IN THE SUPREME COURT OF THE STATE OF NEVADA

In the Matter of

THE WILLIAM J. RAGGIO FAMILY TRUST.

DALE CHECKET RAGGIO, individually and as Trustee of The Marital Deduction Portion and Credit Share of the William J. Raggio Family Trust,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE DAVID A. HARDY,
Respondents,
and
LESLIE RAGGIO RIGHETTI and TRACY RAGGIO CHEW, Co-Trustees of the William J. Raggio and Dorothy B. Raggio Trust under agreement dated January 27, 1998 as decanted and Vested Remaindermen of the Marital Deduction Trust portion of The William J. Raggio Family Trust,
Real Parties in Interest.

No. 76582

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District Court Consolidated Case No. PR13-00624

REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR, ALTERNATIVELY, MANDAMUS

Concerning The District Court, Department 15 (Hon. David A. Hardy), Second Judicial District

HOLLAND & HART LLP
J. Robert Smith (SBN10992)
Frank Z. LaForge (SBN 12246)
5441 Kietzke Lane, Second Floor
Reno, Nevada 89511
(775) 327-3000 | 786-6179 Fax

ECHEVERRIA LAW OFFICE
John Echeverria (SBN 200)
9432 Double R Boulevard
Reno, Nevada 89521
(775) 786-4800 | 786-4808 Fax

Attorneys for Petitioner
DALE CHECKET RAGGIO, individually and as trustee of The Marital Deduction Portion of the William J. Raggio Family Trust

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I. INTRODUCTION

The issue in this appeal is whether Plaintiffs' discovery into Dale's distributions as trustee and beneficiary of a separate trust is relevant to a legitimate legal claim. Specifically, that discovery is predicated on Plaintiffs' argument that Dale is legally obligated to make disbursements from the Marital Trust, as its trustee, in some proportion to the Credit Shelter Trust. There are three potential sources of law that might create this legal obligation: the trust's terms, Nevada's statutory law, and the general fiduciary duties imputed to trustees. As established in the opening brief, none of these sources creates the obligation on which Plaintiffs' discovery is premised.

As a starting point, Plaintiffs do not dispute that the Trust itself does not contain any provision concerning a proportional spenddown. Nor is there any term explicitly requiring the trustee to consider the beneficiary's other potential resources—including other trusts—before making disbursements. Thus, the Trust itself does not create the obligation on which Plaintiffs' discovery is founded.

Nevada's statutory law does not impose that obligation either. Rather, NRS 163.4175 establishes a presumption that a trustee need not consider a beneficiary's other resources before making a discretionary disbursement "[e]xcept provided otherwise in the trust instrument." Plaintiffs claim that Section 5.1's inclusion of a single word—"necessary"—is sufficient to satisfy NRS 163.4175's express-

exception requirement. But Plaintiffs misread the function of that word in Section 5.1. Indeed, a majority of courts in other states, who do not even have a statutory equivalent to NRS 163.4175, reject such a reading of the word "necessary" in analogous circumstances. Further, NRS 163.419(3) explicitly provides that a trustee may make unequal disbursements among beneficiaries to the same trust "[a]bsent express language in a trust to the contrary." Here, the beneficiaries at issue belong to two different trusts and Plaintiffs do not allege that there is any such express Trust language.

Thus, the only possible legal source of Plaintiffs' claim that Dale must make disbursements from the Martial Trust in some relation to the Credit Shelter Trust are her fiduciary duties as a trustee. But Plaintiffs cannot use general fiduciary duties to effectively interject a specific term otherwise absent from the Trust. As demonstrated in the opening brief, fiduciary duties operate within the scope of a trust's terms and Nevada law; they do not supplant them. Despite their lengthy discussion of fiduciary duties, Plaintiffs do not dispute this point.

Accordingly, because there is no obligation that Dale make disbursements from the Marital Trust in relation to the Credit Shelter Trust under the Trust's terms, Nevada law, or a trustee's general fiduciary duties, Plaintiffs' discovery concerning the Credit Shelter Trust is not relevant to a legitimate legal claim. The Court should therefore reverse the District Court's motion-to-compel order.

II. FACTS

Plaintiffs agree that where the trust language is clear, the court cannot consider extrinsic evidence. OB at 15; AB at 23. Indeed, they conclude that the Trust is unambiguous. AB at 23. Yet Plaintiffs make extrinsic claims about the nature of Senator Raggio's relationships with the parties and their respective inheritances from him throughout their brief. E.g., Answer To Petition For Writ Of Prohibition Or, Alternatively, Mandamus ("AB") at 1, 6–8, 29–30, 41–42.

Dale objects to Plaintiffs' reliance on such evidence, which Plaintiffs concede is not relevant given the Trust's unequivocal terms. Dale also disputes many of Plaintiffs' claims and characterizations. While this is not the right forum for that debate, were the case to go to trial, Dale will show, among other things, that Senator Raggio's relationship with Plaintiffs was complicated, that he loved Dale dearly, and that he was close to her grandchildren. Dale further objects that Plaintiffs fail to produce any record citation for their extrinsic-fact claims. NRAP 28(e)(1).

Last, Plaintiffs misrepresent the parties' respective inheritances from Senator Raggio. They repeatedly note that Dale has already received $1.8 million in assets from Senator Raggio's estate. E.g., AB at 6, 7. Plaintiffs, however, neglect to mention the seven-figure inheritance they themselves have already received from

Senator Raggio. While they would have the Court believe that the Marital Trust residue is their sole inheritance, that is not the case.

In any event, Plaintiffs' fact claims do not affect the matter before the Court. Even if the Court were to accept Plaintiffs' Disney-like characterization of the case—beloved children robbed of their inheritance by a wicked stepmother—the writ does not turn on such facts. Rather, whether Dale abused her discretion hinges on the Trust's terms and Nevada law, which, as shown below, require that the writ be granted.

III. ARGUMENT

A. Plaintiffs' procedural arguments are meritless.

1. Writs are available for improper blanket discovery orders with no regard for relevance.

As established in the opening brief, the Court may entertain an extraordinary writ to review trial courts' discovery orders to (1) thwart improper, blanket discovery orders with no regard to relevance and (2) prevent enforcement of discovery orders that compel the disclosure of privileged information. OB at 13–14 (citing *Valley Health System, LLC v. Eighth Judicial District Court,* 252 P.3d 676, 679 (Nev. 2011)).

Plaintiffs argue that the District Court's order to compel is not a blanket order "with no regard to relevance." AB at 13. But this is a legal not procedural argument. The question of relevance represents the legal issue in the writ—is a

trustee in Dale's position required to consider other trust assets in making distributions under NRS 163.4175? If the answer is no, as Dale has shown it must be, then the broad discovery sought by Plaintiffs is legally irrelevant and the writ should be granted. While Plaintiffs presume that Dale's fiduciary duties somehow trump NRS 163.4175 in a way that would make their discovery requests permissible (AB at 16–21), this too is a legal argument that both the opening brief and this brief show lacks merit. OB at 29–31; Section III(C), *infra*.

Plaintiffs also emphasize that their discovery requests do not seek privileged information. Dale does not disagree. But nor do Plaintiffs deny that the information they seek is otherwise confidential and encroaches on the privacy interests of Dale and the Credit Shelter Trust beneficiaries. OB at 14. This point may not end the debate, but it is certainly relevant.

Last, Plaintiffs do not dispute that the writ addresses the central legal issue in the underlying case, which can be decided solely on the Trust's terms and is thus ripe for appellate review. *Id*. In other words, judicial efficiency dictates that it is better to address that issue now and before costly discovery and, possibly, a trial.

2. Dale raises the same argument in her writ as she did below.

Plaintiffs also argue at length that the writ makes a new argument never raised before the District Court. AB at 8–12. They claim that Dale previously

omitted any argument about Section 5.1's "necessary" and "proper" terms, which they argue constitutes an exception to NRS 163.4175. *Id*. at 10–11.

As a threshold issue, Dale is unaware of any authority that to preserve an appellate issue, a party must not only raise an argument but also foresee and disprove what the other party believes are exceptions to that argument. Nor have Plaintiffs provided any such authority.

In any event, this issue was raised and addressed before the District Court. While Plaintiffs' motion to compel, on which this writ is based, never even mentioned NRS 163.4175 (II AA-0335–41),[1] Dale's opposition to Plaintiffs' motion to compel argued that "Nevada law imposes no independent duty on [Dale] to consider other sources of income in making distributions from the Marital Trust" under NRS 163.4175. II AA-0403, 414. Dale explained that "There is no contrary provision in the [] Trust, and accordingly, there is little that [Plaintiffs] can do to urge an alternate interpretation of this statute." *Id*. at 414. After Dale's opposition, Plaintiffs argued that Section 5.1's use of the terms "necessary" and "proper" constitute an exception to NRS 163.4175 in their *reply brief*. III AA-0637–38.

[1] Although this appeal arises from Plaintiffs' motion to compel, Plaintiffs largely focus on Dale's motion for partial summary judgment.

Accordingly, Plaintiffs' claim of an "end run around the District Court" is misplaced. AB at 11. First, the parties argued about both the applicability of NRS 163.4175 and the meaning of Section 5.1's "necessary" and "proper" clause at length before the District Court at oral argument. *E.g.*, IV PA-0697–701. Moreover, the District Court expressly addressed that issue in its decision denying Dale's motion for partial summary judgment. *Id.* at 0761. While the District Court's reasoning on the matter would have been better placed in its brief motion-to-compel order, Plaintiffs cannot deny that the District Court meaningfully considered the issue.

B. NRS 163.4175 is dispositive.

In the opening brief, Dale showed that the Marital Trust's trustee is not obligated to consider the beneficiary's other resources (including the Credit Shelter Trust) in making disbursements under NRS 163.4175, which states as follows:

> Except as otherwise provided in the trust instrument, the trustee is not required to consider a beneficiary's assets or resources in determining whether to make a distribution of trust assets.

OB at 15. Plaintiffs raise two arguments in response. First, they claim that NRS 163.4175 does not apply to a beneficiary's separate discretionary trusts. Second, they claim that Section 5.1's use of the term "necessary" satisfies NRS 163.4175's "unless otherwise provided in the trust instrument" exception. As shown below, neither argument has merit.

1. Plaintiffs' claim that NRS 163.4175 does not apply to a beneficiary's other discretionary trust funds makes little sense.

Plaintiffs begin by taking an extremely narrow reading of NRS 163.4175. They argue that the statute's reference to "a beneficiary's assets or resources" excludes a beneficiary's right to funds from another discretionary trust. AB at 15. They reason that until those funds are disbursed, they are the trustee's assets, not the beneficiary's. *Id*. This novel argument fails for at least four reasons.

First, this interpretation makes little sense. Under Plaintiffs' reasoning, a trustee *is not obligated* to consider a beneficiary's liquid "assets and resources," such as the beneficiary's Powerball winnings "in determining whether to make a distribution of trust assets" under NRS 163.4175. On the other hand, the trustee *is obligated* to consider that same beneficiary's right to not-yet-distributed funds in a different discretionary trust, even though Plaintiffs say those funds do not even belong to the beneficiary. Plaintiffs make no effort to explain why the Legislature might have made such an arbitrary distinction. *See J.E. Dunn Nw., Inc. v. Corus Const. Venture, LLC*, 249 P.3d 501, 506 (Nev. 2011) ("This court seeks to avoid interpretations that yield unreasonable or absurd results."). And if the Credit Shelter Trust funds are not the beneficiary's assets or resources, it is unclear why Plaintiffs believe the Martial Trust trustee must consider them at all.

Second, NRS 163.4175's use of the terms "assets or resources" are broad enough to include a beneficiary's undistributed discretionary trust funds. For example, Merriam-Webster's Collegiate Dictionary's first definition for the word "resource" is "a source of supply or support." 74 (11th ed. 2012). If a discretionary-support trust for Dale's "support, care, and maintenance" is not a source of supply or support, it is difficult to imagine what is. Also, if the Legislature meant to make an exception to NRS 163.4175 for a beneficiary's other trusts, it likely would have done so explicitly, not implicitly through expansive terms like "assets and resources."

Third, as explained in the opening brief and not disputed by Plaintiffs, the Legislature's purpose in enacting NRS 163.4175 and S.B. 287 was to provide flexibility to Nevada's trust law to keep it competitive in drawing trust business to the state. OB at 7. Yet Plaintiffs' narrow construction of NRS 163.4175 limits trustees' discretion and thus undermines the flexibility envisioned by the S.B. 287.

Fourth, having reasoned that NRS 163.4175 makes an exception for a beneficiary's right to discretionary distributions from other trusts, Plaintiffs argue that the "petition is unable to cite even a single on-point authority to the contrary." AB at 15. But, of course, there is no case law whatsoever construing NRS 163.4175, which is why neither party has cited any directly "on-point authority." Plaintiffs also claim that comment e to Section 50 of the Restatement "comes the

closest to addressing" whether a trustee must consider a beneficiary's other assets. *Id*. at 16. But the Restatement is not Nevada law and is only used for guidance when Nevada law is unclear. *See Klabacka v. Nelson*, 394 P.3d 940, 951 (Nev. 2017) (rejecting a Restatement principle because it "is inconsistent with Nevada's statutory framework and the legislative history of NRS Chapter 166"). Further, comment e explains that "*the presumption* is that the trustee is to take the beneficiary's other resources into account in determining whether and in what amounts distributions are to be made." THIRD RESTATEMENT OF TRUSTS §50, cmt. e (2003) (emphasis added). Critically, as explained in the opening brief and not disputed by Plaintiffs, Nevada rejected this presumption when it enacted NRS 163.4175 in favor of a more flexible approach. OB at 7–8. Accordingly, Plaintiffs' reliance on the Restatement's presumption is unhelpful to interpret NRS 163.4175, which rejects that presumption.

2. Section 5.1 does not create an exception to NRS 163.4175.

The central issue in this writ is whether the Trust provides an express exception to NRS 163.4175's rule that a trustee is not obligated to consider a beneficiary's other resources. As shown in the opening brief and confirmed below, Section 5.1's use of the terms "necessary" and "proper" does not create an express exception to NRS 163.4175. OB at 17–23. Further, Plaintiffs' restrictive reading of those terms contradicts Senator Raggio's express intent to empower the trustee

with the broadest discretion allowed by Nevada law. *Id*. at 23–26. It also runs against the dominant intention of the Trust to benefit Dale. *Id*. at 26–29.

a. Section 5.1's inclusion of the word "necessary" is insufficient to constitute an express exception to NRS 163.4175.

Section 5.1 provides as follows:

> . . . [T]he Trustee shall pay to or apply for the benefit of [Dale] as much of the principal of the Trust as the Trustee, in the Trustee's discretion, shall deem *necessary* for the *proper* support, care, and maintenance of [Dale].

I PA-0075 (emphasis added). As demonstrated in the opening brief, the word "proper" qualifies "support, care, and maintenance" and does not condition the payment of principal. OB at 21–22. Plaintiffs do not seem to respond to this point, much less prove that the term "proper" implicates the beneficiary's other resources. Plaintiffs' entire argument that the Trust expressly provides an exception to NRS 163.4175 thus falls entirely on Section 5.1's inclusion of the word "necessary."

In the opening brief, Dale showed that the term "necessary" defines the scope and range of Senator Raggio's gift to his wife and does not create a threshold condition of *financial* need. OB at 17–18. The word "necessary" applies to whether the *amount of the disbursement* is necessary for Dale's maintenance requirements. *Id*. Plaintiffs, on the other hand, interpret the term "necessary" much more broadly to create a categorical requirement that any disbursements be based on the

beneficiary's holistic financial need—i.e., if the beneficiary has other resources with which she can independently fund for her own "support, care, and maintenance," then disbursements from the Marital Trust are, in Plaintiffs' view, *unnecessary*. AB at 23–26. Thus, Plaintiffs claim that the trustee abuses her discretion if she fails to consider Dale's other resources or makes a disbursement to cover a support cost where Dale's other resources could cover that cost.

While Plaintiffs claim that Dale reads the word "necessary" out of Section 5.1, this is untrue. *Id*. at 25. In Section 5.1, the word "necessary" qualifies "as much of the principal of the Trust": [T]he Trustee shall pay to or apply for the benefit of [Dale] *as much of the principal* of the Trust *as the Trustee*, in the Trustee's discretion, *shall deem necessary* for the proper support, care, and maintenance of [Dale]." Therefore, the trustee could not disburse funds for a support item that greatly exceeds Dale's accustomed standard of living at the time of Senator Raggio's death by, for instance, buying a $1 million exotic pet turtle for herself. *See*, *e.g*., THE LAW OF TRUSTS AND TRUSTEES §229 (2018) ("[A] trustee should provide support from the trust to enable the beneficiary to maintain her accustomed standard of living, often referred to as the station in life rule."). Plaintiffs' interpretation, however, ignores the "*as much* principal" clause.

In the opening brief, Dale also explained that *most* courts interpret the term "necessary" in similar discretionary support trusts in a manner that does not

obligate the trustees to condition disbursements on the beneficiary's availability of other resources. OB at 18–21. In this regard, the opening brief cited decisions from five different state supreme courts (Oregon, Montana, Kansas, Arkansas, and Iowa). OB at 18–19. Nor was this even a complete list.[2] It also cited decisions from intermediate appellate courts from three other states on point. *Id.*

In response, Plaintiffs inform us that the decisions of those five supreme courts and three intermediate courts of appeal were "unreasoned." AB at 33. For example, Plaintiffs opine that the Kansas Supreme Court's decision in *Godfrey v. Chandley*, 811 P.2d 1248 (Kan. 1991), is "not only unreasoned but also nonsensical" because the court did not interpret the word "necessary" in a discretionary support trust to require consideration of the beneficiary's other resources. AB at 34. There, the settlor created a discretionary support trust using the word "necessary": "The trust estate shall pay, monthly or at such intervals as may be agreed upon by the Trustee and my Wife, during the period of the trust such portion of the net income from the trust as may be *necessary* for her support,

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[2] *See*, *e.g.*, *Hamilton Nat. Bank of Chattanooga v. Childers*, 211 S.W.2d 723, 724 (Ga. 1975) (holding with respect to a discretionary support trust with a "necessary" clause that "[i]f the testator had intended for the trustee to consider her other means of support, such a provision could have been included in his will and, indeed, is commonly provided."); *Winkel v. Streicher*, 295 S.W.2d 56, 61–62 (Mo. 1956) ("[W]e believe that language directing a trustee to pay to a beneficiary so much as is necessary for his support would ordinarily be understood by a testator to mean that the beneficiary was to receive his full support from the trust estate.").

health, and maintenance." 811 P.2d at 1251. Relying in part on the word "necessary," the appellees argued that the provision indicated the settlor's intention "to pay only those expenses which exceeded [the wife's] personal income." *Id*. After surveying case law from several states, the Kansas Supreme Court rejected that argument, concluding that the settlor's "provision is limited only by what is necessary. In other words, it cannot be used to provide nonessential items." *Id*. at 1253. Plaintiffs, however, assert that a trustee cannot "decide what is 'nonessential' without a view of the widow's assets." AB at 34. But *Godfrey* interprets "necessary" to qualify only the kinds of support "items" available under the trust, as opposed to the beneficiary's independent financial ability to pay for those items. In other words, it prevented the trustee from issuing disbursements for items unnecessary for the beneficiary's "support, health, and maintenance." The Kansas Supreme Court's construction, like most other courts, therefore gives the term "necessary" meaning; it is just not the meaning that Plaintiffs prefer.[3]

Using both italics and boldface, Plaintiffs also proclaim that "reading the word 'necessary' in the discretionary distribution standard to require consideration of Dales' assets may even be the *majority rule*" or "the *modern trend*," citing

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[3] Plaintiffs also claim that *Godfrey* is distinguishable because the agreement at issue was meant to "primarily" benefit the wife, which was its "main" purpose. AB at 34. But as demonstrated in the opening brief and not disputed by Plaintiffs, upon Senator Raggio's death, the Trust's main purpose is to benefit Dale and her grandchildren. OB at 26–29; Section III(B)(2)(c), *infra*.

Section 50 of the Restatement. AB at 32 (boldface omitted); *id*. at 22. But this is grossly misleading. Nothing in the Restatement comments construes the term "necessary" in a support trust to *require* consideration of the beneficiary's other assets, as Plaintiffs claim. Instead, the Restatement discusses the general "*presumption*" of whether a trustee (a) must, (b) must not, or (c) may discretionarily take a beneficiary's other resources into consideration. RESTATEMENT OF TRUSTS §50, cmt. e (2003). With "several qualifications," the Restatement endorses the third option as a general presumption. *Id*. Moreover, it is critical to acknowledge, again, that Nevada rejected the Restatement's presumption when it enacted NRS 163.4175. Nevada thus stands apart from the Restatement and other states on this issue.

In any event, the Restatement itself cautions against any severe interpretation of the word "necessary" in support trusts:

> Under the usual construction of a support standard (supra) it would not be reasonable (Comment *b*), or even a result contemplated by the settlor (Comment *c*), for the trustee to provide only bare essentials for a beneficiary who had enjoyed a relatively comfortable lifestyle. (*This is so even though the discretionary power is couched in terms of amounts the trustee considers "necessary" for the beneficiary's support.*)

Id. cmt. d(2) (emphasis added). In other words, the word "necessary" cannot be construed to create a requirement of literal need, as Plaintiffs suggest.

Plaintiffs further assert that the opening brief's authorities are distinguishable and then attempt to identify a detail or two that make some those cases different. AB at 34–35. Plaintiffs next cite a handful of cases that they emphatically declare "are more on point and better reasoned." *Id*. at 35 (emphasis omitted). As explained in the opening brief, however, every trust is different and thus Dale does not deny that there are differences between the Trust in this case and the trust in literally every other case ever to have interpreted a discretionary trust. OB at 21. Nor does Dale dispute that a minority of cases have concluded that discretionary support trusts with the word "necessary" create a condition of financial need. But Dale does not agree that they are "better reasoned" as Plaintiffs opine[4] or that those cases are somehow "more on point."[5] Again, there are differences in every trust.

Indeed, the biggest distinction between this case and the cases collectively cited by both parties is that the Trust in this case is governed by NRS 163.4175.

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[4] Plaintiffs' determination of which cases are "unreasoned" or "better reasoned" appears to be based not on actual reason but whether the case at hand supports Dale's position or Plaintiffs'.

[5] For example, Plaintiffs assert that *Austin v. U.S. Bank of Washington*, 869 P.2d 404 (Wash. Ct. App. 1994) has "similar language" as Section 5.1. AB at 39, n.9. It does not. The relevant trust provision in *Austin* states: "The trustee shall pay . . . $100 per month to my sister . . . for the remainder of her natural life, and such additional sums therefrom *as may be required for any emergency or need*, in the sole discretion of my trustee." *Id*. at 406 (emphasis added). Section 5.1, however, does not condition disbursement to be "required" by "emergency or need."

Where the authorities cited by Plaintiffs either apply a presumption that a trustee should consider the beneficiary's other resources or look solely at trust's terms to make that determination, Nevada stands alone in that it expressly provides by statute that, "[e]xcept as otherwise provided in the trust instrument," a trustee need not do so. It stands to reason that the Legislature probably did not expect Nevada trustees to have to conduct fine-toothed legal scholarship on the inclusion of single words like "necessary" to determine whether a trust satisfies that exception, particularly given "the morass of conflicting authorities" noted by Plaintiffs. AB at 33. Rather, the Legislature probably anticipated such exceptions to be explicit, such as this one from a California case:

> The Trustee shall pay to or apply for the benefit of [the beneficiary] . . . so much of the income, and so much of the principal, of the Trust estate, up to the whole thereof, as the Trustee shall deem necessary for the health, support, maintenance, and education, of [the beneficiary], *taking into consideration all other sources available for such purposes*.

E.g., Young v. McCoy, 147 Cal. App. 4th 1078, 1082 (2007).

Plaintiffs additionally note that Section 5.1 could have stated something like "the trustee is not required to consider her other assets," although they do not appear to have found any examples such language in actual trusts from case law. AB at 35. But Plaintiffs' suggestion negates NRS 163.4175's presumption by effectively requiring trusts to expressly authorize the trustee to ignore the

beneficiary's other resources. Put differently, NRS 163.4175 assumes that the trustee already has that discretionary power and puts the burden on the challenging party to demonstrate that the trust provides otherwise.

Further, as demonstrated in the opening brief, in relying exclusively on the word "necessary," Plaintiffs assume that Senator Raggio elected to use an awfully oblique means to create a condition of financial need or proportional-disbursement requirement in Section 5.1. OB at 22. And Plaintiffs do not dispute that the Trust shows that Senator Raggio knew how to focus the trustee's consideration when that was his desire. *Id.*; I PA-0076 §5.2 (providing that "the Trustee may wish to consider [Dale's] age and health, the sizes of [her] and Settlor's respective estates, and a computation of the combined death taxes . . . .").

Plaintiffs often suggest that Section 5.1's use of the term "shall" implicates a stricter discretionary standard because it suggests a mandatory requirement. AB at 28, 33, 35 n.6, 7, 37, 39. But Section 5.1 does not state that such disbursements "shall *be* necessary," as Plaintiffs suggest. Instead, it states that "the Trustee shall pay . . . as much principal of the Trust as the Trustee, in the Trustee's discretion, *shall deem* necessary . . . ." The word "deem," which implicates the trustee's discretion, removes any suggestion that the "shall" part of Section 5.1 calls for a more stringent discretionary standard.

Plaintiffs also often suggest that the fact that the Marital Trust and Credit Shelter Trust share a similar discretionary-support standard somehow creates an obligation for the trustee to make distributions from one by reference to the other. *Id*. at 4–7, 14. But Plaintiffs never provide any reason why this would be, much less any authority on the point.

In sum, standing by itself, Section 5.1's inclusion of the word "necessary" is insufficient to create an exception to NRS 163.4175. Yet, as the next sections show, there are at least two additional reasons why the Court must reject Plaintiffs' restrictive reading.

b. The Trust gives Dale liberal discretion over disbursements, which militates against Plaintiffs' rigid interpretation.

In the opening brief, Dale showed that Senator Raggio intended to vest her with the broadest discretion allowed by Nevada law as trustee to both trusts. OB at 23–26. This is demonstrated by Section 8.1(a)'s provision that "*the most liberal*" construction applies to the trustee's discretion and that the Trust intended "to give [the trustee] *the greatest latitude and discretion to the Trustee*" allowed by its terms and Nevada law. I PA-0079 (emphasis added). It is further demonstrated by Section 5.1's double emphasis on the trustee's discretion in making distributions "in the Trustee's discretion" and as she "shall *deem* necessary." Dale also showed that Nevada law itself gives trustees exceptional discretion, as demonstrated by

S.B. 287's enactment of NRS 163.4175 and NRS 163.419(3). OB at 7–8, 24–25. In response, Plaintiffs argue that Dale's discretion as trustee is limited to the terms and limitations of the Trust. AB at 40. But the opening brief never suggests otherwise. The important point here is that the Trust objectively states a desire to vest Dale with the broadest discretion possible, which necessarily includes her discretion to determine what is "necessary for [her] proper support, care, and maintenance" under Section 5.1.

As demonstrated by *In re Estate of Lindgren*, the liberal discretion given to the Dale is therefore incompatible with an overly strict interpretation of words like "necessary": "We will not interpret the liberal Trust language by way of a limited reading of the word 'necessary,' referred to by the court as 'need.'" 885 P.2d 1280, 1282 (Mont. 1994); OB at 25–26. Plaintiffs suggest that *Lindgren* is distinguishable because the instrument there specifically provided that the "discretion to make distributions should be exercised 'liberally.'" AB at 35 n.7. They reason that Senator Raggio "could have specified that Dale may exercise discretion to make distributions 'liberally.'" *Id*. at 35. But the Trust gives Dale "the most liberal discretion" and "greatest latitude and discretion" as trustee *in all determinations*, which necessarily includes her discretion to make distributions.

In sum, Plaintiffs' strict reading of Section 5.1's "necessary" clause conflicts with the broad discretion authorized by the Trust and Nevada law.

c. Plaintiffs do not deny that Senator Raggio prioritized Dale's needs over Plaintiffs', which is relevant to Section 5.1's construction.

In the opening brief, Dale showed that courts often look to a settlor's dominant purpose in a trust to determine whether a discretionary-support trust is conditioned on financial need or is more like a gift of support. *See* OB at 26–27 (citing several authorities for this proposition). Plaintiffs characterize this point as a "proposed reading of the Agreement as an absolute gift." AB at 42. Not so. To reiterate, whether the settlor's dominant intention behind a discretionary-support trust was to benefit the beneficiary or the remaindermen is relevant to the limited determination as to whether distributions under the trust are (a) strictly conditioned on the beneficiary's financial need or (b) more like a gift of support. The latter is a gift in the sense that it not conditioned on the beneficiary's financial need. But unlike true gifts, disbursements must still meet the trust's support standard.

In this regard, Plaintiffs do not deny that the Trust's dominant purpose is to benefit Dale and her grandchildren, as demonstrated by nearly all its terms and its near silence concerning Plaintiffs. OB at 26–29. Plaintiffs, however, note that the Trust gives the residue of the Marital Trust to the W&D Trust, to which they are beneficiaries and conclude that Senator Raggio "contemplated a remainder for [Plaintiffs]." AB at 41. Elsewhere in their brief, Plaintiffs argue that Dale's reading

of the word "necessary" would "thwart [Senator Raggio's] intent to leave an inheritance for his daughters." *Id*. at 29.

But, again, Section 5.1 never even suggests that the trustee must consider the preservation of principal for the remaindermen's behalf in making discretionary distributions. In fact, Section 5.1 does not even mention the prospect of any remaining principal. Rather, how any remaining principal should be distributed is explained two sections later in Section 5.3, which simply states that "the entire remaining principal of the [Marital Trust] shall be added to and augment the [W&D Trust]." II AA-000076. And though Plaintiffs claim it represents their "inheritance," Section 5.3 does not even mention Plaintiffs by name.

Moreover, Plaintiffs' argument that Section 5.3 indicates Senator Raggio's strong desire to leave a substantial inheritance to Plaintiffs is incompatible with the fact that there was a very real possibility when Senator Raggio executed the Trust that the Marital Trust would never be funded at all. OB at 4, 28. As explained in the opening brief, the Marital Trust was to be funded exclusively from the "maximum marital deduction allowed" in the year of Senator Raggio's death, which could have been as little as zero, as it was in 2010. *Id*. In that event, all the Trust estate would have flowed into the Credit Shelter Trust in which Plaintiffs

have no remainder interest.[6] Tellingly, Plaintiffs' answering brief is silent on this critical point.

Relying on comment g to Section 50 of the Restatement, Plaintiffs also spend several pages shotgunning opinions on dozens of potential considerations in interpreting a trustee's discretionary powers. AB at 27–32. At one point, they even conclude that Senator Raggio's marriage to Dale of "only 9 years" should somehow be construed against the scope of her discretion as trustee. *Id.* at 30. Putting aside the summary nature of Plaintiffs' conclusions, comment g explains that "[r]ealistically, however, *these factors often reveal little of a settlor's actual intent*" and that "the significance of the particular facts and circumstances is often *highly speculative*." RESTATEMENT OF TRUSTS §50, cmt. g (2003) (emphasis added). The Restatement therefore concludes, like the opening brief, that "the most revealing and reliable guides for resolving these types of questions are *the underlying purposes of the trust or provision in question*." *Id.* Again, upon Senator Raggio's death, the Trust focuses on Dale and her grandchildren, which Plaintiffs do not dispute.

Indeed, the Restatement's illustrative example of a tax-oriented trust in comment g is telling: "A common and revealing example is that of a trust that can

[6] Again, Plaintiffs have already received a seven-figure inheritance from Senator Raggio outside what they might receive under the Marital Trust.

be readily recognized as tax motivated and planned, with further indication that the discretionary beneficiary was of first concern to the settlor, even if others were also important beneficiaries of the plan." *Id*. The Restatement concludes that the trustee's discretion should be viewed liberally and in favor of the generous consumption of principal in such tax-motivated trusts:

> [T]he appropriate and almost natural conclusions would be: (i) that the trust purposes and thus *the settlor's intentions would be best served by a liberal and generous construction of any discretionary standards in question*, and of the lifestyle and luxuries the beneficiary should enjoy; but that those same purposes and intentions would be served by recognizing (ii) that the trustee should have *flexible discretion with respect to the question of considering other resources*, and (iii) that in this trust the discretion should be exercised, when advantageous and not a cause of feelings of insecurity, *to encourage consumption of substantial principal of the beneficiary's potentially taxable wealth*.

Id. (emphasis added).

Here, as in the Restatement's example, the Trust's purpose is to convey tax-exempt assets to Dale and, indeed, the Marital Trust is specifically funded with "the maximum marital deduction allowable in determining the federal estate tax." II AA-000075 (§4.4). Therefore, it is formally entitled "the Marital *Deduction* Trust." The Restatement thus again rejects Plaintiffs' claim that the trustee's discretion over disbursements should be viewed stringently. Instead, the Restatement calls for liberal discretion and favors the beneficiary's generous use of

principal. In this regard, if, as Plaintiffs argue, Senator Raggio intended to limit Dale's benefit of the Marital Trust to what is necessary in the severest sense of that term, it makes little sense that he would have appointed her to be both its beneficiary and trustee. Put another way, Plaintiffs assume that Senator Raggio consciously put his wife in a heavily conflicted and restrictive position, which seems contrary to human nature and basic common sense.

Accordingly, the Trust's primary intention to benefit Dale also militates against Plaintiffs' restrictive reading of Section 5.1.

C. Plaintiffs fail to show that Dale's fiduciary duties obligate her to make proportional distributions between two different trusts.

Plaintiffs' principal argument for the relevance of their discovery into the Credit Shelter Trust is that Dale's general fiduciary duties of good faith, loyalty, and impartiality as a trustee obligate her to proportion distributions between that trust and the Marital Trust in some manner. AB at 16–21. In this regard, Plaintiffs seem to view Dale's general fiduciary duties as existing independently from Nevada's statutory law and the Trust's terms. *Id*. But, as demonstrated in the opening brief and not disputed by Plaintiffs, a trustee's fiduciary duties govern *within* the scope of the trust's terms and Nevada law. OB at 29–30; *citing*, *e.g.*, *Nemec v. Shrader*, 991 A.2d 1120, 1128–29 (Del. 2010).

Here, Plaintiffs and the District Court concede that the Trust's terms do not require Dale to proportionally spend down the Marital and Credit Shelter Trusts.

Nor does Nevada's relevant statutory law, which unequivocally rejects such proportioning even within the same trust:

> Absent express language in a trust to the contrary, if a discretionary interest permits unequal distributions between beneficiaries or to the exclusion of other beneficiaries, the trustee may distribute all of the undistributed income and principal to one beneficiary in the trustee's discretion.

NRS 163.419(3). And, as demonstrated above, NRS 163.4175 provides that a trustee need not consider a beneficiary's other resources. Plaintiffs, however, ask the Court to apply such fiduciary duties in a way that trumps both NRS 163.419(3) and NRS 163.4175 and adds a specific term to the Trust for the proportional distribution between the two trusts. AB at 16–21.

Moreover, the opening brief noted that there is no authority for the proposition that the fiduciary duties of good faith, loyalty, and impartiality apply across *different trusts* with *different sets of beneficiaries*. OB at 31. For instance, the duty of impartiality requires a trustee to be impartial among the beneficiaries of *a single trust*. It does not, however, require a trustee to spread distributions proportionally among the beneficiaries of different trusts. Tellingly, Plaintiffs provide no authority to the contrary.

In sum, Plaintiffs cannot use a trustee's fiduciary duties to create a specific term not otherwise found in the Trust and in a manner that is contrary Nevada's statutory law.

D. Plaintiffs do not dispute that the proportionality requirement they urge is too vague to be enforceable.

The opening brief explained that Plaintiffs do not offer an enforceable standard for the judiciary or trustee for apportioning distributions between the Marital and Credit Shelter Trusts. OB at 32. Again, the District Court and Plaintiffs both acknowledge that there is no 50/50 proportional spend-down requirement for the two trusts. *Id.*; *see also e.g.*, IV PA-0760 ("We forthrightly admit that because net income is mandatory under the marital deduction trust . . . they cannot be proportional, they cannot be equal."). Accordingly, if not equally, Dale asked how exactly is the trustee supposed to proportion her distributions in a manner that would not constitute an abuse of discretion? OB at 32–33.

Plaintiffs offer no meaningful response and thus concede the issue. Instead, they focus on a different standard. They claim that the ascertainable standard is "one of support." AB at 23–24. To be sure, the general support standard guides a trustee's discretion in a single discretionary support trust. Yet Plaintiffs also claim that Dale's discretion is limited by an additional *proportionality standard* that imposes a duty to disburse the two separate trusts' funds in some relation to one another. They do not, however, offer a precise proportionality standard that would allow either the trustee or the judiciary to determine whether the trustee is abusing her discretion in portioning distributions between the two trusts in any particular amounts.

IV. CONCLUSION

The Court should reverse the District Court's order compelling Dale to respond to Plaintiffs' blanket discovery requests concerning the Credit Shelter Trust. As established above, that order was based on an incorrect interpretation of the Trust's terms and Nevada law.

Respectfully submitted this November 5, 2018.

/s/ Frank Z. LaForge
J. Robert Smith (State Bar No. 10992)
Frank Z. LaForge (State Bar No. 12246)
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno, Nevada 89511
Tel. (775) 327-3000 | 786-6179 Fax

John Echeverria (State Bar No. 200)
ECHEVERRIA LAW OFFICE
9432 Double R Boulevard
Reno, Nevada 89521
Tel. (775) 786-4800 | 786-4808 Fax

Attorneys for Petitioner

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, in Times New Roman 14-point font, double spaced.

I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 6970 words.

Finally, I hereby certify that I have read this 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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 November 5, 2018.

/s/ Frank Z. LaForge
J. Robert Smith (State Bar No. 10992)
Frank Z. LaForge (State Bar No. 12246)
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno, Nevada 89511
Tel. (775) 327-3000 | 786-6179 Fax

John Echeverria (State Bar No. 200)
ECHEVERRIA LAW OFFICE
9432 Double R Boulevard
Reno, Nevada 89521
Tel. (775) 786-4800 | 786-4808 Fax

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Martha Hauser, certify that on November 5, 2018, I electronically filed the foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR, ALTERNATIVELY, MANDAMUS**, with the Clerk of the Nevada Supreme Court via the Court's e-Flex system. Service will be made by e-Flex on all registered participants. Non-eFlex participants will be served by U.S. mail, as noted.

Michael A. Rosenauer
MICHAEL A. ROSENAUER, LTD.
michael@mrosenauer.com

Attorneys for Real Parties in Interest
Tracy Raggio Chew

G. Barton Mowry
Enrique R. Schaerer
MAUPIN, COX & LEGOY
gbmowry@mcllawfirm.com
eschaerer@mcllawfirm.com

Attorneys for Real Party in Interest
Leslie Raggio Righetti

Hon. David A. Hardy
Dept. 15
Second Judicial District Court
75 Court Street
Reno, Nevada 89501
By U.S. Mail

/s/ Martha Hauser
An Employee of HOLLAND & HART LLP