

CERTIFICATE OF COMPLIANCE

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

8
9
10 2. We further certify that this brief complies with the page- or type-volume
11 limitations of NRAP 28.1(e) and NRAP 32(a)(7) because, excluding the
12 parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed forty
13 pages.
14

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

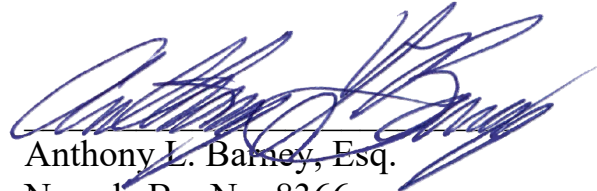
27 ///

28 ///

1 4. We understand that we may be subject to sanctions in the event that the
2 accompanying brief is not in conformity with the requirements of the
3 Nevada Rules of Appellate Procedure.
4

5 Dated this 4th day of May 2020.
6

7
8 Respectfully Submitted,
9 ANTHONY L. BARNEY, LTD.

10 

11 Anthony L. Barney, Esq.
12 Nevada Bar No. 8366
13 3317 W. Charleston Blvd., Suite B
14 Las Vegas, NV 89102
15 Telephone: (702) 438-7878
16 Facsimile: (702) 259-1116
17 office@anthonybarney.com
18 *Attorney for Anthony L. Barney, Ltd.*
19
20
21
22
23
24
25
26
27
28

Telephone: (702) 438-7878
Facsimile: (702) 259-1116
office@anthonybarney.com
Attorney for Anthony L. Barney, Ltd.

TABLE OF CONTENTS

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

CERTIFICATE OF COMPLIANCE.....	ii
ATTORNEY’S CERTIFICATE PURSUANT TO NRAP 28.2.....	iv
TABLE OF CONTENTS.....	v
TABLE OF AUTHORITIES.....	vi
INTRODUCTION.....	1
STATEMENT OF FACTS.....	2
LEGAL AUTHORITY AND ARGUMENT.....	4
I. <i>The Court’s ruling is in contravention of NRS 163.023 and 164.025 and must be reheard.</i>	5
II. <i>The Court’s ruling also negatively affects other state statutes and must be reheard.</i>	11
CONCLUSION.....	13
CERTIFICATE OF SERVICE.....	16

TABLE OF AUTHORITIES

CASES:

Bouvier v. Ahern (In re W.N. Connell & Marjorie T. Connell Living Tr.),
426 P.3d 599, 602 (Nev. 2018)..... 7

Pellegrini v. State, 17 Nev. 860 874, 34 P.3d 519, 528-29 (2001) 10

STATUTES:

NRS §163.5559..... 2,3,4,
11,12,
14

NRS §164.033..... 11

NRS §164.023..... 5,6,
11

NRS §164.025..... 5,8,9,
10,11,
12

NRS §166..... 2,11,
13,14

NRS §166.170..... 14

OTHER AUTHORITIES:

NRAP 26.1(a)..... ii

NRAP 28.1(e)..... iv

NRAP 28(e)..... ii,iv

NRAP 32(a)(4)-(7)..... ii,iv

NRAP 40..... i

1 **INTRODUCTION**

2 This Court entered an Order of Reversal and Remand on April 16, 2020.

3
4 While the Order appears to state that it is based solely upon the language of the
5 Trust,¹ it also contains language which could be understood to address ALB,
6 LTD’s arguments that: 1) Even in the absence of express authorization, the
7 Trustee had discretion to make the payment; and, 2) the Trust cannot avoid
8 payment absent a valid spendthrift provisions or other statutory provision
9 preventing payment to a creditor.² The Order’s language, if intended to address
10 anything more than the terms of the Trust, creates serious problems for the
11 statutory framework created by the Nevada Legislature, and would not only
12 prejudice ALB, LTD on remand, but all creditors of a settlor in the future.³
13
14
15
16

17 This Court should rehear the matter to provide clarifications regarding
18 whether or not the Order was intended to address the following arguments, 1)
19
20

21 ¹ See Order of Reversal and Remand dated April 16, 2020 (“Order”, “April 16,
22 2020 Decision”) at Page 3: ¶2, “As this dispute involves trust interpretation and
23 there are no disputed facts, our review is de novo.” See also page 4 stating “we
24 agree with appellants that the Trust does not authorize payment of Barney, Ltd.’s
25 claim from trust assets,” and at Page 5: ¶1 stating “we decline to address
26 appellants’ remaining arguments.”

26 ² See April 16, 2020 Decision at Page 4, which alludes to ALB, LTD’s arguments.
27 See also Appellant’s Motion To Reissue Order as Published Opinion Pursuant to
28 NRAP 36(f)dated April 29, 2020.

³ Notably, the Payne Parties appear to be arguing that the Court has created an
additional mechanism to avoid payment to and/or defraud creditors of a settlor

1 even without explicit authorization, the Trustee had the power and discretion to
2 approve and pay the creditor of the second settlor to die; and 2) even if the Trustee
3 did not have discretion and because neither NRS 166, nor NRS 163.5559 apply to
4 this Trust, the Trust cannot avoid payment of the settlor's creditors. To the extent
5 that the Court intended its Order to dispose of these arguments, ALB, LTD
6 provides the following arguments for why such disposal is contrary to established
7 law.
8
9
10

11 STATEMENT OF FACTS

12 This Court properly found that “[t]his is an appeal from a district court
13 order allowing the partial payment of a creditor’s claim in a trust action.”⁴ Other
14 than arguing that the terms of the Trust do not authorize payment of the surviving
15 settlor’s creditors, which is not true⁵, Susan Christian-Payne, Rosemary Keach,
16 and Raymond Christian, Jr., (the “Payne Parties”) brought forth two statutory
17 arguments.
18
19
20

21 First, the Payne Parties argued that the Christian Family Trust (“Trust”) was
22 a spendthrift trust which prevented payment to creditors of the settlor. ALB, LTD
23
24

25 even when a trust does not qualify as a self-settled spendthrift/asset protection
26 trust, which appears to be the effect of the current April 16, 2020 Decision.

27 ⁴ See Order of Reversal and Remand at Page 1: ¶1

28 ⁵ See *RESAPP I: 000032 - 000062*; Christian Family Trust Dated October 11,
2016, Article 4 § 4.2.

1 provided evidence⁶ that the Trust was, by its terms, not a self-settled spendthrift
2 trust as to the co-settlor, Nancy Christian. This Court appears to have impliedly
3 adopted ALB LTD’s argument in this regard through its de novo review.
4 Additionally, this Court did not rule that the alleged spendthrift clause in the Trust
5 prevented payment of Nancy’s creditors. The Payne Parties now appear to agree
6 that the Trust is not a spendthrift trust, despite their prior argument and have
7 recently filed a motion to publish this Court’s April 16, 2020 Decision stating
8 “Although the [Christian Family Trust] was not established as a Nevada Domestic
9 Asset Protection Trust (DAPT)...”⁷
10
11
12
13

14 Secondly, the Payne Parties argued that the Trust was a purely discretionary
15 trust as to Nancy and attempted to apply NRS 163.5559. This statute provides, in
16 pertinent part, that “a creditor of a settlor may not seek to satisfy a claim against
17 the settlor from the assets of a trust **if the settlor’s sole interest in the trust is the**
18 **existence of a discretionary power granted to a person other than the**
19 **settlor.**”⁸ ALB, LTD provided evidence that the Trust was not purely a
20 discretionary trust, or in other words, Nancy’s interest was not solely the existence
21 of a discretionary power granted to another person. This Court, by its de novo
22
23
24
25

26 ⁶ Respondent’s Answering Brief § V

27 ⁷ See Appellant’s Motion to Reissue Order As A Published Decision Pursuant to
28 NRAP 36(f) (“Appellant’s Motion”); at Page 4: ¶1.

⁸ NRS 163.5559 (Emphasis added)

1 review adopted ALB LTD’s position in this regard when it stated “In addition to
2 being the surviving settlor after Raymond’s death, Nancy was also a beneficiary
3 of the Trust with both a discretionary interest in receiving support from trust
4 assets and a mandatory interest as to her possession of the Bluff Point property
5 and certain personal property of Raymond.”⁹
6
7

8 The Payne Parties provided no other plausible statutory argument regarding
9 any provisions that would prevent the payment to a creditor of the settlor from the
10 Trust. Notably, the Court adopted ALB, LTD’s factual evidence¹⁰, which puts it at
11 odds with its own decision and, more importantly, puts it in direct contravention
12 with the Nevada Revised Statutes as discussed further below. Additionally, this
13 Court appears to have relied on no statute or case law to make its ruling. Indeed,
14 ALB LTD can find no statute or case law on point that would support this Court’s
15 ruling to prevent payment of a creditor’s claim against the settlor made against the
16 Trust, or to allow a court to *sua sponte* overrule the discretion of a trustee, and
17 overrule a court order¹¹ permitting the payment to a settlor’s creditor based upon a
18 trustee’s broad discretion¹² within the terms of the trust itself.
19
20
21
22
23

24
25 ⁹ See Order of Reversal and Remand dated April 16, 2020 at Page 4: ¶1

26 ¹⁰ See Appellant’s Motion to Reissue Order as a Published Decision Pursuant to
NRAP 36(F)

27 ¹¹ See RESAPP IV: 000745 – 000748: Order dated April 10, 2018

28 ¹² See RESAPP I: 000032 - 000062: Christian Family Trust Dated October 11,
2016, Article 10.1 § (t) & Article 11 § 11.1

1 **LEGAL AUTHORITY AND ARGUMENT**

2 *I. The Court’s ruling is in contravention of NRS 163.023 and 164.025 and*
3 *must be reheard.*

4 First, the Court’s April 16, 2020 decision (“April 2020 Decision”) is in
5
6 contravention to two well-established statutes: NRS 163.023 and 164.025. The
7
8 Order appears to hold that 1) the absence of authorization in a trust to take an
9
10 action completely bars the Trustee from taking such an action and/or the Court
11
12 from authorizing the Trustee to take such an action (despite broad powers given to
13
14 the Trustee by the terms of the Trust¹³ and state statute¹⁴), and 2) the process for a
15
16 creditor to make claims against a trust is essentially void, because a settlor’s
17
18 creditor cannot allegedly make a claim after the death of the settlor (although the
19
20 statute¹⁵ specifically permits such action), because the settlor’s estate must have
21
22 an interest in the trust. ALB, LTD does not believe that this Court intended for the
23
24 Order to directly contravene the terms of the Trust and the statutes cited above.
25
26 Thus, this case must be heard reheard on the following issues.

27 First, the Court makes no significant analysis regarding the fact that even in
28 the absence of express authorization to pay the creditors of the second settlor to

27 ¹³ Id.

28 ¹⁴ NRS 163.023

¹⁵ Id.

1 die, the Trust does not prohibit such payment and provides the Trustee broad
2 discretion¹⁶ which is sufficiently broad to cover such distributions.
3

4 Pursuant to the Trust instrument, the Trustees were vested with and had “all
5 the rights, powers, and privileges which an absolute owner of the same property
6 would have.”¹⁷ This broad grant of rights, coupled with the broad discretion
7 provided to the Trustees pursuant to statute certainly allows for the payment of
8 creditors of the transferor (without consideration) of the Trust property.
9
10

11 NRS 163.023 provides that “A trustee has the powers provided in the trust
12 instrument, **expressed by law or granted by the court upon petition**, as
13 necessary or appropriate to accomplish a purpose of the trust, but the court may
14 not grant a power expressly prohibited by the trust instrument.” Herein, the
15 trustees had the absolute power to distribute trust funds and did so¹⁸ with the
16 power that was expressly provided to them in the Trust instrument. The district
17 court granted the power to pay the creditor of the settlor, postmortem by petition¹⁹.
18 The Trust instrument and NRS 163.023 allowed for the payment to the creditor
19 and the district court approved such powers upon petition to pay the trustor’s
20 creditor as a result.
21
22
23
24

25
26 ¹⁶ See RESAPP I: 000032 - 000062: Christian Family Trust Dated October 11,
27 2016, Article 10.1 § (t) & Article 11 § 11.1

28 ¹⁷ Id.

¹⁸ See RESAPP IV: 000745 – 000748: Order dated April 10, 2018

1 Notably, despite the Payne Parties allegations that the purpose of the Trust
2 was to avoid paying Nancy’s creditors, the Trust language provides no support for
3 such a position. Indeed, the Trust language explicitly provides that the spendthrift
4 provision is inapplicable to the trustor (Raymond and Nancy Christian).²⁰ See
5 *Bouvier v. Ahern* (In re W.N. Connell & Marjorie T. Connell Living Tr.), 426
6 P.3d 599, 602 (Nev. 2018) “We construe trusts in a manner effecting the
7 apparent intent of the settlor. To determine the settlor's intent, we employ contract
8 principles, including determining the intentions of the settlor "by considering [the
9 trust] as a whole,” and favoring the most "fair and reasonable" interpretation of
10 the trust's language.”

15 Assuming this Court’s Order was meant to address ALB LTD.’s argument
16 – that by statute the Trust could not avoid payment of a settlor’s creditor – this
17 Court’s ruling appears to advance a fundamental error allowing a settlor to avoid
18 payment of a settlor’s creditor despite language to the contrary in the trust’s
19 terms²¹ and contrary to several statutes relating to the vast majority of trust matters
20 in Nevada. Indeed, if this Court meant to hold that the broad rights and discretion
21 granted to the trustee under the terms of the Trust was not sufficient to allow the
22
23
24
25
26

27 ¹⁹ See RESAPP III: 000473 – 000555: Petition for Fees and Costs dated February

28 ²⁰ See RESAPP I: 000032 - 000062: Christian Family Trust Dated October 11,
2016, Article 14 §14.2

1 trustee to make payment to a creditor of the settlor, it would need to make such a
2 finding against the weight of the Trust instrument, the wealth of existing case law,
3 and the statutory scheme that provides broad rights and discretion to trustees.
4

5 Secondly, the Nevada legislature clearly provided for payment of creditors
6 of a settlor, even after the death of the settlor, unless certain requirements were
7 met. In other words, the power to pay creditors of a settlor after the death of a
8 settlor is expressed by law, specifically NRS 164.025. NRS 164.025 provides a
9 mechanism for the trustee to avoid liability to a creditor of the settlor or the trust
10 when making distributions to the beneficiaries of the Trust and allows a trustee to
11 issue notice to creditors for claims against the settlor and the trust. The statute
12 further provides that, “[a] person having a claim, **due or to become due, against**
13 **a settlor** or the trust, as applicable, must file the claim with the trustee within 90
14 days after the mailing, for those required to be mailed, or 90 days after publication
15 of the first notice to creditors.”²² The trustee may not avoid personal liability to a
16 creditor for distributions made to the beneficiaries of the trust if the trustee fails to
17 issue notice to creditors and timely claims are made.
18
19
20
21
22

23 This Court’s Order states “[b]ecause Barney, Ltd. did not seek payment
24 until after Nancy’s Death, and because Nancy’s estate did not have an interest in
25
26

27
28 ²¹ See RESAPP I: 000032 - 000062: Christian Family Trust Dated October 11,
2016, Article 10.1 § (t)

1 the Trust... we conclude that the district court erred by approving the
2 disbursement of Trust funds to pay Barney, Ltd.”²³ This presents two problems
3 related to NRS 164.025. First, NRS 164.025 explicitly allows claims against a
4 settlor to be raised after the death of the settlor. NRS 164.025 (providing an after-
5 death mechanism for payment of creditors, stating in pertinent part “**after the**
6 **death of the settlor of the trust...** A person having a claim, due or **to become**
7 **due, against a settlor** or the trust, as applicable, must file the claim with the
8 trustee.”) The fact that ALB LTD sought payment after Nancy’s death appears to
9 be irrelevant in light of the express authorization provided by NRS 164.025. In
10 other words, this Court’s citation of post-mortem nature of the claim as a bar
11 against payment makes the language in NRS 164.025 authorizing submission of
12 claims to become due against a settlor after death superfluous or nugatory.
13
14
15
16
17

18 Second, this Court’s April 16, 2020 Decision appears to create an additional
19 bar on the payment of claims against the Settlor when it stated, “because Nancy’s
20 estate did not have an interest in the Trust”.²⁴ Such a requirement is unreasonable
21 as it would apply to all, or an overwhelming majority of trusts, because the
22 settlor’s estate very rarely, if ever, retains or obtains an interest in the settlor’s
23 trust after the settlor’s death. This would make NRS 164.025 meaningless for the
24
25
26

27
28 ²² NRS 164.025(3)

²³ See Order of Reversal and Remand at Page 4: ¶2

1 vast majority of trusts (if not all trusts), because if a creditor’s claim against a
2 settlor cannot be satisfied out of the settlor’s trust, unless the settlor’s estate
3 retained an interest therein, there would be no purpose to having a statutory
4 process authorizing payment of creditor’s claims against a settlor from the trust, or
5 allowing a creditor to adjudicate the rejection of such a claim.
6
7

8 Trusts were created to avoid precisely the mechanism that the Court is
9 requiring; or, in other words, trusts were created to avoid the process of passing
10 assets through the probate court. There is no benefit to a trust to give a settlor’s
11 estate a legal ownership interest in trust assets after the death of the settlor or in
12 which the settlor’s estate retained an interest. In order to make NRS 164.025
13 applicable, this Court’s April 16, 2020 Decision would, in effect, require a trustee
14 to convert non-probate assets into probate assets, with no apparent benefit to any
15 party interested in the estate plan (other than the attorneys). Additionally, a trust
16 would substantially increase the costs of administration by requiring the new
17 probate assets to be administered through the probate court. This would be
18 counter-productive, cost prohibitive and would appear to provide no benefit to the
19 ultimate beneficiaries of the trust and probate estates.
20
21
22
23
24

25 This Court held in *Pellegrini v. State*, 117 Nev. 860, 874, 34 P.3d 519, 528-
26 29 (2001) that “we must construe statutory language to avoid absurd or
27
28

²⁴ Id.

1 unreasonable results, and, if possible, we will avoid any interpretation that
2 renders nugatory part of a statute.” Herein, the Court must clarify its April 16,
3 2020 Decision which allows for this Trust to avoid the payment of a settlor’s
4 creditors, overrules the broad discretion of a trustee, overrules the court’s adoption
5 of a trustee’s broad discretion and renders superfluous or nugatory the creditor’s
6 statutory procedure in NRS 164.025 authorizing the submission of claims to
7 become due against a settlor after death. The Court must rehear the issues because
8 the April 16, 2020 Decision directly contravenes the well-established statutes
9 cited above. ALB, LTD respectfully requests this Court grant its petition for
10 rehearing and clarify its position.
11
12
13
14

15 *II. The Court’s ruling also negatively affects other state statutes and must be*
16 *reheard.*

17 The Court’s April 16, 2020 Decision also negatively affects, or is contrary
18 to, NRS 164.033, 163.5559, and NRS 166 and must therefore be clarified. First,
19 NRS 164.033(1)(c), provides that without reference to whether the settlor is living
20 or dead, or retains a beneficial interest in the Trust “an interested person
21 [including a creditor] may petition the court to enter an order...If property of the
22 trust is subject to a claim of a creditor of the settlor of the trust.” This Court’s
23 April 16, 2020 Decision appears to make the determination that a creditor must
24
25
26
27
28

1 make a petition while the settlor is yet alive²⁵ when it is clear that such a petition
2 can be made after a settlor's death²⁶. Herein, such a petition was made after the
3 settlor's death and payment of the creditor was approved by the Court.²⁷ The April
4 16, 2020 Decision appears to undermine this statute and its effect; therefore, this
5 issue must be clarified on rehearing.
6
7

8 Second, NRS 163.5559 provides, again without reference to whether the
9 settlor is living or dead or whether the settlor retains a beneficial interest in the
10 trust, that a creditor of a settlor may not satisfy its claim against the trust if the
11 settlor's interest is purely a discretionary interest. This very limited and specific
12 statement appears to be an exception to the general rule, that a creditor can satisfy
13 its claim against a settlor from the settlor's trust if there is an additional interest
14 beyond a discretionary one. The April 16, 2020 Decision appears to make the
15 determination that this statute applies only to claims brought against a settlor
16 during his lifetime and that postmortem claims would be barred. Although this
17 statute does not apply herein, because the Settlor had a mandatory interest (and
18 not just a discretionary interest), the Court's apparent interpretation in its April 16,
19 2020 Decision affects this statute as well.
20
21
22
23
24

25
26 ²⁵ Id.

27 ²⁶ NRS 164.025

28 ²⁷ See RESAPP IV: 000745 – 000748: Order dated April 10, 2018

1 Neither of the statutes cited by the Payne Parties – NRS 166.170 and NRS
2 163.5559 – apply to the Trust or provide the Trust with creditor protection against
3 the Settlor’s creditors. The Trust language clearly provides that the spendthrift
4 provision does not apply to the settlor’s interest. In fact, the Payne Parties
5 acknowledge that the Trust does not provide asset protection in their most recent
6 motion to this Court. Additionally, this Court found that Nancy was a beneficiary
7 with both a discretionary and mandatory interest, making NRS 163.5559
8 inapplicable as well.
9
10
11

12 Since the April 16, 2020 Decision provides confusion regarding whether
13 silence constitutes prohibition of the settlor’s discretion to authorize payment to
14 creditor’s of the second settlor to die,²⁸ ALB, LTD requests that this Court rehear
15 this matter and address whether 1) even without explicit authorization, the Trustee
16 had the power and discretion to approve and pay the creditor of the second settlor
17 to die²⁹; and 2) even if the Trustee did not have discretion, because neither NRS
18 166, nor NRS 163.5559 apply to this Trust, the Trust cannot avoid payment of the
19 settlor’s creditors.
20
21
22
23

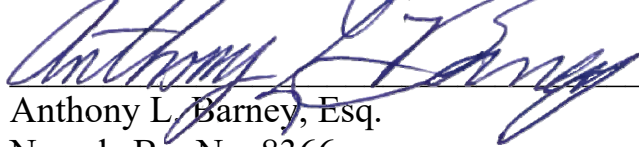
24 Alternatively, ALB, LTD, requests that this Court clarify its April 16, 2020
25 Decision so that the language of the same does not prejudice ALB, LTD’s ability
26
27

28 ²⁸ See Order of Reversal and Remand at Page 4: ¶2

1 to argue statutory authority which the Court appears to contravene in its April 16,
2 2020 Decision, but which it appears was not fully considered or contemplated by
3 this Court.
4

5 DATED this 4th day of May 2020.
6

7 Respectfully Submitted,
8 **ANTHONY L. BARNEY, LTD.**

9 

10 Anthony L. Barney, Esq.
11 Nevada Bar No. 8366
12 Tiffany S. Barney, Esq.
13 Nevada Bar No. 9754
14 3317 W. Charleston Blvd., Suite B
15 Las Vegas, NV 89102
16 Telephone: (702) 438-7878
17 Facsimile: (702) 259-1116
18 office@anthonybarney.com
19
20
21
22
23
24
25
26

27
28 ²⁹ See RESAPP I: 000032 - 000062: Christian Family Trust Dated October 11,
2016, Article 4 § 4.2

1 **CERTIFICATE OF SERVICE**

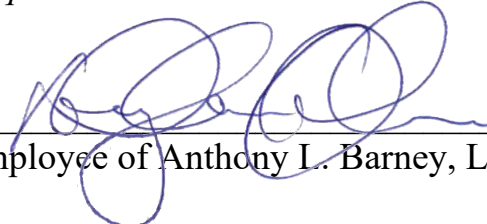
2 I hereby certify that I am an employee of Anthony L. Barney, Ltd., and not
3
4 a party to this action. I further certify that, except as otherwise noted, on May 4th,
5
6 2020 I served the foregoing **PETITION FOR REHEARING** through the Nevada
7
8 Supreme Court electronic filing system upon the following persons or entities:

8 Cary Colt Payne, Esq.
9 700 S. 8th St.
10 Las Vegas, NV 89101
11 carycoltpaynechtd@yahoo.com
12 *Attorney for Susan Christian-Payne,
Rosemary Keach, and Raymond Christian, Jr.*

13 Jerimy Kirschner, Esq.
14 5550 Painted Mirage Rd., Suite 320
15 Las Vegas, Nevada 89149
16 jerimy@jkirschnerlaw.com
Attorney for Jacqueline Utkin

17 Joseph Powell, Esq.
18 1701 Village Center Circle, Suite 150
19 Las Vegas, Nevada 89134
20 joey@rushforth.com
Attorney for Monte Reason

21 Russel J. Geist, Esq.
22 10080 West Alta Drive, Suite 200
23 Las Vegas, Nevada 89145
24 rgeist@hutchlegal.com
25 *Attorney for Frederick P. Waid, Esq.*

26
27 
28 _____
Employee of Anthony L. Barney, Ltd.