parties going to appeal it? Probably. I think people are looking for things to go because I think this case will never end. I think I will retire, and the case will be going on. Hopefully, I'll be wrong on that, but that's my gut feeling. So I ain't stupid in that context, on that.

Where there is a lot of discretion to the Court, the issue is fundamental fairness, getting all the evidence that we need out there. I do believe the Court has a lot of discretion whether to admit an expert testimony. I think, in this case, the real question is: Will these expert testimonies really help the trier of fact?

I'm not sure if Mr. Rushforth would. If you're going to give me a lecture on the law, I'm not sure I need the lecture on the law, or the explanation of the law. I think the law speaks for itself. Spendthrift trusts are pretty straightforward, and I've read the statutes on that in preparation. I'm not so sure what he could add to the trier of fact. I know he's helped write it, so I do understand that, but I'm not sure what he could add from a law side that Mr. Solomon or the other attorneys can't add. If I needed some more information on the actual law, the post-trial briefs could be -- could achieve that, as well, so I'm not so sure exactly.

I did not read -- so it's clear for the record, I

did not read any of the reports, I did not read any documents that were attached to the pretrial. I think that's inappropriate. They're not in evidence, there's no foundation for it, so I didn't read anything. I just read the briefs.

The problem with that is Mr. Dickerson attached his report, as an attachment to his. So they're trying to keep it out, yet, they attach it to theirs, to address it on that. So I didn't read his actual reports, I just read the briefs, so the I could deal with it without looking at the reports, because I don't want to be tainted one way or the other, since all the documents were -- should not have been attached to the pretrial memo, because now they're in the record, and now they got to be stricken from the record because they're not evidentiary. The reliability and the integrity of any of those documents have not been established, so they're not of evidentiary value. So, be that as it may, that's where we're at.

If I go forward, if I keep the expert witnesses out, they're going to cry foul, they didn't have a chance to do their case-in-chief. If I let them in, you guys yell foul because you didn't get a chance to cross-examine and prepare. So I'm kind of in that situation. But the fact is that I'm not really sure what Mr. Rushforth would add, but I'll hear argument on that, what he would add to the Court, to help the

trier of fact determine a key issue on that.

I do understand trusts, and we have researched the law, as far as trusts. It has some impact. But we also have family/divorce law, and equity principles, as well, so be that as it may.

As far as the time frames, when I looked at the time frames, I didn't give you the discovery scheduling order, I let you guys work it out by yourself. I did look at the rules, as argued by Mr. Solomon, that those rules would not apply, the 16.2, because we're in the middle of a trial that we had started, seems like decades ago, but I guess it's only years ago; that we had started this trial a while back, so it wouldn't have been because 16.2 applies to new matters on that.

And with that in mind, I did read 16.2 in detail, and here's my relevant time frame that I can have the attorneys address. I saw the stip and order to allow ELN Trust to join as a necessary party was signed and filed by the parties on August 9th, 2011. We were here on October 11th, 2011. I said I would start looking into scheduling a scheduling order.

We came back on December 13th, 2011. Mr. Dickerson acknowledged that the ELN Trust had orally designated to him experts Garrity and Rushforth. We did not give trial dates at

that time, because we wanted parties to look at their trial calendars to see when we'd get this done, and no trial date was given. So, according to Mr. Solomon, you guys clearly knew experts, and there had been about 210 days before the trial date of July 16th.

On January 31st, counsels agreed that, upon the Court's decision as to the trust's motion to dismiss the third-party complaint, then we'd set up our scheduling orders and get our trial dates all set. We came back on February 23rd, 2012, when I gave my decision as to the motion to dismiss, and as to what I was going to entertain and what I wouldn't entertain, and I gave you a trial date of July 16th, 2012. I wanted it in May, but some counsels had some conflicts, needed more time. Essentially, this gave everybody 140 days notice of the discovery, of what would be needed for the July 16th date.

And if I went by the statutory language under 16.2, if I apply that -- which I don't think I would in this case, just out of the time -- but it would say that, if we went by the rules, well, they would have to -- the trust would have had to file and serve its financial disclosures by October 9th, based on the stipulation and order joining them.

They would have had to have disclosed the identity of the rebuttal -- of their expert witnesses by January 7th.

I think you knew who their witnesses were before then, as of December. Then it would have been up to Mrs. Nelson to submit their rebuttal witnesses by March 7th, 60 days thereafter. And it would have been up to the trust to serve and disclose their expert reports by May 16th, which would have been 60 days before trial. And then Ms. Nelson would have had 60 days thereafter to disclose their rebuttal expert, which, of course, would have been the day of trial.

So those time frames, if I looked at the time frames by 16.2, they don't exactly fall into our time frame because of the fact that they came in late with the necessary party, so I did not really give those the hard and fast rule, because we didn't give you a scheduling order. But if we went by the rule on that, that's about the time frames that would have came.

But I did not think that would be fair to the bottom line because, while the defense knew about the expert witnesses, until they get those reports, know exactly what they were going to base their testimony on, as far as the -- their opinions, the reasons for their opinions, the data that they relied on in forming their opinions, and exhibits they'd be using -- the qualifications, I wasn't too worried about because they could have figured that out, they knew these people before, any publications that they have.

But the real key is the defense is not in a position -- or I should say Ms. Nelson is not in a position to adequately cross-examine expert witnesses at this late date. And Mr. Solomon says, well, as a fallback would be to give them some more time. Well, I ain't going to give them more time because I ain't going to be here until I die. I'm going to get this case done. And I think Mr. Eric and Ms. Lynita need to get this case done, so I'm not inclined to say, okay, let's continue it again just for those experts, in order to get this matter going forward, so I'm just not inclined with that.

Again, as to the attorney Mr. Rushforth, I'm not sure what he could add to me, to the trier of fact, to help me in this case. Mr. Garrity clearly could add information. Apparently, Mr. Garrity has been involved in this case, in the trust, and could help trace the money or help trace the property, so I do think he has some issues, maybe not as an expert, but simply as a witness on that. He did testify before. Matter of fact, when he did testify initially, it was this Court's hope to get this matter resolved, if I made some initial findings on the trust, that maybe we'll get this case done.

We had Mr. Jeffrey Burr testify, and the understanding was that Ms. Nelson would not object to Mr.

Garrity being an expert witness if Mr. Jimmerson, counsel at that time, would not object to Jeffrey Burr being an expert. I did not have Jeffrey Burr as an expert witness. I don't believe we -- I don't remember if we qualified him as an expert witness. I'd have to check that out, to be honest, and I'll take argument from you guys. I don't think we did.

I saw it as more of what the intent of the parties were when they set up the trust, to get an idea of what it was about. He did talk about the separate properties. So it really wasn't a trace into the property, it -- what it was to see what the parties were when they set up the trust.

And Mr. Garrity testified, if I remember, as to some tax issues. I think there was a huge tax exception or -- wouldn't be the right word -- that you had, that you would lose, if I made the decision here, and they're worried about that it could not be transferred, so he talked about the tax considerations; and also, as far as why the value as to Mr. Nelson's business was difficult to ascertain because of the nature of the business. I did not see Mr. Garrity testifying at that time as an expert, either. I thought he was a witness, just as Attorney Burr was, so I did not consider either of them to be experts.

At this time, so the parties can know -- and I'll hear argument and set up a record -- I would not be inclined

to let Mr. Rushforth in, his testimony or his report. Mr. Garrity, I would allow him to testify, not as an expert, but as a witness, since he can trace money, he knows where it came into, he's been involved with how money went to the trust. I think that is very interesting, and made it necessary to the Court to determine the nature of the property, separate or marital property, if it was community property, it he put it in the trust. Of course, he cannot put marital property in the trust; he can put his half, but not her half. So I think the tracing would be important. I'm not sure what Mr. Garrity would add as an expert anyways, beyond this, because I haven't read any of their reports. But that's where I'm at right now.

I'm not sure if Ms. Nelson had any expert witnesses that we want to talk about. But that's where I'm at now. I want to give everybody a chance to kind of address those issues because I know exactly where we're at, and I want to give everybody a fair shake in this case. But I'm not inclined to continue it further because we'll never get done.

So that's kind of my initial ruling and findings, but I'm glad to hear argument on those issue on that, to get a nice record, so we can move this forward, and see if you can persuade me otherwise what I need to do, but we can get this case going forward.

So, Mr. Dickerson, since this was your motion, I'll

let you go first to address any concerns by the Court, and then we'll hear from --

MR. DICKERSON: Thank you, Your Honor. Mr. Karacsonyi will handle the oral argument.

THE COURT: Okay.

MR. KARACSONYI: Needless to say, we agree a lot with what Your Honor said; we don't have much to add.

The only thing we would add is with regards to the testimony of Mr. Garrity. The -- Rule 53 is the rule -- of the Nevada Rules of Civil Procedure, is the rule that applies to special masters. There has been acknowledgments on both sides that Mr. Birch is going to testify here as a special master, and has been appointed by the Court as a special master. Your Honor, in your most recent -- in one of your most recent rulings, even found him to be a special master, confirmed that you had appointed him as a special master.

The information they seek to elicit from Garrity, a lot of it is duplicative of what has been presented by Mr. Birch. And under Rule 53, there is a procedure for them to take, if they want, to object to the information provided to Your Honor by Mr. Birch. It says, Rule 53(e)(1):

"The master shall prepare a report upon the matter submitted to the master by the order of reference; and, if required to make findings of facts and

conclusions of law, the master shall set them forth in the report. The master shall file the report with the Clerk of the Court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits."

Now I note that there's been at least half a dozen, maybe a dozen -- I don't know the exact number, but somewhere in that neighborhood -- reports filed by Mr. Birch throughout the course of these proceedings, regarding the source application of funds for various entities and trusts.

Now, unless otherwise directed, the master shall serve a copy of the report on each party, which was done. Okay? In non-jury actions, in an action to be tried without a jury, the Court shall accept the master's findings of facts, unless clearly erroneous.

"Within 10 days after being served, with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the Court for action upon the report and upon objections thereto shall, by motion and upon notice, as proscribed in Rule 6(b). The Court, after a hearing, may adopt the report or may modify

it or may reject it, in whole or in part, or may receive further evidence."

If you didn't like what Mr. Birch said the first time when he filed it, your remedy was to file a motion with the Court saying that you believed the report to clearly erroneous, and ask the Court, by motion, as this rule provides, to receive further evidence; i.e., Mr. Garrity.

That's not what's happened here. We agree with everything else Your Honor said. To the extent you're going to let Mr. Garrity testify, or the Court is inclined to let Mr. Garrity testify, his testimony cannot be considered to contradict that of Mr. Birch. Mr. Birch's reports have already been filed herein. The time for objection has passed, and no objections have been filed.

THE COURT: Thank you.

MR. SOLOMON: Thank you, Your Honor.

I, obviously, don't disagree with a lot of what Your Honor put on the record. I would like to go over just a couple of points, so you understand our perspective of it.

You asked us because 16.2 clearly doesn't apply, to sit down and try and work out a schedule. I had a brief conversation with Mr. Dickerson. He proposed a week before trial. I said, I have no objection to that. We never even put that in anything formal. We never agreed to any other

deadlines, simply stated.

I continue -- I got documents from them last week, Your Honor, productions from them. Neither of us were following any type of scheduling order or restrictions. I got production of documents, I got a list -- I got a new name of a witness last week. Before that, I got more documents. Subpoenas went out by them, calling for production of documents, the same time these reports were being filed. Both sides knew that there was no time deadlines, so to suggest that there was is just not accurate.

The fundamental fairness that Your Honor raises is an important issue. The fundamental fairness here is, in my opinion, that we're going to be severely prejudiced if we're not allowed to produce all of the evidence on the -- and have this matter decided on the merits.

And what seems to me is important on their side is Your Honor has already observed they knew about our experts no later than December; it was actually earlier that we -- I advised Mr. Dickerson. But he acknowledged on the record in December that he knew who they were. He knows what the issues are. He framed the issues in his counterclaim. Those are the issues, Your Honor.

We intend, primarily, to use these experts, to show that these trusts are valid, and that they were respected

within the norms of the practice of the State of Nevada. And the witnesses that we're going to call, Mr. Rushforth and Mr. Garrity, are competent and, I submit, would be helpful. You got the right standard. You have a lot of discretion here to allow these in, if you find them helpful.

We're privileged to be here with a very bright judge, and we understand that. But we don't believe you practice in this area. And we all, as lawyers, have areas of law that we aren't experts in. Both of these witnesses are experts in these very types of trusts and estate planning that was employed in this case. They know what the law is, they know what the community standards are, they have investigated what the facts are. And we believe they can help prove our case and assist this Court in rendering a proper factual determination under the law, as to what the -- what these parties did and how it affects their interest in this divorce.

Mr. Dickerson's pleadings alleged that these were alter egos of the parties, and these witnesses are prepared, again, to prove, elicit testimony through them, that they fit within the terms of Nevada law; they were, in fact, factually complied with in terms of complying with that law; and that Your Honor will have evidence at that point to determine whether you believe they have proved and can prove their case, that these trusts should be disregarded.

Mr. Birch, the order appointing him, says, is ordered -- he's appointed by this Court to:

"-- perform a forensic accounting, intended to provide the Court with an accurate evaluation of the parties' estate."

That's what he did. Mr. Garrity is not doing that. And in fact, Mr. Garrity, they simply accepted Mr. Birch's report and listing of what the assets were and what he thought the values are. What Mr. Garrity does is trace the assets, to show the Court the flow of the same, starting from when he was able to develop the record.

Our case, by way of preview, will start with the separate property agreement. It will carry forward from that point to demonstrate that the parties intentionally kept their assets separate, and that that remained so through the point of time when they established, in 2001, the self-settled spendthrift trust; and that, even after that point, there was a concerted effort by the parties to keep their assets separate, and in fact, it was done.

The testimony will also show that the parties did what was required by the law each step of the way, in order to preserve the separateness of their property; and that, despite the claim of the opposite side of this courtroom, in fact, those assets were preserved as separate property, and no

community property is contained with Eric's self-settled spendthrift trust, and it has been operated under the law and community standards, in terms of how a trust is supposed to operate; and, therefore, it cannot be the alter ego.

NRS 50.275 sets a very low threshold for admissibility of expert testimony, as Your Honor knows. Simply, will it assist the trier of fact in understanding or determining a fact issue?

In a bench trial, which this is, these type of motions in limine are almost never granted, Your Honor. And the reason is you can simply sustain an objection to a question as it's asked, point by point, if you believe it's not going to be helpful to you or is beyond the competency or otherwise inadmissible, and you can simply disregard anything you don't believe, or you don't think you need help on, you'd rather look at it yourself. This is not a jury trial, where you need to a motion in limine.

Their motion in limine grounds were that somehow we were late. And I think we clearly were not late. They had the opportunity to depose both of these witnesses, since at least December, when Mr. Dickerson acknowledged them. They had the ability to send interrogatories out, asking what these guys are going to do. They discovered the same records that my experts looked at and are basing their opinion on. They

knew what the issues were, they framed the issues in their own pleading. Yet, now they're claiming surprise and unfairness, we're not ready, we didn't know what they were going to say? Gee, that would have been real hard to guess that my experts were going to say what I just represented.

Experts are allowed in Nevada to testify on mixed questions of fact and law, and even on the ultimate issue, and that's expressly set forth at NRS 50.295. It is extremely common, Your Honor, for lawyers who are experts in trusts and estate matters to testify as experts within that field before a court of law, in order to, not only explain what the law is in their technical area, but to help the Court apply it.

There is a Nevada Supreme Court case on this, which I happened to be in. It was The Matter of the Estate of John W. Bowles, it's at 120 Nev. 990, in 2004. In that case, the American Cancer Society was taking the position that the executors/trustees' commissions were unreasonable, even though they had been set under their traditional five percent rule that pertained at that time.

Mr. Gardner Joli, who was a long-term trust and estate lawyer, was allowed to testify, not only on his review of what the lawyers had done, to try and justify their fee, but also on the application of what he saw under the rules and Nevada law. In fact, I'm quoting from the Court's decision;

I'll just give one sentence of it: "He" -- he, meaning Joli.

"He finally concluded that Kyle & Kyle's fee agreement in this matter was unreasonable under the applicable statutory provisions and Nevada Supreme Court Rules, NRS 150.060, and Supreme Court Rule 155."

We cited other cases, Your Honor, where courts have done and allowed the same thing, one of which is going to be a hugely important case for Your Honor to read. And this case is called In Re Marriage of Lund, it's at 94 Cal. Rptr. 3d 84, it's a Cal. App. 2009 case. For the purposes of this hearing, their estate planning lawyers were allowed to provide an opinion on whether certain estate planning documents had the effect of transmuting key immunity property into separate property, under the law.

Now that case cites another case, and both of those we're going to provide to the Court because they're hugely relevant on the issue that you're going to have to decide in this case, and that is whether the separate property agreement, the 1993 separate property agreement, can be used -- as the other side says, it's only binding with respect to creditors and asset protection, but it's not binding on this Court with respect to division of property because that case and another case that's cited there say you can't have it both

ways, and it's not permissible, and you can't even allow parol evidence on that issue. It is what it is under that separate property agreement, or in that case, a community property agreement.

We cited several other cases, Rio Grande Valley Gas Company v. City of Edinburg, at 59 S.W.3d 199 (Tex. App. 2009). There, estate planning attorneys were called -- allowed to give opinion on the effect of corporate structures and how they worked on the issue of whether they were being used as the alter egos of each other and other entities.

There is no question in this case, whether or not he started off that way, Mr. Burr, in his testimony, got into a lot of Nevada law and how it applied. And I know that he left this Court with an impression that I don't think is accurate. And I took his examination on two days of depositions, and think I can bring him back on the stand to explain what he tried to tell the Court, what he meant and didn't mean. Because, frankly, when he veered into issues of law and was asked these things, he was not clear. And I submit he wasn't asked the proper questions; and, when he is asked the proper questions, comes out with the proper answers.

Mr. Rushforth is certainly able to do that and to clarify what Mr. Burr had to say and how it works with respect to the practice of estate planning, and the tools that one

uses in estate planning for asset protection, and what the consequences of using those various state structures are. And that's the purpose of him.

He can, I think, assist this Court in understanding how these estate planning tools work and what they're intended to do, and what they're intended not to do, and how they apply in this case, based on the facts. This Court can regard or disregard this testimony as it's elicited, and you can sustain objections if you think any of the questions I'm asking him are invading your province, which you're capable and want to do yourself, and that's fine.

Expert reports are not admissible. We have no intent to admit these reports, that was never our intent. The intent was to get them out as fast as we could. It was very difficult to do under the factual circumstances of this case. And Mr. Garrity can sit and explain what he had to do to be able to put this together. It took many, many, many months to do this. And part of the problem, of course, was we couldn't get him paid, couldn't get him the retainer that he wanted.

Again, Your Honor, you've got the touchstone, and that's fundamental fairness. The fundamental fairness in this case tips the scales to allowing us a fair and full opportunity to present our case on the merits. There is nothing that's been done to the other side that they didn't do

to themselves by their own inaction. And it would be simply unfair to our side of this case if we are not permitted to call these witnesses to present our case.

You wanted a tracing. You mentioned at least 10 times since I've been involved in this case that you wanted the tracing. They knew you wanted the tracing. They finally, at the end of the day -- and I don't know why they waited so long -- asked this Court to appoint Mr. Birch to do that. And Your Honor recently ruled that it was too late because that was going to delay the trial to get him started on that. But if you recall our response, we said, we've been having Garrity work on this for months, and we assumed they've been doing this. Why are they now trying to get somebody else to do it? That's part of their burden.

Our position is, once we establish the separate property agreements, burden shifts to them to show that this isn't separate property anymore. They've got the obligation to do that. And to a large extent, our witnesses are going to dispel anything they try and present in that regard. Again, fundamental fairness that we be allowed to do that.

I don't want to continue this trial, I'm ready to go, Your Honor. My client is ready to go, our witnesses are ready to go. The last thing we want to do is continue this trial. But this issue is so important that I threw in that

counter-motion to say, if you're inclined at all to buy their argument that somehow they've been opportuned [sic] upon, we haven't seen any of their expert reports. We haven't seen a witness list, we haven't seen an exhibit list, Your Honor, we haven't seen a pretrial memorandum from them; we haven't seen any of that stuff from them. It's okay to trial-ambush us, but boy, the standard works the opposite way when they think they can get some "gotcha" out of it.

They sat by and watched, knowing that we were working on this, for months, because we said it every pleading. They knew the Court just awarded us money to pay to these experts. And they didn't do anything about that, they let us spend that money. They let the experts work on this, incur all those charges, get it done as quick as we can. And after it's done, they first raise the objection.

And they don't even tell Your Honor that, immediately, I called Mr. Dickerson and said, I know this is later than I wanted it, I've been pushing, pushing, pushing, but I will stipulate to let you take depositions right now, if you want to. He said, I'll think about it, wrote me the next day and said, nope, we're going to say it's too late.

They made their own bed, Your Honor. It's not fair to us. Fundamental fairness is that we be able to call these witnesses and allow the Court to rule on the questions as

they're asked. You're the one who ultimately has to decide whether or not they're going to help you. Thank you.

THE COURT: All right. Rebuttal, please?

MR. KARACSONYI: I don't know what the --

MS. FORSBERG: Your Honor, I had a couple of things before we go on. Sorry.

THE COURT: All right.

MR. KARACSONYI: Oh, sorry.

MR. DICKERSON: Just a couple of quick things.

As you know, Your Honor, I am the last attorney involved in this, the most new one on this panel in this case. So, of course, with that being said, I probably had the last review with new eyes of all that trial period that you went through. I probably reviewed all the video transcript most recently than anybody here because I am the last one in. So a couple of issues that just struck me.

On August 31st, if you recall, Mr. Jimmerson filed a motion in limine for their expert Jolla Awanay. But what happened? You let him in, but you said he can't -- he can come in as an expert -- which he has no other role here; he has no role. He didn't work on anybody's books, so he could even testify that way. But you allowed him, said that he could.

He hasn't testified yet because they haven't gotten

to their case-in-chief, if you recall, because it morphed to a settlement conference. It pretty much morphed to a big settlement conference, as you know, from my review of it all. So you allowed that, but you said his report couldn't come in. That was on the day of trial, August 31st, if you recall. So it seems like this unfairness is happening on that side. They wanted theirs, and you allowed it, but now they don't want the trust to have theirs? It just doesn't seem fair, Your Honor, in any way.

The other issue, though, is, after reviewing it all, I think Mr. Solomon covered it, but to reiterate it, if Mr. Burr only testified to how these parties entered their -- entered a trust, I would agree with that total assessment that you made of it, except for he didn't. His testimony went way afield of saying what you could do with trusts, how trusts work legally, and how the law applies. So it seems that it would even be a rebuttal witness against what he had already testified.

So that would be my only two points, Your Honor: That you allowed them to have theirs on the day of trial on the motion in limine by him, but you just excluded the report. I think it should be treated fairly, it should be treated the same.

THE COURT: Very good. Rebuttal, Counsel?

MR. KARACSONYI: Thank you, Your Honor.

I don't know -- I don't know whether they've swayed you or not, Your Honor. But either way, we'd need to -- there are some things that need to be addressed.

First of all, the timeliness issue, under no set of circumstances could they have honestly believed that it was all right to give your expert report 17 days before trial and seven days before trial. Mr. Solomon, Mr. Luszeck, Ms. Forsberg are accomplished enough attorneys to know that, even under non-family law cases, in other civil matters, non-domestic civil matters, everybody has at least 30 days for rebuttal. In family court, it's 60 days. There is no way they could think this was all right.

Now what they acknowledge in their motion is, you know what, we could have done this, had we gotten your permission. The rule provides:

> "The Court, upon good cause shown or by stipulation of the parties, may extend the deadline for exchange of the experts' reports or relieve a party of the duty to prepare a report in an appropriate case."

They point that out to Your Honor as a reason to grant -- to allow these witnesses to testify right now. You knew the rule was there, you're charged with knowledge of it. You could have filed the motion. Now is not the time to argue

that these -- that we should be relieved of our duties. Seventeen days and seven days is simply not enough.

Now they argue, well, we offered you the opportunity to depose them. About what? What are we going to talk to them about, the weather? I mean, we have their names, their names and their addresses. We have nothing to say what their information is going to be.

Now they want to charge us with the duty of serving discovery to find out what it's going to be. Let me ask -- let me tell you how those discovery responses are responded to. Objection, work product, you'll get a written report; objection, work product, call him in for a deposition, start asking him what he's going to testify; work product, we haven't -- we're not done with it. Okay? There was no way we could have deposed these people.

Are they going to argue that we were expected to depose them in the 17 days and seven days before trial? Those are full days, Your Honor, not judicial days; there was a holiday there, too, July 4th. When we're preparing thousands of pages of documents? It's just simply not possible.

This argument they make that they couldn't pay their costs. They never needed permission before to pay costs and fees, including all of Mr. Jimmerson's fees -- or actually, not all of them, but a good portion of them. We have checks

to back that out. The trust expressly provides that the investment trustee, Mr. Nelson, is entitled to employ and compensate attorneys.

You know, Mr. Nelson never really thought he needed much permission from this Court for anything. If you recall, he did lots of transactions, never once with permission. But in an abundance of caution, he just felt this one time, this one time, he needed permission to pay experts, to pay his attorneys' fees? This argument is almost laughable.

Even if that was a concern, whose fault is it that you waited nearly seven months to file the motion requesting the fees and costs. You had this expert, by your own admission, both experts hired in 2011. Here comes March 7th, 2012, you're just filing your motion. You were made a party August 19th, 2011. You voluntarily appeared in this action. You had all your -- you had everything in order. You're not trying to ambush us? It's been 10 months.

As the Court expressly found in one of its recent orders, the motion to pay attorneys' fees and costs was denied. You didn't give them permission to do anything, they didn't need the permission. You also found that they had plenty of fees and costs to pay for that.

In fact, Judge, let's tie this together. You had the money, you found 400,000 to buy the Wyoming property that

we came in here screaming and yelling about, in -- on January 2012; yet, your experts, who you retained in 2011, you couldn't find any money for it, it just wasn't there, needed the Court's permission. Didn't need the Court's permission to go buy a four-hundred-thousand-dollar piece of property and do a seven-hundred-thousand-dollar note, but needed permission to pay your experts?

Now what about the experts? Rushforth. Testimony by experts. They cite you the rule, but it's like they gloss over it. He said, if the testimony -- it's real plain, Your Honor. NRCP 50, real low standard. If it will help you ascertain the facts. Okay? NRS, testimony by experts.

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence, or determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training, or education may testify to matters within the scope of such knowledge."

They said, well, in their report, you know, we just make this blanket statement that Mr. Rushforth is going to testify about the law. I didn't know Mr. Rushforth was qualified in any other area but the law. I've looked over his CV. In fact, I'll tell you what it says, just in the opening

line. It says here:

"Layne T. Rushforth is an attorney, who focuses his practice in matters involving estate planning, business planning, trust administration, and probate."

I don't see that he's a forensic accountant. What can he -- what facts can he help you to understand? The only thing he can testify about is the law. Needless to say, he's not listed -- he doesn't list in his practice areas his specialty is family law. We are sitting, or appearing today in a domestic relations court. This is a divorce action. Yet, Mr. Rushforth doesn't even list domestic relations as an area of specialty. What special knowledge then does he have?

Now we did attach the report. And the reason we attached the report is because, if we didn't attach the report, we felt that the other side would say we didn't present you with adequate information to consider the issue. We apologize for that. We were -- we had contemplated not attaching the report. But we ultimately attached the report because we felt that we had to present to you exactly what it was that we were trying to exclude, and you had to have all the facts before you.

THE COURT: For the record, I didn't read it, the reports, at all.

MR. KARACSONYI: In the document, we purposely only listed one portion of the report: The opinion requested. There was five portions, this is all you need to know.

"I am sending this letter to express my opinions as an expert witness with respect to the following questions: Do the separate property agreement and separate property trust signed by Eric and Lynita Nelson in 1993 affect their property interests, both as to the claims of their creditors and as to their rights between themselves in a divorce proceeding?"

I find it so ironic that they have pounded this drum this whole time about the case law, Judge. The case law says that a witness cannot give an opinion as to the character of property; that a witness' opinion about the character of property should not be considered by the Court. But hey, wait a sec, maybe our party can't, but let's just circumvent the rule. Here's our expert, who's going to tell you the law and the character of property. You can't have it both ways.

I find it ironic, too, Your Honor -- and I'm going to state this objection generally, for today and for the rest of this proceeding -- that the Eric L. Nelson Nevada Trust is here arguing about the separate property agreement. The Eric L. Nelson Nevada Trust has no interest in the separate property agreement. It was not a party to the separate

property agreement, and it is not a third-party beneficiary.

It is well settled, under basic contract law 101, and the rules and the laws of every state in this country, that, in order to sue on a contract, you have to be either in privity or an intended third-party beneficiary. The law of this state is clear on that point.

> "It is axiomatic that a party does not have standing to sue on a contract unless he or she is a party to the contract or an intended third-party beneficiary."

Hartford Fire Insurance v. Trustee of Construction Industrial, 125 Nev. 16, quote:

> "To obtain third-party beneficiary status, there must clearly appear a promise or an intent to benefit the third party; and, ultimately, it must be shown that the third party's reliance thereon is foreseeable."

Lift Seat v. Tracy Inventory Company.

The ELN Trust didn't even exist until 2001. It would have been impossible for them to be an intended third-party beneficiary. In fact, under the terms of the agreement, Paragraph 7, no irrevocable trust could be a third-party beneficiary because the agreement is only -- the only trusts that don't violate the terms of the agreement are revocable

trusts.

So, for them to want to call Mr. Rushforth on matters that don't affect them and they don't have standing on is not allowed, it's not permissible. They can't address anything pre-2001. They just don't have an interest in the subject matter at those points in time. There's two people that do have an interest in the subject matter at that point in time and that were present; that's Eric and Lynita Nelson. Mr. Nelson has already stated his position with respect to that separate property agreement.

They say that we -- that Mr. Burr was presented as an expert, that you allowed him to testify about issues of the law. But guess what? You're the only one that's presented a case. You called Mr. Burr.

It's funny. Ms. Forsberg said that she was probably the last person to look over the testimony. I'm pretty sure I'm the last person that looked over the prior court proceedings. The prior court proceedings show clearly that it was Mr. Jimmerson, Mr. Nelson's attorney, who enlisted -- elicited testimony from Mr. Burr about the intent of the agreement, about the -- what the Judge -- what the Court could do under Nevada law. You elicited the testimony. You can't now take it back. You want to rebut your own elicited testimony?

Now the other things in Mr. Rushforth's report, his next area is:

"Does the trust agreement for the Eric L. Nelson Nevada Trust, May 30th, 2001, create a valid self-settled spendthrift trust, sometimes referred to as an 'asset protection trust,' under Nevada law?"

That's a question of law. The Court decides that.

"If Eric's separate property trust is valid, what is the status of separate property that was transferred to it?"

Again, an area of law.

"Is it possible for property in Eric's separate property trust to become classified as community property?"

The law determines that.

"What is the status of community property, if any, that was transferred to the trust?"

Again, these are all legal questions. There is nothing in here about doing any kind of factual inquiry.

We have cited propositions that directly support our position. I'm sure the Court has gone over them. There's a plethora of evidence. McCormick on Evidence says all courts exclude such extreme conclusory expressions.

In Downer v. Brown Mat, the Court -- the Court went

on to -- or In Re Initial Public Offering Securities, 174 F.Supp. 2nd 61 that we cited, the Southern District of New York cited every single federal appeals court as adopting this rule. What happens is that:

> "The calling of lawyers as expert witnesses to give opinions as to the application of the law to particular facts usurps the duty of the trial court to instruct the jury on the law as applicable to the facts, and results in no more than a modern-day trial by oath."

That's exactly what it is. They're going to get up there and say, we interpret the law this way. Are we to hire three rebuttal experts on the law and say, wait, we outweigh you three to one, we have three lawyers who are willing to support our reading of the law? No, that's not how it works. It's just not allowed.

Now what they cite to you, it's interesting, and they tell you they're important cases. I read the cases. Let me tell you about what happened in Lund. In Lund, the case they tell you is really germane to this argument, Lund, they never actually reach the issue of whether or not the experts could testify about the law. The reason they never reach the issue is because -- just because in the lower court, both sides just went out and hired an expert on the law. Nobody

objected, nobody said anything.

For them to cite that as a piece of -- as a common law case that supports their position is frivolous. That's like me going out and finding some facts, a factual recitation from the Nevada Supreme Court, and saying, look, Judge, they did that in the trial court there, that supports my position. You have to have holdings.

Now they obviously -- if you look at their -- if you look at their brief, they obviously searched wide and far. They've got a Texas case, I think a Massachusetts or -- Massachusetts or Maine case that the citation is incorrect because it couldn't be found. Maybe, perhaps, it's -- you know, I don't know, our system -- our research system. I'm not saying it was intentional or anything like that.

They have the Texas case. It's interesting. The Texas case they cite to you, Judge, clearly states -- hold it, Judge. One second.

(Pause in proceedings.)

MR. KARACSONYI: I apologize. The Court's indulgence -- oh, here it is. It's interesting. It does state one rule of law in that case about this issue, it really does. It says:

"An expert may not give an opinion regarding a question of law because such issues are not for the

fact-finder to determine."

Cite one case that says, I can put an expert up there, and the expert can help advise the Court about the law. They haven't cited that case because it doesn't exist. It does exist in some international contexts, we've seen that; those cases are out there. But in this context, it doesn't exist, and that's why they haven't cited it.

Gardner Joli gave testimony in bolds [sic] about what the -- about what's the reasonable fee, which is a -- based on the work that was performed, okay, about the facts of the case, and what his opinion was of a reasonable fee. We know, under -- under attorneys' fees cases, the Court has to consider whether the fee was reasonable, and attorneys typically call other attorneys to say whether that's a reasonable fee in the community. But they don't call them to apply the law.

What has happened in this case is somewhat tragic. I did go over that testimony. I went over that testimony, and that testimony proves to you conclusively that everything these parties had was community property. But that wasn't good enough because the Court wasn't going to take Eric Nelson's settlement offers and make them its ruling.

So, instead, what he did is this complete about-face. And now what they're trying to do here, and what's

going to happen here is they're going to try to negate six days of testimony. They're not able to do that; judicial estoppel will apply to prevent them from doing that, and we'll get into it.

But the Court had this issue exactly right, when we walked in here today. The analysis was spot-on. And like you said, there's no reason for these witnesses to be able to testify. The only thing that these witnesses could offer is neither of these witnesses have any personal knowledge of the facts or any -- can offer anything to the Court factually. So we would -- we would request that the Court enter its order, in accordance with what was stated today, except for the part about letting Garrity contradict the testimony of Mr. Birch.

MR. SOLOMON: Your Honor, can I be heard just on a couple of matters? He raised a lot of the matters there --

THE COURT: I'll give you a little bit of rebuttal, but then I'll give you a chance to respond. I don't want this to go on forever, but since there are so many issues, I will give you that, so there's a clear record, because it's --

MR. SOLOMON: I appreciate it, Your Honor. And I'm not going to repeat, or try not to repeat what I said, but just with respect to some of the statements he made.

First of all, Your Honor, your order -- he represented that your order did not deal with the issue of

payment to our experts in this case, but it clearly did. In fact, you further ordered that the ELN Trust is directed to pay the sum of $40,000 towards the expert witness fees.

THE COURT: For the record, that's a June 5th, 2012 order --

MR. SOLOMON: Yes.

THE COURT: -- by the Court, just for the record.

MR. SOLOMON: Yes, it is, Your Honor. So you know, that comment that we were outside the order, I don't know where that came from.

There is no reasons they couldn't have asked interrogatories and taken the depositions of these people. Once you designate witnesses, experts as experts and not and consultants, their entire file is open to you, and they were designated as such. So to say that they couldn't have used that device is simply incorrect.

He also said that the law in Nevada prohibits opinion on whether property is community or otherwise. What those cases say is lay opinion, and this is expert opinion. So those also don't apply.

Then to say that we don't have the right to talk about what happened in the separate property agreement as it affects our case? We're not suing on that contract, Your Honor. I agree with that. We don't have standing to sue on

it as the trust.

But we certainly have an interest in showing the Court that the property that was funded into our trust in 2001, where it originated, and the character of the property; that it wasn't community property that was put into that trust without her knowledge and consent. That's what we're going to prove, that's what we're going to have testimony on, and that's going to establish that the community -- I'm sorry -- that the separate property coming into our trust is, in fact, that. So it's an extremely relevant issue to us. And we have the standing and the ability to show that, and intend to do so.

I have read -- I may not have been the last to read, but I don't care. I read Mr. Dickerson -- I'm sorry -- Mr. Burr's testimony, and I told the Court right at the beginning of this case that I need to clean that up. And both trial attorneys -- and they're fine attorneys, I respect Mr. Jimmerson and Mr. Dickerson very, very much. They both weighed in to the issues of law with respect to how these things work and what the law is. And that's because you can't do it in a vacuum, you can't. In order to understand what the parties did, you have to understand why they did it and what the parameters of the law is. And that's permissible. It's done all the time.

It's the -- counsel is correct. I can't bring a witness up here to say, Your Honor, I want you to know, NRS dah, dah, dah says dah, dah, dah, if that's the purpose of his testimony. Everybody agrees that can't be done. But what he can say is Kyle & Kyle did this work, and they were awarded fees under this community standard of five percent, but in my opinion, NRS 155 or 157.035, and Supreme Court Rule 155 should have been the applicable law; and, under that law, he's not entitled to that fee because, and analyze it, and help the Court with the facts. That's done all the time, and that's what we propose to do here.

And again, it's a question-by-question issue. If Your Honor doesn't want to hear the answer to the question, or you think we've invaded something, you'll rule at that point, and we'll move on. But to wholesale keep it out on that type of ground is simply not the law, and deprives us of the ability to present our case, and we believe will deprive the Court of the ability to help understand how to deal with some of the factual issues that you're going to have to make decisions on. And so, for that reason, Your Honor, we again request to be allowed to recall these witnesses.

THE COURT: Well --

MR. KARACSONYI: Just real briefly, to --

THE COURT: It's your motion, so I'll give you the

last word. It's your motion, so you'll get the last word.

MR. KARACSONYI: To protect my integrity, I said that the Court found that it specifically denied their motion for attorneys' fees and costs, effectively denied it. Okay? I'm looking at the order from this Court, entered July 11th, 2012. It was prepared by the Court, actually. Page 3.

THE COURT: I think I prepared a lot of orders the last couple of weeks.

MR. KARACSONYI: Yeah.

"The Court further finds that, as to the ELN Trust's requests to provide language in the order stating that the Court granted, in part, its motion for attorneys' fees and costs, this language does not need to be included, and has been rendered moot by the Court's subsequent order, issued on June 5th, 2012, which directed that the ELN Trust could not utilize the enjoined funds to pay its attorneys' fees and costs and expert fees and costs, thereby effectively denying the ELN Trust's motion."

Again, Judge, they cite to you a few cases where the holding -- the issue of whether a Judge -- whether a party can -- whether an attorney can be called to testify about the law, they don't even reach that issue. I challenge them again, show you a case.

We've cited treatises, we've cited cases from around the country saying that every court holds this way. He hasn't cited a single case that says you can call an expert about the law. Now he wants you to believe that he can call an expert to apply the facts to the law.

You have that opportunity, you have that opportunity in your pretrial memorandum, if it doesn't get stricken for inappropriately putting in a report that shouldn't belong there. You have that opportunity in opening arguments and closing. You have that opportunity by -- via a trial brief. But the Court's job is to apply the facts to the law that are -- that have been found.

It's interesting, when we were here, in their motion, they say -- they talk about how we made this frivolous argument under Chapter 78, that Chapter 78 should apply to alter ego determinations for self-settled spendthrift trusts. We obviously don't agree that it was frivolous.

In fact, the trust statutes that they're going to -- or the alter ego statutes that they're going to rely on were actually passed nine years after -- or eight years after these trusts were created. Prior to that, the only standard you would have had is Chapter 78, and we still think it's applicable.

But they talk about the frivolous argument. Did we

have an -- did we have an opportunity to call an expert? Surely, you can decide that as a matter of law. In fact, they said you did decide it as a matter of law. I don't recall us having the opportunity or an y rule of law that would allow us the opportunity to call in an expert witness to tell you whether Chapter 78 applies.

It was fine when you made that finding without any expert assistance. Now what they want to do, says there right there in Mr. Rushforth's report, he wants to come in here and tell you the standard to apply to alter egos and self-settled spendthrift trusts. They know that's not the law, it's not permissible, and the Court shouldn't allow it here.

THE COURT: Thank you. As far as -- and I won't hear any more arguments. As far as, the Court appreciates both counsels, and I want to give you some direction on that.

Again, I'm still at the point I'm not sure what Mr. Rushforth would add to this Court. I do know I do not practice trust law, but I do my research, I'm prepared. I don't see those issues as being a matter of his testimony would help me as a trier of fact, to make determinations.

The nature of that property will be key, of course, if it's separate and community. I know they've had the separate property agreements, I know all of that from the testimony. So I still don't see how Mr. Rushforth would add

to the Court as a trier of fact in determining a fact that would be important to the Court in its decision.

I've got very competent counsel. Mr. Solomon is very well versed on the issue of -- I imagine that's why he was hired by the trust on that -- very well versed on the law. And I leave it for the attorneys to argue what the law is. And if I need more points and authorities, I'll have the points and authorities, so I'm really not sure what Mr. Rushforth would add to this Court at this time.

Therefore, I'm still inclined to strike Mr. Rushforth as an expert witness, as I do not believe that he will add anything to this Court that would beneficial to the Court, helping to determine key questions of fact, so the Court can come up with a fair and just decision under the law. So I'm still inclined to keep Mr. Rushforth out.

I am concerned about the untimely disclosure, 17 days prior to trial. This is my fault because we do it in family court, and we get criticized all the time, and I stepped right into it; that we run family court like it's not a real court because we're loosey and goosey. I know better than that. I've been doing juvenile for a while, so I kind of lost my focus on you got to keep the foot to the fire, otherwise, we're in all these loosey-goosey everything comes in, and family court becomes a joke, to be quite honest,

because there's no rules and no one applies the rules.

I've had attorneys in family court argue hearsay and tell me, well, Judge, it's family court, hearsay doesn't apply. I mean, that's exactly how ridiculous it's gotten. And I stepped right into on this case by not saying, here's the rules, here's the time frames, and if you screw it up, you don't -- that's because I respected all counsel; I still do.

I respect all counsel, they felt they could resolve this. They've been very amicable. While they have zealously argued issues on behalf of their client, they've always been very professional towards each other and very honorable, all of the attorneys, so I did not feel the need to do that. And again, that was my fault, and that is not saying that the attorneys did anything in bad faith. There's the matter, I should have set it down so I wouldn't be here and spend the first hour, two hours of trial on the motions. But I stepped into it, and it's my fault.

I am going to allow Mr. Garrity to testify. The reason for that, Mr. Garrity has got key questions of fact and he can trace the property, because that's what I need to see, where the property came from, how it got into it. The representations are, is that he was involved with the assets with the trust.

I do not think he's invading the province of Mr.

Birch. Mr. Birch was an accountant because Ms. Nelson was worried that they were hiding things, and he was loosey goosey, and there was a million transactions going back and forth, and promissory notes to family members. So they felt that there was some, maybe just not above, forthright issues by Mr. Nelson, to make sure they could track the estate.

And that's what Mr. Birch was, not to track money going in from the beginning, was it separate, was it -- where it came from. It was what the accounts look like, what the assets look like, and what it looks like now, and what's happened to address the issues. So I believe his goal was completely different that Mr. Garrity, who would have knowledge on the assets of the trust, where the property came from, so this Court can determine character of property, was it separate going in, was it community going in.

Of course, Mr. Nelson could only put property into the Eric Nelson Trust that he had rights to do it. And if was community property, he could not put Ms. Nelson's -- I don't know -- half into that. So that's -- so I think Mr. Garrity -- I think Mr. Garrity has already testified, so I think there's no unfairness to Mr. Dickerson and his client since Mr. Garrity did testify, so they kind of know exactly where he was coming from.

I do think Mr. Rushforth, though, again, would not

add anything. I think he's really getting into the province of more of the law. I'm not sure what he could give me, as far as what facts would help me apply the law, I just don't see it at this point.

However, due to the lateness of that report, the fact that not -- that I do not believe that Mr. Rushforth, at this time, would add anything to this Court that could help the Court as a trier of fact make a determination in this case, I am going to exclude Mr. Rushforth at this time as an expert witness.

And I'm going to allow Mr. Garrity to testify, as I guess I think he's got information that's very necessary to this Court, as far as the character of the property, as far as tracing, so the Court can make those determinations, what was separate, what was community.

I do understand the estate is a separate entity. I do know the estate did not have an opportunity to cross-examine Mr. Burr, or Attorney Burr, I should say. So I do understand Mr. Solomon's concerns, as from the trust, Mr. Nelson's trust, Mr. Nelson's interest is separate than the trust's interests. While we can say they're very strongly correlated, the issue on that, the trust does have a separate interest; and, therefore, they need the change to examine Mr. -- Attorney Burr, to see if, quote, "the right questions were

asked."

This Court, for the record, entertained those six days of trial, thought I could get it resolved if I got that on the table, thought we had it resolved a couple of times because of that testimony. And then we had the trust come in late. That was no fault on that, they had a right to be in from day one. I should have made them -- brought them in for day on that, but it was not raised at that point.

Mr. Nelson knew what was going on. The trust knew exactly what was going on. The fact was, though, they still had the right to be served and get in. That's why Mr. Dickerson stipulated to them coming in, so now I have to give them the right to their discovery and explore that.

But at this time, I do not believe that Mr. Rushforth can add anything to this Court, to help this Court determine a fact that would help this Court render a decision, the ultimate decision as to the character and nature of the property at stake, and the distribution of that property, accordingly.

Number two, I think the attorneys here can address the issues as to the law. I think they're very competent law [sic]. It's a trust, and while I don't practice it all the time, I would do my homework, you can rest assured on that. I've already done a lot of research, will continue to do the

research as these issues come up. I would have done a lot of research already because of the issues as they come up, will continue to do that. And I think the attorneys, if there any issues, I can have them do a post-trial brief or memo as to specific issues, or if they want that, give them a chance to do that as well, to solidify the record on that, to give everybody a chance, in fairness, and to address any legal issues they thought that they may, so I think I can consider that, as well, if I think it's fair and just, to give everybody a chance to make sure that this Court is well versed on the law or other issues it needs to know. And the fact that it was untimely with the report, and as to Mr. Rushforth, I will, for those reasons, grant the motion in limine as to Mr. Rushforth only.

I am going to allow Mr. Garrity to testify because I think his testimony would definitely be beneficial to this Court on key issues, as to the character of the property, was it separate going in, whether the property went into the estate or into the trust, where it came from. I think that's very germane, and therefore allow Mr. Garrity. I do not believe the lateness of his report impacts Ms. Nelson, since he's already testified. I forgot what the dates were before, so he knew exactly what was going on. I knew his position on that. And for those reasons, I will grant the motion in

limine in part, deny it as to Mr. Garrity.

I'm going to deny attorneys' fees at this time because I think these issues were out there, and I think it's my fault for not setting the scheduling order, and therefore, I will deny the request for attorneys' fees at this time, and we'll have an order issued. Mr. Joe, we'll have you submit the order -- Karacsonyi. I can never say your last name, so I'll jut call it "Mr. Joe." How do you pronounce your last name?

MR. DICKERSON: Karacsonyi.

MR. KARACSONYI: Karacsonyi.

THE COURT: Karacsonyi, let me write it down because I keep forgetting. Mr. Karacsonyi --

MR. KARACSONYI: Joe is fine, Your Honor.

THE COURT: -- will prepare the order, subject to --

MR. KARACSONYI: Are we striking the --

THE COURT: I am going to strike all the documents that are attached to the pretrial memo. I would not strike the pretrial memo, but I will strike the documents that were attached thereto. I also will strike your attachment to your motion --

MR. KARACSONYI: Thank you.

THE COURT: -- that had his written report because I didn't read it, and I told my law clerk not to read it. They

did not read any documents, they only read the motions because I wanted to avoid any tainting by the Court, either way, so we have it. So I will strike the documents attached to the pretrial memo, and I will strike the report from Mr. Rushforth that was attached to Ms. Nelson's --

MR. SOLOMON: Your Honor, there's documents other than the reports attached.

THE COURT: Is there --

MR. SOLOMON: So you're just striking the reports, correct?

THE COURT: Well, I wasn't sure what other documents were attached because I don't look at documents attached, because I don't want to read them, because now they're already in the record. They may or may not be appropriate for the evidentiary, I don't know what else was there.

MR. DICKERSON: They have evidentiary value.

THE COURT: What's that?

MR. DICKERSON: I mean, they have no evidentiary value.

THE COURT: Exactly.

MR. DICKERSON: They may be part of the record --

THE COURT: Yeah, yeah.

MR. DICKERSON: -- but they have no evidentiary value.

MR. KARACSONYI: I mean, our position --

MS. PROVOST: It's Burr's -- excerpts from Burr's deposition, excerpts from Koch's deposition --

MR. DICKERSON: This is --

MS. PROVOST: -- and an email from --

MR. KARACSONYI: That's what's attached.

MR. DICKERSON: Yeah. This is --

THE COURT: Do you have a problem with that other stuff being there? I'm not sure because it's just got no evidentiary basis to this Court.

MR. DICKERSON: No, I -- it's just the report, and the report should be stricken.

THE COURT: The report? All right. Give me --

MR. DICKERSON: Just --

MR. SOLOMON: That's my point, Your Honor.

THE COURT: Okay. Just as to the reports then. Okay?

MR. DICKERSON: If I may then, Your Honor?

THE COURT: Sure.

MR. DICKERSON: This is Mr. Garrity's report. Okay? So this is what we were provided with.

THE COURT: Oh, gee.

MR. DICKERSON: I would ask this accommodation.

THE COURT: I say that, for the record, it looks

like it's about three inches.

MR. DICKERSON: It's easily three inches.

THE COURT: At least three inches thick on that. That's the report from Mr. Garrity that you got only 10 days before trial?

MR. DICKERSON: Right.

MS. PROVOST: Yes.

THE COURT: Okay.

MR. DICKERSON: Now here's what I would ask Your Honor, because we do need some accommodations. First, in light of the fact that Mr. Birch is the court-appointed master in this case, I did not take any liberties to make any communication with Mr. Birch about this. I would ask permission to be able to provide Mr. Birth with Mr. Garrity's report, so that when Mr. Birch testifies, he can comment on the report and what Mr. Garrity has done, and the appropriateness of what he's done, and whether it makes sense to me. So I think we can get an opinion out of him, and not a biased opinion, from the Court's expert.

MR. DICKERSON: I would also tell Your Honor that I have provided the report to two individuals that I intend to call for the purposes of responding and commenting about the report and the propriety of the report. And that would be Melissa Attanasio and Joe Lealani. Mr. Lealani has been tied

up on other matters. Ms. Attanasio has -- is in the process, I believe even today, of going through and trying to work on putting together her analysis of it and where she believes the flaws are, and the same thing with Mr. Lealani. So we are not going to -- obviously, Mr. Lealani and Ms. Attanasio would not be able to testify until probably early next week. And I'm going to ask them to get on it as soon as they can, to see if they can devote as much time.

With respect to Mr. Garrity himself, if I could get just a little bit more time to be able to prepare for at least some cross-examination, with the right to be able to reserve that cross and call him next week, to further the cross. But with that being the case, I think you're planning on going until Thursday. If we could plan Mr. Garrity say around Thursday or -- Thursday would be the best.

(Participants confer.)

THE COURT: Does that work for you guys? I don't want --

MR. SOLOMON: I don't know. I have to call him. He was planning -- he was actually planning and due today because he's got a very tight schedule. I'll accommodate, obviously, counsel with respect to the timing issue, and I need to talk to him.

THE COURT: Yeah, talk to Mr. Garrity and see,

because I hate to have to have to call him back. Maybe that might be a leverage to him, if he can just stay a couple -- fly in a little bit later, because I hate to have him -- I don't think they need to call him back as a rebuttal, some of the way to get him, if they felt they didn't have a fair chance to cross-examine. So I'd like to see if he -- if it works Thursday, that probably would be good for everybody. But if he can't, let me know, and we'll figure something else. We'll try -- we'll give everybody --

MR. SOLOMON: I'll do that. I strongly object that the request that Mr. Birch be involved in this. His role, and the role of a -- as Your Honor acknowledged in the order, the role of a special master is fairly limited, and he is not going to be -- shouldn't be called by the Court to comment on the quality of the -- of another expert's testimony. They've got Melissa, they've got Joe. They've been around forever, they know what the issues are. They've reviewed this thing.

It's right within what they've been -- to say that they're not prepared, frankly, Your Honor, is somewhat disingenuous because that is their very position. What Mr. Garrity reports on is the very contrary of what their position is and what they've had the burden to prove all along. So they're prepared. They know what the facts are.

I mean, timing is one thing, but to have another

expert comment on this is just totally inappropriate, in the form of a special master. And I don't think Mr. Birch could do it anyway. And all -- I mean, he's a very confident man, but that's -- you know, that's not what he did. That's not his role. That's the Court's role, to determine whether or not the evidence being presented proves a party's case, and it shouldn't be done by a special master.

THE COURT: Do you want a one-minute rebuttal, Mr. Dickerson?

MR. DICKERSON: Yes, Your Honor. Interestingly, I do respectfully disagree with -- that Mr. Garrity's report is contrary to our position. I actually think there's much in Mr. Garrity report that just kills them, and basically supports exactly what the settlor of the trust told Your Honor with respect to what the intent of the parties was when they entered into their separate property agreements and when they entered into the trust. They're forgetting, the settlor has already testified, and judicial estoppel prevents them from contradicting the settlor's intent that he expressed to this Court.

Now with that, I believe Mr. Birch will tell you that he requested from Mr. Nelson all the information that Mr. Nelson has with respect to the tracing of his properties, and with respect to the debt, and particular with respect to the

issue of debt. And yet, Mr. Nelson never provided him with the documentation that he was requesting. And Mr. Birch is taking the position, if you cannot provide me with the documentation, it doesn't exist. And I think he would confirm that, and he's here in the courtroom right now.

So I -- and I think what you're going to find in Mr. Garrity's report is exactly that. If Eric didn't provide him with the documentation, all Mr. Garrity did is says, okay, Eric, I take you at your word. And that's what you're going to hear and see when Mr. Garrity testifies. And that's why I think it would be important for the Court's expert to be able to review this, and then be able to comment to you as to what he requested from Mr. Nelson, and why he rejected what Mr. Nelson was attempting to provide to him.

MR. SOLOMON: And in fact, it's going to be the opposite. Mr. Garrity is going to testify that he used the documents that went to Mr. Birch for the purposes of that analysis. So it's --

THE COURT: Well, at this time, I'm not going to have Mr. Birch get involved in that. If we need to later on, if I need sometimes, I'll look at that. My issue is Mr. Birch came in for a very limited purpose. I didn't want him to be an expert witness on one side or another. If Mr. Garrity did rely on what he was told, not documents that I can take into

consideration, what weight I give his testimony. But if his testimony was based on what people told him and wasn't at the level of what this Court would expect someone to rely on, then I'll disregard it, all of it, part of it. And so I think that will go based on the cross-examination.

I think Ms. Attanasio and Mr. Lealani can testify as to any flaws that they thought in his analysis. But I want to keep our master out of it, as I thought he really was more just to sit through and see if he can get a handle on what was the estate was, what was there, because they felt things were flying in and out. And that's what I wanted Mr. Birch to do, and not get caught up and be an expert for one side or other, really just to see an accounting, what he thought the estate was, and different types of property on that, as far as what was there, what real estate, things like that. And that really was his role.

I'll leave it to Mrs. -- your people to review that, see what they thought would be the flaws in the report and analysis, and see if you come out that way, instead of Mr. Birch being that. And if -- later on, if it looks like there's some stuff where I need to call Mr. Birch, as far as you thought the documents were not provided, I can look at that time.

But I'd like to keep him out of it at this time. I

don't see the need for it, and I think it can probably be done without Mr. Birch being involved in that aspect of it, as he had a very limited purpose as a master. I think Mr. Garrity's purpose is much different and apart than what Mr. Birch was retained by this -- by the parties to -- as far as from the Court's standpoint. So I'll deny that request to submit it to Mr. Birch at this time.

We will try to accommodate, see if we can get Mr. Garrity late Thursday or early next week, depending on his schedule. And we'll also see with your people on that, see what it looks like. If I need to give it another day here or there next week, I'll make it happen because we need to get it done.

I want to give everybody a fair chance, as much opportunity to be prepared and get everything out on that, because we need to get this done for these -- I mean, these people have been going on this forever, and there's a value to getting it resolved, no matter what happens afterwards, so ...

MR. DICKERSON: Judge, if I may inquire on this. As you recall, we are in the middle of plaintiff's case-in-chief.

THE COURT: Yes.

MR. DICKERSON: How are we proceeding? Is the plaintiff continuing with their case-in-chief, or is the trust now taking over and interrupting that?

MS. FORSBERG: Your Honor, I believe you already --

MR. SOLOMON: I'm glad you raised it.

MS. FORSBERG: -- ruled on that. I mean, before, whenever we started this, you said you would address this issue because it would clear things out. So I believe that we are supposed to be on the issues of the trust, that is what I thought we were supposed to -- you had said you would deal with that first.

THE COURT: I was going to deal with --

MS. FORSBERG: We had asked for a separate day. You said you'd deal with that first, and then the other.

MR. DICKERSON: I don't have any objection --

THE COURT: Okay.

MR. DICKERSON: -- to doing it that way. I just want -- so if can then get an idea of -- I received a call from --

THE COURT: Well, the --

MR. DICKERSON: -- Mr. Solomon last week, with respect to his desire to call Jeff Burr again as a witness. And I believe Mr. Burr was leaving town, so I indicated I had no objection to him calling him today. So I'm assuming --

MR. SOLOMON: Unfortunately, he left.

THE COURT: He already left?

MR. DICKERSON: Oh, he's already out of town?

MR. SOLOMON: Yeah. So he said --

THE COURT: When is he going to be back?

MR. SOLOMON: -- he would like to testify on Wednesday, if possible.

THE COURT: This Wednesday? Okay. We'll accommodate that. We want --

MR. SOLOMON: He's in the middle of his vacation. He's actually flying back for that.

THE COURT: Oh, just for that?

MR. DICKERSON: Oh, I thought he was town. Okay.

MS. PROVOST: In fact, we asked that they tell us if Mr. Burr was not going forward today.

(Participants confer.)

THE COURT: Would Wednesday work for Mr. Burr? Because we'll accommodate Mr. Burr if --

MR. SOLOMON: Yes, he said it would.

THE COURT: Okay.

MR. SOLOMON: We heard from his staff.

MR. DICKERSON: All right. Then what would be the order of the witnesses?

(Participants confer.)

THE COURT: It's about eleven o'clock, as far as housekeeping. Did you guys want to do opening statements, and then break for lunch. I can give you some time right now, and

we can talk about housekeeping, as far as how we deal with witnesses, so we get a time frame. Because we've got Monday, Tuesday, Wednesday, Thursday. And then next week, I think we got Monday and Tuesday.

If I need to kick another day or two -- what I do now is I've got my juvenile calendar being covered by a *pro tem*, which means I'll have twice as much work to do, because they'll continue anything of issue back to me anyway, so I'll have to catch up on that. But I can kick another day or two, if we need to.

I want to get it done for everyone, I want to give everybody as much chance as they can to accommodate the witnesses. So if we need another day or two next week, Wednesday or Thursday, I'll make it happen, if we need to, but ...

MR. SOLOMON: Yeah, I will agree to cooperate on both sides, who we're going to try and call. My problem, Mr. Dickerson, is I expected to call Dan today. I'm not going to do that now, so I need to call some other to get them in here, and I'll do that during the lunch hour.

MR. DICKERSON: Do you know who you'd be calling?

MR. SOLOMON: I'll -- yeah. I'm probably going to try and get all the office people in today, so I'm probably going to get Rochelle and Nola.

(Participants confer.)

MR. DICKERSON: All right. Great.

THE COURT: And then --

MS. FORSBERG: Your Honor, if I could clarify one other housekeeping matter on that, because what you had stated before was that you were going to do the trust things, and hopefully come up with a ruling on that, so we'd know what to move forward on. So is that your plan? I just wondered --

THE COURT: Well --

MS. FORSBERG: -- what the Court's plan is. Are you going to try to resolve that issue, so that it limits it? Because it's either wide open, and we have so much to cover for the Court on the second half, or if you make a ruling, then it just limits it. I'm just wondering what the Court's --

THE COURT: Yeah. Well, I guess it depends on what the evidence is submitted. Because the reality of it is Mr. Garrity coming later in the week on that, this issue has kind of taken over the focus of the trial at this point on that. I'd like to see if I got enough evidence. If I think I can make a ruling at the close of it, I will. If not, we'll sit there and see what we have to do. And if you need more witnesses, we'll give you more time.

I would like -- I was hoping I could get -- that was

language of subsection NRS 166.170(3):

> (3) *A creditor may not bring an action with respect to transfer of property to a spendthrift trust* unless a creditor can prove by clear and convincing evidence that the transfer of property was a fraudulent transfer pursuant to chapter 112 of NRS or that the transfer violates a legal obligation owed to the creditor under a contract or a valid court order that is legally enforceable by that creditor. In the absence of such clear and convincing proof, the property transferred is not subject to the claims of the creditor. *[Emphasis added.]*

(b) *Challenges to the Validity of an SSST.* If a creditor cannot successfully challenge a transfer to an SSST directly, a common tactic is for the creditor to challenge the validity of the trust itself, usually on the grounds that the trust is a "sham" or that the trust is the alter ego of the settlor of the trust without any separate existence.

(c) *The "Sham Trust" Argument.* The concept of a "sham trust" is usually invoked by the Internal Revenue Service in tax-related federal court cases, but the term has appeared in some state court cases as well.

(i) Lack of Economic Substance. In tax cases, a trust is considered a "sham" if there is no "economic substance" to the creation of a trust. That concept does not apply to an SSST, especially when the tax code recognizes that the trust is a grantor trust that has no separate existence for tax-law purposes.

(ii) Lack of Legal Formalities. In state-law cases, the general rule is that a trust is a sham and is not to be recognized if the principal parties have disregarded the legal formalities of the trust.[11] Cases not involving an SSST focus on the settlor's retention of benefits and the settlor's control over the trust, including the influence of the settlor over the trustee.

{A} Influence should not be a factor when determining whether or not an SSST is a sham. Consistent with the public policy reflected in Nevada's legislation relating to spendthrift trusts, two commentators have stated (referring to an SSST as an "APT" or asset-protection trust):[12]

> *[T]here are numerous other reasons that debunk the notion that friendly relations between a trustor and trustee are, by themselves, proof of a sham:*
>
> *a. It is the very nature of a trust relationship that trustors*

[11] See "Sham Trust Theory—Limited Tax Holdings", *Planning and Defending Domestic Asset-protection Trusts*, SS039 ALI-ABA 1741, 1792 and 2 *Asset Protection: Domestic & International Law & Tactics* § 14A:125 for discussions of this topic.

[12] 2 *Asset Protection: Domestic & International Law & Tactics* § 14A:125, footnotes omitted.

will pick trustees they trust, and it should not be surprising that trustees will take care of a trustor-beneficiary.

b. Trustees are supposed to carry out a trustor's intent.

c. Given that trustees are fiduciaries who are supposed to be solicitous of their beneficiaries' best interests, they often make distributions requested by beneficiaries—trustors or nontrustors.

d. The need for a trustee to honor its legal duties to a trustor-beneficiary is most acute precisely when creditors press claims.

e. A trustee's failure to honor its duties during the pendency of a creditor's claim could expose the trustee to claims for breach of duty, and a beneficiary asserting such claims could seek money damages, a declaratory judgment for specific performance of those duties, or other remedies.

f. An APT that functions exactly as required by the terms of the agreement is not a sham.

g. As discussed above, American precedent shows that proper trust administration involving an independent trustee and observing legal formalities will survive a sham challenge.

h. A rule or argument that a sham trust exists simply because a trustee engages in a pattern of trust distributions or other friendly measures to or for a trustor-beneficiary could actually have an undue chilling effect on a trustee's independence.

{B} I know of no facts that would indicate that the formalities of the trust have been disregarded.

D.4 Merger and Alter Ego. A creditor may wish to challenge the recognition of a trust by arguing that the trust and the settlor are merged or that the trust is merely the alter ego for the settlor.

(a) *Merger.* The doctrine of merger for trusts was repudiated in NRS 163.007, which allows the trust to continue as an entity that is separate from its creator, trustee, and beneficiary, even if they are one and the same.

(b) *Alter Ego, Generally.* There is no Nevada statute that specifies what makes a trust the alter ego of its settlor, but NRS 163.418 and NRS 163.4177 provide some guidelines.

(i) The statutory language of NRS 163.418 is as follows:

NRS 163.418 Clear and convincing evidence required to find settlor to be alter ego of trustee of irrevocable trust; certain factors insufficient for finding that settlor controls or is alter ego of trustee of irrevocable trust. Absent clear and convincing evidence, a settlor of an irrevocable trust shall not be deemed to be the alter ego of a trustee of an irrevocable trust. If a party asserts that a settlor of an irrevocable trust is the alter ego of a trustee of the trust, the following factors, alone or in combination, are not sufficient evidence for a court to find that the settlor controls or is the alter ego of a trustee:

1. The settlor has signed checks, made disbursements or executed other documents related to the trust as the trustee and the settlor is not a trustee, if the settlor has done so in isolated incidents.

2. The settlor has made requests for distributions on behalf of a beneficiary.

3. The settlor has made requests for the trustee to hold, purchase or sell any trust property.

4. The settlor has engaged in any one of the activities, alone or in combination, listed in NRS 163.4177.

(ii) The statutory language of NRS 163.4177 is as follows:

NRS 163.4177 Factors which must not be considered exercising improper dominion or control over trust. If a party asserts that a beneficiary or settlor is exercising improper dominion or control over a trust, the following factors, alone or in combination, must not be considered exercising improper dominion or control over a trust:

1. A beneficiary is serving as a trustee.

2. The settlor or beneficiary holds unrestricted power to remove or replace a trustee.

3. The settlor or beneficiary is a trust administrator, general partner of a partnership, manager of a limited-liability company, officer of a corporation or any other manager of any other type of entity and all or part of the trust property consists of an interest in the entity.

4. The trustee is a person related by blood, adoption or marriage to the settlor or beneficiary.

5. The trustee is the settlor or beneficiary's agent, accountant, attorney, financial adviser or friend.

6. The trustee is a business associate of the settlor or beneficiary.

(c) From the documents I have reviewed relating to this case, I found no clear

and convincing evidence that shows that Eric is the alter ego of Eric's SSST.

(i) While other jurisdictions may restrict the role that the settlor of an SSST may play, Nevada law merely requires that all distributions to the settlor are received "only subject to the discretion of another person." [See NRS 166.040(2)(g).[13]] That is the only limitation. NRS 166.040(3) states:

> (3) Except for the power of the settlor to make distributions to himself or herself without the consent of another person, the provisions of this section shall not be construed to prohibit the settlor of a spendthrift trust from holding other powers under the trust, whether or not the settlor is a cotrustee, including, without limitation, the power to remove and replace a trustee, direct trust investments and execute other management powers.

(ii) Lynita has alleged that persons serving as the Distribution Trustee have violated a duty by consenting to distributions requested by Eric.[14] This is a specious argument.

{A} Under NRS 163.419, a trustee given absolute discretion[15] "has no duty to act reasonably in the exercise of that discretion."

{B} Under NRS 166.040(2)(g)[16], the person authorizing a distribution to the settlor of an SSST need not be a trustee at all. Because the spendthrift trusts in this case give the Distribution Trustee absolute discretion, that trustee cannot violate a duty to a beneficiary because neither applicable Nevada law nor the trust instrument imposes any specific duty on the Distribution Trustee except to act within the constraints of the trust agreement.

{C} Although Lynita has alleged that the trust agreement has been violated,[17] her main complaint is that the Distribution Trustee "performed exactly as ERIC instructed".[18] Even if that allegation were true, that does not make Eric's SSST an "alter ego" of Eric because the Distribution Trustee is authorized to do exactly that. The Distribution Trustee has the authority to accept or decline any request. The Distribution Trustee's alleged conduct does not constitute actions that

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[13] As amended by Section 206 of Chapter 270, Statutes of Nevada 2011, at page 102.

[14] See, for example, paragraph 46 on page 19 and paragraph 49 on page 20 of LSN's Counter-Claim.

[15] Subsection 3.1 of the Eric's SSST on page 2.

[16] As amended by Section 205, Chapter 270, Statutes of Nevada 2011, at page 102. Before the amendment, this was covered by NRS 164.040(2)(b).

[17] See, for example, paragraph 45 on page 19 of LSN's Counter-Claim.

[18] Paragraph 46 on page 19 of LSN's Counter-Claim.

are inconsistent with the provisions of the trust and of applicable law.

(d) *Application of NRS 78.747.* NRS 78.747 does not apply to trusts, either by specific application or by analogy.

(i) *Specific Application.* The alter-ego doctrine, as codified in NRS 78.747, clearly applies to corporations and does not apply to trusts. There is no statutory or judicial authority that supports applying that statute to trusts. The public policy reflected in NRS Chapter 166 allows a settlor to create a trust that he can manage, benefit from, and control except as to distributions. Applying the alter-ego rules reflected in the language of NRS 78.747 would frustrate that public policy. It would also contradict the statutes mentioned above, (NRS 163.418 and NRS 163.4177), which specifically relate to trusts.

(ii) *Application by Analogy.* Similarly, there is no authority for applying the principles of NRS 78.747 to trusts by analogy, especially when NRS 163.418 and NRS 163.4177 exist. Under NRS 78.747(2), a person who is a stockholder, director or officer is the alter ego of a corporation if (1) the corporation "is influenced and governed" by that person; (2) the "unity of interest and ownership" is such that the person and the corporation "are inseparable from each other"; AND (3) recognizing the entity as separate "would sanction fraud or promote a manifest injustice." Thus there are three elements of this statute that must be met before it applies. I will discuss the three elements individually, but it is important to understand that all three must exist in order to apply the alter-ego doctrine under NRS 78.747.

{A} Influence and Govern. NRS 78.747(2)(a) requires that the alleged alter ego of the corporation must influence and govern the corporation. When the settlor is a trustee of an SSST (as permitted by law), this element is always applicable; however, NRS 163.417 and 163.4177 specifically provide that this type of involvement by the settlor is insufficient to find that a settlor controls or is the alter ego of the trustees of the trust and "*must not be considered exercising improper dominion or control over the trust*".

{B} Unity of Interest and Ownership. NRS 78.747 requires that as between the alter ego and the corporation there be "such unity of interest and ownership that the corporation and the stockholder, director or officer are inseparable from each other". The Nevada Supreme Court has indicated that as to the "unity of interest and ownership", the factors to be considered are "commingling of funds, undercapitalization, unauthorized diversion of funds, treatment of corporate assets as the individual's own, and failure to observe corporate formalities."[19] I will address those factors individually, as follows:

(I) Commingling. I am unaware of any allegation of commingling of

[19] *Lorenz v. Beltio, Ltd.*, 114 Nev. 795, 808, 963 P.2d 488, 497 (1998)

funds. From what I am aware, the trustees of Eric's SSST have consistently maintained the assets of the trust separate and apart from the assets of Eric, and the trust is authorized to conduct transactions with Eric and others under the terms of the trust instrument and under Nevada law.

(II) Undercapitalization. Undercapitalization is not relevant to any trust.

(III) Unauthorized Diversion of Funds. I am unaware of any alleged facts that would constitute an "unauthorized diversion of funds" in violation of the terms of the trust. To constitute an "unauthorized diversion of funds", a distribution would have to violate the terms of the trust.

(IV) Treating Assets as One's Own. Corporate law does not permit an officer, director, or shareholder to treat corporate assets as their own. In contrast, Nevada spendthrift trust law allows the settlor of an SSST to retain certain indicia of ownership and ownership benefits. Thus, when applied to trusts, the alter-ego doctrine prohibits "treatment of trust assets as the individual's own *in a manner not permitted under the terms of the trust or under applicable law.*" I am unaware of any facts that would show that Eric treated the assets of Eric's SSST in any way that was inconsistent with the terms of the trust or applicable law. To avoid negating NRS Chapter 166 and the public policy reflected therein, Eric's SSST should not be disregarded or treated as a nullity because the settlor retains a degree of control that is allowed by law. NRS Chapter 166 specifically permits the settlor of a spendthrift trust to be a beneficiary without limits as to the benefits received and to have any power except "for the power of the settlor to make distributions to himself or herself without the consent of another person".[20]

(V) Conclusion as to Unity of Interest and Ownership. Without proof that establishes that the settlor has maintained ownership benefits in violation of applicable law or of the trust's terms, the alter-ego doctrine cannot be applied in this case.

{C} *Fraud and Manifest Injustice.* Lynita has alleged fraud and injustice with respect to the transfers to the trust and with respect to distributions from the trust.

(I) Transfers. As to asset transfers, the challenges to those transfers appear to be barred by either (1) the statute of limitations found in NRS 166.170 or (2) by the failure to provide clear and convincing evidence that there is a fraudulent transfer or that the transfer constitutes a violation of an enforceable legal obligation, which means that any fraud or manifest injustice was triggered by the claimant's own action (or inaction). The application of NRS 166.170 to bar the claims of Lynita is no more unjust than the application of any statute of limitation under NRS

[20] NRS 166.040(3).

Chapter 11 or than the application of any exemption under NRS Chapter 21, and even fraud-based claims are barred thereby.

(II) Distributions. As to the distributions made from the trust, there cannot be fraud or manifest injustice when the trust is administered in compliance with the law and with the trust instrument. Unless there is proof that a distribution was made in violation of the terms of the trust or applicable law, there cannot be fraud or manifest injustice.

D.5 *There is No Alter Ego.* After adapting the principles of NRS 78.747 to an SSST and after applying the principals of NRS 163.418 and NRS 163.4177, it is my opinion that there is no alter ego involved in the SSSTs because there is no impermissible influence or control, no impermissible unity of ownership, and no fraud or manifest injustice[21]. A trust is not intended to be a business entity like a corporation, and it is inappropriate to use corporate law to ask a court to disregard an irrevocable trust that has been created and administered in compliance with applicable trust law.

E. STATUTES OF LIMITATION

E.1 In my opinion, transfers to Eric's SSST are subject to the limitations of NRS 166.170, which is discussed below.

(a) The limitations of NRS Chapter 11 may also apply, but if the challenge to a transfer to a spendthrift trust is barred under NRS 166.170, it is barred regardless of any provision in NRS Chapter 11.

(i) NRS 11.190(3)(d) specifically states that NRS 166.170 supersedes the longer period that would otherwise be allowed for allegations of fraud under that provision.

(ii) NRS 166.170(8) reads, "*Notwithstanding any other provision of law, no action of any kind, including, without limitation, an action to enforce a judgment entered by a court or other body having adjudicative authority, may be brought at law or in equity against the trustee of a spendthrift trust if, as of the date the action is brought, an action by a creditor with respect to a transfer to the spendthrift trust would be barred pursuant to this section.*"

(b) In this situation, if a deed of real property to Eric was made in 1993 pursuant to the Separate Property Agreement, any challenge to that deed is beyond the statute of limitations. Actions for the recovery of real property or for the profits therefrom must be made within five years. [NRS 11.070 and 11.080] Those statutes require the person asserting the claim to be "seized or possessed of the premises" within five years, and that

[21] If Lynita alleges "fraud and injustice" with respect to transfers to the SSSTs, those claims are time-barred under NRS 166.170.

would not be true as to Lynita with respect to any deeds of real property to Eric's SSST in 2001.

(c) As to personal property:

(i) NRS 11.190 states that actions based upon a written contract must be brought within six years. If Lynita wanted to assert that Eric made transfers in violation of a contract, any violation asserted within six years prior to the filing of the divorce complaint would be within the statute of limitations. Any breach would have had to occur after May 6, 2003 in order to come within this limitation.

(ii) Even if NRS 166.170 were inapplicable, Lynita's argument to negate transfers to the SSST seem to be based on a side agreement that the Separate Property Agreement was subject to an understanding that it was only binding as against third-party creditors. As stated in subsection B.2, above, evidence of such a side agreement is inadmissible. Even if evidence of a side agreement were admissible, a contract not in writing is subject to the four-year statute of limitations under NRS 11.190. Any breach of the agreement would have had to occur after May 6, 2005 to come within this limitation. Again, it is my opinion that NRS 166.170 applies and not NRS Chapter 11.

(iii) As to any alleged breach of the statutes relating to community property, the breach would have had to occur after May 6, 2006 in order to come within the limitation given in NRS 11.190(3)(a).

E.2 NRS 166.170 provides the statute of limitations relating to transfers to spendthrift trusts. The term "creditor" in that statute refers to "a person who has a claim", as defined in NRS 112.150(4). The first three subsections of NRS 166.170 read as follows:

1. A person may not bring an action with respect to a transfer of property to a spendthrift trust:

(a) If the person is a creditor when the transfer is made, unless the action is commenced within:

(1) Two years after the transfer is made; or

(2) Six months after the person discovers or reasonably should have discovered the transfer,

whichever is later.

(b) If the person becomes a creditor after the transfer is made, unless the action is commenced within 2 years after the transfer is made.

2. A person shall be deemed to have discovered a transfer at the time a public record is made of the transfer, including, without limitation, the conveyance of real property that is

recorded in the office of the county recorder of the county in which the property is located or the filing of a financing statement pursuant to chapter 104 of NRS.

3. A creditor may not bring an action with respect to transfer of property to a spendthrift trust unless a creditor can prove by clear and convincing evidence that the transfer of property was a fraudulent transfer pursuant to chapter 112 of NRS or that the transfer violates a legal obligation owed to the creditor under a contract or a valid court order that is legally enforceable by that creditor. In the absence of such clear and convincing proof, the property transferred is not subject to the claims of the creditor. Proof by one creditor that a transfer of property was fraudulent or wrongful does not constitute proof as to any other creditor and proof of a fraudulent or wrongful transfer of property as to one creditor shall not invalidate any other transfer of property.

E.3 Because Lynita and Eric established their SSSTs concurrently and using the same attorney, and they were aware that the transfers to the SSSTs were from property in their respective 1993 separate property trusts, it is clear that they were aware of the transfers to the SSST. In addition, a notice relating to transfers to the trust was published in *Nevada Legal News* three times commencing on August 23, 2001 [Burr00237]. Thus, even if it is assumed that Lynita had a claim against Eric at the time of any transfer of assets to the SSST, no challenge to that transfer could be asserted more than two years after the date of that transfer.

E.4 Lynita may try to argue that a transfer to Eric's SSST violated "a contract or a valid court order that is legally enforceable by that creditor" within the meaning of NRS 166.170(3). That argument would still fail for at least two reasons:

(a) First, even if that were true, the claim still has to be brought within the two-year time frame given in NRS 166.170(1).

(b) Second, to fit within the statute, the transfer itself must violate an enforceable contract or court order, and I have not seen any contract or court order that specifically prohibited any transfer.

E.5 The two-year statute of limitations under NRS 166.170 begins as of the date the asset is transferred to the trust. Under NRS 163.002, an asset is considered an asset of the trust as soon as it is declared to be an asset by the owner who is the trustee or as soon as it is transferred to another person as trustee.

F. Documents Cited

The documents cited herein are referred to herein using the underlined caption show below, and any number that appears in brackets refers to the Bates numbering on the first page of that document:

F.1 Eric's SSST: The trust established under the trust agreement titled "The Eric L. Nelson Nevada Trust" dated 5/30/2001 [Burr00256].

F.2 LSN's Counter-Claim: Lynita Sue Nelson's (1) Answer to Claims of The Eric L. Nelson Nevada Trust; and (2) Claims for Relief against Eric L. Nelson et al. filed 09/30/2011.

F.3 Separate Property Agreement: The "Separate Property Agreement" dated April 28, 1993, signed by Eric and Lynita [Burr00151].

F.4 Separate Property Trusts: This refers to the Eric L. Nelson Separate Property Trust dated July 13, 1993 [Burr00388] and the Nelson Trust dated July 13, 1993 [Burr00172].

G. Involved Persons

The underlined captions below are shorthand references for the major parties involved in this case.

G.1 Eric: Eric L. Nelson, Plaintiff and Counter-defendant.

G.2 Lynita: Lynita Sue Nelson, Defendant and Counter-claimant.

H. Credentials

H.1 My *Curriculum Vitae* is enclosed.

H.2 A list of recent cases in which I have been engaged as an expert witness is also enclosed.

I. Conclusion

Based on the facts as I presently understand them, it is my opinion that:

I.1 The Separate Property Agreement and Separate Property Trusts signed by Eric and Lynita Nelson in 1993 are binding, both as to the claims of third-party creditors and as to their rights in a divorce proceeding.

(a) The terms of the Separate Property Agreement should be construed from the agreement itself as written, and extrinsic evidence that contradicts the unambiguous meaning of the written agreement is inadmissible.

(b) Even if extrinsic evidence were admissible, the testimony of the drafting attorney confirms that the parties intent is consistent with the terms of the written agreement.

(c) Mr. Burr's testimony also indicates that Lynita's position that there was a binding side agreement or understanding that community property principles would continue to apply despite clear contractual language otherwise would have frustrated the intent of the agreement. The Court cannot properly condone Lynita's acceptance of the separate property agreement as against creditors while arguing that Eric's SSST holds

community property because "a person shall not be allowed at once to benefit by and repudiate an instrument, but, if he chooses to take the benefit which it confers, he shall likewise take the obligations or bear the onus which it imposes."[22].

I.2 The trust agreement titled THE ERIC L. NELSON NEVADA TRUST dated May 30, 2001 ("Eric's SSST") creates a valid self-settled spendthrift trust ("SSST")

I.3 Because Eric's SSST is a valid SSST:

(a) Property in Eric's SSST is no longer his separate property. His interest is a discretionary interest in a trust, as defined in NRS 163.4185(1)(c).

(b) Is it not possible for property in Eric's SSST to become classified as community property because the property is not his. Nevada law does not give him enforceable rights that would allow him to withdraw property unilaterally, and thus ownership of the property cannot be imputed to him. There is no legal authority that allows a spouse to assert a community property interest in property not owned by the other spouse.

(c) If a transfer of community property to Eric's SSST was made by Eric without Lynita's consent, Lynita could challenge that transfer if she raises that challenge within the limitation period given in NRS 166.170.

I.4 NRS 78.747 does not apply to trusts and should not be applied by analogy. The statutes that should be applied are NRS 163.418 and NRS 163.4177. After NRS 163.418 and NRS 163.4177 are applied to this case, Lynita's allegations fail to make a case showing clear and convincing evidence that Eric was the alter ego of, or inappropriately controlled, Eric's SSST. Neither Eric's SSST nor any trustee thereof is the alter ego of anyone because there is no evidence that anyone controlled the trust in any way that violated its terms or applicable law.

I.5 Transfers to Eric's SSST are subject to the limitations of NRS 166.170. The limitations of NRS Chapter 11 may also apply, but if the challenge to a transfer to a spendthrift trust is barred under NRS 166.170, it is barred regardless of any provision in NRS Chapter 11. I have not seen the transfer documents pertinent to transfers to Eric's SSST, but unless the transfers were made less than two years prior to the divorce complaint, they are not subject to challenge.

Sincerely,

Layne T. Rushforth

LAYNE T. RUSHFORTH
layne@rushforth.net

[22] See footnote 6, above.

CURRICULUM VITAE

LAYNE T. RUSHFORTH

THE RUSHFORTH FIRM, LTD.
9505 Hillwood Drive, Suite 100
Las Vegas, Nevada 89134-0514
Telephone: (702) 255-4552
Fax: (702) 255-4677
Internet E-mail: layne@rushforth.net
Web pages: http://rushforthfirm.com and http://rushforth.net/

SUMMARY

Layne T. Rushforth is an attorney who focuses his practice in matters involving estate planning, business planning, trust administration, and probate. Mr. Rushforth is licensed in Utah (since 1978) and in Nevada (since 1981). He has been active in the estate planning community as a lecturer, an author, and an officer of an association of estate planners.

Mr. Rushforth's practice as an attorney from 1978 through the present has focused on the drafting of wills, trusts, contracts, and other legal documents related to estate and business planning. He regularly appears in the Probate Court of the Eighth Judicial District Court in Clark County, Nevada with respect to estate and trust administration matters. His trust and probate practice includes representation before the Probate Court related to will contests and other disputes related to estates and trusts. He has been recognized as an expert witness in estate planning and estate administration matters in both state and federal court proceedings.

CURRENT STATUS

2002-Present: Principal attorney and sole owner of THE RUSHFORTH FIRM, LTD., 9505 Hillwood Drive, Suite 100, Las Vegas, Nevada 89134-0514; Telephone (702) 255-4552; Fax (702) 255-4677.

PRIOR LEGAL CAREER

1996 - 2002: Member of THE BUSCH FIRM, practicing in the firm's Nevada office at 9505 Hillwood Drive, Suite 100, Las Vegas, Nevada 89134. THE BUSCH FIRM closed its Nevada office in 2002. Its primary office is located at 2532 Dupont Drive, Irvine California 92612-1254, Telephone (949) 474-7368.

1990 - 1995: Senior associate with the law firm presently known as BECKLEY SINGLETON, 530 Las Vegas Boulevard South, Las Vegas, Nevada 89101; Telephone (702) 385-3373.

1989 - 1990: Member of the law firm of SEGAL, McMAHAN & RUSHFORTH, CHARTERED, formerly known as OSHINS & SEGAL, CHARTERED, 720 South Fourth Street, Las Vegas,

NV 89101; Telephone (702) 382-5212, one of three professional corporations associated together under the name of "OSHINS, GIBBONS, BERKLEY, SEGAL, BERMAN & WOLFSON, An Association of Professional Corporations". This firm no longer exists.

1988 - 1989: Member and associate of the law firm of RUDIAK, OSHINS, SEGAL & LARSEN, CHARTERED, 720 South Fourth Street, Las Vegas, NV 89101; Telephone (702) 382-5212. (This firm ceased the active practice of law at the end of 1989 after George Rudiak retired and Brent Larsen went into solo practice.)

1981 - 1988: Member of JOHNSON & RUSHFORTH, P.C. (now JOHNSON LAW OFFICES), 530 South Fourth Street, Las Vegas, Nevada 89101; Telephone (702) 384-2830.

1979 - 1981: Associate with the law firm of JACKMAN & ASSOCIATES (now Law Office of FREDERICK A. JACKMAN), 867 North 900 West Street, Orem, UT 84057-7701, Telephone (801) 225-1632.

1978 - 1979: Partner with the law firm of CROOK & RUSHFORTH (now defunct), Orem, UT.

EDUCATION

April, 1978: Graduated *cum laude* from the J. Reuben Clark Law School at Brigham Young University with a Juris Doctor (J.D.) degree.

April, 1975: Graduated *cum laude* from Brigham Young University with a Bachelor of Arts (B.A.) degree in Political Science and Spanish.

RECOGNITION BY PEERS AND COURTS

Recognized as an expert witness in the area of trusts and estate planning in federal and Nevada state courts. Also has collaborated with co-counsel in complex cases, including litigation and disputes relating to trusts and estates. He has also served as a mediator in a trust dispute case. Counsel with whom Mr. Rushforth has associated or for whom he has acted as an expert witness or mediator include the following:

John H. Cotton & Christopher G. Rigler, John H. Cotton & Associates, Las Vegas, Nevada
Mark Solomon, Dana Dwiggins, and Alan Freer, Solomon Dwiggins Freer & Morse, Ltd., Las Vegas, Nevada
Bernard L. Karr, McDonald Hopkins LLC, Cleveland, Ohio
Robert E. Thomson, Esq., Jekel, Howard & Thomson, Scottsdale, Arizona
Steven E. Trytten, Anglin Flewelling Rasmussen Campbell & Trytten, LLP, Pasadena, California
Rob Graham, Rob Graham & Associates, Las Vegas, Nevada
Steve Morris, Morris Pickering & Peterson, Las Vegas, Nevada
John Porter and Stephanie Loomis-Price, Baker & Botts, Houston, Texas

Dominic Campisi, Evans, Latham & Campisi, San Francisco, California
G. Dallas Horton, G. Dallas Horton & Associates, Las Vegas, Nevada
Greg Morris, Morris Ltd. Gregory J. Morris, Ltd., Las Vegas, Nevada
David Johnson, Johnson & Johnson, Las Vegas, Nevada
Alan Harter, Las Vegas, Nevada

Fellow with the American College of Trust and Estate Counsel (ACTEC), which is "an association of lawyers skilled and experienced in: the preparation of wills and trusts; estate planning; probate procedure and administration of trusts and estates of decedents, minors and incompetents." "Fellows are selected on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to these fields through lecturing, writing, teaching and bar activities."[1] Appointed by ACTEC as Nevada State Chair, serving in that office from March 2005 to March 2010.

Listed in the Martindale-Hubbell legal directory with an "AV" rating. Quoting from the Martindale-Hubbell web pages, an "AV Rating shows that a lawyer has reached the height of professional excellence. He or she has usually practiced law for many years, and is recognized for the highest levels of skill and integrity."[2]

Member of the Probate and Trust Section of the State Bar of Nevada, and member of that Section's Legislation Committee, which drafts and submits proposed legislation to the Nevada Legislature to improve Nevada law related to estate and trust administration.

Co-chair of the Legislative Committee of the Probate and Trust Section of the State Bar of Nevada (2012), previously having served as a member of that Committee for several years.

Member of the Southern Nevada Estate Planning Council, which is an association of estate-planning professionals, including certified public accountants, certified life underwriters, trust officers, and attorneys. Served as its president for two years (1986-1988).

Former Board Member of the Nevada Planned Giving Roundtable, an association of estate planners and charitable organizations with the goal of encouraging planned charitable giving. Past president (1997). [This organization ceased to exist in 2003.]

Listed as one of Nevada's top attorneys in the area of "Trusts and Estates" in *The Best Lawyers in America* compiled by Steven Naifeh and Gregory White Smith on the basis of interviews and surveys involving local attorneys. All editions from 1987 through the present.

Former member (1982-1993) and former chairman (1992-1993) of the Clark County Bar Continuing Legal Education Committee.

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[1] See http://www.actec.org/public/MemberInfo.asp.

[2] See http://www.martindale.com/xp/Martindale/Lawyer_Locator/Search_Lawyer_Locator/rating_info.xml.

SEMINARS AND PUBLICATIONS

May 2012: Lecturer for continuing education presentation videotaped in Las Vegas, Nevada titled "Nevada Trust & Estate Law Update; Cases, Revised Statutes & Drafting Tips" sponsored by Life Oak CLE, Inc. (nevadacle.com) and author of a supporting manual with the same title.

September 2011: Lecturer for continuing education presentation in Las Vegas, Nevada titled "Estates and Trusts Under the Microscope: SB 221 Examined". Co-lecturer: Mark Solomon.

June 2010: Lecturer for continuing education presentation videotaped in Las Vegas, Nevada titled "Tips, Tricks, Traps & Pitfalls in Drafting Nevada Trusts" sponsored by Life Oak CLE, Inc. (nevadacle.com) and author of a supporting manual with the same title.

September 2009: Lecturer for continuing education presentation in Las Vegas, Nevada titled "Estate and Probate Legislation Update 2009: Trust, Estate and Guardianship Practices". Co-lecturer: Mark Solomon.

October 2008: Lecturer and author for continuing education presentation in Las Vegas, Nevada titled "Fundamentals of Trust Administration" sponsored by National Business Institute. Co-lecturers: Philip C. Van Alstyne and Kirk D. Kaplan.

June 2008: Lecturer and author for continuing education presentation in Las Vegas, Nevada titled "The 7 Greatest Estate Planning Techniques" sponsored by Lorman Education Services. Co-lecturers: Kim Boyer, Catherine M. Colombo, Briar K. Stall, and S. Craig Stone II.

September 2006: Lecturer for continuing legal education presentations in Las Vegas and Reno, Nevada titled "Drafting Wills and Powers of Attorney in Nevada" and "Drafting Trusts in Nevada" sponsored by Live Oak CLE. Co-lecturer: Scott A. Swain.

November 2005: Lecturer for continuing education presentation in Las Vegas, Nevada titled "Greatest Estate Planning Techniques". Co-lecturers: S. Craig Stone II and Kim Boyer.

April 2005: Lecturer for continuing legal education presentation in Las Vegas and Reno, Nevada titled "Estate Planning" sponsored by the State Bar of Nevada. Co-lecturer: Scott A. Swain.

October 2004: Lecturer for "Representing the Elderly in Nevada", a continuing education presentation sponsored by Professional Education Systems, Inc. Co-lecturers and co-authors of the seminar materials: Kim Boyer, Jasen E. Cassady, and Elyse M. Tyrell.

November 2003: Lecturer for "Fall Planning Update", a continuing education presentation sponsored by the Nevada Community Foundation. Co-lecturers: Jay Larsen, Dara Goldsmith, and Steven Oshins.

October 2003: Lecturer for "Nevada Probate Update" continuing education presentation sponsored by Live Oak CLE.

April 2002: Lecturer for continuing education presentation broadcast nationally via satellite and via Internet webcast from Dallas, Texas titled "Estate Planning Techniques In Response to the 2001 Tax Act" sponsored by Business Professionals Network, Inc. Co-lecturers: Martin (Marty) Satinsky - Isdaner & Company, LLC; Stephanie (Stevie) Casteel - Bank of America Private Bank in Atlanta; and Patrick Pacheco - Davis, Ridout, Jones and Gerstner.

December 2001: Lecturer for continuing education presentation in Las Vegas, Nevada titled "Ethical Considerations in Estate Planning" sponsored by Live Oak CLE.

June 2000: Lecturer for continuing education presentation in Las Vegas and Reno, Nevada titled "Nevada Post-Mortem Planning" sponsored by Professional Education Systems, Inc. Co-lecturer: Scott A. Swain.

December 1998: Lecturer for continuing education presentation in Las Vegas and Reno, Nevada titled "The Estate Administration Course" sponsored by Professional Education Systems, Inc. Co-lecturer: Scott A. Swain.

February 1998: Lecturer for continuing education presentation in Las Vegas and Reno, Nevada titled "Estate Planning Update for Up-and-Comers" sponsored by the State Bar of Nevada. Co-lecturer: Todd Torvinen.

December 1997: Lecturer for continuing education presentation in Las Vegas and Reno, Nevada titled "The Estate Planning Course" sponsored by Professional Education Systems, Inc. Co-lecturer: Scott A. Swain.

June 1997: Lecturer for continuing education presentation titled "Trust and Estates for Dummies" at the Annual Convention for the State Bar of Nevada, Disneyland Hotel, Anaheim, California. Co-lecturer: Greg Morris.

August 1996: Co-Author of article titled "An Analysis of the Final GST Regulations: Certain Planning Issues Still Remain" (Tax Management Memorandum, BNA, August 15, 1996). Co-authors: Allen Walburn and R. Zebulon Law.

June 1995: Lecturer for portion of ethics seminar titled "Ethics in Estate Planning and Estate Administration", Clark County Bar Association,

January 1995: Lecturer for seminar titled "Bridge the Gap", State Bar of Nevada, which was taught in Reno and Las Vegas, Nevada.

December 1993: Lecturer for seminar titled "Estate Administration in Nevada", National Business Institute, Inc. The materials for the seminar were co-authored by Mr. Rushforth, Barbara K. Finley, Stephen C. Moss, and Bradley J. Richardson.

November 1993: Lecturer for seminar titled "The Trust Course", which was sponsored by Professional Education Systems, Inc. Co-lecturer: Gregory J. Morris.

May 1993: Lecturer for seminar titled "Wills & Estates", which was sponsored by the State Bar of Nevada and held in Reno and Las Vegas. He authored sections of the seminar manual titled "Wills and Testamentary Trusts" and "Tips for The Real World", and he co-authored the section titled "Revocable Trusts".

September 1992: Lecturer for seminar titled "The Limited Liability Company", sponsored by William D. Bagley and Philip P. Whynott.

May 1991: Lecturer for seminar titled "Effective Will Drafting", which was sponsored by the State Bar of Nevada and held in Reno and Las Vegas.

March 1991: Lecturer for seminar titled "Medicaid Law, Guardianship Law, and Estate Planning", which was sponsored by Professional Education Systems, Inc. Co-lecturer: Patricia L. Brown. The lecturers co-authored a manual for the seminar.

October 1990: Lecturer for seminar titled "Advising the Family Business", which was sponsored by the State Bar of Nevada.

January 1990: Lecturer for seminar titled "Nevada Practical Probate", which was sponsored by Professional Education Systems, Inc. Co-lecturer: Patricia L. Brown. The lecturers co-authored a manual for the seminar.

September 1989: Lecturer for seminar titled "Nevada Drafting Estate Planning Documents", which was sponsored by Professional Education Systems, Inc. Co-lecturers: Patricia L. Brown and Richard A. Oshins. The lecturers co-authored a manual for the seminar.

December 1987: Lecturer for seminar titled "Basic Probate in Nevada", which was sponsored by Professional Education Systems, Inc. Co-lecturer: Jerome L. Blut. The lecturers co-authored a manual with Robert E. Armstrong, Terrill R. Dory, and John Sande, III.

November 1987: Lecturer for an "Estate Planning Conference" sponsored by the Nevada Society of Certified Public Accountants and the State Bar of Nevada.

January 1987: Lecturer for seminar titled "Nevada Practical Probate", which was sponsored by Professional Education Systems, Inc. Co-lecturer: John G. Gubler. The lecturers co-authored a manual for the seminar.

May 1987: Lecturer for seminar titled "Nevada Estate Planning Trust Drafting", which was sponsored by Professional Education Systems, Inc. Co-lecturer: Patricia L. Brown. The lecturers co-authored a manual for the seminar.

1986: Lecturer for seminar titled "Nevada Practical Probate", which was sponsored by Professional Education Systems, Inc. Co-lecturers were Robert E. Armstrong, George K. Folsom, and John G. Gubler. The lecturers co-authored a manual for the seminar.

1984: Lecturer for seminar titled "Nevada Estate Planning and Probate: The Basics and Beyond", which was sponsored by National Business Institute, Inc. Co-lecturer: Patricia L. Brown. The lecturers co-authored a manual for the seminar.

1983: Principal author of the *Nevada Estate Planning and Probate Handbook* written for the general public, nonattorney estate-planning advisors, and attorneys not specializing in estate planning. The co-author was Charles W. Johnson, and it was published by Johnson & Rushforth, P.C. under the name of the "Nevada Estate Planning Institute".

1982: Lecturer for seminar titled "Nevada Practical Estate Planning", which was sponsored by Professional Education Systems, Inc. His co-lecturer was his partner, Charles W. Johnson. The seminar was attended by attorneys, accountants, trust officers, and paralegals. The lecturers co-authored a manual for the seminar with the same title.

RECENT EXPERT WITNESS EXPERIENCE OF ATTORNEY LAYNE T. RUSHFORTH

I have been involved as an expert witness in these cases during the past five years:

1. 2011: *Burson v. Burson*, Case No. D414217 in the Family Court of the Eighth Judicial District Court in Clark County, Nevada. I have not been informed of the outcome in this case.

   a. The Plaintiff was Roy Burson, and the Defendant was Paula K. Briley, also known as Paula K. Burson. This is a divorce case.

   b. I was retained as an expert witness by EVANS & RIVERA-ROGERS, LTD., counsel for the Defendant. Christina Evans of that firm was subsequently replaced by attorney Michael Warhola. I was engaged to testify as to the validity of a trust schedule declaring certain property to be community property and its effectiveness in transmuting separate property into community property. I was also asked to opine with respect to certain provisions of a limited partnership agreement.

   c. I prepared a written report, and I gave testimony at trial.

2. 2010: *Frei v. Goodsell*, Case No. A-10-619242 in the Eighth Judicial District Court, Clark County, Nevada. This case resulted in a jury verdict for the Defendant.

   a. The Plaintiff is Emil Frei III, and the Defendants are attorney Daniel V. Goodsell and his firm Goodsell & Olsen.

   b. I was retained as an expert witness by the Defendants' counsel, John H. Cotton & Associates. I was engaged to give an opinion as to whether an attorney-client relationship existed between the Plaintiff and the Defendants and whether or not the Defendants had breached a duty of care to a client or potential client. A unique element to this case involves the fact that the Defendants prepared documents for an existing client for signature by the Plaintiff, and the Plaintiff had given the Defendants' client a power of attorney to act for Plaintiff.

   c. I have submitted a report and a response to a report of the Plaintiffs' expert, and my deposition has been taken. Trial was held in February 2011, and I was qualified and testified as an expert witness..

3. 2010: *Leseberg v. Woods et al.*, Case No. A-551940 in the Eighth Judicial District Court, Clark County, Nevada. This case went to trial and was settled during jury deliberations.

   a. The Plaintiffs are Reta Leseberg and Mark Leseberg, and the Defendants are attorney R. Glen Woods and his law firm, Woods Erickson Whitaker Miles & Mauruice, LLC.

   b. I was retained by Solomon, Dwiggins & Freer, counsel for the Plaintiffs. I was asked to give an opinion as to whether or not the Defendants breached the standard of care with respect to their representation of the Plaintiffs concurrently with their representation of the estate of Earl Leseberg and of R. Glen Woods in his capacity as

trustee of various trusts. I have submitted a report and a response to another expert's report, and my deposition was taken. Over a two-day period, I testified at the trial in December of 2010.

4. 2009-2010: *Buck v. Hoffman*, Case No. CV09-00324 in the Second Judicial District Court, Washoe County, Nevada.

   a. The Plaintiffs were Christian Buck and Anne Buck-Fenn. The defendants were John Hoffman (individually and as trustee), Leonard C. Buck (individually and as trustee), and the law firm of Hoffman, Test, Guinan & Collier.

   b. I was retained by counsel for the Plaintiffs, Solomon, Dwiggins & Freer. I was asked to give an opinion as to whether or not the individual Defendants has breached their fiduciary duties in their capacity as the trustees of two different trusts. I have submitted a report and a response to another expert's report, and my deposition was taken. I testified at the trial on June 2, 2010.

5. 2009: *Chingros v. Chingros*, Case No. A-555810 7 in the Eighth Judicial District Court, Clark County, Nevada. This case settled without a trial.

   a. The Plaintiffs were Christopher W. Chingros and Arthur S. Chingros. The Defendants were Carolyn A. Chingros, the William N. Chingros Separate Property Trust dated December 14, 1994, and the Chingros Family Limited Partnership dated December 14, 1994.

   b. I was retained by counsel for the Defendants, Hutchison & Steffen. I submitted a report. A trial was scheduled for the Fall of 2010, but it was settled without my having to testify. I was asked to opine with respect to a trustee's authority to make distributions in kind and the beneficiaries' right to demand a cash distribution under the terms of a trust.

6. 2008: *HSK Living Trust v. Kratke*, Case No. A-532821 in the Eighth Judicial District Court, Clark County, Nevada.

   a. The Plaintiff was the HSK Living Trust. The Defendants were Stephen Kratke, the Kratke Family Trust, and the Steven and Cheryl Kratke 2001 Revocable Trust.

   b. I was retained by counsel for the Defendants, Solomon, Dwiggins & Freer, Ltd. I prepared a report and a response to the rebuttal of another expert, and a brief deposition was taken. The case settled before trial. My opinion related to the division of a married couple's trust upon the death of the first spouse to die, and it included issues involving Nevada law applied to the facts of the case. The legal issues involved in my opinion related to: (a) community property held in a trust; (b) the

revocability of a trust where no right of revocation was reserved; (c) the powers of a trustee; (d) the exercise of a power of appointment by a will containing no specific reference to a power of appointment; and (e) the rules governing the construction of a trust.

Prepared June 27, 2012 as an exhibit to an opinion letter written for the case of *Nelson v. Nelson*, Case No. D-09-411537-D in the Family Court of the Eighth Judicial District Court in Clark County, Nevada.

Exhibit "B"

Nelson - Layne Rushforth Report - EDCR 2.47 Conference

Josef Karacsonyi

Sent: Monday, July 09, 2012 1:16 PM

To: Jeffrey P. Luszeck [jluszeck@sdfnvlaw.com]; Mark Solomon [msolomon@sdfnvlaw.com]; rhonda@ifdlaw.com

Cc: Bob Dickerson; Katherine Provost; Shari Aidukas; File Room

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Dear Mr. Luszeck:

This e-mail shall serve to confirm my conversation with you this afternoon pursuant to EDCR 2.47, wherein I requested that the ELN Trust stipulate to exclude from trial Layne T. Rushforth's testimony and report, and to strike Mr. Rushforth's report from the ELN Trust's Pre-Trial Memorandum. As I stated during our telephone conference, Mr. Rushforth was not timely disclosed as an expert, nor was his report timely produced. Furthermore, it is well established that an expert cannot testify regarding the interpretation of law, or application of facts to law.

You indicated during our telephone conference that you would discuss our request with Mr. Solomon, and that if I do not hear otherwise from you by the end of the day, I am to assume that the ELN Trust will not agree to exclude Mr. Rushforth's testimony and report from trial, and to strike Mr. Rushforth's report from the ELN Trust's Pre-Trial Memorandum.

If you will not agree to exclude Mr. Rushforth's testimony and report from trial, and to strike Mr. Rushforth's report from the ELN Trust's Pre-Trial Memorandum, you will leave us no option but to file a motion tomorrow requesting such relief from the Court. I sincerely hope that it will be not necessary to file such a motion, as I see no valid reason for the ELN Trust to believe that Mr. Rushforth's testimony and report will be admissible at trial. If we are required to file such motion we will be requesting an award of fees and costs.

We appreciate your time and attention to this matter. If you have any questions or concerns, please do not hesitate to contact us.

Best Regards,

Josef Karacsonyi, Esq.

The Dickerson Law Group
Telephone (702) 388-8600
Facsimile (702) 388-0210
1745 Village Center Circle
Las Vegas, Nevada 89134

Exhibit "C"

DECLARATION OF JOSEF M. KARACSONYI, ESQ.

I, JOSEF M. KARACSONYI, declare under penalty of perjury under the law of the State of Nevada that the following statement is true and correct:

1. I am over the age of 18 years. I am an attorney licensed to practice in the State of Nevada and counsel for Defendant, Lynita Sue Nelson, in this action. I have personal knowledge of the facts contained herein, and I am competent to testify thereto.

2. I am making this affidavit in support of DEFENDANT'S MOTION IN LIMINE TO EXCLUDE FROM TRIAL THE TESTIMONY AND REPORT OF LAYNE T. RUSHFORTH, ESQ., AND ANY PURPORTED EXPERT TESTIMONY REGARDING THE INTERPRETATION OF LAW, AND APPLICATION OF FACTS TO LAW; TO STRIKE THE ERIC L. NELSON NEVADA TRUST'S PRE-TRIAL MEMORANDUM; AND FOR ATTORNEYS' FEES AND COSTS ("the Motion").

3. On Friday, July 9, 2012, I had a telephone conference with Jeffrey P. Luszeck, Esq., of Solomon, Dwiggins, Freer & Morse, Ltd., counsel for the ELN Trust, to discuss the issues presented in the Motion. Despite such conference, counsel was unable to resolve the matter satisfactorily.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

DATED this 10th day of July, 2012.

JOSEF M. KARACSONYI

FILED
JUL 11 2 04 PM '12
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

ERIC L. NELSON,

Plaintiff/Counterdefendant,

vs.

LYNITA SUE NELSON, LANA MARTIN, as Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Defendant/Counterclaimants.

LANA MARTIN, Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Crossclaimant,

vs.

LYNITA SUE NELSON,

Crossdefendant.

CASE NO.: D-09-411537-D
DEPT. NO.: O

NOTICE OF ENTRY OF ORDER

FRANK P. SULLIVAN
DISTRICT JUDGE
FAMILY DIVISION, DEPT. O
LAS VEGAS NV 89101

TO:

Rhonda Forsberg, Esq.
Robert Dickerson, Esq.
Mark Solomon, Esq.
Jeffrey Luszeck, Esq.
Larry Bertsch

PLEASE TAKE NOTICE that FINDINGS OF FACT AND ORDER was duly entered in the above-referenced case on the 11th day of July, 2012.

DATED this 11 day of July, 2012.

Lori Parr
Judicial Executive Assistant
Dept. O

FRANK R SULLIVAN
DISTRICT JUDGE
FAMILY DIVISION, DEPT. O
LAS VEGAS NV 89101

ORDR

FILED

JUL 11 2 04 PM '12

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

ERIC L. NELSON,

Plaintiff/Counterdefendant,

vs.

LYNITA SUE NELSON, LANA MARTIN, as Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Defendant/Counterclaimants.

LANA MARTIN, Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Crossclaimant,

vs.

LYNITA SUE NELSON,

Crossdefendant.

CASE NO.: D-09-411537-D
DEPT. NO.: O

FINDINGS OF FACT AND ORDER

This Matter having come before this Honorable Court on Lana Martin, Distribution Trustee of the Eric L. Nelson Nevada Trust and Lynita Nelson's Requests for the Court to consider drafts of two proposed Orders from the hearings this Court held on February 23, 2012

and April 10, 2012 respectively, with the Court having reviewed the language of the proposed Orders and being duly advised in the premises, good cause being shown:

THE COURT HEREBY FINDS that with respect to the February 23, 2012 Order, the impasse between the Eric L. Nelson Nevada Trust (hereinafter, "ELN Trust") and Lynita Nelson concerns whether the Order from this hearing should contain language foreclosing this Court from considering NRS Chapter 78 in its analysis of Lynita Nelson's first and second claims for relief for veil-piercing and reverse veil-piercing respectively, contained in their First Amended Claims for Relief against Eric Nelson and the ELN Trust.

THE COURT FURTHER FINDS that at the hearing on February 23, 2012, this Court essentially stated that one does not analyze alter ego or piercing the veil claims of a Spendthrift Trust under the same criteria as a Corporation since they are created for entirely different purposes and are governed by different statutory schemes (NRS 166 for Spendthrift Trusts and NRS 78 for Corporations).

THE COURT FURTHER FINDS that NRS 78.015 provides that the provisions contained in Chapter 78 expressly apply to Corporations and NRS 78.747 describes when a shareholder, director or officer acts as the "alter-ego" of the Corporation.

THE COURT FURTHER FINDS that NRS Chapter 163 contains provisions that apply to "Trusts" generally, including a statute entitled, "Clear and convincing evidence required to find settlor to be alter ego of trustee of irrevocable trust; certain factors insufficient for finding that settlor controls or is alter ego of trustee of irrevocable trust." NRS 163.418.

THE COURT FURTHER FINDS that even though the Trust at issue in this case is a Spendthrift Trust governed by Chapter 166 of the Nevada Revised Statutes, it is a "type" of

trust nonetheless, and, as such, NRS 78.747 is not the applicable provision for Ms. Nelson's veil-piercing and reverse veil-piercing claims.

THE COURT FURTHER FINDS that excluding NRS 78.747 as the applicable alter-ego provision and applying NRS 163.418 comports with the Legislature's intent evidenced by the fact that it drafted a specific "alter-ego" statute applicable to "Trusts" generally under NRS 163 and did not place a provision in Chapter 166 stating that the statutory provisions of NRS 163 are excluded from being applied to Spendthrift Trusts.

THE COURT FURTHER FINDS that as to the April 10, 2012 Order, the ELN Trust and Lynita Nelson cannot agree on the proposed language in the Order with respect to the following issues: (1) whether the Order should contain language that the ELN Trust's request for attorneys' fees and costs were granted; and (2) the scope of the Court's injunction issued on April 10, 2012.

THE COURT FURTHER FINDS that while the ELN Trust wants to place language in the April 10, 2012 Order that the Court found that its requested amount of attorneys' fees and costs are reasonable and shall be paid, there is no need for this language as it has been rendered moot by the Court's Order issued on June 5, 2012, which addressed the reasonableness and payment of the requested attorney fees.

THE COURT FURTHER FINDS that as to the ELN Trust's request to provide language in the Order stating that the Court granted, in part, its Motion for attorneys' fees and costs, this language does not need to be included and has been rendered moot by the Court's subsequent Order issued on June 5, 2012, which directed that the ELN Trust could not utilize the enjoined funds to pay its attorneys' fees and costs and experts' fees and costs, thereby, effectively denying the ELN Trust's Motion.

NK P. SULLIVAN
DISTRICT JUDGE
LY DIVISION, DEPT. O
S VEGAS NV 89101

THE COURT FURTHER FINDS that as to the scope of the Court's injunction issued on April 10, 2012, the proposed language presented by Lynita Nelson exceeds the scope of the Court's injunction because Ms. Nelson's proposed injunction states that the ELN Trust "shall not incur additional liabilities," which is not consistent with the Court's ruling that as of 3:00 p.m. on April 10, 2012, the ELN Trust is enjoined from acquiring any new assets, and selling or encumbering any existing assets, thereby maintaining the status quo of the ELN Trust, pending the conclusion of the divorce trial.

THEREFORE, IT IS HEREBY ORDERED that this Court directs that the following language be contained in the Order as to Ms. Nelson's veil-piercing and reverse veil-piercing claims from the February 23, 2012 hearing:

> "IT IS HEREBY ORDERED that the provisions contained in NRS 78 are not the appropriate standards to be applied to Lynita Nelson's veil-piercing and reverse veil-piercing claims against the ELN Trust."

IT IS FURTHER ORDERED that this Court shall adopt the language contained in Lynita Nelson's proposed April 10, 2012 Order stating the following:

> "IT IS HEREBY ORDERED that the ELN Trust's Motion for Payment of Attorneys Fees and Costs is taken under advisement with the Court to issue a separate Findings of Fact and written Order on this request."

IT IS FURTHER ORDERED that this Court shall adopt the language contained in the ELN Trust's proposed April 10, 2012 Order stating the following:

> "IT IS FURTHER ORDERED that Defendant's request for additional injunctive relief is GRANTED, and to preserve the status quo of the ELN Trust as of 3:00 p.m. on April 10, 2012, the ELN Trust is enjoined from, and shall not acquire any new or additional assets, encumber existing assets, or sell existing assets without specific Order of the Court.

NK R. SULLIVAN
ISTRICT JUDGE
Y DIVISION, DEPT. O
VEGAS NV 89101

IT IS FURTHER ORDERED that counsel for the ELN Trust shall prepare the Order from the February 23, 2012 hearing consistent with these Findings and Order, and is directed to provide a copy to opposing counsel for review prior to submittal to this Court for signature.

IT IS FURTHER ORDERED that counsel for Lynita Nelson shall prepare the Order from the April 10, 2012 hearing consistent with these Findings and Order, and is directed to provide a copy to opposing counsel for review prior to submittal to this Court for signature.

Dated this 6th day of July, 2012.

Honorable Frank P. Sullivan
District Court Judge – Dept. O

NK P. SULLIVAN
DISTRICT JUDGE
LY DIVISION, DEPT. O
S VEGAS NV 89101

FILED

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

ERIC L. NELSON,

Plaintiff/Counterdefendant,

vs.

LYNITA SUE NELSON, LANA MARTIN, as Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Defendant/Counterclaimants.

LANA MARTIN, Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Crossclaimant,

vs.

LYNITA SUE NELSON,

Crossdefendant.

CASE NO.: D-09-411537-D
DEPT. NO.: O

NOTICE OF ENTRY OF ORDER

FRANK P. SULLIVAN
DISTRICT JUDGE
FAMILY DIVISION, DEPT. O
LAS VEGAS NV 89101

TO:

Rhonda Forsberg, Esq.
Robert Dickerson, Esq.
Mark Solomon, Esq.
Jeffrey Luszeck, Esq.
Larry Bertsch

PLEASE TAKE NOTICE that FINDINGS OF FACT AND ORDER was duly entered in the above-referenced case on the 11th day of July, 2012.

DATED this \\ day of July, 2012.

Lori Parr
Judicial Executive Assistant
Dept. O

FRANK R SULLIVAN
DISTRICT JUDGE
FAMILY DIVISION, DEPT. O
LAS VEGAS NV 89101

ORDR

FILED
JUL 11 2 04 PM '12
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

ERIC L. NELSON,

Plaintiff/Counterdefendant,

vs.

LYNITA SUE NELSON, LANA MARTIN, as Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Defendant/Counterclaimants.

CASE NO.: D-09-411537-D
DEPT. NO.: O

LANA MARTIN, Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Crossclaimant,

vs.

LYNITA SUE NELSON,

Crossdefendant.

FINDINGS OF FACT AND ORDER

This matter having come before this Honorable Court on Defendant Lynita Nelson's Motion for Court Order Directing Larry Bertsch to Examine Transactions Relating to Acquisition and Sale of Wyoming Property, Acquisition and Sale of Phoenix Properties, and Tracing of all Current Assets; Counterdefendant, Cross-defendant, Third-Party Defendant,

Lana Martin, Distribution Trustee of the Eric L. Nelson Nevada Trust's Opposition to Motion for Court Order Directing Larry Bertsch to Examine Transactions Relating to Acquisition and Sale of Wyoming Property, Acquisition and Sale of Phoenix Properties, and Tracing of all Current Assets; and Countermotion to Compel Lynita Nelson's Expert Witness to Return Documents to the ELN Trust; Plaintiff, Eric Nelson's Opposition to Defendant's Motion for Court Order Directing Larry Bertsch to Examine Transactions Relating to Acquisition and Sale of Wyoming Property, Acquisition and Sale of Phoenix Properties, and Tracing of all Current Assets; Defendant Lynita Nelson's Reply to Opposition to Motion for Court Order Directing Larry Bertsch to Examine Transactions Relating to Acquisition and Sale of Wyoming Property, Acquisition and Sale of Phoenix Properties, and Tracing of all Current Assets filed by Eric Nelson, Reply to Opposition to Motion for Court Order Directing Larry Bertsch to Examine Transactions Relating to Acquisition and Sale of Wyoming Property, Acquisition and Sale of Phoenix Properties, and Tracing of all Current Assets filed by the Eric L. Nelson Nevada Trust and Opposition to the Eric L. Nelson Nevada Trust's Countermotion to Compel Return of Documents; Counterdefendant, Cross-defendant, Third-Party Defendant, Lana Martin, Distribution Trustee of the Eric L. Nelson Nevada Trust's Response to New Issues Raised in Lynita Nelson's Reply to Opposition to Motion for Court Order Directing Larry Bertsch to Examine Transactions Relating to Acquisition and Sale of Wyoming Property, Acquisition and Sale of Phoenix Properties, and Tracing of all Current Assets; and Reply to Opposition to Countermotion to Compel Lynita Nelson's Expert Witness to Return Documents to the ELN Trust; and Plaintiff Eric Nelson's Notice of Joinder to Response to New Issues Raised in Lynita Nelson's Reply to Opposition to Motion for Court Order Directing Larry Bertsch to Examine Transactions Relating to Acquisition and Sale of Wyoming Property, Acquisition and Sale of

Phoenix Properties, and Tracing of all Current Assets; and Reply to Opposition to Countermotion to Compel Lynita Nelson's Expert Witness to Return Documents to the ELN Trust, with the Court having reviewed the pleadings and papers filed herein and being duly advised in the premises, good cause being shown:

THE COURT HEREBY FINDS that on May 4, 2012, Lynita Nelson filed a Motion with this Court asking that the Court order the forensic accountant that it appointed, Larry Bertsch, to perform the following tasks: examine all transactions relating to the acquisition and sale of the Wyoming Property (hereinafter, "Wyoming Downs Property"); examine all transactions relating to the acquisition and sale of the "Sycamore Plaza" Phoenix Property and the "Tierra Del Sol" Phoenix Property (hereinafter, "Phoenix Properties"); and trace the source of all current assets held by either the Eric L. Nelson Nevada Trust (hereinafter, "ELN Trust") or the LSN Nevada Trust (hereinafter, "LSN Trust").

THE COURT FURTHER FINDS that Ms. Nelson's request of the Court stems from information that she has discovered regarding the purchase of the Wyoming Downs Property and Mr. and Ms. Nelson's accumulation of assets that they both held in joint tenancy, despite the existence of a Separate Property Agreement that they both entered in 1993.

THE COURT FURTHER FINDS that in its Order issued on June 9, 2011, the Court made the following Order:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that LARRY BERTSCH, CPA and NICHOLAS MILLER, CFE, are appointed by this Court to perform a forensic accounting intended to provide the Court with an accurate evaluation of the parties' estate. Counsel for the parties are to meet separately with the Court appointed experts and confirm the areas they desire the experts to review during their evaluation.

THE COURT FURTHER FINDS that Ms. Nelson represents that her requests for Mr. Bertsch's investigations and subsequent reports are necessary because they will "ensure the

Court has the most accurate information regarding the assets at issue in this divorce at the time of trial."

THE COURT FURTHER FINDS that the ELN Trust argues in its Opposition that Ms. Nelson is essentially requesting that the Court allow Mr. Bertsch to conduct her discovery for the evidentiary hearing, that such request exceeds the scope of Mr. Bertsch's appointment and that Ms. Nelson's specific request that Mr. Bertsch trace the source of all of the assets held by the ELN Trust and the LSN Trust to determine the disposition of the property as either community property or separate property is an improper delegation to a special master of the Court's duty.

THE COURT FURTHER FINDS that Mr. Nelson filed his own Opposition in which he made several of the same arguments as the ELN Trust, but also went into his own theory as to why the Wyoming Downs Property is separate property and requested attorney's fees.

THE COURT FURTHER FINDS that as to Mr. Nelson's argument regarding the classification of the Wyoming Downs property, this Court is not going to entertain Mr. Nelson's theory as he and the ELN Trust will have their opportunity at the evidentiary hearing to establish the classification of the Wyoming Downs property.

THE COURT FURTHER FINDS that as to Mr. Nelson's request for attorney's fees, this Court does not find Ms. Nelson's Motion was filed disingenuously or to delay the trial, and, as such, this Court is not inclined to grant Mr. Nelson's request for reasonable attorney's fees.

THE COURT FURTHER FINDS that the issue before this Court is simply whether or not Ms. Nelson's request for Mr. Bertsch to perform the aforementioned tasks exceeds the scope of this Court's appointment.

THE COURT FURTHER FINDS that NRCP 53 (c) provides that "The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only..."

THE COURT FURTHER FINDS that the Nevada Supreme Court has determined that "Masters are appointed to aid judges in the performance of specific judicial duties...not to place the trial judge into a position of a reviewing court." *Russell v. Thompson,* 96 Nev. 830, 835, 619 P.2d 537, 539 (Nev. 1980).

THE COURT FURTHER FINDS that a Court's referral to a special master is only warranted when it is absolutely necessary, not when the Court simply desires to appoint a special master as this might lead to the Court's delegation of too much authority or power to the special master. *Venetian Casino Resort, LLC v. Eighth Jud. Dist. Ct. of St. ex rel. Co. of Clark,* 118 Nev. 124, 128, 41 P.3d 327, 329 (Nev. 2002) citing *Russell v. Thompson*, 96 Nev. 830, 834, 619 P.2d 537, 540 (Nev. 1980).

THE COURT FURTHER FINDS that in *Thompson,* the Nevada Supreme Court held that a writ of mandamus would properly issue because the Judge, in contravention of NRCP 53, improperly abdicated his judicial duties when he appointed the special master to make determinations as to whether the property at issue was separate or community property, to recommend an appropriate division of the property at issue and/or any alimony, and to provide the Court with a report chronicling his Findings of Fact and Conclusions of Law, forthwith. *Thompson*, at 832, 538.

THE COURT FURTHER FINDS that in *Thompson*, the Nevada Supreme Court agreed with the Colorado Supreme Court's holding that in accordance with Rule 53 of the Colorado Rules of Civil Procedure, which contains a very similar provision that exists in NRCP 53, "...where the issues in a divorce case are not beyond the competence of a court to consider without a master, a reference [to a master] constitutes an unjustified delegation of the court's decision-making powers." *Thompson*, at 834, 539 citing *Gelfond v. Dist. Ct.*, 180 Colo. 95, 504 P.2d 673 (Colo. 1972).

THE COURT FURTHER FINDS that while the ELN Trust argues that Ms. Nelson's request that Mr. Bertsch examine all transactions relating to the acquisition and sale of the Wyoming Downs Property, the Phoenix Properties and trace the source of all current assets held by the ELN Trust and the LSN Trust, respectively, teeters on the brink of this Court abdicating its judicial decision-making authority, this Court does not interpret Ms. Nelson's Motion to include such a request as she is only asking the Court to authorize Mr. Bertsch to trace the source of the properties contained in the respective trusts, not to empower Mr. Bertsch with the authority to make determinations as to the classification of the property..

THE COURT FURTHER FINDS that although Ms. Nelson is not requesting that the Court abdicate its judicial decision-making power in contravention of NRCP 53 and *Thompson*, this Court is not inclined to grant Ms. Nelson's request as it exceeds the scope of this Court's Order issued on June 9, 2011 that Mr. Bertsch perform a forensic accounting of all of the assets at issue in this divorce and their respective streams of income and expenses, not to trace the source of the income used to acquire said properties.

ANK R. SULLIVAN
DISTRICT JUDGE
ILY DIVISION, DEPT. O
\S VEGAS NV 89101

THE COURT FURTHER FINDS that Ms. Nelson's request for Mr. Bertsch to analyze the transactions involved with the Wyoming Downs Property and Phoenix Properties and trace the source of all of the assets held by the ELN Trust and LSN Trust, not only exceeds the scope of Mr. Bertsch's original appointment, but would further delay the start of the July 16, 2012 Evidentiary Hearing.

THE COURT FURTHER FINDS that with respect to the ELN Trust's Countermotion to compel Ms. Nelson's Expert Witness to return original Wells Fargo Bank Statements to the ELN Trust, Ms. Nelson should simply make copies of the documents at issue, subject to reimbursement for copying costs, and provide the originals back to the ELN Trust.

THEREFORE, IT IS HEREBY ORDERED that Ms. Nelson's Motion is DENIED in its entirety.

IT IS FURTHER ORDERED that the ELN Trust's Countermotion to compel the return of the original Wells Fargo Bank Statements is hereby GRANTED, subject to reimbursement for copying costs.

IT IS FURTHER ORDERED that Mr. Nelson's request for attorney's fees is hereby DENIED.

Dated this 13th day of July, 2012.

Honorable Frank P. Sullivan
District Court Judge – Dept. O

TRANS

EIGHTH JUDICIAL DISTRICT COURT

FAMILY DIVISION

CLARK COUNTY, NEVADA

ERIC L. NELSON, Plaintiff, vs. LYNITA NELSON, Defendant.	CASE NO. D-09-411537-D DEPT. L **(SEALED)**

BEFORE FRANK P. SULLIVAN
DISTRICT COURT JUDGE

TRANSCRIPT RE: TRIAL - VOL I

Monday, July 16, 2012

APPEARANCES:

Plaintiff:	ERIC L. NELSON
For the Plaintiff:	RHONDA K. FORSBERG, ESQ. Rhonda K. Forsberg, Chtd. 64 N. Pecos Road, Suite 800 Henderson, Nevada 89074 (702) 990-6468
Defendant:	LYNITA NELSON
For the Defendant:	ROBERT PAUL DICKERSON, ESQ. JOSEF M. KARACSONYI, ESQ. KATHERINE L. PROVOST, ESQ. The Dickerson Law Group 1745 Village Center Las Vegas, Nevada 89134 (702) 388-89134
Intervenors:	LANA MARTIN, TRUSTEE, ET AL
For the Intervenors:	MARK ALAN SOLOMON, ESQ. JEFFREY P. LUSZECK, ESQ. Solomon, Dwiggins & Freer, Ltd 9060 W. Cheyenne Avenue Las Vegas, Nevada 89129 (702) 853-5483

INDEX

WITNESSES

EXHIBITS

(Exhibits Continued)

E X H I B I T S
(Continued)

	Admitted
FOR THE INTERVENORS: (Continued)	
Intervenor Exhibit 41	160
Intervenor Exhibit 42	161
Intervenor Exhibit 43	162
Intervenor Exhibit 45	164
Intervenor Exhibit 46	164
Intervenor Exhibit 47	167
Intervenor Exhibit 48	167
Intervenor Exhibit 49	168
Intervenor Exhibit 50	169
Intervenor Exhibit 52	170
Intervenor Exhibit 53	170
Intervenor Exhibit 54	171
Intervenor Exhibit 55	172
Intervenor Exhibit 56	172
Intervenor Exhibit 58	173
Intervenor Exhibit 59	173
Intervenor Exhibit 60	174
Intervenor Exhibit 61	174
Intervenor Exhibit 62	175
Intervenor Exhibit 64	176
Intervenor Exhibit 65	176
Intervenor Exhibit 66	176
Intervenor Exhibit 67	176
Intervenor Exhibit 68	176
Intervenor Exhibit 70	177
Intervenor Exhibit 71	177
Intervenor Exhibit 72	211
Intervenor Exhibit 73	217
Intervenor Exhibit 77	212
Intervenor Exhibit 99	179
Intervenor Exhibit 100	180
Intervenor Exhibit 101	180
Intervenor Exhibit 103	180
Intervenor Exhibit 105	180
Intervenor Exhibit 106	180
Intervenor Exhibit 107	180
Intervenor Exhibit 108	181

(Exhibits Continued)

E X H I B I T S
(Continued)

	Admitted
FOR THE INTERVENORS: (Continued)	
Intervenor Exhibit 109	181
Intervenor Exhibit 110	181
Intervenor Exhibit 111	181
Intervenor Exhibit 112	181
Intervenor Exhibit 113	181
Intervenor Exhibit 115	182
Intervenor Exhibit 116	182
Intervenor Exhibit 117	182
Intervenor Exhibit 118	182
Intervenor Exhibit 119	183
Intervenor Exhibit 120	183
Intervenor Exhibit 121	183
Intervenor Exhibit 123	183
Intervenor Exhibit 124	183
Intervenor Exhibit 125	183
Intervenor Exhibit 126	184
Intervenor Exhibit 127	184
Intervenor Exhibit 128	184
Intervenor Exhibit 129	184
Intervenor Exhibit 130	184
Intervenor Exhibit 131	184
Intervenor Exhibit 133	185
Intervenor Exhibit 134	186
Intervenor Exhibit 136	186
Intervenor Exhibit 137	186
Intervenor Exhibit 138	186
Intervenor Exhibit 139	186
Intervenor Exhibit 140	186
Intervenor Exhibit 141	187
Intervenor Exhibit 142	187
Intervenor Exhibit 143	187
Intervenor Exhibit 144	187
Intervenor Exhibit 145	187
Intervenor Exhibit 146	187
Intervenor Exhibit 147	188
Intervenor Exhibit 148	188
Intervenor Exhibit 149	209

(Exhibits Continued)

E X H I B I T S
(Continued)

	Admitted
FOR THE INTERVENORS: (Continued)	
Intervenor Exhibit 150	219
Intervenor Exhibit 151	220
Intervenor Exhibit 152	220
Intervenor Exhibit 153	221
Intervenor Exhibit 155	220
Intervenor Exhibit 156	221
Intervenor Exhibit 158	220
Intervenor Exhibit 159	221
Intervenor Exhibit 162	210
Intervenor Exhibit 163	188
Intervenor Exhibit 164	188
Intervenor Exhibit 165	190

LAS VEGAS, NEVADA MONDAY, JULY 16, 2012

PROCEEDINGS

(Proceedings commence at 9:35 a.m.)

THE COURT: This is the time set in the matter of Eric Nelson and Lynita Nelson, Case Number D-411537. We'll get everybody's appearances for the record, and we'll get this show on the road. Start with Mr. Solomon.

MR. SOLOMON: Thank you. Mark Solomon on behalf of Lana Martin, distribution trustee of the ELN Self-Settled Spendthrift Trust.

THE COURT: Thank you.

MR. LUSZECK: Jeff Luszeck on behalf of Lana Martin as distribution trustee of the ELN Self-Settled Spendthrift Trust.

MS. FORSBERG: Rhonda Forsberg on behalf of Eric Nelson.

THE COURT: Good to see you, Mr. Nelson.

MR. DICKERSON: Thank you, Your Honor. Bob --

MS. FORSBERG: Ms. Martin is right there --

THE COURT: Oh, sorry. I see. Okay.

MR. DICKERSON: Good morning. Bob Dickerson. My bar number is 0945. I'm here on behalf of Lynita Nelson, along with Josef Karacsonyi, whose bar number is 10634, and

Katherine Provost, whose bar number is 8414. And Ms. Nelson is here with us.

THE COURT: It's good to see you, as well; Ms. Lynita Nelson, as well.

We're ready to get this matter going. There was a motion in limine filed to exclude the testimony and reports of Daniel Garrity, as well as the attorney in the matter, that's the expert Mr. Rushforth. I have read the motion, the oppositions.

At this time, I'll give some preliminary, and then I'll hear arguments as to that issue. You know, I'm not happy that we're there -- that we're hearing this on a motion in limine. I told the parties to -- I should have set a scheduling order. I've been doing this long enough to know not to leave it to the attorneys, because that's exactly where we end up, where we're at. I'm not happy about it because you should have been able to resolve it. Apparently, we can't resolve anything, from language in orders, I have to resolve every issue between that, and I ain't happy about it.

As far as the issue, it comes down to fundamental fairness. And the position of Mr. Dickerson is that, basically, a trial by ambush, that they get the expert reports by Mr. Rushforth 17 days before trial, and Mr. Garrity 10 days before trial; and, therefore, they're not able to prepare in

detail for cross-examination or rebuttal. I do understand that.

And the other side by Mr. Solomon, and the argument was that they kind of knew who these witnesses were going all the way back to December, so there really was no surprise on the fact, and they had some problems getting the experts done on time, because of money, and getting approval by the Court, to -- in order to pay the experts, so they could do that; and that the Court -- if the Court wanted the rules to apply, the Court would have said the rules apply.

But I left it to the attorneys because, two or three times, we talked about it, and two or three times, the attorney said, no, Judge, we don't need a scheduling order, we can work it out. And I think I even said, I don't want to be on the eve of trial, and have people fighting that they were ambushed or were not given proper notice and things like that. And that's exactly where we're at, so shame on me, to allow that to happen, so ... but it is where it's at.

I'll be honest what my preliminary are, and I'll have you guys argue on it. I ain't stupid. I do know that, as far as an expert, the competency of an expert to allow them in is in the sound discretion of the Court as to competency. The issue is fundamental fairness. If I keep that experts out, is that a reversible error? Could be. And are the

community property because "a person shall not be allowed at once to benefit by and repudiate an instrument, but, if he chooses to take the benefit which it confers, he shall likewise take the obligations or bear the onus which it imposes."[22].

I.2 The trust agreement titled THE ERIC L. NELSON NEVADA TRUST dated May 30, 2001 ("Eric's SSST") creates a valid self-settled spendthrift trust ("SSST")

I.3 Because Eric's SSST is a valid SSST:

(a) Property in Eric's SSST is no longer his separate property. His interest is a discretionary interest in a trust, as defined in NRS 163.4185(1)(c).

(b) Is it not possible for property in Eric's SSST to become classified as community property because the property is not his. Nevada law does not give him enforceable rights that would allow him to withdraw property unilaterally, and thus ownership of the property cannot be imputed to him. There is no legal authority that allows a spouse to assert a community property interest in property not owned by the other spouse.

(c) If a transfer of community property to Eric's SSST was made by Eric without Lynita's consent, Lynita could challenge that transfer if she raises that challenge within the limitation period given in NRS 166.170.

I.4 NRS 78.747 does not apply to trusts and should not be applied by analogy. The statutes that should be applied are NRS 163.418 and NRS 163.4177. After NRS 163.418 and NRS 163.4177 are applied to this case, Lynita's allegations fail to make a case showing clear and convincing evidence that Eric was the alter ego of, or inappropriately controlled, Eric's SSST. Neither Eric's SSST nor any trustee thereof is the alter ego of anyone because there is no evidence that anyone controlled the trust in any way that violated its terms or applicable law.

I.5 Transfers to Eric's SSST are subject to the limitations of NRS 166.170. The limitations of NRS Chapter 11 may also apply, but if the challenge to a transfer to a spendthrift trust is barred under NRS 166.170, it is barred regardless of any provision in NRS Chapter 11. I have not seen the transfer documents pertinent to transfers to Eric's SSST, but unless the transfers were made less than two years prior to the divorce complaint, they are not subject to challenge.

Sincerely,

LAYNE T. RUSHFORTH
layne@rushforth.net

[22]See footnote 6, above.

N:\DOCS\M-Q\Nelson.Eric.6691\Letter.LTR-MAS.2012-06-27.wpd

CURRICULUM VITAE

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SUMMARY

Layne T. Rushforth is an attorney who focuses his practice in matters involving estate planning, business planning, trust administration, and probate. Mr. Rushforth is licensed in Utah (since 1978) and in Nevada (since 1981). He has been active in the estate planning community as a lecturer, an author, and an officer of an association of estate planners.

Mr. Rushforth's practice as an attorney from 1978 through the present has focused on the drafting of wills, trusts, contracts, and other legal documents related to estate and business planning. He regularly appears in the Probate Court of the Eighth Judicial District Court in Clark County, Nevada with respect to estate and trust administration matters. His trust and probate practice includes representation before the Probate Court related to will contests and other disputes related to estates and trusts. He has been recognized as an expert witness in estate planning and estate administration matters in both state and federal court proceedings.

CURRENT STATUS

2002-Present: Principal attorney and sole owner of THE RUSHFORTH FIRM, LTD., 9505 Hillwood Drive, Suite 100, Las Vegas, Nevada 89134-0514; Telephone (702) 255-4552; Fax (702) 255-4677.

PRIOR LEGAL CAREER

1996 - 2002: Member of THE BUSCH FIRM, practicing in the firm's Nevada office at 9505 Hillwood Drive, Suite 100, Las Vegas, Nevada 89134. THE BUSCH FIRM closed its Nevada office in 2002. Its primary office is located at 2532 Dupont Drive, Irvine California 92612-1254, Telephone (949) 474-7368.

1990 - 1995: Senior associate with the law firm presently known as BECKLEY SINGLETON, 530 Las Vegas Boulevard South, Las Vegas, Nevada 89101; Telephone (702) 385-3373.

1989 - 1990: Member of the law firm of SEGAL, McMAHAN & RUSHFORTH, CHARTERED, formerly known as OSHINS & SEGAL, CHARTERED, 720 South Fourth Street, Las Vegas,

NV 89101; Telephone (702) 382-5212, one of three professional corporations associated together under the name of "OSHINS, GIBBONS, BERKLEY, SEGAL, BERMAN & WOLFSON, An Association of Professional Corporations". This firm no longer exists.

1988 - 1989: Member and associate of the law firm of RUDIAK, OSHINS, SEGAL & LARSEN, CHARTERED, 720 South Fourth Street, Las Vegas, NV 89101; Telephone (702) 382-5212. (This firm ceased the active practice of law at the end of 1989 after George Rudiak retired and Brent Larsen went into solo practice.)

1981 - 1988: Member of JOHNSON & RUSHFORTH, P.C. (now JOHNSON LAW OFFICES), 530 South Fourth Street, Las Vegas, Nevada 89101; Telephone (702) 384-2830.

1979 - 1981: Associate with the law firm of JACKMAN & ASSOCIATES (now Law Office of FREDERICK A. JACKMAN), 867 North 900 West Street, Orem, UT 84057-7701, Telephone (801) 225-1632.

1978 - 1979: Partner with the law firm of CROOK & RUSHFORTH (now defunct), Orem, UT.

EDUCATION

April, 1978: Graduated *cum laude* from the J. Reuben Clark Law School at Brigham Young University with a Juris Doctor (J.D.) degree.

April, 1975: Graduated *cum laude* from Brigham Young University with a Bachelor of Arts (B.A.) degree in Political Science and Spanish.

RECOGNITION BY PEERS AND COURTS

Recognized as an expert witness in the area of trusts and estate planning in federal and Nevada state courts. Also has collaborated with co-counsel in complex cases, including litigation and disputes relating to trusts and estates. He has also served as a mediator in a trust dispute case. Counsel with whom Mr. Rushforth has associated or for whom he has acted as an expert witness or mediator include the following:

John H. Cotton & Christopher G. Rigler, John H. Cotton & Associates, Las Vegas, Nevada
Mark Solomon, Dana Dwiggins, and Alan Freer, Solomon Dwiggins Freer & Morse, Ltd., Las Vegas, Nevada
Bernard L. Karr, McDonald Hopkins LLC, Cleveland, Ohio
Robert E. Thomson, Esq., Jekel, Howard & Thomson, Scottsdale, Arizona
Steven E. Trytten, Anglin Flewelling Rasmussen Campbell & Trytten, LLP, Pasadena, California
Rob Graham, Rob Graham & Associates, Las Vegas, Nevada
Steve Morris, Morris Pickering & Peterson, Las Vegas, Nevada
John Porter and Stephanie Loomis-Price, Baker & Botts, Houston, Texas

Dominic Campisi, Evans, Latham & Campisi, San Francisco, California
G. Dallas Horton, G. Dallas Horton & Associates, Las Vegas, Nevada
Greg Morris, Morris Ltd. Gregory J. Morris, Ltd., Las Vegas, Nevada
David Johnson, Johnson & Johnson, Las Vegas, Nevada
Alan Harter, Las Vegas, Nevada

Fellow with the American College of Trust and Estate Counsel (ACTEC), which is "an association of lawyers skilled and experienced in: the preparation of wills and trusts; estate planning; probate procedure and administration of trusts and estates of decedents, minors and incompetents." "Fellows are selected on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to these fields through lecturing, writing, teaching and bar activities."[1] Appointed by ACTEC as Nevada State Chair, serving in that office from March 2005 to March 2010.

Listed in the Martindale-Hubbell legal directory with an "AV" rating. Quoting from the Martindale-Hubbell web pages, an "AV Rating shows that a lawyer has reached the height of professional excellence. He or she has usually practiced law for many years, and is recognized for the highest levels of skill and integrity."[2]

Member of the Probate and Trust Section of the State Bar of Nevada, and member of that Section's Legislation Committee, which drafts and submits proposed legislation to the Nevada Legislature to improve Nevada law related to estate and trust administration.

Co-chair of the Legislative Committee of the Probate and Trust Section of the State Bar of Nevada (2012), previously having served as a member of that Committee for several years.

Member of the Southern Nevada Estate Planning Council, which is an association of estate-planning professionals, including certified public accountants, certified life underwriters, trust officers, and attorneys. Served as its president for two years (1986-1988).

Former Board Member of the Nevada Planned Giving Roundtable, an association of estate planners and charitable organizations with the goal of encouraging planned charitable giving. Past president (1997). [This organization ceased to exist in 2003.]

Listed as one of Nevada's top attorneys in the area of "Trusts and Estates" in *The Best Lawyers in America* compiled by Steven Naifeh and Gregory White Smith on the basis of interviews and surveys involving local attorneys. All editions from 1987 through the present.

Former member (1982-1993) and former chairman (1992-1993) of the Clark County Bar Continuing Legal Education Committee.

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[1]See http://www.actec.org/public/MemberInfo.asp.

[2]See http://www.martindale.com/xp/Martindale/Lawyer_Locator/Search_Lawyer_Locator/rating_info.xml.

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SEMINARS AND PUBLICATIONS

May 2012: Lecturer for continuing education presentation videotaped in Las Vegas, Nevada titled "Nevada Trust & Estate Law Update; Cases, Revised Statutes & Drafting Tips" sponsored by Life Oak CLE, Inc. (nevadacle.com) and author of a supporting manual with the same title.

September 2011: Lecturer for continuing education presentation in Las Vegas, Nevada titled "Estates and Trusts Under the Microscope: SB 221 Examined". Co-lecturer: Mark Solomon.

June 2010: Lecturer for continuing education presentation videotaped in Las Vegas, Nevada titled "Tips, Tricks, Traps & Pitfalls in Drafting Nevada Trusts" sponsored by Life Oak CLE, Inc. (nevadacle.com) and author of a supporting manual with the same title.

September 2009: Lecturer for continuing education presentation in Las Vegas, Nevada titled "Estate and Probate Legislation Update 2009: Trust, Estate and Guardianship Practices". Co-lecturer: Mark Solomon.

October 2008: Lecturer and author for continuing education presentation in Las Vegas, Nevada titled "Fundamentals of Trust Administration" sponsored by National Business Institute. Co-lecturers: Philip C. Van Alstyne and Kirk D. Kaplan.

June 2008: Lecturer and author for continuing education presentation in Las Vegas, Nevada titled "The 7 Greatest Estate Planning Techniques" sponsored by Lorman Education Services. Co-lecturers: Kim Boyer, Catherine M. Colombo, Briar K. Stall, and S. Craig Stone II.

September 2006: Lecturer for continuing legal education presentations in Las Vegas and Reno, Nevada titled "Drafting Wills and Powers of Attorney in Nevada" and "Drafting Trusts in Nevada" sponsored by Live Oak CLE. Co-lecturer: Scott A. Swain.

November 2005: Lecturer for continuing education presentation in Las Vegas, Nevada titled "Greatest Estate Planning Techniques". Co-lecturers: S. Craig Stone II and Kim Boyer.

April 2005: Lecturer for continuing legal education presentation in Las Vegas and Reno, Nevada titled "Estate Planning" sponsored by the State Bar of Nevada. Co-lecturer: Scott A. Swain.

October 2004: Lecturer for "Representing the Elderly in Nevada", a continuing education presentation sponsored by Professional Education Systems, Inc. Co-lecturers and co-authors of the seminar materials: Kim Boyer, Jasen E. Cassady, and Elyse M. Tyrell.

November 2003: Lecturer for "Fall Planning Update", a continuing education presentation sponsored by the Nevada Community Foundation. Co-lecturers: Jay Larsen, Dara Goldsmith, and Steven Oshins.

October 2003: Lecturer for "Nevada Probate Update" continuing education presentation sponsored by Live Oak CLE.

April 2002: Lecturer for continuing education presentation broadcast nationally via satellite and via Internet webcast from Dallas, Texas titled "Estate Planning Techniques In Response to the 2001 Tax Act" sponsored by Business Professionals Network, Inc. Co-lecturers: Martin (Marty) Satinsky - Isdaner & Company, LLC; Stephanie (Stevie) Casteel - Bank of America Private Bank in Atlanta; and Patrick Pacheco - Davis, Ridout, Jones and Gerstner.

December 2001: Lecturer for continuing education presentation in Las Vegas, Nevada titled "Ethical Considerations in Estate Planning" sponsored by Live Oak CLE.

June 2000: Lecturer for continuing education presentation in Las Vegas and Reno, Nevada titled "Nevada Post-Mortem Planning" sponsored by Professional Education Systems, Inc. Co-lecturer: Scott A. Swain.

December 1998: Lecturer for continuing education presentation in Las Vegas and Reno, Nevada titled "The Estate Administration Course" sponsored by Professional Education Systems, Inc. Co-lecturer: Scott A. Swain.

February 1998: Lecturer for continuing education presentation in Las Vegas and Reno, Nevada titled "Estate Planning Update for Up-and-Comers" sponsored by the State Bar of Nevada. Co-lecturer: Todd Torvinen.

December 1997: Lecturer for continuing education presentation in Las Vegas and Reno, Nevada titled "The Estate Planning Course" sponsored by Professional Education Systems, Inc. Co-lecturer: Scott A. Swain.

June 1997: Lecturer for continuing education presentation titled "Trust and Estates for Dummies" at the Annual Convention for the State Bar of Nevada, Disneyland Hotel, Anaheim, California. Co-lecturer: Greg Morris.

August 1996: Co-Author of article titled "An Analysis of the Final GST Regulations: Certain Planning Issues Still Remain" (Tax Management Memorandum, BNA, August 15, 1996). Co-authors: Allen Walburn and R. Zebulon Law.

June 1995: Lecturer for portion of ethics seminar titled "Ethics in Estate Planning and Estate Administration", Clark County Bar Association.

January 1995: Lecturer for seminar titled "Bridge the Gap", State Bar of Nevada, which was taught in Reno and Las Vegas, Nevada.

December 1993: Lecturer for seminar titled "Estate Administration in Nevada", National Business Institute, Inc. The materials for the seminar were co-authored by Mr. Rushforth, Barbara K. Finley, Stephen C. Moss, and Bradley J. Richardson.

November 1993: Lecturer for seminar titled "The Trust Course", which was sponsored by Professional Education Systems, Inc. Co-lecturer: Gregory J. Morris.

May 1993: Lecturer for seminar titled "Wills & Estates", which was sponsored by the State Bar of Nevada and held in Reno and Las Vegas. He authored sections of the seminar manual titled "Wills and Testamentary Trusts" and "Tips for The Real World", and he co-authored the section titled "Revocable Trusts".

September 1992: Lecturer for seminar titled "The Limited Liability Company", sponsored by William D. Bagley and Philip P. Whynott.

May 1991: Lecturer for seminar titled "Effective Will Drafting", which was sponsored by the State Bar of Nevada and held in Reno and Las Vegas.

March 1991: Lecturer for seminar titled "Medicaid Law, Guardianship Law, and Estate Planning", which was sponsored by Professional Education Systems, Inc. Co-lecturer: Patricia L. Brown. The lecturers co-authored a manual for the seminar.

October 1990: Lecturer for seminar titled "Advising the Family Business", which was sponsored by the State Bar of Nevada.

January 1990: Lecturer for seminar titled "Nevada Practical Probate", which was sponsored by Professional Education Systems, Inc. Co-lecturer: Patricia L. Brown. The lecturers co-authored a manual for the seminar.

September 1989: Lecturer for seminar titled "Nevada Drafting Estate Planning Documents", which was sponsored by Professional Education Systems, Inc. Co-lecturers: Patricia L. Brown and Richard A. Oshins. The lecturers co-authored a manual for the seminar.

December 1987: Lecturer for seminar titled "Basic Probate in Nevada", which was sponsored by Professional Education Systems, Inc. Co-lecturer: Jerome L. Blut. The lecturers co-authored a manual with Robert E. Armstrong, Terrill R. Dory, and John Sande, III.

November 1987: Lecturer for an "Estate Planning Conference" sponsored by the Nevada Society of Certified Public Accountants and the State Bar of Nevada.

January 1987: Lecturer for seminar titled "Nevada Practical Probate", which was sponsored by Professional Education Systems, Inc. Co-lecturer: John G. Gubler. The lecturers co-authored a manual for the seminar.

May 1987: Lecturer for seminar titled "Nevada Estate Planning Trust Drafting", which was sponsored by Professional Education Systems, Inc. Co-lecturer: Patricia L. Brown. The lecturers co-authored a manual for the seminar.

1986: Lecturer for seminar titled "Nevada Practical Probate", which was sponsored by Professional Education Systems, Inc. Co-lecturers were Robert E. Armstrong, George K. Folsom, and John G. Gubler. The lecturers co-authored a manual for the seminar.

1984: Lecturer for seminar titled "Nevada Estate Planning and Probate: The Basics and Beyond", which was sponsored by National Business Institute, Inc. Co-lecturer: Patricia L. Brown. The lecturers co-authored a manual for the seminar.

1983: Principal author of the *Nevada Estate Planning and Probate Handbook* written for the general public, nonattorney estate-planning advisors, and attorneys not specializing in estate planning. The co-author was Charles W. Johnson, and it was published by Johnson & Rushforth, P.C. under the name of the "Nevada Estate Planning Institute".

1982: Lecturer for seminar titled "Nevada Practical Estate Planning", which was sponsored by Professional Education Systems, Inc. His co-lecturer was his partner, Charles W. Johnson. The seminar was attended by attorneys, accountants, trust officers, and paralegals. The lecturers co-authored a manual for the seminar with the same title.

RECENT EXPERT WITNESS EXPERIENCE OF ATTORNEY LAYNE T. RUSHFORTH

I have been involved as an expert witness in these cases during the past five years:

1. 2011: *Burson v. Burson*, Case No. D414217 in the Family Court of the Eighth Judicial District Court in Clark County, Nevada. I have not been informed of the outcome in this case.

   a. The Plaintiff was Roy Burson, and the Defendant was Paula K. Briley, also known as Paula K. Burson. This is a divorce case.

   b. I was retained as an expert witness by EVANS & RIVERA-ROGERS, LTD., counsel for the Defendant. Christina Evans of that firm was subsequently replaced by attorney Michael Warhola. I was engaged to testify as to the validity of a trust schedule declaring certain property to be community property and its effectiveness in transmuting separate property into community property. I was also asked to opine with respect to certain provisions of a limited partnership agreement.

   c. I prepared a written report, and I gave testimony at trial.

2. 2010: *Frei v. Goodsell*, Case No. A-10-619242 in the Eighth Judicial District Court, Clark County, Nevada. This case resulted in a jury verdict for the Defendant.

   a. The Plaintiff is Emil Frei III, and the Defendants are attorney Daniel V. Goodsell and his firm Goodsell & Olsen.

   b. I was retained as an expert witness by the Defendants' counsel, John H. Cotton & Associates. I was engaged to give an opinion as to whether an attorney-client relationship existed between the Plaintiff and the Defendants and whether or not the Defendants had breached a duty of care to a client or potential client. A unique element to this case involves the fact that the Defendants prepared documents for an existing client for signature by the Plaintiff, and the Plaintiff had given the Defendants' client a power of attorney to act for Plaintiff.

   c. I have submitted a report and a response to a report of the Plaintiffs' expert, and my deposition has been taken. Trial was held in February 2011, and I was qualified and testified as an expert witness..

3. 2010: *Leseberg v. Woods et al.*, Case No. A-551940 in the Eighth Judicial District Court, Clark County, Nevada. This case went to trial and was settled during jury deliberations.

   a. The Plaintiffs are Reta Leseberg and Mark Leseberg, and the Defendants are attorney R. Glen Woods and his law firm, Woods Erickson Whitaker Miles & Mauruice, LLC.

   b. I was retained by Solomon, Dwiggins & Freer, counsel for the Plaintiffs. I was asked to give an opinion as to whether or not the Defendants breached the standard of care with respect to their representation of the Plaintiffs concurrently with their representation of the estate of Earl Leseberg and of R. Glen Woods in his capacity as

trustee of various trusts. I have submitted a report and a response to another expert's report, and my deposition was taken. Over a two-day period, I testified at the trial in December of 2010.

4. 2009-2010: *Buck v. Hoffman,* Case No. CV09-00324 in the Second Judicial District Court, Washoe County, Nevada.

a. The Plaintiffs were Christian Buck and Anne Buck-Fenn. The defendants were John Hoffman (individually and as trustee), Leonard C. Buck (individually and as trustee), and the law firm of Hoffman, Test, Guinan & Collier.

b. I was retained by counsel for the Plaintiffs, Solomon, Dwiggins & Freer. I was asked to give an opinion as to whether or not the individual Defendants has breached their fiduciary duties in their capacity as the trustees of two different trusts. I have submitted a report and a response to another expert's report, and my deposition was taken. I testified at the trial on June 2, 2010.

5. 2009: *Chingros v. Chingros*, Case No. A-5558107 in the Eighth Judicial District Court, Clark County, Nevada. This case settled without a trial.

a. The Plaintiffs were Christopher W. Chingros and Arthur S. Chingros. The Defendants were Carolyn A. Chingros, the William N. Chingros Separate Property Trust dated December 14, 1994, and the Chingros Family Limited Partnership dated December 14, 1994.

b. I was retained by counsel for the Defendants, Hutchison & Steffen. I submitted a report. A trial was scheduled for the Fall of 2010, but it was settled without my having to testify. I was asked to opine with respect to a trustee's authority to make distributions in kind and the beneficiaries' right to demand a cash distribution under the terms of a trust.

6. 2008: *HSK Living Trust v. Kratke*, Case No. A-532821 in the Eighth Judicial District Court, Clark County, Nevada.

a. The Plaintiff was the HSK Living Trust. The Defendants were Stephen Kratke, the Kratke Family Trust, and the Steven and Cheryl Kratke 2001 Revocable Trust.

b. I was retained by counsel for the Defendants, Solomon, Dwiggins & Freer, Ltd. I prepared a report and a response to the rebuttal of another expert, and a brief deposition was taken. The case settled before trial. My opinion related to the division of a married couple's trust upon the death of the first spouse to die, and it included issues involving Nevada law applied to the facts of the case. The legal issues involved in my opinion related to: (a) community property held in a trust; (b) the

revocability of a trust where no right of revocation was reserved; (c) the powers of a trustee; (d) the exercise of a power of appointment by a will containing no specific reference to a power of appointment; and (e) the rules governing the construction of a trust.

Prepared June 27, 2012 as an exhibit to an opinion letter written for the case of *Nelson v. Nelson*, Case No. D-09-411537-D in the Family Court of the Eighth Judicial District Court in Clark County, Nevada.

FILED
7/11/12

MLIM
THE DICKERSON LAW GROUP
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Attorneys for Defendant

DISTRICT COURT

FAMILY DIVISION

CLARK COUNTY, NEVADA

ERIC L. NELSON, Plaintiff/Counterdefendant, v. LYNITA SUE NELSON, Defendant/Counterclaimant.	CASE NO. D-09-411537-D DEPT NO. "O"
ERIC L. NELSON NEVADA TRUST dated May 30, 2001, and LSN NEVADA TRUST dated May 30, 2001, Necessary Parties (joined in this action pursuant to Stipulation and Order entered on August 9, 2011	DATE OF HEARING: TIME OF HEARING:
LANA MARTIN, as Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001, Necessary Party (joined in this action pursuant to Stipulation and Order	

entered on August 9, 2011)/ Purported Counterclaimant and Crossclaimant,

v.

LYNITA SUE NELSON and ERIC NELSON,

Purported Cross-Defendant and Counterdefendant,

LYNITA SUE NELSON,

Counterclaimant, Cross-Claimant, and/or Third Party Plaintiff,

v.

ERIC L. NELSON, individually and as the Investment Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001; the ERIC L. NELSON NEVADA TRUST dated May 30, 2001; LANA MARTIN, individually, and as the current and/or former Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001, and as the former Distribution Trustee of the LSN NEVADA TRUST dated May 30, 2001); NOLA HARBER, individually, and as the current and/or former Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001, and as the current and/or former Distribution Trustee of the LSN NEVADA TRUST dated May 30, 2001; ROCHELLE McGOWAN, individually; JOAN B. RAMOS, individually; and DOES I through X,

Counterdefendant, and/or Cross-Defendants, and/or Third Party Defendants.

NOTICE: YOU ARE REQUIRED TO FILE A WRITTEN RESPONSE TO THIS MOTION WITH THE CLERK OF THE COURT AND TO PROVIDE THE UNDERSIGNED WITH A COPY OF YOUR RESPONSE WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS MOTION. FAILURE TO FILE A WRITTEN RESPONSE WITH THE CLERK OF THE COURT WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS MOTION MAY RESULT IN THE REQUESTED RELIEF BEING GRANTED BY THE COURT WITHOUT HEARING PRIOR TO THE SCHEDULED HEARING DATE.

DEFENDANT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY AND REPORT OF DANIEL T. GERETY, CPA

COMES NOW Defendant/Counterclaimant, LYNITA SUE NELSON ("Lynita"), by and through hers attorneys, ROBERT P. DICKERSON, ESQ., KATHERINE L. PROVOST, ESQ., and JOSEF M. KARACSONYI, ESQ., of THE DICKERSON LAW GROUP, and submits the following Memorandum of Points and Authorities in support of her Motion in Limine.

This Motion is made and based upon the following Memorandum of Points and Authorities, the attached Declaration, all papers and pleadings on file herein, as well as oral argument of counsel as may be permitted at the hearing on this matter.

DATED this 10th day of July, 2012.

THE DICKERSON LAW GROUP

By _____

ROBERT P. DICKERSON, ESQ.
Nevada Bar No. 000945
KATHERINE L. PROVOST, ESQ.
Nevada Bar No. 008414
JOSEF M. KARACSONYI, ESQ.
Nevada Bar No. 010634
1745 Village Center Circle
Las Vegas, Nevada 89134
Attorneys for Defendant

NOTICE OF MOTION

TO: ERIC L. NELSON, Plaintiff;

TO: RHONDA K. FORSBERG, ESQ., of FORSBERG & DOUGLAS, Attorneys for Plaintiff;

TO: MARK A. SOLOMON, ESQ., and JEFFREY P. LUSZECK, ESQ., of SOLOMON, DWIGGINS & FREER, LTD., Attorneys for the Eric L. Nelson Nevada Trust;

PLEASE TAKE NOTICE that the undersigned will bring the foregoing DEFENDANT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY AND REPORT OF DANIEL T. GERETY, CPA, on for hearing before the above-entitled Court on _____, 2012 at _____ a.m./p.m.

THE DICKERSON LAW GROUP

By _____

ROBERT P. DICKERSON, ESQ.
Nevada Bar No. 000945
KATHERINE L. PROVOST, ESQ.
Nevada Bar No. 008414
JOSEF M. KARACSONYI, ESQ.
Nevada Bar No. 010634
1745 Village Center Circle
Las Vegas, Nevada 89134
Attorneys for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

A. Procedural History

Plaintiff, Eric L. Nelson ("Eric"), and Defendant, Lynita Sue Nelson ("Lynita"), were married on September 17, 1983. They have been married for nearly 29 years. During this lengthy marriage the parties have been blessed with five children. Three of the parties' children are now adults. Custody of the remaining two (2) minor children has been resolved by the parties' Stipulated Parenting Agreement that was entered as an Order of this Court on February 8, 2010.

On May 6, 2009, Eric filed his Complaint for Divorce initiating this action. Prolonged litigation followed including eight (8) days of trial conducted between August 2010 and November 2010. This action is set for a continuation of trial proceedings beginning July 16, 2012.

On Thursday, July 6, 2012, a mere ten (10) days before the continuation of Trial, Third-Party Defendant, Lana Martin ("Ms. Martin"), in her capacity as Distribution Trustee of the Eric L. Nelson Nevada Trust (the "ELN Trust"), produced the ELN Trust's Fifth Supplemental Disclosure, formally listing Daniel T. Gerety, CPA ("Mr. Gerety") as a purported expert witness for the ELN Trust for the first time, and producing for the first time a written report prepared by Mr. Gerety. [1]

Mr. Gerety's report is improper in that it purports to interpret for the Court the "trust accounting of the Eric L. Nelson Nevada Trust," and the "contingent non-contingent debt of the trust," the very same matters addressed by the court's Special

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[1] Mr. Gerety was previously disclosed as an expert witness for Eric Nelson, in Mr. Nelson's First Supplemental NRCP 16.1 Disclosure of Witnesses and Documents on July 7, 2010. This Disclosure indicated Mr. Gerety "may be called to testify with regard to the absence of value of the Plaintiff's business. He is anticipated to give his opinion regarding the absence of value of the business and his reasons therefore. Tax considerations and costs to the parties as they affect certain assets of the parties will also be a subject of likely testimony." Mr. Gerety testified at trial in this matter, as to those designated issues only, on October 20, 2010.

Master, Larry Bertsch, CPA in his reports to the Court. Pursuant to NRCP 53(e)(2), "in an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous." Eric and the ELN Trust had the ability to challenge Mr. Bertsch's reports through the process identified in NRCP 53. Specifically, "[w]ithin 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the Court for action upon . . . objections thereto shall be by motion and upon notice as prescribed in Rule 6(d)." The ELN Trust failed to do so. Now, on the eve of trial, the ELN Trust seeks admittance of Mr. Gerety's expert opinions as to the same matters analyzed by Mr. Bertsch.

II. Legal Analysis

A. Motions in limine.

Eighth Judicial District Court Rules, Rule 2.47 (2012), provides:

> Unless otherwise provided for in an order of the court, all motions in limine to exclude or admit evidence must be in writing and filed not less than 45 days prior to the date set for trial and must be heard not less than 14 days prior to trial.
>
> (a) The court may refuse to sign orders shortening time and to consider any oral motion in limine and any motion in limine which is not timely filed or noticed.
>
> (b) Motions in limine may not be filed unless an unsworn declaration under penalty of perjury or affidavit of moving counsel is attached to the motion setting forth that after a conference or a good-faith effort to confer, counsel have been unable to resolve the matter satisfactorily. A "conference" requires a personal or telephone conference between or among counsel. Moving counsel must set forth in the declaration/affidavit what attempts to resolve the matter were made, what was resolved, what was not resolved and the reasons therefore. If a personal or telephone conference was not possible, the declaration/affidavit shall set forth the reasons.

As set forth in the "Introduction and Factual Statement," above, the ELN Trust did not formally disclose Mr. Gerety as a proposed expert witness, or Mr. Gerety's report, until July 5, 2012, eleven (11) days prior to Trial. Accordingly, it was

impossible for Lynita to file this motion in limine within the time period prescribed by EDCR 2.47, and this Motion should be considered by the Court.

Furthermore, on July 9, 2012, Lynita's counsel, Katherine L. Provost, Esq., conducted a telephone conference with the ELN Trust's counsel, Jeffrey P. Luszeck, Esq., in a good-faith effort to address the issues presented herein as required by EDCR 2.47(b). During this call, Mr. Luszeck confirmed that the ELN Trust would not stipulate to the exclusion of Mr. Gerety as an expert witness or to the exclusion of his expert report, necessitating this Motion.

B. The ELN Trust failed to timely disclose Daniel Gerety as an expert, and to timely produce Mr. Gerety's report, and Mr. Gerety must not be permitted to testify at the continuation of Trial in this matter.

Nevada Rules of Civil Procedure, Rule 16.2(a)(3) (2012)("Disclosure of Expert Testimony"), provides:

> (A) In addition to the disclosures required by paragraphs (1) and (2), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under NRS 50.275, 50.285, and 50.305. These disclosures must be made within 90 days after the financial disclosures are required to be filed and served under Rule 16.2(a)(1) or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (3)(B), within 60 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under Rule 26(e)(1).
>
> (B) Except as otherwise stipulated or directed by the court, a party who retains or specially employs a witness to provide expert testimony in the case, or whose duties as an employee of the party regularly involve giving expert testimony, shall deliver to the opposing party a written report prepared and signed by the witness, within 60 days before trial. The court, upon good cause shown or by stipulation of the parties, may extend the deadline for exchange of the experts' reports or relieve a party of the duty to prepare a written report in an appropriate case. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding 4 years.

NRS 50.275 provides:

> **Testimony by experts.** If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

On August 9, 2011, the parties, through counsel, stipulated to join the ELN Trust and LSN Nevada Trust, dated May 1, 2001 (the "LSN Trust"), as necessary parties to this action. On August 19, 2011, Attorney Mark Solomon, on behalf of Ms. Martin and the ELN Trust, filed an initial Notice of Appearance, followed by an Answer to Eric's Complaint for Divorce, as well as Counterclaims and Cross-claims against Eric and Lynita, respectively. Despite joining this action on August 19, 2011, the ELN Trust waited over ten (10) months to formally disclose Mr. Gerety as a proposed expert witness in this matter on behalf of the Trust, and to produce a report from Mr. Gerety. These disclosures were made a mere eleven (11) days before Trial is scheduled to resume. As Mr. Gerety's October 20, 2010 trial appearance was challenged due to his failure to provide an expert report to Lynita's counsel prior to his trial appearance, Mr Gerety was well aware of the need to provide an expert report well-prior to the July 5, 2012 disclosure at issue in this Motion.

NRCP 16.2(a)(3), and its counterpart for civil actions not involving domestic relations, NRCP 16.1(a)(2), limit the time periods for parties to disclose expert witnesses and reports. Specifically, NRCP 16.2(a)(3) requires parties to disclose expert witnesses 135 days (4.5 months) after service of the summons and complaint (financial disclosure forms are due forty-five (45) days after service of the summons and complaint pursuant to NRCP 16.2(a)(1), and expert disclosures are required ninety (90) days thereafter), and to produce a report from any proposed expert at least sixty (60) days prior to trial. NRCP 16.1(a)(2) requires parties to disclose experts and reports at least ninety (90) days before the discovery cut-off (absent extraordinary circumstances). The purpose of these rules is to prevent trial by ambush, and to allow

any other party to an action receiving an expert disclosure and report from another party sufficient time to analyze and conduct discovery concerning same, and to retain an expert to contradict or rebut such experts/reports. In fact, NRCP 16.2(a)(1)(A) allows parties receiving an expert disclosure from another party sixty (60) days to designate a rebuttal expert, and to produce his or her report, and NRCP 16.1(a)(2) allows parties receiving an expert disclosure from another party thirty (30) days from the date of such disclosure to disclose a rebuttal expert, and to produce his or her report.

There is absolutely no justification for the ELN Trust to have waited until eleven (11) days prior to the continuation of trial to formally disclose Mr. Gerety as a proposed expert and produce his report. The timing of such disclosure does not afford Lynita sufficient or reasonable time to analyze and conduct discovery regarding Mr. Gerety's report, or to disclose a rebuttal expert and report. NRCP 16.2(a)(1) and 16.1(a)(2) were enacted to prevent exactly this situation. Accordingly, Mr. Gerety must be excluded from further testifying or offering any opinions in this matter at trial.

B. All of Mr. Rushforth's purported "expert opinions" involve interpretation of law, and application of alleged facts to law, and are wholly inadmissible at trial.

Assuming that the ELN Trust had timely disclosed Mr. Gerety as an expert witness, and timely produced Mr. Gerety's report, which clearly the ELN Trust did not, the opinions the ELN Trust seeks to elicit from Mr. Gerety are wholly inadmissible. Nevada Revised Statutes, Section 50.275 (2012), provides:

> **Testimony by experts.** If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

(Emphasis added). Mr. Gererty's testimony is not being offered to help this Court to understand the evidence in this matter, or to assist the Court to determine a fact in issue. Rather, Mr. Gerety's expert report, submitted eleven (11) days prior to trial,

endeavors to create fact. Within his expert report Mr. Gerety reports that he has made adjustments to the ELN Trust's books . . . to correct the books. As his expert opinion is not based upon the true books and records of the ELN Trust (which were provided to and reviewed by Mr. Bertsch), but rather, Mr. Gerety's creative accounting, Mr. Gerety cannot in any manner assist the trier of fact to understand the evidence or to determine a fact in issue.

NRS 125.070 provides, "The judge of the court shall determine all questions of law and fact arising in any divorce proceeding under the provisions of [Chapter 125]." It shall be this Court's job to determine if Mr. Bertsch's reports are clearly erroneous, based upon the evidence previously elicited at trial and the testimony and evidence to be presented at the continuation of trial. If such a finding cannot be made, then the Court shall accept the master's findings of fact.

For the foregoing reasons, the Court should exclude Mr. Gerety from further testifying at the upcoming continuation of trial in this matter, as an expert, or in any other manner, and should enter an Order prohibiting the ELN Trust and Eric from seeking to introduce adjusted books and records through Mr. Gerety or any other witness at trial.

D. Lynita should be awarded her fees and costs for this Motion.

NRS 18.010 permits litigants to recover their attorneys' fees where the Court finds that a claim or defense of an opposing party was maintained without reasonable ground or to harass the prevailing party. As set forth in subparagraph B of this Legal Analysis, the ELN Trust was severely untimely in disclosing Mr. Gerety's report to Lynita and her counsel. Furthermore, as was set forth in subparagraph C of this Legal Analysis, the opinions the ELN Trust seek to elicit from Mr. Gerety at trial are not based upon the true books and records of the ELN Trust (which were provided to and reviewed by Mr. Bertsch), but rather, Mr. Gerety's creative accounting. Lynita's

counsel contacted the ELN Trust's counsel prior to filing the instant motion to determine if the issue of Mr. Gerety's testimony and report could be resolved without the need for litigation. The ELN Trust indicated it would not stipulate to the exclusion of Mr. Gerety as an expert witness or to the exclusion of his expert report, necessitating this Motion.

Pursuant to *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), in awarding reasonable fees and costs to Lynita this Court will need to make specific findings regarding the quality of Lynita's advocates, the character of the work done in this Motion, the work actually performed, and the result. It is impossible at this time to provide the Court with a total amount of time spent towards this Motion, as a Reply to the ELN Trust's opposition (if any) to Lynita's Motion, and a Court appearance, will undoubtedly be required. In the event, however, that the Court rules in Lynita's favor after the hearing in this matter, it is requested that Lynita be allowed to submit the total amount of time spent, and fees incurred in connection with this Motion, and offer suggested findings regarding the award of fees and costs.

III. CONCLUSION

Based upon the foregoing analysis and authorities, Lynita respectfully requests that the Court enter an Order granting this Motion in its entirety, and Order the ELN Trust to pay all fees and costs associated with this Motion.

DATED this 10th of July, 2012.

THE DICKERSON LAW GROUP

By _____

ROBERT P. DICKERSON, ESQ.
Nevada Bar No. 000945
KATHERINE L. PROVOST, ESQ.
Nevada Bar No. 008414
JOSEF M. KARACSONYI, ESQ.
Nevada Bar No. 010634
1745 Village Center Circle
Las Vegas, Nevada 89134
Attorneys for Defendant

DECLARATION OF KATHERINE L. PROVOST, ESQ.

I, KATHERINE L. PROVOST, declare under penalty of perjury under the law of the State of Nevada that the following statement is true and correct:

1. I am over the age of 18 years. I am an attorney licensed to practice in the State of Nevada and counsel for Defendant, Lynita Sue Nelson, in this action. I have personal knowledge of the facts contained herein, and I am competent to testify thereto.

2. I am making this affidavit in support of DEFENDANT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY AND REPORT OF DANIEL T. GERETY, CPA (the "Motion").

3. I have read the Motion and swear, to the best of my knowledge, that the facts as set forth therein are true and accurate, save and except any fact stated upon information and belief, and as to such facts I believe them to be true. I hereby reaffirm said facts as if set forth fully herein to the extent that they are not recited herein. If called upon by this Court, I will testify as to my personal knowledge of the truth and accuracy of the statements contained therein.

4. On July 9, 2012, I conducted a telephone conference with the ELN Trust's counsel, Jeffrey P. Luszeck, Esq., in a good-faith effort to address the issues presented herein as required by EDCR 2.47(b). During this call, Mr. Luszeck confirmed that the ELN Trust would not stipulate to the exclusion of Mr. Gerety as an expert witness or to the exclusion of his expert report, necessitating this Motion.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

DATED this 10th day of July, 2012.

KATHERINE L. PROVOST

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am serving via U.S. Mail, a true and correct copy of the foregoing DEFENDANT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY AND REPORT OF DANIEL T. GERETY, CPA, to the following at their last known addresses on this 10th day of July, 2012.

RHONDA K. FORSBERG, ESQ .
FORSBERG & DOUGLAS
1070 W. Horizon Ridge Pkwy., Ste. 100
Henderson, Nevada 89012
Attorneys for Plaintiff

MARK A. SOLOMON, ESQ.
JEFFREY P. LUSZECK, ESQ.
SOLOMON, DWIGGINS, FREER & MORSE, LTD.
9060 W. Cheyenne Avenue
Las Vegas, Nevada 89129

An employee of The Dickerson Law Group

0001

DISTRICT COURT

CLARK COUNTY, NEVADA

ERIC L. NELSON Plaintiff(s), -vs- LYNITA SUE NELSON Defendant(s).	CASE NO. D411537 DEPT. NO. O **FAMILY COURT MOTION/OPPOSITION FEE INFORMATION SHEET (NRS 19.0312)**

Party Filing Motion/Opposition: ☐ Plaintiff/Petitioner ☒ Defendant/Respondent

MOTION FOR OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY AND REPORT OF DANIEL T. GERETY, CPA

Motions and Oppositions to Motions filed after entry of a final order pursuant to NRS 125, 125B or 125C are subject to the Re-open filing fee of $25.00, unless specifically excluded. (NRS 19.0312)

NOTICE:
If it is determined that a motion or opposition is filed without payment of the appropriate fee, the matter may be taken off the Court's calendar or may remain undecided until payment is made.

Mark correct answer with an "X."

1. No final Decree or Custody Order has been entered. ☒ YES ☐ NO

2. This document is filed solely to adjust the amount of support for a child. No other request is made.
☐ YES ☒ NO

3. This motion is made for reconsideration or a new trial and is filed within 10 days of the Judge's Order
If YES, provide file date of Order: _____
☐ YES ☒ NO

If you answered YES to any of the questions above, you are not subject to the $25 fee.

Motion/Opposition ☐ IS ☒ IS NOT subject to $25 filing fee

Dated this 10th of July, ~~200~~ 2012

Shari Aidukas
Printed Name of Preparer

Shari Aidukas
Signature of Preparer

MLIM
THE DICKERSON LAW GROUP
ROBERT P. DICKERSON, ESQ.
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Attorneys for Defendant

DISTRICT COURT

FAMILY DIVISION

CLARK COUNTY, NEVADA

ERIC L. NELSON, Plaintiff/Counterdefendant, v. LYNITA SUE NELSON, Defendant/Counterclaimant.	CASE NO. D-09-411537-D DEPT NO. "O"
ERIC L. NELSON NEVADA TRUST dated May 30, 2001, and LSN NEVADA TRUST dated May 30, 2001, Necessary Parties (joined in this action pursuant to Stipulation and Order entered on August 9, 2011	Date of Hearing: Time of Hearing:
LANA MARTIN, as Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001, Necessary Party (joined in this action pursuant to Stipulation and Order	

entered on August 9, 2011)/ Purported Counterclaimant and Crossclaimant,

v.

LYNITA SUE NELSON and ERIC NELSON,

Purported Cross-Defendant and Counterdefendant,

LYNITA SUE NELSON,

Counterclaimant, Cross-Claimant, and/or Third Party Plaintiff,

v.

ERIC L. NELSON, individually and as the Investment Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001; the ERIC L. NELSON NEVADA TRUST dated May 30, 2001; LANA MARTIN, individually, and as the current and/or former Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001, and as the former Distribution Trustee of the LSN NEVADA TRUST dated May 30, 2001); NOLA HARBER, individually, and as the current and/or former Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001, and as the current and/or former Distribution Trustee of the LSN NEVADA TRUST dated May 30, 2001; ROCHELLE McGOWAN, individually; JOAN B. RAMOS, individually; and DOES I through X,

Counterdefendant, and/or Cross-Defendants, and/or Third Party Defendants.

NOTICE: YOU ARE REQUIRED TO FILE A WRITTEN RESPONSE TO THIS MOTION WITH THE CLERK OF THE COURT AND TO PROVIDE THE UNDERSIGNED WITH A COPY OF YOUR RESPONSE WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS MOTION. FAILURE TO FILE A WRITTEN RESPONSE WITH THE CLERK OF THE COURT WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS MOTION MAY RESULT IN THE REQUESTED RELIEF BEING GRANTED BY THE COURT WITHOUT HEARING PRIOR TO THE SCHEDULED HEARING DATE.

DEFENDANT'S MOTION IN LIMINE TO EXCLUDE FROM TRIAL THE TESTIMONY AND REPORT OF LAYNE T. RUSHFORTH, ESQ., AND ANY PURPORTED EXPERT TESTIMONY REGARDING THE INTERPRETATION OF LAW, AND APPLICATION OF FACTS TO LAW; TO STRIKE THE ERIC L. NELSON NEVADA TRUST'S PRE-TRIAL MEMORANDUM; AND FOR ATTORNEYS' FEES AND COSTS

COMES NOW Defendant, LYNITA SUE NELSON ("Lynita"), by and through her attorneys, ROBERT P. DICKERSON, ESQ., JOSEF M. KARACSONYI, ESQ., and KATHERINE L. PROVOST, ESQ., of THE DICKERSON LAW GROUP, and submits the following Memorandum of Points and Authorities in support of her Motion in Limine to Exclude from Trial the Testimony and Report of Layne T. Rushforth, Esq., and Any Purported Expert Testimony Regarding the Interpretation of Law, and Application of Facts to Law; to Strike the Eric L. Nelson Nevada Trust's Pre-Trial Memorandum; and for Attorneys' Fees and Costs ("Motion").

This Motion is made and based upon the following Memorandum of Points and Authorities, the attached Declaration, all papers and pleadings on file herein, as well as oral argument of counsel as may be permitted at the hearing on this matter.

DATED this 10th day of July, 2012.

THE DICKERSON LAW GROUP

By _____
ROBERT P. DICKERSON, ESQ.
Nevada Bar No. 000945
KATHERINE L. PROVOST, ESQ.
Nevada Bar No. 008414
JOSEF M. KARACSONYI, ESQ.
Nevada Bar No. 010634
1745 Village Center Circle
Las Vegas, Nevada 89134
Attorneys for Defendant

NOTICE OF MOTION

TO: ERIC L. NELSON, Plaintiff;

TO: RHONDA K. FORSBERG, ESQ., of FORSBERG & DOUGLAS, Attorneys for Plaintiff; and

TO: MARK A. SOLOMON, ESQ., and JEFFREY P. LUSZZECK, ESQ., of SOLOMON, DWIGGINS & FREER, LTD., Attorneys for the Eric L. Nelson Nevada Trust.

PLEASE TAKE NOTICE that the undersigned will bring the foregoing DEFENDANT'S MOTION IN LIMINE TO EXCLUDE FROM TRIAL THE TESTIMONY AND REPORT OF LAYNE T. RUSHFORTH, ESQ., AND ANY PURPORTED EXPERT TESTIMONY REGARDING THE INTERPRETATION OF LAW, AND APPLICATION OF FACTS TO LAW; TO STRIKE THE ERIC L. NELSON NEVADA TRUST'S PRE-TRIAL MEMORANDUM; AND FOR ATTORNEYS' FEES AND COSTS on for hearing before the above-entitled Court on _____, 2012 at _____ a.m./p.m.

THE DICKERSON LAW GROUP

By _____
ROBERT P. DICKERSON, ESQ.
Nevada Bar No. 000945
KATHERINE L. PROVOST, ESQ.
Nevada Bar No. 008414
JOSEF M. KARACSONYI, ESQ.
Nevada Bar No. 010634
1745 Village Center Circle
Las Vegas, Nevada 89134
Attorneys for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction and Factual Statement

Trial in this matter is currently scheduled to continue on July 16, 2012. On Thursday, June 28, 2012, a mere seventeen (17) days before the continuation of trial, Third-Party Defendant, Lana Martin ("Ms. Martin"), as Distribution Trustee of the Eric L. Nelson Nevada Trust (the "ELN Trust"), produced the ELN Trust's Fourth Supplement to Initial Disclosures, listing Layne T. Rushforth, Esq. ("Mr. Rushforth") as a purported expert witness for the ELN Trust, and producing for the first time a written report prepared by Mr. Rushforth. Mr. Rushforth's report, a copy of which is attached hereto as **Exhibit A**, is nothing more than a legal memorandum, wherein Mr. Rushforth purports to summarize and interpret Nevada law for the Court, and apply purported facts in this matter to his alleged interpretation of the law. As is set forth below, Mr. Rushforth must be excluded from testifying at the upcoming continuation of trial in this matter, based on the untimeliness of his disclosure as a purported expert by the ELN Trust, and the disclosure of his purported "expert report," and the well-settled rule that an expert witness cannot testify about the interpretation of law, or the application of facts to law. Furthermore, the Pre-Trial Memorandum filed by the ELN Trust on Friday, July 6, 2012, should be stricken, based on the ELN Trust's decision to attach and incorporate into such Pre-Trial Memorandum the inadmissible report of Mr. Rushforth.

II. Legal Analysis

A. Motions in limine.

Eighth Judicial District Court Rules, Rule 2.47 (2012), provides:

> Unless otherwise provided for in an order of the court, all motions in limine to exclude or admit evidence must be in writing and filed not less than 45 days prior to the date set for trial and must be heard not less than 14 days prior to trial.

. . .

> (a) The court may refuse to sign orders shortening time and to consider any oral motion in limine and any motion in limine which is not timely filed or noticed.
>
> (b) Motions in limine may not be filed unless an unsworn declaration under penalty of perjury or affidavit of moving counsel is attached to the motion setting forth that after a conference or a good-faith effort to confer, counsel have been unable to resolve the matter satisfactorily. A "conference" requires a personal or telephone conference between or among counsel. Moving counsel must set forth in the declaration/affidavit what attempts to resolve the matter were made, what was resolved, what was not resolved and the reasons therefore. If a personal or telephone conference was not possible, the declaration/affidavit shall set forth the reasons.

As set forth in the "Introduction and Factual Statement," above, the ELN Trust did not formally (in a written disclosure) disclose Mr. Rushforth as an expert witness, or produce Mr. Rushforth's report, until June 28, 2012, seventeen (17) days prior to trial. Accordingly, it was impossible for Lynita to file this motion in limine within the time period prescribed by EDCR 2.47, and this Motion should be considered by the Court.

Furthermore, on July 9, 2012, Lynita's counsel, Josef M. Karacsonyi, Esq., conducted a telephone conference with the ELN Trust's counsel, Jeffrey P. Luszeck, Esq., in a good-faith effort to confer and resolve the issues presented herein as required by EDCR 2.47(b). See **Exhibit B**, confirming e-mail sent by Mr. Karacsonyi to Mr. Luszeck on July 9, 2012; and **Exhibit C**, Declaration of Josef M. Karacsonyi, Esq. Unfortunately, the ELN Trust would not stipulate to exclude Mr. Rushforth, and his report from trial, nor to strike Mr. Rushforth's report from the ELN Trust's Pre-Trial Memorandum, necessitating this Motion.

B. The ELN Trust failed to timely disclose Layne Rushforth, Esq. as an expert, and to timely produce Mr. Rushforth's report, and Mr. Rushforth must not be permitted to testify at the continuation of trial in this matter.

Nevada Rules of Civil Procedure, Rule 16.2(a)(3) (2012)("Disclosure of Expert Testimony"), provides:

> (A) In addition to the disclosures required by paragraphs (1) and (2), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under NRS 50.275, 50.285, and

> 50.305. These disclosures must be made within 90 days after the financial disclosures are required to be filed and served under Rule 16.2(a)(1) or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (3)(B), within 60 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under Rule 26(e)(1).
>
> (B) Except as otherwise stipulated or directed by the court, a party who retains or specially employs a witness to provide expert testimony in the case, or whose duties as an employee of the party regularly involve giving expert testimony, shall deliver to the opposing party a written report prepared and signed by the witness, within 60 days before trial. The court, upon good cause shown or by stipulation of the parties, may extend the deadline for exchange of the experts' reports or relieve a party of the duty to prepare a written report in an appropriate case. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding 4 years.

On August 9, 2011, the parties, through counsel, stipulated to join the ELN Trust and LSN Nevada Trust, dated May 1, 2001 (the "LSN Trust"), as necessary parties to this action. On August 19, 2011, Mark Solomon, Esq., on behalf of Ms. Martin and the ELN Trust, filed an initial Notice of Appearance, followed by an Answer to Plaintiff, Eric L. Nelson's ("Eric") Complaint for Divorce, and Counterclaims and Cross-claims against Eric and Lynita, respectively. Despite joining this action on August 19, 2011, the ELN Trust waited over ten (10) months to formally disclose Mr. Rushforth as an expert witness in this matter, and to produce a report from Mr. Rushforth. As previously stated, these disclosures were made a mere seventeen (17) days before trial is scheduled to resume.

NRCP 16.2(a)(3), and its counterpart for civil actions not involving domestic relations, NRCP 16.1(a)(2), limit the time periods for parties to disclose expert witnesses and reports. Specifically, NRCP 16.2(a)(3) requires parties to disclose expert witnesses 135 days (4.5 months) after service of the summons and complaint (financial

disclosure forms are due forty-five (45) days after service of the summons and complaint pursuant to NRCP 16.2(a)(1), and expert disclosures are required ninety (90) days thereafter), and to produce a report from any proposed expert at least sixty (60) days prior to trial. NRCP 16.1(a)(2) requires parties to disclose experts and reports at least ninety (90) days before the discovery cut-off (absent extraordinary circumstances). The purpose of these rules is to prevent trial by ambush, and to allow any other party to an action receiving an expert disclosure and report from another party sufficient time to analyze and conduct discovery concerning same, and to retain an expert to contradict or rebut such experts/reports. In fact, NRCP 16.2(a)(1)(A) allows parties receiving an expert disclosure from another party sixty (60) days to designate a rebuttal expert, and to produce his or her report, and NRCP 16.1(a)(2) allows parties receiving an expert disclosure from another party thirty (30) days from the date of such disclosure to disclose a rebuttal expert, and to produce his or her report.

There is absolutely no justification for the ELN Trust to have waited until seventeen (17) days prior to the continuation of trial to disclose Mr. Rushforth as a proposed expert and produce his report. The timing of such disclosure does not afford Lynita sufficient or reasonable time to analyze and conduct discovery regarding Mr. Rushforth's report, or to disclose a rebuttal expert and report. NRCP 16.2(a)(1) and 16.1(a)(2) were enacted to prevent exactly this situation. Accordingly, Mr. Rushforth must be excluded from testifying or offering any opinions in this matter at trial.

B. <u>All of Mr. Rushforth's purported "expert opinions" involve interpretation of law, and application of alleged facts to law, and are wholly inadmissible at trial.</u>

Assuming that the ELN Trust had timely disclosed Mr. Rushforth as an expert witness, and timely produced Mr. Rushforth's report, which clearly the ELN Trust did not, the opinions the ELN Trust seeks to elicit from Mr. Rushforth are wholly

inadmissible. Nevada Revised Statutes, Section 50.275 (2012), provides:

> **Testimony by experts.** If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

(Emphasis added). Mr. Rushforth's testimony is not being offered to help this Court to understand the evidence in this matter, or to assist the Court to determine a fact in issue. Instead, Mr. Rushforth is being offered to advise the Court about Nevada law, and the application of Nevada law to the facts in this matter. This is clear from Mr. Rushforth's report, which is nothing more than a legal memorandum purporting to describe and interpret the law in Nevada, and apply the facts of this case to Mr. Rushforth's alleged interpretation of Nevada law:

> A. Opinion Requested:
>
> I am sending this letter to express my opinions, as an expert witness, with respect to the following questions:
>
> A.1 Do the Separate Property Agreement and Separate Property Trusts signed by Eric and Lynita Nelson in 1993 affect their property interests, both as to the claims of their creditors and as to their rights between themselves in a divorce proceeding? . . .
>
> A.2 Does the trust agreement for the ERIC L. NELSON NEVADA TRUST dated May 30, 2011 ("Eric's SSST") create a valid self-settled spendthrift trust ("SSST") sometimes referred to as an asset protection trust ("APT") under Nevada law? . . .
>
> A.3 If Eric's SSST is a valid SSST:
>
> (a) What is the status of separate property that was transferred to Eric's SSST? . . .
>
> (b) It is possible for property in Eric's SSST to become classified as community property if it was his separate property at the time of its contribution? . . .
>
> (c) What is the status of community property, if any, that was transferred to the trust? . . .

. . .

A.4 What would be required to establish that Eric's SSST is the alter ego of Eric Nelson sufficient to disregard the trust as a separate entity? . . .

A.5 What statute or statute of limitation apply to negate transfers to the trust?

NRS 125.070 provides, "The judge of the court shall determine all questions of law and fact arising in any divorce proceeding under the provisions of [Chapter 125]." Although the Nevada Supreme Court has not yet addressed the issue, it is well settled that adjudicating issues of law is within the exclusive province of the court. "The rule prohibiting experts from providing their legal opinions or conclusions is so well established that it is often deemed a basic premise or assumption of evidence law- a kind of axiomatic principle. [Citation omitted]. In fact, every [federal] circuit has explicitly held that experts may not invade the court's province by testifying on issues of law." *In re Initial Public Offering Securities Lit.*, 174 F.Supp.2d 61, 64 (S.D.N.Y. 2001). "[T]he calling of lawyers as 'expert witnesses' to give opinions as to the application of the law to particular facts usurps the duty of the trial court to instruct the jury on the law as applicable to the facts, and results in no more than a modern day 'trial by oath' in which the side procuring the greater number of lawyers able to opine in their favor wins." *Downer v. Bramet*, 199 Cal.Rptr. 830, 833, 152 Cal.App.3d 837, 842 (Cal. App. 4th Dist. 1984).

> As McCormick on Evidence teaches: Undoubtedly some highly opinionated statements by the witness amount to nothing more than an expression of his general belief as to how the case should be decided or the amount of damages which would be just. **All courts** exclude such extreme, conclusory expressions. There is no necessity for this kind of evidence; its receipt would suggest that the judge and jury may shift responsibility for the decision to the witness. In any event, the opinion is worthless to the trier of fact. 1 McCormick on Evidence § 12, at 60 (6th ed. 1999).

Webb v. Omni Block, 216 Ariz. 349, 354, 166 P.3d 140, 144-45 (Ariz. App. Div. 1 2007) (emphasis added); *see also*, *Steffensen v. Smith's Management Corp.*, 862 P.2d 1342, 1347 (Utah 1993) ("Opinion testimony is not helpful to the fact finder when it is

couched as a legal conclusion. These extreme expressions of the general belief of the expert witness tend to blur the separate and distinct responsibilities of the judge, jury, and witness."). For the foregoing reasons, the Court should exclude Mr. Rushforth from testifying at the upcoming continuation of trial in this matter, and should enter an Order prohibiting the ELN Trust and Eric from seeking to elicit legal conclusions from any witness at trial.

C. The ELN Trust's Pre-Trial Memorandum should be stricken for the improper inclusion of Mr. Rushforth's report in such memorandum.

As set forth above, the opinions and report of Mr. Rushforth are inadmissible at the continuation of trial in this matter. Despite the inadmissibility of Mr. Rushforth's "opinions," the ELN Trust has improperly attached a copy of Mr. Rushforth's report to its Pre-Trial Memorandum, in an attempt to prejudice Lynita, and have Mr. Rushforth's opinions considered by the Court without actually having Mr. Rushforth admitted to testify at trial. The Court should not condone this strategy, and should strike the ELN Trust's Pre-Trial Memorandum.

D. Lynita should be awarded her fees and costs for this Motion.

NRS 18.010 permits litigants to recover their attorneys' fees where the Court finds that a claim or defense of an opposing party was maintained without reasonable ground or to harass the prevailing party. As set forth in subparagraph B of this Legal Analysis, the ELN Trust was severely untimely in disclosing Mr. Rushforth's report to Lynita and her counsel. Furthermore, as was set forth in subparagraph C of this Legal Analysis, the opinions the ELN Trust seek to elicit from Mr. Rushforth at trial invade the exclusive province of the Court, and are wholly inadmissible. Lynita's counsel contacted the ELN Trust's counsel prior to filing the instant motion to explain Lynita's position with respect to Mr. Rushforth's testimony and report, and to give the ELN Trust an opportunity to withdraw Mr. Rushforth as a proposed witness in this matter.

See **Exhibit C**. Without reasonable grounds, the ELN Trust refused to agree to same, necessitating this Motion.

Pursuant to *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), in awarding reasonable fees and costs to Lynita this Court will need to make specific findings regarding the quality of Lynita's advocates, the character of the work done in this Motion, the work actually performed, and the result. It is impossible at this time to provide the Court with a total amount of time spent towards this Motion, as a Reply to the ELN Trust's opposition (if any) to Lynita's Motion, and a Court appearance, will undoubtedly be required. In the event, however, that the Court rules in Lynita's favor after the hearing in this matter, it is requested that Lynita be allowed to submit the total amount of time spent, and fees incurred in connection with this Motion, and offer suggested findings regarding the award of fees and costs.

III. CONCLUSION

Based upon the foregoing analysis and authorities, Lynita respectfully requests that the Court enter an Order granting this Motion in its entirety, and Order the ELN Trust to pay all fees and costs associated with this Motion.

DATED this 10th day of July, 2012.

THE DICKERSON LAW GROUP

By _____
ROBERT P. DICKERSON, ESQ.
Nevada Bar No. 000945
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am serving via U.S. Mail, a true and correct copy of the foregoing DEFENDANT'S MOTION IN LIMINE TO EXCLUDE FROM TRIAL THE TESTIMONY AND REPORT OF LAYNE T. RUSHFORTH, ESQ., AND ANY PURPORTED EXPERT TESTIMONY REGARDING THE INTERPRETATION OF LAW, AND APPLICATION OF FACTS TO LAW; TO STRIKE THE ERIC L. NELSON NEVADA TRUST'S PRE-TRIAL MEMORANDUM; AND FOR ATTORNEYS' FEES AND COSTS, to the following at their last known addresses on this 10th day of July, 2012.

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0001

DISTRICT COURT

CLARK COUNTY, NEVADA

ERIC L. NELSON

Plaintiff(s),

-vs-

LYNITA SUE NELSON

Defendant(s).

CASE NO. D411537

DEPT. NO. O

FAMILY COURT MOTION/OPPOSITION FEE INFORMATION SHEET (NRS 19.0312)

Party Filing Motion/Opposition: ☐ Plaintiff/Petitioner ☒ Defendant/Respondent

MOTION FOR OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE FROM TRIAL THE TESTIMONY AND REPORT OF LAYNE T. RUSHFORTH, ESQ., AND ANY PURPORTED EXPERT TESTIMONY REGARDING THE INTERPRETATION OF LAW, AND APPLICATION OF FACTS TO LAW; TO STRIKE THE ERIC L. NELSON NEVADA TRUST'S PRE-TRIAL MEMORANDUM; AND FOR ATTORNEYS' FEES AND COSTS

Motions and Oppositions to Motions filed after entry of a final order pursuant to NRS 125, 125B or 125C are subject to the Re-open filing fee of $25.00, unless specifically excluded. (NRS 19.0312)

NOTICE:
If it is determined that a motion or opposition is filed without payment of the appropriate fee, the matter may be taken off the Court's calendar or may remain undecided until payment is made.

Mark correct answer with an "X."

1. No final Decree or Custody Order has been entered. ☒ YES ☐ NO

2. This document is filed solely to adjust the amount of support for a child. No other request is made.
☐ YES ☒ NO

3. This motion is made for reconsideration or a new trial and is filed within 10 days of the Judge's Order
If YES, provide file date of Order: _____
☐ YES ☒ NO

If you answered YES to any of the questions above, you are not subject to the $25 fee.

Motion/Opposition ☐ IS ☒ IS NOT subject to $25 filing fee

Dated this 10th of July, ~~200~~ 2012

Shari Aidukas
Printed Name of Preparer

Shari Aidukas
Signature of Preparer

Motion-Opposition Fee.doc/1/30/05

Exhibit "A"

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June 27, 2012

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Re: Nelson v. Nelson
(Our File: 6691)

Dear Mark:

A. OPINION REQUESTED

I am sending this letter to express my opinions, as an expert witness, with respect to the following questions:

A.1 Do the Separate Property Agreement and Separate Property Trusts signed by Eric and Lynita Nelson in 1993 affect their property interests, both as to the claims of their creditors and as to their rights between themselves in a divorce proceeding? *My response to this question is in section B of this letter.*

A.2 Does the trust agreement for the ERIC L. NELSON NEVADA TRUST dated May 30, 2001 ("Eric's SSST") create a valid self-settled spendthrift trust ("SSST") sometimes referred to as an asset protection trust ("APT") under Nevada law? *My response to this question is in subsection C.1 of this letter.*

A.3 If Eric's SSST is a valid SSST:

(a) What is the status of separate property that was transferred to Eric's SSST? *My response to this question is in subsection C.2 of this letter.*

(b) Is it possible for property in Eric's SSST to become classified as community property if it was his separate property at the time of its contribution? *My response to this question is in subsection C.3 of this letter.*

(c) What is the status of community property, if any, that was transferred to the trust? *My response to this question is in subsection C.4 of this letter.*

A.4 What would be required to establish that Eric's SSST is the alter ego of Eric Nelson sufficient to disregard the trust as a separate entity? *My response to this question is in section D of this letter.*

A.5 What statute or statutes of limitation apply to negate transfers to the trust? *My response to this question is in subsection E of this letter.*

B. Validity of 1993 Property Arrangements

B.1 In my opinion, NRS 123.080 and NRS 123.220(1) allow spouses to alter the default rules of spousal property interests, and their mutual consent is sufficient consideration. Thus, community property can be transmuted in to separate property, and vice versa. Transmutation must be established by clear and convincing evidence[1], but the agreement between Eric and Lynita is both clear and convincing, and it satisfies the requirement of NRS 123.220(1).

Paragraph 2 of the Separate Property Agreement dated April 28, 1993 reads as follows:

> "The Parties agree that this AGREEMENT shall be controlling in determining the ownership of each party's property regardless the manner in which the property was previously held or titled, acquired through capital or personal efforts, or whether the property is real, personal or any variation thereof."

B.2 The foregoing provision does not state that the agreement is only controlling in some situations or that it does not apply in others.

(a) To state that the agreement would be binding against third-party creditors but not binding in a divorce would be a modification that would vary the terms of the written agreement. The Nevada Supreme Court has ruled on more than one occasion that "[i]f the terms of an agreement are clear, definite and unambiguous, parol evidence may not be introduced to vary those terms."[2] Thus, it is inappropriate for the court to consider any extrinsic evidence of any contrary terms, understandings, or agreements unless the terms of an agreement are ambiguous. The 1993 agreement is not ambiguous, and even if it were, Nevada law allows only clarifying evidence, not evidence that contradicts the express terms of the agreement.[3] Contracts, like wills, should be construed by reading the actual words

[1] *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994).

[2] *Crow-Spieker No. 23 v. Robinson*, 629 P.2d 1198, 1199 (Nev. 1981).

[3] *Ringle v. Bruton*, 86 P.3d 1032, 1037 (Nev. 2004).

used, not by trying to infer intent from something else.[4]

(b) Although extrinsic evidence is not admissible to contradict the terms of the Separate Property Agreement, the testimony of the drafting attorney, Jeffrey L. Burr, supports the validity of that agreement, as written, and does not support the proposition that the transmutation of community property really only operated as to third parties, such as creditors, leaving the parties as if no marital property agreement had been written in the event of a divorce between them. Mr. Burr testified that a side agreement would make the plan ineffective. He also testified that he explained the legal consequences of the agreement to both parties, pointing out that equalization would have to occur by gift, making it clear that it would not occur automatically, dispelling any inference that community property rights would stay intact.

(c) The following excerpts come from the transcript of the videotaped deposition of Mr. Burr taken February 22, 2012 (omitting objections):

(i) From page 22 (Questioning by Mark Solomon):

Q: You can't, for example, have a situation where the parties agree that for purposes of creditors they're going to treat this as separate-property pools, but for any other purpose it's a wink and a nod and it's not really separate property, it's something different; is that correct?

A: Yeah. There has to be -- basically the division of assets in the plan has to be done without any outside agreements in order to be effective.

Q: It has to be a real agreement?

A: Yes.

Q: You can't have hidden side agreements?

A: Right.

Q: You can't have a wink and a nod that we're not going to treat this consistently for all purposes; correct?

A: Yes.

(ii) From pages 32-33 (Questioning by Mark Solomon):

Q: When you had meetings with Lynita and Eric, did you explain to both of them the legal consequences of an agreement like this?

---

[4] See *Zirovcic v. Kordic*, 101 Nev. 740, 709 P.2d 1022 (1985), quoting language from *Jones v. First Nat. Bank*, 72 Nev. 121, 296 P.2d 295 (1956).

A: Yes.

Q: Do you believe you had an ethical obligation, representing both Lynita and Eric in connection with the development of this type of estate plan, to go over with them the benefits and the risks and the detriments involved in entering such agreement?

A: Yes.

Q: Did you fulfill that ethical obligation to the best of your ability?

A: Yes.

(iii) From page 35 (Questioning by Mark Solomon):

Q: Did you have any discussion at that time, 1993, prior to the execution of this agreement, with Eric and/or Lynita about what they could do in the future should one trust become more or less valuable than the other party's trust?

A: Yes.

Q: And did you -- what did you tell them in that regard?

A: I just told them that as of that date, by agreement, they would have an equal division; and since it was not their intent to -- it was not divorce or dissolution planning, it was their intent at that time to keep their assets, you know, pretty much equally owned, that it would be important to periodically rebalance the trusts so that the assets would maintain equal value in each trust.

Q: And how would that be accomplished in the future?

A: By gift.

Q: Okay. You did tell them that?

A: Yes.

(iv) From page 84 (Questioning by Mark Solomon):

Q: You have no understanding one way or the other whether there was any agreement between Lynita and Eric to ignore the Separate-Property Agreement in the event of a divorce; is that correct as a factual matter?

A: Right.

(v) From page 113 (Questioning by Dickerson):

Q: Was there any discussion as to the purpose of the separate-property settlement agreement and the two trusts that you prepared for the Nelsons?

A: Yes.

Q: What was the purpose?

A: Again, the purpose was to take community property that would be exposed 100 percent to liabilities that Eric might incur in the venture he was undertaking and to separate that community property into separate property so that at least Lynita's one-half could remain protected in the event a liability occurred and that Eric were to, well, incur liability and they would try to reach Lynita's assets. The creditors could not reach the assets.

(vi) From pages 125-126 (Questioning by Dickerson):

Q: Was there any discussion that you recall having with them of the legal consequences of this agreement should they get a divorce?

A: We talked about that 'cause that was a big topic, and again my -- this is my own personal opinion. You know, this particular planning was done for asset-protection purposes as to third parties; and I always warn my clients or at least tell them that, you know, when it comes to dissolution of a marriage, I believe there's a lot more opportunity to have the Court award property in an equitable manner based on the intended parties. But again, I'm not a family-law attorney, but we have that discussion. So that's why I said, "As a safety valve, to be sure that you can maintain your equal ownership, it's best to periodically equalize the property through gifting."

(d) The following excerpts come from the transcript of the videotaped deposition of Mr. Burr taken April 11, 2012 (omitting objections):

(i) From page 195 (Questioning by Mark Solomon):

Q: ". . . it had to be a true agreement where the property was separated – the community was separated -- into separate property for all purposes. Does that comport with your recollection?

A: Yes.

Q: Okay. You also indicated that there couldn't be a side agreement, a secret side agreement, where it was separate property for some purposes but not for others. Do you recall so testifying?

A: Yes.

(ii) From pages 196-197 (Questioning by Mark Solomon):

Q: In fact if the parties had such an agreement, express or implied, that this agreement would not apply in the event of a divorce, isn't it your legal opinion, as you've already expressed in earlier portions of your deposition, that that would give a creditor a very good claim that the agreement was not a true division of the community property and therefore would not help you, in essence, in the estate planning you were trying to achieve?

A: I mean I think the document speaks for itself. They basically agreed to divide their property at that point in time in two equal parts and treat that property as separate property, so that's what this agreement accomplished. As far as the legal impact of some type of implied or side agreement, I really couldn't give an opinion on that. All I can say is that's what was occurring here, that they were dividing their property into separate property as allowed by law, as permitted by law.

B.3 One cannot accept the benefits of an agreement for some purposes and then repudiate it for others.[5] From the materials I have reviewed, the parties' intent was to separate assets so that only Eric's separate property would be exposed to the perceived additional risk that came from the investments he was making. Lynita cannot accept that benefit while arguing that she really retained an interest in Eric's separate property. The Nevada Supreme Court has ruled that it "is well settled that a person shall not be allowed at once to benefit by and repudiate an instrument, but, if he chooses to take the benefit which it confers, he shall likewise take the obligations or bear the onus which it imposes."[6]

B.4 Once the Separate Property Agreement identified the parties' separate property, each party was expressly permitted to transfer his or her separate property to his or her own revocable trust. Such a transfer could not transmute the property to community property in the absence of an express declaration otherwise.

B.5 Thus, in my opinion, if the Separate Property Trusts created in 1993 were funded with the separate property identified in the Separate Property Agreement, or with property traceable thereto, then the assets of those trusts would constitute the separate property of each settlor unless that settlor expressly declared otherwise.

[5] *Schmidt v. Horton*, 287 P. 274, 280 (Nev. 1930).

[6] *Fed. Mining & Engr. Co. v. Pollak*, 85 P.2d 1008, 1012 (Nev. 1939), citing *Alexander v. Winters*, 24 Nev. 143, 146, 50 P. 798, 799 (1897).

C. VALIDITY OF ERIC L. NELSON NEVADA TRUST AS A NEVADA SPENDTHRIFT TRUST

C.1 NRS Chapter 166 governs the validity of spendthrift trusts, including a trust that provides for the benefit of the trust's settlor, which we refer to as a "self-settled spendthrift trust" or an "SSST". In order for a valid SSST to be established, the trust must be properly established under NRS 163.002 et seq., and it must also meet these additional requirements of NRS Chapter 166:

(a) There is a nexus to Nevada, which can be met if any one of the following is true:

(i) All or part of the land, rents, issues or profits affected are in Nevada;

(ii) All or part of the personal property, interest of money, dividends upon stock and other produce thereof, affected, are in Nevada;

(iii) The declared domicile of the creator of a spendthrift trust affecting personal property is in Nevada; or

(iv) At least one qualified trustee has powers that include maintaining records and preparing income tax returns for the trust, and all or part of the administration of the trust is performed in Nevada.

(b) One trustee must be a Nevada resident or a bank or trust company having an office to conduct business in Nevada. [NRS 166.015(2)]

(c) The trust must be irrevocable, distributions to the settlor are discretionary or fit within specific statutory exceptions, and the trust is not intended to hinder, delay or defraud known creditors. [NRS 166.040(1)(b)]

(d) I have reviewed the Eric L. Nelson Nevada Trust dated May 30, 2001, and its terms comply with the requirements to establish an irrevocable self-settled spendthrift trust.

C.2 When property is transferred to an irrevocable spendthrift trust, the rights of the transferor, as such, are terminated, and the rights of all persons are determined only as provided in the trust agreement. Since Eric cannot unilaterally remove any property and his distributions are subject to the discretionary approval of the "distribution trustee", it is a misnomer to characterize the property as his separate property. His property rights are limited to that of a beneficiary with a "discretionary interest", as defined in NRS 163.4185(1)(c), and Nevada law limits his enforceable rights. See also NRS 166.130, which provides that a "*beneficiary of a spendthrift trust has no legal estate in the capital, principal or corpus of the trust estate*" unless the trust mandates a distribution after a term of years, which does not apply in this case.

(a) More specifically, NRS 163.419(1) states, "A court may review a trustee's

exercise of discretion concerning a discretionary interest only if the trustee acts dishonestly, with improper motive or fails to act."

~~(b) NRS 21.090(1)(ee)(2) exempts from the claims of creditors any discretionary interest, even if the trust is not a spendthrift trust.~~

(c) Thus, unless an asset can be removed from the trust under the limited provisions of NRS 166.170, it comes out of the trust only in the trustee's discretion.

C.3 If the value of a married person's separate property is increased by the uncompensated (or under-compensated) personal services of that person, the property becomes community property as to the increased value attributable to the services not compensated for.[7] Insofar as I can determine, that rule applies only to a spouse's own property. If a person works for a corporation, and his uncompensated personal services increase the value of the corporation's assets, the person's spouse cannot claim any community property interest in the corporation's assets because the person does not own them. (A different rule may apply if the corporation is found to be the person's alter ego, and that issue is discussed in section D of this letter.) In this case, the owner of the assets is a trust, and unless the trust is found to be Eric's alter ego, I found no legal authority for imposing any community property interest upon the assets of the trust.

C.4 If community property were transferred to Eric's SSST without Lynita's consent, then that would be a violation of NRS 123.230(2). If that were true, Lynita could have filed a complaint seeking either (a) to have the improper transfer set aside[8] or (b) to have a constructive trust imposed (assuming she could produce clear and convincing evidence supporting the imposition of a constructive trust[9]), but the complaint for such relief would have had to be filed within the applicable statute of limitations (discussed in section E of this letter). In this case, I am unaware of any specific allegation of a transfer of community property to Eric's SSST, and I express no opinion as to any specific transfer of property.

D. Application of the Alter-Ego Doctrine To Spendthrift Trusts

You have requested that I express my opinion with respect to the application of NRS 78.747 or any other alter-ego doctrine to a self-settled spendthrift trust ("SSST") established and

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[7] See *Johnson v. Johnson*, 89 Nev. 244, 510 P.2d 625 (1973), *Schulman v. Schulman*, 92 Nev. 707, 558 P.2d 525 (1976), and *Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978). These cases reflect the Nevada Supreme Court's adoption of *Pereira v. Pereira*, 156 Cal. 1, 103 P. 488 (1909) and *Van Camp v. Van Camp*, 53 Cal.App. 17, 199 P. 885 (1921) and indicate the Court's preference to apply the *Pereira* ruling unless the *Van Camp* method is shown to be more equitable.

[8] There does not seem to be a single remedy for negating the effects of an inappropriate transfer of community property. For real property, inappropriate transfers have been resolved in a quiet title action. See *Neumann v. McMillan*, 629 P.2d 1214, 1215 (Nev. 1981). Negating an invalid disposition of community property has also been raised in a contract dispute case. See *Peccole v. Eighth Jud. Dist. Ct. In and For County of Clark*, 899 P.2d 568, 570 (Nev. 1995).

[9] For a general discussion of the use of a constructive trust as a remedy for a fraud upon the community, see Bradley L. Adams, "The Doctrine of Fraud on the Community", 49 Baylor L. Rev. 445, 468 (1997).

administered in compliance with NRS Chapter 166. For the reasons given in this letter, it is my opinion that neither the law nor the facts of this case (as I presently understand them) justify a ruling that Eric is the alter ego of the Eric's SSST or of its Distributions Trustee.

D.1 Public Policy Overview. In order to evaluate the application of any alter-ego doctrine to a self-settled spendthrift trust, it is important to understand the public policy regarding such a trust.

(a) *Original Policy against Self-Settled Spendthrift Trusts.* Until the mid-1990s, the laws of all states uniformly prohibited the establishment of a spendthrift trust that was completely exempt from the claims of a beneficiary's creditors to the extent the settlor[10] was a beneficiary. In other words, an SSST could not be created because of a public policy that generally prohibited arrangements that allowed a settlor to benefit from a trust he created with his own assets that was shielded from the claims of the settlor's creditors.

(b) *Shift in Domestic Public Policy to Compete with Foreign Trusts.* Trusts subject to the laws of foreign jurisdictions have allowed SSSTs for many years. In the mid-1990s, because of the lucrative trust business, state legislatures started to consider allowing domestic asset-protection trusts in order to entice trust business into their states. Beginning with Alaska and Delaware in 1997, various states have adopted statutes that allow the creation of SSSTs whose assets are exempt from the claims of the settlor's creditors. Thus, the public policy shifted, allowing the settlor to benefit from a trust that would not be liable for the payment of creditors except as to a creditor who can timely meet its burden to prove that such trust or a transfer thereto violates the law.

(c) *Exceptions to Protection for Some States.* The public policy of several states, including South Dakota, Tennessee, Utah, Wyoming, New Hampshire, and Rhode Island, as reflected in their respective spendthrift trust statutes, excluded protection for certain claims, including claims for child support and/or alimony.

D.2 Nevada's Current Public Policy. Nevada's public policy is reflected in the various amendments to NRS Chapter 166 in 1999, 2001, 2007, 2009, and 2011, as well as changes to NRS Chapters 163, 164, and 165 in the same years. In part, the ongoing legislative changes reflect a desire to create laws that attract and retain trust business in Nevada. It also reflects a desire to reduce disputes, including those based on improper dominion and control or based on an alter-ego theory.

D.3 Challenges to the Trust or to Trust Transfers. To access the assets of the trust, a challenger must either invalidate the trust or invalidate transfers to the trust.

(a) *Challenges to SSST Transfers.* Nevada's law provides for complete creditor protection for assets transferred to SSSTs with only two exceptions: (1) fraudulent transfers and (2) transfers that violate an enforceable legal obligation. This is reflected in the

[10]The term "settlor" and "trustor" are used interchangeably in this letter.

evidence is not admissible to contradict the plain language of the trust" and "[a] trustor's intention must be determined in view of the circumstances existing at the time of the creation of the trust."[8] As the court observed in *Edwards*:

> It is not the business of the court to say, in examining the terms of a will, what the testator intended, but what is the meaning to be given to the language which he used. Where the terms of a will are free from ambiguity, the language used must be interpreted according to its ordinary meaning and legal import and the intention of the testator ascertained thereby.[9]

Courts limit their inquiry to the four corners of the trust document because "the language of the trust deed itself is the best and controlling evidence of such intent."[10] Accordingly, courts regularly exclude evidence from parties and/or the settlor concerning the intention of trust terms. The terms of the trust agreement are conclusive of the testator's intent.[11]

Here, the terms of the Separate Property Agreement, ELN Separate Property Trust and LSN Separate Property Trust, ELN SSST and LSN SSST are clear, definite and unambiguous. Irrespective of Lynita's purported intent in the execution and implementation of the Separate Property Agreement, ELN Separate Property Trust and LSN Separate Property Trust, ELN SSST and LSN SSST, the express terms of the trusts and Separate Property Agreement govern and any extrinsic evidence regarding Lynita's intent is simply not relevant. As the trusts are not ambiguous, and there are no allegations that any ambiguity exists, Lynita's intent is inadmissible. Therefore, this Court should exclude any testimony regarding Eric and/or Lynita's intent from being heard at trial.

C. LYNITA'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

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of only one construction: the plain provisions of the trust instrument ... determine its construction.") (Citations omitted).

[8] *In re Estate of Zilles*, 200 P.3d 1024, 1028 (Ariz. Ct. App. 2008).

[9] *Id.*, quoting *Estate of Avila,* 85 Cal. App. 2d 38, 39 (1948).

[10] *In re Estate of Devine*, 910 A.2d 699, 703 (Pa. Super. 2006).

[11] *See, e.g., Taylor*, 978 A.2d at 542-43 ("The issue of intent as it relates to the interpretation of a trust instrument ... is to be determined by examination of the language of the trust instrument itself and not by extrinsic evidence of actual intent.").

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Chapter 166 of the Nevada Revised Statutes codifies the Spendthrift Trust Act of Nevada. For purposes of Chapter 166, a spendthrift is defined as "a trust in which by the terms thereof a valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary is imposed."[12] "The beneficiary or beneficiaries of such trust shall be named or clearly referred to in the writing. No spouse, former spouse, child or dependent shall be a beneficiary unless named or clearly referred to as a beneficiary in the writing."[13] "A beneficiary of a spendthrift trust has no legal estate in the capital, principal or corpus of the trust estate . . ."[14]

NRS 166.170 limits the time frame in which a creditor,[15] which is defined as "a person who has a claim, may bring an action against a trust advisor,[16] trustee and/or spendthrift trust. Specifically, NRS 166.170 provides:

> 1. A person may not bring an action with respect to a transfer of property to a spendthrift trust:
>
> (a) If the person is a creditor when the transfer is made, unless the action is commenced within:
>
> (1) Two years after the transfer is made; or
>
> (2) Six months after the person discovers[17] or reasonably should have discovered the transfer, whichever is later.
>
> (b) If the person becomes a creditor after the transfer is made, unless the action is commenced within 2 years after the transfer is made. (Emphasis added).

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[12] NRS 166.020.

[13] NRS 166.080.

[14] NRS 166.130.

[15] *See* NRS 112.150(4) defines a creditor as "a person who has a claim."

[16] *See* NRS 166.170(6)(a) defines trust advisor as: "any person, including, without limitation, an accountant, attorney or investment adviser, who gives advice concerning or was involved in the creation of, transfer of property to, or administration of the spendthrift trust or who participated in the preparation of accountings, tax returns or other reports related to the trust." (Emphasis added).

[17] NRS 166.170(2) ("A person shall be deemed to have discovered a transfer at the time a public record is made of the transfer, including, without limitation, the conveyance of real property that is recorded in the office of the county recorder of the county in which the property is located or the filing of a financing statement pursuant to chapter 104 of NRS.").

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NRS 166.170(3)[18] and (6),[19] require that a creditor prove by "clear and convincing evidence" that the transfer of property was a fraudulent transfer and/or violated the laws of the State of Nevada.

In her Opposition to the Motion to Dismiss, Lynita contended, for the first time, that her delay was justified because none of her "causes of action could have accrued until June, 2011."[20] Said statement is patently false as Lynita's Counsel demanded, prior to the initiation of this divorce and when Eric was unrepresented by counsel, that Eric acknowledging that all of the property owned by the ELN SSST and LSN SSST was community property. Indeed, Lynita's Counsel even threatened to initiate a lawsuit to invalidate said trusts and the Separate Property Agreement in March, 2009, which upon information and belief, Lynita attempted to do in or around July 2009. For reasons unbeknownst to the ELN Trust, Lynita unjustifiably delayed bringing her claims against the ELN SSST until the fall of 2011, beyond the 2 year statute of limitations period.

Indeed, as set forth in the Amended Third-Party Complaint, both the ELN SSST and LSN SSST were concurrently created and funded in May 2001, as Lynita clearly knew.[21] Additionally, a notice relating to transfers made to the ELN SSST and LSN SSST was published in Nevada Legal News three times commencing on August 21, 2001. Consequently, the statute of limitations began

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[18] NRS 166.170(3) reads as follows: "[a] creditor may not bring an action with respect to transfer of property to a spendthrift trust unless a creditor can prove by clear and convincing evidence that the transfer of property was a fraudulent transfer pursuant to chapter 112 of NRS or that the transfer violates a legal obligation owed to the creditor under a contract or a valid court order that is legally enforceable by that creditor. In the absence of such clear and convincing proof, the property transferred is not subject to the claims of the creditor. Proof by one creditor that a transfer of property was fraudulent or wrongful does not constitute proof as to any other creditor and proof of a fraudulent or wrongful transfer of property as to one creditor shall not invalidate any other transfer of property."

[19] NRS 166.170(6) reads as follows: "[a] person other than a beneficiary or settlor may not bring a claim against a trustee of a spendthrift trust unless the person can show by clear and convincing evidence that the trustee acted in violation of the laws of this State, knowingly and in bad faith, and the trustee's actions directly caused the damages suffered by the person. As used in this subsection, "trustee" includes a cotrustee, if any, and a predecessor trustee."

[20] *See* Opp. at p. 19, ll. 5-9.

[21] *See* Amended Third-Party Complaint at ¶¶ 28-29.

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to run in or around May 2001, over ten (10) years ago. Pursuant to NRS 166.170, any claim that Lynita may have had against the ELN SSST should have been brought no later than May 2003, within two (2) years of its creation and funding; however, she failed to do so. Said failure precludes Lynita's claims against the ELN SSST.

D. LYNITA CANNOT PREVAIL ON HER ALTER EGO CLAIM.[22]

There is no Nevada statute that specifies what makes a trust the alter ego of its settlor, but NRS 163.418 and NRS 163.4177 provide some guidelines. NRS 163.418 provides that an alter ego claim must be proven by clear and convincing evidence, and the following factors, alone or in combination, are insufficient for a finding of alter ego:

1. The settlor has signed checks, made disbursements or executed other documents related to the trust as the trustee and the settlor is not a trustee, if the settlor has done so in isolated incidents.
2. The settlor has made requests for distributions on behalf of a beneficiary.
3. The settlor has made requests for the trustee to hold, purchase or sell any trust property.
4. The settlor has engaged in any one of the activities, alone or in combination, listed in NRS 163.4177.

Further, NRS 163.4177 provides that "[i]f a party asserts that a beneficiary or settlor is

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[22] Despite this Court's express holding that Lynita's alter ego claim should be brought under NRS 163 and not NRS 78, because a corporate alter ego claim requires a "different criteria," Lynita is under the mistaken belief that her alter ego claim under NRS 78 has not been dismissed. In regards to Lynita's alter ego claim, this Court stated: "[t]he alter ego claim, while I think the defense, or I should say the defense, I think that Ms. Nelson will have a difficult time with the alter ego cause its different with spendthrift trusts. I do not believe that you look at the alter ego or the piercing of the corporate veil like you would do under NRS 78 corporations. I think there's a whole different criteria you look at. The reason for that is the spendthrift trust is set up a whole different way and a person can be a trustee and normally when you have the alter ego in corporations you have different criteria because the entity itself is separate. Here a spendthrift you can be a trustee; you just cannot be the distribution trustee that you determine money comes to you because that's the whole purpose of a spendthrift trust. While I think its difficult to prove I think they can have a shot at proving it. I think when you look at it I don't think you look at NRS 78 as far as determining alter ego claims, I think you look under NRS 163 which talks about alter egos, irrevocable trusts and 163.4177 talks about factors which must not be considered to be exercising improper dominion or control over trusts and it lists those criteria 1 through 6 about the beneficiary serving as a trustee and those type of things. So I think that's the appropriate that you look at to determine alter ego not the corporate alter ego. [02-23-12 Hearing, VTS 15:16:32 - 15:17:50].

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exercising improper dominion or control over a trust, the following factors, alone or in combination, must not be considered exercising improper dominion or control over a trust:"

1. A beneficiary is serving as a trustee.
2. The settlor or beneficiary holds unrestricted power to remove or replace a trustee.
3. The settlor or beneficiary is a trust administrator, general partner of a partnership, manager of a limited-liability company, officer of a corporation or any other manager of any other type of entity and all or part of the trust property consists of an interest in the entity.
4. The trustee is a person related by blood, adoption or marriage to the settlor or beneficiary.
5. The trustee is the settlor or beneficiary's agent, accountant, attorney, financial adviser or friend.
6. The trustee is a business associate of the settlor or beneficiary.

Lynita's Amended Third-Party Complaint fails to specify any admissible evidence to support her alter ego claim. Indeed, the majority, if not all, of Lynita's self-serving allegations elicited to date are inadmissible at trial:

1. "Eric has asserted his management and control over the ELN Trust;"[23]
2. "Eric has influenced, directed, and controlled all aspects of both [ELN Trust] and the LSN Trust;"[24]
3. Lana, "Eric's employee, close friend . . . served as the Distribution Trustee for [ELN Trust] and the LSN Trust;[25]
4. Nola, "Eric's sister . . . served as the Distribution Trustee for [ELN Trust] and the LSN Trust for approximately four years;[26]
5. "Eric directed the release of thousand of dollars of trust income to Eric and other third parties, including Eric's family members (Cal Nelson, Paul Nelson, Chad Ramos, Ryan Nelson and others) . . . to fund Eric's and Eric's family members' personal expenditures;"[27]
6. Eric dictated the asset transfers and loans he desired to be

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[23] *Cf.* Amended Third-Party Complaint at ¶ 6 *with* NRS 163.4177(3).

[24] *Cf.* Amended Third-Party Complaint at ¶ 6 *with* NRS 163.418(2).

[25] *Cf.* Amended Third-Party Complaint at ¶ 10 *with* NRS 163.4177(5) & (6).

[26] *Cf.* Amended Third-Party Complaint at ¶ 10 *with* NRS 163.4177(4).

[27] *Cf.* Amended Third-Party Complaint at ¶ 11 *with* NRS 163.418(2) & (3) and NRS 163.4177(3).

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performed;[28]

7. "Eric's actions demonstrate that [ELN Trust] was influenced, directed, controlled and governed by Eric;"[29]

8. Lana, Rochelle and Joan, "as employees of any one of Eric's entities, they each handled Eric's books and records and day to day operations (under Eric's direction and control), acted as the registered agent for any one of Eric's entities (under Eric's direction and control), and/or acted as the notary public for Eric's entities, including notarizing documents related to the [ELN Trust] and [LSN Trust];[30]

9. "[t]here has been such unity of interest and ownership between Eric and [ELN Trust] that one is inseparable from the other;[31]

10. "Eric's actions demonstrate his control over [ELN Trust] and the assets held in the Trust, including the distribution of assets of [ELN Trust] for his own personal benefit;[32] and

11. "Eric's direct or indirect control and direction of [ELN Trust] investments and disbursements invalidate any spendthrift aspect of the Trust."[33]

Since Lynita cannot cite and/or introduce any admissible evidence to meet her burden to support an alter ego claim by clear and convincing evidence under NRS 163.418, her First and Second Claims for Relief for alter ego are improper.

1. SETTLEMENT STATEMENTS ARE INADMISSIBLE AS A MATTER OF LAW.

Since this Court has made it clear that she will have a "difficult time" with the alter ego claim because "its different with spendthrift trusts,"[34] Lynita now contends that she has "demonstrate[d] a

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[28] *Cf.* Amended Third-Party Complaint at ¶ 12 *with* NRS 163.418(3) and NRS 163.4177(3).

[29] *Cf.* Amended Third-Party Complaint at ¶¶ 73 and 78 *with* NRS 163.418(2) & (3) and NRS 163.4177(1)-(6).

[30] *Cf.* Amended Third-Party Complaint at ¶ 13 *with* NRS 163.418(3) and NRS 163.4177(5).

[31] *Cf.* Amended Third-Party Complaint at ¶¶ 74 & 79 *with* NRS 163.418(2) & (3) and NRS 163.4177(1)-(6).

[32] *Cf.* Amended Third-Party Complaint at ¶ 74 *with* NRS 163.418(2) & (3) and 163.4177(1)-(6).

[33] *Cf.* Amended Third-Party Complaint at ¶ 84 *with* NRS 163.418(2) & (3) and NRS 163.4177(1)-(6).

[34] *See* 02-23-12 Hearing, VTS 15:16:32 - 15:17:50.

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high likelihood of success on her alter ego claims"[35] based upon inadmissible statements purportedly made by Eric. Eric's statements are not controlling because under Nevada law, personal opinion of either spouse as to separate or community character of property is of no moment whatsoever in determining legal status of that property.[36] On the effect of the opinion of a spouse as evidence of the separate or community character of property, the court in *Re Pepper's Estate*, 158 Cal. 619, 625-26, 112 P. 62 (Cal. 1910)[37] stated:

> Whether the property was community or separate, was a question of law, depending on the manner and time of its acquisition. The opinion of Pepper [the husband] on this legal question was entitled to no weight.

Lynita's logic is similarly flawed because settlement proposals are inadmissible to prove the validity/invalidity of Lynita's claims.[38] This basic rule of law was recognized by Lynita's Counsel at trial wherein Mr. Dickerson repeatedly objected to questions on the basis of settlement discussions.[39] In light of the foregoing, this Court should summarily disregard the self-serving excerpts previously referenced by Lynita, and any attempt by Lynita to continue to rely upon the same at trial.

E. LYNITA'S CLAIM FOR CONSTRUCTIVE TRUST IS IMPROPER.

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[35] *See* Opposition to Motion to Dismiss. at p. 14, ll. 24-27.

[36] *See Hardy v. United States*, 918 F. Supp. 312, 317 (D. Nev. 1996) ("The personal opinion of either spouse as to the character of the property is of no moment whatsoever."); *See also*, *Peters v. Peters*, 92 Nev. 687, 692, 557 P.2d 713, 716 (1976) ("The opinion of either spouse as to whether property is separate or community is of no weight whatever."); *In re Wilson's Estate*, 56 Nev. 353, 53 P.2d 339, 344 (1936) (court disregarded affidavit, even through it raises some doubt regarding correctness of findings of the district court, because "it has been decided by this court, as well as by appellate courts of other states, that the opinion of either spouse as to whether property is separate or community is of no weight.").

[37] Overruled on other grounds by *In re Neilson's Estate*, 371 P.2d 745 (Cal. 1962).

[38] *See generally*, NRS 48.105.

[39] *See* August 30, 2010, Trial Transcript at p. 71, ll. 23-24 ("MR. DICKERSON: Objection to anything dealing with settlement discussions."); p. 100, ll. 9-10 ("MR. DICKERSON: Objection, Your Honor, to any hearsay, anything – any discussions on settlement.").

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A constructive trust[40] is an equitable remedy, as opposed to a claim.[41] Thus, if a party's legal claims fail so does the underlying equitable remedies.[42] As an equitable remedy sounding in tort, a party is precluded from seeking a constructive trust if the party has an adequate remedy at law for damages.[43] Lynita has an adequate remedy at law for damages under her other claims for relief. For this reason alone, Lynita's constructive trust claim is improper. Further, Lynita has failed to plead and/or otherwise cannot meet the requisite elements for a constructive trust. For this reason alone, Lynita's Fourteenth Claim for Relief is improper.

F. LYNITA SHOULD BE COMPELLED TO PAY MR. BERTSCH'S FEES AND COSTS.

On March 2, 2011, despite the fact that she had already retained a forensic accountant, Joe

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[40] "[A] constructive trust exists where: '(1) a confidential relationship exists between the parties; (2) the retention of legal title by the holder thereof against another would be inequitable; and (3) the existence of such a trust is essential to the effectuation of justice.'" *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1027, 967 P.2d 437, 442 (1998) (quoting *Locken v. Locken*, 98 Nev. 369, 372, 650 P.2d 803, 804-05 (1982)).

[41] *See DeLee v. Roggen*, 111 Nev. 1453, 1457, 907 P.2d 168, 170 (1995) (quoting *Locken v. Locken*, 98 Nev. 369, 372, 650 P.2d 803, 804-05 (1982)) (Reiterating that "'[a] constructive trust is a remedial device by which the holder of legal title to property is held to be a trustee of that property for the benefit of another who in good conscience is entitled to it'"); *see also Bemis v. Estate of Bemis,* 114 Nev. 1021, 1027, 967 P.2d 437, 441 (1998) ("The constructive trust is no longer limited to [fraud and] misconduct cases; it redresses unjust enrichment, not wrongdoing.") (quoting Dan B. Dobbs, Law of Remedies § 4.3(2) (2d ed.1993)).

[42] *Gilbert v. City of Cambridge*, 932 F.2d 51, 57 (1st Cir. 1991) ("It is settled, therefore, that where legal and equitable claims coexist, equitable remedies will be withheld if an applicable statute of limitations bars the concurrent legal remedy."); *United States v. Lon Lee*, 2006 WL 2927245 (D. Or. 2006) aff'd sub nom. *United States v. Lee*, 06-30611, 2007 WL 3001685 (9th Cir. 2007) ("Here, Petitioner has failed to allege facts sufficient to support a finding of a constructive trust because she has failed to allege an underlying substantive right to the properties that would justify the imposition of an exceptional remedy.").

[43] *Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 896 F.2d 54, 58 (3rd Cir. 1990) ("The proper remedy for breach of contract, however, is an award of damages at law, not the equitable remedy of constructive trust."); *Pearson's Pharmacy, Inc. v. Express Scripts, Inc.*, 505 F. Supp. 2d 1272, 1278 (M.D. Ala. 2007) ("The presence of an adequate remedy at law precludes the enforcement of a constructive trust. . . The court finds that plaintiffs have an adequate remedy at law for damages under a theory of breach of contract."); *Gimbel v. Feldman*, 1996 WL 342006 (E.D.N.Y. 1996) ("Constructive trusts are equitable remedies sounding in tort to recovery money or property acquired through fraud or undue influence").

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Leauanae, and had paid him nearly $70,000.00,[44] Lynita requested that this Court "appoint a forensic accountant to review the financial records at issue in this litigation."[45] The ELN SSST would have opposed Lynita's self-serving request had it been a Party in this litigation at that time.

On April 4, 2011, this Court appointed Larry Bertsch, CPA and Nicholas Miller, CFE to perform a "forensic accounting intended to provide the Court with an accurate evaluation of the parties' estate."[46] Since the April 4, 2011, hearing Mr. Bertsch has completed the task for which he was appointed by providing this Court with detailed reports of any and all assets belonging to the Parties.

On April 26, 2012, Mr. Bertsch filed an Application of Forensic Accounts for Allowance of Fees and Reimbursement of Expenses for the Period from April 4, 2011 through March 31, 2012,[47] seeking the payment of $58,938.00 in fees and $2.00 in costs (in addition to the $60,000.00 that he has already been paid by Eric and/or the ELN SSST). To date, neither Lynita nor the LSN SSST have paid any of Mr. Bertsch's fees and costs even though said Parties benefit the most from his retention.[48] Lynita and/or the LSN SSST should pay any additional fees and costs owed to Mr. Bertsch for reasons, including, but not limited to, the following.

First, the ELN SSST was not a party to this action when Mr. Bertsch was appointed as Special Master. Consequently, the ELN SSST never agreed to pay the fees and costs associated with Mr. Bertsch. Second, the ELN SSST is not in a position to pay its own attorneys' fees, expert fees, administration expenses ***let alone*** Mr. Bertsch's fees and costs. Third, upon information and belief,

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[44] *See* Notice of Filing Amendment to Source and Application of Funds for Lynita Nelson, on file herein.

[45] *See* Order, previously filed May 25, 2011, on file herein.

[46] *See* Order, previously filed June 9, 2011, on file herein.

[47] *See* Application of Forensic Accounts for Allowance of Fees and Reimbursement of Expenses for the Period from April 4, 2011 through March 31, 2012, previously filed on April 26, 2012, on file herein.

[48] Indeed, said reports, schedules, transactions *etc*. performed by Mr. Bertsch does not benefit the ELN SSST because the ELN SSST is already in possession of documents that Mr. Bersch is analyzing/reviewing.

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the liquid assets of Lynita and/or the LSN SSST vastly exceed those of the ELN SSST. Fourth, Lynita and/or the LSN SSST are the only Parties that reap the benefit of Mr. Bertsch's engagement, especially in light of the fact that they have not had to contribute to his fees and costs. Indeed, the majority of reports, schedules, transactions *etc*. analyzed and/or prepared by Mr. Bertsch pertain to the ELN SSST and/or entities owned by the same. Said reports, schedules, transactions *etc*. do not benefit the ELN SSST because the ELN SSST is already in possession of documents that Mr. Bersch is analyzing/reviewing. To the extent that Lynita and/or the LSN SSST contend that they have insufficient documents/information regarding the ELN SSST, it is her responsibility to request said documents/information through the numerous avenues of discovery, analyze said information, and retain an expert of her choosing. It is inappropriate for Lynita and/or the LSN SSST on one hand to expect a third-party to prepare their case-in-chief, and on the other hand demand that the ELN SSST, who was not even a party to this litigation when Mr. Bertsch was appointed, pay the bill.

V. ATTORNEYS' FEES AND COSTS

Amount of Fees Incurred to Date (through June 30, 2012):	$236,863.50
Amount of Costs Incurred to Date (through June 30, 2012):	$8,098.96
Amount of Fees Paid to Date (through June 30, 2012):	$154,595.38
Amount Remaining Due and Owing:	**$65,714.23**

The ELN SSST has incurred additional attorneys' fees and costs from July 1, 2012, to the present date, and will continue to do so in preparing for the July 16, 2012, trial. The ELN SSST is entitled to their attorneys' fees and costs under the terms of the ELN SSST,[49] this Court's Findings of Fact and Order dated January 31, 2012 and overwhelming case law.[50]

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[49] *See generally*, ELN SSST, Article XII, Section 12.1, 12.2 and 12.6.

[50] *See, e.g.*, *See* NRS 163.375 ("A fiduciary may compromise, adjust, arbitrate, sue on or defend, abandon or otherwise deal with and settle claims in favor of or against the estate or trust a the fiduciary deems advisable. . ."); NRS 163.380 ("A fiduciary may employ and compensate, out of income or principal or both and in such proportion as the fiduciary deems advisable, persons deemed by the fiduciary needful to advise or assist in the proper settlement of the estate or administration of the trust, including, but not limited to, agents, accountants, brokers, attorneys at law, attorneys-in-fact . . ."); RESTATEMENT (THIRD) OF TRUSTS § 581 ("Equity imposes upon the trustee the duty of defending the integrity of the trust, if he has reasonable ground for believing that

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VI. LIST OF WITNESSES

A. ELN SSST'S LIST OF WITNESSES

1. LANA MARTIN
c/o Solomon Dwiggins Freer & Morse, Ltd.
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483

Ms. Martin is expected to testify concerning the facts and circumstances surrounding the Counterclaims and Cross-Claims, damages claimed and any other information which is pertinent to this lawsuit.

2. LYNITA SUE NELSON
c/o Robert P. Dickerson, Esq.
Dickerson Law Group
1745 Village Center Circle
Las Vegas, NV 89134
Telephone: (702) 388-8600

Ms. Nelson is expected to testify concerning the facts and circumstances surrounding the Counterclaims and Cross-Claims, damages claimed and any other information which is pertinent to

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the attack is unjustified or if he is reasonably in doubt on that subject."); RESTATEMENT (SECOND) OF TRUSTS § 178 ("The trustee is under a duty to the beneficiary to defend actions which may result in a loss to the trust estate . . ."); *Sundquist v. Sundquist*, 639 P.2d 181, 188 (Utah 1981) (stating that "[a] trustee has the fiduciary duty and the concomitant power to defend the trust from the depletion of its assets by decrees of termination or invalidity"); *Estate of Harvey*, 330 P.2d 478, 164 Cal.App.2d 330 (Ca. 1958) (a testamentary trustee has a power and duty to resist a claim by the widow of the testator that the trust property was community property); *Bank of Am. Nat. Trust & Sav. Ass'n v. Long Beach Fed. Sav. & Loan Ass'n*, 141 Cal. App. 2d 618, 624, 297 P.2d 443, 447 (Ca. 1956) ("The law governing the administration of trusts is that a trustee not only has the right, but it is his duty, whenever necessary to the proper administration, preservation and execution of the trust or to its defense"); *Avery v. Bender*, 126 A.2d 99, 113 (Vt. 1956) (holding that a trustee has "an active duty to participate" in litigation and to employ counsel for that purpose in an action to declare a trust amendment null and void as it "put in issue the validity of part of the trust as it was being administered by [the trustee]"); *In re Kessler's Estate*, 196 P.2d 559, 561 (Cal. 1948) (stating "it is [the trustee's] duty to defend the estate from all unjust and illegal attacks made upon it which affect the interests of heirs, devisees, legatees or creditors"); *Rossi v. Davis*, 133 S.W.2d 363, 376 (Mo. 1939) (recognizing that a trustee is entitled to all expenses reasonably necessary for the prevention of a failure of the trust, including fees and expenses incurred in litigation concerning the trust's validity); *Republic Nat. Bank & Trust Co. v. Bruce*, 130 Tex. 136, 141, 105 S.W.2d 882, 885 (Comm'n App. 1937) ("The absolute and positive duty is imposed upon him [the trustee] to defend the life of the trust whenever it is assailed, if the means of defense are known to him, or can with diligence be discovered.").

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this lawsuit.

3. ERIC L. NELSON
c/o Rhonda K. Forsberg, Esq.
Forsberg & Douglas
1070 W. Horizon Ridge Parkway, #100
Henderson, NV 89012
Telephone: (702) 800-3588

Mr. Nelson is expected to testify concerning the facts and circumstances surrounding the Counterclaims and Cross-Claims, interests claimed and any other information which is pertinent to this lawsuit.

4. SHELLEY NEWELL
7800 Blue Eagle Way
Las Vegas, NV 89128

Ms. Newell is expected to testify concerning the facts and circumstances surrounding the Counterclaims and Cross-Claims, interests claimed and any other information which is pertinent to this lawsuit.

5. ROCHELLE MCGOWAN
c/o Solomon Dwiggins Freer & Morse, Ltd.
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
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Ms. McGowan is expected to testify concerning the facts and circumstances surrounding the Counterclaims and Cross-Claims, interests claimed and any other information which is pertinent to this lawsuit.

6. JOAN RAMOS
c/o Solomon Dwiggins & Freer, Ltd.
9060 West Cheyenne Avenue
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Ms. Ramos is expected to testify concerning the facts and circumstances surrounding the Counterclaims and Cross-Claims, interests claimed and any other information which is pertinent to this lawsuit.

7. NOLA HARBER
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Ms. Harber is expected to testify concerning the facts and circumstances surrounding the Counterclaims and Cross-Claims, interests claimed and any other information which is pertinent to this lawsuit.

8. JEFFREY BURR, ESQ.
Jeffrey Burr, Ltd.
2600 Paseo Verde Parkway, # 200
Henderson, NV 89074

Mr. Burr is expected to testify concerning the facts and circumstances surrounding the Counterclaims and Cross-Claims, interests claimed and any other information which is pertinent to this lawsuit.

9. RICHARD KOCH, ESQ.
Koch & Brim, LLP
4520 S. Pecos Road #4
Las Vegas, NV 89121

Mr. Koch is expected to testify concerning the facts and circumstances surrounding the Counterclaims and Cross-Claims, interests claimed and any other information which is pertinent to this lawsuit.

B. ELN SSST'S LIST OF EXPERT WITNESSES

1. LAYNE T. RUSHFORTH, ESQ.
The Rushforth Firm, Ltd.
P.O. Box 371655
Las Vegas, Nevada 89137-1655
Telephone: (702) 255-4552

Mr. Rushforth is a designated expert and is expected to provide testimony regarding any and all matters contained in his report dated June 27, 2012, which is attached hereto as **Exhibit 5.**

2. DANIEL T. GERETY, CPA
Gerety & Associates, CPA's
6817 S. Eastern Avenue, Suite 101
Las Vegas, Nevada 89119-4684
Telephone: (702) 933-2213

Mr. Gerety is a designated expert and is expected to provide testimony regarding any and all matters contained in his report dated July 5, 2012, which is attached hereto as **Exhibit 6**.

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The ELN SSST reserves the right to call any witnesses on Eric and Lynita's List of Witnesses, any and all witnesses called to testify by Eric or Lynita, and any and all necessary rebuttal witnesses for purposes of rebuttal testimony.

VII. LIST OF EXHIBITS

A. Pre-Hearing Exhibits disclosed in Plaintiff's Pre-Trial Memorandum on or around August 30, 2010.

B. Exhibits disclosed in Defendant's Pre-Trial Memorandum on or around August 27, 2010.

C. Separate Property Agreement dated April 28, 1993 (but executed on July 13, 1993).

D. Correspondence from Jeffrey L. Burr, Esq. to Richard Koch, Esq. dated July 13, 1993.

E. THE ERIC L. NELSON SEPARATE PROPERTY TRUST dated July 13, 1993.

F. THE NELSON TRUST dated July 13, 1993.

G. ERIC L. NELSON NEVADA TRUST u/a/d 5/30/2001

H. THE LSN NEVADA TRUST dated May 30, 2001

I. Minutes of Annual Meetings for the ERIC L. NELSON NEVADA TRUST u/a/d 5/30/2001.

J. Minutes of Annual Meetings for the THE LSN NEVADA TRUST dated May 30, 2001.

K. Any and all documents disclosed by Lynita S. Nelson in her Responses to Requests for Production of Documents and Fifth and Sixth Supplement to Initial Disclosures.

The ELN SSST reserves the right to utilize any document on Eric and Lynita's List of Exhibits, and any and all necessary documents for purposes of rebuttal testimony.

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LAS VEGAS, NEVADA 89129
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E-MAIL: sdf@sdfnvlaw.com

VIII. LENGTH OF TRIAL

This Court has already scheduled trial on this matter for July 16-19 and 23-24, 2012. The ELN SSST believes it would it is in the best interests of all Parties to hear the claims pertaining to the ELN SSST and LSN SSST first (*i.e.* declaratory relief, alter ego, constructive trust, *etc.*).

DATED this 6th day of July, 2012.

SOLOMON DWIGGINS & FREER, LTD.

By: _____

MARK A. SOLOMON, ESQ.
Nevada State Bar No. 0418
JEFFREY P. LUSZECK
Nevada State Bar No. 9619
Cheyenne West Professional Centre
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129

CERTIFICATE OF MAILING

I HEREBY CERTIFY that pursuant to EDCR 7.26(a), service of the foregoing **THE ERIC L. NELSON NEVADA TRUST'S PRETRIAL MEMORANDUM** was made on this 6th day of July, 2012, by sending a true and correct copy of the same by United States Postal Service, first class postage fully prepaid, to the following at his last known address as listed below:

Robert P. Dickerson, Esq.
Dickerson Law Group
1745 Village Center Circle
Las Vegas, NV 89134

_____
An employee of SOLOMON DWIGGINS & FREER, LTD.

SOLOMON DWIGGINS & FREER, LTD.
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EXHIBIT 1

EXHIBIT 1

DISTRICT COURT

CLARK COUNTY, NEVADA

ERIC L. NELSON,

Plaintiff/Counterdefendant,

vs. Case No. D-411537

LYNITA SUE NELSON; LANA MARTIN, as Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Defendants/Counterclaimants.

LANA MARTIN, Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Cross-claimant,

vs.

LYNITA SUE NELSON,

Cross-defendant.

VIDEOTAPED DEPOSITION OF JEFFREY L. BURR
Volume I

Taken on Wednesday, February 22, 2012
At 10:05 a.m.

Held at Solomon Dwiggins Freer & Morse
9060 West Cheyenne Avenue
Las Vegas, Nevada

Reported by: Ellen A. Goldstein, CCR 829

of his assets?

MR. SOLOMON: Object; leading.

THE WITNESS: Again we -- that was an important part of our discussion and she -- I mean I told both of them that the assets that remained would be available, you know, for the community for both them and their family at the discretion of course of the trustee of that trust and the trustor. In this case it was a revocable trust, so trustor/trustee.

BY MR. DICKERSON:

Q And did you explain to Lynita that she would be a beneficiary under Eric's trust?

A Yes.

Q Did Eric have any discussion or do you recall any conversation by Eric where he communicated to Lynita in any way his intent to equalize the property on a periodic basis?

A All I recall -- all I recall is that they were committed to this plan but to make sure that they were treating each other fairly and equally down the road in relation to their property and their property rights.

Q Was there any discussion as to the purpose of the separate-property settlement agreement and the two trusts that you prepared for the Nelsons?

A Yes.

Q What was the purpose?

A Again, the purpose was to take community property that

would be exposed 100 percent to liabilities that Eric might incur in the venture he was undertaking and to separate that community property into separate property so that at least Lynita's one-half could remain protected in the event a liability occurred and that Eric were to, well, incur liability and they would try to reach Lynita's assets. The creditors could not reach the assets.

Q Do you recall how many times you met with Lynita Nelson to explain what you said here today with respect to this transaction involving what occurred in 1993?

A I'm going to say, to the best of my recollection, three times.

Q Prior to those meetings in 1993, you did have an ongoing attorney-client relationship with Lynita Nelson; is that right?

A Yes.

Q And do you believe that she had the trust and confidence in the advice that you were giving her?

A Yes.

Q Now, isn't it true, Mr. Burr, that you recommended to her the name of Richard Koch?

A Yes.

Q And you suggested only one attorney, Richard Koch?

A I don't recall, but I know I suggested Richard.

Q And that -- and actually you contacted Richard Koch,

REPORTER'S CERTIFICATE

I, Ellen A. Goldstein, a duly certified court reporter in and for the County of Clark, State of Nevada, do hereby certify:

That I reported the taking of the deposition of the witness, JEFFREY L. BURR, at the time and place aforesaid;

That prior to being examined, the witness was by me duly sworn to testify to the truth, the whole truth and nothing but the truth;

That the witness requested to read and sign the transcript herewith;

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript of said deposition is a complete, true and accurate transcription of my said shorthand notes taken down at said time.

I further certify that I am not a relative or employee of an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel involved in said action, nor a person financially interested in the action.

IN WITNESS THEREOF, I have hereunto set my hand in the County of Clark, State of Nevada, this 29th day of February 2012.

_____
Ellen A. Goldstein, CCR No. 829

EXHIBIT 2

EXHIBIT 2

DISTRICT COURT

CLARK COUNTY NEVADA

ERIC L. NELSON, Plaintiff/Counterdefendant, vs. LYNITA SUE NELSON, LANA MARTIN, as Distribution Trustee of ERIC L. NELSON NEVADA TRUST dated May 30, 2001, Defendants/Counterclaimants.	CASE NO. D-411537 DEPT. NO. O
LANA MARTIN, Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001, Crossclaimant, vs. LYNITA SUE NELSON, Crossdefendant.	

DEPOSITION OF RICHARD KOCH, ESQ.

Taken on Tuesday, May 1, 2012

At 10:06 a.m.

At Solomon Dwiggins & Freer, Ltd.

9060 West Cheyenne Avenue

Las Vegas, Nevada

Reported by: CINDY K. JOHNSON, RPR, CCR NO. 706

understanding that this agreement did not truly effectuate the parties' intent?")

THE WITNESS: I would say, yes, it would -- that this would be an incomplete representation of the agreement, if that had been represented to me.

BY MR. SOLOMON:

Q. Okay.

A. In other words, this might have been the agreement, but it may not have been complete.

Q. In accordance with your custom and habit, what would you have advised Lynita in order to explain the legal effect of this agreement and have her acknowledge to you that she had an understanding of its legal consequences?

MS. PROVOST: Object as to the form of the question. He has no recollection of what he advised Lynita. If you're asking about his custom and habit with any general person, then I don't have an objection to that.

THE WITNESS: My custom would have been to explain how community and separate property work and it'd kind of be about the principles about bringing property into the marriage, about the community property rights that have accrued during the marriage, about how community property and separate property can be

converted.

And I would have, I guess, wanted her to be satisfied that she was an intelligent woman who has some understanding of that, that this was done freely by her.

I have no recollection of going through the property list, which I see here, or the values -- I don't see any values here -- but I would have wanted to make sure she had some comprehension of what the agreement meant.

BY MR. SOLOMON:

Q. Okay. Would that also have included -- that explanation have included how the separate property would be divided normally upon divorce, if that were to occur?

A. I don't -- I have no idea if I discussed that with her specifically or not. I don't know. But I -- that's certainly a good topic for discussion. I don't know if I discussed that with her specifically.

Q. Okay. Would that have been your -- I'm not asking -- I know you have no recollection of it --

A. I understood that.

Q. -- so I'm not asking --

A. And I'm saying, generally, I don't know if I would have discussed that. I guess I would have. My perceived understanding of what they're doing and why

CERTIFICATE OF COURT REPORTER

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, Cindy Johnson, a duly licensed reporter for Clark County, State of Nevada, do hereby certify: That I reported the deposition of Richard Koch, Esq., commencing on Tuesday, May 1, 2012, at 10:06 a.m.

That prior to being deposed, the witness was duly sworn by me to testify to the truth. That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript is a complete, true and accurate transcription of my said shorthand notes. Transcript review pursuant to NRCP 30(e) was requested.

I further certify that I am not a relative or employee of counsel or any of the parties, nor a relative or employee of the parties involved in said action, nor a person financially interested in the action.

IN WITNESS WHEREOF, I have set my hand in my office in the County of Clark, State of Nevada, this 7th day of May 2012.

Cindy K. Johnson, RPR, CCR No. 706

EXHIBIT 3

EXHIBIT 3

Eric Nelson

From: "Denise Gentile" <denise@dickersonlawgroup.com>
To: "Eric Nelson" <eric@enlvcorp.com>
Cc: "L. Nelson" <tiggywinkle@cox.net>; "Bob Dickerson" <bob@dickersonlawgroup.com>
Sent: Monday, March 02, 2009 4:26 PM
Subject: re: Nelson divorce

Eric,

I have spoken with Lynita regarding your divorce case and have the following response to your various demands and concerns:

First, be aware that we ARE working on the case (contrary to your comments) and we are doing everything that we can to avoid having to go to court and battle this case in an adversarial setting. Florence Rodriguez spent an inordinate amount of time trying to create a list of assets and questions relating to your estate. Unfortunately, Florence was on vacation for the last two weeks, and I was unable to access her or discuss the case with her because she was out of the country. I needed her help in understanding what information she had obtained and what she believed we were still missing. Today is her first day back, and I have not yet had the opportunity to meet with her to review everything that you have delivered as compared to what she believes we need or were missing from the document productions.

In the meantime, to keep the peace and to ensure that this matter proceeds smoothly, we ask that you continue to support Lynita in the manner she has been supported by you during the pendency of this action. Lynita requests that you pay her directly the sum of $16,000 per month. In addition, you promised that you would pay for Lynita's carpet and have told me that you would do so. Now, you have placed conditions on the case and inform that you will only do this if you were able to meet with us. However, a meeting with us does not provide the necessary information at this point. We have met and discussed this case *ad nauseum*, but I am not permitted to take you at your word. My job is to ensure that you provide the necessary documentation to support your position. In that regard, more documentation is needed to ensure that we have what is necessary to complete this case.

Additionally, you have incessantly asked that Lynita sign the deeds on the Mississippi property. However, we need to clarify some issues in this matter. There have been documents presented to you asking you to acknowledge all of the property is community property. Mr. Burr asked that you sign them, and you refused. You since have admitted that the separate property agreements (as much as you would like to rely upon them in your arguments for this divorce), were prepared to ensure that Lynita was protected from creditors. Yet, after the execution of said agreements, you have operated in such a way that you handle and manage the affairs of both separate property trusts and conduct yourself as if the property is yours in both. If you are willing to sign the documents presented to you by Mr. Burr, and willing to acknowledge the community nature of all of the assets, then we may be able to make some quicker progress. Otherwise, if this matter becomes contested, Lynita will be forced to file a claim against you to set aside those agreements.

In this regard, and as an additional informal document request, there are certain items of information that I know we are missing, which I am going to request from you by way of this e-mail:

1) Please provide any and all management contracts you may have with the Silver Slipper Casino
2) Please provide all financial statements and ledgers for the various entities owned by you, including Eric Nelson Auctioneering (at least for the past 6 years) (you provided pieces and parts of financial statements for ENA and Eric Nelson Trust, but they were deficient and failed to provide a full picture of what has happened in those entities).
3) Please provide all tax returns from the various entities owned by you
4) Please provide an accounting of the funds which were in the Mellon and other investment accounts, for the past 5 years – so as to account for the additional several million dollars which were invested therein, but which was depleted during the period just prior to your separation from Lynita. It is my understanding that there was in excess of $13,000,000 in those accounts, but was depleted by you down to $8,000,000 just prior to the separation (we can start with an accounting of what was in those accounts over the last 2 years, and work from there)
5) Please provide me with copies of your personal bank account statements for the past 5 years (but I will accept as a start the bank statements for the last year and then we can work from there)

3/10/2009

6) Please provide me with an accounting of each and every auction that you have performed in the last six years and an accounting of the proceeds therefrom (we can start with the auctions you performed in 2007 and 2008, and work from there)

7) Please provide all documentation indicating from where you derive your income. Are you paid a management fee from Silver Slipper, are you drawing money from one of your various entities? Please advise us about from where you pull your income.

In addition to the foregoing, Lynita and I are working on a different settlement proposal which may result in a resolution of this case. I will forward that to you as soon as possible, and once I have it confirmed with Lynita regarding the specific terms. In the meantime, please work on getting me the documents as listed hereinabove.

Finally, you mentioned to Jenn in one of your voice mails that you may be getting a lawyer or you have sought counsel with a lawyer. If you have retained a lawyer to help you in this case, I am forbidden from communicating directly with you. Please advise if you still represent yourself, or whether you have counsel with whom I need to speak.

Thank you,

Denise Gentile

Denise Gentile

Denise L. Gentile, Esq.
THE DICKERSON LAW GROUP
1745 Village Center Circle
Las Vegas, Nevada 89134
Telephone (702) 388-8600
Facsimile (702) 388-0210

3/10/2009

EXHIBIT 4

EXHIBIT 4

Dickerson Law Group
1745 Village Center Circle
Las Vegas, NV 89134
Telephone: 702-388-8600
Fax: 702-388-0210

August 19, 2009
Invoice No. 3007

LYNITA S. NELSON
7065 Palmyra Ave.
Las Vegas, NV 89117

Client Number: 08-198 LYNITA S. NELSON
Matter Number: 08-120 NELSON, LYNITA S. adv. ERIC L. NELSON;
For Services Rendered Through 7/31/2009.

Fees

Date	Timekeeper	Description	Hours	Amount
07/06/2009	FRU	Review emails from client.	0.40	$70.00
07/07/2009	FRU	Draft and revise transmittal letter regarding [redacted]	0.50	$87.50
07/08/2009	DLG	Numerous emails between Ed Kainen and Lynita Nelson regarding scheduling meeting and e-mail from Lynita regarding issues in the case.	0.40	$180.00
07/13/2009	FRU	Review and analyze evidence developed in order to prepare for tomorrow's conference with Eric and his counsel.	1.70	$297.50
07/14/2009	DLG	Office conference with Lynita Nelson, Eric Nelson, and Ed Kainen. [Eric Nelson left the meeting early and Lynita and Ed remained; then Lynita remained after Ed departed. - discussed financial disclosure and motion for temporary support].	2.50	$1,125.00
07/14/2009	FRU	Office conference with Lynita Nelson, Eric Nelson, Edward Kainen, and Denise Gentile, Esq., requested by Eric. Mr. Nelson walked out almost upon commencement when documents requested of him. Continued meeting with his counsel. Reached agreement regarding necessity of forensic accountant and joint business appraiser, Stephen Nicolatus. Forensic accountant not determined. Ed indicated he was sending over financial disclosure and it was in the process o being prepared.	2.50	$437.50

Continued On Next Page

Date		Description	Hours	Amount
07/24/2009	FRU	Telephone conference with Lynita Nelson.	0.20	$35.00
07/27/2009	FRU	Draft and revise correspondence to Dolores H. Millikie, City Deputy County Attorney, Civil Division, Mohave County regarding requested payment.	0.30	$52.50
07/28/2009	FRU	Telephone conference with client, conference with Denise Gentile, revised, finalized, and faxed letter to Mohave County District Attorney; work on preparation of financial declaration.	4.90	$857.50
07/29/2009	FRU	Draft motion and order to seal case; start preparing first draft of motion for temporary orders.	5.20	$910.00
07/30/2009	FRU	Reviewed LSN & ELN Trusts and work on first draft of motion[redacted]	5.40	$945.00
		Billable Hours / Fees:	24.80	$4,997.50

Timekeeper Summary

Timekeeper DLG worked 2.90 hours at $450.00 per hour, totaling $1,305.00.
Timekeeper FRU worked 21.10 hours at $175.00 per hour, totaling $3,692.50.

Cost Detail

Date	Description	Amount	Check No.
07/08/2009	Postage	$0.44	
07/29/2009	Postage	1.76	
07/31/2009	Photocopies July 2009	26.20	
	Total Costs	$28.40	

Payment Detail

Date	Description	Amount
08/18/2009	Credit Card Payment from Visa pursuant to authorization received from L. Nelson for payment of Invoice No. 2977	($9,912.50)
08/18/2009	Credit Card Payment from Visa pursuant to authorization received from L. Nelson for payment of Invoice No. 2977	($239.27)
08/18/2009	Credit Card Payment from Visa pursuant to authorization received from L. Nelson for payment of Invoice No. 2977	($504.82)
	Total Payments Received:	($10,656.59)

Continued On Next Page

EXHIBIT 5

EXHIBIT 5

The Rushforth Firm, Ltd.
A Professional Limited-Liability Company

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layne@rushforth.net

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http://rushforthfirm.com

June 27, 2012

Mark A. Solomon, Esq.
Solomon Dwiggins & Freer, Ltd.
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129

Re: Nelson v. Nelson
(Our File: 6691)

Dear Mark:

A. OPINION REQUESTED

I am sending this letter to express my opinions, as an expert witness, with respect to the following questions:

A.1 Do the Separate Property Agreement and Separate Property Trusts signed by Eric and Lynita Nelson in 1993 affect their property interests, both as to the claims of their creditors and as to their rights between themselves in a divorce proceeding? *My response to this question is in section B of this letter.*

A.2 Does the trust agreement for the ERIC L. NELSON NEVADA TRUST dated May 30, 2001 ("Eric's SSST") create a valid self-settled spendthrift trust ("SSST") sometimes referred to as an asset protection trust ("APT") under Nevada law? *My response to this question is in subsection C.1 of this letter.*

A.3 If Eric's SSST is a valid SSST:

(a) What is the status of separate property that was transferred to Eric's SSST? *My response to this question is in subsection C.2 of this letter.*

(b) Is it possible for property in Eric's SSST to become classified as community property if it was his separate property at the time of its contribution? *My response to this question is in subsection C.3 of this letter.*

(c) What is the status of community property, if any, that was transferred to the trust? *My response to this question is in subsection C.4 of this letter.*

A.4 What would be required to establish that Eric's SSST is the alter ego of Eric Nelson sufficient to disregard the trust as a separate entity? *My response to this question is in section D of this letter.*

A.5 What statute or statutes of limitation apply to negate transfers to the trust? *My response to this question is in subsection E of this letter.*

B. Validity of 1993 Property Arrangements

B.1 In my opinion, NRS 123.080 and NRS 123.220(1) allow spouses to alter the default rules of spousal property interests, and their mutual consent is sufficient consideration. Thus, community property can be transmuted in to separate property, and vice versa. Transmutation must be established by clear and convincing evidence[1], but the agreement between Eric and Lynita is both clear and convincing, and it satisfies the requirement of NRS 123.220(1).

Paragraph 2 of the Separate Property Agreement dated April 28, 1993 reads as follows:

> "The Parties agree that this AGREEMENT shall be controlling in determining the ownership of each party's property regardless the manner in which the property was previously held or titled, acquired through capital or personal efforts, or whether the property is real, personal or any variation thereof."

B.2 The foregoing provision does not state that the agreement is only controlling in some situations or that it does not apply in others.

(a) To state that the agreement would be binding against third-party creditors but not binding in a divorce would be a modification that would vary the terms of the written agreement. The Nevada Supreme Court has ruled on more than one occasion that "[i]f the terms of an agreement are clear, definite and unambiguous, parol evidence may not be introduced to vary those terms."[2] Thus, it is inappropriate for the court to consider any extrinsic evidence of any contrary terms, understandings, or agreements unless the terms of an agreement are ambiguous. The 1993 agreement is not ambiguous, and even if it were, Nevada law allows only clarifying evidence, not evidence that contradicts the express terms of the agreement.[3] Contracts, like wills, should be construed by reading the actual words

---

[1] *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994).

[2] *Crow-Spieker No. 23 v. Robinson*, 629 P.2d 1198, 1199 (Nev. 1981).

[3] *Ringle v. Bruton*, 86 P.3d 1032, 1037 (Nev. 2004).

used, not by trying to infer intent from something else.[4]

(b) Although extrinsic evidence is not admissible to contradict the terms of the Separate Property Agreement, the testimony of the drafting attorney, Jeffrey L. Burr, supports the validity of that agreement, as written, and does not support the proposition that the transmutation of community property really only operated as to third parties, such as creditors, leaving the parties as if no marital property agreement had been written in the event of a divorce between them. Mr. Burr testified that a side agreement would make the plan ineffective. He also testified that he explained the legal consequences of the agreement to both parties, pointing out that equalization would have to occur by gift, making it clear that it would not occur automatically, dispelling any inference that community property rights would stay intact.

(c) The following excerpts come from the transcript of the videotaped deposition of Mr. Burr taken February 22, 2012 (omitting objections):

(i) From page 22 (Questioning by Mark Solomon):

Q: You can't, for example, have a situation where the parties agree that for purposes of creditors they're going to treat this as separate-property pools, but for any other purpose it's a wink and a nod and it's not really separate property, it's something different; is that correct?

A: Yeah. There has to be -- basically the division of assets in the plan has to be done without any outside agreements in order to be effective.

Q: It has to be a real agreement?

A: Yes.

Q: You can't have hidden side agreements?

A: Right.

Q: You can't have a wink and a nod that we're not going to treat this consistently for all purposes; correct?

A: Yes.

(ii) From pages 32-33 (Questioning by Mark Solomon):

Q: When you had meetings with Lynita and Eric, did you explain to both of them the legal consequences of an agreement like this?

---

[4]See *Zirovcic v. Kordic*, 101 Nev. 740, 709 P.2d 1022 (1985), quoting language from *Jones v. First Nat. Bank*, 72 Nev. 121, 296 P.2d 295 (1956).

A: Yes.

Q: Do you believe you had an ethical obligation, representing both Lynita and Eric in connection with the development of this type of estate plan, to go over with them the benefits and the risks and the detriments involved in entering such agreement?

A: Yes.

Q: Did you fulfill that ethical obligation to the best of your ability?

A: Yes.

(iii) From page 35 (Questioning by Mark Solomon):

Q: Did you have any discussion at that time, 1993, prior to the execution of this agreement, with Eric and/or Lynita about what they could do in the future should one trust become more or less valuable than the other party's trust?

A: Yes.

Q: And did you -- what did you tell them in that regard?

A: I just told them that as of that date, by agreement, they would have an equal division; and since it was not their intent to -- it was not divorce or dissolution planning, it was their intent at that time to keep their assets, you know, pretty much equally owned, that it would be important to periodically rebalance the trusts so that the assets would maintain equal value in each trust.

Q: And how would that be accomplished in the future?

A: By gift.

Q: Okay. You did tell them that?

A: Yes.

(iv) From page 84 (Questioning by Mark Solomon):

Q: You have no understanding one way or the other whether there was any agreement between Lynita and Eric to ignore the Separate-Property Agreement in the event of a divorce; is that correct as a factual matter?

A: Right.

(v) From page 113 (Questioning by Dickerson):

Q: Was there any discussion as to the purpose of the separate-property settlement agreement and the two trusts that you prepared for the Nelsons?

A: Yes.

Q: What was the purpose?

A: Again, the purpose was to take community property that would be exposed 100 percent to liabilities that Eric might incur in the venture he was undertaking and to separate that community property into separate property so that at least Lynita's one-half could remain protected in the event a liability occurred and that Eric were to, well, incur liability and they would try to reach Lynita's assets. The creditors could not reach the assets.

(vi) From pages 125-126 (Questioning by Dickerson):

Q: Was there any discussion that you recall having with them of the legal consequences of this agreement should they get a divorce?

A: We talked about that 'cause that was a big topic, and again my -- this is my own personal opinion. You know, this particular planning was done for asset-protection purposes as to third parties; and I always warn my clients or at least tell them that, you know, when it comes to dissolution of a marriage, I believe there's a lot more opportunity to have the Court award property in an equitable manner based on the intended parties. But again, I'm not a family-law attorney, but we have that discussion. So that's why I said, "As a safety valve, to be sure that you can maintain your equal ownership, it's best to periodically equalize the property through gifting."

(d) The following excerpts come from the transcript of the videotaped deposition of Mr. Burr taken April 11, 2012 (omitting objections):

(i) From page 195 (Questioning by Mark Solomon):

Q: "... it had to be a true agreement where the property was separated – the community was separated -- into separate property for all purposes. Does that comport with your recollection?

A: Yes.

Q: Okay. You also indicated that there couldn't be a side agreement, a secret side agreement, where it was separate property for some purposes but not for others. Do you recall so testifying?

A: Yes.

(ii) From pages 196-197 (Questioning by Mark Solomon):

Q: In fact if the parties had such an agreement, express or implied, that this agreement would not apply in the event of a divorce, isn't it your legal opinion, as you've already expressed in earlier portions of your deposition, that that would give a creditor a very good claim that the agreement was not a true division of the community property and therefore would not help you, in essence, in the estate planning you were trying to achieve?

A: I mean I think the document speaks for itself. They basically agreed to divide their property at that point in time in two equal parts and treat that property as separate property, so that's what this agreement accomplished. As far as the legal impact of some type of implied or side agreement, I really couldn't give an opinion on that. All I can say is that's what was occurring here, that they were dividing their property into separate property as allowed by law, as permitted by law.

B.3 One cannot accept the benefits of an agreement for some purposes and then repudiate it for others.[5] From the materials I have reviewed, the parties' intent was to separate assets so that only Eric's separate property would be exposed to the perceived additional risk that came from the investments he was making. Lynita cannot accept that benefit while arguing that she really retained an interest in Eric's separate property. The Nevada Supreme Court has ruled that it "is well settled that a person shall not be allowed at once to benefit by and repudiate an instrument, but, if he chooses to take the benefit which it confers, he shall likewise take the obligations or bear the onus which it imposes."[6]

B.4 Once the Separate Property Agreement identified the parties' separate property, each party was expressly permitted to transfer his or her separate property to his or her own revocable trust. Such a transfer could not transmute the property to community property in the absence of an express declaration otherwise.

B.5 Thus, in my opinion, if the Separate Property Trusts created in 1993 were funded with the separate property identified in the Separate Property Agreement, or with property traceable thereto, then the assets of those trusts would constitute the separate property of each settlor unless that settlor expressly declared otherwise.

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[5] *Schmidt v. Horton*, 287 P. 274, 280 (Nev. 1930).

[6] *Fed. Mining & Engr. Co. v. Pollak*, 85 P.2d 1008, 1012 (Nev. 1939), citing *Alexander v. Winters*, 24 Nev. 143, 146, 50 P. 798, 799 (1897).

C. VALIDITY OF ERIC L. NELSON NEVADA TRUST AS A NEVADA SPENDTHRIFT TRUST

C.1 NRS Chapter 166 governs the validity of spendthrift trusts, including a trust that provides for the benefit of the trust's settlor, which we refer to as a "self-settled spendthrift trust" or an "SSST". In order for a valid SSST to be established, the trust must be properly established under NRS 163.002 et seq., and it must also meet these additional requirements of NRS Chapter 166:

(a) There is a nexus to Nevada, which can be met if any one of the following is true:

(i) All or part of the land, rents, issues or profits affected are in Nevada;

(ii) All or part of the personal property, interest of money, dividends upon stock and other produce thereof, affected, are in Nevada;

(iii) The declared domicile of the creator of a spendthrift trust affecting personal property is in Nevada; or

(iv) At least one qualified trustee has powers that include maintaining records and preparing income tax returns for the trust, and all or part of the administration of the trust is performed in Nevada.

(b) One trustee must be a Nevada resident or a bank or trust company having an office to conduct business in Nevada. [NRS 166.015(2)]

(c) The trust must be irrevocable, distributions to the settlor are discretionary or fit within specific statutory exceptions, and the trust is not intended to hinder, delay or defraud known creditors. [NRS 166.040(1)(b)]

(d) I have reviewed the Eric L. Nelson Nevada Trust dated May 30, 2001, and its terms comply with the requirements to establish an irrevocable self-settled spendthrift trust.

C.2 When property is transferred to an irrevocable spendthrift trust, the rights of the transferor, as such, are terminated, and the rights of all persons are determined only as provided in the trust agreement. Since Eric cannot unilaterally remove any property and his distributions are subject to the discretionary approval of the "distribution trustee", it is a misnomer to characterize the property as his separate property. His property rights are limited to that of a beneficiary with a "discretionary interest", as defined in NRS 163.4185(1)(c), and Nevada law limits his enforceable rights. See also NRS 166.130, which provides that a "*beneficiary of a spendthrift trust has no legal estate in the capital, principal or corpus of the trust estate*" unless the trust mandates a distribution after a term of years, which does not apply in this case.

(a) More specifically, NRS 163.419(1) states, "A court may review a trustee's

exercise of discretion concerning a discretionary interest only if the trustee acts dishonestly, with improper motive or fails to act."

(b) NRS 21.090(1)(cc)(2) exempts from the claims of creditors any discretionary interest, even if the trust is not a spendthrift trust.

(c) Thus, unless an asset can be removed from the trust under the limited provisions of NRS 166.170, it comes out of the trust only in the trustee's discretion.

C.3 If the value of a married person's separate property is increased by the uncompensated (or under-compensated) personal services of that person, the property becomes community property as to the increased value attributable to the services not compensated for.[7] Insofar as I can determine, that rule applies only to a spouse's own property. If a person works for a corporation, and his uncompensated personal services increase the value of the corporation's assets, the person's spouse cannot claim any community property interest in the corporation's assets because the person does not own them. (A different rule may apply if the corporation is found to be the person's alter ego, and that issue is discussed in section D of this letter.) In this case, the owner of the assets is a trust, and unless the trust is found to be Eric's alter ego, I found no legal authority for imposing any community property interest upon the assets of the trust.

C.4 If community property were transferred to Eric's SSST without Lynita's consent, then that would be a violation of NRS 123.230(2). If that were true, Lynita could have filed a complaint seeking either (a) to have the improper transfer set aside[8] or (b) to have a constructive trust imposed (assuming she could produce clear and convincing evidence supporting the imposition of a constructive trust[9]), but the complaint for such relief would have had to be filed within the applicable statute of limitations (discussed in section E of this letter). In this case, I am unaware of any specific allegation of a transfer of community property to Eric's SSST, and I express no opinion as to any specific transfer of property.

D. Application of the Alter-ego doctrine To Spendthrift Trusts

You have requested that I express my opinion with respect to the application of NRS 78.747 or any other alter-ego doctrine to a self-settled spendthrift trust ("SSST") established and

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[7]See *Johnson v. Johnson*, 89 Nev. 244, 510 P.2d 625 (1973), *Schulman v. Schulman*, 92 Nev. 707, 558 P.2d 525 (1976), and *Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978). These cases reflect the Nevada Supreme Court's adoption of *Pereira v. Pereira*, 156 Cal. 1, 103 P. 488 (1909) and *Van Camp v. Van Camp*, 53 Cal.App. 17, 199 P. 885 (1921) and indicate the Court's preference to apply the *Pereira* ruling unless the *Van Camp* method is shown to be more equitable.

[8]There does not seem to be a single remedy for negating the effects of an inappropriate transfer of community property. For real property, inappropriate transfers have been resolved in a quiet title action. See *Neumann v. McMillan*, 629 P.2d 1214, 1215 (Nev. 1981). Negating an invalid disposition of community property has also been raised in a contract dispute case. See *Peccole v. Eighth Jud. Dist. Ct. In and For County of Clark*, 899 P.2d 568, 570 (Nev. 1995).

[9]For a general discussion of the use of a constructive trust as a remedy for a fraud upon the community, see Bradley L. Adams, "The Doctrine of Fraud on the Community", 49 Baylor L. Rev. 445, 468 (1997).

administered in compliance with NRS Chapter 166. For the reasons given in this letter, it is my opinion that neither the law nor the facts of this case (as I presently understand them) justify a ruling that Eric is the alter ego of the Eric's SSST or of its Distributions Trustee.

D.1 Public Policy Overview. In order to evaluate the application of any alter-ego doctrine to a self-settled spendthrift trust, it is important to understand the public policy regarding such a trust.

(a) *Original Policy against Self-Settled Spendthrift Trusts.* Until the mid-1990s, the laws of all states uniformly prohibited the establishment of a spendthrift trust that was completely exempt from the claims of a beneficiary's creditors to the extent the settlor[10] was a beneficiary. In other words, an SSST could not be created because of a public policy that generally prohibited arrangements that allowed a settlor to benefit from a trust he created with his own assets that was shielded from the claims of the settlor's creditors.

(b) *Shift in Domestic Public Policy to Compete with Foreign Trusts.* Trusts subject to the laws of foreign jurisdictions have allowed SSSTs for many years. In the mid-1990s, because of the lucrative trust business, state legislatures started to consider allowing domestic asset-protection trusts in order to entice trust business into their states. Beginning with Alaska and Delaware in 1997, various states have adopted statutes that allow the creation of SSSTs whose assets are exempt from the claims of the settlor's creditors. Thus, the public policy shifted, allowing the settlor to benefit from a trust that would not be liable for the payment of creditors except as to a creditor who can timely meet its burden to prove that such trust or a transfer thereto violates the law.

(c) *Exceptions to Protection for Some States.* The public policy of several states, including South Dakota, Tennessee, Utah, Wyoming, New Hampshire, and Rhode Island, as reflected in their respective spendthrift trust statutes, excluded protection for certain claims, including claims for child support and/or alimony.

D.2 Nevada's Current Public Policy. Nevada's public policy is reflected in the various amendments to NRS Chapter 166 in 1999, 2001, 2007, 2009, and 2011, as well as changes to NRS Chapters 163, 164, and 165 in the same years. In part, the ongoing legislative changes reflect a desire to create laws that attract and retain trust business in Nevada. It also reflects a desire to reduce disputes, including those based on improper dominion and control or based on an alter-ego theory.

D.3 Challenges to the Trust or to Trust Transfers. To access the assets of the trust, a challenger must either invalidate the trust or invalidate transfers to the trust.

(a) *Challenges to SSST Transfers.* Nevada's law provides for complete creditor protection for assets transferred to SSSTs with only two exceptions: (1) fraudulent transfers and (2) transfers that violate an enforceable legal obligation. This is reflected in the

[10]The term "settlor" and "trustor" are used interchangeably in this letter.

language of subsection NRS 166.170(3):

> (3) *A creditor may not bring an action with respect to transfer of property to a spendthrift trust* unless a creditor can prove by clear and convincing evidence that the transfer of property was a fraudulent transfer pursuant to chapter 112 of NRS or that the transfer violates a legal obligation owed to the creditor under a contract or a valid court order that is legally enforceable by that creditor. In the absence of such clear and convincing proof, the property transferred is not subject to the claims of the creditor. *[Emphasis added.]*

(b) *Challenges to the Validity of an SSST.* If a creditor cannot successfully challenge a transfer to an SSST directly, a common tactic is for the creditor to challenge the validity of the trust itself, usually on the grounds that the trust is a "sham" or that the trust is the alter ego of the settlor of the trust without any separate existence.

(c) *The "Sham Trust" Argument.* The concept of a "sham trust" is usually invoked by the Internal Revenue Service in tax-related federal court cases, but the term has appeared in some state court cases as well.

(i) Lack of Economic Substance. In tax cases, a trust is considered a "sham" if there is no "economic substance" to the creation of a trust. That concept does not apply to an SSST, especially when the tax code recognizes that the trust is a grantor trust that has no separate existence for tax-law purposes.

(ii) Lack of Legal Formalities. In state-law cases, the general rule is that a trust is a sham and is not to be recognized if the principal parties have disregarded the legal formalities of the trust.[11] Cases not involving an SSST focus on the settlor's retention of benefits and the settlor's control over the trust, including the influence of the settlor over the trustee.

{A} Influence should not be a factor when determining whether or not an SSST is a sham. Consistent with the public policy reflected in Nevada's legislation relating to spendthrift trusts, two commentators have stated (referring to an SSST as an "APT" or asset-protection trust):[12]

> *[T]here are numerous other reasons that debunk the notion that friendly relations between a trustor and trustee are, by themselves, proof of a sham:*
>
> *a. It is the very nature of a trust relationship that trustors*

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[11] See "Sham Trust Theory--Limited Tax Holdings", *Planning and Defending Domestic Asset-protection Trusts*, SS039 ALI-ABA 1741, 1792 and 2 *Asset Protection: Domestic & International Law & Tactics* § 14A:125 for discussions of this topic.

[12] 2 *Asset Protection: Domestic & International Law & Tactics* § 14A:125, footnotes omitted.

will pick trustees they trust, and it should not be surprising that trustees will take care of a trustor-beneficiary.

b. Trustees are supposed to carry out a trustor's intent.

c. Given that trustees are fiduciaries who are supposed to be solicitous of their beneficiaries' best interests, they often make distributions requested by beneficiaries—trustors or nontrustors.

d. The need for a trustee to honor its legal duties to a trustor-beneficiary is most acute precisely when creditors press claims.

e. A trustee's failure to honor its duties during the pendency of a creditor's claim could expose the trustee to claims for breach of duty, and a beneficiary asserting such claims could seek money damages, a declaratory judgment for specific performance of those duties, or other remedies.

f. An APT that functions exactly as required by the terms of the agreement is not a sham.

g. As discussed above, American precedent shows that proper trust administration involving an independent trustee and observing legal formalities will survive a sham challenge.

h. A rule or argument that a sham trust exists simply because a trustee engages in a pattern of trust distributions or other friendly measures to or for a trustor-beneficiary could actually have an undue chilling effect on a trustee's independence.

{B} I know of no facts that would indicate that the formalities of the trust have been disregarded.

D.4 Merger and Alter Ego. A creditor may wish to challenge the recognition of a trust by arguing that the trust and the settlor are merged or that the trust is merely the alter ego for the settlor.

(a) *Merger.* The doctrine of merger for trusts was repudiated in NRS 163.007, which allows the trust to continue as an entity that is separate from its creator, trustee, and beneficiary, even if they are one and the same.

(b) *Alter Ego, Generally.* There is no Nevada statute that specifies what makes a trust the alter ego of its settlor, but NRS 163.418 and NRS 163.4177 provide some guidelines.

(i) The statutory language of NRS 163.418 is as follows:

NRS 163.418 Clear and convincing evidence required to find settlor to be alter ego of trustee of irrevocable trust; certain factors insufficient for finding that settlor controls or is alter ego of trustee of irrevocable trust. Absent clear and convincing evidence, a settlor of an irrevocable trust shall not be deemed to be the alter ego of a trustee of an irrevocable trust. If a party asserts that a settlor of an irrevocable trust is the alter ego of a trustee of the trust, the following factors, alone or in combination, are not sufficient evidence for a court to find that the settlor controls or is the alter ego of a trustee:

1. The settlor has signed checks, made disbursements or executed other documents related to the trust as the trustee and the settlor is not a trustee, if the settlor has done so in isolated incidents.

2. The settlor has made requests for distributions on behalf of a beneficiary.

3. The settlor has made requests for the trustee to hold, purchase or sell any trust property.

4. The settlor has engaged in any one of the activities, alone or in combination, listed in NRS 163.4177.

(ii) The statutory language of NRS 163.4177 is as follows:

NRS 163.4177 Factors which must not be considered exercising improper dominion or control over trust. If a party asserts that a beneficiary or settlor is exercising improper dominion or control over a trust, the following factors, alone or in combination, must not be considered exercising improper dominion or control over a trust:

1. A beneficiary is serving as a trustee.

2. The settlor or beneficiary holds unrestricted power to remove or replace a trustee.

3. The settlor or beneficiary is a trust administrator, general partner of a partnership, manager of a limited-liability company, officer of a corporation or any other manager of any other type of entity and all or part of the trust property consists of an interest in the entity.

4. The trustee is a person related by blood, adoption or marriage to the settlor or beneficiary.

5. The trustee is the settlor or beneficiary's agent, accountant, attorney, financial adviser or friend.

6. The trustee is a business associate of the settlor or beneficiary.

(c) From the documents I have reviewed relating to this case, I found no clear

and convincing evidence that shows that Eric is the alter ego of Eric's SSST.

> (i) While other jurisdictions may restrict the role that the settlor of an SSST may play, Nevada law merely requires that all distributions to the settlor are received "only subject to the discretion of another person." [See NRS 166.040(2)(g).[13]] That is the only limitation. NRS 166.040(3) states:
>
> > (3) Except for the power of the settlor to make distributions to himself or herself without the consent of another person, the provisions of this section shall not be construed to prohibit the settlor of a spendthrift trust from holding other powers under the trust, whether or not the settlor is a cotrustee, including, without limitation, the power to remove and replace a trustee, direct trust investments and execute other management powers.

(ii) Lynita has alleged that persons serving as the Distribution Trustee have violated a duty by consenting to distributions requested by Eric.[14] This is a specious argument.

{A} Under NRS 163.419, a trustee given absolute discretion[15] "has no duty to act reasonably in the exercise of that discretion."

{B} Under NRS 166.040(2)(g)[16], the person authorizing a distribution to the settlor of an SSST need not be a trustee at all. Because the spendthrift trusts in this case give the Distribution Trustee absolute discretion, that trustee cannot violate a duty to a beneficiary because neither applicable Nevada law nor the trust instrument imposes any specific duty on the Distribution Trustee except to act within the constraints of the trust agreement.

{C} Although Lynita has alleged that the trust agreement has been violated,[17] her main complaint is that the Distribution Trustee "performed exactly as ERIC instructed".[18] Even if that allegation were true, that does not make Eric's SSST an "alter ego" of Eric because the Distribution Trustee is authorized to do exactly that. The Distribution Trustee has the authority to accept or decline any request. The Distribution Trustee's alleged conduct does not constitute actions that

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[13]As amended by Section 206 of Chapter 270, Statutes of Nevada 2011, at page 102.

[14]See, for example, paragraph 46 on page 19 and paragraph 49 on page 20 of LSN's Counter-Claim.

[15]Subsection 3.1 of the Eric's SSST on page 2.

[16]As amended by Section 205, Chapter 270, Statutes of Nevada 2011, at page 102. Before the amendment, this was covered by NRS 164.040(2)(b).

[17]See, for example, paragraph 45 on page 19 of LSN's Counter-Claim.

[18]Paragraph 46 on page 19 of LSN's Counter-Claim.

are inconsistent with the provisions of the trust and of applicable law.

(d) *Application of NRS 78.747.* NRS 78.747 does not apply to trusts, either by specific application or by analogy.

(i) *Specific Application.* The alter-ego doctrine, as codified in NRS 78.747, clearly applies to corporations and does not apply to trusts. There is no statutory or judicial authority that supports applying that statute to trusts. The public policy reflected in NRS Chapter 166 allows a settlor to create a trust that he can manage, benefit from, and control except as to distributions. Applying the alter-ego rules reflected in the language of NRS 78.747 would frustrate that public policy. It would also contradict the statutes mentioned above,(NRS 163.418 and NRS 163.4177), which specifically relate to trusts.

(ii) *Application by Analogy.* Similarly, there is no authority for applying the principles of NRS 78.747 to trusts by analogy, especially when NRS 163.418 and NRS 163.4177 exist. Under NRS 78.747(2), a person who is a stockholder, director or officer is the alter ego of a corporation if (1) the corporation "is influenced and governed" by that person; (2) the "unity of interest and ownership" is such that the person and the corporation "are inseparable from each other"; AND (3) recognizing the entity as separate "would sanction fraud or promote a manifest injustice." Thus there are three elements of this statute that must be met before it applies. I will discuss the three elements individually, but it is important to understand that all three must exist in order to apply the alter-ego doctrine under NRS 78.747.

{A} Influence and Govern. NRS 78.747(2)(a) requires that the alleged alter ego of the corporation must influence and govern the corporation. When the settlor is a trustee of an SSST (as permitted by law), this element is always applicable; however, NRS 163.417 and 163.4177 specifically provide that this type of involvement by the settlor is insufficient to find that a settlor controls or is the alter ego of the trustees of the trust and "*must not be considered exercising improper dominion or control over the trust*".

{B} Unity of Interest and Ownership. NRS 78.747 requires that as between the alter ego and the corporation there be "such unity of interest and ownership that the corporation and the stockholder, director or officer are inseparable from each other". The Nevada Supreme Court has indicated that as to the "unity of interest and ownership", the factors to be considered are "commingling of funds, undercapitalization, unauthorized diversion of funds, treatment of corporate assets as the individual's own, and failure to observe corporate formalities."[19] I will address those factors individually, as follows:

(I) Commingling. I am unaware of any allegation of commingling of

[19] *Lorenz v. Beltio, Ltd.*, 114 Nev. 795, 808, 963 P.2d 488, 497 (1998)

funds. From what I am aware, the trustees of Eric's SSST have consistently maintained the assets of the trust separate and apart from the assets of Eric, and the trust is authorized to conduct transactions with Eric and others under the terms of the trust instrument and under Nevada law.

(II) Undercapitalization. Undercapitalization is not relevant to any trust.

(III) Unauthorized Diversion of Funds. I am unaware of any alleged facts that would constitute an "unauthorized diversion of funds" in violation of the terms of the trust. To constitute an "unauthorized diversion of funds", a distribution would have to violate the terms of the trust.

(IV) Treating Assets as One's Own. Corporate law does not permit an officer, director, or shareholder to treat corporate assets as their own. In contrast, Nevada spendthrift trust law allows the settlor of an SSST to retain certain indicia of ownership and ownership benefits. Thus, when applied to trusts, the alter-ego doctrine prohibits "treatment of trust assets as the individual's own *in a manner not permitted under the terms of the trust or under applicable law.*" I am unaware of any facts that would show that Eric treated the assets of Eric's SSST in any way that was inconsistent with the terms of the trust or applicable law. To avoid negating NRS Chapter 166 and the public policy reflected therein, Eric's SSST should not be disregarded or treated as a nullity because the settlor retains a degree of control that is allowed by law. NRS Chapter 166 specifically permits the settlor of a spendthrift trust to be a beneficiary without limits as to the benefits received and to have any power except "for the power of the settlor to make distributions to himself or herself without the consent of another person".[20]

(V) Conclusion as to Unity of Interest and Ownership. Without proof that establishes that the settlor has maintained ownership benefits in violation of applicable law or of the trust's terms, the alter-ego doctrine cannot be applied in this case.

{C} *Fraud and Manifest Injustice.* Lynita has alleged fraud and injustice with respect to the transfers to the trust and with respect to distributions from the trust.

(I) Transfers. As to asset transfers, the challenges to those transfers appear to be barred by either (1) the statute of limitations found in NRS 166.170 or (2) by the failure to provide clear and convincing evidence that there is a fraudulent transfer or that the transfer constitutes a violation of an enforceable legal obligation, which means that any fraud or manifest injustice was triggered by the claimant's own action (or inaction). The application of NRS 166.170 to bar the claims of Lynita is no more unjust than the application of any statute of limitation under NRS

[20] NRS 166.040(3).

Chapter 11 or than the application of any exemption under NRS Chapter 21, and even fraud-based claims are barred thereby.

(II) Distributions. As to the distributions made from the trust, there cannot be fraud or manifest injustice when the trust is administered in compliance with the law and with the trust instrument. Unless there is proof that a distribution was made in violation of the terms of the trust or applicable law, there cannot be fraud or manifest injustice.

D.5 *There is No Alter Ego*. After adapting the principles of NRS 78.747 to an SSST and after applying the principals of NRS 163.418 and NRS 163.4177, it is my opinion that there is no alter ego involved in the SSSTs because there is no impermissible influence or control, no impermissible unity of ownership, and no fraud or manifest injustice[21]. A trust is not intended to be a business entity like a corporation, and it is inappropriate to use corporate law to ask a court to disregard an irrevocable trust that has been created and administered in compliance with applicable trust law.

E. Statutes of Limitation

E.1 In my opinion, transfers to Eric's SSST are subject to the limitations of NRS 166.170, which is discussed below.

(a) The limitations of NRS Chapter 11 may also apply, but if the challenge to a transfer to a spendthrift trust is barred under NRS 166.170, it is barred regardless of any provision in NRS Chapter 11.

(i) NRS 11.190(3)(d) specifically states that NRS 166.170 supersedes the longer period that would otherwise be allowed for allegations of fraud under that provision.

(ii) NRS 166.170(8) reads, "*Notwithstanding any other provision of law, no action of any kind, including, without limitation, an action to enforce a judgment entered by a court or other body having adjudicative authority, may be brought at law or in equity against the trustee of a spendthrift trust if, as of the date the action is brought, an action by a creditor with respect to a transfer to the spendthrift trust would be barred pursuant to this section.*"

(b) In this situation, if a deed of real property to Eric was made in 1993 pursuant to the Separate Property Agreement, any challenge to that deed is beyond the statute of limitations. Actions for the recovery of real property or for the profits therefrom must be made within five years. [NRS 11.070 and 11.080] Those statutes require the person asserting the claim to be "seized or possessed of the premises" within five years, and that

[21] If Lynita alleges "fraud and injustice" with respect to transfers to the SSSTs, those claims are time-barred under NRS 166.170.

would not be true as to Lynita with respect to any deeds of real property to Eric's SSST in 2001.

(c) As to personal property:

(i) NRS 11.190 states that actions based upon a written contract must be brought within six years. If Lynita wanted to assert that Eric made transfers in violation of a contract, any violation asserted within six years prior to the filing of the divorce complaint would be within the statute of limitations. Any breach would have had to occur after May 6, 2003 in order to come within this limitation.

(ii) Even if NRS 166.170 were inapplicable, Lynita's argument to negate transfers to the SSST seem to be based on a side agreement that the Separate Property Agreement was subject to an understanding that it was only binding as against third-party creditors. As stated in subsection B.2, above, evidence of such a side agreement is inadmissible. Even if evidence of a side agreement were admissible, a contract not in writing is subject to the four-year statute of limitations under NRS 11.190. Any breach of the agreement would have had to occur after May 6, 2005 to come within this limitation. Again, it is my opinion that NRS 166.170 applies and not NRS Chapter 11.

(iii) As to any alleged breach of the statutes relating to community property, the breach would have had to occur after May 6, 2006 in order to come within the limitation given in NRS 11.190(3)(a).

E.2 NRS 166.170 provides the statute of limitations relating to transfers to spendthrift trusts. The term "creditor" in that statute refers to "a person who has a claim", as defined in NRS 112.150(4). The first three subsections of NRS 166.170 read as follows:

> 1. A person may not bring an action with respect to a transfer of property to a spendthrift trust:
>
> (a) If the person is a creditor when the transfer is made, unless the action is commenced within:
>
> (1) Two years after the transfer is made; or
>
> (2) Six months after the person discovers or reasonably should have discovered the transfer,
>
> whichever is later.
>
> (b) If the person becomes a creditor after the transfer is made, unless the action is commenced within 2 years after the transfer is made.
>
> 2. A person shall be deemed to have discovered a transfer at the time a public record is made of the transfer, including, without limitation, the conveyance of real property that is

recorded in the office of the county recorder of the county in which the property is located or the filing of a financing statement pursuant to chapter 104 of NRS.

3. A creditor may not bring an action with respect to transfer of property to a spendthrift trust unless a creditor can prove by clear and convincing evidence that the transfer of property was a fraudulent transfer pursuant to chapter 112 of NRS or that the transfer violates a legal obligation owed to the creditor under a contract or a valid court order that is legally enforceable by that creditor. In the absence of such clear and convincing proof, the property transferred is not subject to the claims of the creditor. Proof by one creditor that a transfer of property was fraudulent or wrongful does not constitute proof as to any other creditor and proof of a fraudulent or wrongful transfer of property as to one creditor shall not invalidate any other transfer of property.

E.3 Because Lynita and Eric established their SSSTs concurrently and using the same attorney, and they were aware that the transfers to the SSSTs were from property in their respective 1993 separate property trusts, it is clear that they were aware of the transfers to the SSST. In addition, a notice relating to transfers to the trust was published in *Nevada Legal News* three times commencing on August 23, 2001 [Burr00237]. Thus, even if it is assumed that Lynita had a claim against Eric at the time of any transfer of assets to the SSST, no challenge to that transfer could be asserted more than two years after the date of that transfer.

E.4 Lynita may try to argue that a transfer to Eric's SSST violated "a contract or a valid court order that is legally enforceable by that creditor" within the meaning of NRS 166.170(3). That argument would still fail for at least two reasons:

(a) First, even if that were true, the claim still has to be brought within the two-year time frame given in NRS 166.170(1).

(b) Second, to fit within the statute, the transfer itself must violate an enforceable contract or court order, and I have not seen any contract or court order that specifically prohibited any transfer.

E.5 The two-year statute of limitations under NRS 166.170 begins as of the date the asset is transferred to the trust. Under NRS 163.002, an asset is considered an asset of the trust as soon as it is declared to be an asset by the owner who is the trustee or as soon as it is transferred to another person as trustee.

F. Documents Cited

The documents cited herein are referred to herein using the underlined caption show below, and any number that appears in brackets refers to the Bates numbering on the first page of that document:

F.1 Eric's SSST: The trust established under the trust agreement titled "The Eric L. Nelson Nevada Trust" dated 5/30/2001 [Burr00256].

F.2 LSN's Counter-Claim: Lynita Sue Nelson's (1) Answer to Claims of The Eric L. Nelson Nevada Trust; and (2) Claims for Relief against Eric L. Nelson et al. filed 09/30/2011.

F.3 Separate Property Agreement: The "Separate Property Agreement" dated April 28, 1993, signed by Eric and Lynita [Burr00151].

F.4 Separate Property Trusts: This refers to the Eric L. Nelson Separate Property Trust dated July 13, 1993 [Burr00388] and the Nelson Trust dated July 13, 1993 [Burr00172].

G. Involved Persons

The underlined captions below are shorthand references for the major parties involved in this case.

G.1 Eric: Eric L. Nelson, Plaintiff and Counter-defendant.

G.2 Lynita: Lynita Sue Nelson, Defendant and Counter-claimant.

H. Credentials

H.1 My *Curriculum Vitae* is enclosed.

H.2 A list of recent cases in which I have been engaged as an expert witness is also enclosed.

I. Conclusion

Based on the facts as I presently understand them, it is my opinion that:

I.1 The Separate Property Agreement and Separate Property Trusts signed by Eric and Lynita Nelson in 1993 are binding, both as to the claims of third-party creditors and as to their rights in a divorce proceeding.

(a) The terms of the Separate Property Agreement should be construed from the agreement itself as written, and extrinsic evidence that contradicts the unambiguous meaning of the written agreement is inadmissible.

(b) Even if extrinsic evidence were admissible, the testimony of the drafting attorney confirms that the parties intent is consistent with the terms of the written agreement.

(c) Mr. Burr's testimony also indicates that Lynita's position that there was a binding side agreement or understanding that community property principles would continue to apply despite clear contractual language otherwise would have frustrated the intent of the agreement. The Court cannot properly condone Lynita's acceptance of the separate property agreement as against creditors while arguing that Eric's SSST holds

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATT KLABACKA, Distribution Trustee of the Eric L. Nelson Nevada Trust dated May30, 2001, Appellant/Cross Respondent. vs. LYNITA SUE NELSON, Individually and in her capacity as Investment Trustee of the LSN NEVADA TRUST dated May 30, 2001; and ERIC L. NELSON, Individually and in his capacity as Investment Trustee of the ELN NEVADA TRUST dated May 30, 2001; Respondents/Cross-Appellants.	**Supreme Court Case No. 66772** **District Court Case No. D-09-411537** Electronically Filed Dec 01 2015 10:33 a.m. Tracie K. Lindeman Clerk of Supreme Court
MATT KLABACKA, as Distribution Trustee of the Eric L. Nelson Nevada Trust dated May30, 2001, Appellants, vs. ERIC L. NELSON; LYNITA SUE NELSON, INDIVIDUALLY; AND LSN NEVADA TRUST DATED MAY 30, 2001, Respondents.	**Consolidated With:** **Supreme Court Case No. 68292**

RECORD ON APPEAL
VOLUME 12

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Supreme Court Case 66772 Consolidated with 68292 In the Matter of: Klabacka v. Nelson et al.

INDEX

27	**6501-6750**
28	**6751-7000**
29	**7001-7250**
30	**7251-7489**

Supreme Court Case 66772 Consolidated with 68292 In the Matter of: Klabacka v. Nelson et al.

INDEX

		Intervenor Trial Exhibit 2)	
25	06/08/2015	Findings of Fact and Order	6226 – 6248
30	03/22/2007	Grant, Bargain, Sale Deed (Admitted as Nelson Exhibit 57A)	7394 – 7396
26	01/09/2001	Handwritten Note from Jeff Burr File (Admitted as Intervenor Trial Exhibit 20)	6389 - 6391
26	01/15/2001	Handwritten Note from Jeff Burr File (Admitted as Intervenor Trial Exhibit 21)	6392
26	07/15/1993	Handwritten Note to Melina (Admitted as Intervenor Trial Exhibit 1)	6252
8	08/19/2011	Initial Appearance Fee Disclosure (NRS Chapter 19)	1775- 1776
1	05/18/2009	Joint Preliminary Injunction	9-10
30	09/08/2011	Judgement and Order Granting Plaintiffs' Motion for Summary Judgment in United States District Court, Central District of California, Case No. 2:11-cv-02583-JEM (Admitted as GGGGG at Tab 23)	7409 - 7410
26	02/17/2009	Last Will and Testament of Mrs. Nelson (Admitted as Intervenor Trial Exhibit 19)	6384 - 6388
26	00/00/0000	Letter of Instruction signed by Mrs. Nelson (Admitted as Intervenor Trial Exhibit 18)	6383
26	06/19/1998	Letter to Mr. and Mrs. Nelson from Jeffrey L. Burr & Associates (Admitted as Intervenor Trial Exhibit 11)	6347 - 6349
6	01/30/2001	Letter to Mr. and Mrs. Nelson from Jeffrey L. Burr & Associates (Admitted as Intervenor Trial Exhibit 22)	6393
26	02/15/2001	Letter to Mr. and Mrs. Nelson from Jeffrey L. Burr & Associates (Admitted as Intervenor Trial Exhibit 23)	6394
26	05/30/2001	Letter to Mr. and Mrs. Nelson from Jeffrey L. Burr & Associates (Admitted as Intervenor Trial Exhibit 28)	6442 – 6444
26	05/30/2001	Letter to Mrs. Nelson from Jeffrey L. Burr & Associates (Admitted as Intervenor Trial Exhibit 26)	6434 - 6437
26	05/30/2001	Letter to Mrs. Nelson from Jeffrey L. Burr & Associates (Admitted as Intervenor Trial Exhibit 27)	6438 - 6441
26	05/03/2002	Letter to Mrs. Nelson from Jeffrey L. Burr & Associates (Admitted as Intervenor Trial Exhibit 40)	6447
26	03/26/2003	Letter to Mrs. Nelson from Jeffrey L. Burr & Associates (Admitted as Intervenor Trial Exhibit 44)	6448
26	05/03/2004	Letter to Mrs. Nelson from Jeffrey L. Burr & Associates (Admitted as Intervenor Trial Exhibit 51)	6449
26	05/04/2005	Letter to Mrs. Nelson from Jeffrey L. Burr & Associates (Admitted as Intervenor Trial Exhibit 57)	6450
26	02/09/2009	Letter to Mrs. Nelson from Jeffrey L. Burr & Associates (Admitted as Intervenor Trial Exhibit 79)	6453 - 6457
26	02/09/2009	Letter to Mrs. Nelson from Jeffrey L. Burr & Associates (Admitted as Intervenor Trial Exhibit 80)	6458 – 6461
26	00/00/0000	Letter to Nevada Legal News from Jeffrey L. Burr & Associates (Admitted as Intervenor Trial Exhibit 29)	6445 – 6446

26,	07/13/1993	Letter to Richard Koch with Separate Property Agreement (Admitted as Intervenor Trial Exhibit 3)	6262 - 6272
11	05/15/2012	Limited Objection to Application of Forensic Accountants for Allowance of Fees and Reimbursement of Expenses for the period from April 4, 2011 through March 31, 2012	2710 – 2712
8	09/30/2011	Lynita Sue Nelson's: (1) Answer to Claims of The Eric L. Nelson Nevada Trust; and (2) Claims for Relief Against Eric L. Nelson Nevada Trust dated May 30, 2001, Lana Martin, Nola Harber, Rochelle McGowan, Joan B. Ramos, and Does 1 through X (Whether Designed as a Counterclaim, Cross-Claim and/or Third Party Complaint)	1818 - 1853
9	12/20/2011	Lynita Sue Nelson's: (1) First Amended Answer to Claims of the Eric L. Nelson Nevada Trust and (2) First Amended Claims for Relief Against Eric L. Nelson Nevada Trust dated May 30, 2001, Lana Martin, Nola Harber, Rochelle McGowan, Joan B. Ramos, and Does 1 through X (Whether Designed as a Counterclaim, Cross-Claim and/or Third Party Complaint)	2140 - 2182
30	05/07/2013	Memorandum from Robert P. Dickerson in Support of AB378 (Exhibit 8)	7480 - 7487
27	00/00/0000	Miscellaneous Documents produced by Defendants (Admitted as Intervenor Trial Exhibit 167)	6513 – 6549
29, 30	03/01/2002	Mississippi Deeds (Admitted as Nelson Exhibit 8A)	7069 - 7393
10	03/06/2012	Motion for Payment of Attorneys' Fees and Costs	2461 – 2494
19	06/05/2013	Motion for Payment of Funds Belonging to Defendant Pursuant to Court's Decree to Ensure Receipt of the Same, and for Immediate Payment of Court Appointed Expert	4743 – 4752
8	11/07/2011	Motion to Dismiss	1885 - 1908
9	01/17/2012	Motion to Dismiss Amended Third-Party Complaint and Motion to Strike	2190 - 2224
8	11/29/2011	Motion to Dissolve Injunction	1916 - 1999
7	06/24/2011	Motion to Join Necessary Party; or in the Alternative; to Dismiss Claims Against The Eric L. Nelson Nevada Trust dated May 30, 2011	1606 - 1661
23	10/20/2014	Notice of Appeal	5576 – 5578
25, 26	06/23/2015	Notice of Appeal	6249 – 6251
21	09/10/2013	Notice of Entry of Injunctions from September 4, 2013 Hearing	5230 – 5241
10	01/31/2012	Notice of Entry of Order	2264 – 2272
11	05/29/2012	Notice of Entry of Order	2739 – 2745
12	06/05/2012	Notice of Entry of Order	2759 – 2770

12	07/11/2012	Notice of Entry of Order	2914 – 2920
12	0711/2012	Notice of Entry of Order	2921 – 2929
19	08/07/2012	Notice of Entry of Order	4517 – 4520
	06/03/2012	Notice of Entry of Order	4691 – 4742
8	11/14/2011	Notice of Entry of Order and Order – August 24, 2011 Hearing	1909 - 1915
21	09/03/2013	Notice of Entry of Order Denying Countermotion to Stay Payments and Transfer Property Pending Appeal and/or Resolution to the Nevada Supreme Court for an Extraordinary Writ	5148 – 5153
23	09/22/2014	Notice of Entry of Order Determining Disposition of Dynasty Development Management, Inc. AKA Wyoming Downs	5553 – 5561
19	10/10/2012	Notice of Entry of Order form July 16, 2012 Hearing	4683 – 4690
19	08/31/2012	Notice of Entry of Order from April 10, 2012 Hearing and Injunction	4531 – 4539
19, 20	08/31/2012	Notice of Entry of Order from February 23, 2012 Hearing Partially Granting ELN Trust's Motion to Dismiss Third-Party Complaint Without Prejudice.	4540 – 4550
23	09/22//2014	Notice of Entry of Order from July 22, 2013 Hearing on Lynita Nelson's Motion to Amend or Alter Judgment for Declaration and Related Relief	5562 – 5575
21, 22	09/30/2013	Notice of Entry of Order from September 4, 2013 Hearing Regarding Payment of Lindell Professional Plaza Income	5247 – 5254
19	08/29/2012	Notice of Entry Of Order Granting Motion for Relief from Automatic Stay and Denying Motion to Dismiss Without Prejudice	4521 – 4527
12	06/05/2011	Notice of Entry of Order regarding Findings of Fact and Order dated June 5, 2012	2771 – 2782
7	08/09/2011	Notice of Entry of Stipulation and Order	1742 - 1746
8	09/14/2011	Notice of Filing a Summary Appraisal Report of a Two-Story Office Building (3611 Lindell Road, Las Vegas, NV)	1789 - 1801
10	02/27/2012	Notice of Filing Amendment to Source and Application of Duns for Lynita Nelson	2249 – 2460
10	01/27/2012	Notice of Filing Amendment to Source and Application of Funds for Emerald Bay Mississippi, LLC Filed December 8, 2011	2257 – 2263
10	02/27/2012	Notice of Filing Amendment to Source and Application of Funds for Eric L. Nelson Nevada Trust	2425 – 2248
7	07/05/2011	Notice of Filing Asset Schedule and Notes to Asset Schedule	1662 - 1683
9	12/23/2011	Notice of Filing Corrected Asset Schedule by Ownership	2186 - 2189
7	07/15/2011	Notice of Filing Income and Expense Reports for Banone-AZ LLC	1713 -1724

8	08/15/2011	Notice of Filing Income and Expense Reports for Emerald Bay Resorts, LLC	1762 – 1769
7	07/19/2011	Notice of Filing Income and Expense Reports for Eric L. Nelson Nevada Trust	1725 - 1741
7, 8	08/15/2011	Notice of Filing Income and Expense Reports for Eric Nelson Auctioneering	1747 - 1761
9, 10	01/26/2012	Notice of Filing Income and Expense Reports for Eric Nelson Auctioneering	2225 -2256
8	09/28/2011	Notice of Filing Income and Expense Reports for Lynita Nelson	1806 - 1817
7	07/11/2011	Notice of Filing Income and Expense Reports for: (1) Banone, LLC and (2) Dynasty Development Group	1684 - 1712
10	02/16/2012	Notice of Filing Source and Application of Funds for Banone-AZ, LLC	2362 – 2389
11	04/11/2012	Notice of Filing Source and Application of Funds for Dynasty Development Group, LLC	2645 – 2677
9	12/08/2011	Notice of Filing Source and Application of Funds for Eric L. Nelson Nevada Trust	2060 - 2095
11	04/23/2012	Notice of Filing Source and Application of Funds Pursuant to April 10, 2012 Hearing	2678 – 2709
8	10/03/2011	Notice of Filing Summary Appraisal Report of +202.50 Acres of Agricultural/Residential Land (Uinta County, Wyoming)	1854 - 1859
8	10/06/2011	Notice of Submission of First Billing for Fees and Expenses of Forensic Accountants	1860 -1884
11	04/09/2012	Opposition to Countermotion for Receiver, Additional Injunction and Fees and Costs	2630 – 2642
21	08/23/2013	Opposition to Imposition of Charging Order and Appointment of Receiver	5043 – 5066
10, 11	03/26/2012	Opposition to Motion for Payment of Attorneys' Fees and Costs, and Countermotion for Receiver, Additional Injunction, and Fees and Costs	2495 – 2594
20	06/18/2013	Opposition to Motion for Payment of Funds Belonging to Defendant Pursuant to Court's Decree to Ensure Receipt of the Same, and for Immediate Payment of Court Appointed Expert; and Countermotion to Stay Payments and Transfer Property Pending Appeal and/or Resolution to the Nevada Supreme Court for an Extraordinary Writ	4799 – 4812
16	07/20/2012	Opposition to Motion in Limine to Exclude to Exclude from Trial the Testimony and Report of Daniel T. Gerety, CPA, Layne T. Rushforth, Esq. and Any Purported Experts Testimony Regarding the Interpretation of Law, and Application of Facts to Law; to Strike the Eric L. Nelson Nevada Trusts' Pre-Trial Memorandum; and Counter-Motion to Continue Trial and for Attorneys' Fees and Costs	3803 – 3838

8, 9	12/01/2011	Opposition to Motion to Dismiss and Countermotion for an Award of Attorneys' Fees and Costs	2000 - 2040
9	12/07/2011	Opposition to Motion to Dissolve Injunction and Countermotion for an Aware of Attorneys' Fees and Costs	2041 - 2059
30	07/11/2012	Order entered in Case D-09-411537-D	7471 – 7479
20	06/19/2013	Order for Payment of Funds Pursuant to June 3, 2013 Decree of Divorce	4847 – 4850
30	08/09/2011	Order in Case No. D-09-411537-D	7400 - 7402
6	11/17/2010	Partial Transcript, Non-Jury Trial, November 17, 2010	1256 – 1435
6	11/22/2010	Partial Transcript, Non-Jury Trial, November 22, 2010	1436 – 1499
6, 7	11/22/2010	Partial Transcript, Non-Jury Trial, November 22, 2010	1500 - 1605
21	09/27/2013	Plaintiff Eric Nelson's Response to Lynita's Response to Court Ordered Accountings Provided by Eric Nelson	5242 – 5246
19	08/31/2012	Post-Trial Brief of Eric L. Nelson Nevada Trust Dated May 30, 2001	4551 – 4610
30	01/28/2005	Promissory Note in favor of Lana Martin	7488
30	01/28/2005	Promissory Note in favor of Robert A. Martin	7489
29	09/25/1999	Real Estate Records for 5220 E. Russell Road, Las Vegas, Nevada (UUUU)	7017 - 7049
	06/06/2013	Receipt of Copy regarding Motion for Payment of Funds Belonging to Defendant Pursuant to Court's Decree to Ensure Receipt of the Same, and for Immediate Payment of Court Appointed Expert	4753 – 4754
8	09/19/2011	Reply to Counterclaim and Answer to Cross – Claim	1802 - 1805
24, 25	01/14/2015	Reply to ELN Trust's Opposition to Defendant's Motion to Enforce the June 3, 2013 Decree of Divorce, Address Issues Relating to Property Awarded to Defendant in the Divorce, and for Related Relief and Eric Nelson's Opposition to Defendants Motion to Enforce June 3, 2013 Decree of Divorce, Address Issues Relating to Property Awarded to Defendant in the Divorce, and for Related Relief and Opposition to Eric Nelson's Countermotion	5941 – 6076
11	05/22/2012	Reply to Limited Objection to Application of Forensic Accountants for Allowance of Fees and Reimbursement of Expenses for the period from April 4, 2011 through March 31, 2012 filed by the Eric L. Nelson Nevada Trust and Reply to Limited Objection to Application of Forensic Accountants for Allowance of Fees and Reimbursement of Expenses for the period from April 4, 2011 through March 31, 2012 filed by Eric Nelson	2713 – 2738
22	10/14/2013	Reply to Opposition to Countermotion/Petition for Appointment of Authorized Trustee and for Fees and Costs	5255 – 5265

20	07/11/2013	Reply to Opposition to Defendant's Motion to Amend or Alter Judgement, for Declaratory and Related Relief and Joinder to Opposition	4851 – 4869
21	08/30/2013	Reply to Opposition to Imposition of Charging Order and Appointment of Receiver and Requests for Injunction and Fees and Costs	5067 – 5087
11	04/04/2012	Reply to Opposition to Motion for Payment of Attorneys' Fees and Costs	2595 – 2623
9	12/09/2011	Reply to Opposition to Motion to Dismiss and Countermotion for An Aware of Attorneys' Fees and Costs	2096 - 2123
9	12/09/2011	Reply to Opposition to Motion to Dissolve Injunction and Opposition to Countermotion for an Aware of Attrorneys Fees and Costs	2124 -2139
22	10/15/2013	Reply to Plaintiff Eric Nelson's Response to Court Order Accountings	5266 - 5287
27, 28, 29	07/05/2012	Report of Gerety & Associates (Admitted as Intervenor Trial Exhibit 168)	6550 – 7014
21	08/30/2013	Response to Court Order Accountings Provided by Eric Nelson	5088 – 5147
19	09/28/2012	Response to Defendant Lynita S. Nelson's Post-Trial Memorandum on Trust Issues	4628 – 4657
29	01/21/2002	Soris Original Mortgage – (Wyoming Property) – (Admitted as Nelson Exhibit 41C)	7050 – 7068
8	08/24/2011	Summons directed to Eric Nelson	1779 -1782
8	08/24/2011	Summons directed to Lynita Sue Nelson	1783 -1786
11	04/05/2012	Supplement to Opposition to Motion for Payment of Attorneys' Fees and Costs, and Countermotion for Receiver, Additional Injunction, and Fees and Costs	2624 – 2629
	10/08/2012	Supplement to Verified Memorandum of Attorneys' Fees and Costs	4658 – 4682
26. 27	05/30/2001	The Eric L. Nelson Nevada Trust (Admitted as Intervenor Trial Exhibit 86)	6475 – 6508
12	07/06/2012	The Eric L. Nelson Nevada Trust's Pretrial Memorandum	2783 – 2849
26	07/13/1993	The Eric L. Nelson Separate Property Trust (Admitted as Intervenor Trial Exhibit 7)	6313 – 6341
26	05/30/2001	The LSN Nevada Trust (Admitted as Intervenor Trial Exhibit 25)	6395 - 6433
26	07/13/1993	The Nelson Trust (Admitted as Intervenor Trial Exhibit 5)	6283 - 6311
20, 21	08/01/2013	Transcript Re: All Pending Motions	4991 – 5039
21	09/05/2013	Transcript Re: All Pending Motions	5154 – 5229
22	10/21/2013	Transcript Re: All Pending Motions	5288 – 5347
25	01/26/2015	Transcript RE: All Pending Motions	6077 – 6225
22, 23	06/04/2014	Transcript RE: Decisions	5495 – 5552

20	06/19/2013	Transcript Re: Motion	4813 – 4846
20	07/22/2013	Transcript Re: Motion	4876 – 4990
10	02/23/2012	Transcript regarding Decision	2390 – 2424
10	01/31/2012	Transcript relating to Motion	2273 – 2361
4	10/19/2010	Transcript, Non-Jury Trial, October 19, 2010	849 – 990
4, 5, 6	10/20/2010	Transcript, Non-Jury Trial, October 20, 2010	991 – 1255
1, 2	08/30/2010	Transcript, Non-Jury Trial, Volume 1 from August 30, 2010	40 – 258
2	08/31/2010	Transcript, Non-Jury Trial, Volume 2 from August 31, 2010	259 - 441
2, 3	08/31/2010	Transcript, Non-Jury Trial, Volume 3 from August 31, 2010	442 – 659
3,4	09/01/2010	Transcript, Non-Jury Trial, Volume 4 from September 1, 2010	660 –848
13, 14	07/17/2012	Trial Transcript Re: Non-Jury Trial	3181 – 3406
14, 15	07/18/2012	Trial Transcript Re: Non-Jury Trial	3407 – 3584
22	05/30/2014	Trial Transcript RE: Non-Jury Trial	5348 – 5494
15	07/19/2012	Trial Transcript Re: Non-Jury Trial – Vol. I	3585 – 3714
16	07/23/2012	Trial Transcript Re: Non-Jury Trial – Vol. I	3839 – 3943
17	07/24/2012	Trial Transcript Re: Non-Jury Trial – Vol. I	4050 – 4187
18	07/25/2012	Trial Transcript Re: Non-Jury Trial – Vol. I	4279 – 4447
15, 16	07/19/2012	Trial Transcript Re: Non-Jury Trial – Vol. II	3715 – 3802
16, 17	07/23/2012	Trial Transcript Re: Non-Jury Trial – Vol. II	3494 -4049
17, 18	07/24/2013	Trial Transcript Re: Non-Jury Trial – Vol. II	4188 – 4278
18, 19	07/25/2012	Trial Transcript Re: Non-Jury Trial – Vol. II	4448 -4514
12, 13	07/16/2012	Trial Transcript Volume I	2930 – 3120
13	07/16/2012	Trial Transcript Volume II	3121 – 3180
26	02/17/2009	Trust Agreement of the Total Amendment and Restatement of the Nelson Trust (Admitted as Intervenor Trial Exhibit 14)	6351 – 6381
30	03/31/2011	Trust Ownership-Distribution Report of Larry Bertsch (Admitted as Exhibit GGGGG at Tab 9)	7397 – 7399
19	09/28/2012	Verified Memorandum of Attorneys' Fees and Costs	4611 – 4627

In answering Paragraph No. 12 of the Cross-Claim, the Trustee admits that Eric L. Nelson serves as the Investment Trustee of the ELN Trust and has acted in accordance with the terms of the same. The Trustee denies the remaining allegations contained therein.

In answering Paragraph No. 13 of the Cross-Claim, the Trustee admits that Joan B. Ramos and/or Rochelle McGowan are employees of the ELN Trust and/or an entity owned by the ELN Trust. The Trustee denies the remaining allegations contained therein.

In answering Paragraph No. 16 of the Cross-Claim, the Trustee admits that she e-mailed the law office of Jeffrey Burr in or around June 2003 and that said e-mail speaks for itself. The Trustee denies the remaining allegations contained therein.

PARTIES

In answering Paragraph No. 18 of the Cross-Claim, the Trustee admits that the Complaint for Divorce and Answer and Counterclaim allege that Eric L. Nelson and Lynita S. Nelson are husband and wife. The Trustee further admits that Eric L. Nelson is the Investment Trustee of the ELN Trust. The Trustee denies the remaining allegations contained therein.

In answering Paragraph No. 19 of the Cross-Claim, the Trustee admits that she is a resident of Clark County, Nevada and is the Distribution Trustee of the ELN Trust. The Trustee further admits that she is a former Distribution Trustee of the LSN Trust. The Trustee denies the remaining allegations contained therein.

In answering Paragraph No. 20 of the Cross-Claim, the Trustee admits that Nola Harber is: (1) serving a voluntary mission for The Church of Jesus Christ of Latter-Day Saints in Laie, Hawaii; (2) the sister of Eric L. Nelson; (3) a former Distribution Trustee of the ELN Trust; and (4) a former Distribution Trustee of the LSN Trust. The Trustee denies the remaining allegations contained therein.

In answering Paragraph No. 21 of the Cross-Claim, the Trustee admits that Rochelle McGowan is an employee of the ELN Trust or an entity owned by the ELN Trust. The Trustee denies the remaining allegations contained therein.

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In answering Paragraph No. 22 of the Cross-Claim, the Trustee admits that Joan B. Ramos is an employee of the ELN Trust or an entity owned by the ELN Trust. The Trustee denies the remaining allegations contained therein.

The allegations contained within Paragraph No. 23 of the Cross-Claim state conclusions to which no response is required. To the extent a response is required, the Trustee is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

JURISDICTION AND VENUE

In answering Paragraph No.'s 24, 25, 26 and 27 of the Cross-Claim, the Trustee denies all of the allegations therein.

ADDITIONAL FACTS

In regards to Paragraph No. 28 of the Cross-Claim, the Trustee admits that the ELN Trust was created on or around May 30, 2001, and that she was named as the Distribution Trustee and Eric L. Nelson was named as the Investment Trustee. The Trustee denies the remaining allegations contained therein.

In regards to Paragraph No. 29 of the Cross-Claim, the Trustee admits that the LSN Trust was created on or around May 30, 2001, and that she was named as the Distribution Trustee and Lynita S. Nelson was named as the Investment Trustee. The Trustee denies the remaining allegations contained therein.

In regards to Paragraph No. 30 of the Cross-Claim, the Trustee admits that the ELN Trust and LSN Trust are Nevada self-settled spendthrift trusts. The Trustee denies the remaining allegations contained therein.

In regards to Paragraph No. 31 of the Cross-Claim, the Trustee admits that the ELN Trust and LSN Trust were drafted by the law offices of Jeffrey Burr. The Trustee is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

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In answering Paragraph No.'s 32, 33 and 34 of the Cross-Claim, the Trustee is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraphs, and on that basis denies each and every allegation contained therein.

In regards to Paragraphs No.'s 35 and 36, 38, 39, 40, 41, 42 and 43 of the Cross-Claim, the Trustee admits that the terms of the ELN Trust and LSN Trust speak for themselves. The ELN Trust denies the remaining allegations contained therein.

In answering Paragraph No. 37 of the Cross-Claim, the Trustee is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

In regards to Paragraph No. 44 of the Cross-Claim, the Trustee admits that the legal fees incurred by the ELN Trust in this Divorce Proceeding are being paid from the ELN Trust pursuant to its terms. The ELN Trust denies the remaining allegations contained therein.

In answering Paragraph No.'s 45, 46, 49, 50, 53 and 56 of the Cross-Claim, the Trustee denies all of the allegations therein.

In regards to Paragraph No.'s 47 and 48 of the Cross-Claim, the Trustee admits that on or around February 22, 2007, she was replaced by Nola Harber, who is the sister of Eric L. Nelson, as Distribution Trustee of the ELN Trust. The Trustee is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraphs, and on that basis denies each and every allegation contained therein.

In regards to Paragraph No.'s 51, 52, 54 and 55 of the Cross-Claim, the Trustee admits that on or around February 22, 2007, she was replaced by Nola Harber, who is the sister of Eric L. Nelson, as Distribution Trustee of the LSN Trust. The Trustee is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraphs, and on that basis denies each and every allegation contained therein.

In regards to Paragraphs No.'s 57, 58 (A) - (I), 59 and 60 of the Cross-Claim, the Trustee admits that the report entitled "Source and Application of Funds for Eric L. Nelson Nevada Trust" speaks for itself. The ELN Trust denies the remaining allegations contained therein.

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In answering Paragraph No. 61 of the Cross-Claim, the Trustee denies all of the allegations therein.

In answering Paragraph No. 62 of the Cross-Claim, the Trustee admits that Eric L. Nelson filed his Complaint for Divorce on or around May 6, 2009. The Trustee denies the remaining allegations contained therein.

In answering Paragraph No.'s 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76 and 77, the Trustee is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraphs, and on that basis denies each and every allegation contained therein.

FIRST CLAIM FOR RELIEF
(VEIL-PIERCING AGAINST THE ELN TRUST)[1]

The allegations contained within Paragraph No. 78 of the Cross-Claim state conclusions to which no response is required. To the extent a response is required, the Trustee is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

In answering Paragraph No.'s 79, 80 and 81 of the Cross-Claim, the Trustee denies all of the allegations therein.

In answering Paragraph No.'s 82[2] and 83 of the Cross-Claim, the Trustee is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraphs, and on that basis denies each and every allegation contained therein.

SECOND CLAIM FOR RELIEF
(REVERSE VEIL-PIERCING AGAINST THE ELN TRUST)

The allegations contained within Paragraph No. 84 of the Cross-Claim state conclusions to which no response is required. To the extent a response is required, the Trustee is without sufficient

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[1] Lynita S. Nelson's Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fifteenth Claims for Relief have been dismissed, and as such, no response is necessary for said claim.

[2] Lynita S. Nelson's claim for Veil-Piercing under NRS 78.487 has been dismissed, and as such, no response is necessary for said claim.

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knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

In answering Paragraph No.'s 85, 86 and 87 of the Cross-Claim, the Trustee denies all of the allegations therein.

In answering Paragraph No.'s 88[3] and 89 of the Cross-Claim, the Trustee is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraphs, and on that basis denies each and every allegation contained therein.

FOURTEENTH CLAIM FOR RELIEF
(CONSTRUCTIVE TRUST AGAINST THE ELN TRUST)

The allegations contained within Paragraph No. 162 of the Cross-Claim state conclusions to which no response is required. To the extent a response is required, the Trustee is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

In answering Paragraph No.'s 163, 164, 165 and 166 of the Cross-Claim, the Trustee denies all of the allegations therein.

In answering Paragraph No. 167 of the Cross-Claim, the Trustee is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraphs, and on that basis denies each and every allegation contained therein.

FIFTEENTH CLAIM FOR RELIEF
(INJUNCTIVE RELIEF AGAINST THE ELN TRUST)

The allegations contained within Paragraph No. 168 of the Cross-Claim state conclusions to which no response is required. To the extent a response is required, the Trustee is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph, and on that basis denies each and every allegation contained therein.

In answering Paragraph No.'s 169 and 170 of the Cross-Claim, the Trustee denies all of the allegations therein.

---

[3] Lynita S. Nelson's claim for Veil-Piercing under NRS 78.487 has been dismissed, and as such, no response is necessary for said claim.

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In answering Paragraph No. 171 of the Cross-Claim, the Trustee is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said Paragraphs, and on that basis denies each and every allegation contained therein.

AFFIRMATIVE DEFENSES

In addition to the defenses set forth above, the Trustee interposes the following affirmative defenses:

1. This Court lacks jurisdiction to hear matters arising under Title 12 and 13 of the Nevada Revised Statutes as NRS 164.015(1) specifically provides that the probate "court has exclusive jurisdiction of proceedings initiated by the petition of an interested person concerning the internal affairs of a nontestamentary trust. . ."

2. Lynita S. Nelson's claims are barred due to her failure to comply with NRS 164.015.

3 This Court lacks jurisdiction to enter the injunction against the ELN Trust because an injunction pertains to "the internal affairs of a nontestamentary trust. . .," and is therefore subject to the Probate Court's exclusive jurisdiction under Title 12 and Title 13 of the Nevada Revised Statutes.

4 Lynita S. Nelson failed to comply with NRS 30.060, which mandates that "[a]ny action for declaratory relief under this section may only be made in a proceeding commenced pursuant to the provisions of title 12 or 13 of NRS, as appropriate."

5 Lynita S. Nelson's allegations pertaining to the ELN Trust cannot and should not be considered in alter ego claims under NRS 163.418.

6. Lynita S. Nelson's Cross-Claims are time-barred by NRS 166.170 and/or other applicable statute of limitations.

7. Lynita S. Nelson's Cross-Claims fail to state facts sufficient to constitute a cause of action against the ELN Trust.

8. To the extent that any or all occurrences, happenings, injuries, and/or damages alleged in Lynita S. Nelson's Cross-Claim were proximately caused and/contributed to by the wrongful acts and/or omissions of Lynita S. Nelson, Lynita S. Nelson is precluded from obtaining judgment against the ELN Trust.

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9. Lynita S. Nelson is barred from any recovery against the ELN Trust based upon the doctrines of waiver, estoppel, laches and unclean hands.

10. Lynita S. Nelson's Cross-Claims are frivolous, unnecessary and unwarranted, and the Trustee has been required to retain the services of an attorney to defend this action and is entitled to recover attorney's fees and costs incurred.

11. The Trustee may have other affirmative defenses that are not currently known but which may become known through the course of discovery, and the Trustee reserves the right to allege such affirmative defenses as they become known.

DATED this 1st day of June, 2012.

SOLOMON DWIGGINS & FREER, LTD.

By: _____

MARK A. SOLOMON, ESQ.
Nevada State Bar No. 0418
JEFFREY P. LUSZECK
Nevada State Bar No. 9619
Cheyenne West Professional Centre'
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Attorneys for Lana Martin, Distribution Trustee of the ERIC L. NELSON NEVADA TRUST

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to EDCR 7.26(a), service of the foregoing **ANSWER TO LYNITA SUE NELSON'S FIRST AMENDED CLAIMS FOR RELIEF AGAINST THE ERIC L. NELSON NEVADA TRUST dated May 30, 2001** was made on this 1st day of June, 2012, by sending a true and correct copy of the same by United States Postal Service, first class postage fully prepaid, to the following at his last known address as listed below:

Rhonda K. Forsberg, Esq.
Nevada State Bar No. 009557
Forsberg & Douglas
Via E-mail Only rhonda@ifdlaw.com
Attorney for Counterdefendant, Eric L. Nelson

Robert P. Dickerson, Esq.
Dickerson Law Group
1745 Village Center Circle
Las Vegas, NV 89134

An employee of SOLOMON DWIGGINS & FREER, LTD.

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RECEIVED
6/5/12

FILED
JUN 5 2 03 PM '12
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

ERIC L. NELSON,

Plaintiff/Counterdefendant,

vs.

LYNITA SUE NELSON, LANA MARTIN, as Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Defendant/Counterclaimants.

LANA MARTIN, Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Crossclaimant,

vs.

LYNITA SUE NELSON,

Crossdefendant.

CASE NO.: D-09-411537-D
DEPT. NO.: O

NOTICE OF ENTRY OF ORDER

FRANK R SULLIVAN
DISTRICT JUDGE
FAMILY DIVISION, DEPT. O
LAS VEGAS NV 89101

TO:

Rhonda Forsberg, Esq.
Robert Dickerson, Esq.
Mark Solomon, Esq.
Jeffrey Luszeck, Esq.
Larry Bertsch

PLEASE TAKE NOTICE that FINDINGS OF FACT AND ORDER was duly entered in the above-referenced case on the 5th day of June, 2012.

DATED this 5 day of June, 2012.

Lori Parr
Judicial Executive Assistant
Dept. O

FRANK R. SULLIVAN
DISTRICT JUDGE
FAMILY DIVISION, DEPT. O
LAS VEGAS NV 89101

ORDR

FILED
JUN 5 2 03 PM '12
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

ERIC L. NELSON,

Plaintiff/Counterdefendant,

vs.

LYNITA SUE NELSON, LANA MARTIN, as Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Defendant/Counterclaimants.

LANA MARTIN, Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Crossclaimant,

vs.

LYNITA SUE NELSON,

Crossdefendant.

CASE NO.: D-09-411537-D
DEPT. NO.: O

FINDINGS OF FACT AND ORDER

This Matter having come before this Honorable Court on April 10, 2012, on Counterdefendant, Crossdefendant, Third Party Defendant Lana Martin, Distribution Trustee of the Eric L. Nelson Nevada Trust's Motion for Payment of Attorneys' Fees and Costs, Defendant Lynita Nelson's Opposition to Motion for Payment of Attorneys' Fees and Costs

ANK R. SULLIVAN
DISTRICT JUDGE
ILY DIVISION, DEPT. O
AS VEGAS NV 89101

and Countermotion for Receiver, Additional Injunction and Fees and Costs, Lana Martin's Reply to Opposition to Motion for Attorneys' Fees and Costs, and Lana Martin's Opposition to Countermotion for Receiver, Additional Injunction and Fees and Costs, with Plaintiff, Eric Nelson, appearing and being represented by Rhonda Forsberg, Esq., Defendant, Lynita Nelson, appearing and being represented by Robert Dickerson, Esq., Katherine Provost, Esq., and Josef Karacsonyi, Esq., and Counterdefendant, Crossdefendant, Third Party Defendant Lana Martin, Distribution Trustee of the Eric L. Nelson Nevada Trust, being represented by Mark Solomon, Esq., and Jeffrey Luszeck, Esq., with the Court having reviewed Counterdefendant, Crossdefendant, Third Party Defendant's Motion, Defendant's Opposition and Countermotion and Counterdefendant, Crossdefendant, Third Party Defendant's Reply and Opposition to Countermotion, having heard oral argument and being duly advised in the premises, good cause being shown:

THE COURT HEREBY FINDS that in its Findings of Fact and Order filed on January 31, 2012, this Court made the following Order:

IT IS FURTHER ORDERED that any monies received by Eric L. Nelson, or any entity owned or controlled by Mr. Nelson, related to his ownership interest in the Silver Slipper Casino/Dynasty Development Group, LLC, shall remain in his attorney's interest bearing account and that the ELN Trust is otherwise enjoined from using any such monies received from the sale of Dynasty Development Group LLC's interest in the Silver Slipper Casino Venture LLC without an Order from this Court.

. . .

. . .

THE COURT FURTHER FINDS that monies in the amount of One Million Five Hundred Sixty-Eight Thousand Dollars ($1,568,000.00) that Dynasty Development Group, LLC, obtained as a result of a transaction involving the Silver Slipper Casino are subject to the Court's Injunction issued on January 31, 2012.

THE COURT FURTHER FINDS that in its Findings of Fact and Order that was filed on January 31, 2012, this Court made the following Order:

IT IS FURTHER ORDERED that Lana Martin, Trustee of ELN Trust, is free to seek leave of this Court to obtain any funds or assets necessary to defend against any lawsuits, including this divorce action, that will have a direct effect on the value of any properties that are contained in the ELN Trust and, as such, are susceptible to a community interest claim.

THE COURT FURTHER FINDS that the Eric L. Nelson Nevada Trust (hereinafter, "ELN Trust") argues in its Motion that it currently owes the Law Firm of Solomon, Dwiggins and Freer, Ltd., (hereinafter, "Solomon Law Firm") Sixty-Eight Thousand Six Hundred Eighty-Two Dollars and Eighty-Nine Cents ($68,682.89) for fees and costs, and is requesting an additional Sixty Thousand Dollars ($60,000.00) to be held as a retainer to offset attorneys' fees and costs incurred in preparation for the July, 2012 Evidentiary Hearing.

THE COURT FURTHER FINDS that the Solomon Law Firm is requesting expert witnesses' fees in the amount of Thirty-Four Thousand Nine Hundred One Dollars and Five Cents ($34,901.05) due and owing to Gerety and Associates, CPA; Twenty-Five Thousand Dollars ($25,000.00) to be held as a retainer for Gerety & Associates to offset fees associated with the preparation of an expert witness report for the July, 2012 Evidentiary Hearing; and Twenty Thousand Dollars ($20,000.00) for The Rushforth Firm to offset fees associated with the preparation of an expert witness report for the July, 2012 Evidentiary Hearing.

THE COURT FURTHER FINDS that the ELN Trust desires to utilize a portion of the One Million Five Hundred Sixty-Eight Thousand Dollars ($1,568,000.00) that is subject to the Court's injunction issued on January 31, 2012, to pay for the aforementioned attorneys and expert witnesses' fees and costs.

THE COURT FURTHER FINDS that at the hearing on April 10, 2012, the Court informed the parties that it would issue an Order as to the payment of the requested attorneys and expert witnesses' fees and costs from the One Million Five Hundred Sixty-Eight Thousand Dollars ($1,568,000.00) that this Court has enjoined the ELN Trust from using pending further Order of this Court.

THE COURT FURTHER FINDS that in her Opposition, Ms. Nelson argues that Ms. Martin, as the Distribution Trustee, lacks standing to maintain her request for attorneys' fees and expert witnesses' fees on behalf of the ELN Trust because the express terms of the Trust do not provide her with the authority to make such request.[1]

THE COURT FURTHER FINDS that NRS 163.380 provides that a person acting in his role as a fiduciary may utilize any income created by the Trust to pay professionals necessary to assist in the administration of the Trust, including accountants and attorneys.

THE COURT FURTHER FINDS that Lana Martin, as the Distribution Trustee, has taken the following actions since Mr. and Mrs. Nelson stipulated to joining the ELN Trust as a necessary party on August 9, 2011: filed an Answer to the Complaint for Divorce and Counterclaim and Cross-claim on August 13, 2011; filed a Motion to Dismiss on November 7,

[1] Specifically, Article XII, Section 12.1 (z) of the Eric L. Nelson Nevada Trust provides that the Investment Trustee shall have the power "to employ and compensate, out of the principal or income or both, as the Trustee shall determine, such agents, persons, corporation or associations, including accountants, brokers, attorneys, tax specialists, certified financial planners, realtors, and other assistants and advisors deemed needful by the Trustees even if they are associated with a Trustee, for the proper settlement, investment and overall financial planning and administration of the Trust..."

ANK R. SULLIVAN
DISTRICT JUDGE
ILY DIVISION, DEPT. O
S VEGAS NV 89101

2011; filed a Motion to Dissolve Injunction on November 29, 2011; and filed a Motion to Dismiss Amended Third Party Complaint and Motion to Strike on January 17, 2012.

THE COURT FURTHER FINDS that at the hearing on April 10, 2012, Lana Martin produced a copy of a Delegation of Authority signed by Mr. Nelson , as Investment Trustee, delegating his authority as to the powers to employ and compensate attorneys, accountants, etc., to Lana Martin as Distribution Trustee.

THE COURT FURTHER FINDS that irrespective of the Delegation of Authority or the express terms contained in the ELN Trust, this Court has recognized the fact that Lana Martin, as Distribution Trustee, has acted on behalf of the ELN Trust since it joined this action, and, as such, does not lack standing to ask the Court for attorneys and other professionals' fees and costs.

THE COURT FURTHER FINDS that alternatively, even though Lana Martin is the Distribution Trustee and is not expressly authorized to employ and compensate professionals under the terms of the ELN Trust, Mr. Nelson, as Investment Trustee, should not maintain the responsibility "to employ and compensate, out of the principal or income or both...such agents, etc..." in this action due to an apparent inherent conflict such arrangement would create as the ELN Trust is alleging that it is a separate entity representing its own interests, apart from and contrary to Mr. and Mrs. Nelson's interests in this divorce action.

THE COURT FURTHER FINDS that at the hearing held on April 10, 2012, the Court requested that Mr. Larry Bertsch, the Court-appointed forensic accountant, prepare a report chronicling the costs the ELN Trust incurs with respect to its day-to-day operations as well as its respective sources of yearly and monthly income.

THE COURT FURTHER FINDS that, according to the Notice of Filing Source and Application of Funds Pursuant to April 10, 2012 Hearing filed by the forensic accountant Mr. Bertsch, the ELN Trust's bank accounts reflect a total balance of Four Hundred Seventy-One Thousand Eight Hundred Ninety-Eight Dollars and Fifty-Six Cents ($471,898.56) as of April 20, 2012.

THE COURT FURTHER FINDS that while the ELN Trust incurs many expenses which this Court would classify as "operating expenses," as reflected in the aforementioned Notice filed by Larry Bertsch, the ELN Trust has also incurred expenses entitled "Eric Nelson Draws and Expenses" and "Bella Kathryn Improvements and Expenses (Eric's Residence)," which are of particular interest to this Court.

THE COURT FURTHER FINDS that, as to the "Eric Nelson Draws and Expenses," while Mr. Nelson is entitled to distributions under the ELN Trust, it is interesting to note that since the inception of these divorce proceedings in 2009, the ELN Trust has made direct payments to Mr. Nelson in the total amount of Four Hundred Twenty-Nine Thousand Nine Hundred Four Dollars and Twenty Cents ($429,904.20) through March of 2012; and has paid Mr. Nelson's expenses in the total amount of Two Hundred Sixty-Seven Thousand Five Hundred Seventy-Two Dollars and Nine Cents ($267,572.09) through March of 2012.

THE COURT FURTHER FINDS that, as to the "Bella Kathryn Improvements and Expenses (Eric's Residence)," since the inception of these divorce proceedings in 2009, the ELN Trust has made payments towards the improvement of the Bella Kathryn residence in the total amount of One Million Seven Hundred Sixty-Five Thousand Sixty-Three Dollars and Seventy-Two Cents ($1,765,063.72) through March of 2012; and payments towards the

expenses of the Bella Kathryn residence in the total amount of Seventy-Four Thousand Four Hundred Thirty-One Dollars and Seven Cents ($74,431.07) through March of 2012.

THE COURT FURTHER FINDS that considering the fact that the ELN Trust had bank accounts totaling a balance of Four Hundred Seventy-One Thousand Eight Hundred Ninety-Eight Dollars and Fifty-Six Cents ($471,898.56) as of April 20, 2012; that the ELN Trust has made direct payments to Mr. Nelson in the total amount of Four Hundred Twenty-Nine Thousand Nine Hundred Four Dollars and Twenty Cents ($429,904.20) through March of 2012; that the ELN Trust has paid Mr. Nelson's expenses in the total amount of Two Hundred Sixty-Seven Thousand Five Hundred Seventy-Two Dollars and Nine Cents ($267,572.09) through March of 2012; that the ELN Trust has made payments towards the improvement of the Bella Kathryn residence in the total amount of One Million Seven Hundred Sixty-Five Thousand Sixty-Three Dollars and Seventy-Two Cents ($1,765,063.72) through March of 2012; and that the ELN Trust has made payments towards the expenses of the Bella Kathryn residence in the total amount of Seventy-Four Thousand Four Hundred Thirty-One Dollars and Seven Cents ($74,431.07) through March of 2012, the ELN Trust has sufficient financial resources to pay for the attorneys' fees, expert witnesses' fees and other costs associated with the litigation of this matter without the need to access the funds currently enjoined by this Court.

THE COURT FURTHER FINDS that this Court decided to enjoin access to the One Million Five Hundred Sixty-Eight Thousand Dollars ($1,568,000.00) to ensure that the ELN Trust would not engage in any business ventures that might dissipate the value of these funds pending determination as to the community property claims of Mrs. Nelson.

ANK R SULLIVAN
DISTRICT JUDGE
ILY DIVISION, DEPT. O
S VEGAS NV 89101

THE COURT FURTHER FINDS that due to Mrs. Nelson's pending community interest claims as to the ELN Trust's assets, including the enjoined monies totaling One Million Five Hundred Sixty-Eight Thousand Dollars ($1,568,000.00), it is most appropriate at this stage of the proceedings for this Court to continue to utilize statutes and case law in the context of divorce law as they would be most instructive in helping this Court render a fair and just decision.

THE COURT FURTHER FINDS that the statutory scheme contained in Chapters 123 and 125 of the Nevada Revised Statutes promotes a policy of ensuring that the value of any property or pecuniary interests that the parties have asserted maintain their "status quo" pending the outcome of the divorce action.[2]

THE COURT FURTHER FINDS that, upon review of the Billing Statement provided by the Solomon Law Firm, the request for attorneys' fees in the amount of Sixty Eight Thousand Six Hundred Eighty-Two Dollars and Eighty-Nine Cents ($68,682.89) is fair and reasonable based upon the quality of the legal services rendered; the character, difficulty, and intricacy of the required legal services rendered; and the skill, time and attention given to the legal work provided by counsel.

THE COURT FURTHER FINDS that the request for Retainer Fees in the amount of Sixty Thousand Dollars ($60,000.00) to offset attorneys' fees and costs incurred in preparation for the Evidentiary Hearing to be held in July of 2012 is a fair and reasonable amount based upon the extended, protracted and litigious history of this divorce proceeding.

[2] Specifically, NRS 123.225 provides that the husband and wife's interest in community property are "present, existing and equal interests." NRS 125.050 provides that after a complaint is filed, if it appears probable to the Court that either party is considering acting in such a way that would "defeat or render any less effectual" any order a Court may make concerning a party's property or pecuniary interests, the Court shall, through a restraining order, prevent the party from taking such detrimental action.

THE COURT FURTHER FINDS that while a request has been made for the expert witnesses' fees to date in the amount of Thirty-Four Thousand Nine Hundred One Dollars and Five Cents ($34,901.05), and an additional Forty-Five Thousand Dollars ($45,000.00) to offset fees associated with the preparation of the expert witnesses' reports for the upcoming Evidentiary Hearing, this Court has only been provided with an invoice in the amount of $34,901.05 without detail as to the services provided by the expert witnesses, and, as such, this Court lacks sufficient documentation to determine the fairness and reasonableness of the requested expert witnesses' fees at this time.

THE COURT FURTHER FINDS that while the Court lacks sufficient details as to the expert witnesses' services provided to date and to be provided in preparation for the impending Evidentiary Hearing, this Court will authorize an initial payment of Forty Thousand Dollars ($40,000.00) towards the expert witnesses' fees, which would appear prudent at this time based the pending legal issues in regards to the ELN Trust and community property claims associated therewith, subject to reconsideration and/or reimbursement upon submission of an itemized billing statement at the conclusion of the Evidentiary Hearing.

THEREFORE, IT IS HEREBY ORDERED that the ELN Trust is precluded from utilizing the monies, subject to this Court's January 31, 2012 injunction, in the amount of One Million Five Hundred Sixty-Eight Thousand Dollars ($1,568,000.00) to pay its retained attorneys' fees and costs and retained experts' fees and costs.

IT IS FURTHER ORDERED that the ELN Trust is directed to pay the sum of Sixty Eight Thousand Six Hundred Eighty-Two Dollars and Eighty-Nine Cents ($68,682.89) for legal services and a retainer fee in the amount of Sixty Thousand Dollars ($60,000) to Solomon, Dwiggins, and Freer, Ltd.

IT IS FURTHER ORDERED that the ELN Trust is directed to pay the sum of Forty Thousand Dollars ($40,000) towards the expert witnesses' fees made payable to Solomon, Dwiggins, and Freer, Ltd.

IT IS FURTHER ORDERED that this Court reserves the right to offset any attorneys' fees and/or expert witnesses' fees awarded to date based upon this Court's ultimate determination as to the respective parties' property rights and division thereof, as deemed fair and just.

Dated this 5th day of June, 2012.

Honorable Frank P. Sullivan
District Court Judge – Dept. O

FILED

JUN 5 2 03 PM '12

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

ERIC L. NELSON,

Plaintiff/Counterdefendant,

vs.

LYNITA SUE NELSON, LANA MARTIN, as Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Defendant/Counterclaimants.

LANA MARTIN, Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Crossclaimant,

vs.

LYNITA SUE NELSON,

Crossdefendant.

CASE NO.: D-09-411537-D
DEPT. NO.: O

NOTICE OF ENTRY OF ORDER

R SULLIVAN
STRICT JUDGE
FAMILY DIVISION, DEPT. O
LAS VEGAS NV 89101

TO:

Rhonda Forsberg, Esq.
Robert Dickerson, Esq.
Mark Solomon, Esq.
Jeffrey Luszeck, Esq.
Larry Bertsch

PLEASE TAKE NOTICE that FINDINGS OF FACT AND ORDER was duly entered in the above-referenced case on the 5th day of June, 2012.

DATED this 5 day of June, 2012.

Lori Parr
Judicial Executive Assistant
Dept. O

ORDR

FILED
JUN 5 2 03 PM '12
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

ERIC L. NELSON,

Plaintiff/Counterdefendant,

vs.

LYNITA SUE NELSON, LANA MARTIN, as Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Defendant/Counterclaimants.

LANA MARTIN, Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Crossclaimant,

vs.

LYNITA SUE NELSON,

Crossdefendant.

CASE NO.: D-09-411537-D
DEPT. NO.: O

FINDINGS OF FACT AND ORDER

This Matter having come before this Honorable Court on April 10, 2012, on Counterdefendant, Crossdefendant, Third Party Defendant Lana Martin, Distribution Trustee of the Eric L. Nelson Nevada Trust's Motion for Payment of Attorneys' Fees and Costs, Defendant Lynita Nelson's Opposition to Motion for Payment of Attorneys' Fees and Costs

SULLIVAN
CT JUDGE
MILY DIVISION, DEPT. O
AS VEGAS NV 89101

and Countermotion for Receiver, Additional Injunction and Fees and Costs, Lana Martin's Reply to Opposition to Motion for Attorneys' Fees and Costs, and Lana Martin's Opposition to Countermotion for Receiver, Additional Injunction and Fees and Costs, with Plaintiff, Eric Nelson, appearing and being represented by Rhonda Forsberg, Esq., Defendant, Lynita Nelson, appearing and being represented by Robert Dickerson, Esq., Katherine Provost, Esq., and Josef Karacsonyi, Esq., and Counterdefendant, Crossdefendant, Third Party Defendant Lana Martin, Distribution Trustee of the Eric L. Nelson Nevada Trust, being represented by Mark Solomon, Esq., and Jeffrey Luszeck, Esq., with the Court having reviewed Counterdefendant, Crossdefendant, Third Party Defendant's Motion, Defendant's Opposition and Countermotion and Counterdefendant, Crossdefendant, Third Party Defendant's Reply and Opposition to Countermotion, having heard oral argument and being duly advised in the premises, good cause being shown:

THE COURT HEREBY FINDS that in its Findings of Fact and Order filed on January 31, 2012, this Court made the following Order:

IT IS FURTHER ORDERED that any monies received by Eric L. Nelson, or any entity owned or controlled by Mr. Nelson, related to his ownership interest in the Silver Slipper Casino/Dynasty Development Group, LLC, shall remain in his attorney's interest bearing account and that the ELN Trust is otherwise enjoined from using any such monies received from the sale of Dynasty Development Group LLC's interest in the Silver Slipper Casino Venture LLC without an Order from this Court.

. . .

. . .

SULLIVAN
T JUDGE

ILY DIVISION, DEPT. O
S VEGAS NV 89101

THE COURT FURTHER FINDS that monies in the amount of One Million Five Hundred Sixty-Eight Thousand Dollars ($1,568,000.00) that Dynasty Development Group, LLC, obtained as a result of a transaction involving the Silver Slipper Casino are subject to the Court's Injunction issued on January 31, 2012.

THE COURT FURTHER FINDS that in its Findings of Fact and Order that was filed on January 31, 2012, this Court made the following Order:

IT IS FURTHER ORDERED that Lana Martin, Trustee of ELN Trust, is free to seek leave of this Court to obtain any funds or assets necessary to defend against any lawsuits, including this divorce action, that will have a direct effect on the value of any properties that are contained in the ELN Trust and, as such, are susceptible to a community interest claim.

THE COURT FURTHER FINDS that the Eric L. Nelson Nevada Trust (hereinafter, "ELN Trust") argues in its Motion that it currently owes the Law Firm of Solomon, Dwiggins and Freer, Ltd., (hereinafter, "Solomon Law Firm") Sixty-Eight Thousand Six Hundred Eighty-Two Dollars and Eighty-Nine Cents ($68,682.89) for fees and costs, and is requesting an additional Sixty Thousand Dollars ($60,000.00) to be held as a retainer to offset attorneys' fees and costs incurred in preparation for the July, 2012 Evidentiary Hearing.

THE COURT FURTHER FINDS that the Solomon Law Firm is requesting expert witnesses' fees in the amount of Thirty-Four Thousand Nine Hundred One Dollars and Five Cents ($34,901.05) due and owing to Gerety and Associates, CPA; Twenty-Five Thousand Dollars ($25,000.00) to be held as a retainer for Gerety & Associates to offset fees associated with the preparation of an expert witness report for the July, 2012 Evidentiary Hearing; and Twenty Thousand Dollars ($20,000.00) for The Rushforth Firm to offset fees associated with the preparation of an expert witness report for the July, 2012 Evidentiary Hearing.

SULLIVAN
JUDGE
ILY DIVISION, DEPT. O
S VEGAS NV 89101

THE COURT FURTHER FINDS that the ELN Trust desires to utilize a portion of the One Million Five Hundred Sixty-Eight Thousand Dollars ($1,568,000.00) that is subject to the Court's injunction issued on January 31, 2012, to pay for the aforementioned attorneys and expert witnesses' fees and costs.

THE COURT FURTHER FINDS that at the hearing on April 10, 2012, the Court informed the parties that it would issue an Order as to the payment of the requested attorneys and expert witnesses' fees and costs from the One Million Five Hundred Sixty-Eight Thousand Dollars ($1,568,000.00) that this Court has enjoined the ELN Trust from using pending further Order of this Court.

THE COURT FURTHER FINDS that in her Opposition, Ms. Nelson argues that Ms. Martin, as the Distribution Trustee, lacks standing to maintain her request for attorneys' fees and expert witnesses' fees on behalf of the ELN Trust because the express terms of the Trust do not provide her with the authority to make such request.[1]

THE COURT FURTHER FINDS that NRS 163.380 provides that a person acting in his role as a fiduciary may utilize any income created by the Trust to pay professionals necessary to assist in the administration of the Trust, including accountants and attorneys.

THE COURT FURTHER FINDS that Lana Martin, as the Distribution Trustee, has taken the following actions since Mr. and Mrs. Nelson stipulated to joining the ELN Trust as a necessary party on August 9, 2011: filed an Answer to the Complaint for Divorce and Counterclaim and Cross-claim on August 13, 2011; filed a Motion to Dismiss on November 7,

[1] Specifically, Article XII, Section 12.1 (z) of the Eric L. Nelson Nevada Trust provides that the Investment Trustee shall have the power "to employ and compensate, out of the principal or income or both, as the Trustee shall determine, such agents, persons, corporation or associations, including accountants, brokers, attorneys, tax specialists, certified financial planners, realtors, and other assistants and advisors deemed needful by the Trustees even if they are associated with a Trustee, for the proper settlement, investment and overall financial planning and administration of the Trust..."

2011; filed a Motion to Dissolve Injunction on November 29, 2011; and filed a Motion to Dismiss Amended Third Party Complaint and Motion to Strike on January 17, 2012.

THE COURT FURTHER FINDS that at the hearing on April 10, 2012, Lana Martin produced a copy of a Delegation of Authority signed by Mr. Nelson , as Investment Trustee, delegating his authority as to the powers to employ and compensate attorneys, accountants, etc., to Lana Martin as Distribution Trustee.

THE COURT FURTHER FINDS that irrespective of the Delegation of Authority or the express terms contained in the ELN Trust, this Court has recognized the fact that Lana Martin, as Distribution Trustee, has acted on behalf of the ELN Trust since it joined this action, and, as such, does not lack standing to ask the Court for attorneys and other professionals' fees and costs.

THE COURT FURTHER FINDS that alternatively, even though Lana Martin is the Distribution Trustee and is not expressly authorized to employ and compensate professionals under the terms of the ELN Trust, Mr. Nelson, as Investment Trustee, should not maintain the responsibility "to employ and compensate, out of the principal or income or both...such agents, etc..." in this action due to an apparent inherent conflict such arrangement would create as the ELN Trust is alleging that it is a separate entity representing its own interests, apart from and contrary to Mr. and Mrs. Nelson's interests in this divorce action.

THE COURT FURTHER FINDS that at the hearing held on April 10, 2012, the Court requested that Mr. Larry Bertsch, the Court-appointed forensic accountant, prepare a report chronicling the costs the ELN Trust incurs with respect to its day-to-day operations as well as its respective sources of yearly and monthly income.

THE COURT FURTHER FINDS that, according to the Notice of Filing Source and Application of Funds Pursuant to April 10, 2012 Hearing filed by the forensic accountant Mr. Bertsch, the ELN Trust's bank accounts reflect a total balance of Four Hundred Seventy-One Thousand Eight Hundred Ninety-Eight Dollars and Fifty-Six Cents ($471,898.56) as of April 20, 2012.

THE COURT FURTHER FINDS that while the ELN Trust incurs many expenses which this Court would classify as "operating expenses," as reflected in the aforementioned Notice filed by Larry Bertsch, the ELN Trust has also incurred expenses entitled "Eric Nelson Draws and Expenses" and "Bella Kathryn Improvements and Expenses (Eric's Residence)," which are of particular interest to this Court.

THE COURT FURTHER FINDS that, as to the "Eric Nelson Draws and Expenses," while Mr. Nelson is entitled to distributions under the ELN Trust, it is interesting to note that since the inception of these divorce proceedings in 2009, the ELN Trust has made direct payments to Mr. Nelson in the total amount of Four Hundred Twenty-Nine Thousand Nine Hundred Four Dollars and Twenty Cents ($429,904.20) through March of 2012; and has paid Mr. Nelson's expenses in the total amount of Two Hundred Sixty-Seven Thousand Five Hundred Seventy-Two Dollars and Nine Cents ($267,572.09) through March of 2012.

THE COURT FURTHER FINDS that, as to the "Bella Kathryn Improvements and Expenses (Eric's Residence)," since the inception of these divorce proceedings in 2009, the ELN Trust has made payments towards the improvement of the Bella Kathryn residence in the total amount of One Million Seven Hundred Sixty-Five Thousand Sixty-Three Dollars and Seventy-Two Cents ($1,765,063.72) through March of 2012; and payments towards the

expenses of the Bella Kathryn residence in the total amount of Seventy-Four Thousand Four Hundred Thirty-One Dollars and Seven Cents ($74,431.07) through March of 2012.

THE COURT FURTHER FINDS that considering the fact that the ELN Trust had bank accounts totaling a balance of Four Hundred Seventy-One Thousand Eight Hundred Ninety-Eight Dollars and Fifty-Six Cents ($471,898.56) as of April 20, 2012; that the ELN Trust has made direct payments to Mr. Nelson in the total amount of Four Hundred Twenty-Nine Thousand Nine Hundred Four Dollars and Twenty Cents ($429,904.20) through March of 2012; that the ELN Trust has paid Mr. Nelson's expenses in the total amount of Two Hundred Sixty-Seven Thousand Five Hundred Seventy-Two Dollars and Nine Cents ($267,572.09) through March of 2012; that the ELN Trust has made payments towards the improvement of the Bella Kathryn residence in the total amount of One Million Seven Hundred Sixty-Five Thousand Sixty-Three Dollars and Seventy-Two Cents ($1,765,063.72) through March of 2012; and that the ELN Trust has made payments towards the expenses of the Bella Kathryn residence in the total amount of Seventy-Four Thousand Four Hundred Thirty-One Dollars and Seven Cents ($74,431.07) through March of 2012, the ELN Trust has sufficient financial resources to pay for the attorneys' fees, expert witnesses' fees and other costs associated with the litigation of this matter without the need to access the funds currently enjoined by this Court.

THE COURT FURTHER FINDS that this Court decided to enjoin access to the One Million Five Hundred Sixty-Eight Thousand Dollars ($1,568,000.00) to ensure that the ELN Trust would not engage in any business ventures that might dissipate the value of these funds pending determination as to the community property claims of Mrs. Nelson.

THE COURT FURTHER FINDS that due to Mrs. Nelson's pending community interest claims as to the ELN Trust's assets, including the enjoined monies totaling One Million Five Hundred Sixty-Eight Thousand Dollars ($1,568,000.00), it is most appropriate at this stage of the proceedings for this Court to continue to utilize statutes and case law in the context of divorce law as they would be most instructive in helping this Court render a fair and just decision.

THE COURT FURTHER FINDS that the statutory scheme contained in Chapters 123 and 125 of the Nevada Revised Statutes promotes a policy of ensuring that the value of any property or pecuniary interests that the parties have asserted maintain their "status quo" pending the outcome of the divorce action.[2]

THE COURT FURTHER FINDS that, upon review of the Billing Statement provided by the Solomon Law Firm, the request for attorneys' fees in the amount of Sixty Eight Thousand Six Hundred Eighty-Two Dollars and Eighty-Nine Cents ($68,682.89) is fair and reasonable based upon the quality of the legal services rendered; the character, difficulty, and intricacy of the required legal services rendered; and the skill, time and attention given to the legal work provided by counsel.

THE COURT FURTHER FINDS that the request for Retainer Fees in the amount of Sixty Thousand Dollars ($60,000.00) to offset attorneys' fees and costs incurred in preparation for the Evidentiary Hearing to be held in July of 2012 is a fair and reasonable amount based upon the extended, protracted and litigious history of this divorce proceeding.

[2] Specifically, NRS 123.225 provides that the husband and wife's interest in community property are "present, existing and equal interests." NRS 125.050 provides that after a complaint is filed, if it appears probable to the Court that either party is considering acting in such a way that would "defeat or render any less effectual" any order a Court may make concerning a party's property or pecuniary interests, the Court shall, through a restraining order, prevent the party from taking such detrimental action.

THE COURT FURTHER FINDS that while a request has been made for the expert witnesses' fees to date in the amount of Thirty-Four Thousand Nine Hundred One Dollars and Five Cents ($34,901.05), and an additional Forty-Five Thousand Dollars ($45,000.00) to offset fees associated with the preparation of the expert witnesses' reports for the upcoming Evidentiary Hearing, this Court has only been provided with an invoice in the amount of $34,901.05 without detail as to the services provided by the expert witnesses, and, as such, this Court lacks sufficient documentation to determine the fairness and reasonableness of the requested expert witnesses' fees at this time.

THE COURT FURTHER FINDS that while the Court lacks sufficient details as to the expert witnesses' services provided to date and to be provided in preparation for the impending Evidentiary Hearing, this Court will authorize an initial payment of Forty Thousand Dollars ($40,000.00) towards the expert witnesses' fees, which would appear prudent at this time based the pending legal issues in regards to the ELN Trust and community property claims associated therewith, subject to reconsideration and/or reimbursement upon submission of an itemized billing statement at the conclusion of the Evidentiary Hearing.

THEREFORE, IT IS HEREBY ORDERED that the ELN Trust is precluded from utilizing the monies, subject to this Court's January 31, 2012 injunction, in the amount of One Million Five Hundred Sixty-Eight Thousand Dollars ($1,568,000.00) to pay its retained attorneys' fees and costs and retained experts' fees and costs.

IT IS FURTHER ORDERED that the ELN Trust is directed to pay the sum of Sixty Eight Thousand Six Hundred Eighty-Two Dollars and Eighty-Nine Cents ($68,682.89) for legal services and a retainer fee in the amount of Sixty Thousand Dollars ($60,000) to Solomon, Dwiggins, and Freer, Ltd.

SULLIVAN
JUDGE
ILY DIVISION, DEPT. O
.S VEGAS NV 89101

IT IS FURTHER ORDERED that the ELN Trust is directed to pay the sum of Forty Thousand Dollars ($40,000) towards the expert witnesses' fees made payable to Solomon, Dwiggins, and Freer, Ltd.

IT IS FURTHER ORDERED that this Court reserves the right to offset any attorneys' fees and/or expert witnesses' fees awarded to date based upon this Court's ultimate determination as to the respective parties' property rights and division thereof, as deemed fair and just.

Dated this 5th day of June, 2012.

Honorable Frank P. Sullivan
District Court Judge – Dept. O

SULLIVAN
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DISTRICT COURT

CLARK COUNTY, NEVADA

ERIC L. NELSON, Plaintiff/Counterdefendant, vs. LYNITA SUE NELSON, LANA MARTIN, as Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001 Defendants/Counterclaimants.	Case No. D-411537 Dept. No. O **DATE OF TRIAL:** July 16, 2012 **TIME OF TRIAL:** 9:00 a.m.

LANA MARTIN, Distribution Trustee of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001,

Crossclaimant,

vs.

LYNITA SUE NELSON,

Crossdefendant.

THE ERIC L. NELSON NEVADA TRUST'S PRETRIAL MEMORANDUM

Lana Martin, Distribution Trustee ("Trustee") of the ERIC L. NELSON NEVADA TRUST dated May 30, 2001 ("ELN SSST"), by and through her Counsel of Record, Solomon Dwiggins &

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Freer, Ltd., hereby file this Pretrial Memorandum pursuant to EDCR 5.87.

I. STATEMENT OF ESSENTIAL FACTS

A. BRIEF STATEMENT OF FACTS

1. SEPARATE PROPERTY AGREEMENT AND SEPARATE PROPERTY TRUSTS

On or around July 13, 1993, Eric and Lynita entered into the Separate Property Agreement, wherein they divided their community property into separate property, and established THE ERIC L. NELSON SEPARATE PROPERTY TRUST dated July 13, 1993 ("ELN Separate Property Trust"), and THE NELSON TRUST dated July 13, 1993 ("LSN Separate Property Trust") due to Lynita's moral adversion to gaming and other types of risky investments. Jeffrey L. Burr, Esq., the scrivenor of the Separate Property Agreement, ELN Separate Property Trust and LSN Separate Property Trust, confirmed Lynita's adversion to gaming and testified that another purpose of the aforementioned Separate Property Agreement and trusts were to:

> take community property that would be exposed 100 percent to liabilities that Eric might incur in the venture he was undertaking and to separate that community property into separate property so that at least Lynita's one-half could remain protected in the event a liability occurred and that Eric were to, well, incur liability and they would try to reach Lynita's assets. The creditors could not reach the assets.[1]

Prior to entering into the Separate Property Agreement, Lynita met with competent Counsel, Richard Koch, Esq., who explained to her the effect of the Separate Property Agreement. Indeed, Mr. Koch, who acknowledged that he had no independent recollection of the 1993 events, nevertheless testified that it was his custom and practice to:

> explain how community and separate property work and it'd kind of be about the principles about bringing property into the marriage, about the community property rights that have accrued during the marriage, about how community property and separate property can be converted.
> And I would have, I guess, wanted her to be satisfied that she was an intelligent woman who has some understanding of that, that this was done freely by her.[2]

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[1] *See* Deposition Transcript of Jeffrey L. Burr at p. 117, l. 25 - p. 118, l. 1-7, attached hereto as **Exhibit 1**.

[2] *See* Deposition Transcript of Richard Koch, Esq. at p. 22, l. 20 - p. 23, l. 4, attached hereto as **Exhibit 2**.

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In discovery, Lynita has failed to introduce any evidence that the Separate Property Agreement, ELN Separate Property Trust or LSN Separate Property Trust are invalid or that she lacked a sound understanding of the legal implications of said documents prior to executing the same.

2. SELF-SETTLED SPENDTHRIFT TRUSTS

On May 30, 2001, in order to enhance the estate plan Eric and Lynita had in place, Mr. Burr recommended that Eric establish the ELN SSST and that Lynita establish the LSN SSST. The ELN SSST was funded by assets that were wholly owned by the ELN Separate Property Trust. Likewise, the LSN SSST was funded by assets that were wholly owned by the LSN Separate Property Trust. Eric has always served as Investment Trustee of the ELN SSST,[3] and Lynita has always served as Investment Trustee of the LSN SSST.

In discovery, Lynita has failed to introduce any evidence that the ELN SSST or LSN SSST are invalid or that she lacked a sound understanding of the legal implications of said trusts. The evidence at trial will show that Lynita has been intricately involved with the management and operation of the LSN SSST.

3. DIVORCE PROCEEDING

Prior to Eric initiating the initial divorce proceeding on or around May 6, 2009, Lynita and her Counsel recognized that neither Eric nor Lynita owned many, if any, assets, as Eric had previously transferred all of his separate property to the ELN Separate Property Trust and ultimately the ELN SSST, and Lynita had previously transferred all of her separate property to the LSN Separate Property Trust and ultimately the LSN SSST. Because Lynita and her Counsel were aware of the ramifications of the Separate Property Agreement, the separate property trusts and self-settled spendthrift trusts (*i.e.* all community property had been transmuted to separate property in 1993), Lynita's Counsel demanded that Eric execute certain documents as early as March 2, 2009, when Eric was unrepresented by counsel, acknowledging that all of the property owned by the ELN SSST and LSN SSST was community property. Indeed, in an e-mail dated March 2, 2009, Denise Gentile, Esq. of the Dickerson Law Group sent e-mail correspondence to Eric wherein she stated:

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[3] *See* ELN SSST, at Article XI.

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> There have been documents presented to you asking you to acknowledge all of the property is community property. Mr. Burr asked that you sign them, and you refused. . . . If you are willing to sign the documents presented to you by Mr. Burr, and willing to acknowledge the community nature of all of the assets, then we may be able to make some quicker progress. Otherwise, if this matter becomes contested, Lynita will be forced to file a claim against you to set aside those agreements.[4]

It should be noted Lynita has failed/refused to produce said e-mail or the documents that the Dickerson Law Group prepared for Eric to execute, when he was unrepresented by counsel, despite her duty to do so under NRCP 16.2 and in response to Requests for Production of Documents to Lynita. In any case, Eric did not execute the proferred acknowledgment.

Additionally, on or around July 30, 2009, the Dickerson Law Group spent 5.40 hours reviewing the ELN SSST and LSN SSST and working on some type of motion, which upon information and belief was drafted to set aside the ELN SSST and LSN SSST.[5] Said motion was never filed.

Notwithstanding the fact that Lynita and her Counsel recognized the existence, and legal implications, of the Separate Property Agreement, ELN Separate Property Trust, LSN Separate Property Trust, ELN SSST and LSN SSST prior to the initiation of this divorce, they ignored the same until Eric filed his Motion to Join Necessary Party on or around June 24, 2011.

B. NAMES AND AGES OF THE PARTIES

Plaintiff/Counterdefendant, Eric L. Nelson ("Eric") - 52;

Defendant/Crossdefendant, Lynita S. Nelson ("Lynita") - 50; and

Defendant/Counterclaimant, Lana Martin, Distribution Trustee of the ELN SSST.

C. DATE OF MARRIAGE

September 17, 1983.

D. RESOLVED ISSUES

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[4] *See* E-mail from Denise Gentile, Esq. to Eric dated March 2, 2009, attached hereto as **Exhibit 3**.

[5] *See* Dickerson Law Group billing record dated August 19, 2009, attached hereto as **Exhibit 4**.

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No issues pertaining to the ELN SSST have been resolved.

II. CHILD CUSTODY

Issues pertaining to child custody are inapplicable to the ELN SSST.

III. SPOUSAL SUPPORT

To the extent that spousal support is being requested, it would be inappropriate and in contravention of ELN SSST and general trust law to compel spousal support to be paid from the ELN SSST.

IV. BRIEF STATEMENT OF CONTESTED LEGAL AND FACTUAL ISSUES

A. DYNASTY'S BANKRUPTCY PROCEEDING DOES NOT PRECLUDE THIS COURT'S ABILITY TO CONFIRM THAT THE ELN SSST IS A VALID SELF-SETTLED SPENDTHRIFT TRUST AND THAT LYNITA POSSESSES NO OWNERSHIP INTEREST THEREIN.

Dynasty, an asset owned by the ELN SSST, was forced to file bankruptcy in order to preserve its current appeal and to address the contingent liens that are presently threatening the 125 acres in Mississippi. Lynita's prior contention that Dynasty's decision to file for Chapter 11 bankruptcy impedes this Court's ability to resolve this action at the July 2012 is erroneous for several reasons, including that it presumes that she possesses a community interest in the ELN SSST, specifically Dynasty, which is simply not true. The evidence at trial will show that the ELN SSST is a valid self-settled spendthrift trust of which Lynita possesses no interest. In any case, the bankruptcy will not impede this Court's ability to confirm who possesses an ownership interest in Dynasty: the ELN SSST. Consequently, the fact that Dynasty filed for bankruptcy is inconsequential to the July 2012 trial, and said trial should proceed as scheduled.

B. LYNITA SHOULD BE PRECLUDED FROM INTRODUCING OR OFFERING ANY EVIDENCE AND/OR STATEMENTS REGARDING HER INTENT IN EXECUTING THE SEPARATE PROPERTY AGREEMENT, ELN SEPARATE PROPERTY TRUST, LSN SEPARATE PROPERTY TRUST, ELN SSST AND/OR LSN SSST.

As a matter of law, courts strictly determine a settlor's intent from the language contained in the trust document and not the settlor's undeclared or subsequent intentions.[6] Like contract law,

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[6] *See, e.g., Taylor v. Taylor,* 978 A.2d 538, 542-43 (Conn. Ct. App. 2009) ("The issue of intent as it relates to the interpretation of a trust instrument ... is to be determined by examination of the language of the trust instrument itself and not by extrinsic evidence of actual intent . . .. The

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courts only consider extrinsic evidence if the trust document is ambiguous.[7] Moreover, "extrinsic

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construction of a trust instrument presents a question of law. . ."); *Soeffe v. Jones*, 270 S.W.3d 617, 628 (Tex. Ct. App. 2008) ("Construction of an unambiguous trust is a matter of law for the court. In construing a trust, we are to ascertain the intent of the grantor from the language in the four corners of the instrument."); *Kimberlin v. Dull,* 218 S.W.3d 613, 616 (Mo. Ct. App. 2007) ("[A]bsent ambiguity, the intent of the settlor is determined from the four corners of the trust instrument. It is not this court's function to rewrite a trust in order to effectuate a more equitable distribution or to impart an intent to the testatrix that is not expressed in the trust"); *Keisling v. Landrum*, 218 S.W.3d 737, 741 (Tex. Ct. App. 2007) ("The construction of a will or trust instrument is a question of law for the trial court. Courts construe trusts to determine the intent of the maker. The intent of the maker must be ascertained from the language used within the four corners of the instrument.") (Citations omitted); *Blue Ridge Bank and Trust Co. v. McFall.* 207 S.W.3d 149, 156-57, 161 (Mo. Ct. App. 2006) ("As a starting point in any analysis of a testamentary document, we note that the paramount rule of will or trust construction is to discern the intent of the settlor. Such intention must be ascertained from the instrument as a whole, and must be adhered to unless it conflicts with some positive rule of law. . . . [I]n interpreting the trust, the court must look to the language of the instrument and not to the results to be achieved. . . . Courts are to ascertain what the testator meant from the words actually used.") (Citations omitted); *Sherard v. Sherard*, 142 P.3d 673, 677 (Wyo. 2006) ("The intent is determined from the trust document itself. [T]he interpretation of the language of a trust instrument constitutes a question of law"); *Estate of Edwards*, 203 Cal. App.3d 1366, 1371 (1988) (Citing *Estate of Stokley*, 108 Cal. App. 3d 461, 467 (1980) ("The testator's intent is determined from the language of the will itself. The intention which an interpretation of a will seeks to ascertain is the testator's intention as expressed in the words of the will, not some undeclared intention which may have been in his mind.").

[7] *See, e.g., Jones*, 270 S.W.3d at 628 ("If the words in the trust are unambiguous, we do not go beyond them to find the grantor's intent. Our focus is not what the grantor may have intended to write, but what words are actually used in the trust instrument. If the words are unambiguous, extrinsic evidence is not admissible to show that the grantor had some other intent than that expressed in the clear words of the trust."); *Carmody v. Betts*, 104 Ark. App. 84, 88, 289 S.W.3d 174, 178 (Ark. Ct. App. 2008) ("Extrinsic evidence may be received on the issue of the testator's intent only if the terms of the will are ambiguous. Absent a finding of ambiguity by the court, testimony about the settlor's intent should not be considered. When the terms of a trust are unambiguous, it is the court's duty to construe the written agreement according to the plain meaning of the language employed."); *Sherard*, 142 P.3d at 677 ("The intent is determined from the trust document itself. [T]he interpretation of the language of a trust instrument constitutes a question of law. . . . Where the language used in the trust is unambiguous, the plain provisions of the trust determine its construction and interpretation does not require consideration of evidence."); *Goodwine v. Goodwine*, 819 N.E.2d 824, 829 (Ind. Ct. App. 2004) ("To determine the settlor's intent, courts look first to the language used in the trust document. If the terms of the trust instrument are not ambiguous, a court may examine only the document itself to determine the settlor's intent.") (Citations omitted); *In re Reid*, 46 P.3d 188, 190 (Okla. Ct. App. 2002) ("As a general rule, the interpretation of the language of a trust instrument constitutes a question of law. . . . The courts strive to ascertain and effect the intent of the settlor, but parole evidence may not be considered where there is no ambiguity and the language of a declaration of trust is clear and plainly susceptible

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