IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF: THE W.N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST, DATED MAY 18, 1972,

JACQUELINE M. MONTOYA; AND KATHRYN A. BOUVIER,

Appellants,

vs.

ELEANOR C. AHERN A/K/A ELEANOR CONNELL HARTMAN AHERN,

Respondent.

No 71577

District Court Case No.:
P-09-066425-T

Appeal from the Eighth Judicial District Court, The Honorable Gloria Sturman Presiding

MOTION TO EXCEED TYPE-VOLUME LIMITATION

Pursuant to NRAP 32(a)(7)(D), Appellants, Jacqueline M. Montoya and Kathryn A. Bouvier ("Appellants"), hereby move this Honorable Court for leave to file a reply brief exceeding the type-volume limitation set out in NRAP 32(a)(7)(A)(ii) by 1,561 words. The additional length is necessary because the Appellants' reply brief responds to both respondent's answering brief and an amicus brief.[1] Although Appellants undertook every effort to achieve brevity in their reply, they could not respond to all relevant issues raised in the answering brief and amicus brief in only 7,000 words. A true and accurate copy of the Appellants' proposed

[1] On September 11, 2017, this Court entered its Order Granting Motion which stated that Beneficiaries could respond to the amicus curie filed by Marquis Aurbach & Coffing as part of their reply brief.

reply brief is attached to this motion as **Exhibit 1**. The proposed brief contains the required certificate of compliance pursuant to NRAP 32(a).

Based on the above, the Appellants believe good cause exists to allow the filing of a brief which exceeds the word requirements of NRAP(a)(7)(A)(ii) by 1,561.

Dated this 24th day of October 2017.

RUSHFORTH LEE & KIEFER, LLP

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Certificate of Service

I hereby certify that I electronically filed and served the foregoing **MOTION TO EXCEED TYPE-VOLUME LIMITATION** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System on October 24, 2017 upon the following:

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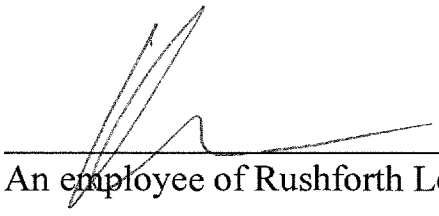

An employee of Rushforth Lee & Kiefer, LLP

EXHIBIT 1

(PROPOSED REPLY BRIEF]

Case No. 71577

In the Supreme Court of Nevada

IN THE MATTER OF: THE W.N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST, DATED MAY 18, 1972,	)
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vs.	)
ELEANOR C. AHERN A/K/A ELEANOR CONNELL HARTMAN AHERN,	)
Respondent.	)

Appeal
from the Eighth Judicial District Court, Clark County
The Honorable Gloria Sturman
District Court Case No. P-09-066425-T

APPELLANTS' REPLY BRIEF *AND* RESPONSE TO AMICUS BRIEF[1]

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant Jacqueline M. Montoya is an individual. Ms. Montoya has been represented throughout this matter by THE RUSHFORTH FIRM, LTD and RUSHFORTH LEE & KIEFER, LLP.[2]

Appellant Kathryn A. Bouvier is an individual. Ms. Bouvier has been represented in this matter by the following law firms: (1) ALBRIGHT, STODDARD, WARNICK, & ALBRIGHT, (2) THE RUSHFORTH FIRM, LTD., and (3) RUSHFORTH LEE & KIEFER, LLP.

Respectfully submitted this 24th day of October 2017.

RUSHFORTH LEE & KIEFER, LLP

By: _____
JOSEPH J. POWELL (SBN 8875)
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[2] RUSHFORTH LEE & KIEFER, LLP is the successor law firm to THE RUSHFORTH FIRM. LTD

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Ms. Ahern's undisputed actions violated the broad and enforceable No-Contest Clause[3] and she knows it. Accordingly, her only hope of success is to divert the Court's attention from the core issues on appeal. With this in mind, instead of directing the arguments in her answering brief (the "Answering Brief") to the key points raised by the Beneficiaries—like the mandatory nature of NRS 163.00195(1), the inapplicability of the exceptions outlined at NRS 163.00195(3) and (4), and the lack of legal authority supporting the district court's ill-advised "trustee exception"—Ms. Ahern focuses on a variety of irrelevant topics.

First, Ms. Ahern attacks the Beneficiaries for their alleged interference with the Trust's administration. This effort misses the mark because the Beneficiaries' alleged acts[4] have nothing to do with Ms. Ahern's undisputed violations of the No-Contest Clause. Then, Ms. Ahern unartfully argues that the No-Contest Clause fails

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[3] Capitalized terms not herein defined have the meaning ascribed to them in the Beneficiaries' opening brief.

[4] Ms. Ahern's Statement of the Case/Facts section is twenty-four pages long and contains a variety of inappropriate (and disputed) allegations related to the Beneficiaries. As this appeal focuses on Ms. Ahern's actions in relation to the Trust, it is not appropriate to address Ms. Ahern's unsubstantiated claims against the Beneficiaries in the reply brief. With that said, the Beneficiaries expressly deny any wrongdoing in relation to the Trust, the Court-Appointed Trustee, and Ms. Ahern.

to specifically prohibit her undisputed misconduct (lying, cheating, contempt, and theft). This contention fails as it ignores this Court's prior decision in *Matter of the ATS 1998* which held that the *exact* language employed by the Settlors in the No-Contest Clause is "extremely broad."

Next, Ms. Ahern revives her "trustee exception" argument. However, just like the district court, Ms. Ahern fails to provide a single citation to any relevant legal authority which supports such an exception (because none exists), making the issue a non-starter. Finally, Ms. Ahern re-asserts her undue influence defense. Not surprisingly, she neglects to mention that this same defense was properly rejected by the district court after trial, is unsupported by any admissible evidence, and is wholly contradicted by her prior admissions.

All of Ms. Ahern's diversionary tactics come up short. Consequently, the Court can only conclude that the district court erred in failing to enforce the No-Contest Clause against Ms. Ahern.

RESPONSE TO AMICUS BRIEF

Hoping the Court will save it from its poor decision to represent Ms. Ahern, as well as its continued failure to pursue payment of its fees through regular methods, Marquis Aurbach & Coffing ("MAC") filed an amicus curiae (the "Amicus Brief") in support of Ms. Ahern. More than anything, MAC wants to protect the district court's February 9, 2017 Decision and Order which provides MAC with a lien

against Ms. Ahern's beneficial interest in the Trust pursuant to NRS 18.015 (the "Lien Order"). In sum, MAC contends that enforcement of the No-Contest Clause will wipe out the Lien Order, leaving it without proper recourse for payment of its fees. In support of this contention, MAC argues that the Beneficiaries' appeal is barred by the "law of the case" doctrine and claim preclusion.

MAC's arguments are flawed for a variety of reasons. First, MAC has not meaningfully briefed the issues. Despite arguing that certain un-appealed orders from the district court (including the Lien Order) prevent the Beneficiaries from pursuing the present appeal, the Amicus Brief contains no citations to relevant Nevada case law regarding preclusion. Next, MAC's arguments presume that Ms. Ahern asserted a preclusion defense below. She did not. Additionally, MAC fails to acknowledge the distinct difference between the Beneficiaries' present attempts to enforce the No-Contest Clause, and those undertaken early in the litigation (which were based on different actions of Ms. Ahern not at issue in this appeal). Finally, MAC ignores the fact that a judgment in its favor will remain regardless of the outcome of this appeal. Because of these deficiencies, MAC's arguments should be entirely ignored by the Court.

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II. LEGAL ARGUMENT

REPLY TO ANSWERING BRIEF

A. There Is No Dispute Regarding the Application of NRS 163.00195.

Ms. Ahern's Answering Brief makes no attempt to address any aspect of NRS 163.00195.[5] Because of this, Ms. Ahern has aligned herself with the Beneficiaries' analysis and application of NRS 163.00195. *See In re Parental Rights as to A.L.*, 130 Nev. Adv. Op. 91, 337 P.3d 758, 761-62 (2014) (*citing* NRAP 31(d); *Bates v. Chronister,* 100 Nev. 675, 681–82, 691 P.2d 865, 870 (1984)).

1. Ms. Ahern Agrees that Application of NRS 163.00195 Is Mandatory.

The Beneficiaries' Opening Brief thoroughly articulates the mandatory application of NRS 163.00195 to the Trust's No-Contest Clause. (*See* p. 32-33). Ms. Ahern's Answering Brief makes no attempt to address this issue. Accordingly, Ms. Ahern concedes that enforcement of the No-Contest Clause is mandatory pursuant to NRS 163.00195 (barring the application of any statutorily outlined exception).

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[5] While note 11 of the Answering Brief makes mention of the mandatory nature of NRS 163.00195, it neither references NRS 163.00195, nor provides any legal analysis regarding the same. Instead, Ms. Ahern boldly states: "Appellants forget that this mandate is only true if the actual provision itself is triggered by specific conduct. As explained above, the No-Contest Clause is not triggered here." At p. 48 (internal citation omitted).

2. Ms. Ahern Agrees that None of the Statutory Exceptions Outlined at NRS 163.00195 Apply to Her.

The Beneficiaries devoted four and a half pages of their opening brief to a detailed analysis of the inapplicability of the statutory exceptions set forth at NRS 163.00195(3) and (4). (*See* p. 34-38). Despite this, Ms. Ahern's Answering Brief does not address any of these exemptions.[6] Consequently, Ms. Ahern concedes that she is not exempt from the application of NRS 163.00195 based on any of the statutory exceptions found at subsections (3) and (4).

B. Ms. Ahern Violated the Trust's "Extremely Broad" No-Contest Clause.

The parties agree that NRS 163.00195 is mandatory and that none of its exceptions apply. Consequently, Ms. Ahern can only avoid enforcement of the No-Contest Clause if she can demonstrate that her admitted misconduct falls outside the provision's plain language. Given the broad nature of the terms employed in the No-Contest Clause, coupled with the severity of Ms. Ahern's undisputed malfeasance, it is clear Ms. Ahern is out of luck.

1. Ms. Ahern's Actions Were Deliberate and Calculated.

Nowhere in her Answering Brief does Ms. Ahern dispute that she: (1) violated the district court's order to segregate funds (8 AA 1618 at ¶ 1); (2) failed to properly apply her fiduciary duties (*see id.* at ¶ 2); (3) failed to protect the Beneficiaries'

[6] *See supra* at n. 2.

interest in the Trust (*see id.* at ¶ 3); (4) misapplied Trust income (*see id.*); (5) deprived the Beneficiaries of funds owed to them (*see id.*); (6) removed funds from Trust accounts in violation of district court order (8 AA 1619 at ¶ 6); or (7) filed an incomplete and intentionally inaccurate accounting (*see id.* at ¶ 7).

Instead of denying the above conduct, Ms. Ahern cunningly argues that the Settlors never intended her wrongdoing to trigger the Trust's No-Contest Clause (Answering Brief at p. 37). In support of this contention, Ms. Ahern states that her egregious acts "were certainly not an attempt to permanently thwart the intent of her father and mother" as expressed in the No-Contest Clause. (*see id.* at p. 38). The clear intent of the Settlors was to stop *any* attack on the administration and distribution of the Trust. Lying, stealing, and cheating fit the bill.

2. The Relevant Language Is "Considerably Broad."

Ms. Ahern boldly argues that if the "settlors intended [her] breach of duty, or mishandling of funds, to constitute an attack on, opposition to, or [attempt] to set aside the Trust, they would have included it in the [No-Contest Clause]." (Answering Brief p. 37). Given Ms. Ahern's undisputed conduct detailed above, it is not surprising she advocates for such a narrow interpretation of the No-Contest Clause—she cannot deny her wrongdoing, so she must argue that it falls outside the relevant parameters. Fortunately, the Court can quickly dispatch Ms. Ahern's argument as it recently determined that language forbidding a beneficiary from

attacking, opposing, or seeking to set aside the administration and/or distribution of a trust prohibits an "extremely broad" range of conduct. *See Matter of the ATS 1998 Trust*, 2017 WL 3222533, *2 (July 28, 2017).

In *ATS 1998 Trust*, this Court examined a no-contest clause with the exact verbiage at issue here. *Id.* at *2. Like the Trust's No-Contest Clause, the provision in question prohibited any action by a beneficiary to "attack, oppose, or seek to set aside the administration and distribution" of the subject trust. *Id.* Although this Court ultimately determined that the beneficiary was immune from enforcement of the subject no-contest clause by virtue of the "safe harbor" provisions set forth at NRS 163.00195(3) (none of which apply here), it first determined that the no-contest clause contained prohibitions which were "considerably broad." *Id.* Specifically, the Court found that mere allegations of breach and misappropriation detailed in the beneficiary's petition against the trustee were enough to "constitute prima facie violations of the ***extremely broad*** no-contest clause." *Id.* (emphasis added).

Ms. Ahern's argument turns this Court's analysis in *ATS 1998 Trust* on its head. Instead of viewing the No-Contest Clause as the broad, deterrent provision it is, Ms. Ahern argues that her actions fall outside its plain language because neither theft nor breach of fiduciary duty are expressly prohibited. Under Ms. Ahern's approach, a no-contest clause could only prohibit a broad range of misconduct if each potential violation is specifically detailed. In other words, according to Ms.

Ahern, a no-contest clause must read like a comprehensive criminal statute if it is to have any real consequence.

Such an approach defies logic, as well as this Court's clear holding in *ATS 1998 Trust*. If the language in the No-Contest Clause is broad enough that mere allegations in a petition constitute a prima facie violation, the admitted theft of at least $800,000 (Answering Brief at p. 17) is a no brainer.

C. Ms. Ahern's Role as Trustee Cannot Save Her from the No-Contest Clause.

1. Ms. Ahern's Logic Is Flawed.

The Seventh Article of the Trust Agreement describes in detail the various powers bestowed on the trustee. (1 AA 26-27). Additionally, this article incorporates and adopts the various statutory powers set forth between NRS 163.265 and NRS 163.410. (1 AA 27). These powers are numerous and all-encompassing, and include the authority to borrow (NRS 163.320), advance (NRS 163.325), manage (NRS 163.300), and sell (NRS 163.270). At their core, these powers give the trustee *complete* control over, and *unfettered* access to, all Trust assets. These are the powers Ms. Ahern held when she violated the No-Contest Clause.

Shockingly, Ms. Ahern believes that her increased power and authority over Trust assets make her *less* culpable than a common beneficiary. Accordingly, had Ms. Ahern committed her wrongs while a lowly beneficiary, enforcement of the No-Contest Clause would be a given; but because her misdeeds occurred while a trustee,

she gets a free pass. This argument defies common sense as it ignores one of the most basic principles of trust law: trustees are held to the highest standard of conduct.

A trustee is a "fiduciary who must act in good faith and with fidelity to the beneficiary of the trust." *Bank of Nevada v. Speirs*, 95 Nev. 870, 873, 603 P.2d 1074, 1076 (1979). This means that the "trust relationship imposes stringent and high standards of conduct upon the trustee." *Pino v. Budwine*, 568 P.2d 586, 588 (N.M. 1977). Consequently, the trustee of an express trust is "subject to what is probably ***the highest standard of fiduciary duty known to the law***." *Busby v. Worthen Bank & Trust Co., N.A.,* 484 F.Supp. 647, 652 (E.D. Ark. 1979) (emphasis added). Indeed, this fiduciary standard is so high that some courts willingly disregard statutes of limitations if application of the same would serve to "shield trustees from their responsibilities." *Taplin v. Taplin*, 88 So.3d 344, 348 (Fla. Dist. Ct. App. 2012); *Nayee v. Nayee,* 705 So.2d 961, 963 (Fla. Dist. Ct. App. 1998).

Ms. Ahern's situation is akin to a bank manager who steals from the vault with the aid of the key her prestigious position affords. Importantly, although the manager's malfeasance is more easily accomplished—unlike common employees, she has unfettered access to the vault by virtue of the key—the betrayal is more severe (she holds a greater trust). Ms. Ahern's misconduct was made possible because of the increased power, authority, and access the mantle of trustee provided.

She abused these powers, and her position, for personal gain. Her fiduciary sized malfeasance deserves a fiduciary sized punishment, not a slap on the wrist.

2. Ms. Ahern Cites No Authority for Her "Trustee Exception."

Noticeably absent from the Answering Brief is any legal authority which supports the "trustee exception" created by the district court's Surcharge Order. (Answering Brief p. 42-45). Instead of directing the Court to such authority (which does not exist), Ms. Ahern focuses her arguments on distinguishing and refuting the legal authorities cited by the Beneficiaries. Ms. Ahern's efforts are misguided as the authorities cited by the Beneficiaries in the Opening Brief are merely supplementary, and not controlling (like the authority found at NRS 163.00195).

Enforcement of a no-contest clause in Nevada is governed by NRS 163.00195. Section (1) of this statute provides that a no-contest clause "must be enforced" except "as otherwise provided in subsections (3) and (4)." NRS 163.0195. In other words, a court is only excused from enforcing a valid and applicable no-contest clause if one or more of the statutorily defined exceptions apply.

Nowhere in subsection (3) nor (4) is there the slightest hint of a "trustee exception." *See* NRS 163.00195. Despite this, the Surcharge Order adds such an exception. However, the district court was only authorized to make such an addition if it could properly demonstrate that an additional exception was necessary to accomplish the facial purpose of NRS 163.00195. *See State Indus. Sys. v. Bokelman*,

113 Nev. 1116, 1122, 946 P.2d 179, 183 (1997). ("Where the language of the statute is plain and unambiguous, such that the legislative intent is clear, a court should not add to or alter [the language] to accomplish a purpose not on the face of the statute or apparent from permissible extrinsic aids such as legislative history or committee reports.") (internal quotations omitted). At a minimum, this required citation to at least one relevant legal authority which employed similar reasoning under similar circumstances. Yet, neither the Surcharge Order nor the Answering Brief cite any such authority (because it does not exist).

Simply stated, if the district court wanted to add an exception to NRS 163.00195, it was obligated to provide a well-articulated and well-reasoned justification to do so. Instead, it provided nothing. If Ms. Ahern wants to pick up where the district court left off, she has the same duty.

3. A "Trustee Exception" Will Lead to Increased Fraud and Theft.

The majority of Nevada trusts are administered by non-professional trustees. Commonly, a beneficiary is selected by the settlors to serve in the dual role of trustee/beneficiary (just like Ms. Ahern). Should this Court adopt Ms. Ahern's proposed exception, it will automatically exempt a great number of Nevada beneficiaries from the enforcement of otherwise valid and applicable no-contest clauses.

The beneficiaries who would benefit from such an exception are those with heightened access to, and control over, trust assets—i.e. beneficiaries who also have the power and authority of a trustee. Anytime such beneficiaries defraud or steal from a trust with a no-contest clause, they need only claim that their actions occurred while acting in their capacity as trustee. And, as long as they abscond with less trust money than they would otherwise be entitled to over the life of the trust, they can merely payback the stolen funds (i.e. surcharge), after which their regular trust distributions will re-commence. In essence, the bank manager described above gets to keep her job as long as she pays back her stolen loot. This is hardly a disincentive.

No contest clauses are intended to have a deterrent effect. *See Rafalko v. Georgiadis*, 777 S.E.2d 870, 880 (Va. 2015). A deterrent is only as effective as the threat of punishment associated with the act being discouraged. Beneficiaries who also serve as trustees will not fear the bark of a no-contest clause if this Court removes the bite. Simply stated, the district court's proposed "trustee exception" is a bad idea.

D. Ms. Ahern's Undue Influence Argument Falls Flat.

1. Ms. Ahern's Intent Has Already Been Established.

Like all affirmative defenses, an undue influence defense seeks to relieve a defendant of culpability—not because the alleged conduct did not occur, but because the conduct has been excused. *See* BLACK'S LAW DICTIONARY (10th Ed. 2014)

(defining "affirmative defense" as a "defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true."). The logic is simple: if the influenced party is not responsible for her conduct, such conduct should not be punishable. In Ms. Ahern's case, she believes her misconduct (lying, stealing, cheating, and defying district court orders) is excused because such actions were "done not of her own cognition." (Answering Brief at p. 48). In other words, Ms. Ahern contends she cannot be punished for something Ms. Nouna forced her to do.

The problem with Ms. Ahern's argument is that she inappropriately assumes undue influence is measured on a sliding scale. It is not. Either a party's free will is destroyed, rendering her incapable of the requisite intent and capacity, or it was not. The doctrine of undue influence only applies in the rare and extreme circumstance where the "free agency" of the party has been "overcome" and "destroyed." *In re Estate of Bethurem*, 129 Nev. Adv. Op. 92, 313 P.3d 237, 241 (2013). To destroy one's free agency, is to "damage [it] so thoroughly as to make [it] unusable, unrepairable, or non-existent." BLACK'S LAW DICTIONARY (10th Ed. 2014) (defining "destroy"). Ms. Ahern's various admissions make clear that her free agency was usable, repairable, and existent at all relevant times.

During closing arguments, Ms. Ahern's counsel admitted that she was at least partially culpable for her wrongful conduct in relation to the Trust:

> It's rather clear that our position is that that remedy [i.e. enforcement of the No-Contest Clause] is inappropriate and that the ***appropriate remedy*** is and always has been ***a surcharge of her interest*** in the trust until the trust is made whole for any malfeasance that she occurred or that she incurred.

(8 AA 1580) (emphasis added). After admitting this, Ms. Ahern's counsel then argued:

> Now I think we can all agree on this record that you have found that ***Mrs. Ahern has in fact misapplied trust funds, disobeyed your order, and been untruthful to the Court,*** all actions that generally would result in surcharging her interest. But those actions don't justify the additional step of attempting to remove her as a beneficiary, contrary to the clear language of [the No-Contest clause].

(8 AA 1582) (emphasis added).

In accordance with Ms. Ahern's admissions at trial, the district court ruled:

> Mrs. Ahern's ***failure*** to comply with the Court's Order to protect the Movants' 65% share, however, resulted in a misapplication of the Trust income, which deprived the [Beneficiaries] of funds owed to them under the terms of the Trust. Ms. Ahern's ***misapplication*** of Trust funds warrants a surcharge against Ms. Ahern's 35% share of the Trust, to be paid to [Beneficiaries], in a total amount to be determined at a future hearing to be set by this Court.

(8 AA 1618) (emphasis added). Importantly, Ms. Ahern did not appeal this ruling, nor does she contest it in her Answering Brief.

In her Answering Brief, Ms. Ahern further admits that her misconduct "amounted to nothing more than a breach of her fiduciary duties as the Trustee—a breach for which she has been significantly punished." (p. 28). In making this

argument, Ms. Ahern concedes two key points: (1) she admits she was capable of forming the requisite intent to breach a fiduciary duty, and (2) her conduct in breaching said duty is punishable.

By asserting that a surcharge was the "appropriate remedy," while also acknowledging her culpability for fiduciary breaches, Ms. Ahern conceded that a substantial portion of her free will/agency must have survived any alleged influence exerted by Ms. Nouna. And, if any portion of Ms. Ahern's free agency survived, it cannot have been "destroyed."

2. The District Court Properly Excluded Ms. Ahern's Undue Influence Defense and Ms. Ahern Never Challenged This Ruling.

Even without Ms. Ahern's prior admissions, her undue influence defense still fails because it was properly excluded by the district court. Ms. Ahern first instituted her undue influence defense the Friday before a Monday trial. (7 AA 1311-14). On Monday morning, Beneficiaries' counsel presented an oral motion to the district court arguing that Ms. Ahern was judicially estopped from presenting a defense which ran contrary to all her prior positions and theories in the case, and which was only first offered a mere three days before trial. (7 AA 1311-16). Specifically, counsel argued:

> Your Honor, I'll just point out that again, as of [February 18, 2016], before the trial brief was filed, the position taken by Ms. Ahern is that there's never been any undue influence. And in fact, in their trial brief on page 7, it says, "The remaining claims are innocuous; that

> is, it's clear that the trust funds were mishandled in between 2013 and 2015, and Eleanor will be responsible for ensuring that the trust is compensated appropriately once the extent of the loss is finally determined."
>
> So, are they changing course? Are they going to stipulate to dismiss their appeal, which is based on the fact that [Ms. Ahern's] entitled to 100 percent of the trust income? Because if they're not, they're taking two completely incongruent positions that cannot be sustained.

(7 AA 1315-16).

The court deferred its ruling on the motion until after the presentation of evidence. (7 AA 1316) ("Well, I think that's—that goes to argument, so we'll certainly hear those arguments. I do think that we need to take some testimony.").

At the close of trial, the Beneficiaries renewed their motion (8 AA 1315), after which the court issued its oral ruling and trial findings. (8 AA 1594). The court's oral ruling contains no findings nor conclusions regarding any alleged undue influence. (8 AA 1594-1615). In fact, the words "undue" and/or "influence" are not found anywhere in the twenty pages of transcript which outline the Court's proclamation. (*see id.*). Like the court's oral decision, the written order (the Surcharge Order) also makes no mention of undue influence. (8 AA 1617-20).

Simply stated, the Surcharge Order granted the Beneficiaries' renewed motion and properly excluded Ms. Ahern's untimely and inappropriate undue influence defense. This is evident from its complete lack of analysis regarding undue influence despite Ms. Ahern's repeated efforts to raise this issue at trial. Accordingly, Ms.

Ahern's argument that "evidence in the record demonstrates that any conduct [she] engaged in was because of undue influence" (Answering Brief at p. 45) puts the cart before the horse. To prevail on this issue, Ms. Ahern must first demonstrate that the district court's denial of her undue influence defense was erroneous (which she cannot do).[7] Only after she succeeds on this first hurdle, can Ms. Ahern then address the sufficiency of the undue influence evidence presented at trial.

Considering Ms. Ahern's Answering Brief makes no mention of the district court's exclusion of her defense, it is clear this first hurdle remains. Consequently, any analysis of the evidence (or lack of evidence) allegedly presented at trial is wholly inappropriate and premature.

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[7] Judicial estoppel is appropriate when a party takes a second position in judicial proceedings which is wholly inconsistent with the party's first position already presented and accepted by the court (as long as the first position was not taken as a result of ignorance, fraud or mistake). *NOLM, LLC v. Cnty. of Clark,* 120 Nev. 736, 743, 100 P.3d 658, 663 (2004) (citations omitted). At an earlier stage in the litigation (i.e. the hearing on the parties' competing motions for summary judgment), Ms. Ahern was adamant that she was "completely with it, very intelligent, and capable of managing not only her personal finances, but the finances of the trust." (7 AA 1312). She made these representations (upon which the district court relied) to ensure she could argue she was fully capable of continuing as trustee of the Trust; and because such representations allowed Ms. Ahern to contend she was entitled to 100% of the Trust income (i.e. and not that she unilaterally changed the long-held distribution scheme without cause). Ms. Ahern's prior position was taken deliberately and with the intent of advancing her interests in the litigation. The more recent assertion of undue influence is wholly inconsistent with her prior position in that it asserts that Ms. Ahern was not in control of herself, and more importantly, the Trust.

3. There Was No Evidence of Undue Influence.

Regardless of her clear admissions and failure to address the court's exclusionary ruling, Ms. Ahern's argument still fails because she presented no credible evidence of undue influence at trial.

To be clear, success on an undue influence defense requires a showing of much more than "mere influence." *Mueller v. Wells,* 367 P.3d 580, 583 (Wash. 2016); *In re Will of Jones*, 669 S.E.2d 572, 574 (N.C. 2008); *Harris v. Berry*, 98 S.E.2d 251, 253 (S.C. 1957). Indeed, influence is not "undue unless it constitutes moral or physical coercion destructive of free agency, and even persuasion, much less mere suggestion, is not undue influence either in the legal or moral sense if freedom of will remains intact." *In re Blake's Will*, 120 A.2d 745, 748 (N.J. 1956).

a. Ms. Montoya Has No Personal Knowledge of Any Alleged Influence.

Ms. Ahern's depiction of Ms. Montoya's trial testimony is misleading. (*See* Answering Brief at p. 19-21). Although it is true that Ms. Montoya's testimony discussed Ms. Nouna's relationship/friendship with Ms. Ahern, Ms. Montoya made clear that she had "no firsthand knowledge as it relates to any influence [Ms. Nouna] might have had over [Ms. Ahern]." (7 AA 1506). In fact, Ms. Montoya testified that she had only ever observed Ms. Nouna and Ms. Ahern interact on two occasions, neither of which involved any discussion regarding finances. (7 AA 1505-06). At best, Ms. Montoya's testimony regarding Ms. Nouna's alleged influence is

speculative.[8] Accordingly, it should be disregarded. *See* NRS 50.025(1) ("A witness may not testify to a matter unless: (1) evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); *see also Nevada Power Co. v. Monsanto Co.,* 891 F.Supp. 1406, 1415 (D. Nev. 1995) ("speculative testimony about how another might have acted without personal knowledge is not admissible as evidence.") (*citing* Fed. R. Evid. 602).[9]

b. Ms. Ahern Attended Trial, But Did Not Testify.

The United States Supreme Court has long held that the "best evidence in the power of the parties ***must always be furnished.***" *Simpson & Co. v. Dall*, 70 U.S. 460, 474 (1865) (emphasis added). Unlike Ms. Montoya, Ms. Ahern has personal knowledge regarding the alleged influence of Ms. Nouna. *See* NRS 50.025(1). Critically, Ms. Ahern asserts she was merely "susceptible" to the influence of Ms. Nouna, and not that she lacks mental capacity (Answering Brief at p. 47). Ms. Ahern attended trial (7 AA 1359), while Ms. Nouna did not.

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[8] Importantly, once Ms. Ahern's counsel attempted to steer Ms. Montoya's testimony toward her understanding (or, more appropriately, her lack of understanding) regarding Ms. Nouna's alleged influence on Ms. Ahern, Beneficiaries' counsel raised a timely speculation objection. (7 AA1481).

[9] Fed. R. Evid. 602 states, in part: "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

In other words, Ms. Ahern: (1) has personal knowledge of the matter at issue, (2) maintained the requisite capacity to offer testimony, and (3) had the opportunity to testify outside the presence of her alleged influencer. Yet, despite this clear path to the witness stand, Ms. Ahern did not offer any testimony at trial. To distract from this fact, Ms. Ahern argues that undue influence "is [usually] established by circumstantial evidence." (Answering Brief at p. 45, *citing Norlander v. Cronk*, 300 Minn. 471, 475, 221 N.W.2d 108, 111 (1974)). Of course, Ms. Ahern fails to mention that in the very case she cites to support her proposition, the influenced party took the stand and testified. *See Norlander*, 221 N.W. at 112.

The key element of "circumstantial evidence" is "evidence"—and by failing to take the stand, Ms. Ahern did not marshal any.

c. Ms. Ahern Benefitted from Her Malfeasance.

Ms. Ahern boldly claims that she should benefit from the presumption of a "confidential and fiduciary relationship" between herself and Ms. Nouna. (Answering Brief at p. 46). In support of her argument, Ms. Ahern cites to this Court's decision in *In re Jane Tiffany Trust 2001,* 124 Nev. 74, 177 P.3d 1060 (2008). (Answering Brief at p. 46). In *Jane Tiffany Trust* this Court declared that a "presumption of undue influence arises when a ***fiduciary relationship exists*** and the ***fiduciary benefits*** from the questioned transaction." 124 Nev. 74, 78, 177 P.3d 1060, 1062-63 (2008) (emphasis added). In other words, this presumption only

applies when: (1) a fiduciary relationship is established, and (2) the fiduciary receives a direct benefit from the encouraged behavior. Neither of these elements have been established by Ms. Ahern.

A fiduciary is someone "who is ***required*** to act for the benefit of another person." BLACK'S LAW DICTIONARY (10th Ed. 2014) (emphasis added). Accordingly, chapter 162 of NRS (titled "Fiduciaries") defines a fiduciary to include:

> [A]ny trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust or estate.

NRS 162.020(1)(b). In other words, a "fiduciary" has a legally recognized role (e.g. agent, trustee, guardian, etc.) with accompanying legal duties and responsibilities.

There was no evidence presented at trial which indicates that Ms. Nouna held any fiduciary position nor owed any legal duty to Ms. Ahern. However, one year prior to trial, Ms. Ahern submitted a declaration to the district court which explained that Ms. Nouna was merely a "trusted friend," and that Ms. Ahern maintained "***complete control*** and understanding of [her] finances and business affairs." (7 AA 1312)[10] (emphasis added). When Ms. Ahern chose not to take the stand at trial, she

[10] The Beneficiaries' counsel read this portion of the declaration into the record at the trial. This declaration has been added to the record (9 AA 1779-81).

did not rebut her prior sworn statement. Consequently, the district court took Ms. Ahern at her word and assumed that Ms. Nouna was merely a friend.

At trial, the Court-Appointed Trustee offered hours of testimony regarding his investigation into Ms. Ahern's misallocation and theft of Trust funds. (7 AA 1359-1467). At no point during this testimony did the Court-Appointed Trustee mention Ms. Nouna. (*See id.*). Critically, he also testified that during his investigation Ms. Ahern contacted him directly and offered to return Trust funds in her possession. (7 AA 1433). Ms. Ahern delivered a $700,000 cashier's check to her former counsel, who immediately provided the same to the Court-Appointed Trustee. (7 AA 1435).

Ms. Ahern was clearly in possession and control of the $700,000 which she elected to return. Accordingly, the only person who benefitted from this theft was Ms. Ahern (and not Ms. Nouna). Even if Ms. Nouna was a fiduciary (which she was not), the presumption set forth in *Jane Tiffany Trust* cannot apply as Ms. Nouna did not benefit from Ms. Ahern's theft.

d. Ms. Ahern's Reliance on Deposition Testimony Is Inappropriate.

At various points in her Answering Brief Ms. Ahern cites to the Beneficiaries' deposition testimony (*See* at p. 5-9, 12, 46-47). As this deposition testimony was never part of the trial record—because it is inadmissible hearsay—it cannot be considered on this appeal. NRS 51.325 makes clear that deposition testimony is inadmissible hearsay *unless* the witness is "unavailable." Ms. Ahern subpoenaed

both Beneficiaries as trial witnesses and both Beneficiaries attended the trial. Indeed, Ms. Montoya was called to the witness stand and testified. (7 AA 1468). In other words, Ms. Ahern had the full opportunity to obtain testimony from the Beneficiaries at trial, but elected to examine only Ms. Montoya (and only on limited issues). Accordingly, the Beneficiaries were "available" at trial and their prior deposition testimony constitutes inadmissible hearsay.

RESPONSE TO AMICUS BRIEF

A. MAC Has Not "Meaningfully Briefed" Its Arguments.

This Court "need not consider an issue that has not been fully raised by appellants or meaningfully briefed by either party." *Badillo v. American Brands, Inc.*, 117 Nev. 34, 42, 16 P.3d 435 440 (2001) (citations omitted). For an issue to be "meaningfully briefed," it must be "supported by cogent argument and citation to relevant authority." *Berkson v. LePome*, 126 Nev. 492, 501, 245 P.3d 560, 566 (2010) (*citing Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n. 38, 130 P.3d 1280, 1288 n. 38 (2006)). Accordingly, the Court should not review "conclusory arguments which fail to address the issues in the case." *Consolidated Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998) (*citing SIIS v. Buckley*, 100 Nev. 376, 382, 682 P.2d 1387, 1390 (1984)).

Despite the existence of numerous precedential opinions from this Court which sufficiently outline the legal doctrines of claim preclusion[11] and law of the case,[12] the Amicus Brief fails to cite a single Nevada authority on either of these principles. Instead, it directs the Court to irrelevant federal case law, generic snippets from Wright & Miller, and a random decision from a New York appellate court. (Amicus Brief at p. 11-14). Importantly, the Amicus Brief also fails to outline any of the required elements which must be present for these doctrines to apply. (*See id.*).

In short, instead of offering "cogent arguments and citation to relevant authority," the Amicus Brief provides only "conclusory arguments which fail to address the issues in the case." Consequently, MAC's inadequate arguments should be ignored.

B. The Beneficiaries Are Not Precluded from Enforcing the No-Contest Clause Through the Surcharge Petition.

Even if MAC meaningfully briefed its Amicus Brief arguments (which it did not), they still fail because: (1) Ms. Ahern never asserted a preclusion defense (and MAC cannot do so on her behalf), (2) the prior ruling on the No-Contest Clause is

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[11] *See Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. Adv. Op. 28, 321 P.3d 912 (2014); *Holt v. Reg'l Tr. Serv. Corp.*, 127 Nev. 886, 266 P.3d 602 (2011); *Tom v. Innovative Home Sys., LLC,* 132 Nev. Adv. Op. 15, 368 P.3d 1219 (2016).

[12] *See Hsu v. Cnty. of Clark*, 123 Nev. 625. 173 P.3d 724 (2007); *Dictor v. Creative Mgmt. Serv., LLC*, 126 Nev. 41, 223 P.3d 332 (2010).

irrelevant, (3) the Beneficiaries' present efforts to enforce the No-Contest Clause are based on different claims, and (4) the legal requirements for preclusion/law of the case have not been met (nor even discussed).

1. Ms. Ahern Has Never Argued Preclusion as a Defense to the Surcharge Petition.

"A party may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below." *Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989) *(citing Tupper v. Kroc,* 88 Nev. 146, 494 P.2d 1275 (1972)). MAC's preclusion theory has never been asserted by Ms. Ahern as a defense to the Surcharge Petition. In fact, the terms "preclusion," "res judicata," "barred," and "law of the case" are not found anywhere in the record below—not in Ms. Ahern's trial brief (1 RA 1-196), nor in the trial transcript (7 AA 1305-1520; 8 AA 1521-1648). Critically, Ms. Ahern's answering brief also makes no mention of a preclusion defense—likely because she understands that *Powers v. Powers* and *Tupper v. Kroc* bar her from raising such a defense for the first time on appeal. If Ms. Ahern cannot raise a preclusion defense herself, common sense dictates that MAC cannot raise it on her behalf through an amicus filing.

2. MAC's Preclusion Theory Ignores the MSJ Order's Clear Language.

MAC boldly asserts that the Surcharge Petition presents nothing more than "a nuanced version of the same argument that the [trial court] already rejected."

(Amicus Brief at p. 23). This argument ignores the plain language of the April 20, 2015 Summary Judgement order (the "MSJ Order") and the Surcharge Petition.

The MSJ Order addresses Ms. Ahern's efforts to obtain a favorable court interpretation regarding the Trust's distribution provisions:

> The Court adjudges and determines that the positions of each of the parties, ***seeking the correct interpretation of the Trust provisions as to entitlement to the [Trust] property***, were not asserted in bad faith, and that therefore good cause to impose the no-contest penalties does not exist and such claims, both Eleanor's claim on the one hand, and [the Beneficiaries'] claim on the other hand, are denied with prejudice.

(4 AA 744) (emphasis added). Conversely, the Surcharge Petition outlines Ms. Ahern's more-recently discovered misconduct which was wholly unrelated to her prior request for judicial interpretation:

> As light has been shed on this matter through the investigation of Fredrick P. Waid, who this Court appointed after its removal of [Ms. Ahern], it has now been established that [Ms. Ahern] has ***wrongfully stolen and converted assets that did not belong to her*** and which were mandated by this Court to be held in trust until her behavior could be sorted through and the frivolous, bad faith nature of her actions could clearly be seen by this Court. [Ms. Ahern] has violated multiple orders of this Court, and in so doing has also perjured herself on multiple occasions in a blatant attempt to cover her misdeeds. ... Not only should it now be declared that [Ms. Ahern] has forfeited her income interest share of the Trust as her conduct has directly violated the terms of the Trust's no-contest clause, but she must also be held liable for treble damages as well as punitive damages for her conduct.

(4 AA 848-49) (emphasis added).

Enforcing the No-Contest Clause based on theft and fraud is hardly "a nuanced version" of seeking the same enforcement because a party pursued an inappropriate interpretation of the Trust.

3. MAC's Preclusion Theory Ignores the Relevant Timeline of Events.

On December 23, 2014, the Beneficiaries filed their opposition to Ms. Ahern's motion for summary judgment, which included a countermotion for summary judgment, as well as a petition for enforcement of the Trust's No-Contest Clause (the "Enforcement Petition"). (9 AA 1649-1741). The Enforcement Petition requested a declaration that Ms. Ahern had "forfeited her rights and benefits under the [Trust] by wrongfully claiming all income earned by the [Trust] and attempting to deprive [Beneficiaries] of their right to income under the [Trust]." (9 AA 1678-79). On January 14th and 30th of 2015, the district court held hearings on the parties' competing motions for summary judgment and the Enforcement Petition. (3 AA 506-595; 3 AA 710-11).

On March 13, 2015, Ms. Ahern provided a court-ordered accounting for the period between June 2013 and January 2015. (4 AA 749). On March 20, 2015, the district court held a hearing regarding the accounting, which included a discussion of inappropriate transactions detailed therein. (3 AA 596-685). On March 26, 2015, the district court held a separate hearing at which it considered removing Ms. Ahern based on her various misdeeds. (3 AA 690).

In April of 2015, the district court then issued a series of written orders which memorialized its holdings from the January 14th, January 30th, March 20th, and March 26th hearings. On April 1st, the district court entered its Order Appointing New Temporary Trustee which removed Ms. Ahern as trustee of the Trust and replaced her with the Court-Appointed Trustee. (3 AA 686-687). Next, on April 16th, the court entered the MSJ Order which granted the Beneficiaries' motion for summary judgment, while denying the Enforcement Petition. (3 AA 710-26).

Finally, on April 20th the court entered three orders: (1) Order Regarding the Accounting, Breach of Fiduciary Duty Claims, and Award of Attorneys' Fees, which addressed the various deficiencies in Ms. Ahern's March 13, 2015 accounting (4 AA 748-52), (2) Order Confirming Acting Successor Trustee, which confirmed the Court-Appointed Trustee as acting successor trustee of the Trust until further order of the court (4 AA 753-54), and (3) Order Compelling Eleanor Ahern to Turn Over Trust Records to Acting Successor Trustee, which required Ms. Ahern to execute a release and authorization allowing the Court-Appointed Trustee to access certain Trust records and documents directly from third parties. (4 AA 755-56).

Shortly after these April orders were entered, the Court-Appointed Trustee began investigating various aspects of Ms. Ahern's actions related to Trust assets. (4 AA 774). On May 6, 2015, the Court-Appointed Trustee submitted an affidavit

to the district court which detailed his preliminary findings regarding Ms. Ahern's wrongful actions. (4 AA 772 -76). The affidavit concludes:

> Since my appointment as Trustee and in the course of my investigation of the financial affairs of the Trust for 2013, 2014 and 2015 year to date, I have discovered numerous potential violations of other Court orders by Ms. Ahern regarding the expenditure and use of Trust funds. These matters will be brought to the Court's attention after the completion of an audit of Ms. Ahern's tenure as Trustee.

(4 AA 775).

The Surcharge Petition was filed twenty-eight days after the Court-Appointed Trustee's affidavit. (4 AA 845-66). The Surcharge Petition specifically references the affidavit and details Ms. Ahern's conduct revealed through the Court-Appointed Trustee's investigation. (4 AA 850).

The above sequence demonstrates that the claims set forth in the Enforcement Petition are unrelated to the claims laid out in the Surcharge Petition. Importantly, the court orally denied the Enforcement Petition on January 30, 2015. (3 AA 724). The Beneficiaries were not even aware of the misconduct which gave rise to the claims set forth in the Surcharge Petition until the Court-Appointed Trustee filed his affidavit on May 6, 2015. The Beneficiaries are not precluded from enforcing the No-Contest Clause simply because Ms. Ahern successfully concealed her misconduct until after the Enforcement Petition was denied.

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4. Nevada Law Does Not Support MAC's Argument.

a. The "Law of the Case" Doctrine Requires a Prior Appellate Determination.

In Nevada, the "law-of-the-case doctrine provides that when an ***appellate court decides a principle or rule of law***, that decision governs the same issues in subsequent proceedings in that case." *Dictor*, 126 Nev. at 44, 223 P.3d at 334 (emphasis added). This means that for the law-of-the-case doctrine to apply, "the appellate court must ***actually address and decide*** the issue explicitly or by necessary implication." *See id.* (*Citing Snow-Erlin v. U.S.*, 470 F.3d 804, 807 (9th Cir. 2006)).

Until now, no appellate court has addressed the enforceability of the Trust's No-Contest Clause. The Enforcement Petition—which asserted claims related to Ms. Ahern's efforts to cut off Trust distributions without court approval—was denied as part of the MSJ Order. This issue was not appealed. This appeal resulted from the district court's more recent denial of the Surcharge Petition which makes entirely different claims (*See above*). Simply stated, there is no prior appellate decision which can serve as the law-of-the-case.

b. Claim Preclusion Requires the Same Claims.

Claim preclusion is only applicable when (1) the same parties are involved in both cases, (2) a valid final judgment is entered in the first case, and (3) the subsequent action is based on the same claims (or any part of them that were or could have been brought in the first case). *Alcantra,* 321 P.3d at 915. Importantly, claims

are not the "same" for purposes of claim preclusion when the second action is based on new/subsequent wrongs. *See Cent. States, Southeast and Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, 296 F.3d 624, 628-29 (7th Cir. 2002); *Green v. Wolff*, 372 P.2d 427, 434 (Mont. 1962) (determining that "[s]uccessive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom."); *Chern v. Bank of America*, 544 P.2d 1310, 1313 (Cal. 1976) (determining that when "the subsequent action involves parallel facts, but a different historical transaction, the application of the law to the facts is not subject to collateral estoppel.") More specifically, a "subsequent breach of [trust] claim will not be treated as identical to an earlier [trust] claim (and therefore res judicata will not operate as a bar) where the facts underlying the later claim were either unknown or incapable of being known at the time of the earlier action." *RBC Capital Markets, LLC v. Educ. Loan Trust IV*, 87 A.3d 632, 645 (Del. 2014).

MAC's unsupported theory of preclusion wholly ignores two simple facts: (1) Ms. Ahern's subsequent breaches of the No-Contest Clause were only discovered *after* she was removed as trustee and the Court-Appointed Trustee gained access to Trust accounts, and (2) Ms. Ahern was removed as trustee *after* the district court denied the Enforcement Petition.

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C. The Beneficiaries Lacked Standing to Appeal the Lien Order

MAC argues that it would be inappropriate to enforce the No-Contest Clause in the present appeal because "[n]one of the parties appealed the [Lien Order]." (Amicus Brief at p. 16). In essence, MAC contends that the Beneficiaries waived their right to enforce the No-Contest Clause by failing to appeal the Lien Order. This contention misses the mark as it ignores that the Beneficiaries had no appealable interest in the Lien Order.

The Lien Order provides a lien which is "***only against*** [Ms. Ahern's] beneficial interest in the Trust." (Amicus Brief at Exhibit 1) (emphasis added). In other words, the lien has no effect on the Beneficiaries' rights. Accordingly, the Beneficiaries cannot be "real parties in interest" (*See* NRCP 17(a)) because they lack the "right to enforce" Ms. Ahern's rights and, therefore, do not have a "significant interest in the [Lien Order] litigation." *Szilagyi v. Testa,* 99 Nev. 834, 838, 673 P.2d 495, 498 (1983); *see also Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011) (explaining that the "inquiry into whether a party is a real party in interest overlaps with the question of standing.").

The Beneficiaries did not waive their right to enforce the No-Contest Clause by failing to appeal an order they had no standing to challenge—especially

considering the present appeal was filed almost four months before the Lien Order was issued by the district court.[13]

D. Enforcement of the No-Contest Clause Will Not Destroy MAC's Ability to Collect Its Fees.

MAC argues that the Beneficiaries' appeal should be denied because enforcement of the No-Contest Clause would result in a denial of MAC's fees. (Amicus Brief at p. 11) (explaining that MAC "should [not] be denied payment just because the instrument in question included a no-contest clause."). This argument misstates facts.

On February 28, 2017, the district court issued a judgment in favor of MAC and against Ms. Ahern in the total amount of $160,955.12. (Amicus Brief at Exhibit 2). This judgment makes no mention of NRS 18.015 (i.e. it is not a lien, but a judgment), nor does it contain any restrictions on enforcement. (*See id.*) This means that MAC is free (and has been, since March of 2017) to pursue whatever collection/execution action(s) it believes necessary to recover on its judgment. And, nothing about the present appeal will affect the validity of the February 28th judgment. In other words, regardless of what happens to MAC's lien, it will still

[13] The notice of appeal in this matter was filed on October 19, 2016. The Lien Order was entered by the district court on February 9, 2017 (Answering Brief at Exhibit 1).

have a valid judgment against Ms. Ahern. Such circumstance hardly creates a denial of MAC's fees.

F. Allowing an Attorney Lien to Thwart a No-Contest Clause Will Have Dire Consequences.

MAC maintains that enforcement of the No-Contest Clause would have a "deterrent effect for other attorneys who may deem it simply too risky to represent parties in litigation regarding a trust with a no-contest clause." (Amicus Brief at p. 19). To bolster its argument, MAC holds itself out as an unwitting and innocent victim. (Amicus Brief at p. 18-19). This is not the case.

MAC's attorneys knew what they were doing when they decided to represent Ms. Ahern. As sophisticated trust counsel, these attorneys knew the only way to guarantee payment of MAC's fees from Trust assets was to provide services which were beneficial to the Trust (thus making the subject fees "administrative expenses"). MAC's attorneys also understood that Ms. Ahern's beneficial interest was in jeopardy if it could be demonstrated that she took action in violation of the Trust's No-Contest Clause. Additionally, these attorneys knew that MAC's first task as Ms. Ahern's counsel was to stop enforcement of a settlement agreement which would have fully resolved all litigation (including the present appeal) and removed all risk regarding the No-Contest Clause. (*Id.*)[14] Despite this, MAC elected to

[14] The Lien Order states: "A settlement was negotiated in the interim, but Eleanor terminated her counsel and hired MAC to successfully oppose enforcement of the settlement."

represent Ms. Ahern in her individual capacity. (Amicus Brief at Exhibit 1).[15] MAC's decision was voluntary, calculated, and informed. This hardly describes an innocent victim.

Furthermore, MAC's deterrence argument is backwards. If successful, this argument will allow a no-contest clause to be thwarted (and the settlor's intent ignored) by the mere existence of an attorneys' lien. Savvy trust attorneys will quickly exploit such a rule by requiring their beneficiary clients to provide them a contractual lien against their trust interest as security for payment. Then, when a no-contest issue arises, the attorney points to the lien and successfully shields his client. A no-contest clause is intended to protect the intent of a settlor, not a sophisticated attorney who wants an easy way to get paid.

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[15] The Lien Order explains that "all of the work undertaken by MAC was exclusively related to [Ms. Ahern's] interest ***and not for the benefit of the Trust.***" (emphasis added).

CONCLUSION

For the reasons outlined above (as well as those stated in the opening brief), the Beneficiaries respectfully request that this Court overrule the district court's refusal to enforce the No Contest Clause in the Surcharge Order and issue an order requiring the immediate enforcement of the No Contest Clause against Ms. Ahern pursuant to NRS 163.00195.

Respectfully submitted this 24th day of October 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14-point, double-spaced Times New Roman font. I further certify that this brief ***does not comply*** with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), because it contains **8,561** words.[16]

I hereby certify that I have read this reply brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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[16] Because of this non-compliance, a Motion to Exceed Type-Volume Limitation has been filed simultaneously herewith.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 24th day of October 2017.

RUSHFORTH LEE & KIEFER, LLP

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 24th day of October 2017, Electronic service of the foregoing APPELLANTS' REPLY BRIEF AND RESPONSE TO AMICUS BRIEF shall be made in accordance with the Master Service List as follows:

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