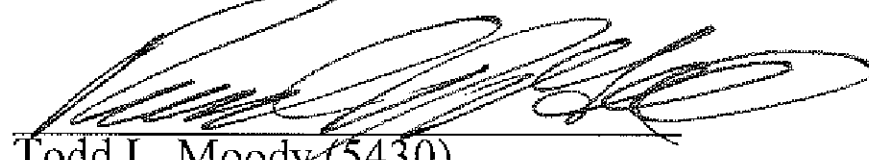
.../



1 A copy of Alice Frei's Affidavit is attached as Exhibit A.

2 DATED this 20<sup>th</sup> Day of February, 2015.

3  
4 HUTCHISON & STEFFEN, LLC

5 

6 Todd L. Moody (5430)

7 Russel J. Geist (9030)

8 10080 West Alta Drive, Suite 200

9 Las Vegas, Nevada 89145

10 (702) 385-2500

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12 *Attorneys for Lawrence Howe and*

13 *Elizabeth Mary Frei*

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

PECCOLE PROFESSIONAL PARK

10080 WEST ALTA DRIVE, SUITE 200

LAS VEGAS, NV 89145

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this 20 day of February, 2015, I caused the above and foregoing document entitled **ERRATA TO SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION TO CONSTRUE TERMS OF TRUST, TO COMPEL COMPLIANCE WITH TERMS OF TRUST, TO CONFIRM REMOVAL OF TRUSTEE, TO COMPEL REDRESS OF BREACH OF FIDUCIARY DUTIES, AND TO RELEASE JURISDICTION OF THE TRUST** to be served as follows:

- ☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☐ to be served via facsimile; and/or
- ☒ pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or
- ☐ to be hand-delivered;

to the attorneys and/or parties listed below at the address and/or facsimile number indicated below:

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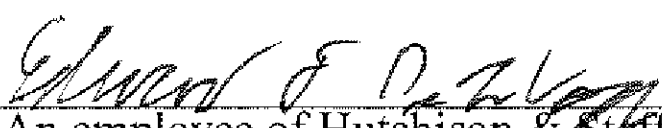
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Peter Brock  
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Garrett Park, MD 20896

John Brock  
P.O. Box 127  
Santa Barbara, CA 93102

Vincent Brock  
15549 La Subida Drive  
Hacienda Heights, CA 91745

Elizabeth Frei  
63 Park Avenue  
Bedford Hills, NY 10057

  
An employee of Hutchison & Steffen, LLC

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EXHIBIT PAGE ONLY

## EXHIBIT A

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

AFFIDAVIT OF ALICE FREI

STATE OF TEXAS )  
COUNTY OF HARRIS ) ss.

I, Alice Frei, being first duly sworn under penalty of perjury, hereby deposes and say as follows:

1. I am the daughter of Emil Frei, III, and the step-daughter of Adoria B. Frei, both deceased. I am also a beneficiary under the Frei Irrevocable Trust, also known as the Frei Joint Irrevocable Trust ("Trust"), dated October 29, 1996.

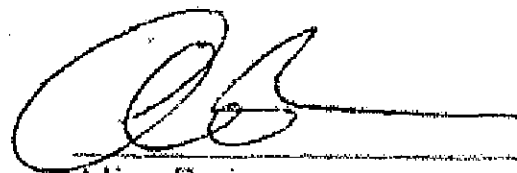
2. On or about August 6, 2013, I received an email from Heather St. John of Premier Trust, which contained a letter dated the same date, from Mark Dreschler, President of Premier Trust, who was the Trustee of the Trust at the time. The letter contained an explanation of the process of distribution and a spreadsheet of trust share division. The copy of the email and letter attached to this Affidavit as Exhibit 1 is the same email and correspondence which I received on August 6, 2013.

3. On or about October 24, 2013, I received an email from Beth Marchiano of Premier Trust, which contained a letter dated October 23, 2014, from Mark Dreschler, President of Premier Trust, who was the Trustee of the Trust at the time. The letter contained an explanation of the coordination with the probate process. The copy of the email and letter attached to this Affidavit as Exhibit 2 is the same email and correspondence which I received on October 24, 2013.

4. On or about May 12, 2014, I received an email which contained a letter dated May 12, 2014, from Mark Dreschler, President of Premier Trust, who was the Trustee of the Trust at the time. The letter contained an update on the coordination with the probate process and an updated allocation of trust shares. The copy of the email and letter attached to this Affidavit as Exhibit 3 is the same email and correspondence which I received on May 12, 2014.

1 5. I received these emails at the time that they were sent by Premier Trust based on the  
2 date indicated in the email header.

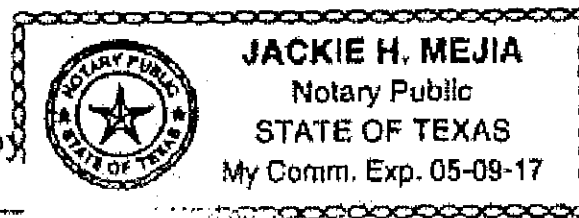
3 DATED February 10, 2015.

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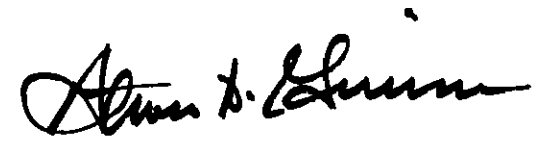
8 Alice Frei

9 STATE OF Texas )  
10 COUNTY OF Harris ) ss.

11  
12 SUBSCRIBED AND SWORN TO before me by  
13 Alice Frei  
14 this 10 day of February, 2015.



15   
16 Notary Public  
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CLERK OF THE COURT

SUPP  
JONATHAN W. BARLOW  
Nevada Bar No. 9964  
CLEAR COUNSEL LAW GROUP  
50 S. Stephanie St., Ste. 101  
Henderson, NV 89012  
(702) 476-5900  
(702) 924-0709 (Fax)  
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Attorneys for Stephen Brock

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the

CASE NO. P-09-065257-T

FREI IRREVOCABLE TRUST, dated  
October 29, 1996.

DEPARTMENT: 26

**SUPPLEMENTAL REPLY TO SUPPLEMENTAL OPPOSITIONS OF PREMIER TRUST  
AND LAWRENCE HOWE AND ELIZABETH MARY FREI TO THE PETITION TO  
CONSTRUE TERMS OF TRUST, TO COMPEL COMPLIANCE WITH TERMS OF  
TRUST, TO CONFIRM REMOVAL OF TRUSTEE, TO COMPEL REDRESS OF  
BREACH OF FIDUCIARY DUTIES, AND TO RELEASE JURISDICTION OF THE  
TRUST**

Stephen Brock, by and through his attorneys of record of the law firm Clear Counsel Law Group, hereby replies to Premier Trust's and Lawrence Howe's and Elizabeth Mary Frei's Supplemental Oppositions to Petitioner's Petition in this matter, as follows:

As noted by Premier Trust ("Premier") and Lawrence Howe and Elizabeth Mary Frei (the "Freis") in their Supplemental Oppositions, the Court continued this matter in order to allow Premier additional time to brief issues that it had not raised in its initial Opposition, which Premier argued for the first time at the hearing on this matter on January 26, 2015. Principally, the Court allowed additional briefing on (1) the issue of whether a settlor and beneficiary of an irrevocable trust may agree to amend the terms of the irrevocable trust; and (2) whether the June

2009 Order reforming the Trust affected the spendthrift clause of the Trust. To the extent that Premier's Supplemental Opposition addresses issues beyond the two issues set forth above, Brock objects to Premier taking advantage of the opportunity to provide supplemental briefing on these two issues to expand the scope of its initial opposition on matters already covered in its initial opposition. Brock, therefore, requests that the Court strike such parts of Premier's Supplemental Opposition that address issues beyond the two issues for which supplemental briefing was allowed.

I. THE TRUST COULD NOT BE AMENDED IN 2010 BECAUSE ADORIA FREI WAS NOT ALIVE AT THAT TIME.

The 2010 settlement agreement that included Brock and Emil "Tom" Frei, III<sup>1</sup>, did not amend or modify the terms of the Frei Irrevocable Trust (the "Trust") in any manner because Adoria Frei, a settlor of the Trust, was not alive at that time and, therefore, unable to consent to the modification of her trust. Both Premier and the Freis rely on §338 of the Restatement (Second) of Trusts<sup>2</sup> to support the proposition that the settlor and beneficiary(ies) of a trust can compel the modification of a trust, even an irrevocable trust. Brock does not necessarily dispute this general principle of law. In fact, Premier and the Freis are correct that they have provided the Court with reference to the law that definitively answers whether the 2010 settlement agreement acted as a modification of the Trust, and the answer to that question is a definitive **NO, it did not modify the Trust**. Section 338 of the Restatement provides, "If the settlor and all of the beneficiaries of a trust consent and none of them is under an incapacity, they can compel the termination or modification of the trust ...." (Emphasis added.) Conveniently located in the very

---

<sup>1</sup> Brock and Tom have known each other for approximately 51 years, since Brock was 6 years old. In addition to Tom being Brock's step-father, Tom and Brock were personal friends. The settlement agreement was a global settlement agreement that involved many more parties in addition to Brock and Tom, including the Frei children, Tom's guardian-ad-litem, other trusts, and business entities.

<sup>2</sup> Premier also cites to California statutes that provide the same principles of law as are set forth in §338 of the Restatement.

1 first comment to this section and conveniently ignored by Premier and the Freis, comment (a)  
2 clarifies the scope of this rule: “**If the settlor is dead**, the consent of his heirs or personal  
3 representatives is not sufficient to justify the termination of the trust under the rule stated in this  
4 Section. **The rule is not applicable ... to trusts created inter vivos if the settlor has died.**” In  
5 short, if a settlor is dead, the trust cannot be modified or terminated even with the consent of all of  
6 the beneficiaries and another settlor.

7 As Premier and the Freis are well aware, but conveniently ignore, Adoria Frei is the settlor  
8 of the Frei Irrevocable Trust. Adoria died on January 28, 2009, more than a year prior to the time  
9 that the 2010 global settlement agreement settled disputed matters that had nothing to do with the  
10 Trust. Being dead, Adoria was “under an incapacity” and, therefore, incapable of consenting to a  
11 modification of the Trust that she created. Premier and the Freis have provided the Court with a  
12 very easy answer to the Court’s first inquiry of whether the 2010 settlement agreement acted as a  
13 modification of the Trust and that answer is **no**, the 2010 settlement agreement did not modify the  
14 Trust because Adoria did not consent to the modification of the Trust.

15 Both the Musick case relied upon by Premier and the Hein case relied upon by the Freis  
16 are completely inapposite as neither case deals with facts where the settlor died prior to the  
17 purported modification of the trust. In Hein, the court permitted the modification of the trust  
18 because all of the settlors and beneficiaries consented to the modification. 543 N.W.2d 19 (Mich.  
19 App. 1995). The court then cited to a case in which the court had denied modification of a trust  
20 and noted that that case was distinguishable from Hein because there “**the settlor had died, and**  
21 **thus could not consent to the trust’s termination.**” Id. at 21 (emphasis added). The Hein court  
22 then stated, “In this case, the settlors are alive and have consented to the termination of the trust.”  
23 Id. Neither Premier nor the Freis have provided any case law, statutes, or secondary sources to  
24 support the proposition that an irrevocable trust can be modified where a settlor of the trust has



died before the purported modification. This is not surprising because it is sound law that a trust cannot be modified after the death of the settlor.

## II. THE 2009 ORDER REFORMING THE TRUST DID NOT AFFECT THE SPENDTHRIFT CLAUSE DURING TOM'S LIFE.

During the January 26, 2015, hearing, the Court also queried whether the 2009 Order reforming the Trust affected the spendthrift provision of the Trust at that time. Brock addressed this issue in his Reply to Opposition filed in this matter on January 12, 2015. In its Supplemental Opposition, Premier makes no new arguments regarding this issue that it did not already make in its initial Opposition.<sup>3</sup> In its initial Opposition, and as reiterated in its Supplemental Opposition, Premier argues that the 2009 reformation destroyed the spendthrift nature of the trust because the 2009 reformation granted the beneficiaries a future right to demand distribution from the trust. Oddly, Premier continues to rely solely on §153(2) of the Restatement (Second) of Trusts that deals with present possessory interests rather than §153(1) that deals with future possessory interests as is the case with the 2009 reformation.

This issue is plainly and very easily disposed of by reading the unambiguous and painfully plain language of §153 of the Restatement:

(1) Except as stated in §§ 156 and 157,<sup>4</sup> if by the terms of a trust the beneficiary is entitled to have the principal conveyed to him at a future time, a restraint on the voluntary or involuntary transfer of his interest in the principal is valid.

(2) If the beneficiary is entitled to have the principal conveyed to him immediately, a restraint on the voluntary or involuntary transfer of his interest in the principal is invalid.

As Brock has pointed out in his Reply and at the January 26<sup>th</sup> hearing, the only change made by way of the 2009 reformation was to reform how the Trust was to be distributed after the

---

<sup>3</sup> The Freis do not make any argument related to this issue in their Supplemental Opposition and, therefore, apparently concede that the 2009 reformation did not affect the spendthrift provision of the Trust.

<sup>4</sup> The exceptions in §§ 156 and 157 are inapplicable to the present situation.

1 death of Tom. The 2009 reformation did not affect the beneficiaries' rights to the principal or  
2 income of the Trust during Tom's life. In other words, the 2009 reformation granted to the  
3 beneficiaries a future right to demand distribution and it certainly did NOT grant the  
4 beneficiaries any immediate right to demand distribution.

5 The two subsections of §153 of the Restatement could not be more plain in their  
6 application to this very situation. Subsection 1 says as plain as day that if a beneficiary is entitled  
7 to have the principal conveyed to him "at a future time" then a spendthrift restriction is valid.  
8 Subsection 2 provides that if a beneficiary is entitled to immediate conveyance of the principal,  
9 then a spendthrift restriction is not valid. In this case, in 2010, Brock had no immediate  
10 entitlement to distribution; he had only a FUTURE right to the principal. As such, the spendthrift  
11 provision of Article Thirteen of the Trust was valid in 2010 and restricted Brock's ability to  
12 pledge his interest in the Trust.

13 If the Court accepts Premier's proposition that a future right to distribution destroys a  
14 spendthrift clause even prior to the time that the future right becomes an immediate right, this  
15 Court would find contrary to the entire body of spendthrift trust law. Neither Premier nor the  
16 Freis have cited this Court to one single case anywhere in the United States that holds that a  
17 future right to distribution destroys the present effect and protection of a spendthrift provision.  
18 The reason they have not so cited is because such a case does not exist. The development of  
19 spendthrift law over the course of the last 150 years has consistently and always held that a  
20 spendthrift provision is valid where the beneficiary has only a future right to distribution.

21 In fact, a holding that a future right to distribution destroys spendthrift protection  
22 immediately would destroy thousands and thousands of Nevada trusts by subjecting those trusts to  
23 immediate creditor attachment, including, most likely, trusts that were drafted by Premier's  
24 counsel and trusts that Premier itself is now administering. In essence, Premier is asking this

1 Court to open each and every trust to creditor attachment so long as there is some provision in the  
2 trust that grants a beneficiary a right to distribution at some time in the future. Premier's advocacy  
3 of this legal outcome is not only a breach of its fiduciary duty to the beneficiaries of this Trust,  
4 but a breach of fiduciary duty to the numerous other trusts that Premier is administering right now  
5 that will become subject to creditor attachment if Premier's position is accepted. Premier is  
6 selling every one of those trusts down the river in order to save itself in this one small case.

7 Counsel for all parties involved in this matter would acknowledge that a countless number  
8 of irrevocable trusts are created in Nevada where the settlors contribute assets to the trust to be  
9 held in trust for a certain period of time, but that at some point those assets are to be distributed to  
10 the beneficiaries outright and free of trust. More than likely, counsel for all parties involved in  
11 this matter have actually drafted these very trusts and advised settlors regarding these trusts.  
12 Premier's proposition of law that it is advocating here would subject the assets of those trusts to  
13 immediate attachment by creditors of the beneficiaries even though the beneficiaries have no right  
14 to the principal or income of the trusts until years in the future. This proposition is a complete 180  
15 degree reversal of the entire body of spendthrift trust law and certainly not a proposition that  
16 Premier can truly think is an appropriate development in the body of trust law.

17 In the situation of the Trust in question in our case, the spendthrift clause of Article  
18 Thirteen of the Trust supports a material purpose of this Trust in particular and is crucial to the  
19 function of the Trust. As background, it is important to understand basic principles of irrevocable  
20 life insurance trusts, such as is this Trust. ILITs are commonly used as a method to transfer  
21 wealth upon the settlors' deaths that passes outside of the settlors' taxable estates. The settlors  
22 will typically fund the ILIT with a life insurance policy insuring the lives of the settlors. The  
23 settlors may also contribute a substantial amount of money to be held in the trust for the purpose  
24 of paying the annual insurance premium. Each year, the settlors typically contribute additional

1 funds to the trust for the purpose of paying the annual insurance premium to the extent that the  
2 principal of the trust is insufficient to pay the premium. The beneficiaries are granted a limited  
3 right to withdraw a portion of the annually contributed funds (but not principal or income of the  
4 trust!) for a thirty day period. If the funds are not withdrawn, the funds are added to the principal  
5 of the trust and are then used to pay the annual insurance premium for the life insurance policy  
6 owned by the trust.

7 A spendthrift clause is a standard feature of ILITs to prevent creditors of the beneficiaries  
8 from gaining access to the principal and income of the trust during the settlors' lives because if  
9 the creditors access the principal and income, the trustee's ability to pay the annual premium for  
10 the life insurance policy would be greatly endangered, thus subjecting the policy owned by the  
11 trust to lapse and destroying the purpose of the trust itself. It is also a very common feature of  
12 ILITs to provide that after the settlors have died and the life insurance proceeds collected, the  
13 trustee is to distribute those funds outright and free of trust to the beneficiaries of the trust (a  
14 "distribution trust"). Other ILITs provide that the collected life insurance proceeds are to remain  
15 in trust to provide benefit for the settlors' descendants (or other class of beneficiaries) over  
16 several generations (a "dynasty or legacy trust").

17 In our case, prior to the 2009 reformation, the Trust provided for a "dynasty" type trust  
18 upon the death of the second to die of Adoria and Tom. Adoria and Tom realized that this is not  
19 what they intended and, therefore, moved the Court to reform the Trust to make the Trust a  
20 "distribution" trust upon their deaths. Had the Trust been initially drafted to provide for a  
21 "distribution" trust upon their deaths, there is no doubt that a spendthrift provision would have  
22 still been included as the spendthrift provision supports the material purpose of the Trust. The  
23 material purpose of the Trust was to ensure that 7.5 million dollars was able to be transferred  
24 outside of their taxable estates to Adoria's and Tom's children upon the death of the second of

1 them to die. The spendthrift provision during Adoria's and Tom's lives protected the principal  
2 and income of the Trust to ensure that the trustee of the Trust was able to pay the annual premium  
3 for the life insurance policy. Quite to the contrary of this position, Premier is advocating that the  
4 entire Trust was subject to the creditors of the beneficiaries of the Trust and, therefore, subject to  
5 allowing the life insurance policy to lapse if a premium could not be paid because a creditor had  
6 attached the principal of the Trust, thus subverting the very purpose for which the Trust was  
7 created. Premier's suggestion could have sacrificed 7.5 million dollars for the sake of the benefit  
8 of one creditor of one beneficiary of the Trust.

9 It is frankly shocking to the conscience that Premier, a company that exists for the sole  
10 purpose of administering trusts, would advocate a fundamental change to the body of trust law  
11 that would destroy any protection for thousands of ILITs created and/or administered in the State  
12 of Nevada. Premier's position in this case would cause countless other ILITs being administered  
13 right now by Premier itself to the threat of collapse when creditors reach the principal of those  
14 trusts prior to the settlors' deaths and cause the life insurance policies held by the trusts to lapse  
15 when the premium cannot be paid because the creditors have taken some or all of the money to be  
16 used to pay the premium. Surely Premier understands that this is the effect of the position that it is  
17 taking in this case and surely Premier does not really believe that this is a good idea for trust law  
18 in the State of Nevada. It is absolutely fascinating to see one of the largest trust administration  
19 companies in Southern Nevada take a position that fundamentally weakens trust protections in  
20 favor of strengthening creditors. With friends like this on the side of trusts, who needs creditors as  
21 enemies? The position that they are advocating burns the whole house down so long as they can  
22 save their baseball card collection first.

23 In summary, §153 of the Restatement (Second) of Trusts sets forth sound law. Subsection  
24 1 provides that if a beneficiary cannot get to the principal of the trust, neither can the

1 beneficiary's creditors. Subsection 2 provides that if a beneficiary can get to the principal of the  
2 trust, so too can the beneficiary's creditors. In 2010, Brock could NOT get to the principal of the  
3 Trust, and he was, therefore, prevented from allowing his creditors access to the principal of the  
4 Trust. This is the easiest decision possible: the spendthrift clause was in effect in 2010, and  
5 Brock's attempted pledge of his interest in the Trust was invalid.

6 III. BROCK DID NOT CONSENT TO PAYMENT OF \$300,000 TO THE FREIS.

7 In its Supplemental Opposition, Premier asserts that it provided two emails to Brock to  
8 notify him that Premier would be paying Brock's share of the Trust to the Freis. Though Premier  
9 provides a copy of those two emails, the emails do not show the email address to which the  
10 emails were sent for Brock. Also, Premier does not state anywhere in its Supplemental  
11 Opposition or in any of its affidavits the email address to which these emails were sent. This is  
12 not surprising because **Premier knows that the email address it was using for Brock was an**  
13 **incorrect email address and that Brock, therefore, never received Premier's emails**. Thus,  
14 Premier has not proven that it notified Brock that it was planning to thwart the intention of the  
15 settlors and that it was going to take up the cause of a creditor of a beneficiary of the Trust, rather  
16 than defending the Trust and a beneficiary of the Trust.

17 In January 2014, Brock emailed Premier to inquire about the status of the Trust. Premier's  
18 response email on January 21, 2014, was the first time that Premier notified Brock that it had  
19 given away \$300,000 of Brock's share of the Trust. Prior to January 21, 2014, Brock had received  
20 no communications whatsoever from Premier. In its January 21, 2014, email to Brock, Premier  
21 acknowledged that it had a bad email address for Brock. See Declaration of Stephen Brock,  
22 Exhibit A. Interestingly, since Premier was notified in January 2014 by Brock that he had no idea  
23 that Premier had sent payment to the Freis and that he did not agree with payments being sent to  
24

1 the Freis, Premier has not sent any other payments to the Freis despite the fact that Premier has  
2 distributed 99.8% of all of the other beneficiaries' shares of the Trust to those beneficiaries.

3 Not only did Premier send emails to an incorrect email address for Brock, Premier never  
4 has reached out to Brock by telephone or regular mail after it heard nothing back from Brock  
5 from those two emails. Brock has repeatedly requested an opportunity to meet with Premier's  
6 staff. See Brock Decl., Exhibit A. Not only has Premier not allowed Brock to meet with Premier,  
7 but Premier has not even given Brock the professional courtesy of even responding to his requests  
8 to meet. Brock lives 1.7 miles from Premier's office, but was never given the courtesy of an  
9 opportunity to meet with Premier prior to Premier deliberately breaching its fiduciary duty,  
10 favoring a creditor of a beneficiary of the Trust, and giving away \$300,000 that the settlors  
11 intended to be distributed to Brock. Instead, Premier has met with or talked with the Freis  
12 numerous times. Brock, on the other hand, was simply ignored as he has been throughout this  
13 entire process. The fact that Premier hid from the Court the fact that it knew that the emails it had  
14 sent had not been received by Brock, but instead asserted that Brock had been notified, is  
15 disturbing and extremely disappointing.

16 Brock reiterates and reasserts that he does not consent and has never consented to Premier  
17 paying any portion of his share of the Trust to the Freis. Brock reiterates that he was not aware of  
18 Premier doing so until after Premier had done so. Premier has provided no evidence to the  
19 contrary. Despite Premier's attempts to revise and strain history, Brock has never consented to  
20 Premier's actions in deliberately breaching its fiduciary duties to Brock.

21 IV. BROCK IS THE ONLY INCOME BENEFICIARY OF THE TRUST AND HAS  
22 THE RIGHT TO REMOVE THE TRUSTEE.

23 As Brock has previously pointed out, a "majority of the beneficiaries then eligible to  
24 receive mandatory or discretionary distributions of net income" may remove the trustee of the

1 Trust. Premier asserts that because there is a microscopic residual amount being held as an  
2 administrative reserve that all of the other nine beneficiaries remain current income beneficiaries.  
3 Premier itself, however, has already provided a statement to all beneficiaries that provides that the  
4 nine other beneficiaries have received “final distribution” from the Trust. In fact, the other nine  
5 beneficiaries have received approximately 99.9% of their Trust share. It is quite possible that  
6 these beneficiaries will actually receive no additional distributions if there are administrative  
7 expenses that must be paid from the small reserve maintained by Premier. Premier has not  
8 asserted in any of its affidavits that it has or will pay any income to any of these nine  
9 beneficiaries. Upon information and belief, the approximately \$15,000 reserve is not held in any  
10 income bearing account, but is likely instead held in Premier’s general trust account as an  
11 administrative reserve. The proposition that such a minute reserve entitles the other nine  
12 beneficiaries to income that is not being generated and that will never be distributed to them is  
13 nonsensical.

14 In any event, this Court should determine that the income interest of the other nine  
15 beneficiaries terminated upon Premier making what it itself described as a “final distribution” to  
16 these nine beneficiaries. NRS 164.810(4) provides that an income interest ends on the day before  
17 a “terminating event” occurs. If distribution of 99.9% (and possibly 100%) of a beneficiary’s  
18 share of a trust is not a “terminating event,” then the term “terminating event” has no actual  
19 meaning. Brock requests that the Court construe NRS 164.810(4) to mean that distribution of  
20 99.9% (or what is possibly 100%) of a beneficiary’s share of a trust is a “terminating event” that  
21 ends that beneficiary’s income interest in the trust. Therefore, because Premier has made “final  
22 distribution” to these nine beneficiaries (by its own admission), Brock is the only remaining  
23 beneficiary entitled to receive distributions of income and is, therefore, entitled to remove  
24 Premier as trustee of the Trust.



1 Premier asserts that Article Twelve, Section 3(f) of the Trust provides support for the idea  
2 that the other nine beneficiaries are income beneficiaries. Premier asserts that it has set aside the  
3 \$15,000 reserve “from trust income” and, therefore, the other beneficiaries must be income  
4 beneficiaries. Beside the fact that Premier’s completely after-the-fact, self-serving pronouncement  
5 that the reserve was set aside “from trust income” was likely decided upon only once the  
6 Supplemental Opposition was drafted, whether the reserve was actually set aside from trust  
7 income does not mean that the beneficiaries remain “income beneficiaries”. Instead, even if the  
8 reserve was set aside from trust income (which is doubtful other than for the fact that it now fits  
9 Premier’s narrative), the reserve is now held as principal of the Trust because it is “property held  
10 in trust for distribution to a remainder beneficiary when the trust terminates.” NRS 164.785(9)  
11 (definition of principal). Premier is holding the reserve in trust for distribution to these nine  
12 beneficiaries once it has completed its final administrative functions.

13 Furthermore, NRS 164.785(5) defines an “income beneficiary” as a “person to whom net  
14 income of a trust is or may be payable.” Here, Premier has provided no evidence whatsoever that  
15 it is going to or ever will pay any net income of the Trust to these nine beneficiaries. Any income  
16 generated by the Trust will be generated on Stephen’s share of the Trust that remains held in the  
17 Trust. Because Stephen is the only beneficiary of that share, such income is payable only to him.  
18 As such, Stephen is the only income beneficiary and is entitled to remove Premier as trustee of  
19 the Trust.

20 V. BROCK HAS MOVED DILIGENTLY AND QUICKLY UPON BECOMING  
21 AWARE OF PREMIER’S BREACH OF FIDUCIARY DUTY.

22 In its Supplemental Opposition, Premier argues for the first time that Brock should be  
23 prevented from making his arguments because of the doctrine of laches. Premier did not raise this  
24 argument in its initial Opposition or at the January 26<sup>th</sup> hearing. Brock, therefore, requests that the

1 Court strike this portion of Premier's Supplemental Opposition for seeking to take unfair  
2 advantage of this Court's leave to file supplemental briefing on two narrow issues, neither of  
3 which is related to laches.

4 To the extent that Brock is required to respond to Premier's new argument, the doctrine of  
5 laches is inapplicable because Brock has moved diligently and quickly to protect his rights once  
6 he became aware of Premier's breach of fiduciary duty. As noted, prior to Brock contacting  
7 Premier on January 18, 2014, Premier has never provided any notice to Brock that it was  
8 "relying" on the 2010 settlement agreement in order to breach its fiduciary duties to Brock. (As  
9 noted above, the only two attempts to so notify Brock were delivered to incorrect email  
10 addresses.) As soon as Brock became aware of Premier's breach, Brock sought legal counsel to  
11 assist him in preparing his Petition. As soon as Brock located an attorney (present counsel) that  
12 had no conflict of interest in opposing Premier, a Petition was prepared and immediately filed.  
13 The Petition was filed approximately only ten months after becoming aware of Premier's breach.  
14 During those ten months, Premier took no action whatsoever in "reliance" on the 2010 settlement  
15 agreement because Premier had already wrongfully distributed the \$300,000 prior to Brock's  
16 January 18, 2014, notice to Premier that he was not aware of Premier's actions. Brock has not  
17 inexcusably delayed bringing this Petition once he was aware of Premier's breach of fiduciary  
18 duty.

19 In its many affidavits, Premier provides no proof whatsoever from the time that Premier  
20 became co-trustee of the Trust in 2009 until January 2014 that it communicated to Brock that it  
21 was going to "rely" on the 2010 settlement agreement. Premier was not a party to the settlement  
22 agreement. If Premier was aware of the 2010 settlement agreement, it never so notified Brock  
23 until January 2014. Premier's "reliance" on the 2010 settlement agreement is by its own making  
24 not by any action taken by Brock to cause Premier to rely on the settlement agreement. Because

Premier was not led to “rely” on the settlement agreement by Brock, the doctrine of laches does not apply.

VI. CONCLUSION.

The principles of spendthrift trust law are directly applicable to this situation. For 150 years, those principles have provided that if a beneficiary of a trust is not immediately entitled to distribution of principal from a trust, a spendthrift provision of the trust prevents the beneficiary from pledging, assigning, anticipating, or encumbering his interest (whether present or future) in the trust. Neither Premier nor the Freis have cited to any case that has held to the contrary because there is no case to the contrary. The 2009 reformation of the Trust did not change the fact that Brock did not have any immediate entitlement to distribution of the Trust until after Tom died. Because Brock did not have any immediate entitlement to distribution from the Trust in 2010, Brock was prohibited from pledging his interest in the Trust as security for his debts. Also, even if Brock and Tom intended to subvert the spendthrift protections of the Trust in 2010 (which they did not), they could not modify the Trust because Adoria was not alive and not able to consent to any modification to the Trust.

Brock, therefore, requests that the Court enter the following orders:

A. That the terms of the Trust be construed to declare that the Trust is a valid spendthrift trust pursuant to the terms of the Trust and pursuant to Nevada law;

B. That the trustees of the Trust be compelled to comply with the terms of the Trust and to disregard and defeat any demand upon the Trust from Brock’s creditors, including specifically the Freis;

C. That the Court declare that the 2010 attempted pledge or assignment of Brock’s interest in the Trust by way of the Settlement Agreement is void ab initio;

1 D. That Premier Trust be ordered to immediately disburse the entire, remaining  
2 balance of Stephen Brock's share of the Trust to Brock;

3 E. That the Court confirm the removal of Premier Trust as trustee of the Trust, or in  
4 the alternative, order the removal of Premier Trust;

5 F. That Premier Trust be ordered to pay \$300,000 to Brock's share of the Trust;

6 G. That the trustee fee of Premier Trust be reduced to \$0 and that Premier Trust be  
7 ordered to return any trustee fee it has collected;

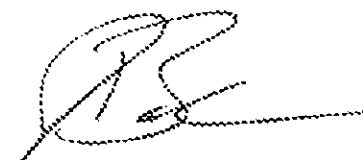
8 H. That Premier Trust be ordered to pay the attorneys' fees and costs incurred by  
9 Brock in bringing this Petition;

10 I. That the Court release jurisdiction of the Trust; and,

11 J. For such other and further orders as this Court deems appropriate.

12 DATED this 27th day of February, 2015.

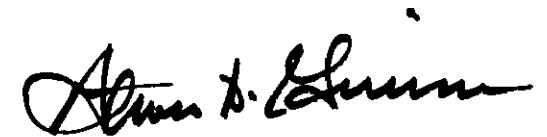
13 **CLEAR COUNSEL LAW GROUP**

14 

15 **JONATHAN W. BARLOW**

16 Nevada Bar No. 9964

17 Attorneys for Stephen Brock



CLERK OF THE COURT

TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

In the Matter of the Trust of )	CASE NO. P-065257
)	
FREI JOINT IRREVOCABLE TRUST )	DEPT. NO. XXVI
DATED OCTOBER 29, 1996 )	
)	
)	
)	<b>Transcript of</b>
)	<b>Proceedings</b>

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BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE

**PETITION: CONSTRUE TERMS OF TRUST, COMPEL COMPLIANCE, CONFIRM  
REMOVAL OF TRUSTEE, COMPEL REDRESS OF BREACH OF FIDUCIARY  
DUTIES, AND RELEASE JURISDICTION OF TRUST**

MONDAY, JANUARY 26, 2015

APPEARANCES:

FOR THE PETITIONER: JONATHAN W. BARLOW, ESQ.

FOR THE RESPONDENTS: RUSSEL J. GEIST, ESQ.  
DOUGLAS D. GERRARD, ESQ.  
RICHARD D. CHATWIN, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER  
TRANSCRIBED BY: JULIE POTTER, TRANSCRIBER

INDEX

WITNESSES

<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
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RESPONDENT'S WITNESS:

Stephen Brock	36	47/51		60	
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EXHIBITS

<u>DESCRIPTION:</u>	<u>ADMITTED</u>
(No exhibits admitted)	

1 LAS VEGAS, NEVADA, MONDAY, JANUARY 26, 2015, 10:01 A.M.

2 (Court was called to order)

3 THE COURT: Good morning. We'll go on the record.  
4 This is Case P-09-065257. We'll have counsel state their  
5 appearances for the record and also who is present.

6 MR. BARLOW: Sure. Good morning, Your Honor.  
7 Jonathan Barlow for petitioner Stephen Brock.

8 MR. GEIST: Russel Geist, Bar No. 9030, on behalf of  
9 Lawrence Howe and Elizabeth Mary Frei who are Trustees of the  
10 Emil Frei III Trust.

11 MR. GERRARD: Good morning, Your Honor. Douglas  
12 Gerrard and Richard Chatwin of Gerrard Cox Larsen on behalf of  
13 Premier Trust.

14 THE COURT: Okay. All right. So this is your  
15 petition, Mr. Barlow.

16 MR. BARLOW: Yes. Good morning, Your Honor. Thank  
17 you for the time this morning. This is our petition to construe  
18 the terms of the Frei Irrevocable Trust. And to make clear, the  
19 nature of the hearing we're here about today is, in our opinion,  
20 there's a certain setup of undisputed material facts that would  
21 entitle to Mr. Brock to a judgment as a matter of law,  
22 essentially we're seeking what would be akin to a summary  
23 judgment on the undisputed facts.

24 When we get into this, Your Honor, this is really  
25 elementary issues to the principles of trust law and to the

1 issue that are set out under spendthrift trust law more  
2 specifically. And this situation is really very strange. I've  
3 read a lot of cases about spendthrift laws. I've prepared for  
4 this. And it's a very strange and somewhat unprecedented  
5 position to be in at this point.

6           And all of the spendthrift trust cases that have been  
7 reported, those arise when a creditor or a beneficiary seeks to  
8 attach or reach the beneficial interest of a beneficiary of a  
9 spendthrift trust. And the trustee stands up and says, no, I'm  
10 not going to allow that. I'm going to defend the trust.

11           And here we have a peculiar situation where the  
12 trustee is not only refusing to stand up for the terms of the  
13 spendthrift trust, but is, in fact, making arguments that the  
14 creditor of a beneficiary of the trust is making. And it's  
15 visually easy to see that here where the trustee is sitting with  
16 the creditor of the beneficiary.

17           Now, the issues of law that we're here to argue about  
18 today are, as I see them, essentially three. One is during Dr.  
19 Frei's life, Dr. Frei being the settlor of the Trust, during his  
20 life was this Trust subject to a valid spendthrift provision.  
21 Number two, if so, in 2010, still during Dr. Frei's life, was  
22 Stephen Brock prohibited from pledging his interest in the  
23 Trust.

24           And number three, if so, if he was prohibited from  
25 pledging his interest in the Trust, and if that pledge was void,



1 did Premier Trust breach its fiduciary duties by making  
2 distribution to the creditor of the beneficiary of the Trust  
3 rather than to the beneficiary. Those are the three principle  
4 issues that we're seeking a judgment of a matter of law on  
5 today.

6 And now the undisputed facts, just quickly on those,  
7 that I believe entitles to this. One, there's a trust. No one  
8 has disputed the validity of the Trust. It's been provided on  
9 the record. It's a long 100 and some-odd page document.

10 Number two, in 2009, there was a court order reforming  
11 the Trust, essentially amending the Trust by court order,  
12 amended a portion of the Trust, in particular the portion of the  
13 Trust that dealt with how the property was to be distributed  
14 after the settlors died.

15 Number three, in 2010, during the course of disputed  
16 litigation between Mr. Brock, my client, and his now purported  
17 creditors, they entered into a settlement agreement by which Mr.  
18 Brock agreed to pay a lot of money. The amount is not  
19 necessarily material right now, but he agreed to pay a lot of  
20 money, and agreed in that settlement agreement to secure his  
21 obligation by his interest in the Trust we're talking about  
22 today.

23 The -- the order -- there's been an order approving  
24 that settlement entered by the Court. The settlement agreement  
25 says what it says and the order says what it says. We don't

1 dispute that those say what they say. Subsequent to that, Dr.  
2 Frei died in 2013 being the second settlor to die.

3           And after that, after Dr. Frei's death, Premier Trust  
4 as the Trustee distributed \$300,000 of Mr. Brock's money to a  
5 creditor or a creditor of his, and as we understand, we haven't  
6 seen exact figures, but we understand that there's approximately  
7 \$450,000 still in the Trust for Mr. Brock as part of his share  
8 for which his creditors are still claiming attachment under the  
9 previous settlement agreement.

10           And finally we received and provided to the Court a  
11 statement, transactions from Premier Trust that appear to show  
12 the final distributions were made to nine of the ten  
13 beneficiaries, thus appearing to leave Mr. Brock the only  
14 remaining beneficiary of the Trust entitled to income.

15           So that's the set of facts. I'm not sure what Premier  
16 Trust or the creditors are going to argue today, but in my  
17 opinion there are no other facts beyond those that are material  
18 to the issues of law. I mean, we could probably assume arguendo  
19 the validity of the things they're going to say for the purpose  
20 of this hearing. I don't know what that's going to be, but  
21 given this -- this set of six or seven facts, I don't think  
22 there's anything else material.

23           So the -- getting into the issues of law, the first  
24 issue is was the Trust during Dr. Frei's life subject to a valid  
25 spendthrift provision. The -- the bedrock principal trust laws

1 we all know. It's axiomatic. It's said so many times. It's  
2 that the Court is required to determine and enforce the intent  
3 of the settlors. Of the settlors.

4           And that's a really important point to remember here  
5 is that this is about what Adoria and Dr. Frei stated in their  
6 Trust should happen with their money, okay. So we have to  
7 understand that. This is not about what Stephen Brock as a  
8 beneficiary of the Trust did. This is about what the settlors  
9 said happened to their estate.

10           So once we -- and when we look into their intent, we  
11 look at the document itself and determine if it's ambiguous or  
12 unambiguous. If the trust document is unambiguous, then we  
13 don't look outside of the trust for extrinsic evidence into the  
14 interpretation of the trust. Those are basic, very principle  
15 issues in the interpretation of a trust and they're decided  
16 frequently, those principles, in spendthrift trust cases  
17 throughout the country.

18           So then we -- we look, then, in 2010. We jump to 2010  
19 when Mr. Brock entered into the settlement agreement that had  
20 that language, that his obligation to the agreement would be  
21 secured by his interest in the Trust. So in 2010 was the Trust  
22 subject to a valid spendthrift trust, or spendthrift provision?

23           The NRS Chapter 166 is very clear on this issue and  
24 it's very instructive. NRS 166.020 states that a spendthrift  
25 trust is defined to be a trust in which by the terms thereof a

1 valid restraint on the voluntary and involuntary transfer of the  
2 interest of the beneficiary is imposed. So, I guess, the  
3 definition of a trust says it includes a spendthrift provision.  
4 It says you can't voluntarily or involuntarily assign it.

5           166.040 states that any person competent by law to  
6 execute a will or deed may, by writing only, duly executed by  
7 will, conveyance, or other writing, create a spendthrift trust  
8 in real, personal, or mixed property for the benefit of (a) a  
9 person other than the settlor.

10           Finally, the third principle that's important in  
11 determining whether this was a spendthrift trust is 166.050 that  
12 states no specific language is necessary for the creation of a  
13 spendthrift trust. It is sufficient if by the terms of the  
14 writing (construed in the light of this chapter if necessary)  
15 the creator manifests his intention to create such a trust.

16           So the statutes give us the basic principles of what a  
17 spendthrift trust is. So in that light, if you look at the  
18 Trust itself, you look at Article 13, Section 3 of the Trust.  
19 Article 13, Section 3 of the Trust says to the fullest extent  
20 permitted by law, the interests of all of the beneficiaries in  
21 the various trusts and trust properties subject to this  
22 agreement shall not be alienated, pledged, anticipated,  
23 assigned, or encumbered unless specifically authorized by the  
24 terms of this agreement. Such interest shall not be subject to  
25 legal process or to claims of any creditors while such interests

1 remain trust property.

2           It couldn't be much more clearer that, I mean, that is  
3 a spendthrift provision. It says the beneficiaries can't give  
4 it away, they can't assign it, they can't encumber it, they  
5 can't pledge it. They can't do anything with the settlor's  
6 property while it remains in the Trust.

7           Further evidence that it's a spendthrift trust is that  
8 in Article 1, Sections 3 and 4 of the Trust the settlors state  
9 that they don't -- they're not retaining any interest in this  
10 Trust. So they're no longer beneficiaries. They've created  
11 this Trust for the benefit of the beneficiaries and retain no  
12 interest in it. So it is clearly set up for the benefit of  
13 someone other than the settlors.

14           So we have, then, a trust in writing, a property that  
15 it was conveyed to the Trust, being the interest in the life  
16 insurance policy. The Trust is for a person -- is for the  
17 benefit of person's other than settlors, ten other beneficiaries  
18 being named. And it contains in Article 13 that spendthrift  
19 provision that restrains alienation on the beneficiaries'  
20 interests.

21           There has been no objection to the petition to  
22 construe the terms of the Trust as a spendthrift trust. That  
23 was our initial first request is just to say in 2010 this was a  
24 spendthrift trust or is subject to a spendthrift provision. In  
25 fact, their opposition, Premier's opposition, notes that the

1 Trust has a spendthrift clause. They admit that it has that  
2 clause in there.

3           So then in interpreting the intent of the settlors,  
4 it's very clear with the settlors intended by the plain language  
5 of it. It says that the property that was conveyed to the Trust  
6 is -- the beneficiaries are prohibited from giving that away.  
7 They can't do it while the settlors were both alive.

8           There is a case law in spendthrift trusts that's been  
9 around for -- well, for 150 years and it's very basic to this --  
10 this principle. In 1929 there was a case in Springfield,  
11 Missouri. This is Bixby versus St. Louis Union Trust Company,  
12 323 Mo. 1014. And there the court said that the language used  
13 by the testator's plain and unequivocal leaves no room for  
14 construction. His intention is perfectly clear, to provide for  
15 the future comfort and happiness of his will in the way he  
16 thought best.

17           He desired to protect them against misfortunate,  
18 perhaps against their improvidence or lack of business ability.  
19 His purpose was that they and each of them should receive income  
20 of his trust as free of any alienation, encumbrance, or other  
21 disposition of their interest therein, and free of any  
22 anticipation of or charge against that income. The purpose was  
23 lawful, the means properly [indiscernible]. It is our duty to  
24 make mandatory by statute and offer insights in our decisions to  
25 give force and effect to the intention of the testator.

1           So that's exactly what's happening here is that the  
2   settlers made it very clear what they want done with their  
3   property. This is about what happens with their estate. And,  
4   in fact, one of those main purposes is to protect the  
5   beneficiaries against their own improvidence against making  
6   unwise decisions with their money that create liabilities.

7           What they're saying is that you, beneficiary, you  
8   might make some really bad decisions, whatever those might be.  
9   You might go out and get a hard money loan from a loan shark.  
10   You may go and try to get a brand new vehicle. You may settle a  
11   debt. But, you know what, you're not going to use our money to  
12   pay for that improvidence.

13           That's the bedrock basic principle spendthrift trust  
14   is that you're not going to use the settlor's money to pay for  
15   your improvidence and so we're going to restrain that by  
16   inserting the spendthrift provision in there. And on issue  
17   number one, I don't think there's any dispute that this Trust in  
18   2010 during Dr. Frei's life was a valid spendthrift trust  
19   subject to the spendthrift restrictions.

20           So then the question on issue number two is, which is  
21   really the most important question here today, is what do we  
22   make of this pledge in the settlement agreement and in the order  
23   approving the settlement agreement in 2010. So, again, in 2010  
24   the settlement agreement basically says in resolution of a whole  
25   bunch of disputed issues, Stephen Brock agrees to pay a whole

1 bunch of money to various creditors, including the -- the Emil  
2 Frei III Trust.

3           And the key language then says said amount shall be  
4 secured by Stephen Brock's interest in the Trust, meaning the  
5 one we're talking about today, the Joint Frei Irrevocable Trust,  
6 which shall not be disclaimed by Stephen Brock. That one  
7 sentence is the -- the very thing we're here about is said  
8 amount shall be secured by his interest in the Trust. And what  
9 affect can that have at this point?

10           So in 2010 the question is was that a valid -- was  
11 Stephen Brock allowed to do what he did in 2010? And this issue  
12 is almost -- it's -- it's almost black letter law in spendthrift  
13 law that you can't do this. This is the very reason that  
14 spendthrift provisions and the spendthrift law has developed was  
15 to prevent him from doing this very thing that he did.

16           If we look again at the NRS 166 for instructive,  
17 specifically NRS 166.120(1) to start with, a spendthrift trust  
18 as defined in this chapter restrains and prohibits generally the  
19 assignment, alienation, acceleration, and anticipation of any  
20 interest of the beneficiary under the trust by the voluntary or  
21 involuntary act of the beneficiary, or by operation of law or  
22 any process or at all.

23           It encompasses any attempt however it's found, whether  
24 even it is approved by an order of a court to -- to give away  
25 the beneficial interest of the amount, I don't think, either



1 way.

2           The statute then goes on to say in 166.120(4) that the  
3 trustee in a spendthrift is required to disregard and defeat  
4 every assignment or other act, voluntary or involuntary, that is  
5 attempted contrary to the provisions of this chapter. So the  
6 trustee has a duty imposed by the statutes to -- to disregard  
7 those attempts.

8           Again, this is the -- this is the most basic principle  
9 that arose in the 1800s when spendthrift trusts was born new in  
10 the United States. It's not -- it doesn't follow English law.  
11 English law doesn't follow this and so the United States created  
12 this spendthrift law that says, beneficiary, if the settlor says  
13 you can't do this, you can't do that. You're prohibited from  
14 doing that very thing.

15           THE COURT: Well --

16           MR. BARLOW: It's the most --

17           THE COURT: -- I have --

18           MR. BARLOW: -- basic principle.

19           THE COURT: -- a couple questions about that. And the  
20 -- the concerns I had were, first of all, you know, is this  
21 really a violation of the spendthrift provision where the  
22 settlement was with the settlor during the settlor's life.

23           I understand your argument that it was an irrevocable  
24 trust and they said they had no rights in it, but nevertheless,  
25 where the purpose of the settlement agreement was to resolve the

1 dispute with the settlor himself, is that -- which had to do  
2 with it was couched over in the terms of this is a loan from  
3 Adoria.

4           And so what he's paying back, this loan from Adoria,  
5 arguably, is that really a violation of the spendthrift clause?  
6 And if it is, isn't it untimely to come in four years after the  
7 fact and erase it?

8           MR. BARLOW: No. The second point --

9           THE COURT: Okay.

10           MR. BARLOW: -- if it is -- if we can jump to the  
11 second point and backtrack. The second point, if it -- if the  
12 pledge was invalid, then it's void ab initio. The cases are  
13 clear across the country that if determined to be prohibited,  
14 then it's void, never occurred.

15           THE COURT: Uh-huh.

16           MR. BARLOW: And so when -- when this issue first came  
17 up to the Trustee, to Premier, Premier should have stood up at  
18 that time and said, no, sorry, creditor, that was an invalid  
19 pledge. That was an invalid attempt to retrain -- or an invalid  
20 attempt at anticipation of your interest in the Trust. And so  
21 I'm not -- no, I'm not going to honor it.

22           So the timeliness doesn't -- doesn't matter because at  
23 some point the issue becomes ripe, and that point is at the  
24 point in which a creditor comes forward and says give me the  
25 beneficiaries money under this attempted pledge.

1 THE COURT: Uh-huh.

2 MR. BARLOW: And that happened -- I'm not sure when  
3 the first distribution occurred after Dr. Frei's life, but  
4 that's when this first became a material issue and that's when  
5 the Trustee should have stood up and said, no, I'm going to  
6 defend the spendthrift nature of the Trust, I'm going to defend  
7 the fact that in 2010 it was subject to a spendthrift provision  
8 that prevents you from alienating your interest, your future  
9 interest in this Trust that you have.

10 THE COURT: Okay. So it's the -- it's when the --  
11 when the distribution is made after Dr. Frei's death, not making  
12 the pledge during Dr. Frei's life?

13 MR. BARLOW: Well, no, I mean, the making of the  
14 pledge during his life was void. Because it was prohibited, it  
15 becomes void just in the matter of doing it. I'm saying that  
16 the timeliness of now raising an objection now, it should have  
17 been done by the Trustee --

18 THE COURT: Uh-huh. Okay.

19 MR. BARLOW: -- when the -- when the creditor came  
20 calling. So I don't think timeliness is an issue because,  
21 again, it's void from the beginning, void ab initio. The  
22 question is -- to the first question you have which is apparent  
23 settlement with the settlor himself, I must be honest, I haven't  
24 delved into all the specifics of a long and hotly disputed  
25 litigation case that occurred at that time.

1           Again, I think the only things that's material to the  
2 case today is that there was a settlement agreement in which he,  
3 for whatever reason, in which he, a beneficiary of the Trust,  
4 attempted to secure his obligation by an interest in another  
5 trust where that trust says you can't do that.

6           THE COURT: Uh-huh.

7           MR. BARLOW: You can't do that.

8           THE COURT: Well, and I guess the reason that that  
9 occurs is this -- this happened while Dr. Frei was alive. And  
10 it starts with the reformation, and I'll grant you it wasn't the  
11 reformation of this clause, but it was nevertheless a  
12 reformation of the trust itself in which instead of being the  
13 kind of a trust where it's held long term for the future, you  
14 know, descendants of the ten children, instead the ten children  
15 can elect to, you know, take their shares.

16           Dr. Frei wanted to avoid further disputes about how  
17 people were going to be getting their shares, in an effort to be  
18 fair which is what -- and it's very clear throughout this whole  
19 thing that Dr. Frei and Mrs. Frei wanted to be fair to all ten  
20 of the children from whichever marriage. That was their goal,  
21 was to be fair.

22           And he made a determination that the better way to  
23 effectuate that would be to say you're not going to have to  
24 leave it in there for your grandchildren or whatever, you can --  
25 you can take it and control it when -- when I die. So doesn't

1 that just change the very nature of the -- of the Trust? It's  
2 no longer the kind of trust that he and his wife had originally  
3 set up. It's an entirely different trust.

4 MR. BARLOW: It changes the nature of the trust after  
5 he dies.

6 THE COURT: Uh-huh.

7 MR. BARLOW: So when he dies the nature of the Trust  
8 was changed because at that point essentially it became a  
9 liquidation trust if you want, and said the beneficiaries can  
10 distribute it before that time. While he was alive, that --  
11 that nature of the Trust while he was alive was never changed.  
12 And we look into Article 3 of the Trust that deals with what  
13 happens with my property when the settlor says -- settlors say  
14 what happens with my property while we're still alive.

15 THE COURT: Uh-huh.

16 MR. BARLOW: In Article 3 it says, beneficiaries, your  
17 only interest in this is if you want to exercise a pull money  
18 right. You can pull money out of the Trust when we -- when we  
19 give it to the Trust for the purpose of paying the premium.  
20 Other than that, beneficiaries, you have no right to the income  
21 or principal of the Trust during our lives except as the Trust  
22 has made -- made distributions for -- for that purpose.

23 So during their lives it was still -- the  
24 beneficiaries had no estate in that -- in that trust. And,  
25 again, that's the very nature of a spendthrift trust is that the

1 beneficiaries don't have a legal stake in the -- in the Trust.

2           NRS 166.130 says the beneficiary of a spendthrift  
3 trust has no legal estate in the capital, principal, or corpus  
4 of the trust estate unless under the terms of the trust the  
5 beneficiary is entitled to have it conveyed or transferred to  
6 him or her immediately, meaning at that time.

7           And so when Dr. Frei died, the beneficiaries' right to  
8 request or demand distribution sprung up at that point. And so  
9 at that point, that's the point at which the spendthrift  
10 provision no longer works, then it no longer prohibits  
11 alienation.

12           THE COURT: Well, it's undisputed that -- that Mr.  
13 Brooks -- Brock breached the terms of the settlement agreement.  
14 He did not make the payments. So is it your suggestion that  
15 instead they should have sued to enforce the settlement  
16 agreement? They shouldn't have gone to the Trust to get the  
17 money?

18           MR. BARLOW: Sure. They haven't done that.

19           THE COURT: Okay.

20           MR. BARLOW: They haven't done that. We can assume,  
21 again, for arguendo for the purposes of today without changing  
22 what we're asking, we can assume that payments weren't made on  
23 the settlement agreement. Again, they haven't sued on that.  
24 There's no judgment that says that he breached a contract.  
25 They're simply saying -- they're saying he did, but no court has

1 ever said he did. They're a non-judgment report creditor.

2           Section 153 of the restatement second trust that  
3 counsel pointed out to the Court is really pretty instructive on  
4 this, as well. 150 -- they cited 153(2), which clued us into  
5 153(1). 153(1) says if, by the terms of a trust the beneficiary  
6 is entitled to have the principal paid to him at a future time,  
7 at a future time, after Dr. Frei dies, if he's entitled to have  
8 a principal conveyed to him at a future time, a restraint on the  
9 voluntary or involuntary transfer of his interest in the  
10 principal is valid.

11           So in 2010, due to the reformation, Stephen Brock and  
12 all of the other beneficiaries had a future right. Sometime  
13 down the road after Dr. Frei died they had a future right to  
14 demand or request distribution of the principal. And  
15 spendthrift trust law is very clear on this point that when it's  
16 dealing with a future right to demand it, the restraint is  
17 valid, meaning you can't pledge that future interest right now.

18           Then 153(2) comes in, once that right to demand it  
19 arises, and this is good law and it's codified in NRS  
20 essentially, that if the beneficiary is entitled to have a  
21 principal conveyed to him immediately, right now, then a  
22 restraining on the voluntary or involuntary transfer of his  
23 interest in the principal is invalid.

24           That makes good sense and it's good law. That if  
25 right now I can get to my principal of the Trust, so, too, can

1 my creditors through a proper process or whatever the case may  
2 be. But until I have that right right now, you don't get to get  
3 to it. And I can't give it away. That's the basic bedrock  
4 principal of a spendthrift law is that a future interest cannot  
5 be pledged if it's subject to a valid spendthrift provision  
6 trust.

7           To that point, then, again, emphasizing that the  
8 reformation of the Trust in 2009, again, only changed the nature  
9 of the Trust after Dr. Frei died. The reformation granted a  
10 future right to the beneficiaries to demand distribution. They  
11 had no current right still and Article 3 of the Trust still  
12 prevented them from asking for it currently.

13           The restatement third of Trust, the more recent  
14 iteration of that from the early '90s, again, it says principal  
15 [indiscernible]. Restatement third of trust, Section 58 says  
16 subject to the rules in comment B, which is ownership  
17 equivalence. That's what we're talking about, ownership  
18 equivalences having a current right to the distribution.

19           Subject to that principal of ownership equivalence, if  
20 the terms of a trust provide that a beneficial interest shall  
21 not be transferred by a beneficiary or subject to claiming the  
22 beneficiary's creditors, the restraint on voluntary and  
23 involuntary alienation of the interest is valid. So, again,  
24 subject to a current right to demand it, other than that, if it  
25 says you can't transfer it, you can't transfer it.



1           That's a valid restriction. It's -- it's been in  
2 every -- on every trust treatise that deals with this, every  
3 restatement of the law says this, every case says this. You  
4 can't. If the trust says you can't pledge your interest in the  
5 trust, you can't pledge it unless you have a right to demand the  
6 distribution right now.

7           So the other issues that will likely be raised to give  
8 reason why this -- this should be valid is there's an argument,  
9 well, you know, a court order was entered approving the  
10 settlement agreement, so we've got a court order here. So we're  
11 bound to follow this court order until it's changed. Your  
12 Honor, that's a -- that's a red herring that the case law  
13 dismisses right and left. That is -- and the NRS 166 dismisses  
14 that idea right and left.

15           NRS 166, again, 120, it's the most relevant provision  
16 in that whole chapter. 166.120(3), the beneficiary shall have  
17 no power or capacity to make any disposition whatever of the any  
18 of the income by his or her order, voluntary or involuntary, and  
19 whether made upon the order or direction of any court or courts,  
20 whether of bankruptcy or otherwise. And 166.120 clearly says in  
21 and of itself that a court order can't invalidate an otherwise  
22 valid spendthrift provision of the trust.

23           And this was recently -- this was recently dealt with  
24 in Minnesota, the Minnesota court of appeals. This is Fannie  
25 Mae versus Heather Apartments, Limited Partnership. The

1 citation is 799 N.W. 2d 638, it's a 2011 case in Minnesota.

2           And that case dealt with the beneficiary -- a creditor  
3 of the beneficiary filed a motion for a temporary restraining  
4 order saying don't let -- don't let this beneficiary -- once he  
5 gets his hands on this money, he's going to make it disappear so  
6 we can't get it. So, court, prevent him from doing anything  
7 with this property once he gets his hands on it in the future.

8           And the court granted that, the district court granted  
9 that temporary restraining order that said, beneficiary, once  
10 you have the right to get your hands on this money, you're  
11 retrained from doing anything with it so that we can pay the  
12 creditor who was here standing here saying their owed money.  
13 And so the issue came up to the appellate court, what are we  
14 supposed to do with this district court order?

15           The court order anticipated the future interest of the  
16 beneficiary and said you can't do -- you can't give the money  
17 away at that time. The -- this appellate court through that out  
18 and said it doesn't matter what the district court order said  
19 because that violated the spendthrift provision. So Minnesota  
20 case law and national case law establishes that proceeds of a  
21 spendthrift trust are inviolable until actually received by the  
22 beneficiary.

23           We, therefore, hold that a district court may not,  
24 before proceeds of a spendthrift trust are received by the  
25 beneficiary, determine what the beneficiary may or may not do

1 with the proceeds. To hold otherwise would be to defeat the  
2 spendthrift provision. Citing a Treatise on Trusts by Bogart,  
3 the sole object of a spendthrift trust is to prevent  
4 anticipation of a trust income or principal by assignment of the  
5 right to receive future income or principal or from attempts by  
6 creditors to beneficiary -- of beneficiary through  
7 [indiscernible].

8           So NRS 166 prevents the court order from -- from  
9 breaching the provisions of a spendthrift provision, case law  
10 says that even a court order can't get us around this, and it's  
11 -- it's an invalid pledge. The case law makes it very clear  
12 that invalid pledges are void ab initio. It didn't occur.

13           There could also be an argument that, well, what  
14 they're trying to do here is -- what they're really trying to do  
15 here is change the order of approving settlement. They're  
16 trying to mix that up. And then come five years after the fact  
17 and trying to change the terms of an order approving a  
18 settlement agreement. And that's a -- it certainly sounds good  
19 to the ears, but, again, NRS 166 again provides the answer to  
20 this.

21           The -- the legislature has thought this out that  
22 166.120(2) says that any action to enforce the beneficiary's  
23 rights to determine if the beneficiary's rights are subject to  
24 execution to levy an attachment or for any other remedy must be  
25 made only in a proceeding commenced pursuant to Chapter 153 of

1 NRS, if against a testamentary trust, or NRS 164.010 if against  
2 a nontestamentary trust. A court has exclusive jurisdiction  
3 over any proceedings pursuant to this section.

4           So what they're saying is if we're interpreting the  
5 terms of the spendthrift trust and determining the rights of a  
6 beneficiary under that trust or determining any other issue  
7 related to that trust, the Court has exclusive jurisdiction over  
8 that trust here in this matter. We're not going to go to some  
9 third-party case. We're going to deal with the trust as it is  
10 right here. And so the Court has the ability to interpret this  
11 Trust and enforce the terms of this Trust and declare whether  
12 attempted pledges are -- are void or not.

13           Another issue that they bring up is, well, Mr. Brock  
14 consented to this settlement agreement. He agreed to allow his  
15 interest be pledged. He agreed to let it be used to pay this  
16 obligation. Again, it's a red herring. Again, if that was  
17 true, the beneficiary could consent to a pledge.

18           I mean, that's -- that's why every -- every time a  
19 beneficiary gives away or attempts to give away their interest  
20 in a spendthrift, if they're consenting to it, they're  
21 consenting to an assignment or consenting to a pledge or  
22 consenting to a security interest, if we say, oh, well, just  
23 because they consented then we should be able to breach the  
24 spendthrift provision, that -- that guts the entirety of  
25 spendthrift law because that's the very nature of what we're

1 talking about is a beneficiary consenting to something that the  
2 settlor said you can't consent to that.

3           So the fact that he really consented or not is a red  
4 herring. And if we read 166, it makes clear over and over and  
5 over again that voluntary attempts to pledge an interest are --  
6 are invalid, are against the spendthrift provision.

7           THE COURT: So I guess what I -- you're not saying  
8 that it wasn't a valid -- the settlement itself wasn't valid,  
9 that Dr. Frei had litigation against Mr. Brock and they wanted  
10 to settle their litigation, that's a valid settlement agreement  
11 approved by Judge Cory.

12           But the part that's a problem is that because the  
13 failure to pay would result in money being taken from Mr.  
14 Brock's share of the Trust, that that's the portion that's void.  
15 And I just think it's an enforceable -- because I was just --  
16 like if they had come in and asked for instructions on that --  
17 because the Court approved that settlement. And not only Judge  
18 Cory, but they also brought it to probate court and the probate  
19 court approved it, so --

20           MR. BARLOW: And --

21           THE COURT: It seems like it's an enforceable  
22 agreement.

23           MR. BARLOW: The settlement agreement, sure. They can  
24 -- whatever they want to do with the settlement agreement, they  
25 can do with the settlement agreement. If he hasn't filled his

1 obligation with the settlement agreement, do whatever you want  
2 to enforce a contractual obligation. That's not the point.

3           And another case that deals with that is the Court in  
4 construing another spendthrift trust said we're not opining  
5 about the validity of that agreement, of that assignment that  
6 happened previous. We're just saying that you couldn't use that  
7 to attach an interest in the spendthrift trust. So do whatever  
8 you want over there. We're just saying that you can't come over  
9 here and -- and attempt to secure it by his interest in the  
10 Trust.

11           THE COURT: Uh-huh.

12           MR. BARLOW: So if they want to -- if they want to  
13 file a suit or whatever they want to do with the settlement  
14 agreement, go ahead and that will be dealt with at that time  
15 what the rights of the parties are under the settlement  
16 agreement. But here what we're saying is that, again, when this  
17 issue came up, yes, you said should they have petitioned for  
18 instructions. Absolutely.

19           That -- it's shocking that when Premier Trust who has  
20 administered, I have no idea, thousands of trusts in Clark  
21 County, when they have somebody come along and said, hey, we're  
22 a beneficiary among your -- or we're a creditor or a purported  
23 creditor of one of your beneficiaries, give us their money, it's  
24 shocking that Premier wasn't the first one to the court saying,  
25 wow, I don't know what to do with this because when I read this

1 trust that I'm purportedly administering, there's a clause in  
2 there that says that my beneficiary can't do what these -- what  
3 he attempted to do.

4 And so they should have in 2013, if they were  
5 concerned about this, the Trustee should have stood up and, as  
6 NRS 166.120 says, they should have disregarded and defeated  
7 that. They should have made the effort to do that or at least  
8 get some court instruction on this.

9 It's -- again, it's unprecedented in spendthrift case  
10 law, the body of case law, to have a trustee sitting on the side  
11 of a creditor making the creditor's arguments. The Trustee  
12 always stands up for the Trust and says you can't do this.  
13 Until the Court looks at the terms of that trust and says --

14 THE COURT: But, again, Mr. Barlow, I can't get past  
15 the fact that this settlement agreement was reached during Dr.  
16 Frei's life. So if we're looking at the intent of the settlor,  
17 that was his intent.

18 MR. BARLOW: As to the settlement agreement, possibly.  
19 But the settlor doesn't retain an interest at that point --

20 THE COURT: Uh-huh.

21 MR. BARLOW: -- to change the terms of The trust once  
22 they're -- they're put in place. That would be -- there's two  
23 independent trustees at that point. They're still independent  
24 of whatever is happening here between settlors and beneficiaries  
25 and whatever they're doing.

1           Again, the Trustees, I have no idea if the Trustees  
2 were even aware. I assume they were. It's quite a mess of a  
3 situation. But the Trustees at that time should have stood up  
4 and said, well, you put the terms of the Trust in writing, Dr.  
5 Frei, and that's what we're looking at is the terms of the  
6 writing, not what you're trying to do outside of the terms of  
7 the writing.

8           So his -- his course of dealing outside of the terms  
9 of the writing can't change the terms of the writing itself.  
10 And so the Trustees should have, again, interpreted the terms of  
11 the Trust and applied the terms of the Trust and defeat that  
12 attempted pledge at the time.

13           I've already been around a lot of things, so I just  
14 want to make sure I -- okay. I think I've covered this a little  
15 bit, but Premier has also argued that the reformation which  
16 granted a future right to distribution destroyed the spendthrift  
17 provision in 2009, which is incorrect because in -- that deals  
18 with a future interest. If the current interest is to not  
19 receive any income or principal, then there is no current right  
20 to pledge or reform.

21           So there's no dispute that right now the beneficiaries  
22 of the Trust could pledge an interest. Right now the  
23 beneficiaries could secure it in somebody else, but they  
24 couldn't do that in the past.

25           So then to wrap this back around to the -- to the end



1 point, which is you have to enforce the intent of the settlors  
2 as it's stated in the Trust itself. And that Trust is not  
3 ambiguous when you look at the terms of the Trust itself. And  
4 it said that on the death of the second settlor, here being Dr.  
5 Frei in 2013, the Trust says distribute our property to our  
6 beneficiaries.

7           It doesn't say anywhere in the Trust that the Trustees  
8 are entitled to distribute this money to a creditor of the  
9 beneficiaries. The intent is to give this, the settlors' estate  
10 the way that they said it should be given. They said we want  
11 this given to our children, not to a creditor of our children.

12           THE COURT: But the creditor of the child was the  
13 settlor.

14           MR. BARLOW: No, the Trust, the Emil Frei III Trust.

15           THE COURT: Right.

16           MR. BARLOW: So it's a different entity, the trust. A  
17 different -- even that doesn't change the material fact that  
18 even -- I think even in that situation, even if you're pledging  
19 interest back to the settlor him or herself, if the pledge is  
20 invalid, it's invalid.

21           It doesn't matter to whom you give the pledge because  
22 that's not going to reform or change the nature of the Trust.  
23 The Trust says you can't do that. So even if you say I'm giving  
24 it back to the settlor, that's contrary to the terms of the  
25 Trust, contrary to NRS 166.

1           So, again, if we assume that it was a valid  
2 spendthrift trust in 2010, the assumption being that the  
3 attempted pledge would be void ab initio, then in 2013 when Dr.  
4 Frei died, the creditor stood only as an unsecured creditor at  
5 that point. And, again, Premier at that point would be required  
6 to distribute it in accordance with the terms of the Trust.

7           The Bixby case I talked about previously dealt with a  
8 somewhat similar issue where they're dealing with an agreement  
9 and what part of it was void or not void. That court said to  
10 say that the agreement is valid and that the assignment is void  
11 is to say that the beneficiaries of the trust could accomplish a  
12 certain purpose in an indirect way and to admit that they could  
13 not accomplish the same purpose in a direct way. To permit the  
14 beneficiary to do in a ruinous and roundabout way what he cannot  
15 do in a straight way is to play fast and loose with the language  
16 of the will and to defeat the testator's intention. The form of  
17 the transaction was immaterial in conveyance whether by  
18 operation of law or by the act of any of the parties which  
19 disappoints the purpose of the settlor by diverting the property  
20 or the income from the purposes name would be a breach of the  
21 trust. And for these reasons the agreement was void ab initio.

22           So, again, we can't just get around this by saying,  
23 well, he did it with the settlor himself, they did it in a  
24 settlement agreement, done by order, so we're going to do that  
25 in a roundabout way to tie this back around to tie this back

1 around to get around this spendthrift provision on this back  
2 end. It's a roundabout backwards way to get around the  
3 spendthrift provision and violates the entirety of the body of  
4 law.

5           So the things that we're asking for as far as orders  
6 today, for construction of the Trust, one, to construe the Trust  
7 as a valid -- or excuse me, in 2010 that this Trust was subject  
8 to a valid spendthrift provision in 2010, that the attempted or  
9 apparent pledge of Mr. Brock's interest in the Trust in 2010 was  
10 void as having been prohibited by the spendthrift provision of  
11 the Trust, that in 2013 the creditor, the unsecured creditor,  
12 Premier had a duty and obligation to distribute the Trust to the  
13 beneficiaries of the Trust and to no one else, that Premier  
14 breached that duty by distributing assets to -- to a creditor of  
15 a beneficiary of the Trust, and also as to the remaining amounts  
16 that are still in the Trust, that the Trustee has an obligation  
17 to distribute that property right now to the beneficiary of the  
18 Trust.

19           We're seeking an order to remove Premier Trust as  
20 Trustee, as well. Not only due to the distribution of the  
21 \$300,000, but, again, the last issue of fact is did Mr. Brock  
22 have a right to remove the -- or the Trustee right now. The  
23 Trust provides that a majority of the then current income  
24 beneficiaries of the Trust have a right to remove the Trust --  
25 Trustee.

1           There's ten beneficiaries. Premier Trust itself  
2 provided a statement of transactions that show final  
3 distributions to nine of the ten beneficiaries, which is our --  
4 has been our argument along is that that leaves Stephen Brock as  
5 the only beneficiary. He being the majority himself has the  
6 right of removal under the Trust itself. So whether we go on  
7 breach or whether we go on the Trust provision that allows  
8 removal, we believe that Premier Trust should be removed.

9           We're seeking an order for the return of \$300,000 to  
10 the Trust from Premier to reduce trustee's fees, for a pay from  
11 Mr. Brock's share to zero, and to order Premier Trust to pay Mr.  
12 Brock's attorney's fees incurred in bringing this petition at  
13 this time.

14           Your Honor, do you have any other questions for me  
15 right now?

16           THE COURT: No, thank you.

17           MR. GERRARD: Your Honor, you stated at the last  
18 hearing we could call witnesses. At this point we call Stephen  
19 Brock to the stand.

20           THE COURT: Okay.

21           MR. BARLOW: Your Honor, we just -- as we do that we  
22 want to state an objection to the nature of calling witnesses.  
23 We don't believe there's any relevant witnesses to be called at  
24 this stage of the hearing.

25           THE COURT: Okay. Well, there were a couple of

1 questions that I think were stated by Mr. Brock as, you know, an  
2 information or belief in his petition that I don't necessarily  
3 know were necessarily established by anything other than his  
4 assertion. So I can't really say, as you pointed out, as to  
5 the, you know, questions of fact or law, and I can't necessarily  
6 say that I think there are no questions of fact. So --

7 MR. BARLOW: And that -- that's our position. If the  
8 statement of undisputed material facts that I've set forth --

9 THE COURT: Right.

10 MR. BARLOW: -- is insufficient to make a ruling  
11 today, then you -- then you deny the petition right now without  
12 prejudice. We set it out for an evidentiary hearing down the  
13 road --

14 THE COURT: Right.

15 MR. BARLOW: -- to allow us time to discover whatever  
16 facts that remain material and relevant to that issue. It's in  
17 the nature of a summary judgment motion that undisputed material  
18 facts, if you find that there are facts that may be still  
19 relevant --

20 THE COURT: Okay.

21 MR. BARLOW: -- let's hear those down the road.

22 THE COURT: So, Mr. Gerrard --

23 MR. GERRARD: There are some facts that are relevant  
24 to the defenses that we've raised for today's hearing. And we  
25 want to call Mr. Brock to the stand to have those facts placed

1 into the evidence. And Your Honor stated at the last hearing  
2 that that was going to be permitted. So --

3 THE COURT: Uh-huh.

4 MR. GERRARD: -- I don't really see that there's an  
5 issue here.

6 THE COURT: Okay. Well, you know, as Mr. Barlow has  
7 pointed out, the -- probably the cleaner procedural method would  
8 be to say I just -- I can't grant this motion because I think  
9 there are disputed questions of fact and set it out for a  
10 hearing. I mean --

11 MR. GERRARD: Well --

12 THE COURT: -- it would be great if we could, you  
13 know, get around that and get it all done today. That would be  
14 preferable.

15 MR. GERRARD: I think given what Your Honor said at  
16 the last hearing, everybody was on notice already that we had  
17 the ability to put on witnesses today. So to suggest today at  
18 this hearing that somebody didn't know about that I think would  
19 be a little bit --

20 THE COURT: Well, I don't think he's saying he didn't  
21 know about it. I just --

22 MR. GERRARD: Well, what he's --

23 THE COURT: -- think he's saying --

24 MR. GERRARD: -- what he's arguing, Your Honor, is  
25 that the procedure that Your Honor set at the last hearing

1 should be changed. And what we're saying is with a few  
2 questions to Mr. Brock we can establish defenses which will get  
3 us out of this case. Why should we have to come back for  
4 another hearing when Your Honor already gave notice to the  
5 parties that you were going to set this out and anybody could  
6 call witnesses if they wanted to.

7 THE COURT: Yeah. Thanks.

8 Okay. Mr. Barlow.

9 MR. BARLOW: And, again, our point is that it's in the  
10 nature of a motion for summary judgment. They haven't raised  
11 anything in writing previously by affidavit or otherwise that  
12 would distribute the material facts I set forth. So if those  
13 six or seven facts that I pointed out in the beginning which is  
14 we're simply interpreting this Trust, we're assuming arguendo  
15 that the settlement agreement says what it says and that there's  
16 an obligation on the settlement agreement. If there's some fact  
17 beyond that that's relevant to this, I don't know what it is.

18 And, again, if Your Honor finds there are facts that  
19 would be relevant to that, then let's set this out for an  
20 evidentiary hearing on those facts later on down the road. But  
21 I think that those undisputed facts that they haven't  
22 controverted in any writing prior to this time are sufficient to  
23 make a determination as a matter of law on the issues that we  
24 talked about today.

25 THE COURT: Okay. Thanks. Well, I'm going to allow

1 testimony because I said I would. And I think that it makes  
2 more sense if we can deal with this all today to get this done  
3 today. So I think it would be in the best interest of judicial  
4 economy that we should proceed and see how much of this we can  
5 get resolved today.

6 MR. BARLOW: Can we reserve the right to call further  
7 witnesses at a later time depending on the outcome of the  
8 hearing?

9 THE COURT: Certainly. Okay.

10 STEPHEN BROCK, RESPONDENT'S WITNESS, SWORN

11 THE CLERK: Thank you. Please state your name for the  
12 record and spell it for us, please.

13 THE WITNESS: My name is Stephen Brock; S-T-E-P-H-E-N  
14 B-R-O-C-K.

15 THE CLERK: Thank you.

16 DIRECT EXAMINATION

17 BY MR. GERRARD:

18 Q Mr. Brock, the relationship between yourself and Dr.  
19 Frei is that of a step-father and step-son; correct?

20 A That is correct.

21 Q Okay. And --

22 A And a friend because he's known us -- known me for 52  
23 years.

24 Q And, sir, you were present when there was an oral  
25 settlement agreement that was entered in the record before Judge



1 Cory on March 31, 2010; correct?

2 A I was there, yes.

3 Q In fact, that settlement occurred in a litigation  
4 mater that was ongoing during trial; correct?

5 A That is correct.

6 Q And isn't it true, sir, that Dr. Frei, your  
7 step-father, was a party to that matter?

8 A He was one of the parties along with his children.

9 Q Right. But specifically, and answer my question, Dr.  
10 Frei was present at the trial and he was a party to the matter;  
11 correct?

12 A He was at that trial, yes.

13 Q And at the time that the settlement agreement was  
14 entered on the record at that trial, which occurred on March 31,  
15 2010, isn't it true, sir, that you stated on the record before  
16 Judge Cory that you were giving your consent to all the terms of  
17 that settlement agreement?

18 A Without knowledge about the spendthrift trust --

19 Q Sir, I didn't ask you for --

20 A -- I --

21 Q I didn't ask you for --

22 A -- went ahead and said yes. And none --

23 MR. GERRARD: Judge, I'll ask you --

24 THE WITNESS: -- of the judges --

25 MR. GERRARD: -- to direct the witness --

1 THE WITNESS: -- actually knew that.

2 MR. GERRARD: -- to answer my question and my question  
3 only.

4 THE WITNESS: I am.

5 THE COURT: Certainly. Yeah. Mr. Barlow will have an  
6 opportunity to ask you anything in cross-examination. But if  
7 it's a yes or no question, then the answer is to be a yes or no  
8 response.

9 BY MR. GERRARD:

10 Q So again, sir --

11 THE COURT: And if you can't answer it, you can't  
12 answer it.

13 MR. GERRARD: I'm sorry, Your Honor.

14 BY MR. GERRARD:

15 Q So again, sir, my question, which only requires a yes  
16 or no answer is isn't it true that on March 30th -- excuse me,  
17 31st of 2010, you stated your consent to all the terms of the  
18 settlement agreement placed on the record before Judge Cory.

19 A Based on the facts at hand, yes.

20 Q And isn't it true also, sir, that Dr. Frei was present  
21 and he also stated his consent to all the terms of the  
22 settlement?

23 A I believe so, along with his daughter Mary.

24 Q Okay. In fact, if we look at the transcript from that  
25 hearing, I'm going to read to you from the transcript. You tell

1 me if this is accurate according to your recollection of what  
2 occurred. This is Judge Cory speaking.

3 MR. GERRARD: And, Judge, I'm reading from page 23 of  
4 the transcript from March 31, 2010. Judge Cory Speaking  
5 starting at line 4 of page 23.

6 Now, it will be a binding settlement agreement if the  
7 individuals involved indicate on the record that that is their  
8 understanding and that they wish to settle the case on those  
9 terms. I will ask you, Mr. Brock, is that your understanding  
10 and do you wish to settle the case on those terms?

11 Your response, yes, it is, Your Honor, and I do.

12 BY MR. GERRARD:

13 Q Does that sound like what happened that day?

14 A Based on the fact that we did not --

15 Q Again, sir, yes or no --

16 A -- have, yes.

17 Q -- is that what happened that day?

18 A Based on the facts that we had, yes.

19 Q You didn't qualify your answer in any way, did you?

20 A Because I did not know about it.

21 Q Sir, it's a yes or no answer.

22 A I have answered you.

23 Q Did you qualify your answer in any way, yes or no?

24 MR. BARLOW: Objection, Your Honor. The transcript  
25 states what it states. Asked and answered.

1 THE COURT: Sustained.

2 BY MR. GERRARD:

3 Q And then the court went on and said, all right, Mr.  
4 Frei -- this is your father-in-law, step-father. I'm sorry,  
5 your step-father, correct, Mr. Frei?

6 A Tom is my step-father in law.

7 Q Okay. The court goes on, starting on line 12. All  
8 right, Mr. Frei, is that your understanding of the settlement  
9 terms and is it your desire to settle this case on those terms  
10 that have been spread upon the record? The answer at line 16  
11 from Dr. Frei, yes. Is that what occurred at the time of the  
12 hearing, yes or no?

13 A I believe so if it's in the transcript.

14 Q Okay. So at the time of the hearing, not only did Dr.  
15 Frei agree to the terms of this settlement, you did, as well,  
16 with no qualifications; correct?

17 A Based on what I knew, yes.

18 Q Now, on June 18th of 2010, there was an order entered  
19 by Commissioner Yamashita that also confirmed the settlement;  
20 correct?

21 A Yes.

22 Q Okay. And that occurred approximately three months  
23 after the first settlement; correct?

24 A Yes.

25 Q And Dr. Frei also agreed to the terms of that

1 settlement, didn't he?

2 A He was not there, but my understanding is that he did.

3 Q Now, isn't it true, sir, that Dr. Frei passed away on  
4 April 30, 2013?

5 A Yes.

6 Q Okay. Now, at the time that -- well, let's skip  
7 ahead. On August 6th of 2013, Premier Trust, my client, the  
8 Trustee of this life insurance trust, sent a letter to you and  
9 all of the beneficiaries indicating their intent to make a  
10 \$100,000 payment to your creditors pursuant to that settlement  
11 agreement and asking if they had any objections. Do you recall  
12 receiving that letter?

13 A I do not.

14 Q Do you recall receiving a second letter on October  
15 23rd of 2013, again, this time same contents of the letter, but  
16 making reference to a second \$100,000 payment that was going to  
17 be made under the terms of the settlement. Do you recall  
18 receiving that letter?

19 A No, I do not.

20 Q Okay. Well, what about the third letter of May 12,  
21 2014, that was sent out by my clients. Did you receive that  
22 letter?

23 A I did not.

24 Q Okay. And after each of those letters was sent out,  
25 Premier Trust, having not received any response, made a \$100,000

1 payment in accordance with the settlement agreement, didn't it?

2 A I found out later after requesting information of  
3 which they then sent me documents that purported to what you  
4 just talked about, I finally saw what they had sent out, and  
5 that's when I started questioning everything.

6 Q Okay. And at the time --

7 A But that was in August of 2014.

8 Q So -- well, the last distribution was made in January  
9 of 2014; correct?

10 A Oh, I don't know.

11 Q Okay. So you're saying that you didn't receive any of  
12 the three letters that were sent to all of the beneficiaries --

13 A That is correct.

14 Q -- by Premier Trust?

15 A In fact, I asked --

16 Q Sir, it's a yes or no question.

17 A I did not.

18 Q You either you did --

19 A But I can tell you --

20 Q -- or you didn't.

21 A -- that when I did get it.

22 Q Now, sir, you understood at the time that the  
23 settlement was placed on the record on March 31, 2010, that all  
24 the parties of that settlement were going to rely upon it,  
25 didn't you?

1 A With the facts in -- at hand at the time, yes.

2 Q Sure.

3 A We did not have --

4 Q At the --

5 A -- all of the facts.

6 Q And let's be clear about what those facts are that  
7 were on-hand at that time. On March 31st of 2010, this trust  
8 agreement for the life insurance trust that we're talking about  
9 today was in existence, wasn't it?

10 A The life insurance trust was in existence.

11 Q Sure.

12 A Yes.

13 Q And all of the terms of that life insurance trust were  
14 available to you at that time; correct?

15 A I would have had availability to it, but the lawyers  
16 are who I determined would understand it.

17 Q Again --

18 A And I looked towards them for information.

19 Q And at the time that this occurred, you were  
20 represented by Dana Dwiggin of Solomon Dwiggin; correct?

21 A Correct.

22 Q And Ms. Dwiggin is a recognized attorney with  
23 expertise in trust administration matters, isn't she?

24 A All the attorneys representing us. Blut and Dwiggin,  
25 yes.

1 Q Okay. So you had the trust agreement available to  
2 you. It was also available to Dana Dwiggin, your attorney;  
3 correct?

4 A Yes.

5 Q And with that knowledge of the trust agreement you  
6 entered into this settlement agreement knowing that all the  
7 parties were going to rely upon it, didn't you?

8 A Had everyone understood that there was a -- had the  
9 attorneys told --

10 Q Sir, it's a really a simple question.

11 A -- the judges that this --

12 Q Either you did or you didn't.

13 A -- was not available to be pledged --

14 Q Sir.

15 A -- the --

16 Q Please just answer --

17 A -- no pledge would have occurred.

18 Q -- my question. Just answer my question. I don't  
19 need the rest of the --

20 A Based on the facts at hand, yes.

21 Q Okay. And the facts at hand were the Trust agreement  
22 was in existence, you were represented by very competent  
23 counsel, you both had access to all the agreement, and Dr. Frei,  
24 the settlor, was also present at the time of the settlement;  
25 correct?



1           A     He was there.

2           Q     And he stated his intent on the record at the time of  
3 that settlement on March 31, 2010, didn't he?

4           A     He did without knowledge about --

5           Q     All right.

6           A     -- the spendthrift trust.

7           Q     Thank you. So from that time on March 31, 2010, until  
8 the time that you filed this petition, it was nearly five years  
9 later, you never once told Premier Trust that they didn't have  
10 any authorization, at least from your perspective, to make the  
11 distributions in accordance with --

12          A     I did.

13          Q     -- the settlement agreement, did you?

14          A     When I found out what he had done, I started emailing  
15 him and told him he does not have this right. Absolutely. The  
16 minute I found out. And he would -- he lives 1.9 miles away  
17 from me and he would never meet with me --

18          Q     Sir.

19          A     -- never pick up the phone --

20          Q     What's the date --

21          A     -- or talk to me about it.

22          Q     What's the date that you say you first learned about  
23 this?

24          A     I would have to check my e-mails, but it would be  
25 sometime in July.

1 Q Of 2014?

2 A '14, correct.

3 Q Okay. So what you want the Court --

4 A But I did somewhere in between there.

5 Q So, sir, what you want the Court to believe is that  
6 you had no knowledge of the Trust provisions that was in the  
7 Trust, it was in existence, that both you and your attorney had  
8 reviewed, and that you were basing the settlement agreement  
9 upon --

10 A We did not review that Trust. I did not review that  
11 Trust with her. We reviewed the settlement agreement.

12 Q But it was available to you and you could have  
13 reviewed it if you wanted to at any time; correct?

14 A I could have reviewed if I had understood it, sure.

15 Q All right.

16 MR. GERRARD: Your Honor, I have no further questions  
17 for this witness at this time.

18 THE COURT: Thank you.

19 MR. GERRARD: We'll open up for cross-examination, and  
20 then -- and then I'll make my presentation afterward.

21 THE COURT: Mr. Geist and then Mr. Barlow, yeah.

22 MR. BARLOW: Your Honor, I would just note that --

23 THE COURT: I don't know if Mr. Geist had any  
24 questions.

25 MR. GEIST: I do. I just have a couple questions,

1 Your Honor.

2 THE COURT: Okay. And then you can wrap it up all at  
3 one time.

4 MR. GERRARD: Oh, Your Honor, I forgot. There was one  
5 question I had. I totally forgot.

6 MR. BARLOW: We stipulated to everything that was just  
7 basically said, but whatever.

8 MR. GERRARD: There is one more question I had.

9 BY MR. GERRARD:

10 Q Sir, the settlement agreement required you to make  
11 payments, didn't it?

12 A Yes, it did.

13 Q And other than the \$5,000 that you brought to Judge  
14 Cory's courtroom, you've never made another payment on that  
15 settlement agreement, have you?

16 A That is correct.

17 CROSS-EXAMINATION

18 BY MR. GEIST:

19 Q Good morning, Mr. Brock.

20 A Good morning.

21 Q Taking you back to March 31, 2010, in the middle of  
22 the trial, I believe it was the third day; correct? There was a  
23 settlement discussed on that day. Did you initiate the  
24 settlement?

25 A Not that I'm aware of. I think the lawyers --

1 Q Did you bring a --  
2 A -- talked it out.  
3 Q Did you bring a \$5,000 check to court with you that  
4 day?  
5 A No.  
6 Q You didn't have any payment with you on the --  
7 A No, I --  
8 Q -- day of the settlement?  
9 A -- did not. I gave it to Ms. Dwiggin at some future  
10 date from what I recall. That's what I recall.  
11 Q Okay. Taking you back to 2009, there was a petition  
12 filed on a Frei Irrevocable Trust to reform its terms.  
13 A Yes.  
14 Q Are you familiar with that petition?  
15 A Yes.  
16 Q And can you tell me who filed that petition?  
17 A It should have been Dan Goodsell.  
18 Q And Dan Goodsell being the attorney; correct?  
19 A Correct.  
20 Q Who was Dan Goodsell representing?  
21 A Dan Goodsell was representing myself, Dr. Frei, the  
22 Trust --  
23 Q So --  
24 A -- that I recall.  
25 Q -- you're saying Dan Goodsell represented you. Do you

1 recall that Elliot Blut represented Dr. Frei at that time?

2 A At that time we had a --

3 Q It's a yes or no.

4 A -- guardian ad litem.

5 Q It's a yes or no. 2009. We're not talking 2010. The  
6 petition for reformation.

7 A Well, he had a guardian ad litem in 2009. So --

8 Q Did Elliot Blut represent Dr. Frei?

9 A He eventually, I believe, represented Dr. Frei --

10 Q Okay. So --

11 A -- through power of attorney.

12 Q -- on -- on May 1, 2009, there was a hearing. And at  
13 that hearing before the Probate Commissioner Wesley Yamashita  
14 you were represented by Dan Goodsell, correct, on a petition  
15 that you put forward to reform the terms of the Frei Irrevocable  
16 Trust.

17 A Yes.

18 Q So you had opportunity --

19 A Well, our Trust did.

20 Q I'm sorry?

21 A The Adoria Frei Trust did.

22 Q So you had the opportunity to review the Trust with  
23 your counsel Dan Goodsell prior to the filing of that petition,  
24 which was, I'm assuming, filed under your verification; correct?

25 A We focused on the one thing which was reformatting

1 the --

2 Q Just a yes or no.

3 A -- Trust, so, yes --

4 Q You had the opportunity --

5 A -- that's what we did.

6 Q -- to review it?

7 A Yes.

8 Q And your attorney Dan Goodsell advised you of your  
9 rights as a beneficiary at that time; correct?

10 A Only to the point that we could get distribution when  
11 mom and Tom passed away.

12 Q So you're saying that the reformation was to change  
13 distribution as it was written in the Trust to what you were  
14 petitioning the Court --

15 A Correct. At a future date. Yes.

16 Q -- issue an order -- okay. And just to be clear, Mr.  
17 Goodsell didn't represent Dr. Frei; correct?

18 A I really -- they all went into big lawsuits about  
19 that. I can't tell you how it all played out.

20 Q Okay.

21 A All I know is there's a Goodsell law out there that  
22 said he did not commit malpractice and Dr. Frei signed --

23 Q All right. Thank you.

24 A -- everything correctly.

25 Q Thank you.

1 MR. GEIST: I tender the witness, Your Honor.

2 THE COURT: Thank you.

3 And, Mr. Barlow, anything?

4 CROSS-EXAMINATION

5 BY MR. BARLOW:

6 Q Stephen, can you describe the conversation you had  
7 with Dana Dwiggins in which she described to you the spendthrift  
8 nature of the Frei Irrevocable Trust?

9 MR. GERRARD: Your Honor, before --

10 THE WITNESS: She never did that.

11 MR. GERRARD: -- before he answers that question, I  
12 just want to make sure we're clear. If this is going to be a  
13 conscious waiver of the attorney-client privilege, we want it to  
14 continue for all questions hereafter.

15 MR. BARLOW: So you want a continuance now?

16 MR. GERRARD: No.

17 THE COURT: No, they want to continue the -- this --  
18 this would be a question invading the attorney-client privilege.  
19 So if Mr. --

20 THE WITNESS: Well, I'll waive that.

21 THE COURT: Okay.

22 BY MR. BARLOW:

23 Q The question, then, is did Dana Dwiggins advise you  
24 about the spendthrift nature of the trust?

25 MR. GERRARD: Same -- same comment, Your Honor.

1 THE COURT: Yeah, I have to agree.

2 THE WITNESS: Yeah --

3 THE COURT: It would be --

4 THE WITNESS: -- I will waive --

5 THE COURT: -- a waiver of --

6 THE WITNESS: -- the attorney-client privilege --

7 THE COURT: It would be a waiver.

8 THE WITNESS: -- with Dana Dwiggin. I can only tell  
9 you no one ever advise us. Blut did not. Had the judges known  
10 that there was a spendthrift nature of the Trust, they would  
11 have shut down the negotiations and everybody would have gone  
12 back to the table and figured things out. Because I wasn't  
13 allowed to do what I did, but nobody knew that, especially the  
14 judges. So it's not the judge's fault they didn't know it.  
15 Everybody didn't tell us.

16 BY MR. BARLOW:

17 Q Mr. Brock, can you point to part of that -- we have a  
18 transcript from the hearing regarding the settlement agreement.  
19 Could you point to the part of that transcript?

20 THE COURT: Does he have that?

21 MR. BARLOW: This was attached to our petition. It's  
22 part of Exhibit C that's contained in the order approving  
23 settlement agreements that's been at issue here. There's a  
24 transcript. Premier Trust has already referred to it and read  
25 from it.



1 THE COURT: Okay.

2 BY MR. BARLOW:

3 Q There's a question, Mr. Brock, that is -- if you read  
4 through that transcript, take as long as you want, we can wait,  
5 point us to the page and the line number on which the word  
6 spendthrift is stated in the -- in the transcript.

7 A Spendthrift is not noted. You want me to look at the  
8 whole document? I mean, this page there's nothing that says  
9 anything that -- except that Ms. Dwiggins may review it  
10 primarily.

11 Q And as you sit here and recall the hearing with Judge  
12 Cory that day --

13 A No one ever brought up the spendthrift trust.

14 Q That's the question.

15 A No.

16 Q Was the discussion of spendthrift --

17 A It was never brought up and no one knew about it and  
18 certainly somebody would have brought it up had they known about  
19 it, I think, and this settlement would never have occurred in  
20 the way it did.

21 Q In 2010 did you understand -- did you have an  
22 understanding that your beneficial interest in the Trust was  
23 subject to a spendthrift provision?

24 A I did not.

25 Q Later in 2010 in front of Commissioner Yamashita, did

1 you attend the hearing at which that petition was granted by  
2 Commissioner Yamashita?

3 A I believe so, yes.

4 Q And during that hearing, was there any discussion  
5 about the spendthrift nature of the Trust?

6 A No, not at all.

7 Q What -- if the parties understood that there was a  
8 spendthrift provision restricting your ability to secure your  
9 obligation of the settlement agreement, what do you think would  
10 have happened at the time?

11 MR. GERRARD: Objection. Calls for speculation.

12 THE COURT: Overruled.

13 MR. GERRARD: At least as it relates to all parties  
14 other than this party.

15 THE COURT: Well, I believe he can testify to what he  
16 believes.

17 MR. GERRARD: Well, yeah, he just said the parties.  
18 That's why

19 THE COURT: Yeah, as -- as --

20 BY MR. BARLOW:

21 Q What do you believe -- what do you believe would have  
22 occurred with this -- with the settlement?

23 A I think Judge Cory would have kept making the trial go  
24 forward because he stopped it a number of times due to  
25 settlement discussions. And he would have had someone say, oh,

1 you can't pledge your assets. That trial would have kept going  
2 forward or a different mechanism would have occurred regarding  
3 their request.

4 Q If in 2010 you understood that your beneficial  
5 interest was secured -- or, excuse me, was subject to a  
6 spendthrift provision, would you have entered into the  
7 settlement agreement at that time?

8 A Not at all. Had I understood that I couldn't do that,  
9 it would have been moot. All the lawyers would have understood  
10 he can't sign this because of that spendthrift provision.  
11 That's what I believe. And I think the judges would have shut  
12 it down had they understood it that it existed.

13 Q Well, but when was it that you first became aware  
14 that, excuse me, that Premier Trust had made distributions from  
15 your share of the Trust to the Emil Frei III Trust?

16 A I'd have to check through my e-mails, but sometime in  
17 2014.

18 Q You just think it's summertime, July or August?

19 A Summertime 2014.

20 Q Prior --

21 A It may have been as late -- as early as Spring, but  
22 I'd have to check.

23 Q Prior to that, from the time of Dr. Frei's death to  
24 that point when you first became aware, can you describe what  
25 communications you did receive from Premier Trust?

1 A None until I emailed him.

2 Q None? Did you ever receive any e-mails from Mr.  
3 Dreschler who is the president?

4 A When I emailed him at a request of what are you doing?  
5 And he emailed me back and said we're still trying to figure out  
6 if we're doing what's right essentially and we have to look into  
7 this deeper --

8 Q Sure.

9 A -- you know, because it's a very confusing settlement  
10 agreement, his words --

11 Q When did that --

12 A -- in an e-mail.

13 Q Sorry. When did that e-mail exchange occur?

14 A Sometime in the summer of 2014.

15 Q So after you became aware of the distributions?

16 A Yes.

17 Q I'm talking about --

18 A Yes, after the -- after I became aware.

19 Q From Dr. Frei's death to the time you became aware of  
20 the distributions, how many e-mails did you receive from Premier  
21 Trust or any officer at Premier Trust?

22 A Between him and Heather St. John, maybe three or four.

23 Q What was the nature of those e-mails?

24 A Heather St. John telling me here is a demand letter,  
25 here's how we distributed the assets, we didn't get a signature

1 back from you, we just assumed -- you know, we got them from  
2 everybody else, we assumed you were okay with it.

3 Q Wait. When did that -- I'm talking about from the  
4 time of Dr. Frei's death to the time that you became aware of  
5 the Trust distributions.

6 A The -- when I became aware of the Trust distributions  
7 was during that e-mail and those e-mails with respect to Heather  
8 St. John and Mark Dreschler.

9 Q And that -- what you're just describing occurred in  
10 July or August of 2014?

11 A Correct. Yes.

12 Q Okay. Prior to that time after Dr. Frei's death.

13 A I never had any conversation or any knowledge about  
14 what was going on with the -- the Trust's distributions.

15 Q Okay. So just to be clear, prior -- from the time you  
16 started that e-mail exchange in July or August of 2014, prior to  
17 that time you hadn't had any e-mail exchanges or communications  
18 with Premier?

19 A Maybe early spring when I started requesting  
20 information, but that would be the earlier.

21 Q Okay.

22 A I'd have to go back and check. I'm sorry. But  
23 definitely not prior.

24 Q The -- the settlement -- going back to the settlement  
25 agreement of that other case, was Premier Trust a party to that

1 case?

2 A No.

3 Q Was Premier Trust represented at the hearing approving  
4 the settlement agreement?

5 A I don't believe. He was the Trustee. I don't believe  
6 he was a party or showed up to any of the hearings.

7 Q And there was a co-trustee; right? There was a  
8 co-trustee of the Trust?

9 A The co-trustee is Peter Brock.

10 Q Was Peter Brock a party to the disputed litigation  
11 that was settled by the settlement agreement?

12 A No, he had some representation to show up at a few  
13 hearings, but nothing more than that. I mean, they just were  
14 there to listen. He was running a different trust.

15 Q Was it your understanding that those attorneys  
16 appeared at the hearings on behalf of Peter Brock as trustee of  
17 the Frei Irrevocable Trust?

18 A Yes, as -- as trustee of the Frei Irrevocable Trust.

19 Q Was the Frei Irrevocable Trust a party to the  
20 settlement agreement in any way?

21 A The Frei -- no, not at all.

22 Q Okay.

23 A We're talking about the -- the ILIT?

24 Q Yeah, right. The ILIT.

25 A Okay. Yes. Yeah, no, not at all.

1 Q And the -- at the probate court hearing regarding the  
2 order that approved the settlement agreement, was Premier Trust  
3 present at that hearing?

4 A No.

5 Q Did they have any attorney appear for them?

6 A No.

7 Q Did Peter Brock appear at that hearing?

8 A No.

9 Q Did Peter Brock have an attorney appear at that  
10 hearing?

11 A Not that I'm aware of.

12 Q To your knowledge did they -- were they party to that  
13 petition to approve the settlement --

14 A No.

15 Q -- approve the settlement agreement?

16 A No.

17 MR. BARLOW: I don't have anything else, Your Honor.

18 THE COURT: Thank you.

19 MR. GERRARD: No redirect, Your Honor.

20 THE COURT: Thank you. Thank you, Mr. Gerrard.

21 MR. GEIST: I'm sorry, Your Honor. I do have one.

22 THE COURT: Mr. Geist, you do? Sorry.

23 MR. GEIST: Yes. Sorry, Mr. Brock.

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1 A -- had stock.

2 Q -- anybody --

3 A Yes --

4 Q -- aware --

5 A -- people were aware.

6 Q -- that you had other assets besides your interest in  
7 the Frei Irrevocable Trust --

8 A They were aware.

9 Q -- yes or no?

10 A Yes.

11 Q You made them aware of that?

12 A Yes.

13 Q Thank you.

14 THE COURT: Thanks.

15 Anything further, Mr. Barlow? Okay. Thank you.

16 MR. GERRARD: Thank you, Your Honor. This is actually  
17 quite an interesting case. Interesting because how often is it  
18 that the Court has someone coming in in front of the Court and  
19 saying, Your Honor, I don't want parties to rely upon my own  
20 statements and my own actions and I want you to protect me from  
21 what I agreed to do. And that's what's going on in this case.

22 And throughout all the arguments that we heard, it was  
23 interesting the things that are blatantly ignored. And I'm  
24 going to talk about those things, but before we do that I want  
25 to make sure we set the factual framework so we understand

1 exactly the facts that are critical to this analysis.

2           The first fact that is critical is that this Trust was  
3 put into place in October of 1996. So it's been around for  
4 quite a long time. Mrs. Frei, one of the two settlors, died on  
5 January 28, 2009.

6           Then the next dates that become critical are first the  
7 June 12, 2009, date when there was an order, an order modifying  
8 the distributions to the beneficiaries. That was made reference  
9 to in the testimony that we heard just a few moments ago from  
10 Mr. Brock. His own attorney, Mr. Goodsell, petitioned the Court  
11 to modify the restraint on alienation provisions of this Trust.

12           Typically, the restrain on alienation provision, which  
13 they refer to as a spendthrift provision, operates so that the  
14 beneficiary has no say in whether a distribution is made from a  
15 trust. Because if the beneficiary has a say in it, then the  
16 creditors can potentially exercise the right of that beneficiary  
17 because of the chosen action.

18           Well, what happened here is that Mr. Brock  
19 specifically asked that that restrain on alienation provision be  
20 modified so that any beneficiary could simply ask the Trust to  
21 make a distribution and it had to be done. That is a  
22 modification to the restraint on alienation provision. It's a  
23 modification of the Trust.

24           Of course, they don't say anything about that. They  
25 want to say that that didn't change the spendthrift language,

1 but of course it did. That is one of the elementary protections  
2 provided by a restraint on alienation provision and they  
3 modified it. So what does that date mean to us? Well, it means  
4 two things. Number one, it means that the Trust was modified  
5 and the restraint on alienation provision, with the consent of  
6 the settlor, was changed.

7           Number two, in the event that Mr. Brock just  
8 misrepresented facts to this Court because Mr. Brock just came  
9 before the Court and said I didn't know. I have no idea what I  
10 was doing when I was there in 2010 in front of Judge Cory. I  
11 didn't understand that there was a restraint on alienation  
12 provision in this earlier trust. How could it be possible for  
13 him not to know when he petitioned the Court a year before that  
14 on that very provision to have it modified?

15           The next date that matters is that it was September of  
16 2009, September 14, when Premier Trust accepted a co-trusteeship  
17 with Peter Brock on this Trust. So prior to that date we have  
18 no involvement. Then there was the March 31, 2010, date where  
19 there was an oral settlement agreement put on the record for  
20 Judge Cory.

21           Now, why is this so critically important? Well,  
22 obviously we know that everybody agreed to that settlement.  
23 And, Your Honor, in response to your question, they said we  
24 don't dispute that the settlement agreement is valid and  
25 binding. We just dispute whether this assignment of any right

1 to the Trust is enforceable. We think that is void ab initio.  
2 That was their argument in response to Your Honor's question.

3 Well, here's the problem with their position. That  
4 statement that was made in front of the Court was a modification  
5 of the life insurance trust. The settlor was there and he  
6 expressed his intent very clearly on the record, Dr. Frei, that  
7 the Trust would be permitted to make the payments on the  
8 settlement agreement. And Mr. Brock was also there and he said  
9 the same thing.

10 Well, why does that matter? The reason why it  
11 matters, Your Honor, is that Nevada does not have any law on  
12 whether or not an irrevocable trust can be subsequently  
13 modified, okay? There's no case law, there's no statute in  
14 Nevada on this.

15 In California, however, and we cited this in our brief  
16 to the Court, in California there are provisions that discuss  
17 under what conditions you can modify an irrevocable trust. And  
18 those provisions are set forth in California Probate Code  
19 Section 15.403(a).

20 And I'm bringing this to Your Honor's attention for a  
21 specific reasons, which we'll talk about in a minute. But here  
22 is the circumstances under which an irrevocable trust can be  
23 amended. Number one, if the settlor and all the beneficiaries  
24 agree. That didn't happen here because not all the  
25 beneficiaries were a party to that.

1           Number two, if the settlor and the beneficiary whose  
2 interest is affected both consent, that absolutely happened at  
3 the time of the settlement in front of Judge Cory. The settlor  
4 was there. He expressed his intent. Mr. Brock was there. He  
5 expressed his intent.

6           That, Your Honor, can be a modification of the Trust.  
7 It's quite clear it doesn't have to be in writing. It can be  
8 done orally. All that has to be done is that the parties have  
9 to express that that's their intent. And they both did it on  
10 the record. I read it into the record a few minutes ago during  
11 the questioning of Mr. Brock.

12           Third -- third circumstance under which an irrevocable  
13 trust can be modified under California law. If the continuation  
14 of the trust under its current terms would, quote, defeat or  
15 substantially impair the accomplishment of the purposes of the  
16 trust. Well, we just heard all of this argument about what the  
17 settlor's intent was.

18           You remember that during their initial presentation  
19 there was a lot, a lot of argument about the fact that if Your  
20 Honor allowed this to happen, you're defeating the settlor's  
21 intent. Well, I would say to Your Honor it's exactly the  
22 opposite. If you allow their petition to be granted, then  
23 you're going against the settlor's intent because the settlor  
24 stated his intent on the record.

25           Now, does California law apply? Obviously that's

1 discretionary and up to Your Honor. We petition the probate  
2 court all the time to amend irrevocable trusts using these same  
3 California standards. And it's routinely -- this law is  
4 routinely followed in the probate courts in Nevada because we  
5 don't have any law. And our Nevada Supreme Court has said when  
6 we're lacking law that we look to California's law. And we  
7 cited that in our brief, but I've got, you know, seven or eight  
8 cites here if you need to know what those cite are, but Your  
9 Honor is well aware of that.

10           Now, there is something else that Your Honor should  
11 take into account, and that is the fact that if you look at the  
12 Trust, if you look at the Trust at Article 13, Section 7(e) on  
13 page 13-6, you'll see that this Trust is supposed to be  
14 interpreted under Massachusetts law. Your Honor certainly has  
15 jurisdiction over the Trust, but the law is supposed to be  
16 applied as, according to the Trust document, Massachusetts law.

17           Well, if you look at Section 602 of the Massachusetts  
18 Uniform Trust Code, it says that a modification of an  
19 irrevocable trust is permitted if the settlor and the  
20 beneficiaries agree. And if you look at Section 411,  
21 specifically subsection C(1) and (2), you will see that the  
22 Massachusetts Uniform Trust Code says that modification is  
23 permitted without the consent of all the beneficiaries if the  
24 beneficiary whose interest is affected consents.

25           So what does that mean here, Your Honor? What it

1 means is that on March 31st of 2010, when these parties were  
2 before Judge Cory and the settlor stated his intent to allow  
3 this irrevocable trust to be used to satisfy the debt of Mr.  
4 Brock, and Mr. Brock also stated his intent and his consent to  
5 that occurring, that was a modification under Massachusetts law  
6 of this trust agreement.

7           And you can't get around that. There is absolutely no  
8 way to argue that that's not enforceable. It doesn't have to be  
9 in writing. All that has to be shown is that the parties stated  
10 that that was their intent, and they both did on the record.  
11 Can't be disputed.

12           Now, Your Honor, I would point out that once my client  
13 was appointed as the Trustee with full knowledge of this  
14 settlement agreement, they have been confirmed not once before a  
15 court, but two times with a written court order, my client,  
16 knowing that Dr. Frei and Mr. Brock had both been a party to  
17 that settlement agreement, followed the desire and the intent  
18 stated by both of those parties.

19           But they didn't do it until they first sent out  
20 letters to all the beneficiaries letting them know what was  
21 going to be done. On August 6, 2013, Premier Trust sent out a  
22 letter by e-mail to all the beneficiaries saying they were going  
23 to make a \$100,000 distribution under the settlement agreement.  
24 And then receiving no response from anybody, they made the  
25 distribution on October 9th of 2013.

1           Then again on October 23rd of 2013, they sent out  
2 another e-mail to all the beneficiaries saying we're going to  
3 make \$100,000 distribution in accordance with this settlement  
4 agreement. Then having heard from no one, they made the  
5 distribution on November 4th of 2013.

6           And then again on March -- I'm sorry, May 12th of  
7 2014, Premier Trust again sent an e-mail to all the  
8 beneficiaries saying we're going to make a \$100,000 distribution  
9 to -- charged against Mr. Brock's interest in accordance with  
10 the settlement agreement. And hearing no response they made  
11 that distribution, as well.

12           So \$300,000 was distributed by my client in reliance  
13 upon the settlement agreement, which is a modification to the  
14 Trust. It was a period of almost five years from the time that  
15 that settlement agreement was first put on the record before  
16 Judge Cory and when this petition was brought before Your Honor.

17           And what we have in this case is a claim for --  
18 against my client is a claim for breach of fiduciary duty, which  
19 is fascinating because the law says that you -- a party cannot  
20 create its own damages. You cannot, under the law, create your  
21 own damages. You cannot ask a party to do something, and then  
22 when they do it claim that you've now been damaged. And that's  
23 exactly what has happened in this case.

24           Mr. Brock and Dr. Frei modified the Trust and asked  
25 that my client make distributions and my client did it. And now



1 Mr. Brock is trying to claim that by following his express  
2 instructions that my client is responsible for a breach of  
3 fiduciary duty to him. It's not cognizable under the law. A  
4 party cannot create its own damages.

5           Now, Your Honor, what we have pointed out is one  
6 amendment to the Trust that occurred on June of 2009 with the  
7 order modifying the distributions which we argue show the  
8 settlor's intent to change the restraint on alienation clause.  
9 There was a modification of the -- of the original trust and  
10 allowed Dr. Brock -- I'm sorry, Mr. Brock or any of the other  
11 beneficiaries once the life insurance trust had been funded  
12 after the death of Dr. Frei to simply make a request. And then  
13 the trust has to honor that request and make a distribution.

14           That's a modification of the spendthrift provision  
15 which, obviously, we believe waives any of the arguments that  
16 they have raised. But much more stronger than that is what  
17 happened on the record in March of 2010. And that can only be  
18 construed as a modification of the Trust and it can only be  
19 construed as a settlor stating the settlor's intent.

20           Now, there are two other defenses that are very  
21 important to my claim, and they are, of course, first, judicial  
22 estoppel which we raised in our motion. Look, even -- my client  
23 is just the Trustee. My client will do whatever the Court tells  
24 us that we need to do. If we need to make distributions, we'll  
25 make distributions. Whatever needs to be done, we follow the

1 Court's direction.

2           The reason we care so much is because we're being sued  
3 for damages because we followed the directions of Mr. Brock and  
4 the settlor. And as a result of that we raise the judicial  
5 estoppel defense. And the elements of judicial estoppel, which  
6 under the law, not all of them have to be satisfied, but we  
7 think they all are here, the elements of judicial estoppel under  
8 Nevada law are four.

9           The first that a party has taken two positions.  
10 Clearly that has happened here. Mr. Brock said one thing at the  
11 settlement agreement in front of Judge Cory and now is saying  
12 something completely opposite here.

13           Number two, the positions were taken in judicial or  
14 quasi judicial proceedings. Certainly the proceeding before  
15 Judge Cory was a judicial proceeding and the proceeding here was  
16 a judicial proceeding. So that element is satisfied.

17           The third element is that the party was successful in  
18 asserting the first position. In other words, the Court adopted  
19 that position. And certainly that happened. Judge Cory, right  
20 after the part that we read into the record, said, okay, you've  
21 all now agreed and we're all relying upon this that this is the  
22 agreement and everyone has given their consent to it. So the  
23 Court accepted it as being true and entered it an order based  
24 upon that. So that element is satisfied.

25           Number four, the positions are totally inconsistent.

1 That's obvious. In one position he's saying you can rely upon  
2 the fact that you can take the money out of the Trust that I'm  
3 entitled to and use that to make the payments if necessary. Now  
4 he's saying I had no right to do that. Nobody has any right to  
5 do that. The positions are totally inconsistent.

6 And the last element is that the first position was  
7 not taken as a result of ignorance, fraud, or mistake. Well, in  
8 the argument against judicial estoppel, they argue that there  
9 was a mistake. Guess what, Your Honor, mistakes of law are not  
10 what is covered by this element.

11 It doesn't say that you can be excused by ignorance of  
12 the law. You're never excused by ignorance of the law. You're  
13 never excused by ignorance of the law. You're deemed to  
14 understand what the law is. And Mr. Brock was represented by  
15 very competent counsel in Dana Dwiggin. So -- and prior to  
16 that by Mr. Goodsell. There can't be any suggestion that there  
17 was ignorance of the law.

18 And factually, of course he knew what was happening.  
19 He had just modified the Trust agreement. He knows what's in  
20 the Trust agreement. He knows what the language is. He knew  
21 there was a spendthrift provision because that's specifically  
22 what he was asking to have changed. So -- and that happened in  
23 2009 approximately nine months before the settlement was entered  
24 before Judge Cory.

25 So to suggest that there was any mistake, in fact, I

1 think really cannot be accepted by this Court as a reasonable  
2 argument, especially given the petition that existed. But it  
3 really doesn't matter because both parties knew that this was an  
4 irrevocable trust, and both parties knew it had a spendthrift  
5 provision. And by both parties, I mean Dr. Frei and Mr. Brock,  
6 the beneficiary and the settlor.

7           And they both stated on the record their intent that  
8 that was going to be allowed, which is a modification of the  
9 Trust, which means that that spendthrift provision no longer  
10 exists as it relates to this transaction. So it can't be -- it  
11 cannot be void ab initio because they just modified the Trust.  
12 And so the statutory provision that they're relying upon for  
13 their whole argument doesn't apply in this case.

14           Now, even if it did for any reason, they're judicially  
15 estopped from taking an inconsistent position now after my  
16 client has detrimentally relied upon the position that they  
17 stated before a tribunal, in this case Judge Cory. They cannot  
18 take an inconsistent position and ask for damages as a result of  
19 that inconsistent position.

20           Finally, Your Honor, we raise the laches defense.  
21 It's pretty apparent and pretty obvious in this case why laches  
22 would apply. As Your Honor knows, under the Home Savings  
23 Association versus Bigelow case, which is a 1989 Nevada Supreme  
24 Court case, that laches is more than a mere delay in seeking to  
25 enforce one's rights. It is a delay that works at a

1 disadvantage of another. The case law says that the condition  
2 of a party asserting laches much become so changed he cannot be  
3 restored to his former state.

4 Well, that's exactly what we're talking about here,  
5 Your Honor. My client sent out an e-mail to all the  
6 beneficiaries before each distribution stating what they were  
7 going to do, then hearing nothing, made the distributions in  
8 reliance upon the settlement agreement and the settlor's intent  
9 and Mr. Brock's intent.

10 And what have we now? Four and a half, almost five  
11 years later we're sued to try to unwind those distributions that  
12 were made in reliance upon the statements of Mr. Brock and the  
13 statement of the settlor. And laches certainly applies to my  
14 client under these circumstances, Your Honor.

15 So in summary, what we're -- oh, and there's one other  
16 thing I need to point out, Your Honor. There is a mistake that  
17 we will own up to that was made. Premier Trust did send out an  
18 accounting saying that -- that all the beneficiaries have been  
19 paid, but that is not accurate.

20 There is \$2,000 per beneficiary which remains  
21 undistributed because we didn't want to run into a problem like  
22 what is being argued here in court. And we will own up to that  
23 mistake because there was a statement that was sent out earlier  
24 that did say that the estate was fully distributed. But that's  
25 not the case and we can establish that factually if we need to.

1 It's very easy to account for.

2           Without all the beneficiaries' consent, Premier Trust  
3 cannot be removed. I'm sorry, without the majority of the  
4 beneficiaries' consent Premier Trust cannot be removed. And Mr.  
5 Brock has made no attempt to get the consent of the other  
6 beneficiaries to remove me -- my client as the Trustee.

7           So, Your Honor, in summary, their argument fails for  
8 three different reasons. It fails, number one, because the  
9 Trust was modified not once, but twice. And when it was  
10 modified the spendthrift provision is what specifically was  
11 modified. The first time it was generally modified that allowed  
12 any beneficiary to simply ask for a distribution and have it be  
13 made once the Trust had been funded. That changes the restraint  
14 on the alienation provision and waives the argument they made  
15 later on.

16           The second time it was specifically modified as it  
17 relates to this beneficiary, Mr. Brock. And both the settlor  
18 was there and Mr. Brock was there, and Your Honor has correctly  
19 honed in on that fact as an important issue. Because the  
20 settlor's intent is paramount. And the settlor's intent was  
21 stated on the record before Judge Cory and cannot be disputed.  
22 There is no factual dispute on that.

23           So the modification, both of those, either/or was  
24 sufficient. But the fact that those modifications exist takes  
25 away their argument under the Trust provision that they're

1 relying upon because the Trust no longer had a restraint on the  
2 alienation provision as it relates to Mr. Brock.

3           The second reason why it fails, at least as it relates  
4 to my client, is the estoppel argument. They certainly took an  
5 inconsistent position in front of Judge Cory and in front of  
6 this Court and every element of estoppel exists and you cannot  
7 claim mistake of the law as an element of estoppel, and there  
8 cannot be a mistake of fact because this -- Mr. Brock absolutely  
9 was aware of and had full knowledge of the fact this Trust had  
10 the provisions that it had based upon the 2009 petition that's  
11 evidence.

12           And third, the laches argument. My client certainly  
13 cannot be responsible when almost five years passes and my  
14 client is relying upon the very directions that were given.  
15 Again, I reiterate the first thing I said at the beginning of  
16 this presentation that a party cannot create its own damages.  
17 And it's exactly what is going on here. It's what Mr. Brock is  
18 trying to do. He wants to have his cake and eat it, too, and we  
19 know, Your Honor, that that's not permitted under the law.  
20 Thank you.

21           THE COURT: Thank you, Mr. Gerrard.

22           Mr. Geist.

23           MR. GEIST: Thank you, Your Honor. I will try and  
24 keep it brief.

25           MR. BARLOW: Your Honor, just a preliminary matter to

1 Mr. Geist's arguments. We noted this in our response. We don't  
2 believe that the Emil Frei Trust is an interested party in Mr.  
3 Brock's share in this Trust and we object to their appearance in  
4 any event at this hearing making arguments on behalf of a  
5 creditor of a beneficiary of this Trust.

6 THE COURT: Well, I guess that -- that was why I  
7 wanted to ask is it seems to me that the settlement agreement  
8 that's at issue was a settlement agreement with Mr. Brock and  
9 the Trust which Mr. Geist represents. So to that I would agree  
10 with you technically they aren't -- may not -- that trust may  
11 not have an interest in this -- in the Trust that Mr. Brock has  
12 an interest in, but the settlement agreement that is at issue  
13 here, they did have an interest in.

14 As you pointed out yourself, it wasn't technically Dr.  
15 Frei. It was to be paid to Dr. Frei's trust. So I think that  
16 there is an interest there that they can represent, and I also  
17 don't think that there is a conflict of interest because of Mr.  
18 Wade, so --

19 MR. BARLOW: It's a conflict of interest we're not  
20 [indiscernible] at this point.

21 THE COURT: Right.

22 MR. BARLOW: Again, the -- our point of the petition  
23 was not for the settlement agreements in dispute.

24 THE COURT: Right.

25 MR. BARLOW: It says what it says. They're a



1 purported creditor under it and that doesn't affect the  
2 interpretation of the Trust as they're sitting here today.

3 THE COURT: Understood. I think that's why Mr. Geist  
4 said he was going to be brief.

5 MR. GEIST: I will certainly try to. I think Mr.  
6 Gerrard capably covered most of the ground of what I wanted to  
7 cover. I just wanted to hone in on a few key points, and I will  
8 keep it brief, Your Honor.

9 First of all, you pointed out, and I think that is  
10 something that we do need to make sure is clear and you discuss  
11 properly, the June 2013 order was a final order of the Court and  
12 cannot be modified at this point. There is -- there is case law  
13 under the Nevada Supreme Court that says once a final judgment  
14 has been entered, the district court lacks jurisdiction to  
15 reopen the matter unless a timely motion is made under the rules  
16 of civil procedure.

17 Oral settlement was entered on this on March 31, 2010,  
18 and then June 2010 written order that issued from Judge Cadish  
19 dismissed with prejudice all claims between Stephen and Dr. Frei  
20 and any other implicated party that could possibly -- it was a  
21 global settlement that could possibly be given, including Dr.  
22 Frei's Trust, which we now represent.

23 And it included the terms of the repayment obligation  
24 and Mr. Brock's agreement to secure that obligation with his  
25 beneficial interest in the Trust. As Mr. Gerrard pointed out,

1 Dr. Frei was a part of that agreement. It was a negotiated  
2 agreement. They came to that agreement to modify the terms of  
3 the Trust.

4 And, again, as he pointed out, that was not the first  
5 time that that had happened. And, in fact, it's not the first  
6 time that Mr. Brock had been involved in a modification of the  
7 terms of that trust, of the Frei Irrevocable Trust. So I would  
8 just like to point out that it's not possible at this point to  
9 rescind that order and Mr. Brock's petition at this point is  
10 untimely and it has to be denied.

11 With respect to estoppel that was also brought up in  
12 the defense that we joined on, the reliance was not only on --  
13 on Premier Trust's behalf, but there was also reliance on Mr.  
14 Brock's comments and -- and statements in his, in fact,  
15 affirmative declarations under the agreement that Dr. Frei  
16 relied on.

17 He would not have agreed to end the trial three days  
18 in had Mr. Brock not -- had he not pledged adequate security on  
19 the payments that he was offering. And, of course, the security  
20 was in the form of a trust agreement that Dr. Frei was the  
21 settlor of that, again, had previously agreed to reformation of  
22 its terms and, again, in 2010 there was an agreement between Mr.  
23 Brock and Dr. Frei to reform the terms of the Frei Irrevocable  
24 Trust to permit that pledge of security so that Dr. Frei could  
25 be made whole.

1           Again, it's disingenuous of Mr. Brock to come forward  
2 and try and argue what the settlor's intent was in this matter.  
3 Number one, Mrs. Frei has already passed. Number two, Dr. Frei  
4 was a party to that -- that litigation that brought forth the  
5 settlement agreement. And at the time the agreement was in  
6 place, they were -- Dr. Frei was litigating conversion of  
7 assets, misappropriation of assets that were intended to be used  
8 for Dr. Frei's care throughout his life.

9           The agreement was meant to bring all of that to a  
10 close for Mr. Brock to have a way to pay back the trust that  
11 would care for Dr. Frei. If there is any question as to what  
12 Dr. Frei's intent was, I've asked Fred Wade, whom this Court is  
13 certainly aware of his appointment prior as the guardian ad  
14 litem of Dr. Frei to represent his interest in that matter, and  
15 he can -- he can tell based on his experience what Dr. Frei's  
16 intent was if that's necessary.

17           And then finally the judicial estoppel. Mr. Brock  
18 says that it was a mistake. He didn't know what -- what the  
19 terms of the Trust meant. And, again, I would just caution the  
20 Court that I believe that that's a head fake. I really do, and  
21 I don't think the Court should fall for that.

22           Mr. Brock was involved in a prior petition to the  
23 probate court to reform the terms of that Trust as Mr. Gerrard  
24 covered. He entered into that settlement agreement knowing that  
25 if he did not provide a pledge of adequate security, his promise

1 to pay would not be worth anything.

2 And they make a big point in their reply that Mr.  
3 Brock didn't actually pledge that he had the capability of  
4 making that security. He was only saying he pledged security.  
5 And then they try and make a distinction. Again, I think that's  
6 a head fake. Mr. Brock in the settlement agreement said he is  
7 pledging his interest in the Trust as security. And implicit in  
8 that is that he has the capability of doing so, particularly  
9 with the settlor's blessing as happened in this case.

10 He was adequately represented by counsel at the time.  
11 He was adequately represented by counsel before. And so I don't  
12 think he can rely on the fact that he didn't know. He had  
13 advice. He had advice of counsel the entire way. The bottom  
14 line was, Your Honor, that the case was dismissed before Judge  
15 Cory when -- when it was pronounced, and Judge Cadish signed on  
16 the written order dismissing with prejudice this matter. The  
17 settlor, the beneficiary Mr. Brock were both involved in it.

18 At this point I don't think that there is any reason  
19 to grant his petition to further modify the Trust. It would be  
20 inequitable to do so. It would undermine what was achieved in  
21 the prior -- prior matter and we ask this Court to deny that.

22 THE COURT: I should have asked Mr. Gerrard because I  
23 think Mr. Barlow kind of touched on this and I forgot. The  
24 distinction, I think, is kind of made between Article 7 and  
25 Article 13. Article 7 is the distribution of trust property,

1 Article 13 is definitions and general provisions. And it's in  
2 Article 13 where the specific so-called protective clause or  
3 spendthrift clause appears. The petition to reform was  
4 technically addressed to Article 7, but Article 13 would apply  
5 to Article --

6 MR. GERRARD: Correct.

7 THE COURT: -- 7.

8 MR. GERRARD: You can't -- they're interrelated. You  
9 know, the only reason why you would have to make the amendment  
10 is because of the spendthrift provision. If that spendthrift  
11 provision wasn't there, you wouldn't have to make -- ask for the  
12 modification at all because you could make the distributions at  
13 any time. Anybody could -- any beneficiary could ask for the  
14 distributions to be made. It would be like any other trust. It  
15 would be like a revocable trust. So that's the reason why that  
16 doesn't really matter.

17 THE COURT: Okay. So the mere fact that it was  
18 couched in terms of reforming Article 7 doesn't stand in the way  
19 of -- of the argument that the spendthrift clause contained in  
20 13 is necessarily a part of the reformation.

21 MR. GERRARD: Yes. And also I would remind the Court  
22 that even though that's your specific question, then there was  
23 later an actual reformation of the Trust agreed to.

24 THE COURT: And that's the settlement.

25 MR. GERRARD: By both Mr. Brock and Dr. Frei.

1 THE COURT: Okay. Thank you. All right. Thanks.

2 Sorry, Mr. Barlow. I wanted to get that on the  
3 record.

4 MR. BARLOW: Thank you, Your Honor. I do want to note  
5 that most of the arguments that Mr. Gerrard just made were never  
6 raised in any prior -- in their opposition, not in writing, this  
7 issue of modification of the Trust. It's not right I haven't  
8 had an opportunity to review a defense that they're allegedly  
9 now raising at the last minute and that's one of the reasons why  
10 I was concerned about calling witnesses and such at this  
11 hearing. It turned into trial by ambush.

12 But importantly, again, the modification has never  
13 been raised prior to this -- this hearing and I haven't had an  
14 opportunity to review what they've cited is apparent and what  
15 they allege is authority for that. So I'm a little bit  
16 hamstrung.

17 THE COURT: Yeah, it would be lovely if we had the  
18 Uniform Trust Act, but we don't.

19 MR. BARLOW: We have -- we have NRS 166 which is about  
20 as clear as you can possibly be about spendthrift provisions.  
21 So, let me see, where do we start here? This issue of  
22 determining the settlor's intent, that's getting thrown around a  
23 lot. I think it's being misconstrued. The issue is in  
24 construing the terms of this Trust, if the Court finds the Trust  
25 terms to be unambiguous, then the Court doesn't go outside of

1 the four corners of the Trust to -- to bring in extrinsic  
2 evidence of what the settlor's intent was.

3           So in order to even get to this issue of what did Dr.  
4 Frei intend when entering into the settlement agreement years  
5 after having prepared the Trust agreement itself, you'd have to  
6 first determine that there was some provision of the Trust as it  
7 stands that is -- that is ambiguous, that requires us to get  
8 outside of the terms of the Trust.

9           So the question of determining the settlor's intent is  
10 what does the Trust mean as it -- as it sits there and as it  
11 says it today, not what happened years later. What -- what he  
12 may have intended in agreeing to the settlement agreement is a  
13 totally different thing than what he intended when creating the  
14 trust document itself.

15           So, in other words, if we're going to find that to be  
16 a relevant issue, then there has to be a finding of fact that  
17 there is some provision of the Trust that is ambiguous. And  
18 we'd ask that be entered on the record, a finding of which  
19 provision of the Trust is ambiguous, if that's the case.

20           Then there was a misstatement about Massachusetts law  
21 being applicable. This was referred to in Article 13. It's on  
22 13 -- page 13-6 of the Trust. That says the validity of this  
23 Trust shall be determined by reference to laws of the State of  
24 Massachusetts. The validity of the Trust is not in question  
25 here. We're not talking about whether the Trust is valid or

1 not. That's a long forgotten conclusion.

2           Then the next paragraph of that section says questions  
3 with regard to the construction and administration of the  
4 various trusts contained in this agreement shall be termed by  
5 reference to the laws of the state in which the Trust is then  
6 currently being administered, which is indisputably Nevada. The  
7 Court here has taken jurisdiction of this Trust and the Trustee  
8 lives here in Nevada. So reference to Massachusetts law is  
9 inapplicable at this point. I just wanted to clarify that.

10           The idea that a beneficiary can pledge his future  
11 interest, future right to distribution as security for a debt,  
12 that would act as a modification of the Trust, would run  
13 contrary to the entire body of spendthrift law. That's the  
14 whole purpose of the spendthrift clause to say you can't pledge  
15 a future interest in the Trust.

16           And the idea that Premier Trust or a Trustee can  
17 breach a trust by making distributions contrary to the terms of  
18 the trust and the beneficiaries have no recourse is also -- it  
19 sounds a ridiculous position. Who, then, if the trustee --  
20 arguendo, the trustee breaches the trust. They're suggesting  
21 that the beneficiary and no one else can complain about it. And  
22 so, again, it would gut the entire spendthrift law if the  
23 trustee could beach with impunity and no one could complain  
24 about it at that point.

25           And the whole reason why we're left to make these



1 arguments is because the Trustee didn't make these arguments.  
2 Somebody has to make these arguments to stand up for the Trust  
3 and say, no, this provision of the Trust is valid and it  
4 invalidated -- it prohibited an invalid pledge at the time.

5           The question you asked Mr. Gerrard at the end, which  
6 was the petition to reform the Trust in 2009, I just pulled it  
7 up and read back through it. There's no reference whatsoever to  
8 the spendthrift provision. So this is an interesting question.  
9 What effect does that have on this question we're talking about  
10 today? So what the reformation did was prior to the reformation  
11 Article 7 basically said the assets are going to be held in  
12 Trust for a long time.

13           THE COURT: Right.

14           MR. BARLOW: For the beneficiaries and for their  
15 decedents on down, down, down. The petition to reform the Trust  
16 said, well, that's not really what we wanted to do. We wanted  
17 after we die to allow our beneficiaries the right to take that  
18 money out. But that petition to reform the trust, the  
19 affidavits that accompanied it, the order approving reformation  
20 of the trust nowhere said that the settlor's intent was to allow  
21 creditors of those beneficiaries to attach to the Trust. They  
22 nowhere abrogated the restriction on saying you cannot give away  
23 the interest in the Trust.

24           So, yes, in a -- the point being after Dr. Frei died,  
25 I agree that it's good law that says if a beneficiary can call

1 the distribution of the Trust, if the beneficiary has the right  
2 to put their hands on the trust, so, too, can a creditor. And  
3 so at that point, if I can put my hands on the Trust, I can give  
4 my interest to somebody else. That hasn't occurred since that  
5 right arose. The attempted pledge occurred at a time when he  
6 did not have the right to put his hands on the Trust, thus, the  
7 spendthrift provision applies to invalidate that and prohibit  
8 it.

9           So it didn't change the spendthrift provision, except  
10 to the extent that it said after I die, after Dr. Frei dies,  
11 then a beneficiary would be able to pledge the interest at that  
12 point. So it's still there. It just changed when it applies  
13 and doesn't apply. It applies when Dr. Frei was alive. After  
14 he dies because the beneficiaries can breach the Trust, so, too,  
15 can creditors under a valid pledge at that point.

16           So to assert that the reformation of the Trust  
17 destroyed the spendthrift nature of the Trust, it just doesn't  
18 comport with what was actually petitioned, what was actually  
19 ordered, and what actually happened to the Trust terms  
20 themselves.

21           I want to also make a note for the record an objection  
22 that Mr. Gerrard has made reference to numerous letters,  
23 documents, e-mails, other evidence that's never been put on  
24 record. It's not sitting in any affidavit or declaration from  
25 Premier Trust. We would object to the -- any consideration of

1 those at this time. And anyway, I don't believe they're  
2 relevant to what's happening today.

3 One important point, though, that finally came out  
4 today for the first time after I've been asking for two months  
5 is this issue of how much is still left in Trust for the  
6 beneficiaries. Because we asserted at the beginning and said  
7 it's our understanding that they've distributed to essentially  
8 of these nine beneficiaries.

9 And Premier came back and said, no, no, no, we still  
10 have money in the Trust. And we said, well, what do you have?  
11 No one has ever -- no one has ever told us until we get here  
12 today. So we find out as was suspected that they've retained a  
13 very, very small administrative amount.

14 So, again, the right to remove the Trustee says that  
15 the majority of the majority of the then current income  
16 beneficiaries of the Trust. There's no income being paid to  
17 these nine beneficiaries from that very small administrative  
18 amount. It's benign held for administrative purposes. If  
19 there's any left over at the end of the day, then it would go  
20 out to the beneficiaries in some pro rata amount. But as it  
21 sits right now, they are not income beneficiaries of this Trust.

22 Premier is -- if we had Mr. Dreschler up here, the  
23 president, he would -- he would say I assume that we're not  
24 making distributions of income to these beneficiaries because  
25 it's not generating -- one, it's not generating income, and

1 number two, it's because we're holding it for administrative  
2 purposes.

3           So, again, it's instructive to know that there was  
4 2,000 per, but they're not receiving an income leaving Mr. Brock  
5 as the only one income beneficiary with the right to remove the  
6 Trustee at this time of the Trust.

7           THE COURT: Mr. Barlow, I wanted to know -- would you  
8 want to address that issue, more time to address that issue?  
9 Because for me that's what -- and I asked at the very beginning.  
10 What was significant to me was that Dr. Frei was still alive  
11 when they entered into this settlement agreement. And we have  
12 to -- we have nothing that tells us Dr. Frei wasn't aware of the  
13 terms of his -- his will.

14           This was a very sophisticated individual. I mean,  
15 there are people alive today solely because of the work he did.  
16 Really an impressive individual. And I can't assume that he  
17 didn't know what his intentions were. And when they did come in  
18 and say, yeah, rather than just hold all this, tie all this up  
19 forever and ever, that's not what we wanted to do, we really  
20 want to at this point in time -- and I -- I read all the -- I  
21 read the previous, I read the Frei case.

22           I mean, Mr. Goodsell went and met with him. And he  
23 said they really decided that rather than allow things to be bad  
24 between their children, they just want to be fair to the  
25 children. So let's make sure they get their money now and let's

1 not tie it all up forever. That's a change in their intention.  
2 They seemed to be really aware of what they were doing.

3 I didn't see anything that said Dr. Frei was never  
4 mentally not competent. Maybe -- maybe towards the end, I don't  
5 know. But, I mean, in this time period of 2009 and 2010, he had  
6 a guardian ad litem because he had serious health problems with  
7 his advanced Parkinson's, but I didn't see anything that said  
8 that he was not mentally competent.

9 So that's why I -- you know, I have a problem with  
10 saying that he didn't understand his Trust documents and know  
11 exactly what he was doing. And when he stands up -- I shouldn't  
12 say stands up. When he appears in court and makes a  
13 representation to the judge that this is what I want to do, that  
14 I believe I'm owed this money, I'm willing to settle for it in  
15 the following fashion out of this share, that that doesn't work  
16 a modification.

17 I mean, to me, that just -- that seems what it is at  
18 -- at the -- at the very minimum, that he knew what he was  
19 doing, he knew how he was settling, and he knew the terms upon  
20 which he was settling and said he was going to take a pledge of  
21 these funds. And he never acted on it during his life. I don't  
22 know why. But after his death it was -- there was a  
23 determination to seek to have that settlement agreement honored.

24 I don't know, to me that just seems to -- that's, to  
25 me, very significant is that -- is that he is the person who

1 negotiated -- this was negotiated on behalf of him. He was a  
2 party, he was present, and he said I understand, I don't want to  
3 do that. And there's been a lot of argument about it. And you  
4 indicated a lot of it wasn't in the briefs.

5 MR. BARLOW: None of it was in the brief.

6 THE COURT: And so that's my question. Is -- is -- do  
7 you think that there's anything to be gained from actually  
8 briefing that? Because, to me, that's key.

9 MR. BARLOW: Well, if that -- that is what we're  
10 riding on here. And if that determination is that that is  
11 somehow a modification to the Trust, then absolutely I'd like  
12 the right to look into the --

13 THE COURT: Uh-huh.

14 MR. BARLOW: -- the case law behind that and see if it  
15 supports.

16 THE COURT: Well, because for me right now, I -- I  
17 couldn't say as a matter of law in fact that I feel I can grant  
18 this petition. Because, for me, what's not -- what is -- has  
19 been the problem that I've had with this all along is that the  
20 settlement agreement -- the settlement agreement wasn't with a  
21 trustee, successor trustee. It wasn't with the nine other  
22 children. It was with Dr. Frei and he was a settlor.

23 And I -- like I said, I presume that he -- I didn't  
24 see anything that says he didn't fully understand and -- and  
25 have full -- full faculties and know his estate plan. I think

1 Mr. Goodsell did know his estate plan. So --

2 MR. BARLOW: Again, if that's -- if that's what we're  
3 going on is this idea that it's because Mr. -- or Dr. Frei  
4 was --

5 THE COURT: I think it's significant.

6 MR. BARLOW: -- present --

7 THE COURT: I'm not saying is the only issue that's  
8 significant. But I agree with you that it wasn't really  
9 addressed anywhere. That's why I asked you right up front is --  
10 what's the effect of that? That, to me, is -- I mean, we have  
11 all these other sub issues of when you -- when you made the  
12 specific provision in paragraph 7, how do -- how do the general  
13 definitions and general principles that apply to that read in?

14 It wasn't a whole separate section that says this is a  
15 -- a spendthrift trust. It was part of the general principles  
16 that would apply to the whole thing. So is it automatically  
17 presumed that that's somehow affect -- I mean, that -- those are  
18 some of those issues that just for me at this point I just have  
19 a real question about whether -- it seems to me that Dr. Frei --  
20 that's important --

21 MR. BARLOW: Yeah.

22 THE COURT: -- that it was -- the settlement was with  
23 him.

24 MR. BARLOW: And to clarify, then, and make sure I  
25 understand the issue of the question, then, would be can a

1 settlor and a beneficiary, assuming -- if we assume that it  
2 otherwise is a spendthrift trust, if we assume that, can the  
3 settlor and a beneficiary essentially agree to abrogate a  
4 spendthrift provision through some type of agreement or  
5 consensual --

6 THE COURT: Well, because it says right in here that  
7 such interest shall not be subject to legal process or to claims  
8 of any creditors while interest of the -- oh, wait a minute.  
9 I'm reading the wrong paragraph. Or encumbered unless  
10 specifically authorized by the terms of this agreement. And,  
11 you know, it's Dr. Frei's agreement. And if Dr. Frei wants to  
12 change it --

13 MR. BARLOW: Well, that --

14 THE COURT: -- how does Dr. Frei change it?

15 MR. BARLOW: I don't know. I mean, that's -- if  
16 that's the issue, I don't know, I guess, is the answer to that.  
17 I don't know if Dr. Frei can still change -- can change the  
18 agreement at that point.

19 THE COURT: Yeah.

20 MR. BARLOW: And as Mr. Gerrard noted, there's no  
21 Nevada case law, shockingly, on that point of --

22 THE COURT: Yeah.

23 MR. BARLOW: -- under which circumstances can a  
24 settlor retain the power to amend a spendthrift trust.

25 THE COURT: Right. And as I said, if it were a third



1 party, if it had been the other -- the other beneficiaries, I  
2 might not have had the same concern about it. Even if they  
3 consented to it, they would have been like -- but this is the  
4 settlor who is saying I'm suing you for this, you owe this -- I  
5 believe that you owe me this money, but I'm willing to take it  
6 out of your share.

7 MR. BARLOW: Yeah, and if that's the -- if that's the  
8 defense on which they're standing which is causing the principal  
9 concern, then I think the proper thing to do would be to have  
10 them brief that so that I have -- so there's a proper --

11 THE COURT: Yeah.

12 MR. BARLOW: -- defense on -- on records --

13 THE COURT: I --

14 MR. BARLOW: -- from events --

15 THE COURT: I would -- you know, I understand --

16 MR. BARLOW: -- and have opportunity to respond to  
17 that.

18 THE COURT: -- your point that it wasn't really  
19 addressed.

20 MR. BARLOW: So I don't know what the case law says.

21 THE COURT: Right.

22 MR. BARLOW: Because I haven't looked at that specific  
23 issue of what -- what effect does it have if the settlor is  
24 involved in -- in the process. I don't know.

25 THE COURT: And as I said, a totally unique situation

1 and that's one place where who knows if there is any -- any law  
2 on this. This is such an obscure issue that, I mean, it's such  
3 a rare thing. I just can't -- you know, it's truly a unique  
4 situation. It's not -- it's not like he wanted to buy a car.  
5 It's not like he wanted to send a kid to college. It's not some  
6 third-party debt. I mean, this is with the settlor.

7           So I guess that's my -- that's my question is is your  
8 proposal would be that if they wish to brief that, they should  
9 be given some additional time to brief, you should have a chance  
10 to do the final reply since it's your petition, and then we can  
11 make a final ruling. Because, for me, that's a really  
12 significant aspect of this.

13           MR. BARLOW: So to make sure I get clarification it  
14 would be that their -- their brief would be a supplemental brief  
15 to their opposition just to --

16           THE COURT: Right.

17           MR. BARLOW: -- address the simple issue of did Dr.  
18 Frei's involvement --

19           THE COURT: Well, it's not a real simple issue.

20           MR. BARLOW: Well, I mean --

21           THE COURT: This --

22           MR. BARLOW: -- in the grand scope of the many things  
23 we talked about --

24           THE COURT: Right.

25           MR. BARLOW: -- to this one issue, I should say.

1 THE COURT: Right.

2 MR. BARLOW: Did Dr. Frei's involvement in this  
3 settlement agreement act -- did that act as essentially a  
4 modification of --

5 THE COURT: Right. Well, and the other thing that I  
6 think we've talked about here is my -- is the -- you know, the  
7 questions I raised which is, you know, how does amending,  
8 specifically saying you want to reform paragraph 7 and there's a  
9 general provision, I still think that that's -- it somehow -- it  
10 makes sense to me that it somehow is wrapped up together, that  
11 that's a substantial change to the -- to the terms. And if you  
12 do that, does that wipe out the spendthrift originally? I don't  
13 know. Or is it the combination of the two? It's just -- it's  
14 really very unique.

15 MR. BARLOW: And that's an interesting question. I  
16 think the case law, if we went on that second issue which is --

17 THE COURT: Right. You think --

18 MR. BARLOW: -- spendthrift trusts are -- have -- can  
19 be in many different varieties.

20 THE COURT: Yeah.

21 MR. BARLOW: The nature of them is that right now you  
22 don't have a right to the interest, but you are a current  
23 beneficiary and the trustee can give money to you --

24 THE COURT: Right.

25 MR. BARLOW: -- if he wants to.

1 THE COURT: You know, that --

2 MR. BARLOW: -- sometime down the road.

3 THE COURT: -- would be my inclination because we've  
4 raised some of these issues. And, I mean, you said it. A lot  
5 of this isn't in the briefs, so -- and I think that we need to  
6 make a record here.

7 So I would think that it might be appropriate to have  
8 a supplemental opposition and then you get the final word with  
9 your reply because those -- you know, those are the things that  
10 I saw as concerns for me. You know, the fact that it was Dr.  
11 Frei who the settlement -- not only was present for the  
12 settlement, but that it was about something that was owed to the  
13 settlor. Well, by terms of the settlement it's owed to the  
14 settlor.

15 And then other thing is the interaction of paragraph  
16 -- Article 13 and Article 7 when technically Article 7 is the  
17 only one that's reformed. I mean, I still, you know --

18 MR. BARLOW: Yeah, I mean, if that -- if the  
19 reformation affects Article 13 --

20 THE COURT: Right.

21 MR. BARLOW: -- the spendthrift, it would -- the  
22 suggestion is that it would write the spendthrift provision out  
23 of the trust, essentially, as to Article 3.

24 THE COURT: Right.

25 MR. BARLOW: And then you wouldn't apply Article --

1 meaning that any of the beneficiaries could have pledged their  
2 interest at the time. I don't -- there is no indication that  
3 there was any intent --

4 THE COURT: Right.

5 MR. BARLOW: -- of the reformation to have that be the  
6 effect.

7 THE COURT: Yeah. Exactly.

8 MR. BARLOW: But --

9 THE COURT: Okay.

10 MR. BARLOW: -- I suppose they can brief that if  
11 that's --

12 THE COURT: Well, you know, that's -- that's what I  
13 would suggest because at this point I don't think I've got  
14 enough to go on, but I'm not saying I think that we need to go  
15 into a lot of discovery and have a whole contested matter.  
16 Because I think a lot of this is legal issues. Because as you  
17 said yourself, the only questions asked of Mr. Brock weren't  
18 really contested.

19 MR. BARLOW: Yeah, I --

20 THE COURT: So --

21 MR. BARLOW: At least we can assume arguendo that they  
22 were.

23 THE COURT: Yeah, it is what it is. But you did make  
24 a good point which is we don't have any evidence that, I didn't  
25 see anywhere, that Premier Trust, you know, addressed some

1 inquiry to everybody. And another question I asked was, you  
2 know, well, should they have come in and petitioned for  
3 instructions? When you -- when a trustee writes to all the  
4 beneficiaries and says this is what we're planning to do, nobody  
5 raises an objection, do they still have to get instructions?

6 So, I mean, those are a couple of things that I think  
7 have been raised today that weren't briefed anywhere. And as  
8 you did point out, I didn't see those e-mails and Mr. Brock  
9 denies having received them. So that's -- that's the only  
10 disputed question of fact. That's the only one I really think  
11 we've got. The others, I don't think, really are disputed.

12 So I -- I just -- I don't think I can go forward today  
13 other than to say I would have to deny it today. But I think  
14 that maybe with some simple little briefing we might get there.

15 MR. BARLOW: The last thing that -- the removal of the  
16 trustee based off the right -- not based off the briefs, just a  
17 right of removal.

18 THE COURT: Right.

19 MR. BARLOW: Let me make sure I read the exact --

20 THE COURT: Right. I know it said income -- income  
21 beneficiaries.

22 MR. BARLOW: Income beneficiaries of the Trust.

23 THE COURT: Uh-huh.

24 MR. BARLOW: Again, holding \$2,000 in an  
25 administrative reserve --

1           THE COURT: And, yeah, we don't have those documents,  
2 either. So I think that we need, as you've indicated, we don't  
3 have them. So we -- we would need to have all that be part of  
4 the record so we could make a good record on this whole thing.  
5 And I think that we need a supplemental brief because I'm not --  
6 I don't really need to do a bit litigation on this.

7           MR. BARLOW: No, I agree.

8           THE COURT: But I would just say that today -- I think  
9 I've those questions remaining, but it may be something that  
10 some supplemental briefing and if they could provide the  
11 exhibits for us, then we can go forward. So I don't know how  
12 much time Mr. Gerrard would need. Maybe --

13          MR. GERRARD: Two weeks, Your Honor.

14          THE COURT: Okay. And another --

15          MR. GERRARD: We can do it in a shorter time, if you  
16 need us to.

17          THE COURT: No.

18          MR. GERRARD: But I think two weeks is plenty of time  
19 for us to get --

20          THE COURT: And I was just like --

21          MR. GERRARD: -- that supplemental brief filed.

22          THE COURT: -- if that would be a sufficient amount of  
23 time. And then -- and then we have to allow Mr. Barlow an  
24 opportunity to give us his supplemental.

25          MR. BARLOW: I have a -- not that my workload

1 necessarily has to affect this --

2 THE COURT: Yeah.

3 MR. BARLOW: -- but I do have an answering brief on a  
4 Supreme Court matter due on February 17th, so --

5 THE COURT: All right. So you want to go sometime  
6 after?

7 MR. BARLOW: Five days.

8 THE COURT: So maybe --

9 MR. BARLOW: If I could have probably --

10 THE COURT: If we can do three weeks -- three weeks --

11 MR. BARLOW: Theirs is due by February 13th.

12 THE COURT: Yeah, theirs is due on February 13th.

13 MR. BARLOW: I can have mine in ten days after that,  
14 so February 25th or something like that.

15 THE COURT: Okay. Then that would put us on -- let's  
16 see, March 11th. Is that the -- that would be our probate day  
17 would be March 11th. Right now there's nothing on it. There's  
18 nothing on it as of this second, but, you know, next Friday who  
19 knows what Commissioner will put on for us. So we can hear it  
20 on March 11th, maybe give you guys your own time like today.

21 MR. GERRARD: On my birthday. Nice, Your Honor.  
22 Great.

23 THE COURT: Oh, okay. Excellent.

24 MR. GERRARD: Perfect time.

25 THE COURT: We always love to come to court on our



1 birthdays.

2 Yeah, so it would have to be like at 10:00.

3 MR. GERRARD: So it's my understanding, Your Honor,  
4 that we're going to have our brief done by the 13th?

5 THE COURT: Right.

6 MR. GERRARD: And they're going to have their brief  
7 done by the --

8 THE CLERK: [Inaudible].

9 THE COURT: But it's 10:00 a.m. It's our probate  
10 calendar.

11 THE CLERK: Oh, okay. Okay. Sorry. I thought you,  
12 when you said special setting, their own time --

13 THE COURT: Yeah, 10:00.

14 MR. BARLOW: I think with -- I think we can do this  
15 during your probate calendar, Your Honor. I don't think it'll  
16 take more than 20 or 30 minutes --

17 THE COURT: Right. Because we've already --

18 MR. BARLOW: -- to narrow this down.

19 THE COURT: -- had it fully argued.

20 MR. GERRARD: The arguments have been made. Yeah.

21 THE COURT: It's just this question of to have  
22 briefing on these issues that -- and to make sure that we've got  
23 in the record if there are these e-mails or --

24 MR. BARLOW: I think either way it's going to go up --

25 THE COURT: Yeah.

1 MR. BARLOW: -- so I think the record --

2 THE COURT: Yeah.

3 MR. BARLOW: -- is important.

4 THE COURT: Yeah. So I just think at this point we  
5 need to -- we need to do that. So we can put -- if we put it  
6 out on a probate calendar, if it looks like you guys think  
7 you're going to need more time than just on a regular calendar,  
8 we'd have to find you another time because we do have a trial  
9 set then. So if you see -- if you see what the -- once you see  
10 what their brief is, if you feel I want more time to argue, you  
11 can let us know.

12 MR. BARLOW: Okay.

13 THE COURT: Either side can let us know. How about  
14 that? So we'll put it on a probate calendar planning to be on  
15 the probate calendar with the understanding that if the parties,  
16 after discussing it think, no, we need to actually argue this,  
17 then we'd have to find you an evidentiary hearing time.

18 Like I said, we have these buffer weeks on either side  
19 of our four-week stacks where set our evidentiary hearings. So  
20 we could find one, but right now I just don't know this far out  
21 where that will be. So just so we have a date to work towards  
22 and we continue this hearing. I think continuing it to a  
23 probate calendar make the most sense.

24 MR. GERRARD: So can I just confirm those dates again,  
25 Your Honor.

1 THE COURT: Sure.

2 MR. GERRARD: I just want to make sure I have them.  
3 So I showed February 13th our brief would be due.

4 THE COURT: Correct.

5 MR. GERRARD: February 27th their responding brief  
6 would be due. March 11 at what time? 9:00 a.m. or 10:00?

7 THE COURT: 10:00.

8 MR. GERRARD: 10:00 a.m. would be our hearing time.

9 THE COURT: Right. And since that allows a little bit  
10 more time, we would just need to make sure you have everything  
11 to us. If you -- because you've got your brief due, Mr. Barlow.  
12 Yeah, so we would just want to make sure we have everything.  
13 Well, no, it's getting this pretty close. Like, for example, if  
14 you need to a following Monday or Tuesday or something, that's  
15 okay. But we really would need to have everything a week  
16 before, which would be the 4th.

17 MR. BARLOW: Okay. There won't be any problem on  
18 that.

19 THE COURT: So, yeah, that really does get us --  
20 that's about the earliest we could possibly do it would be the  
21 11th. But I would like to -- I think we've -- we've got to  
22 document all this. And it was indicated, reference was made to  
23 documents that we don't have a record, so we need all that.

24 MR. BARLOW: I was hoping for a homerun today, but --

25 THE COURT: Okay. Well, like I said, rather than just

1 deny it outright and say, you know, go off and do a whole bunch  
2 of discovery, which I don't -- you know, because it's --

3 MR. BARLOW: Yeah, I think that clarifying those --

4 THE COURT: -- it's pretty --

5 MR. BARLOW: -- issues will do it.

6 THE COURT: I mean, it's -- I don't think anybody  
7 disputes the facts. Okay. All right.

8 MR. BARLOW: Thank you for your time.

9 THE COURT: Then we'll see you guys back here in  
10 March.

11 MR. GEIST: Thank you, Your Honor.

12 THE COURT: Thank you all very much.

13 MR. GERRARD: Thank you, Your Honor.

14 THE COURT: Interesting issue. And if you find a case  
15 just like this, I'm going to be stunned. But who knows, it may  
16 be out there. It may be out there.

17 (Proceedings concluded at 12:07 p.m.)

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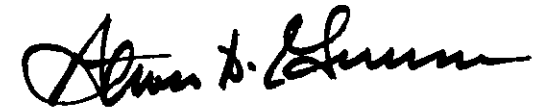
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ATTEST: I HEREBY CERTIFY THAT I HAVE TRULY AND CORRECTLY  
TRANSCRIBED HE AUDIO/VIDEO PROCEEDINGS IN THE ABOVE-ENTITLED  
CASE TO THE BEST OF MY ABILITY.

  
\_\_\_\_\_  
JULIE POTTER  
TRANSCRIBER



CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of

FREI IRREVOCABLE TRUST dated  
October 29, 1996

Case No.: P-09-065257-T  
Dept. No.: 26

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING STEPHEN  
BROCK'S PETITION TO CONSTRUE TERMS OF TRUST, TO COMPEL  
COMPLIANCE WITH TERMS OF TRUST, TO CONFIRM REMOVAL OF TRUSTEE,  
TO COMPEL REDRESS OF BREACH OF FIDUCIARY DUTIES, AND TO RELEASE  
JURISDICTION OF THE TRUST**

THIS MATTER, having come on for oral argument before the Honorable Gloria Sturman on January 14, 2015, January 26, 2015 and March 11, 2015 on STEPHEN BROCK's Petition to Construe Terms of Trust, To Compel Compliance With Terms of Trust, to Confirm Removal of Trustee, to Compel Redress of Breach of Fiduciary Duties, and to Release Jurisdiction of the Trust filed on November 19, 2014, with appearances made by STEPHEN BROCK, who appeared through his counsel, JONATHAN W. BARLOW, ESQ. of CLEAR COUNSEL LAW GROUP, PREMIER TRUST, INC., by and through its counsel, DOUGLAS D. GERRARD, ESQ. and RICHARD D. CHATWIN, ESQ. of the law firm GERRARD COX LARSEN, and LAWRENCE HOWE and ELIZABETH MARY FREI, by and through their counsel, RUSSEL J. GEIST, ESQ. of the law firm HUTCHISON & STEFFEN.

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After reviewing the pleadings filed in this matter, including all supplements filed after the January 26, 2015 hearing and before the March 11, 2015 hearing, and considering all evidence and testimony presented, this Court makes the following findings of fact, conclusions of law and orders:

I.

**FINDINGS OF FACT**

**A. The Frei Irrevocable Trust**

1. On October 29, 1996, Dr. Emil Frei, III ("Dr. Frei") and Adoria B. Frei ("Mrs. Frei"), as husband and wife (jointly the "Settlors"), created the FREI IRREVOCABLE TRUST (the "Trust").

2. The Trust was irrevocable from its inception and named all five of Dr. Frei's children, who were from a previous relationship, and all five of Mrs. Frei's children, who were from a previous relationship, as equal beneficiaries.

3. The Trust showed an intent by Dr. Frei and Mrs. Frei to be fair and equal with all ten children in their estate planning.

4. Stephen Brock ("Stephen") is a son of Mrs. Frei and, therefore, a named beneficiary of the Trust.

5. The Trust contained a spendthrift clause at Article 13, § 3.

6. Mrs. Frei died on January 28, 2009.

**B. The Amendment to the Frei Irrevocable Trust and Premier Becoming Trustee**

7. On April 17, 2009, Stephen, by and through his counsel, Daniel V. Goodsell, Esq., filed a Petition to Confirm Trustees of the Frei Joint Irrevocable Trust dated October 29, 1996, for Order Assuming Jurisdiction Over the Trust, and for an Order Reforming Terms of the Trust (the "2009 Petition").

8. In the 2009 Petition, Stephen sought to amend Article Seven of the Trust to allow a beneficiary of the Trust to withdraw all of their beneficial interest in the Trust after the death of the second of the Settlers to die by making a written request to the Trustee. Stephen's 2009 Petition to modify the Trust was made after one of the Settlers had died.

///

1 9. Probate Commissioner Wesley Yamashita issued a Report and Recommendation  
2 approving the 2009 Petition on May 20, 2009. The Report and Recommendation was never  
3 objected to and an Order approving the Report and Recommendation was entered by this Court on  
4 June 12, 2009 (the "June 2009 Order"). The June 2009 Order modified the Trust.

5 10. On September 14, 2009, Premier Trust, Inc. ("Premier Trust") executed a written  
6 Acceptance of Trustee to become a Co-Trustee of the Trust.

7 **C. Litigation And Global Settlement Between Dr. Frei and Stephen**

8 11. On April 24, 2009, Dr. Frei, one of the Settlers of the Trust, filed a Complaint in  
9 Clark County, Nevada District Court against Stephen and entities controlled by Stephen (Case No.  
10 A-09-588750-C) (hereinafter the "2009 Lawsuit"). In the 2009 Lawsuit, Dr. Frei alleged that  
11 Stephen exploited Dr. Frei, breached fiduciary duties towards Dr. Frei, and converted more than  
12 \$500,000.00 from him.

13 12. On March 31, 2010, in the middle of a jury trial of the 2009 Lawsuit, Stephen,  
14 through his attorney of record, Dana A. Dwiggin, Esq., entered into a global settlement agreement  
15 with Dr. Frei, through his attorney of record, Elliot S. Blut, Esq., before the Honorable Kenneth C.  
16 Cory (hereinafter the "Settlement").

17 13. The Settlement immediately ended not only the 2009 Lawsuit, but also resolved  
18 several other cases in the Clark County, Nevada District Court involving Dr. Frei and Stephen,  
19 including case numbers P-09-065235-E, A-10-609292-C, and A-10-607772-C.

20 14. The Settlement was carefully negotiated and drafted by Stephen and Dr. Frei and  
21 included the following terms, covenants and conditions:

- 22 (i) Stephen promised to repay Dr. Frei (through the Emil Frei, III Trust, a trust  
23 created by Dr. Frei which was revocable at the time the Settlement was  
24 entered into) the total sum of \$415,000.00 (identified as \$175,000, \$150,000  
25 and \$90,000 respectively in the Settlement documents) by making payments  
26 in the amount of \$5,000.00 per month, beginning on June 1, 2010, over a  
three year period, with the principal balance earning interest at the rate of  
prime plus 1% and a balloon payment being made at the end of the three year  
term (hereinafter the "Settlement Payment Obligation").

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*The Order Approving Settlement Agreement provided a settlement shall be secured by "*

(ii) ~~A Stephen agreed to pledge his full beneficial interest in the Trust as security in the event that he failed to make the full Settlement Payment Obligation to Dr. Frei. See Order dated 6/18/2010 Case # P065235~~

(iii) The Settlement called for a 5% default interest rate in the event Stephen Defaulted on the Settlement Payment Obligation.

15. A transcript of a March 31, 2010 hearing before the Honorable Kenneth C. Cory in the 2009 Lawsuit and an Order Approving Settlement Agreement entered with Commissioner Wesley Yamashita in case P-09-065235-E on June 18, 2010 clearly outline the terms, conditions, nature, details, and covenants of each party involved in the Settlement. This 2009 Lawsuit transcript and June 18, 2010 Order also clearly show that Dr. Frei and Stephen understood and fully agreed with all of the terms, conditions, nature, details and covenants of the Settlement, and that each of them intended to modify the Trust to permit (i) Stephen to secure his Settlement obligations with his beneficiary rights under the Trust, and (ii) the Settlement amounts to be paid to Dr. Frei from the Trust if Stephen failed to make the payments outlined in the Settlement. This March 31, 2010 Settlement, as confirmed by the June 18, 2010 Order, constituted an amendment and a modification to the terms of the Trust, which amendment and modification only affected Stephen's beneficiary interest in the Trust (the "2010 Trust Amendment"). This 2010 Trust Amendment was consented to by the only surviving Settlor, Dr. Frei, and the only beneficiary whose interest was impacted, Stephen.

*The Settlement Agreement provided security*

16. ~~Dr. Frei wanted the Settlement Payment Obligation to be secured as part of the for payment through the pledge of Stephen's interest in the trust. Settlement in light of Dr. Frei's belief that Stephen had converted money from him previously, and was unwilling to settle with Stephen without the certainty of payment from the Trust.~~

17. All parties, including Dr. Frei and Stephen, agreed to and relied upon all of the terms, conditions, nature, details and covenants of the Settlement, including Stephen's promise to pledge his beneficial interest in the Trust as security and collateral in the event he failed to make the Settlement Payment Obligation, when they agreed to terminate all litigation between them, including Clark County, Nevada District Court cases A-09-588750-C, P-09-065235-E, A-10-609292-C, and A-10-607772-C.

D. Dr. Frei's Death, Stephen's Default and Payments Made by Premier Trust

18. Dr. Frei died on April 30, 2013.

19. Following Dr. Frei's death, all of the beneficiaries of the Trust, except Stephen, received an outright distribution from the Trust under the powers given to them in the June 2009 Order in an amount equal to all of their beneficial Trust interest, less approximately \$1,725.49 each (equaling approximately \$15,529.39 total among these nine beneficiaries), which has been withheld by Premier Trust as reserves for various future Trust expenses.

20. From the time Stephen entered into the Settlement until the present, he has only made a single \$5,000.00 payment towards his Settlement obligations, which was done on or shortly after the Settlement was finalized before Judge Kenneth C. Cory on March 31, 2010.

21. Following Dr. Frei's death, Premier Trust, in following the terms of the Trust, as modified by the Settlement, made payments to the Emil Frei, III Trust from Stephen's beneficial interest in the Trust in the following amounts and on the following dates:

(i) \$100,000.00 on October 9, 2013.

(ii) \$100,000.00 on November 4, 2013.

(iii) \$100,000.00 on January 10, 2014.

22. After Premier Trust made these three \$100,000.00 payments, Stephen sought to remove Premier Trust as Trustee of the Trust under Article Ten, Section 2 (page 10-1) of the Trust Agreement.

II.

CONCLUSIONS OF LAW

1. In general, the law allows a settlor of an irrevocable trust and a beneficiary of that same irrevocable trust to agree to amend the trust's terms. See, e.g., Cal. Prob. Code § 15404; Restatement (Second) of Trusts § 338 (1959). See also, Musick v. Reynolds, 798 S.W.2d 626, 630 (Tex. App. 1990).

2. However, there is no controlling statute or common law in Nevada on the issue of whether a settlor and beneficiary of an irrevocable trust can agree to amend that trust. There is

1 further no controlling law in Nevada on whether such an amendment would be permitted if one of  
2 the original settlors to the irrevocable trust had died before the amendment.

3         3. This Court uses its equitable powers to determine that under the unique  
4 circumstances of this case, an amendment to the Trust occurred on March 31, 2010 when Dr. Frei,  
5 the surviving settlor, and Stephen, the only Trust beneficiary whose interest is effected, agreed to the  
6 Settlement and agreed to permit Stephen to pledge his interest in the Trust as security therefore. As  
7 a matter of equity, the Settlement between Dr. Frei and Stephen constituted a valid amendment to  
8 the terms of the Trust because the intent of Dr. Frei and Mrs. Frei was followed through the terms of  
9 the Settlement. Some, but not all, of the factors giving rise to this Court's finding that the  
10 Settlement between Dr. Frei and Stephen constituted a valid amendment to the terms of the Trust are  
11 as follows:

- 12                   (i) The Court finds that Dr. Frei, as a Settlor of the Trust, was seeking to recover  
13 from Stephen, who is a beneficiary of the Trust, money which Dr. Frei  
14 alleged Stephen had wrongfully converted and which was to be divided  
15 among all of Dr. and Mrs. Frei's children, through the litigation which ended  
16 with the Settlement. The Settlement was secured through a modification of  
17 the Trust at the time of the Settlement to permit Stephen to repay Dr. Frei  
18 what had allegedly been fraudulently taken by Stephen with Stephen's  
19 beneficial interest in the Trust, and as Stephen allegedly had nothing else, the  
20 modification to the Trust was vital to carrying out the intent of both Dr. and  
21 Mrs. Frei.
- 22                   (ii) It was the intent of both Dr. Frei and Mrs. Frei that they wanted to treat their  
23 children as equal beneficiaries in their estate plans, including the Trust. Had  
24 Stephen been able to keep the monies he allegedly took fraudulently from Dr.  
25 Frei it would have disadvantaged the other nine children and would have been  
26 both unequal and unfair.
- 27                   (iii) The Settlement affected only Stephen's beneficial interest in the Trust, which  
28 is fair to all other beneficiaries of the Trust and consistent with the manifested  
intent of Dr. Frei and Mrs. Frei in their estate planning.
- (iv) The 2010 Trust Amendment was agreed to by both Dr. Frei and Stephen and  
was relied upon by Dr. Frei to resolve all the pending lawsuits.
- (v) Dr. Frei, all the other Trust beneficiaries, and the Co-Trustees of the Trust  
then relied upon the 2010 Trust Amendment for many years, without  
objection from Stephen, until after Dr. Frei died and money had been  
distributed from the Trust in reliance upon the 2010 Trust Amendment.

1           4. Nevada recognizes the doctrine of judicial estoppel. See, e.g., Marcuse v. Del Webb  
2 Communities, Inc., 163 P.3d 462 (Nev. 2007). There are five elements of judicial estoppel: (i) a  
3 party has taken two positions, (ii) the positions were taken in judicial or quasi-judicial  
4 administrative proceedings, (iii) the party was successful in asserting the first position (i.e., the court  
5 adopted the position or accepted it as true), (iv) the two positions are totally inconsistent, and (v) the  
6 first position was not taken as a result of fraud or mistake. Id., 163 P.3d at 663. A party asserting  
7 judicial estoppel does not need to show all of these elements exist to successfully assert the doctrine.  
8 Mainor v. Nault, 120 Nev. 750, 765 (Nev. 2004) (“Although not all of these elements are always  
9 necessary, the doctrine generally applies when...”). A party may be estopped under the doctrine of  
10 judicial estoppel “merely by the fact of having alleged or admitted in his pleadings or former  
11 pleadings the contrary of the assertion sought to be made.” Breliant v. Preferred Equities Corp., 918  
12 P.2d 314, 317 (Nev. 1996) (quoting Sterling Builders, Inc. v. Fuhrman, 80 Nev. 543, 549, 396 P.2d  
13 850, 854 (1964)). The “mistake” portion of the fifth element of judicial estoppel is for mistakes of  
14 fact only, not mistakes of law. Vaile v. Dist. Ct., 118 Nev. 262, 44 P.3d 506, 514 (Nev. 2002)  
15 (quoting Sterling Builders, Inc., 80 Nev. at 549-50, 396 P.2d at 854 (“According to the rule of  
16 judicial estoppel, a party who has stated an oath in a prior proceeding, ‘as in a pleading,’ that a given  
17 fact is true may not be allowed to deny the same fact in a subsequent action”)).

18           5. Here, all of the elements of the doctrine of judicial estoppel apply in this case against  
19 Stephen. Stephen took two inconsistent positions (that he could amend the terms of the Trust  
20 through the Settlement with Dr. Frei but now claims it is impossible to do and is void *ab initio*),  
21 both of the inconsistent positions were taken in judicial or quasi-judicial administrative proceedings,  
22 Stephen was successful in amending the terms of the Trust in regards to his beneficial interest in it  
23 with Dr. Frei through the Settlement in 2010, and Stephen, who was represented by competent  
24 counsel, did not enter into the Settlement due to any ignorance, fraud or mistake. In summary,  
25 Stephen cannot enter into the Settlement with Dr. Frei in 2010, promise to make the Settlement  
26 Payment Obligation, secure that those payments with his beneficial interest in the Trust, and then  
27 later claim that he did not want to agree to the Settlement or that what he agreed to was impossible  
28 or void *ab initio*.

1           6. Dr. Frei justifiably relied upon Stephen's covenants and promises made in the  
2 Settlement, including Stephen's agreement to pledge his full beneficial interest in the Trust as  
3 security in the event he failed to fully pay the Settlement Payment Obligation.

4           7. The justifiable reliance by Dr. Frei in entering into the Settlement with Stephen  
5 judicially estops Stephen and the arguments he has made before this Court. The doctrine of judicial  
6 estoppel exists to prevent a party from taking a benefit of settling a case, telling four judges you  
7 want to settle, and then later try to void those settlements. To allow Stephen to void the Settlement  
8 would completely disregard his former promises to Dr. Frei. Therefore, Stephen cannot argue the  
9 Trust could not be amended through the 2010 Settlement.

10           8. Nevada Revised Statutes Chapter 166's spendthrift protections, including those at  
11 N.R.S. § 166.120, apply between the interest of a trust beneficiary and third parties, not between a  
12 settlor of a trust and a beneficiary of that same trust. Additionally, there are no public policy  
13 considerations that prevent a settlor of an irrevocable trust from amending that trust with the consent  
14 of a beneficiary where the trust has a spendthrift clause.

15           9. Premier Trust has not breached any fiduciary duty while acting as Trustee of the  
16 Trust. Stephen agreed to the Settlement, Settlement Payment Obligation, and the amendment of the  
17 terms of the Trust by virtue of the Settlement and Settlement Payment Obligation and Premier Trust  
18 has properly followed the terms of the Settlement since becoming Trustee of the Trust.

19           10. Premier Trust had no obligation or duty to make any further inquiry into the  
20 Settlement before making the three \$100,000 payments to the Emil Frei, III Trust after Dr. Frei's  
21 death. Furthermore, Premier Trust had the right to rely upon the terms of the Settlement, including  
22 the Settlement Payment Obligation, and the court orders and court transcript from the 2009 Lawsuit  
23 when it made the three \$100,000.00 payments to the Emil Frei, III Trust on October 9, 2013,  
24 November 4, 2013 and January 10, 2014. See Restatement (Second) of Trusts § 216 (1959).  
25 Therefore, the three \$100,000.00 payments were properly made by Premier Trust from Stephen's  
26 beneficial interest in the Trust.

11. It is proper for Premier Trust to satisfy the Settlement Payment Obligation to the Emil Frei, III Trust with the remaining monies it has in the Trust that are part of Stephen's beneficial interest.

12. Under the clear terms of the Trust Agreement, all ten children of Dr. Frei and Mrs. Frei are presently income beneficiaries of the Trust, pursuant to Article Twelve, Section 3, Part f (page 12-4 of the Trust Agreement). Because a majority of the ten children have not sought to remove Premier Trust as a Trustee of the Trust (as is required under Article Ten, Section 2 of the Trust Agreement at page 10-1) it is proper for Premier Trust to remain as Trustee of the Trust.

### III.

#### ORDER

Based upon the above findings of fact and conclusions of law, and good cause appearing:

IT IS HEREBY ORDERED that Stephen's November 19, 2014 Petition to Construe Terms of Trust, to Compel Compliance With Terms of Trust, to Confirm Removal of Trustee, to Compel Redress of Breach of Fiduciary Duties, and to Release Jurisdiction of the Trust is denied in its entirety.

IT IS FURTHER ORDERED that Premier Trust shall use Stephen's beneficial interest in the Trust to satisfy Stephen's remaining Settlement Payment Obligation to the Emil Frei, III Trust, as was agreed to previously in the Settlement.

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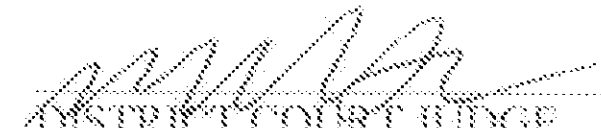
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IT IS FURTHER ORDERED that Premier Trust should remain as Trustee of the Trust.

DATED this 10<sup>th</sup> day of April, 2015.

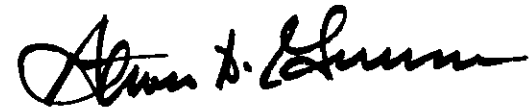
  
DISTRICT COURT JUDGE

Respectfully Submitted By:

GERRARD COX LARSEN



\_\_\_\_\_  
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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

10 In the Matter of ) CASE NO.: P-09-065257-T  
11 FREI IRREVOCABLE TRUST dated ) DEPT NO.: 26  
12 October 29, 1996 )  
13 \_\_\_\_\_ )

**NOTICE OF ENTRY RE: FINDINGS OF FACT, CONCLUSIONS OF LAW AND**  
**ORDER DENYING STEPHEN BROCK'S PETITION TO CONSTRUE TERMS OF**  
**TRUST, TO COMPEL COMPLIANCE WITH TERMS OF TRUST, TO CONFIRM**  
**REMOVAL OF TRUSTEE, TO COMPEL REDRESS OF BREACH OF FIDUCIARY**  
**DUTIES, AND TO RELEASE**  
**JURISDICTION OF THE TRUST**

18 NOTICE IS HEREBY GIVEN that a **FINDINGS OF FACT, CONCLUSIONS OF LAW,**  
19 **AND ORDER DENYING STEPHEN BROCK'S PETITION TO CONSTRUE TERMS**  
20 **OF TRUST, TO COMPEL COMPLIANCE WITH TERMS OF TRUST, TO CONFIRM**  
21 **REMOVAL OF TRUSTEE, TO COMPEL REDRESS OF BREACH OF FIDUCIARY**  
22 **DUTIES, AND RELEASE JURISDICTION OF THE TRUST,** was entered herein on the  
23 10<sup>th</sup> day of April, 2015. A copy of said Order is attached hereto as Exhibit "A".

24 DATED this 14<sup>th</sup> day of April, 2015.

**GERRARD, COX & LARSEN**

/s/ Douglas D. Gerrard, Esq.  
Douglas D. Gerrard, Esq.  
Nevada Bar No. 4613  
2450 St. Rose Pkwy., Suite 200  
Henderson, NV 89074



**CERTIFICATE OF MAILING**

I hereby certify that I am an employee of GERRARD, COX & LARSEN, and that on the 14<sup>th</sup> day of April, 2015, I served a true and correct copy of **NOTICE OF ENTRY RE: FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING STEPHEN BROCK'S PETITION TO CONSTRUE TERMS OF TRUST, TO COMPEL COMPLIANCE WITH TERMS OF TRUST, TO CONFIRM REMOVAL OF TRUSTEE, TO COMPEL REDRESS OF BREACH OF FIDUCIARY DUTIES, AND RELEASE JURISDICTION OF THE TRUST** by e-serving a copy on all parties listed in the Master Service List pursuant to Administrative Order 14-2, entered by the Chief Judge, Jennifer Togliatti, on May 9, 2014.

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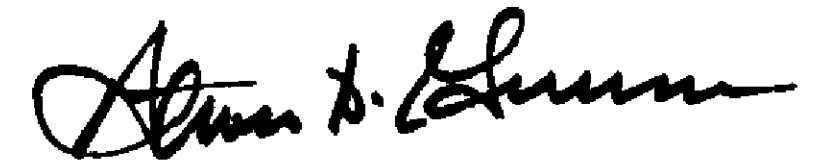
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/s/ Kanani Gonzales  
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**EXHIBIT A**

**EXHIBIT A**



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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of

FREI IRREVOCABLE TRUST dated  
October 29, 1996

Case No.: P-09-065257-T  
Dept. No.: 26

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING STEPHEN  
BROCK'S PETITION TO CONSTRUE TERMS OF TRUST, TO COMPEL  
COMPLIANCE WITH TERMS OF TRUST, TO CONFIRM REMOVAL OF TRUSTEE,  
TO COMPEL REDRESS OF BREACH OF FIDUCIARY DUTIES, AND TO RELEASE  
JURISDICTION OF THE TRUST**

THIS MATTER, having come on for oral argument before the Honorable Gloria Sturman on January 14, 2015, January 26, 2015 and March 11, 2015 on STEPHEN BROCK's Petition to Construe Terms of Trust, To Compel Compliance With Terms of Trust, to Confirm Removal of Trustee, to Compel Redress of Breach of Fiduciary Duties, and to Release Jurisdiction of the Trust filed on November 19, 2014, with appearances made by STEPHEN BROCK, who appeared through his counsel, JONATHAN W. BARLOW, ESQ. of CLEAR COUNSEL LAW GROUP, PREMIER TRUST, INC., by and through its counsel, DOUGLAS D. GERRARD, ESQ. and RICHARD D. CHATWIN, ESQ. of the law firm GERRARD COX LARSEN, and LAWRENCE HOWE and ELIZABETH MARY FREI, by and through their counsel, RUSSEL J. GEIST, ESQ. of the law firm HUTCHISON & STEFFEN.

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After reviewing the pleadings filed in this matter, including all supplements filed after the January 26, 2015 hearing and before the March 11, 2015 hearing, and considering all evidence and testimony presented, this Court makes the following findings of fact, conclusions of law and orders:

I.

**FINDINGS OF FACT**

**A. The Frei Irrevocable Trust**

1. On October 29, 1996, Dr. Emil Frei, III ("Dr. Frei") and Adoria B. Frei ("Mrs. Frei"), as husband and wife (jointly the "Settlors"), created the FREI IRREVOCABLE TRUST (the "Trust").

2. The Trust was irrevocable from its inception and named all five of Dr. Frei's children, who were from a previous relationship, and all five of Mrs. Frei's children, who were from a previous relationship, as equal beneficiaries.

3. The Trust showed an intent by Dr. Frei and Mrs. Frei to be fair and equal with all ten children in their estate planning.

4. Stephen Brock ("Stephen") is a son of Mrs. Frei and, therefore, a named beneficiary of the Trust.

5. The Trust contained a spendthrift clause at Article 13, § 3.

6. Mrs. Frei died on January 28, 2009.

**B. The Amendment to the Frei Irrevocable Trust and Premier Becoming Trustee**

7. On April 17, 2009, Stephen, by and through his counsel, Daniel V. Goodsell, Esq., filed a Petition to Confirm Trustees of the Frei Joint Irrevocable Trust dated October 29, 1996, for Order Assuming Jurisdiction Over the Trust, and for an Order Reforming Terms of the Trust (the "2009 Petition").

8. In the 2009 Petition, Stephen sought to amend Article Seven of the Trust to allow a beneficiary of the Trust to withdraw all of their beneficial interest in the Trust after the death of the second of the Settlers to die by making a written request to the Trustee. Stephen's 2009 Petition to modify the Trust was made after one of the Settlers had died.

///

1 9. Probate Commissioner Wesley Yamashita issued a Report and Recommendation  
2 approving the 2009 Petition on May 20, 2009. The Report and Recommendation was never  
3 objected to and an Order approving the Report and Recommendation was entered by this Court on  
4 June 12, 2009 (the "June 2009 Order"). The June 2009 Order modified the Trust.

5 10. On September 14, 2009, Premier Trust, Inc. ("Premier Trust") executed a written  
6 Acceptance of Trustee to become a Co-Trustee of the Trust.

7 **C. Litigation And Global Settlement Between Dr. Frei and Stephen**

8 11. On April 24, 2009, Dr. Frei, one of the Settlers of the Trust, filed a Complaint in  
9 Clark County, Nevada District Court against Stephen and entities controlled by Stephen (Case No.  
10 A-09-588750-C) (hereinafter the "2009 Lawsuit"). In the 2009 Lawsuit, Dr. Frei alleged that  
11 Stephen exploited Dr. Frei, breached fiduciary duties towards Dr. Frei, and converted more than  
12 \$500,000.00 from him.

13 12. On March 31, 2010, in the middle of a jury trial of the 2009 Lawsuit, Stephen,  
14 through his attorney of record, Dana A. Dwiggins, Esq., entered into a global settlement agreement  
15 with Dr. Frei, through his attorney of record, Elliot S. Blut, Esq., before the Honorable Kenneth C.  
16 Cory (hereinafter the "Settlement").

17 13. The Settlement immediately ended not only the 2009 Lawsuit, but also resolved  
18 several other cases in the Clark County, Nevada District Court involving Dr. Frei and Stephen,  
19 including case numbers P-09-065235-E, A-10-609292-C, and A-10-607772-C.

20 14. The Settlement was carefully negotiated and drafted by Stephen and Dr. Frei and  
21 included the following terms, covenants and conditions:

- 22 (i) Stephen promised to repay Dr. Frei (through the Emil Frei, III Trust, a trust  
23 created by Dr. Frei which was revocable at the time the Settlement was  
24 entered into) the total sum of \$415,000.00 (identified as \$175,000, \$150,000  
25 and \$90,000 respectively in the Settlement documents) by making payments  
26 in the amount of \$5,000.00 per month, beginning on June 1, 2010, over a  
three year period, with the principal balance earning interest at the rate of  
prime plus 1% and a balloon payment being made at the end of the three year  
term (hereinafter the "Settlement Payment Obligation").

27 ///

28 ///

28 ///

*The Order Approving Settlement Agreement provided a settlement shall be secured by "*

(ii) ~~A Stephen agreed to pledge his full beneficial interest in the Trust as security in the event that he failed to make the full Settlement Payment Obligation to Dr. Frei. See Order dated 6/18/2010 Case # P065235~~

(iii) The Settlement called for a 5% default interest rate in the event Stephen Defaulted on the Settlement Payment Obligation.

15. A transcript of a March 31, 2010 hearing before the Honorable Kenneth C. Cory in the 2009 Lawsuit and an Order Approving Settlement Agreement entered with Commissioner Wesley Yamashita in case P-09-065235-E on June 18, 2010 clearly outline the terms, conditions, nature, details, and covenants of each party involved in the Settlement. This 2009 Lawsuit transcript and June 18, 2010 Order also clearly show that Dr. Frei and Stephen understood and fully agreed with all of the terms, conditions, nature, details and covenants of the Settlement, and that each of them intended to modify the Trust to permit (i) Stephen to secure his Settlement obligations with his beneficiary rights under the Trust, and (ii) the Settlement amounts to be paid to Dr. Frei from the Trust if Stephen failed to make the payments outlined in the Settlement. This March 31, 2010 Settlement, as confirmed by the June 18, 2010 Order, constituted an amendment and a modification to the terms of the Trust, which amendment and modification only affected Stephen's beneficiary interest in the Trust (the "2010 Trust Amendment"). This 2010 Trust Amendment was consented to by the only surviving Settlor, Dr. Frei, and the only beneficiary whose interest was impacted, Stephen.

*The Settlement Agreement provided security*

16. ~~Dr. Frei wanted the Settlement Payment Obligation to be secured as part of the for payment through the pledge of Stephen's interest in the trust. Settlement in light of Dr. Frei's belief that Stephen had converted money from him previously, and was unwilling to settle with Stephen without the certainty of payment from the Trust.~~

17. All parties, including Dr. Frei and Stephen, agreed to and relied upon all of the terms, conditions, nature, details and covenants of the Settlement, including Stephen's promise to pledge his beneficial interest in the Trust as security and collateral in the event he failed to make the Settlement Payment Obligation, when they agreed to terminate all litigation between them, including Clark County, Nevada District Court cases A-09-588750-C, P-09-065235-E, A-10-609292-C, and A-10-607772-C.

D. Dr. Frei's Death, Stephen's Default and Payments Made by Premier Trust

18. Dr. Frei died on April 30, 2013.

19. Following Dr. Frei's death, all of the beneficiaries of the Trust, except Stephen, received an outright distribution from the Trust under the powers given to them in the June 2009 Order in an amount equal to all of their beneficial Trust interest, less approximately \$1,725.49 each (equaling approximately \$15,529.39 total among these nine beneficiaries), which has been withheld by Premier Trust as reserves for various future Trust expenses.

20. From the time Stephen entered into the Settlement until the present, he has only made a single \$5,000.00 payment towards his Settlement obligations, which was done on or shortly after the Settlement was finalized before Judge Kenneth C. Cory on March 31, 2010.

21. Following Dr. Frei's death, Premier Trust, in following the terms of the Trust, as modified by the Settlement, made payments to the Emil Frei, III Trust from Stephen's beneficial interest in the Trust in the following amounts and on the following dates:

(i) \$100,000.00 on October 9, 2013.

(ii) \$100,000.00 on November 4, 2013.

(iii) \$100,000.00 on January 10, 2014.

22. After Premier Trust made these three \$100,000.00 payments, Stephen sought to remove Premier Trust as Trustee of the Trust under Article Ten, Section 2 (page 10-1) of the Trust Agreement.

II.

CONCLUSIONS OF LAW

1. In general, the law allows a settlor of an irrevocable trust and a beneficiary of that same irrevocable trust to agree to amend the trust's terms. See, e.g., Cal. Prob. Code § 15404; Restatement (Second) of Trusts § 338 (1959). See also, Musick v. Reynolds, 798 S.W.2d 626, 630 (Tex. App. 1990).

2. However, there is no controlling statute or common law in Nevada on the issue of whether a settlor and beneficiary of an irrevocable trust can agree to amend that trust. There is

1 further no controlling law in Nevada on whether such an amendment would be permitted if one of  
2 the original settlors to the irrevocable trust had died before the amendment.

3         3. This Court uses its equitable powers to determine that under the unique  
4 circumstances of this case, an amendment to the Trust occurred on March 31, 2010 when Dr. Frei,  
5 the surviving settlor, and Stephen, the only Trust beneficiary whose interest is effected, agreed to the  
6 Settlement and agreed to permit Stephen to pledge his interest in the Trust as security therefore. As  
7 a matter of equity, the Settlement between Dr. Frei and Stephen constituted a valid amendment to  
8 the terms of the Trust because the intent of Dr. Frei and Mrs. Frei was followed through the terms of  
9 the Settlement. Some, but not all, of the factors giving rise to this Court's finding that the  
10 Settlement between Dr. Frei and Stephen constituted a valid amendment to the terms of the Trust are  
11 as follows:

- 12                   (i) The Court finds that Dr. Frei, as a Settlor of the Trust, was seeking to recover  
13 from Stephen, who is a beneficiary of the Trust, money which Dr. Frei  
14 alleged Stephen had wrongfully converted and which was to be divided  
15 among all of Dr. and Mrs. Frei's children, through the litigation which ended  
16 with the Settlement. The Settlement was secured through a modification of  
17 the Trust at the time of the Settlement to permit Stephen to repay Dr. Frei  
18 what had allegedly been fraudulently taken by Stephen with Stephen's  
19 beneficial interest in the Trust, and as Stephen allegedly had nothing else, the  
20 modification to the Trust was vital to carrying out the intent of both Dr. and  
21 Mrs. Frei.
- 22                   (ii) It was the intent of both Dr. Frei and Mrs. Frei that they wanted to treat their  
23 children as equal beneficiaries in their estate plans, including the Trust. Had  
24 Stephen been able to keep the monies he allegedly took fraudulently from Dr.  
25 Frei it would have disadvantaged the other nine children and would have been  
26 both unequal and unfair.
- 27                   (iii) The Settlement affected only Stephen's beneficial interest in the Trust, which  
28 is fair to all other beneficiaries of the Trust and consistent with the manifested  
intent of Dr. Frei and Mrs. Frei in their estate planning.
- (iv) The 2010 Trust Amendment was agreed to by both Dr. Frei and Stephen and  
was relied upon by Dr. Frei to resolve all the pending lawsuits.
- (v) Dr. Frei, all the other Trust beneficiaries, and the Co-Trustees of the Trust  
then relied upon the 2010 Trust Amendment for many years, without  
objection from Stephen, until after Dr. Frei died and money had been  
distributed from the Trust in reliance upon the 2010 Trust Amendment.



1           4. Nevada recognizes the doctrine of judicial estoppel. See, e.g., Marcuse v. Del Webb  
2 Communities, Inc., 163 P.3d 462 (Nev. 2007). There are five elements of judicial estoppel: (i) a  
3 party has taken two positions, (ii) the positions were taken in judicial or quasi-judicial  
4 administrative proceedings, (iii) the party was successful in asserting the first position (i.e., the court  
5 adopted the position or accepted it as true), (iv) the two positions are totally inconsistent, and (v) the  
6 first position was not taken as a result of fraud or mistake. Id., 163 P.3d at 663. A party asserting  
7 judicial estoppel does not need to show all of these elements exist to successfully assert the doctrine.  
8 Mainor v. Nault, 120 Nev. 750, 765 (Nev. 2004) (“Although not all of these elements are always  
9 necessary, the doctrine generally applies when...”). A party may be estopped under the doctrine of  
10 judicial estoppel “merely by the fact of having alleged or admitted in his pleadings or former  
11 pleadings the contrary of the assertion sought to be made.” Breliant v. Preferred Equities Corp., 918  
12 P.2d 314, 317 (Nev. 1996) (quoting Sterling Builders, Inc. v. Fuhrman, 80 Nev. 543, 549, 396 P.2d  
13 850, 854 (1964)). The “mistake” portion of the fifth element of judicial estoppel is for mistakes of  
14 fact only, not mistakes of law. Vaile v. Dist. Ct., 118 Nev. 262, 44 P.3d 506, 514 (Nev. 2002)  
15 (quoting Sterling Builders, Inc., 80 Nev. at 549-50, 396 P.2d at 854 (“According to the rule of  
16 judicial estoppel, a party who has stated an oath in a prior proceeding, ‘as in a pleading,’ that a given  
17 fact is true may not be allowed to deny the same fact in a subsequent action”)).

18           5. Here, all of the elements of the doctrine of judicial estoppel apply in this case against  
19 Stephen. Stephen took two inconsistent positions (that he could amend the terms of the Trust  
20 through the Settlement with Dr. Frei but now claims it is impossible to do and is void *ab initio*),  
21 both of the inconsistent positions were taken in judicial or quasi-judicial administrative proceedings,  
22 Stephen was successful in amending the terms of the Trust in regards to his beneficial interest in it  
23 with Dr. Frei through the Settlement in 2010, and Stephen, who was represented by competent  
24 counsel, did not enter into the Settlement due to any ignorance, fraud or mistake. In summary,  
25 Stephen cannot enter into the Settlement with Dr. Frei in 2010, promise to make the Settlement  
26 Payment Obligation, secure that those payments with his beneficial interest in the Trust, and then  
27 later claim that he did not want to agree to the Settlement or that what he agreed to was impossible  
28 or void *ab initio*.

1           6. Dr. Frei justifiably relied upon Stephen's covenants and promises made in the  
2 Settlement, including Stephen's agreement to pledge his full beneficial interest in the Trust as  
3 security in the event he failed to fully pay the Settlement Payment Obligation.

4           7. The justifiable reliance by Dr. Frei in entering into the Settlement with Stephen  
5 judicially estops Stephen and the arguments he has made before this Court. The doctrine of judicial  
6 estoppel exists to prevent a party from taking a benefit of settling a case, telling four judges you  
7 want to settle, and then later try to void those settlements. To allow Stephen to void the Settlement  
8 would completely disregard his former promises to Dr. Frei. Therefore, Stephen cannot argue the  
9 Trust could not be amended through the 2010 Settlement.

10           8. Nevada Revised Statutes Chapter 166's spendthrift protections, including those at  
11 N.R.S. § 166.120, apply between the interest of a trust beneficiary and third parties, not between a  
12 settlor of a trust and a beneficiary of that same trust. Additionally, there are no public policy  
13 considerations that prevent a settlor of an irrevocable trust from amending that trust with the consent  
14 of a beneficiary where the trust has a spendthrift clause.

15           9. Premier Trust has not breached any fiduciary duty while acting as Trustee of the  
16 Trust. Stephen agreed to the Settlement, Settlement Payment Obligation, and the amendment of the  
17 terms of the Trust by virtue of the Settlement and Settlement Payment Obligation and Premier Trust  
18 has properly followed the terms of the Settlement since becoming Trustee of the Trust.

19           10. Premier Trust had no obligation or duty to make any further inquiry into the  
20 Settlement before making the three \$100,000 payments to the Emil Frei, III Trust after Dr. Frei's  
21 death. Furthermore, Premier Trust had the right to rely upon the terms of the Settlement, including  
22 the Settlement Payment Obligation, and the court orders and court transcript from the 2009 Lawsuit  
23 when it made the three \$100,000.00 payments to the Emil Frei, III Trust on October 9, 2013,  
24 November 4, 2013 and January 10, 2014. See Restatement (Second) of Trusts § 216 (1959).  
25 Therefore, the three \$100,000.00 payments were properly made by Premier Trust from Stephen's  
26 beneficial interest in the Trust.

11. It is proper for Premier Trust to satisfy the Settlement Payment Obligation to the Emil Frei, III Trust with the remaining monies it has in the Trust that are part of Stephen's beneficial interest.

12. Under the clear terms of the Trust Agreement, all ten children of Dr. Frei and Mrs. Frei are presently income beneficiaries of the Trust, pursuant to Article Twelve, Section 3, Part f (page 12-4 of the Trust Agreement). Because a majority of the ten children have not sought to remove Premier Trust as a Trustee of the Trust (as is required under Article Ten, Section 2 of the Trust Agreement at page 10-1) it is proper for Premier Trust to remain as Trustee of the Trust.

### III.

#### ORDER

Based upon the above findings of fact and conclusions of law, and good cause appearing:

IT IS HEREBY ORDERED that Stephen's November 19, 2014 Petition to Construe Terms of Trust, to Compel Compliance With Terms of Trust, to Confirm Removal of Trustee, to Compel Redress of Breach of Fiduciary Duties, and to Release Jurisdiction of the Trust is denied in its entirety.

IT IS FURTHER ORDERED that Premier Trust shall use Stephen's beneficial interest in the Trust to satisfy Stephen's remaining Settlement Payment Obligation to the Emil Frei, III Trust, as was agreed to previously in the Settlement.

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GERRARD, COX & LARSEN

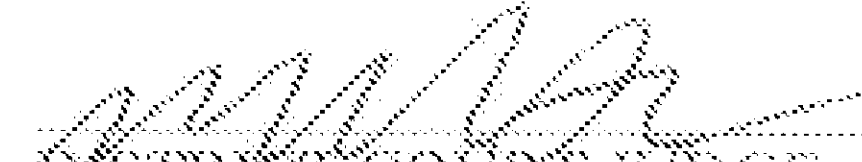
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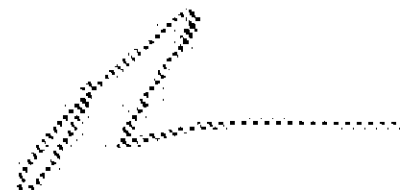
1 IT IS FURTHER ORDERED that Premier Trust should remain as Trustee of the Trust.

2 DATED this 10<sup>th</sup> day of April, 2015.

3  
4  
5   
6 DISTRICT COURT JUDGE

7 Respectfully Submitted By:

8 GERRARD COX LARSEN

9   
10 \_\_\_\_\_  
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DISTRICT COURT  
CLARK COUNTY, NEVADA

In the Matter of )

FREI IRREVOCABLE TRUST dated )  
October 29, 1996. )


CASE NO.: P-09-065257-T  
DEPT. NO.: 26

**NOTICE OF APPEAL**

**NOTICE IS HEREBY GIVEN** that petitioner, Steven Brock, hereby appeals to the Supreme Court of Nevada from the Findings of fact, Conclusions of Law and Order Denying Stephen Brock's Petition to Construe Terms of Trust, to Compel Compliance with Terms of Trust, to Confirm Removal of Trustee, to Compel Redress of Breach of Fiduciary Duties, and to Release Jurisdiction of the Trust entered in this action on April 14, 2015.

Dated this 14<sup>th</sup> day of May, 2015.

THE LAW OFFICE OF MIKE BEEDE, PLLC



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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of The Law Office of Mike Beede, PLLC and that on the 19<sup>th</sup> day of May, 2015, I did cause a true and correct copy of the foregoing **NOTICE OF APPEAL** to be served upon each of the parties listed below via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve System:

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