

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

2 LYNITA SUE NELSON,
3 INDIVIDUALLY, AND IN HER
4 CAPACITY AS INVESTMENT
5 TRUSTEE OF THE LYNITA S. NELSON
6 NEVADA TRUST, DATED MAY 30,
7 2001,

8 Appellant,

9 vs.

10 ERIC L. NELSON, INDIVIDUALLY,
11 AND IN HIS CAPACITY AS
12 INVESTMENT TRUSTEE OF THE ERIC
13 L. NELSON NEVADA TRUST, DATED
14 MAY 30, 2001, and MATT KLABACKA,
15 AS DISTRIBUTION TRUSTEE OF THE
16 ERIC L. NELSON NEVADA TRUST,
17 DATED MAY 30, 2001,

18 Respondents.

Electronically Filed
Jun 10 2019 04:06 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**Supreme Court Case No. 77473
District Court Case No. D411537**

19 **RESPONDENT MATT KLABACKA, DISTRIBUTION TRUSTEE OF THE**
20 **ERIC L. NELSON NEVADA TRUST, DATED MAY 30, 2001, ANSWERING**
21 **BRIEF TO APPELLANT'S OPENING BRIEF**

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1 NRAP 26.1 DISCLOSURE

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

5 Real Party in Interest, Matt Klabacka, Distribution Trustee of the Eric L.
6 Nelson Nevada Trust dated May30, 2001, is not a corporation and therefore does not
7 have any parent corporations and there are no publicly held companies owning 10%
8 or more of its stock. Further, the law firm Solomon Dwiggins and Freer, Ltd., and
9 attorneys Mark A. Solomon, Esq. and Jeffrey P. Luszeck, Esq., have appeared for
10 Matthew Klabacka, Distribution Trustee of the Eric L. Nelson Nevada Trust dated
11 May30, 2001 in the underlying District Court case and will appear for the same before
12 the Nevada Supreme Court in the instant Appeal.

13 DATED this 10th day of June, 2019.

14 SOLOMON DWIGGINS & FREER, LTD.

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1 **JURISDICTIONAL STATEMENT**

2 As set forth in the Motion to Dismiss filed on June 6, 2019, this Court lacks
3 jurisdiction over this appeal for two separate reasons: (1) the appeal was untimely;
4 and (2) the district court’s October 16, 2018 Order is not an appealable order. First,
5 an appeal must be filed “no later than 30 days after the date that written notice of
6 entry of the judgment or order appealed from is served.” Nev. R. App. P. 4(a)(1).
7 Here, the district court denied Lynita’s request to impose a joint preliminary
8 injunction (“JPI”) over all of the ELN Trust’s assets on May 22, 2018.
9 Consequently, Lynita had thirty days from that day, on or before June 21, 2018, to
10 file an appeal. Notwithstanding, Lynita filed a Motion for Reconsideration and
11 Clarification of the Court’s Decision Entered May 22, 2018, which does not toll the
12 period for filing a notice of appeal. See EDCR 5.512(a) (“A party seeking
13 reconsideration and/or rehearing of a ruling (other than an order that may be
14 addressed by motion pursuant to NRCP 50(b), 52(b), 59, or 60), must file a motion
15 for such relief within 14 calendar days after service of notice of entry of the order
16 unless the time is shortened or enlarged by order. A motion for reconsideration does
17 not toll the period for filing a notice of appeal.”). (Emphasis Added). Consequently,
18 Lynita’s Notice of Appeal, which was filed on November 7, 2018, is untimely.

19 Second, there is no statute or court rule that grants this Court jurisdiction to
20 entertain an appeal from the denial of a JPI pursuant to EDCR 5.517. While NRAP
21 3(A)(b)(3) grants this Court jurisdiction over “[a]n order granting or refusing to grant

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1 an injunction or dissolving or refusing to dissolve an injunction,” there is no
2 precedent that said rule applies to the imposition of a JPI pursuant to EDCR 5.517.
3 To the contrary, it appears that NRAP 3(A)(b)(3) pertains to injunctions that were
4 denied and/or granted pursuant to NRCP 65, which requires “[e]vidence that goes
5 beyond the unverified allegations of the pleadings and motion papers...” See,
6 *Hospitality International Group v. Gratitude Group, LLC*, 387 P.3d 208 at * 2
7 (2016).

8 For these reasons, and those set forth in the Motion to Dismiss, this Court lacks
9 jurisdiction over the instant appeal.

10 ROUTING STATEMENT

11 The appeal should be assigned to the Court of Appeals pursuant to NRAP
12 17(b)(10) (“Cases involving family law matters...”). NRAP 17(b)(12) is inapplicable
13 because there is no precedent stating said rule applies to the denial or imposition of a
14 JPI under EDCR 5.517.

15 STATEMENT OF THE CASE AND FACTS

16 Eric and Lynita Nelson were married on September 7, 1983.¹

17
18 ¹ NRAP 30(b) provides: “[e]xcept as otherwise required by this Rule, all matters
19 not essential to the decision of issues presented by the appeal shall be omitted.
20 Brevity is required; the court may impose costs upon parties or attorneys who
21 unnecessarily enlarge the appendix.” Due to the fact that this matter has been the
subject of prior appeals that were heard by this Court (Case No. 66772, consolidated
with Case No. 68292), documents referenced in this Answering Brief, which were
included in the prior appendices, have been cited in the same manner to which they
were cited in the prior appeals (*i.e.*, AAPP or RAPP). Citations to Lynita’s appendix

1 **A. CREATION AND IMPLEMENTATION OF THE SEPARATE**
2 **PROPERTY AGREEMENT AND SEPARATE PROPERTY TRUSTS.**

3 “In 1993, Eric and Lynita entered into the SPA [Separate Property
4 Agreement]² in order to transmute the family’s community assets into the parties’
5 respective separate property.” *See Klabacka v. Nelson*, 394 P.3d 940, 953 (Nev.
6 2017). “The SPA equally divided the parties’ assets into two separate property
7 trusts.” *Id.* “Both parties consulted counsel prior to signing the document, and
8 Lynita consulted additional outside counsel prior to her signing.” *Id.*

9 **B. CREATION AND IMPLEMENTATION OF SELF-SETTLED**
10 **SPENDTHRIFT TRUSTS.**

11 “In 2001, Eric and Lynita converted their separate property trusts into [the
12 ELN Trust]³ and [the LSN Trust],⁴ respectively, and funded the SSSTs with the
13 separate property contained within the separate property trusts.” *Id.* “The trust
14 agreements for [the ELN Trust] and [the LSN Trust] are nearly identical.” *Id.* “Both

15 will be cited to as “SRAPP”). In the event this Court desires the ELN Trust to
16 include the additional documents required by NRAP 30(b)(2) (which documents were
17 already included in the appendices filed in Case No. 66772) it will immediately do
18 so.

19 ² The “SPA states that “the parties hereto desire to split the community estate
20 into the sole and separate property of each spouse in accordance with and for the
21 purposes contained in NRS 123.130 through 123.170, inclusive.”” *Id.*

³ “The ELN Trust” is the ERIC L. NELSON NEVADA TRUST dated May 30,
2001.

⁴ “The LSN Trust” is the LYNITA S. NELSON NEVADA TRUST dated May
2001.

1 trust agreements are in writing and establish an irrevocable trust.” *Id.* “Each trust has
2 a spendthrift provision...” *Id.*

3 **C. ENTRY OF DIVORCE DECREE.**

4 Eric filed for divorce from Lynita in 2009.

5 On June 3, 2013, the district court issued its Decree of Divorce (“decree”).
6 AAPP V19:4691-4742. “The decree disposed of all property, with the exception of
7 Wyoming Downs, an asset purchased during the pendency of the divorce.” *Id.* at
8 945. The decree provides, in part, “that the SPA was valid and the parties SSSTs
9 were validly established and funded with separate property.” *Id.* at 944.

10 **D. INITIATION AND DISPOSITION OF APPEAL.**

11 Following the entry of the Wyoming Downs order the decree became final
12 and the ELN Trust filed its first notice of appeal,” *id.* at 945, and Lynita filed a
13 cross-appeal.

14 On May 25, 2017, this Court rendered its decision in *Klabacka v. Nelson*, 133
15 Nev. 164, 394 P.3d 940, 949 (2017), which decision “[a]ffirmed in part, vacated in
16 part” the decree, and “remand[ed] this matter for further proceedings consistent with
17 this opinion.” In short, this Court held that “the district court must trace those trust
18 assets to determine whether any community property exists within the trusts...” and
19 also “concluded” the remaining arguments were “without merit.” *Id.* at fn. 9.

20 / / /

21 / / /

1 **E. THE DISTRICT COURT GRANTS A LIMITED, STIPULATED,**
2 **INJUNCTION ON REMAND.**

3 On July 31, 2017, after this matter had been remanded to the district court,
4 Lynita filed a countermotion requesting, *inter alia*, that the district court “expressly
5 affirm the [JPI] previously entered.” SRAPP V1: 146:18-22.

6 At the August 8, 2017 hearing on the countermotion for JPI the district court
7 stated, in part:

8 “I’m really not inclined to freeze everything and start all
9 over again,” 8/8/17 hearing transcript at 9:9-10. SRAPP
10 V1:201-241.

11 To be honest, I’m really not inclined to reissue the JPI and
12 freeze all that. I did the same thing when you guys had
13 argued about our transferring all the property to her. You
14 guys opposed that, I said we can always transfer it back,
15 which I did, just told them that they wouldn’t be able to
16 see anything on that so that we could preserve that. So,
17 I’m really not inclined to put a stay on everything. *Id.* at
18 25:17-23. SRAPP V1:201-241.

19 At the January 31, 2018 hearing the District Court stated, in part:

20 As far as the instituting a joint preliminary injunction,
21 that’s all that these trusts do is buy and sell property. So
when you say they should conduct business as usual, by
putting in – that in place and not allowing them to sell
things, that’s what they do. So that would be – it’s a
severe burden that I think when – the fact that the Supreme
Court has already ruled what needs to go back to the ELN
Trust and I don’t think we should be encumbering a
business running and moving forward. These – that’s how
both sides function. So I think that we can’t lose sight of
that. 1/31/18 hearing transcript at 39:12-21. SRAPP
V2:270-335.

1 As stated in the Opening Brief, although the ELN Trust argued against the imposition
2 of a JPI, it stipulated not to transfer the Banone or Lindell Properties to third-parties.
3 SRAPP V1:228.

4 On April 19, 2018, the district court entered its order; however, said order did
5 not address the request for a JPI.

6 On May 5, 2018, Lynita filed her Motion for Reconsideration and Clarification
7 of the Court's Decision Entered on April 19, 2018, wherein she again requested the
8 imposition of a JPI against Eric and/or the ELN Trust. Within a week after filing the
9 May 5, 2018 Motion for Reconsideration Lynita filed lis pendens on all real property
10 titled in the name of the ELN Trust.

11 On May 22, 2018, without oral argument, the district court entered its Order
12 entitled Decision Affirming the Date of Tracing; Denying a Separate Blocked
13 Account for \$720,000; and Granting a JPI for the Banone, LLC and Lindell
14 Properties, which provides, in part:

15 "A Joint Preliminary Injunction for the Banone, LLC and
16 Lindell Properties is Appropriate Because Both Properties
Are Involved In A Claim of Community Property

17 In its April 19, 2018 Order, this Court did not address the
18 request for a Joint Preliminary Injunction for the Banone,
19 LLC. and Lindell Properties. Eighth Judicial District
20 Court Rule 5.517 states that "[u]pon the request of any
21 party at any time prior to the entry of...final judgment, a
preliminary injunction will be issued by the clerk against
the parties to the action enjoining them and their officers,
agents, servant, employees, or a person in active concert or
participating with them from: transferring, encumbering,

1 concealing, selling or otherwise disposing of...any
2 property that is the subject of a claim of community
interest...”

3 Both the Banone, LLC. and Lindell Properties are subject
4 to a claim of community interest. As such, both properties
5 are entitled to a Joint Preliminary Injunction to ensure that
6 the properties remain intact prior to the completion of
7 tracing and the final judgment of this Court. However,
while this Court is aware that multiple Notices of Lis
Pendens regarding both properties have been filed, a Joint
Preliminary Injunction on the properties is appropriate and
will be granted...” SRAPP V2:441-449.

8 Lynita never appealed the May 22, 2018 Order.

9 Contrary to the contention in her Opening Brief that the district court’s “May
10 22, 2018 Order failed to address the remainder of Lynita’s request (*i.e.*, that the JPI
11 apply to all other properties as well),” the district court implicitly, but clearly in
12 context, denied said request by limiting the JPI to the Banone, LLC and Lindell
13 Properties.

14 Unhappy with the May 22, 2018 Order, on June 5, 2018, Lynita filed a Motion
15 for Reconsideration and Clarification of the Court’s Decision Entered on May 22,
16 2018, wherein she requested **for the third time** that the district court reconsider its
17 order and expand the JPI to all assets titled in the name of the ELN Trust. *See*
18 Motion for Reconsideration at 4:18-21 [SRAPP V2:450-457] (“Based on the
19 foregoing, Lynita respectfully requests that the Court reconsider its Decision entered
20 May 22, 2018, and order that the JPI issued is not limited to the Banone, LLC and
21 Lindell Properties.”).

1 On October 16, 2018, the district court entered its Decision on the Motion for
2 Reconsideration and Clarification of the Court's Decision Entered on May 22, 2018,
3 confirming that a JPI "shall only be placed on the Banone, LLC and Lindell
4 Properties." SRAPP V3: 604-613.

5 On November 7, 2018, Lynita filed the instant appeal. Although Lynita had
6 previously acquiesced to having the JPI limited to the property awarded to her in the
7 decree, SRAPP V2:299-300, the appeal demands that the JPI be expanded to "all
8 property which is subject to a claim of community property interest" (whatever that
9 means as she has not delineated which assets should be subject to the JPI).

10 STATEMENT OF STANDARD OF REVIEW

11 As stated herein and in the Motion to Dismiss, there is no precedent confirming
12 that the denial of a JPI under EDCR 5.517 is an appealable order. As such, there is
13 no applicable standard of review for this Court to consider. Lynita's reliance on *State*
14 *ex rel. Office of Attorney Gen., Bureau of Consumer Prot. v. NOS Commc'ns, Inc.*,
15 120 Nev. 65, 66, 84 P.3d 1052, 1053 (2004), is unavailing because in that case this
16 Court considered whether the state demonstrated a "reasonable likelihood that the
17 statutory conditions authorizing injunctive relief exist." *See also, Boulder Oaks Cmty.*
18 *Ass'n. v. B & J Andrews Enterprises, LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31
19 (2009) (finding that the district court abused its discretion in granting Andrews'
20 motion for a preliminary injunction because Andrews does not enjoy a reasonable
21 likelihood of success on the merits.

1 **SUMMARY OF THE ARGUMENT**

2 The district court did not abuse its discretion in refusing to grant a JPI over any
3 and all assets listed in the decree. As will be shown herein, the ELN Trust is not a
4 “party” over which a JPI can be imposed pursuant to EDCR 5.517. Further, contrary
5 to Lynita’s contention, a JPI is not mandatory. Finally, if EDCR 5.517 is in fact
6 applicable to this matter, the requested JPI cannot be granted as to any particular
7 property without some showing that a community property interest likely exists
8 therein, and it cannot extend to assets over which the district court found, and this
9 Court confirmed, Lynita does not have a community property interest.

10 **ARGUMENT**

11 **A. THE IMPOSITION OF A JPI IN A DIVORCE PROCEEDING IS
12 DISCRETIONARY, NOT MANDATORY.**

13 Contrary to Lynita’s contention, the imposition of a JPI in a divorce
14 proceeding is discretionary, not mandatory. Specifically, NRCP 65(f) provides that
15 in suits for divorce the “court may make prohibitive or mandatory orders, with or
16 without notice or bond as may be just.” (Emphasis Added). Further, NRS 125.050
17 grants the district court discretion to enter a restraining order or preserve the status
18 quo if “it is made to appear probable to the court that either party is about to do any
19 act that would defeat or render less effectual any order which the court might
20 ultimately make concerning the property or pecuniary interest.” Because the
21 aforementioned rule and statute is unambiguous this Court should construe the

1 “statute’s language to effectuate...its manifested purpose (*i.e.* that this Court has
2 discretion to impose an injunction in a divorce proceeding). *See e.g., Nevada v.*
3 *Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1170-1171 (Nev. 2008).

4 Here, the district court did not abuse its discretion by refusing to enter a JPI
5 over all assets titled in the name of the ELN Trust because of the severe burden that it
6 would impose on the ELN Trust. Indeed, as recognized by the district court at the
7 January 31, 2018 hearing, the ELN Trust buys and sells real property in the normal
8 course of business and ENJOINING the same would impose a severe burden on the
9 ELN Trust. SRAPP V2:270-335.

10 In light of the foregoing, the district court did not abuse its discretion by
11 limiting the scope of the injunction to the properties stipulated to.

12 **B. EDCR 5.517 DOES NOT APPLY TO AN IRREVOCABLE TRUST.**

13 Even if mandatory, a JPI cannot and should not be imposed on an ENTITY OR
14 irrevocable trust because Nevada law makes it clear that it only applies to the
15 husband and wife in a divorce proceeding.⁵ Specifically, NRS 125.050 provides that
16 it the imposition of an injunction applies to “either party” in a divorce proceeding.

17 ⁵ Even if EDCR 5.517 applies to an irrevocable trust, it can only be imposed
18 “prior to the entry of a decree of divorce or final judgment.” Here, the decree was
19 entered on June 3, 2013, and on “September 22, 2014, the district court disposed of
20 Wyoming Downs, thereby making its judgment final.” *Klabacka* at 945. Although
21 this Court “[a]ffirmed in part, vacated in part” the decree, and “remand[ed] this
matter for further proceedings consistent with this opinion,” it does not appear that
EDCR 5.517 allows a JPI to be imposed after a decree or final judgment are entered,
even if ultimately remanded, and Lynita has failed to introduce any legal support for
said proposition.

1 Further, EDCR 5.85, the predecessor to EDCR 5.517, confirms that a JPI issued
2 under the Eighth Judicial District Court rules only applies to “both parties to the
3 action,” *i.e.* a husband and wife, of which the ELN Trust is neither.⁶

4 Further, under either EDCR 5.517 or EDCR 5.85 a JPI can only be imposed
5 over “joint, common or community property of the parties or any property that is the
6 subject of a claim of community interest.”

7 While the ELN Trust recognizes that this Court remanded this matter to the
8 district court for the sole purpose of conducting a tracing “to determine whether any
9 community property exists within the trusts,” *Klabacka* at 948, it is inequitable to
10 impose a JPI over the ELN Trust without requiring Lynita to make a prima facie
11 showing that she has a community interest in the assets at issue.

12 As indicated *supra*, this Court previously found that the ELN Trust was funded
13 with his sole and separate property. *See e.g., Klabacka* at 943 (“[i]n 2001, Eric and
14 Lynita converted their separate property trusts into [the ELN Trust] and [the LSN
15 Trust], respectively, and funded the SSSTs with the separate property contained
16
17

18 ⁶ Even under the new rules, EDCR 5.102(j) defines a “party” as follows: “Party.
19 Unless the context indicates otherwise, “a party” means a party personally, if
20 unrepresented, or that party’s counsel of record, if represented.” Neither the ELN
21 Trust nor the LSN Trusts are “persons,” but rather separate and distinct legal entities
thereby rendering EDCR 5.517 inapplicable to the ELN Trust and the assets
contained therein.



1 within the separate property trusts.”).⁷ Said finding was based upon evidence, which
2 included, but is not limited to the SSSTs themselves,⁸ which Lynita executed upon
3 the advice of counsel. Consequently, Lynita must prove “[t]ransmutation from
4 separate to community property ... by clear and convincing evidence.”⁹ *See also*
5 *Barrett v. Franke*, 46 Nev. 170, 208 P. 435, 437 (Nev. 1922) (“the right of the
6 spouses in their separate property is as sacred as is the right in their community
7 property, and when it is once made to appear that property was once of a separate
8 character, it will be presumed that it maintains that character until some direct
9 evidence to the contrary is made to appear.”).

10 Notwithstanding the foregoing, Lynita demands the imposition of a JPI over

11 _____
12 ⁷ *See also Klabacka* at 948 (“The parties contest whether the assets within the
13 SSSTs remained separate property or whether, because of the many transfers of
14 property between the trusts, the assets reverted back to community property.”).

15 ⁸ *See e.g.*, the ELN Trust at Article 12, Section 12.13 (“Separate Property. Any
16 Property held in trust and any income earned by the trusts created hereunder shall be
17 the separate property (in distinction with community property, joint tenancy property,
18 tenancy in common, marital property, quasi-community property or tenancy by the
19 entirety) of the beneficiaries of such trusts. Additionally, any distribution to or for
20 the benefit of any beneficiary shall be and remain the sole and separate property and
21 estate of the beneficiaries.”). *See also* V26:6351-6381, V26:6382, V26:6383, amend
the LSN Trust, V26:6350, V26:6351-6352, V26:6462-6468, V26:6469-6474, and
Last Will and Testament, V26:6384-6388 wherein Lynita disinherited Eric from
Lynita’s Trust, which she represented was her separate property and/or property in
which Eric had no legal interest.

⁹ *See Sprenger v. Sprenger*, 110 Nev. 855, 858, 878 P.2d 284, 287 (Nev. 1994)
citing *In re Marriage of Weaver*, 224 Cal.App.3d 478, 273 Cal. Rptr. 696, 701
(1990).

1 the assets titled in the name of the ELN Trust even though she has failed to make a
2 preliminary showing that she is entitled to a community property interest over the
3 assets titled in the name of the ELN Trust.¹⁰

4 **C. IMPOSING A JPI OVER THE ELN TRUST'S ASSETS WOULD BE**
5 **UNCONSTITUTIONAL AND VIOLATE THE DUE PROCESS RIGHTS**
6 **OF THE ELN TRUST AND OTHER THIRD-PARTIES.**

7 The automatic imposition of a JPI over any and all assets titled in the ELN
8 Trust would violate its due process rights guaranteed by the Fourteenth Amendment
9 of the United States Constitution and Article 1, Section 8 of the Nevada Constitution.
10 As this Court is certainly aware, “[i]njunctive relief is extraordinary relief.”¹¹ It is for
11 this reason that a moving party must meet the following requirements prior to a court
12 granting injunctive relief: (1) a likelihood of success on the merits; and (2) a
13 reasonable probability that the moving party will suffer irreparable injury for which

14 ¹⁰ It would also be inequitable to impose a JPI over the ELN Trust because she
15 only made said request after she disposed of the majority of assets titled in the name
16 of Lynita’s Trust. *See, e.g., Mining & Engr. Co. v. Pollak*, 59 Nev. 145, 85 P.2d
17 1008, 1012 (Nev. 1939) (In Nevada, it “is well settled that a person shall not be
18 allowed at once to benefit by and repudiate an instrument, but, if he chooses to take
19 the benefit which it confers, he shall likewise take the obligations or bear the onus
20 which it imposes.”). Indeed, for example, and by no means of limitation, on or
21 around November 1, 2013 Lynita’s Trust sold real property located at 7065 Palmyra
Avenue, Las Vegas, Nevada 89117 for \$829,000.00. AAPP V19:4691-4742.
Consequently, it would be inequitable to impose a JPI over the ELN Trust after
Lynita has disposed of the majority of assets contained within the LSN Trust as it
would adversely affect the ELN Trust’s ability to conduct business in ordinary
course.

20 ¹¹ *See Department of Conservation and Natural Resources, Div. of Water*
21 *Resources v. Foley*, 121 Nev. 77, 80, 109 P.3d 760, 762 (Nev. 2005) (holding that
parties were not entitled to a preliminary injunction).

1 compensatory damages is an inadequate remedy if the conduct of the parties against
2 whom the injunction is being sought is allowed to continue.¹² Further, “[n]o
3 restraining order or preliminary injunction shall issue except upon the giving of
4 security by the applicant...” NRCPC 65(c). Imposing a JPI against the ELN Trust
5 without requiring Lynita to make a preliminary showing that she possesses a
6 community interest in the same and/or the stringent requirements in NRCPC 65 or
7 NRS 33 violates its due process rights.¹³

8 The imposition of a JPI would also adversely impact the due process rights of
9 individuals/entities that are not parties to this litigation. For example, and by no
10 means of limitation, the ELN Trust possesses a 66.67% interest in real property
11 located 5220 East Russell Road, Las Vegas, Nevada (“Russell Road Property”).
12 AAPP V19:4691-4742. The remaining 33.33% is owned by Eric’s brother, Cal
13 Nelson. AAPP V19:4691-4742. It is undisputed that Cal Nelson is not a party to this
14 action. Notwithstanding, imposing an injunction over the Russell Road Property
15 would impede third-party Cal Nelson’s ability to manage and potentially sell the
16 property in which he has an interest, which is contrary to Nevada law.

17 _____
18 ¹² See NRS 33.010. See also *Cameo, Inc. v. Baker*, 133 Nev. 512, 516, 936 P.2d
1029, 831 (Nev. 1997) quoting *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029,
1029 (Nev. 1987).

19 _____
20 ¹³ See e.g., *Dangberg Holdings Nevada, L.L.C. v. Douglas Cty. & its Bd. of Cty.*
21 *Comm’rs*, 115 Nev. 129, 146, 978 P.2d 311, 321–22 (1999) (court found due process
rights were not violated when moving party showed likelihood of success on merits
and irreparable harm).

1 Indeed, “[c]ourts of equity have long observed the general rule that a court may
2 not enter an injunction against a person who has not been made a party to the case
3 before it.”¹⁴ Said rule is consistent with the policy that “[j]udgments at law or decrees
4 in equity affecting the rights of parties to property cannot affect the rights of third
5 parties not before the court.”¹⁵ “The consistent constitutional rule has been that a
6 court has no power to adjudicate a personal claim or obligation unless it has
7 jurisdiction over the person of the defendant.”¹⁶ “Without a proper basis for
8 jurisdiction, or in the absence of proper service of process, the district court has no
9 power to render any judgment against the defendant's person or property unless the
10 defendant has consented to jurisdiction or waived the lack of process.”¹⁷

11 _____
12 ¹⁴ *Additive Controls & Measurement Systems, Inc. v. Flowdata, Inc.*, 96 F.3d
13 1390, 1394 (Fed.Cir.1996). *See also In re Infant Formula Antitrust Litigation*, MDL
14 878 v. *Abbott 20 Laboratories*, 72 F.3d 842, 842-43 (11th Cir.1995) (court lacks
15 subject matter jurisdiction to issue 21 preliminary or permanent injunction against
16 non-party); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832-833 (2nd Cir.1930)
17 (holding that district court was not authorized to issue an injunction against non-party
18 to the underlying action).

15 ¹⁵ *Rutherford v. Union Land & Cattle Co.*, 47 Nev. 21,213 P. 1045, 1047 (1923).

16 ¹⁶ *In re Janssen*, 213 B.R. 558,566 (B.A.P. 8th Cir. 1997) (court conclude that the
17 IRS may not, as it claims, reach the assets titled in REJ in order to satisfy the
18 individual tax liabilities of the party, for the simple reason that REJ has not been
19 named as a party in these proceedings) (citation omitted).

19 ¹⁷ *SEC v. Ross*, 504 F.3d 1130, 1138-39 (9th Cir.2007) (court held that the
20 district court lacked jurisdiction to enter disgorgement order over money held by a
21 nonparty who had allegedly violated securities laws but had not been personally
served or named in a summons and complaint).



1 Finally, a JPI would impede the ELN Trust's ability to manage and invest the
2 its assets in the ordinary course of business pursuant to Article III, Section 3.1 and
3 Article XII, Section 12.1(b), Section 12.1(e), Section 12.1 (f), Section 12. 1(o), Section
4 12.1 (t), Section 12. 1(v) and Section 12.1(aa) of the ELN Trust. AAPP V26:6475-
5 V:27:6508. In addition to the terms of the ELN Trust, Nevada statutes¹⁸ and
6 treatises¹⁹ impose a duty on trustees to invest trust assets so as to make them
7 productive. However, the Trustees cannot do so with a JPI in place.

8 **D. IF APPLICABLE, THE REQUESTED JPI CANNOT EXTEND TO**
9 **ASSETS OVER WHICH THE DISTRICT COURT FOUND, AND THIS**
10 **COURT CONFIRMED, LYNITA DOES NOT HAVE A COMMUNITY**
11 **PROPERTY INTEREST.**

12 Increasing the scope of the JPI to properties over which the district court
13 found, and this Court confirmed, that Lynita does not have a community property
14 interest would constitute gross error. For example, and by no means of limitation,
15 the JPI cannot and should not encompass Wyoming Downs because the district court

15 ¹⁸ See NRS 164. 715 (“A trustee shall invest and manage the trust property solely
16 in the interest of the beneficiaries”); NRS 164.740 (duty to comply with prudent
17 investor rule); NRS 164.750 (“A trustee shall diversify the investments of the
18 trust...”).

18 ¹⁹ See 76 Am. Jur. 2d Trusts§ 435 (“Under the general law ... [a trustee] must
19 exercise his or her independent discretion and judgment in reference to the
20 investment of funds, even where broad discretionary power of investment is given,
21 although provisions enlarging his or her power to invest are strictly construed.”); G.
Bogert, The law of Trusts and Trustees§ 611 (3d ed. 2010) (“The duty to invest and
make the trust property productive must be performed within a reasonable time,
considering the difficulty or ease of finding an appropriate investment and other
circumstances.”).

1 previously found that Wyoming Downs was not community property, and said
2 ruling was upheld by this Court.

3 As this Court recognized in its May 25, 2017 Opinion, the decree disposed of
4 all of the assets owned by the ELN Trust and the LSN Trust, with the exception of
5 Wyoming Downs. *See Klabacka* at 946. Indeed, after a separate evidentiary hearing
6 on Wyoming Downs on May 30, 2014, the district court entered the following
7 findings and orders:

8 **THE COURT FURTHER FINDS** that Dynasty
9 Development Management, LLC (“Dynasty”) was
10 organized as a Nevada LLC on April 26, 2011, with the
11 ELN Trust as its sole member, and with Eric L. Nelson as
12 its manager.

13 **THE COURT FURTHER FINDS** that in or around
14 November 2011, Banone LLC loaned \$75,000 to Dynasty,
15 which Dynasty utilized as an earnest money deposit toward
16 the purchase of Wyoming Downs.

17 **THE COURT FURTHER FINDS** that Wyoming Downs
18 was purchased around November 16, 2011, by Dynasty for
19 \$440,000, which represented a purchase price of \$400,000
20 and a buyer’s premium of \$40,000.

21 **THE COURT FURTHER FINDS** that Dynasty’s
purchase of Wyoming Downs was financed through debt
by Henderson Capital Group, LLC (“Henderson Capital”),
a hard money lender.

THE COURT FURTHER FINDS that the ELN Trust
entered into a promissory note in favor of Henderson
Capital in the amount of \$700,000. Out of the \$700,000
borrowed \$100,000 was taken out for prepayment of fees
and interest. The remaining \$600,000 in loan proceeds,
plus \$175.46 for tax reimbursement, and the \$75,000

1 earnest money deposit (for a total of \$675,175.46), was
2 applied at closing as follows: \$400,000 for the purchase
3 price, \$40,000 for the buyer's premium, \$30,389 in
4 settlement charges, and \$10,000 for an extension fee FOR
5 A TOTAL OF \$480,839.00. Accordingly, at closing a
total of \$194,336.46 (\$675,175.46-\$480,839.00) of equity
was available to pull out. Eric L. Nelson testified that
from the \$194,336.46, \$75,000 was paid back to Banone,
LLC, leaving new money of \$119,336.46.

6 **THE COURT FURTHER FINDS** that although
7 Wyoming Downs was acquired by the ELN Trust during
8 the pendency of the marriage between Eric L. Nelson and
9 Lynita S. Nelson, the Court does not find it to be
10 community property as it was clearly purchased through
11 Dynasty, an entity wholly owned by the ELN Trust and the
12 Court maintained the ELN Trust. The Court found no
13 facts leading it to conclude Lynita S. Nelson or the LSN
14 Trust has an interest in Wyoming Downs. The Court
maintained the integrity of the ELN Trust and LSN Trust
for the reasons set forth in the Divorce Decree.

15 **THE COURT FURTHER FINDS** that there was no
16 transmutation of Wyoming Downs from separate property
17 to community property, even assuming that Wyoming
18 Downs was separate property of Eric L. Nelson, and not
19 the property of the ELN Trust, separate and distinct from
20 Eric L. Nelson. AAPP V23:5553-5561.

21 Lynita appealed the district court's finding that she did not possess a
community property interest in Wyoming Downs. Indeed, Lynita identified the
following "Issue[] on Appeal" in her Docketing Statement:

Whether the district court erred in denying Lynita a one-
half (1/2) interest in Wyoming Downs, which was
purchased during the pendency of Eric's and Lynita's
divorce proceedings. See LSN Trust's Docketing
Statement at 4:10-12 filed on November 25, 2014 in Case

1 No. 66772.²⁰

2 Although this Court affirmed and vacated portions of the decree, it is
3 imperative to note that this Court upheld, as opposed to overturned, the September
4 22, 2014 Order:

5 Accordingly, we affirm in part and vacate in part the
6 district court's decree of divorce, affirm in part and vacate
7 in part the district court's June 8, 2015, order modifying
8 and implementing the divorce decree, and remand this
9 matter for further proceedings consistent with this opinion.
10 *See Klabacka* at 954.²¹

11 *See id.* at fn. 9 (“[w]e have considered the parties’ other arguments [which would
12 have included Lynita’s argument with respect to Wyoming Downs] and conclude
13 they are without merit.”).

14 Upon information and belief, the reason why this Court did not overturn and/or
15 vacate the September 22, 2014 Order is because the district court had already traced
16 the assets utilized to purchase Wyoming Downs and found that said property was not
17 community property. Consequently, it was unnecessary to remand the issue to the
18 district court for additional tracing.

19 ²⁰ *See also* Lynita’s Answering Brief and Opening Brief on Cross-Appeal at p.
20 48:21-22 filed on March 2, 2016 in Case No. 66772 (“The district court’s division of
21 property was equal based on the property that remained at the time of trial, with the
exception of Wyoming Downs.”) pp. 52-53 (“The district court erred by not equally
dividing Wyoming Downs, which was acquired during the pendency of the divorce
litigation.”).

²¹ The only reference to Wyoming Downs in the June 8, 2015 Order involves
providing documentation and income received, not a disposition of property. *See*
October 16, 2018 Order at 7:18-20. SRAPP V3: 604-613.

1 Notwithstanding, Lynita demands that this Court increase the scope of a JPI to
2 include any and all assets titled in the name of the ELN Trust, which would
3 presumably include Wyoming Downs.²²

4 In light of the foregoing, and the fact that Lynita did not appeal the portion of
5 the October 16, 2018 Order that upheld Wyoming Downs as an asset of the ELN
6 Trust,²³ it would be an error to enter a JPI and/or litigate any issue relating to
7 Wyoming Downs.

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13 ²² This is not the first time that Lynita has sought to have this Court revisit its
14 ruling regarding Wyoming Demands in contravention of NRAP 40(a)(1). Indeed, in
15 its Petition for Writ of Mandamus or Other Extraordinary Relief filed on October 30,
16 2018, Supreme Court Case No. 77254, presented the following issue: “[w]hether this
17 Court affirmed the district court’s decision regarding Wyoming Downs and excluded
18 such property from the tracing to be conducted by the district court, even though
19 Wyoming Downs was not expressly excluded from the tracing of assets within the
20 SSSTs.” *See* Petition for Writ of Mandamus at 2:4-7 filed on October 30, 2018, in
21 Case No. 77254. Lynita’s desperate attempt to litigate this issue in its Writ in 2018,
and again now, is inappropriate and contrary to Nevada law.

18 ²³ *See* October 16, 2018 Order at 7:21-8:3. SRAPP V3: 604-613. (“Therefore, as
19 the Nevada Supreme Court’s Decision vacated portions of the divorce decree relating
20 to assets in the ELN and LSN Trust, and the Wyoming Downs property was disposed
21 of in this Court’s September 18, 2014 Order, and not the June 8, 2015 Order, this
Court finds that the ELN Trust remains the owner of the Wyoming Downs
Property.”).

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CONCLUSION

In light of the foregoing, the ELN Trust respectfully requests that this Court affirm the district court's denial of the JPI.

DATED this 10th day of June, 2019.

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By:  _____

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CERTIFICATE OF COMPLIANCE

1
2 1. I hereby certify that this brief complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and
4 the type style requirements of NRAP 32(a)(6) because this brief has been prepared in
5 a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point
6 Times New Roman type style.

7 2. I further certify that this brief complies with the page or type-volume
8 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by
9 NRAP 32(a)(7)(C), it is not proportionately spaced, has a typeface of 14 points, and
10 contains 5,417 words.

11 3. Finally, I hereby certify that I have read this appellate brief, and to the
12 best of my knowledge, information and belief, it is not frivolous or interposed for
13 any improper purpose. I further certify that this brief complies with all applicable
14 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires
15 every assertion in the brief regarding matters in the record to be supported by
16 appropriate references to page and volume number, if any, of the transcript or
17 appendix where the matter relied on is to be found. I understand that I may be
18 subject to sanctions in the event that the accompanying brief is not in conformity

19 / / /

20 / / /

21 / / /

1 with the requirements of the Nevada Rules of Appellate Procedure.

2 DATED this 10th day of June, 2019.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 10th day of June, 2019, I filed a true and correct
3 copy of the foregoing **RESPONDENT’S ANSWERING BRIEF** with the Clerk of
4 the Court via the Court’s E-flex electronic filing system and notice shall be sent
5 electronically by the Court to the following:

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