

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

IN THE MATTER OF THE  
ADMINISTRATION OF THE SSJ'S ISSUE  
TRUST

IN THE MATTER OF THE  
ADMINISTRATION OF THE SAMUEL S.  
JAKSICK, JR., FAMILY TRUST

TODD B. JAKSICK, Individually, as Co-  
Trustee of the Samuel S. Jaksick Jr. Family  
Trust, and as Trustee of the SSJ's Issue Trust;  
MICHAEL S. KIMMEL, Individually and as  
Co-Trustee of the Samuel S. Jaksick Jr. Family  
Trust; KEVIN RILEY, Individually, as Former  
Trustee of the Samuel S. Jaksick Jr. Family  
Trust, and as Trustee of the Wendy A. Jaksick  
2012 BHC Family Trust; and STANLEY  
JAKSICK, Individually and as Co-Trustee of  
the Samuel S. Jaksick Jr. Family Trust,

Appellants/Cross-Respondents,  
vs.  
WENDY JAKSICK,

Respondent/Cross-Appellant.

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PR17-00445/PR17-00446**

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TODD B. JAKSICK'S OPENING BRIEF**

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## **NRAP 26.1 DISCLOSURE STATEMENT**

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of the Court may evaluate possibly disqualifications or recusal.

Todd B. Jaksick is an individual and is not an entity. The undersigned counsel appeared on behalf of this appellant/cross-respondent before the District Court and are expected to appear on behalf of appellant/cross-respondent on appeal.

Dated this 13<sup>th</sup> day of April, 2021.

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## **NRAP 17 ROUTING STATEMENT**

This matter is presumptively retained by the Nevada Supreme Court because it is litigation involving two trusts whose corpus are in excess of \$5,430,000.

NRAP 17(b)(14). This case also raises the issue of how or when inconsistent determinations on equitable claims following a jury verdict on legal claims may violate a party's constitutional right to a jury trial. While this Court has previously addressed a party's constitutional right to a jury trial in a case involving both legal and equitable claims in other contexts, it has not yet issued a decision on the issue involved in this appeal. NRAP 17(a)(11).

## **JURISDICTIONAL STATEMENT**

This Court has jurisdiction over this matter pursuant to NRAP 3A(b)(1), because it is an appeal from a final judgment. This matter involved a bifurcated trial. The legal claims were resolved by a jury verdict entered on March 4, 2019. The remaining equitable claims were resolved by the District Court's Order After Equitable Trial, entered on March 17, 2020. Judgment was then entered on April 1, 2020. All of the parties timely filed various motions to alter or amend the judgment, and those motions were resolved in the District Court's Order Resolving Submitted Matters, entered on June 11, 2020. An Amended Judgment was entered on July 6, 2020. Todd B. Jaksick then filed his timely notice of appeal on July 10, 2020.

## INTRODUCTION

Respondent/cross-appellant Wendy Jaksick (“Wendy”) sued her brother, appellant/cross-respondent Todd Jaksick (“Todd”), and lost. Wendy asserted thirteen claims against Todd, and Wendy lost every claim she asserted against Todd, individually. As a result, Todd was awarded attorney fees against Wendy. The District Court characterized Wendy’s lawsuit as “vexatious,” “harassing,” and “scorched-earth litigation,” that was “influenced more by animus and avarice than by a desire for balanced justice,” and that resulted in Wendy “overreaching” and “swinging for the fences” in seeking damages against Todd. 11 Trustees’ Joint Appendix (“TJA”) 2098-2100.<sup>1</sup> Yet, the District Court then punished Todd, individually, and not Wendy for the litigation.

Without identifying what Todd, individually, did wrong and without identifying any specific injustice to Wendy, the District Court (1) ordered Todd to disgorge all trustee fees since the inception of his trusteeship, (2) awarded Wendy \$300,000 in attorney fees, and (3) required Todd to repay 25% of the legal fees paid to Maupin, Cox & LeGoy, the law firm that represented Todd and two of his co-trustees, for that firms’ representation of Todd and his co-trustees. Todd’s co-trustees prevailed on *every* claim Wendy asserted against them.

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<sup>1</sup> A copy of the District Court’s order is attached in the Addendum to this brief.

The District Court's order is an abuse of its discretion to order disgorgement of trustee fees and award attorney fees under NRS 153.031(3).<sup>2</sup> Under NRS 153.031(3), if a trustee is found to have breached his fiduciary duty, the court may order disgorgement or award fees "if the court determines that such additional relief is appropriate to redress or avoid an injustice." NRS 153.031(3) codifies the general rules on trustee fee disgorgement and payment of beneficiary attorney fees found in *Restatement (Second) of Torts*, § 243 and *Restatement (Third) of Trusts*, § 88, respectively. As those sections explain, disgorgement of trustee fees is not a punitive remedy and should not be applied merely to punish a trustee. *Restatement (Second) of Torts*, § 243 at cmt. a. Furthermore, fees should only be awarded to a beneficiary if the litigation benefits the trusts. *Restatement (Third) of Trusts*, § 88 at cmt. d.

In this bifurcated action, Wendy prevailed on only one of her legal claims that were tried before the jury. Out of four claims, asserted against four trustees, in both their individual and trustee capacity, the jury only found that Todd, as trustee, breached his fiduciary duty to Wendy and awarded Wendy nominal damages in the amount of \$15,000. As a result of the jury's general verdict, the District Court then properly declined to grant Wendy any of her requested equitable relief or to entertain Wendy's challenges to various documents because these arguments had

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<sup>2</sup> A copy of NRS 153.031 is attached in the Addendum to this brief.

been tried to the jury and rejected. Yet, the District Court then myopically granted Wendy her request to disgorge trustee fees and award attorney fees under NRS 153.031(3) without explaining *what* injustice Wendy suffered by losing her “scorched-earth litigation” that would justify punishing Todd, individually. The District Court’s order should be reversed.

### **STATEMENT OF THE ISSUES**

1. Whether the District Court abused its discretion in ordering appellant/cross-respondent Todd to disgorge all trustee fees earned from the inception of his trusteeships?
2. Whether the District Court abused its discretion in awarding \$300,000 in attorney fees to Wendy?
3. Whether the District Court abused its discretion in requiring Todd to personally repay the Family Trust and Issue Trust for 25% of all attorney fees paid to Maupin, Cox & LeGoy for its representation of Todd, as Trustee of the SSJ Issue Trust and Co-Trustee of the Samuel S. Jaksick Jr. Family Trust, and for its representation of appellants/cross-respondents Michael Kimmel and Kevin Riley, as Co-Trustees of the Samuel S. Jaksick Jr. Family Trust?

## STATEMENT OF THE CASE

The appeal arises from a district court order resolving equitable claims following a bifurcated jury and bench trial.<sup>3</sup> The underlying litigation arose from disputes over the administration of the estate of Samuel Jaksick (“Sam”). Prior to his death, Sam created two trusts: (1) the Samuel S. Jaksick Jr. Family Trust (the “Family Trust”); and (2) the SSJ’s Issue Trust (the “Issue Trust”). Todd, Sam’s son, is the trustee of the Issue Trust, and was Co-Trustee of the Family Trust along with Sam’s other son, appellant/cross-respondent Stanley Jaksick (“Stan”). Appellant/cross-respondent Kevin Riley (“Riley”), Sam’s accountant, was initially co-trustee. He resigned, and Todd appointed appellant/cross-respondent Michael Kimmel (“Kimmel”) as Co-Trustee of the Family Trust.

Sam’s daughter, Wendy, was never involved with the trusts due to her troubled personal and financial background. After Todd and Kimmel requested that the District Court approve various trust administration matters, Wendy initiated what the District Court described as “scorched-earth litigation grounded in entitlement and limited self-awareness.” 11 Trustees’ Joint Appendix (“TJA”) 2099. Wendy asserted thirteen counterclaims against Todd, Stan, Kimmel and Riley, both in their capacities as trustees and in their individual capacities. Wendy’s four legal counterclaims were heard in a three-week jury trial. Although

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<sup>3</sup> The legal claims were tried to the jury, and the equitable claims were subsequently tried in a bench trial.

the jury found, on a general verdict form, that Todd had breached his fiduciary duty to Wendy as trustee, the jury found against Wendy on all other claims against all other parties. The jury awarded Wendy \$15,000 in damages, which is substantially less than the \$80,000,000 that Wendy requested at trial.

Following the jury trial, the District Court held a bench trial on the remaining equitable claims. Wendy's factual bases for her equitable claims were the same as those supporting her legal claims, and the District Court correctly found that it could not grant Wendy her requested equitable relief without violating the parties' Seventh Amendment right to a jury trial because the jury had largely rejected Wendy's position. Thus, among other things, the District Court declined to grant Wendy relief concerning trust accountings, alleged document improprieties, indemnification agreements, and agreements and consents to proposed action because the jury had rejected Wendy's fraud claims involving these documents.

Todd, as an individual, prevailed on all of Wendy's claims against him. Confusingly, however, the District Court then decided to punish Todd individually because the jury found that he had breached his fiduciary duties as trustee. Despite finding that the jury approved the accountings, the District Court relied upon those accountings to order Todd to disgorge all of his trustee fees since the inception of

his trusteeship.<sup>4</sup> The District Court also relied upon Wendy’s arguments regarding “document improprieties and notarial misconduct,” that the District Court conceded the jury rejected, to award Wendy \$300,000 in attorney fees without explaining where that number came from, as no billing statement or other affidavit was ever provided by Wendy’s attorneys, nor any specific amount in fees requested. Finally, the District Court also ordered Todd to repay the Family for 25% of the fees paid to Maupin, Cox & LeGoy for its representation of the trustees from Todd’s personal funds. Following motions to alter or amend the judgment by all parties, which were all largely denied, the District Court clarified that Todd must repay the fees paid for representation of Todd *and* Kimmel and Riley, despite the fact that Kimmel and Riley completely prevailed on all of Wendy’s claims against them. This appeal follows.

## **STATEMENT OF THE FACTS**

### **I. GENERAL FACTUAL BACKGROUND**

#### **A. THE PARTIES**

This lawsuit arises from disputes over the administration of Sam’s estate. Sam had three children: (1) Stan; (2) Wendy; and (3) Todd. 1 TJA 205. While

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<sup>4</sup> A copy of the District Court’s Order After Equitable Trial is attached in the Addendum to this brief.



both Stan and Todd were involved in Sam's business enterprises, Todd and Sam were particularly close. 7 TJA 1290.

Sam's estate contained interests in golf courses and residential real estate developments, which Stan primarily oversaw and managed, and various other real property assets including ranches, water rights, and interests in various entities, which Todd primarily managed and oversaw. 1 TJA 63, 292 Sam also owned and resided in a waterfront home at Lake Tahoe (the "Tahoe House"). *Id.* at 236.

Unlike Stan and Todd, Wendy was not involved with her father's businesses or assets. 11 TJA 2097. Sam intentionally chose not to include Wendy in the management of his assets and estate because Wendy has a troubled past replete with both personal and financial issues. *Id.*

Sam tragically died in a drowning accident in April 2013. 1 TJA 284. Prior to his death, Sam had established the two trusts which are the subject of this appeal, namely, the Family Trust and the Issue Trust. *Id.* at 11-55, 220-274.

## **B. THE FAMILY TRUST**

Sam created the Family Trust in 2003, and amended and restated it in 2006. *Id.* at 220. Under the Family Trust, Sam was the sole trustee from 2003 until his death in 2013. *Id.* at 242. The primary beneficiaries of the Family Trust,

following the death of Sam and his wife,<sup>5</sup> were Stan, Todd and Wendy. *Id.* at 220-241.

Under Family Trust, Stan, Todd and Wendy originally were each allocated one-third of the Family Trust assets. *Id.* However, because Wendy “has received substantial sums of money and/or property from [Sam and/or entities Sam owns],” Sam reduced Wendy’s share by \$1,500,000. *Id.* at 233.

Sam designated Stan, Todd and non-party Ray Benetti as his successor co-trustees under the Family Trust. *Id.* at 242. Wendy was never designated as trustee. *See id.* The Family Trust’s assets, at Sam’s death, consisted of various cash assets, Sam’s office building, several substantial notes receivable, and interests in multiple business entities. *Id.* at 292.

In 2006, the Family Trust also owned the Tahoe House. *Id.* at 236. The Family Trust originally granted Stan, Todd and Wendy the right to use the Tahoe House after Sam’s death. *Id.* If the Tahoe House was sold, then Stan, Todd and Wendy were to split the proceeds equally. *Id.* at 237. By the date of Sam’s death, as discussed below, the Tahoe House had been transferred out of the Family Trust.

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<sup>5</sup> Although Sam’s wife survived his death, she died prior to this litigation.

### **C. THE ISSUE TRUST**

Sam created the Issue Trust in 2007, as an irrevocable trust, and appointed Todd as trustee. *Id.* at 11, 48. The beneficiaries are Todd, his two children, Stan, his three children, Wendy, her two children, and Wendy's grandchild. *Id.* at 2, 11.

The Issue Trust is a "dynasty" trust intended to hold and preserve valuable family real estate for the use and enjoyment of multiple generations of the Jaksick family. *Id.* at 2. Although the Issue Trust allows the beneficiaries to use the property it owns, it prohibits distribution of income or principal to the beneficiaries. *Id.* at 2-3.

At the time of Sam's death, the Issue Trust owned a 49% interest in entities that owned a family ranch, and was the beneficiary of Sam's \$6,000,000 life insurance policy. *Id.* at 63. By the time of trial, as discussed below, the Issue Trust had acquired a 51% interest in Incline TSS, Ltd. ("Incline TSS"), the entity that currently owns the Tahoe House.

### **D. SAM'S SUBSEQUENT ESTATE PLANNING**

By 2012, Sam had changed his estate plan in several significant ways. All of Sam's changes were done upon the advice of, and were drafted by, Sam's attorney, Pierre Hascheff, Esq ("Hascheff"). 7 TJA 1290-1300. The notable changes are: (1) indemnification agreements that Sam entered into with Todd and

Stan in 2008 (the “Indemnification Agreements;” (2) the transfer of the Tahoe House to Incline TSS; and (3) the Second Amendment to the Family Trust.

### **1. The Indemnification Agreements**

The recession was not kind to Sam’s real estate holdings, and as a result, Sam desired to protect Todd and Stan from the personal guarantees Todd and Stan had executed on behalf of various trust assets. 3 TJA 483-96. Thus, in 2008, Sam entered into the Indemnification Agreements with both Todd and Stan, in which Sam, as trustee of the Family Trust, agreed to indemnify Todd and Stan to the fullest extent possible from their obligations on trust assets. *Id.*

### **2. The Tahoe House**

Because the Tahoe House was a valuable asset, Sam also desired to create additional creditor protection for his home. 9 TJA 1556. Thus, on November 1, 2010, Sam, as Trustee of the Family Trust, granted Incline TSS an option to purchase the Tahoe House. *Id.* In 2010, Incline TSS was owned by two of Todd’s family trusts, and Todd was the managing member. *See* 1 TJA 116.

Under the option agreement, Incline TSS agreed to pay the Family Trust \$7,250,000 for the purchase of the Tahoe House, which was slightly above its appraised value of \$6,500,00, and slightly more than the \$6,300,000 mortgage on the home. 9 TJA 1556. Hascheff, who drafted the Option Agreement, recorded it on behalf of Sam in February 2011. *Id.*

In November 2011, Sam, as Trustee of the Family Trust, transferred the Tahoe House to SSJ, LLC, an entity wholly-owned by the Family Trust. *Id.* at 1558. The transfer deed was recorded in December 2011. *Id.* Sam, as Trustee of the Family Trust, then assigned the Family Trust's rights under the option agreement to SSJ, LLC, and that assignment was recorded in February 2012. *Id.*

In December 2012, Sam underwent open heart surgery. 4 TJA 723. Thus, he engaged in a flurry of estate planning during that month to ensure that his estate was in order should something occur. Incline TSS made several option payments before ultimately exercising its option to purchase the Tahoe House on December 17, 2012. *See* 4 TJA 723. As a result, Incline TSS assumed the mortgage on the Tahoe House. 1 TJA 114. The transfer deed was recorded on December 28, 2012. *See* 4 TJA 723.

### **3. The Second Amendment to the Family Trust**

Also in December 2012, Sam finalized his estate plan for the Family Trust under the Second Amendment.<sup>6</sup> Again drafted and prepared by Hascheff, the Second Amendment changed the Family Trust in multiple ways. 7 TJA 1292

First, Sam changed successor trustees, and replaced Ray Benetti with Riley. 2 TJA 277. Stan and Todd remained as Riley's co-trustees. *Id.*

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<sup>6</sup> The First Amendment to the Family Trust was terminated by the Second Amendment.

Second, Sam gifted Stan ten percent of the Family Trust's interest in Toiyabe Investment Co., an entity which Stan was (and is) heavily involved in managing. *Id.* at 278.

Third, Sam gifted Stan and Todd each 6% of the Family Trust's shares of Pioneer Group, Inc. ("Pioneer") stock. *Id.* The Family Trust owned 36% of Pioneer, which in turned owned and operated a casino. *See id.* Sam gifted the stock to Stan and Todd because they qualified for gaming licenses. *See id.* Because of Wendy's troubled past, Sam did not believe Wendy could obtain a gaming license, and so he did not gift Wendy any Pioneer stock. *See id.* The Family Trust retained the remaining 25% of Pioneer stock. *Id.*

Fourth, Sam eliminated the provisions of the Family Trust regarding the Tahoe House and specifically noted that "[s]hould the Lake Tahoe home be sold prior to [Sam's] death, the Trust provisions with respect to the Lake Tahoe home shall no longer apply." *Id.* at 279.

Fifth, Sam changed the Family Trust's dispositions to Wendy. He eliminated the \$1,500,000 deduction from Wendy's share, but prohibited her beneficial interest from being distributed to her outright. *Id.* Instead, \$100,000 of

Wendy's share was to be placed into a trust for her daughter, and twenty percent of Wendy's share was to be placed into a trust for Wendy's son.<sup>7</sup> *Id.*

#### **E. TRUST ADMINISTRATION FOLLOWING SAM'S DEATH.**

Upon Sam's unexpected death in April 2013, Todd, Stan and Riley became successor Co-Trustees. 1 TJA 205. Riley resigned in July 2013,<sup>8</sup> and Stan and Todd jointly administered the Family Trust until December 2016, when Todd appointed Kimmel as a third Co-Trustee. *Id.* The following are the trust administration actions that primarily formed the basis of the underlying litigation:

##### **1. The Pioneer Gaming Stock**

In 2013, after the Pioneer shareholders decided to sell the casino, Todd, Stan, Kevin and Wendy devised a method by which Wendy could potentially obtain funds from the sale despite the fact that she did not have a gaming license. 2 TJA 473. Todd and Stan, who had already been transferred 12% (6% each) of the Family Trust's Pioneer stock agreed to split the Family Trust's remaining 25% interest in Pioneer between their subtrusts. *Id.* at 474. If Wendy obtained a gaming license, the 25% of Pioneer stock would be re-allocated so that all three trusts each contained one-third of the 25%. *Id.* If Wendy did not obtain a gaming

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<sup>7</sup> Sam also created \$100,000 trusts for each of Todd's and Stan's children, to be distributed from Todd's and Stan's respective shares of the Family Trust. 2 TJA 279.

<sup>8</sup> Riley remained as accountant for the trusts, and as trustee of other subtrusts created for Wendy's benefit, which may be subject to the cross-appeal, but are not relevant to the issues in this appeal.

license, the Family Trust would shift assets in the amount of the value of one-third of the 25% of Pioneer stock to Wendy's subtrust to compensate her in kind. *Id.* Wendy, Stan, Todd, and Kevin all signed an agreement and consent to proposed action (an "ACPA") agreeing to this course of action. *Id.* at 475-77. Wendy never obtained a gaming license.

## **2. The Tahoe House**

When Sam died, the Issue Trust received \$6,000,000 from his life insurance policy. 1 TJA 114. Because the Issue Trust prohibits cash distributions, Todd, as Trustee, determined that the \$6,000,000 could be used to purchase a majority interest in Incline TSS, the entity that now wholly-owned the Tahoe House. *See id.* This would bring the Tahoe House back into the Issue Trust, while infusing badly-needed cash into the Family Trust.

On June 5, 2013, Todd, as trustee, beneficiary, and manager/member of Incline TSS, Stan and Wendy all entered into an ACPA in which they agreed to use the \$6,000,000 to reinvest in the Tahoe House through Incline TSS. *Id.* at 114-116. The ACPA stated that Incline TSS was the owner of the Tahoe House, that the \$6,000,000 would be used to purchase a membership interest in Incline TSS, and that the \$6,000,000 would be applied by Incline TSS to the promissory note Incline TSS owed to SSJ, LLC (a Family Trust asset) which was currently



outstanding in the amount of \$7,103,255.32. *See id.* As a result, the Issue Trust became a 54% owner of Incline TSS.<sup>9</sup> *Id.*

### **3. Loans to the Family Trust**

On September 28, 2014, Wendy, Stan, Wendy's adult daughter Alexi Smrt, and Todd all entered into two different ACPAs which allowed the Issue Trust to loan money to the Family Trust to cover the Family Trust's operational costs. 1 TJA 118-128. Todd, Wendy, and Stan then also concurrently entered into ACPAs from the Family Trust, in which they authorized the Family Trust's acceptance of the loan proceeds from the Issue Trust, and approved the Family Trust's entry of a promissory notes and security agreements in favor of the Issue Trust on the loans. 3 TJA 515-535.

### **4. Use of the Indemnification Agreement**

The Family Trust owns interests in several entities that own ranch land in Nevada, which in turn is burdened by a large debt owed to AG Credit and Metlife. *See* 2 TJA 490. Todd was a guarantor on this debt, personally, and this debt was included in Todd's Indemnification Agreement. *Id.* In 2013, Todd, Stan, Wendy, and Riley entered into an ACPA approving Todd's exercise of his Indemnification

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<sup>9</sup> In November 2015, Stan wanted to purchase a 17.02% interest in Incline TSS for \$1,500,000, which would have diluted the Issue Trust's interest in Incline TSS from 54% to 44%. 1 TJA 129-177. The parties entered into a second ACPA which authorized this transaction, but Stan ultimately never exercised his option. *Id.*

Agreement to request that Family Trust funds be used to keep the payments on these loans current. *Id.* at 483-88.

## **5. Use of Family Trust Funds**

Also in 2013, Todd, Stan, Riley and Wendy entered into an ACPA approving the transfer of Family Trust funds to any entity in which the Family Trust had an interest, should that entity or its assets require financial assistance. *Id.* at 498-502.

## **6. White Pine Ranch ACPAS**

In 2013, Todd, Stan, Riley and Wendy entered into an ACPA in which they agreed that Family Trust could sell 100 cattle from White Pine Ranch, one of its entities, in order to finance debt and operations on the ranch land on which the cattle were located. 3 TJA 503-505. In 2014, Todd, Stan and Wendy entered into a second ACPA which approved the use of cash held in White Pine's operating account to pay the Family Trust's taxes. *Id.* at 511-13.

## **7. Sammy's Super Cub**

The Family Trust wholly owned an entity named Sammy Supercub LLC, which in turn owned an airplane. 3 TJA 507. Prior to his death, Sam entered into a promissory note for \$85,000, payable to Duck Lake Ranch, LLC, an entity wholly owned by Todd. *Id.* The promissory note was secured by the airplane owned by Sammy Supercub. *Id.* Stan, Todd and Wendy entered into an ACPA in

which they agreed that the airplane could be distributed to Duck Lake Ranch, LLC, in exchange for forgiveness of the note. *Id.* at 507-508.

## **II. PROCEDURAL HISTORY**

### **A. TRUSTEES' ORIGINAL PETITIONS**

After years of Wendy's demands for money and empty threats of litigation, Todd and Kimmel decided to seek court approval of their actions. In August 2017, Todd and Kimmel filed a petition on behalf of the Family Trust, and asked the District Court to approve all accountings and ACPAs since Sam's death. 2 TJA 204-218. Todd also filed a petition on behalf of the Issue Trust, again seeking approval of all accountings and ACPAs since Sam's death. 1 TJA 1-9.

### **B. WENDY'S COUNTERPETITION**

In January 2018, Wendy objected and filed a counterpetition, which she amended in February 2018, against Todd, Stan, Kimmel and Riley, both in their capacities as trustees (current and former) and in their individual capacities. 4 TJA 713-752. Wendy's amended counterpetition was simply scorched earth litigation, in which she challenged every single act that Todd, Stan, Kimmel and Riley had undertaken as trustees, and many acts that ***Sam*** had done during his lifetime. *See id.*

Wendy alleged that (1) the Second Amendment was forged and fraudulent, (2) Todd had forged her name on every ACPA, (3) the trustees had concealed

assets and information from her and had failed to account, (4) the Tahoe House transfer was the result of forgery and fraud, (5) the Indemnification Agreements were forged and fraudulent, (6) Todd stole cattle and water rights from the Family Trusts, and (7) Todd and Stan stole her money from the sale of Pioneer stock. She asserted claims against Todd, Stan, Kimmel and Riley for: (1) breach of fiduciary duty; (2) failure to adequately disclose and to compel an accounting; (3) civil conspiracy and aiding and abetting; (4) aiding and abetting breaches of fiduciary duty; (5) actual fraud; (6) removal of trustees and appointment of an independent trustee; (7) unjust enrichment and constructive trust; (8) preclusion of trust funds to defend the lawsuit; (9) disgorgement of trustee fees under NRS 153.031(3)(a); (10) contest of ACPAs; (11) contest of Indemnity Agreement; (12) an award of attorney fees under NRS 153.031(3)(b); and (13) declaratory judgment that she did not violate the no-contest clause. *See id.*

### **C. JURY TRIAL**

The District Court bifurcated trial on the legal and equitable issues. *See* 5 TJA 949-953. In February 2019, the parties proceeded to a three-week jury trial on Wendy's legal claims for (1) breach of fiduciary duties, (2) civil conspiracy and aiding and abetting, (3) aiding and abetting breaches of fiduciary duties, and (4) fraud.<sup>10</sup> *Id.*

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<sup>10</sup> Stan, who had also filed a counterpetition, settled his claims prior to jury trial.

At trial, Wendy argued extensively that Second Amendment, and the alleged notarial and document irregularities found within its drafts, the accountings, the ACPAs, the Tahoe House transfer, and the Indemnification Agreements were all acts of fraud. *See* 11 TJA 2094-2118. During closing arguments, Wendy asked that the jury award her \$80 million in damages, which was not only the first time that Wendy had ever provided a damages calculation in the litigation,<sup>11</sup> but was also substantially in excess of the value of the trusts and their assets combined. *Id.* at 2100.

The jury rejected Wendy's arguments. 5 TJA 954-957. It found Riley, Kimmel, and Stan not guilty on every count against them in both their capacities as trustees and as individuals. *Id.* The jury found that Todd was not guilty on every count against him in his individual capacity. *Id.* The jury further found that Todd was not guilty on three of Wendy's four claims against him in his capacities as Co-Trustee of the Family Trust and Trustee of the Issue Trust. *Id.* However, the jury did find that Todd was guilty of breaching his fiduciary duties to Wendy as trustee, and awarded Wendy \$15,000 in compensatory damages. *Id.* The jury's verdict was entered on a general verdict form, and that form does not contain any indication as to what the basis for the breach of fiduciary duty finding was. *See id.*

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<sup>11</sup> This was the subject of a motion for a directed verdict which was rendered moot by the jury's verdict.

## **D. DISTRICT COURT'S ORDER RESOLVING EQUITABLE CLAIMS**

### **1. Bench Trial**

Following the jury trial, the parties proceeded to their bench trial on the remaining equitable claims for (1) approval of accountings (both Family Trust and Issue Trust), and Wendy's contest of these accountings; (2) approval of the ACPAs, and Wendy's contest of these; (3) Wendy's contest of the Indemnification Agreements; (4) Wendy's claim for declaratory judgment that she did not violate the no-contest clause; (5) Wendy's claims for unjust enrichment and constructive trust; (6) confirmation of trustees, and Wendy's request for removal; (7) disgorgement of trustee fees; (8) enjoining trustees from using trust assets to defend the litigation; and (9) Wendy's request for attorney fees. *See* 5 TJA 949-953.

The parties held a one-day trial during which they agreed to submit the equitable claims on briefs to the District Court. 7 TJA 1190-1197. At the hearing, the District Court specifically noted that it had concerns that Wendy's equitable claims were simply reiterations of the legal claims the jury had already heard and substantially rejected. *Id.* at 1200. It also noted that the "ACPA's and Indemnification Agreements . . . were an integral part of the trial" and were "broadcast ad nauseam" to the jury. *Id.* The District Court further noted that Wendy "suffers from a credibility problem with this court." *Id.* at 1201. Finally,

the District Court noted that the trustees had an “overwhelming victory in front of the jury . . . .” *Id.* at 1202.

## **2. Order After Equitable Trial**

Following the bench trial, the parties each submitted an opening brief and a closing brief to the District Court in the summer of 2019. *See* 7 TJA 1275-10 TJA 1979. In March 2020, the District Court issued its Order After Equitable Trial, in which it repeatedly highlighted the Seventh Amendment issues created by Wendy’s equitable claims. 11 TJA 2094-2118. Specifically, the District Court found that:

- Wendy “was attempting to retry her case to obtain a second review of similar facts and an outcome different from the jury verdict,” and the District Court “has no authority to dilute or otherwise modify the jury’s verdict.” *Id.* at 2096.
- “Wendy’s legal and equitable claims are grounded in the same common facts . . . . No matter how Wendy frames or argues her equitable claims, she asks this Court to remedy the identical facts and transactions she placed before the jury.” *Id.* at 2100.
- Wendy’s “complaints about the content and general timing of the accountings were presented to the jury in the legal phase of the trial and are therefore facts in common to the equitable claims . . . . The verdict is an express or implicit rejection of Wendy’s complaints about the accountings.” *Id.* at 2106-2107.
- The ACPAs and Indemnification Agreements, “and related transactions were thoroughly presented and argued to the jury – including document preparation, execution, and other formation irregularities. Thus, at least, the jury verdict is an implicit rejection of Wendy’s arguments . . . . The jury constructively approved and affirmed the ACPAs and indemnification agreements when it reached its verdict. The verdict prevents additional litigation and precludes liability exposure for actions taken in reliance upon these documents.” *Id.* at 2108-2109.
- “Wendy’s allegations of misconduct, document impropriety, and self-dealing underlying her request for equitable relief are inseparable from the legal claims she presented to the jury . . . . Any other

equitable relief would constitute double recovery and alter the jury's verdict in violation of the Seventh Amendment . . . ." *Id.* at 2109.

- "Wendy continues to overwhelm this Court with repetitive and lengthy arguments about the option agreements, forgery, fraud, fiduciary duties, unjust enrichment, trustor intentions, consideration, etc. All of Wendy's arguments were presented to the jury and rejected in the jury's verdict." *Id.* at 2116.

The District Court also found that Wendy's counterclaims were vexatious and harassing. It characterized Wendy as:

- being "particularly personal in allegations, the worst of which were harassing, vexatious, and without factual basis," *id.* at 2098;
- as having refused to settle this case choosing "conflict" over "compromise," *id.* at 2098-99;
- having a "litigation position and trial demand [that] were influenced more by animus and avarice than by a desire for balanced justice," *id.* at 2099;
- "overreaching" by asking for \$80 million in damages, *id.*;
- as "initiat[ing] scorched-earth litigation grounded in entitlement and limited self-awareness," *id.*; and
- as "swinging for the fences" by asking for \$80 million, which exceeds the value of the estate and would deprive Todd and Stan of any beneficial interests. *Id.* at 2100.

As a result, the District Court declined to grant Wendy the majority of her requested relief. *See id.* at 2217-2118. The District Court found that the jury had already implicitly affirmed the accountings and all other challenged documents. *Id.* at 2106-2109. The District Court declined to remove the trustees. *Id.* at 2109.

While the District Court did find that Wendy had probable cause to initiate the litigation, and therefore did not violate the no-contest clause, the District Court rejected all of Wendy's objections and declined to find that Todd was unjustly



enriched and/or to impose a constructive trust. *Id.* at 2105-2109. Finally, the District Court found that Todd, individually, Duck Lake Ranch, LLC and Incline TSS,<sup>12</sup> were prevailing parties. *Id.* at 2117. The District Court then awarded Todd, individually, his attorney fees and costs pursuant to Todd's offer of judgment to Wendy. *See id.*

Yet, despite these findings, the District Court then inconsistently and heavily penalized Todd individually on the Wendy's fee requests. First, the District Court, after finding multiple times that the jury had rejected Wendy's arguments about the content and timing of the accountings, and that the jury had affirmed the accountings, then stated that the District Court disagreed that the content and timing of the accountings was sufficient. *Id.* at 2106-2107. Thus, "based upon the jury's verdict that Todd breached his fiduciary duties (and secondarily, this Court's findings about the timing and content of the accountings)," the District Court granted "Wendy's request that Todd disgorge or disclaim all trustee's fees from the inception of his trusteeship through the date when final judgment is entered."<sup>13</sup> *Id.* at 2109-2110.

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<sup>12</sup> Duck Lake Ranch and Incline TSS became parties to the litigation shortly before trial because these entities held title to assets Wendy was attempting to have transferred back to the various trusts. Wendy never asserted any claims directly against these entities.

<sup>13</sup> This amount was to be offset by the 25% fees Todd was ordered to repay, discussed later. *See id.*

Second, despite finding that Wendy's claims were vexatious and harassing, the District Court awarded Wendy \$300,000 in attorney fees "for prevailing in the claim against Todd for breach of fiduciary duty." *Id.* at 2115. It is unclear where this number came from, as Wendy did not previously file a memorandum of fees or make a formal fee request in any specific amount.

Finally, the District Court commented upon notarial malfeasance that resulted in document improprieties. *Id.* at 2097. Despite having conceded that the jury rejected all of Wendy's arguments regarding these document improprieties, the District Court nevertheless found that these improprieties "warrants a substantial financial consequence upon the trust, which this Court includes in its analysis of . . . attorneys' fee requests." *Id.* The District Court ordered Todd to "reimburse the trusts from his personal resources for 25% of the amount paid because the jury determined he breached his fiduciary duties." *Id.* at 2114-2115.

### **3. The Parties Move to Alter or Amend the Judgment**

Following the District Court's order, judgment was entered and all parties filed motions to alter or amend the judgment. 12 TJA 2202-2254, 15 TJA 2993-3043, 16 TJA 3046-3113. Wendy also sought to recover her costs, and the trustees all moved for awards of attorney fees and costs. 12 TJA 2293-13 TJA 2445, 13 TJA 2451-2769, 14 TJA 2777-2833. The District Court denied Wendy her costs.

15 TJA 2846-2847. It found that Kimmel and Riley were “prevailing parties,” but that “neither Wendy Jaksick nor Todd Jaksick is the prevailing party.” *Id.*

The District Court issued a separate order resolving the parties post-judgment motions. 20 TJA 3639-3650. The District Court largely denied all of the parties’ motions to alter or amend the judgment, but did clarify that Todd was required to “pay 25% of the fees paid to the Law Firm of Maupin, Cox & LeGoy for representing Todd, Michael Kimmel, and Kevin Riley in their trustee capacities.” *See id.* This appeal follows.

### **SUMMARY OF THE ARGUMENT**

The District Court abused its discretion in (1) ordering Todd to disgorge all trustee fees since the inception of his trusteeship, (2) awarding Wendy \$300,000 in attorney fees, and (3) ordering Todd to reimburse the Family Trust and Issue Trust for 25% of the fees paid to Maupin, Cox & LeGoy for its representation of Todd, Kimmel and Riley. Under NRS 153.031(3), the District Court can only disgorge trustee fees or award attorney fees if it finds that such an order is necessary to “redress or avoid an injustice.” No such injustice was ever, or could ever, be found, and the District Court’s orders are simply intended to punish Todd unfairly and disproportionately for conduct that the jury approved.

First, the District Court abused its discretion in ordering Todd to disgorge all trustee fees he has earned since the inception of his trusteeships. The District

Court erroneously relied upon the accountings, which it admitted were affirmed by the jury, to support its disgorgement order. This violated Todd's Seventh Amendment rights, and resulted in impermissible speculation into the jury's general verdict. Furthermore, the District Court failed to explain what injustice existed, given its findings that Wendy initiated frivolous "scorched-earth" litigation. Finally, the District Court's order does not consider the fact that Todd's trusteeship of the Issue Trust began in 2007, and Wendy did not complain of any of Todd's behavior as trustee of that trust until 2013.

Second, the District Court abused its discretion in awarding Wendy attorney fees. Again, the District Court erroneously relied upon alleged document improprieties, which it conceded were rejected by the jury, to find that the trusts should pay Wendy fees, in violation of the Seventh Amendment. The District Court similarly did not make any finding as to how Wendy's scorched-earth litigation benefitted the trusts, so as to justify an award of fees to her.

Finally, the District Court erred in requiring Todd to personally reimburse the trusts for 25% of the fees paid to Maupin, Cox & LeGoy for its representation of Todd, Kimmel and Riley. The District Court provides no rationale for its requirement that the trusts be reimbursed for *Kimmel and Riley*, who prevailed on every single claim. The District Court similarly does not identify any injustice that reimbursement of attorney fees will redress, nor does 25% of fees represent the

accurate percentage of Wendy’s nominal success. Wendy asserted thirteen claims against Todd as trustee, and objected to all requests Todd made in both of his petitions. Out of all of these claims, Wendy won on one and was granted nominal damages. The District Court’s order should be reversed.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

The District Court abused its discretion in (1) disgorging Todd’s trustee fees, (2) awarding Wendy attorney fees, and (3) requiring Todd to repay 25% of the fees paid to Maupin, Cox & LeGoy for representing Todd, Kimmel and Riley. This Court reviews district court orders concerning trust administration and attorney fees for an abuse of discretion. *See Hannam v. Brown*, 114 Nev. 350, 362, 956 P.2d 794, 802 (1998) (trust administration); *Berkson v. LePome*, 126 Nev. 492, 504, 245 P.3d 560, 568 (2010) (attorney fees).

Although the District Court does not clearly identify the legal authorities on which it granted Wendy her requested relief, Wendy requested disgorgement and fees under NRS 153.031(3). *See* 3 TJA 742; 11 TJA 2109-2110. Under NRS 153.031(1)(m), a beneficiary may file a petition to compel a redress of a breach of trust.<sup>14</sup> NRS 153.031(3) states:

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<sup>14</sup> A “breach of trust” is a breach of fiduciary duty. *Restatement (Second) of Trusts*, § 201 (1959); *see also Restatement (Third) of Trusts*, § 93 (2012) (same).

If the court grants any relief to the petitioner, the court may, in its discretion, order any or all of the following additional relief if the court determines that such additional relief is appropriate to redress or avoid an injustice:

(a) Order a reduction in the trustee's compensation.

(b) Order the trustee to pay to the petitioner or any other party all reasonable costs incurred by the party to adjudicate the affairs of the trust pursuant to this section, including, without limitation, reasonable attorney's fees. The trustee may not be held personally liable for the payment of such costs unless the court determines that the trustee was negligent in the performance of or breached his or her fiduciary duties.

Here, the District Court abused its discretion in ordering disgorgement and awarding fees under NRS 153.031(3) merely because the jury found that Todd breached his fiduciary duty to Wendy. NRS 153.031(3) limits the court's discretion to only those instances where the court finds that its order is "appropriate to redress or avoid an injustice," and, as will be shown below, there no was injustice which justifies the District Court's order.

## **II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DISGORGING ALL OF TODD'S TRUSTEE FEES.**

The District Court abused its discretion in ordering Todd to disgorge *all* trustee fees he has earned since the inception of his trusteeships because (1) the District Court incorrectly applied NRS 153.031(3)(a) in a punitive manner, (2) there was no injustice to be redressed or avoided, and (3) the District Court's order is not supported by substantial evidence.

**A. NRS 153.031(3)(a) IS NOT PUNITIVE.**

NRS 153.031(3)(a) codifies the general rule on disgorgement of trustee fees found in the *Restatement (Second) of Trusts* (the “Second Restatement”).<sup>15</sup> Under the Second Restatement, “[i]f the trustee commits a breach of trust, the court may in its discretion deny him all compensation or allow him a reduced compensation or allow him full compensation.” *Restatement (Second) of Trusts*, § 243 (1959).

However, disgorgement should ***not*** be ordered for punitive reasons:

When the compensation of the trustee is reduced or denied, the reduction or denial is ***not in the nature of an additional penalty*** for the breach of trust but is based upon the fact that trustee has not rendered or has not properly rendered services for which compensation is given.”

*Id.* at cmt. a (emphasis added).

NRS 153.031(3) incorporates the Second Restatement’s prohibition on punitive disgorgement by limiting a court’s discretion to reduce trustee compensation to only those cases in which the court determines that disgorgement is “appropriate to redress or avoid an injustice.” Thus, NRS 153.031(3)(a) requires more than the mere grant of “any relief” to justify disgorgement; it expressly requires a determination that disgorgement of attorney fees is appropriate to

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<sup>15</sup> Although the Second Restatement has been replaced by the *Restatement (Third) of Trusts* (the “Third Restatement”), NRS 153.031, which was enacted in 1999, reflects the rule set forth in the Second Restatement, and not the Third Restatement. *See Restatement (Third) of Trusts*, § 100 (2012).

“redress or avoid an injustice.” NRS 153.031(3)(a); *see also Williams v. United Parcel Servs.*, 129 Nev. 386, 391, 302 P.3d 1144, 1147 (2013) (holding that statutory “[p]rovisions are read as a whole, with effect given to each word and phrase”). Because there is no injustice to justify the District Court’s order, its order is an abuse of discretion and should be reversed by this Court.

**B. THERE IS NO INJUSTICE TO BE REDRESSED OR AVOIDED.**

There is no injustice that supports the District Court’s order because (1) the District Court’s findings regarding the accountings violates Todd’s Seventh Amendment right to a jury trial, (2) the general verdict form precludes speculation that the accountings could have been the basis of the breach of fiduciary finding, and (3) there is no other injustice identified by the District Court.

**1. Any Finding that the Accountings Are Insufficient And Support Disgorgement Violates Todd’s Seventh Amendment Right to a Jury Trial.**

The jury affirmed the accountings, as repeatedly noted by the District Court, and the District Court’s reliance on the accountings as an “injustice” warranting disgorgement is an abuse of discretion because it violates Todd’s Seventh Amendment right to a jury trial. *See MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 87, 367 P.3d 1286, 1292 (Nev. 2016) (“An abuse of discretion can occur when the district court . . . disregards controlling law.”). Under the Seventh Amendment of the United States Constitution, “no fact tried by a jury shall be



otherwise re-examined in any Court of the United States . . . .” U.S. Const. amend.

VII. Nevada courts are bound by the Seventh Amendment. *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1111-12, 197 P.3d 1032, 1038 (2008). A party’s Seventh Amendment rights are violated when a court “disregard[s] a jury’s finding of fact.” *Acosta v. City of Costa Mesa*, 718 F.3d 800, 828 (9th Cir. 2013) (internal quotations omitted).

The Seventh Amendment particularly applies to cases such as this one, where legal claims are tried by a jury and equitable claims are tried by a judge. If the “claims are based on the same facts,” then, “in deciding the equitable claims, the Seventh Amendment requires the trial judge to follow the jury’s *implicit* or explicit factual determinations.” *Id.* at 829 (internal quotations omitted) (emphasis added). To be binding, the jury’s findings must be on issues “common” to both the legal and equitable claims. *Sturgis Motorcycle Rally, Inc. v. Rushmore Photo & Gifts, Inc.*, 908 F.3d 313, 343 (8th Cir. 2018). When a jury makes findings on issues common to both the legal and equitable claims, the court “may *not* base its decision on factual findings that conflict with the jury’s findings.” *Id.* at 344 (emphasis added). This means that a court cannot “apply [ ] equitable doctrines on the basis of factual predicates rejected, explicitly or implicitly, by a jury verdict.”

*Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.*, 573 F.3d 947, 959 (10th Cir. 2009).<sup>16</sup>

Here, the District Court correctly found that “Wendy’s complaints about the content and general timing of the accountings were presented to the jury,” were “facts common to the equitable claims,” and that the jury verdict “is an express or implicit rejection of Wendy’s complaints about the accountings.” 11 TJA 2106-07. Yet, the District Court then ordered that Todd disgorge *all* trustee fees because of the District Court’s “findings concerning the timing and content of the accountings.” *Id.* at 2109-2110. Because the jury implicitly affirmed the accountings, there was no injustice arising from these accountings. The District Court’s reliance upon them to order disgorgement violates Todd’s Seventh Amendment rights.

**2. The General Verdict Form Precludes Any Speculation that the Accountings Were the Basis for the Breach of Fiduciary Duty Finding.**

Because a general verdict form was used, the District Court cannot speculate that the accountings were why the jury found that Todd breached his fiduciary duties. When a general verdict form is used, the court cannot speculate as to what

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<sup>16</sup> See also *Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1231 (7th Cir. 1995) (holding that “a judge who makes equitable determinations in a case in which the plaintiff’s legal claims have been tried to a jury is bound by any factual findings made or inescapably implied by the jury’s verdict”).

the jurors intended in their award of damages. *Porterfield v. Burlington N. Inc.*, 534 F.2d 142, 147 (9th Cir. 1976).<sup>17</sup>

Although Wendy did argue that the accountings were insufficient and a breach of the trustees' fiduciary duties, Wendy also argued that Todd breached his fiduciary duty in multiple other ways. For example, she claimed Todd breached his fiduciary duties by not treating her fairly (duty of loyalty), by engaging in self-dealing (the Tahoe House, the airplane, the Indemnification Agreement, and all related ACPAs), and by hiding trust assets from her (Pioneer stock and water rights). *See* 3 TJA 713-752. There is simply no way to determine from the general verdict which of these allegations, if any, were the basis of the jury's decision. *See* 5 TJA 958-1157. The District Court's implication that it was the *accountings* is impermissible speculation.

Further, while some of the things that Wendy accused Todd of doing in violation of his fiduciary duties were done by Todd alone, Kimmel, Riley and Stan were all involved in the Family Trust accountings at various times. *See, e.g.*, 2

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<sup>17</sup> *See also Carr v. Nance*, 370 S.W.3d 826, 838 (Ark. 2010) ("When a jury's verdict is rendered on a general verdict form, it is a finding upon the whole case; this court will not speculate on what the jury found where a general jury verdict is used."); *Mouton v. Dominique*, 476 So. 2d 1095, 1097 (La. Ct. App. 1985) ("Further, where a general verdict awards a lump sum, any speculative itemization of the award is improper."); *Walsh v. City of Kansas*, 481 S.W.3d 97, 109 (Mo. Ct. App. 2016) (holding that "a court may not speculate as to what the jury meant" on a jury verdict form); *Castanos v. Lansing*, 152 N.Y.S.2d 946, 954 (Sup. Ct. 1956) ("[I]t is not the function of the court by speculation to divine the thinking of the jury.").

TJA 288-3 TJA 471. Yet, the jury found that Kimmel, Riley, and Stan *did not* breach their fiduciary duties. 5 TJA 958-1157. Thus, even if the District Court could speculate that the accountings were the basis of the breach of fiduciary duty finding, the evidence does not support the District Court’s speculation. *See Finkel v. Cashman Prof’l Inc.*, 128 Nev. 68, 72-73, 270 P.3d 1259, 1262 (2012) (“A decision that lacks support in the form of substantial evidence is . . . an abuse of discretion.” (Internal quotations omitted)).

### **3. There is No Injustice to Be Redressed or Avoided.**

Aside from the accountings, the District Court does not provide any other basis to justify its order on disgorgement aside from the fact that the jury found Todd breached his fiduciary duties. *See* 11 TJA 2094-2118. However, the plain language of NRS 153.031(3) precludes an order disgorging fees *solely* on the basis that a breach of fiduciary duty was found. The District Court must also determine that the disgorgement is “appropriate to redress or avoid an injustice.” *Id.*

The Second Restatement sets forth the following factors to assist in determining whether disgorgement is appropriate:

(1) Whether the trustee acted in good faith; (2) whether the breach of trust was intentional or negligent or without fault; (3) whether the breach of trust related to the management of the whole trust or related only to a part of the trust property; (4) whether or not the breach of trust occasioned any loss and whether, if there has been a loss, it has been made whole by the trustee; and (5) whether the trustee’s services were of value to the trust.

*Restatement (Second) of Trusts*, § 243 at cmt. c.<sup>18</sup>

The jury's general verdict precludes analysis of the first three factors. However, there is no question that Todd's trusteeship has benefitted the trusts. Neither the jury nor the District Court found that Todd's performance as trustee was detrimental to the trusts.

More importantly, any breach of trust was made whole by the \$15,000 damage award against Todd. The District Court made no findings as to why the damage award was insufficient, if at all. *See* 11 TJA 2094-2118. Even if it had, any attempt to enlarge the jury verdict would similarly violate Todd's Seventh Amendment rights. *See Dimick v. Schiedt*, 293 U.S. 474, 486-87 (1935).

Instead, it appears that the District Court simply ordered Todd to disgorge all of his trustee fees in order to punish Todd. But, disgorgement is not a punitive remedy. *Restatement (Second) of Torts*, § 243 at cmt. a. Here, as the District Court found, the jury implicitly affirmed Todd's conduct in (1) the accountings, (2) the ACPAs and related transactions, and (3) the Tahoe House transaction. 11 TJA 2094-2118. There is simply no basis for disgorgement, and the District Court's order should be reversed.

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<sup>18</sup> While this Court has not yet expressly adopted these factors, other jurisdictions apply these factors in disgorgement proceedings under their respective state statutes. *See, e.g., Prob. Ct. of City of Warwick v. Bank of Am.*, 813 F. Supp. 2d 277, 238 (D.R.I. 2011); *Katz v. Katz*, 190 A.2d 425, 431 (N.H. 1963); *Wadsworth v. Bank of Cal.*, 777 P.2d 975, 980 (Or. Ct. App. 1989).

**C. THE DISTRICT COURT'S ORDER IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

Should this Court disagree and find that disgorgement may have been warranted, this Court should still reverse and remand this matter because the District Court's order requiring Todd to disgorge *all* trustee fees he has earned since the inception of both of his trusteeships is an abuse of discretion that is not supported by substantial evidence. *Finkel*, 128 Nev. at 72-73, 270 P.3d at 1262.

First, Todd has been trustee of the Issue Trust since 2007. 1 TJA 11-48. The District Court's order requires Todd to disgorge fees dating back to 2007. 11 TJA 2110. However, Wendy did not challenge Todd's actions as trustee of the Issue Trust until 2013. *See* 4 TJA 713-752-. The conduct of which Wendy complained, as evidenced in the ACPAs, began in 2013. *See id.* The District Court provided no rationale as to why Todd should be required to disgorge fees for six years *prior* to the earliest date of which Wendy alleged Todd engaged in purportedly wrongful conduct. *See* 11 TJA 2094-2118.

Second, the District Court's order disgorging all trustee fees Todd ever earned is inequitably disproportionate when compared the size of the damages awarded by the jury. Where a breach of trust is attributable to specific property,

the fees disgorged should only be those related to that property. *Estate of Gump*, 2 Cal. Rptr. 2d 269, 279 (Ct. App. 1991).<sup>19</sup>

Because a general verdict form was used, neither this Court nor the District Court can attribute the jury's finding of a breach of fiduciary duty to any specific property. However, this does not mean that the District Court has unfettered discretion to disgorge all fees. As the California Court of Appeals explained, the primary purpose of disgorgement is to remedy a loss which has not otherwise been compensated for by the trustee (i.e., through damages). *Estate of Gump*, 2 Cal. Rptr. 2d at 279. Thus, "the rationale for reducing or disallowing compensation must be that the beneficiary should not be required to compensate the trustee for services which were rendered negligently or in breach of trust." *Id.* In explaining this rationale, the California Court of Appeals reaffirmed its prior holding that, "[w]here it is shown that the trustee neither acted fraudulently nor

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<sup>19</sup> See also *In re Trusteeship of Tr. of Williams*, 631 N.W.2d 398, 409 (Minn. Ct. App. 2001) ("Because the reduction or denial of fees is based on the trustee's failure to render or to render properly services for which compensation is given, we hold the corollary to be true: Before reducing or denying trustee's fees, a district court must find that the fees to be reduced or denied relate to the trustee's failure to render services or to render services properly."); *Restatement (Second) of Trusts*, § 243 at cmt. c (directing courts to consider "whether the breach of trust related to the management of the whole trust or related to only part of the trust property" in deciding whether to order disgorgement); *Restatement (Third) of Trusts*, § 100 (2012) (limiting trustee liability for breach of trust to only the amount of the trust property detrimentally "affected by the breach").

benefitted from its negligence, the measure of the trustee's liability is generally limited to the amount of loss actually suffered by the trust beneficiaries.”<sup>20</sup> *Id.*

Here, the District Court did not correlate Todd's fee disgorgement to the damages awarded to Wendy, nor did it attempt to explain why Todd must disgorge all fees when he was found to have damaged a beneficiary in the minimal amount of \$15,000. *See* 11 TJA 2094-2118. For these reasons, Todd requests that this Court reverse the District Court's order on disgorgement.

### **III. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING WENDY ATTORNEY FEES.**

The District Court abused its discretion in awarding Wendy \$300,000 in attorney fees because (1) any reliance upon document improprieties to justify a fee award violates Todd's Seventh Amendment rights, and (2) Wendy's scorched-earth litigation did not benefit the trusts.

#### **1. Any Reliance Upon Alleged Document Improprieties to Justify a Fee Award Violates Todd's Seventh Amendment Rights.**

The District Court abused its discretion and violated Todd's Seventh Amendment rights by relying upon the alleged “notarial misconduct” as a basis for awarding fees to Wendy. 11 TJA 2097. The District Court specifically found that the “notarial misconduct” in the “document preparation, execution, and other formation irregularities” were presented to the jury and the “the jury verdict is an

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<sup>20</sup> The California Court of Appeals' holding conforms to the Third Restatement. *See Restatement (Third) of Trusts*, § 100.



implicit rejection of Wendy’s arguments.” *Id.* at 2109-2116. By relying upon the notary errors, which the District Court concedes the jury rejected, the District Court violated Todd’s Seventh Amendment rights by making a factual finding that conflicts with the jury’s findings. *Sturgis Motorcycle Rally, Inc. v. Rushmore Photo & Gifts, Inc.*, 908 F.3d 313, 344 (8th Cir. 2018).<sup>21</sup>

## **2. Wendy’s Scorched-Earth Litigation Did not Benefit the Trusts.**

As with disgorgement, the District Court did not find that the fee award was necessary to redress or avoid injustice, as required by NRS 153.031(3). *See* 11 TJA 2094-2118. When it comes to awarding a beneficiary attorney fees, an “injustice” which must be redressed arises when the beneficiary’s litigation benefits the trust, and, therefore, the trust should bear the expense of the litigation. *Restatement (Third) on Trusts*, § 88, cmt. d (2012) (emphasis added). As the Restatement explains,

A court may, in the interest of justice, make an award of costs from the trust estate to a beneficiary for some or all of his or her attorney fees and other expenses. ***Ordinarily, however, awards of this type are limited to situations in which the beneficiary’s participation in the proceeding is beneficial to the trust,*** usually either because of a recovery that benefit’s the trust beneficiaries generally (rather than merely the beneficiary in question) or by clarifying a significant uncertainty in the terms of the trust.

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<sup>21</sup> Furthermore, a fee award of \$300,000 for notarial misconduct is excessive, as Nevada law limits damage awards against employers of notaries to \$2,000. NRS 240.150(2).

*Id.* (Emphasis added). This Court, similarly, has previously recognized that attorney fees should only be paid out of a trust estate if the litigation benefitted the trust. *See In re Estate of Bowlds*, 120 Nev. 990, 1000, 102 P.3d 593, 600 (2004).<sup>22</sup>

Wendy's participation in the litigation ***did not*** benefit the Family Trust or Issue Trust, and her de minimis award of \$15,000 in damages only benefitted Wendy personally. The District Court specifically found that: (1) "Wendy was particularly personal in her allegations, the worst of which were harassing, vexatious, and without factual basis;" (2) that Wendy would not "choose compromise over conflict," (3) that "Wendy's litigation position and trial demand were influenced more by animus and avarice than by a desire for balance justice," (3) that Wendy's requested damages of \$80,000,000 was an "overreach," and (4) that "Wendy initiated scorched-earth litigation grounded in entitlement and limited self-awareness." 11 TJA 2094-2118. As a result of all of this, the trusts were embroiled in extremely expensive litigation. Yet, despite making these findings, the District Court then awarded Wendy \$300,000 to the further detriment of the trusts. *Id.* at 2115.

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<sup>22</sup> *See also Whittlesey v. Aiello*, 128 Cal. Rptr. 2d 742, 748 (Ct. App. 2002) ("The underlying principle which guides the court in allowing costs and attorneys' fees incidental to litigation out of a trust estate is that such litigation is a benefit and a service to the trust." (Internal quotations omitted)); *Cook v. Brateng*, 262 P.3d 1228, 1236 (Wash. Ct. App. 2010) ("Generally, attorney fees may be awarded against a trust only where the litigation results in a substantial benefit to the trust." (Internal quotations omitted)).

The District Court's award of fees is not only contrary to the intent of NRS 153.031(3)(b), but is also contrary to Nevada public policy. In Nevada, attorney fees are awarded *against* parties who are found to have brought harassing and vexatious lawsuits, *not to them*. See NRS 18.010(2)(b).

Finally, the District Court provides no basis for its amount awarded. The District Court was not provided with fee memorandums until *after* it entered its order. See 17 TJA 3340-3344. It appears that the District Court simply summoned the \$300,000 out of nowhere, and decided that seemed like a fair amount of fees to award to a litigant who only prevailed on one of her twelve claims, and who was found to be harassing and vexatious by the same court awarding her fees. The District Court's order should be reversed.

#### **IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN ORDERING TODD TO REPAY 25% OF THE FEES INCURRED BY TODD, MICHAEL KIMMEL, AND KEVIN RILEY.**

The District Court abused its discretion in requiring Todd to personally reimburse the Family Trust for 25% of all attorney fees charged by Maupin, Cox & LeGoy because (1) Todd should not be required to repay fees charged for representation of Kimmel and Riley, (2) there is no basis to order Todd to reimburse the trusts for his representation, and (3) the District Court's 25% is not based upon any evidence or rationale.

**1. The District Court Abused Its Discretion in Requiring Todd to Repay Fees for Representation of Kimmel and Riley.<sup>23</sup>**

The District Court erred in requiring Todd to repay attorney fees that the Family Trust incurred in representing *Kimmel and Riley*, because Kimmel and Riley prevailed on all claims Wendy asserted against them and the Family Trust was not harmed by their legal representation. As an initial matter, the law is clear that Kimmel and Riley are entitled to pay for their legal representation as trustees from the corpus of the Family Trust. NRS 153.070 (costs are governed by the trust instrument); 2 TJA 272 (“The Trustee is hereby authorized to defend, at the expense of the trust estate, any contest of or other attack of any nature on the trust estate . . . ). As the Restatement explains, “the trustee can properly incur expenses for reasonable counsel fees and other costs in bringing, defending or settling litigation as appropriate to proper administration or performance of the trustee’s duties.” *Restatement (Third) of Trusts*, § 88 at cmt. d (2012).

Furthermore, there is no question that Maupin, Cox & LeGoy’s representation of Riley and Kimmel benefitted the Family Trust, as Kimmel and Riley prevailed on all of Wendy’s claims against them. While this Court has

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<sup>23</sup> NRS 153.031(3)(b) limits the District Court’s discretion to awarding fees “to any party” that were “incurred by the party.” Technically, the Family Trust was not, and cannot be, a party to any litigation. *Nicholson v. Fazeli*, 6 Cal. Rptr. 3d 881, 891 (Ct. App. 2003) (explaining that the trustee, and not the trust, is the actual party to litigation). However, Wendy requested that the District Court enter an order prohibiting the trusts from using trust funds to defend against her allegations, and it is possible (albeit unclear) that is the request the District Court was considering in this portion of its order.

previously recognized that estate representatives are only entitled to compensation from the estate if their services benefit the estate, *In re Estate of Bowlds*, 120 Nev. at 1000, 102 P.3d at 600, there is simply no question that Riley's and Kimmel's services benefitted the Family Trust given that Wendy lost every single claim she filed against them.

The District Court provides no basis as to why Todd should repay the attorney fees incurred by Kimmel or Riley, other than that Todd was found to have breached his fiduciary duties to Wendy. 11 TJA 2114-2115. But, Kimmel voluntarily appeared as a petitioner with Todd in the Family Trust petition. *See* 2 TJA 204. Todd never asserted any claims against Kimmel. And it was Wendy, not Todd, who named Riley as a party and asserted claims against both he and Kimmel in her counterpetition. 4 TJA 713.

Furthermore, because Wendy was attacking the validity of the Second Amendment to the Family Trust, both Kimmel and Todd had a duty to defend. When the validity of a trust is challenged, a trustee "has a duty to defend the trust." *Restatement (Third) of Trusts*, § 76 at Reporter Note (2007); *see also* Bogert, *Trusts* § 98 (Hornbook, 6th ed. 1987) ("A trustee has a duty to defend the trust . . . ."). The District Court's order appears to punish Todd for the fact that Wendy chose to unsuccessfully sue Kimmel and Riley. But NRS 153.031(3) is not a punitive statute. *See* NRS 153.031(3) (limiting the court's discretion to those

orders necessary to “avoid or redress an injustice”); *see also Restatement (Second) of Trusts*, § 243 at cmt. a.

## **2. There is No Basis to Order Todd to Reimburse the Trust**

Under NRS 153.031(3)(b), the court has discretion order a trustee who is found to have breached a fiduciary duty to personally pay any party their reasonable attorney fees and costs. However, again, this discretion is predicated upon a finding that such repayment is necessary to “redress or avoid an injustice.” NRS 153.031(3). The District Court ignored this mandate, when it summarily held that Todd must repay 25% of all attorney fees simply because the jury found that he breached his fiduciary duties to Wendy. 11 TJA 2114-2115. Todd has already extensively briefed the reasons why there was no injustice above, i.e., Wendy’s vexatious litigation, Wendy’s compensation in the form of a \$15,000 damage award, and the complete lack of any other basis upon which the District Court could find an injustice that does not violate Todd’s Seventh Amendment rights.

Furthermore, the District Court provides no rationale as to why Todd must reimburse 25% of all fees paid. *See id.* Wendy did not prevail on 25% of her claims against Todd. She won one out of thirteen claims against Todd, as trustee. Wendy did not prevail on *any* percent of her claims against Kimmel and Riley. Wendy similarly lost on all of the trustees’ equitable claims for relief. 25% of the fees paid do not accurately represent the percentage of work done on Wendy’s one

successful claim. Moreover, the District Court failed to consider that Maupin, Cox & LeGoy was also assisting Todd and the other trustees with ongoing trust administration matters that were not subject to the litigation. The 25% amount is excessive and punitive, and should be reversed.

### **CONCLUSION**

For the foregoing reasons, Todd respectfully requests that this Court reverse the District Court's order (1) disgorging Todd's trustee fees, (2) awarding Wendy \$300,000 in attorney fees, and (3) requiring Todd to reimburse the trusts for 25% of the attorney fees paid to Maupin, Cox & LeGoy for representation of Kimmel and Riley.

Dated this 13<sup>th</sup> day of April, 2021.

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/s/ Therese M. Shanks

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## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this Appellant/Cross-Respondent Todd B. Jaksick's Opening 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 16 in 14 font and Times New Roman type.

2. I further certify that this opening brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 11,121 words.

3. Finally, I hereby certify that I have read this appellate 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.

Dated this 13<sup>th</sup> day of April, 2021.

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## **CERTIFICATE OF SERVICE**

I certify that on the 13th day of April, 2021, I served a copy of **APPELLANT/CROSS-RESPONDENT TODD B. JAKSICK'S OPENING BRIEF** upon all counsel of record:

☐ BY MAIL: I placed a true copy thereof enclosed in a sealed envelope addressed as follows:

☐ BY FACSIMILE: I transmitted a copy of the foregoing document this date via telecopier to the facsimile number shown below:

☒ BY ELECTRONIC SERVICE: by electronically filing and serving the foregoing document with the Nevada Supreme Court's electronic filing system:

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DATED this 13th day of April, 2021.

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# ADDENDUM

West's Nevada Revised Statutes Annotated

Title 12. Wills and Estates of Deceased Persons (Chapters 132-156)

Chapter 153. Administration of Trusts; Estates for Life and Years (Refs & Annos)

N.R.S. 153.031

153.031. Petition by trustee or beneficiary concerning affairs of trust:  
Purposes of petition; contents; notice and hearing; additional relief

Effective: October 1, 2017  
Currentness

1. A trustee or beneficiary may petition the court regarding any aspect of the affairs of the trust, including:
  - (a) Determining the existence of the trust;
  - (b) Determining the construction of the trust instrument;
  - (c) Determining the existence of an immunity, power, privilege, right or duty;
  - (d) Determining the validity of a provision of the trust;
  - (e) Ascertaining beneficiaries and determining to whom property is to pass or be delivered upon final or partial termination of the trust, to the extent not provided in the trust instrument;
  - (f) Settling the accounts and reviewing the acts of the trustee, including the exercise of discretionary powers;
  - (g) Instructing the trustee;
  - (h) Subject to the requirements of chapter 165 of NRS, compelling the trustee to report information about the trust or account, to the beneficiary;
  - (i) Granting powers to the trustee;
  - (j) Fixing or allowing payment of the trustee's compensation, or reviewing the reasonableness of the trustee's compensation;
  - (k) Appointing or removing a trustee;

**153.031. Petition by trustee or beneficiary concerning affairs of..., NV ST 153.031**

(l) Accepting the resignation of a trustee;

(m) Compelling redress of a breach of the trust;

(n) Approving or directing the modification or termination of the trust;

(o) Approving or directing the combination or division of trusts;

(p) Amending or conforming the trust instrument in the manner required to qualify the estate of a decedent for the charitable estate tax deduction under federal law, including the addition of mandatory requirements for a charitable-remainder trust;

(q) Compelling compliance with the terms of the trust or other applicable law; and

(r) Permitting the division or allocation of the aggregate value of community property assets in a manner other than on a pro rata basis.

2. A petition under this section must state the grounds of the petition and the name and address of each interested person, including the Attorney General if the petition relates to a charitable trust, and the relief sought by the petition. Except as otherwise provided in this chapter, the clerk shall set the petition for hearing and the petitioner shall give notice for the period and in the manner provided in NRS 155.010. The court may order such further notice to be given as may be proper.

3. If the court grants any relief to the petitioner, the court may, in its discretion, order any or all of the following additional relief if the court determines that such additional relief is appropriate to redress or avoid an injustice:

(a) Order a reduction in the trustee's compensation.

(b) Order the trustee to pay to the petitioner or any other party all reasonable costs incurred by the party to adjudicate the affairs of the trust pursuant to this section, including, without limitation, reasonable attorney's fees. The trustee may not be held personally liable for the payment of such costs unless the court determines that the trustee was negligent in the performance of or breached his or her fiduciary duties.

**Credits**

Added by Laws 1999, c. 467, § 428. Amended by Laws 2007, c. 251, § 12; Laws 2009, c. 358, § 28; Laws 2011, c. 270, § 157; Laws 2015, c. 524, § 21, eff. Oct. 1, 2015; Laws 2017, c. 311, § 30, eff. Oct. 1, 2017.

Notes of Decisions (1)

N. R. S. 153.031, NV ST 153.031

**153.031. Petition by trustee or beneficiary concerning affairs of..., NV ST 153.031**

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Current through legislation of the 81st Regular Session (2021) effective as of March 29, 2021. Text subject to revision and classification by the Legislative Counsel Bureau.

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End of Document

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THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

In the Matter of the Administration of the Case No. PR17-00445  
SSJ'S ISSUE TRUST.

\_\_\_\_\_/

CONSOLIDATED

In the Matter of the Administration of the Case No. PR17-00446  
SAMUEL S. JAKSICK, JR. FAMILY TRUST. Dept. No. 15

\_\_\_\_\_/

**ORDER AFTER EQUITABLE TRIAL**

On August 2, 2017, the trustees of the SSJ's Issue Trust ("Issue Trust") and the Samuel S. Jaksick, Jr. Family Trust ("Family Trust") filed Petitions for Confirmation of Trustee and Admission of Trust to the Jurisdiction of the Court, and for Approval of Accountings and Other Trust Administration Matters.<sup>1</sup> October 10, 2017, Wendy Jaksick filed an Opposition and Objection to the Petition. On January 19, 2018, Wendy filed a Counterpetition to Surcharge Trustees for Breach of Fiduciary Duties, for Removal of Trustees and Appointment of Independent Trustee(s), and for Declaratory Judgment and Other Relief, which was subsequently amended on February 23, 2018. Family Trust co-trustee Stan Jaksick filed an Objection to Approval of Accountings and Other Trust Administration Matters on October 10, 2017. Todd Jaksick, as trustee of the Issue Trust

<sup>1</sup> Family Trust co-trustee Stan Jaksick did not join in the petitions.



1 and co-trustee of the Family Trust, and Michael Kimmel as co-trustee of the Family Trust,  
2 are represented by Donald Lattin and Carolyn Renner. Todd is represented in his  
3 individual capacity by Kent Robison. Mr. Robison also represents Duck Lake Ranch, LLC,  
4 Incline TSS, Ltd., and Sammy Supercub, LLC. Stanley Jaksick, as co-trustee of the Family  
5 Trust, is represented by Adam Hosmer-Henner and Philip Kreitlein. Wendy is  
6 represented by Mark Connot and Kevin Spencer.

7 1. This Court presided over a jury trial on legal claims between February 14,  
8 2019, and March 4, 2019. The jury concluded Todd breached his fiduciary duty as trustee  
9 and awarded damages of \$15,000. The jury found no other trustee breached any fiduciary  
10 duty. In addition, the jury found Wendy had not proven her claims for 1) civil conspiracy  
11 and aiding and abetting, 2) aiding and abetting breach of fiduciary duty, or 3) fraud  
12 against any counter-respondent whether individually or as trustee. The jury did not find  
13 any counter-respondent acted with fraud, oppression, or malice.

14 2. On May 13, 2019, this Court began a bench trial to resolve the remaining  
15 equitable claims. By stipulation, the parties submitted written closing trial statements and  
16 replies. This Court authorized supplemental briefing on a narrow issue related to Exhibit  
17 561. This Court has considered all briefs and evidence admitted during the equitable trial  
18 (including many exhibits previously admitted at jury trial).<sup>2</sup> This Court is aware that  
19 disagreements continue and Wendy alleges ongoing breaches of fiduciary duties, as  
20 illustrated by the moving papers relating to post-trial costs, the 2018 annual accountings,  
21 and distribution guidance. It now finds and orders as follows:

### 22 General Findings

23 1. As a factfinder, this Court is authorized to consider its everyday common  
24 sense and judgment, and determine what inferences may be properly drawn from direct  
25 and circumstantial evidence. See Lewis v. Sea Ray Boats, Inc., 119 Nev. 100, 105, 65 P.3d

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26  
27 <sup>2</sup> On May 13, 2019, the parties stipulated into evidence many exhibits previously admitted during the jury  
28 trial. Wendy also offered new evidence during the equitable phase of trial. A list of all documentary  
evidence admitted on equitable issues is contained in this Court's Order Addressing Evidence at Equitable  
Trial, dated May 20, 2019. This Court has not considered unadmitted documentary evidence. However, this  
Court has considered deposition testimony properly part of the trial record pursuant to NRCP 32.

1 245, 248 (2003); Nev. 1GI.5 (2011); Nev. 2EV.3 (2011); Nev. J.I. 1.05 (1986).

2 2. The facts presented in support of the equitable claims inextricably overlap  
3 with the legal claims presented to the jury. Despite how the claims are pled, Wendy is  
4 attempting to retry her case to obtain a second review of similar facts and an outcome  
5 different from the jury verdict.<sup>3</sup> This Court may or may not have reached the same  
6 decision as the jury. Regardless, it has no authority to dilute or otherwise modify the  
7 jury's verdict.

8 3. The file materials compose more than 17,000 pages. There were more than  
9 300 separate pleadings, motions, oppositions, replies, joinders, and other substantive  
10 papers filed in this proceeding. The parties produced tens of thousands of documents  
11 before trial and marked 677 exhibits for the two trials, of which 227 were admitted. The  
12 substantive papers (with exhibits and transcripts) filed since the jury's verdict compose  
13 more than 4,000 pages. This Court has read and re-read the pending moving papers, to  
14 include exhibits and transcripts. It has analyzed every argument presented and carefully  
15 studied the cited authorities. It cannot synthesize the competing moving papers, exhibits,  
16 and arguments into a single coherent order. It cannot resolve the arguments in minutia.  
17 Therefore, this Court elects to make general findings, which are substantially supported by  
18 the evidence of record.

19 4. This Court regrets some of its more direct findings, which it must disclose to  
20 support its discretionary resolution of equitable claims.

21 5. Sam Jaksick created substantial wealth during his life but his leveraged  
22 estate was compromised by the "great recession" during the last season of his life. Sam's  
23 estate is exceedingly complex because he used tens of different corporate entities as  
24 holding companies for his wealth. Sam also partnered with non-family business entities.

25 6. Sam had three children: Stan, Wendy, and Todd. Sam loved each of his  
26

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27 <sup>3</sup> On January 3, 2018, Wendy demanded a jury trial on all legal claims. Wendy demanded a jury – at least in  
28 part – because she likely suspected a judge's comprehensive, studious examination of all evidence would not  
result in the \$80 million compensatory damages and additional punitive damages she asked the jury to  
award. This Court honors Wendy's unfettered constitutional right to a jury trial but it will not re-visit the  
identical facts to arrive at a different outcome for Wendy.

1 children, despite their different strengths, weaknesses, and personalities. Wendy did not  
2 transition well into adulthood and Sam was aware of her inability to provide for herself.  
3 Wendy does not understand financial complexities. Sam was more confident in Stan and  
4 Todd as he worked with them during his life and designated them to continue  
5 participating in his estate and business affairs after his death. Stan's trial participation was  
6 not lengthy but he appears to enjoy some financial fluency and business sophistication.  
7 Stan also presented as a credible witness and thoughtful sibling. While Todd is most  
8 familiar with Sam's business and trust affairs, he is only marginally sophisticated as a  
9 trustee. He regularly deferred to the knowledge and expertise of others.<sup>4</sup> Todd also  
10 presented as conflicted by his own interests, influenced by his animus towards Wendy,  
11 and confused about his duties as a neutral trustee.

12         7. Sam's estate plan evolved over the years, and its last iteration was influenced  
13 by debt, tax avoidance, asset protection, and planning around Stan's divorce. Both Sam  
14 and Todd were exposed to personal liabilities on substantial debts Sam had incurred.  
15 Some of the estate documents were created in haste because of Sam's heart illness and  
16 surgery in December, 2012. (Sam survived his heart illness and tragically died in a water  
17 accident in 2013). Some of the 2012-13 estate planning documents are disorganized,  
18 internally inconsistent, and complicated by notarial mischief or neglect. This Court was  
19 particularly troubled by the notary's abdication of statutory responsibilities, which was an  
20 influencing fact in the litigation Wendy pursued. Notaries are given great authority and  
21 their actions induce reliance. The notary at issue fell below the statutory standards. This  
22 finding alone warrants a substantial financial consequence upon the trust, which this  
23 Court includes in its analysis of the no-contest penalty and attorneys' fees requests.

24         8. Todd's participation in Sam's estate beginning in 2012 can be viewed  
25 through two opposing lenses: he was either a disconnected participant who yielded to his  
26

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27 <sup>4</sup> This Court understands jury instruction no. 11, which does not alter the fact that Todd struggled under the  
28 shadow of his father's business acumen. The dynamic of Todd relying on professionals regarding the  
accountings, while the professionals provided accountings with disclaimers and hyphens, created  
uncertainty (or at least the appearance of uncertainty) about transactions, values, and who was ultimately  
responsible for acts and accountings of trust administration.

1 father's wishes, or he was a subtly strategic participant who enriched himself to the  
2 detriment of his siblings. These opposing possibilities are relevant only to understand  
3 how this dispute became so bitter. This Court is inclined to find Todd was the former  
4 rather than the latter, but regardless, Stan and Wendy had cause to seek answers to  
5 questions created by document anomalies, inadequate disclosures, and transactions  
6 inuring to Todd's benefit.

7       9.       This action began when Stan, Wendy, and Todd were opposed to each other.  
8 The dispute was exacerbated by inadequate information and self-interested perspectives.  
9 Some of the more personal allegations among siblings reveal a family influenced by  
10 misperceptions and individual interests. Wendy was particularly personal in her  
11 allegations, the worst of which were harassing, vexatious, and without factual basis. There  
12 were at least seven lawyers zealously advocating for their clients, which further  
13 entrenched the siblings against each other. The children chose litigation over compromise  
14 to work through the complexities of Sam's estate and their disparate financial  
15 circumstances. With more effortful disclosures, neutral access to information, and a little  
16 sibling patience, they *might* have worked through the messiness of Sam's estate to reach a  
17 non-litigation resolution. Instead, the children sued each other, with Todd and Stan  
18 settling their dispute just days before the jury trial began. Despite the settlement, this  
19 Court is aware of the allegations Stan made against Todd in his deposition and trial  
20 testimony. The settlement does not extinguish Stan's pleading allegations and  
21 testimony – it merely reflects Todd and Stan's strategic and well-advised decision to  
22 compromise their claims before trial. The settlement worked to Wendy's trial detriment,  
23 yet she chose trial over settlement and must now accept the consequences of her choice.  
24 Stan's allegations and testimony are relevant to contextualize the legal and equitable  
25 claims, particularly the request to impose a no-contest penalty and for attorneys' fees  
26 under NRS Chapter 18 and NRCP 68.

27       10.       Todd and Stan contend they made every effort to avoid litigation but could  
28 not persuade Wendy or her attorneys to choose compromise over conflict. This is mostly

1 accurate, as Wendy's litigation position and trial demand were influenced more by animus  
2 and avarice than by a desire for balanced justice. In particular, Wendy's \$80 million jury  
3 demand revealed her overreach. However, Wendy's litigation zeal does not extinguish  
4 her probable cause to seek answers and formulate claims based upon the information she  
5 had at the time — the same information that led to Stan's allegations against Todd.

6       11. Throughout trial this Court reflected upon how Sam would respond if he  
7 observed his children spending millions of dollars litigating his estate. The parties  
8 repeatedly invited this Court to consider Sam's testamentary intentions. Responding to  
9 that invitation, this Court has wondered how Sam would react to see his estate  
10 disproportionately allocated among his children. There is no way to know how or if Sam  
11 would have enlarged Wendy's beneficial interests if he survived the economic recovery.  
12 Sam loved Wendy despite her issues, and this Court suspects Sam would have continued  
13 his pattern of lifetime largesse in favor of his troubled daughter. But suspicion and  
14 speculation are beyond this Court's authority. Death arrives at its own inconvenient time  
15 and none can alter its consequences. Wendy is simply without her paternal benefactor and  
16 is susceptible to the trustees' actions as governed by documents and transactions Sam  
17 approved during his life.

18       12. The trustees' initial petitions were predicated upon accountings that  
19 provided inadequate information. The accountings were untimely, and even if technically  
20 compliant with the statutes, they failed to provide full and fair notice to Wendy as a  
21 beneficiary. This Court acknowledges the trustees attempted to answer Wendy's  
22 questions by making their CPA and lawyers available to Wendy, but there is only  
23 marginal evidence in the record the trustees invested their own personal efforts to satisfy  
24 Wendy's concerns. At some point the trustees' responses became form over function.  
25 Todd particularly grew weary of Wendy, which affected his neutral trusteeship, as  
26 illustrated by his hope to satisfy Wendy's beneficial interests at a discount that inured to  
27 his benefit. In response, Wendy initiated scorched-earth litigation grounded in  
28 entitlement and limited self-awareness. This Court cannot now alter the consequences of

1 the trust administration and litigation choices that precede this order.

2 13. Wendy's legal and equitable claims are grounded in the same common facts  
3 and are exceedingly difficult to segregate. As this Court reviewed the hundreds of pages  
4 of written arguments relating to the equitable claims, it was taken back to the evidence  
5 and arguments presented to the jury. Through the misty fog of painfully voluminous  
6 allegations and varied claims, the core of Wendy's complaint is that Todd breached his  
7 fiduciary duties by self-dealing and failing to disclose information relevant to Wendy as a  
8 beneficiary. No matter how Wendy frames or argues her equitable claims, she asks this  
9 Court to remedy the identical facts and transactions she placed before the jury. This Court  
10 must look to the substance of the claims, not just the labels used in the pleading document.  
11 Nev. Power Co. v. District Court, 120 Nev. 948, 960, 102 P.3d 578, 586 (2004).

12 14. The complexity of Sam's estate warranted extraordinary disclosures,  
13 explanations, and compliance with discovery rules. There were significant discovery  
14 disputes, such that this Court created a schedule for recurring access to the Discovery  
15 Commissioner. This Court also ordered the production of disputed discovery. Discovery  
16 continued to the very eve of trial and Wendy was still attempting to discern her beneficial  
17 interests when trial began.

18 15. There were several sports references and metaphors argued to the jury.  
19 Consistent with that theme, Wendy "swung for the fences" when she asked the jury to  
20 award \$80 million to her (plus punitive damages), an amount that exceeds the evidentiary  
21 value of this estate and would deprive Todd and Stan of any beneficial interests. She now  
22 seeks a "mulligan" by re-arguing to this Court what was over-argued to the jury.<sup>5</sup> The  
23 jury found that Todd breached his fiduciary duties but only awarded \$15,000 to Wendy. It  
24 found against Wendy on all other claims and against all other counter-respondents. This  
25 Court may have been authorized to award additional equitable relief upon the same facts

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26  
27 <sup>5</sup> To illustrate, Wendy argued in her omnibus opposition to the cost memoranda filed before the equitable  
28 claims trial that "damages may still be awarded, transactions may be set-aside, further breaches of fiduciary  
duty may be found, and the ACPAs and other documents may be found fraudulent or invalid, ab initio."  
These were all claims and requests rejected by the jury.

1 if the jury found for Wendy on more claims and against more counter-respondents. But  
2 constitutional and decisional authorities prevent this Court from entering a subsequent  
3 order diluting or altering the jury's verdict.

4 16. Todd asks this Court to contextualize the \$15,000 as a *de minimis* award. This  
5 Court will not infuse qualitative meaning into the jury's verdict. To do so would be  
6 impermissible speculation. Todd breached his fiduciary duties to Wendy. And Wendy  
7 was not awarded the damages she sought. These two facts are integral to this Court's  
8 resolution of equitable claims and fees requests.

### 9 General Legal References

10 1. This Court cannot supplant or alter a jury's verdict by relying upon common  
11 facts to reach a different outcome. See generally Lehrer McGovern Bovis, Inc. v. Bullock  
12 Insulation, Inc., 124 Nev. 1102, 197 P.3d 1032, 1038 (2008) (discussing special interrogatory  
13 verdicts). In Acosta v. City of Costa Mesa, 718 F.3d 800 (9<sup>th</sup> Cir. 2013), the plaintiff  
14 submitted his equitable claim for declaratory relief to the bench after the jury rejected his  
15 legal claims. The court held "it would be a violation of the Seventh Amendment right to  
16 jury trial for the court to disregard a jury's findings of fact. Thus, in a case where legal  
17 claims are tried by a jury and equitable claims are tried by a judge, and the claims are  
18 based on the same facts, in deciding the equitable claims, the Seventh Amendment  
19 requires the trial judge to follow the jury's implicit or explicit factual determinations." Id.  
20 at 828-29 (citations omitted).

21 2. In Sturgis Motorcycle Rally, Inc. v. Rushmore Photo & Gifts, Inc., 908 F.3d  
22 313, 343 (8<sup>th</sup> Cir. 2018), the jury found for the plaintiff on legal intellectual property claims,  
23 but the bench subsequently applied the equitable defenses of laches and acquiescence.  
24 The appellate court reversed, holding "[t]o bind the district court's equitable powers, a  
25 jury's findings must be on an issue 'common' to the action's legal and equitable claims;  
26 otherwise, the court is free to treat the jury's findings as 'merely advisory' . . . ." Id.  
27 Further, "[i]f the jury's findings were on a common issue, the court, in fashioning equitable  
28 relief, may take into account facts that were not determined by the jury, but it may not

1 base its decision on factual findings that conflict with the jury's findings." Id. at 344  
2 (citations omitted); see also Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc., 573  
3 F.3d 947, 959 (10<sup>th</sup> Cir. 2009) (noting a court cannot grant equitable relief on facts rejected  
4 explicitly or implicitly by a jury verdict); Avitia v. Metro Club of Chicago, Inc., 49 F.3d  
5 1219, 1231 (7<sup>th</sup> Cir. 1995) ("[A] judge who makes equitable determinations in a case in  
6 which the plaintiff's legal claims have been tried to a jury is bound by any factual findings  
7 made or inescapably implied by the jury's verdict.").

8 3. Among prescribed form and content, an accounting must provide a  
9 beneficiary with the ability to evaluate his or her interests. NRS 165.135(3). See also NRS  
10 153.041. The cost of preparing an accounting is presumptively borne by the trust. NRS  
11 165.1214(5). Unless acting in good faith, a trustee can be personally liable for failing to  
12 provide an accounting. NRS 165.148. A beneficiary may petition the court to order a  
13 trustee to perform his or her accounting duties. NRS 165.190. This Court may order a  
14 trustee's compensation be reduced or forfeited, or enter other civil penalty, when a trustee  
15 fails to perform his duties. NRS 165.200.

16 4. The trustees' just and reasonable expenses are presumptively governed by  
17 the trust instruments and borne by the trust. However, this Court has authority to review  
18 and settle the trustees' expenses and compensation. NRS 153.070. This Court may also  
19 reduce a trustee's compensation or order a trustee to pay a beneficiary's reasonable  
20 attorneys' fees and costs when the beneficiary compels redress for a breach of trust or  
21 compliance with trust terms. NRS 153.031(3). See also In re Estate of Anderson, No.  
22 58227, 2012 WL4846488 (Oct. 9, 2012). This Court may order the trust expenses defending  
23 against a beneficiary's successful claims be borne by a trustee individually. NRS 18.090.  
24 See also Estate of Bowlds, 120 Nev. 990, 1,000, 102 P.3d 593, 600 (2004) (concluding  
25 payment of attorney's fees from trust assets only when litigation generally benefits the  
26 trust); NRS 153.031(3)(b) (stating if court grants relief to petitioner, it may order trustee to  
27 pay fees and costs); RESTATEMENT (THIRD) OF TRUSTS § 100 (2012) (examining denial of  
28 compensation to breaching trustee).



1           5.       NRS 163.00195 governs no-contest provisions. It begins by emphasizing this  
2 Court's duty to enforce no-contest clauses to effectuate a settlor's intent. NRS 163.00195(1).  
3 However, the statute then creates a wide exception when it provides a no-contest clause  
4 must not be enforced when a beneficiary acts to enforce her legal rights, obtain court  
5 instruction regarding proper administration, seeks to enforce the trustee's fiduciary duties,  
6 or institutes and maintains a legal action in good faith and based on probable cause. NRS  
7 163.00195(4). See also Matter of ATS 1998 Tr., No. 68748, 2017 WL3222533, at \*4 ("[T]he  
8 purpose of a no-contest clause is to enforce the settlor(s)' wishes, not to discourage a  
9 beneficiary from seeking his or her rights."). A legal action is based on probable cause  
10 when the facts and circumstances *available to the beneficiary*, or a properly informed and  
11 advised reasonable person, "would conclude that the trust, the transfer of property into  
12 the trust, any document referenced in or affected by the trust or any other trust-related  
13 instrument is invalid." NRS 163.00195(4)(e) (emphasis added).

14           6.       A trustee has a duty to act impartially, based on what is fair and reasonable  
15 to all beneficiaries. Specifically, "the trustee shall act impartially in investing and  
16 managing the trust property, taking into account any differing interests of the  
17 beneficiaries." NRS 164.720(1). "[I]t is the trustee's duty, reasonably and without personal  
18 bias, to seek to ascertain and to give effect to the rights and priorities of the various  
19 beneficiaries or purposes as expressed or implied by the terms of the trust." RESTATEMENT  
20 (THIRD) OF TRUSTS § 79 (2007).

21           7.       "In all matters connected with [the] trust, a trustee is bound to act in the  
22 highest good faith toward all beneficiaries and may not obtain any advantage over the  
23 latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any  
24 kind." Charleson v. Hardesty, 108 Nev, 878, 882, 839 P.2d 1303, 1306 (1992) (quoting  
25 Morales v. Field, 160 Cal.Rptr. 239, 244 (1980)).

26           8.       This Court may remove a trustee for good cause, including breach of  
27 fiduciary duties. NRS 156.070; NRS 163.115; NRS 163.190; NRS 163.180; NRS 164.040(2);  
28 see also Diotalle v. Sierra Dev. Co., 95 Nev. 164, 591 P.2d 270 (1979) (explaining court has

1 “full equitable powers” to redress breach of trust). Removal may be appropriate when  
2 there is significant animosity between the trustee and a beneficiary, such that it has the  
3 potential to materially interfere with the proper administration of the trust. Acorn v.  
4 Monecchi, 386 P.3d 739, 760 (Wyo. 2016) (explaining the relevant question is whether  
5 “hostility, in combination with existing circumstances, materially interferes with the  
6 administration of the trust or is likely to cause that result”); In re Estate of Stuchlik, 857  
7 N.W.2d 57, 70 (Neb. 2014) (stating a trustee cannot act impartially when “influenced by . . .  
8 animosity toward individual beneficiaries”); BOGERT, LAW OF TRUSTS AND TRUSTEES § 129  
9 (3d rev. ed. 2019) (explaining where there is potential for a conflict of interest to arise from  
10 the dual status of a trustee who is also a beneficiary, removal of the trustee may be  
11 appropriate); see also Dennis v. R.I. Hosp. Trust Nat. Bank, 571 F. Supp. 623, 639 (D.R.I.  
12 1983) (discussing removal may be appropriate when the court could expect “that future  
13 Trust transactions will be scrutinized by the beneficiaries” as a result of lengthy and  
14 antagonistic litigation). Additionally, conflict between the trustee and beneficiary may  
15 form a basis for removal when personal contact or collaboration is required for the  
16 administration of the trust. Blumenstiel v. Morris, 180 S.W.2d 107, 109 (Ark. 1944). “The  
17 purpose of removing a trustee is not to inflict a penalty for past action, but to preserve  
18 trust assets.” Getty v. Getty, 205 Cal.App.3d 134, 140 (1988).

19 9. Attorney’s fees are not allowed to a prevailing party absent a contract,  
20 statute, or rule to the contrary. See Smith v. Crown Fin. Servs., 111 Nev. 277, 890 P.2d 769  
21 (1995) (analyzing the American and English rules regarding attorney’s fees and their  
22 intersection with Nevada Law). NRS 18.010(2)(b) provides that this Court may award  
23 attorney’s fees when it finds a claim was brought or maintained without reasonable  
24 ground, or to harass the prevailing party. Pursuant to NRCP 68(a), “[a]t any time more  
25 than 21 days before trial, any party may serve an offer in writing to allow judgment to be  
26 taken in accordance with its terms and conditions.” If an offer is not accepted within the  
27 prescribed time period, it will be considered rejected by the offeree. NRCP 68(e). If an  
28 offeree rejects an offer and fails to obtain a more favorable judgment, “the offeree must

1 pay the offeror's post-offer costs and expenses, including . . . reasonable attorney fees, if  
2 any be allowed, actually incurred by the offeror from the time of the offer." NRCP  
3 68(f)(1)(B) (emphasis added).

4 10. "[T]he purpose of NRCP 68 is to encourage settlement . . . not to force  
5 plaintiffs unfairly to forego legitimate claims." Beattie v. Thomas, 99 Nev. 579, 588, 668  
6 P.2d 268, 274 (1983). To determine whether an award of fees is appropriate, a court must  
7 consider and weigh the following factors: (1) whether the claim was brought in good faith;  
8 (2) whether the offer of judgment was reasonable and in good faith in both its timing and  
9 amount; (3) whether the decision to reject the offer and proceed to trial was grossly  
10 unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable  
11 and justified in amount.<sup>6</sup> Beattie, 99 Nev. at 588-89, 668 P.2d at 274. No one Beattie factor  
12 is outcome determinative, and each should be given appropriate consideration. Yamaha  
13 Motor Co., USA v. Arnoult, 114 Nev. 233, 252 n.16, 955 P.2d 661, 673 n.16 (1998).

14 11. A proceeding concerning a trust "does not result in continuing supervisory  
15 proceedings, and the administration of the trust must proceed expeditiously in a manner  
16 consistent with the terms of the trust, without judicial intervention or the order, approval  
17 or other action of any court, unless the jurisdiction of the court is [properly] invoked . . . as  
18 provided by other law." NRS 164.015(7).

### 19 Equitable Issues

20 The following equitable issues and arguments are before this Court:

#### 21 1. *Approval of accountings*

22 The trustees ask this Court to settle, allow, and approve the Issue and Family Trust  
23 accountings without further examination, to include approval of trustees' fees, attorneys'

24 \_\_\_\_\_  
25 <sup>6</sup> When considering the fourth Beattie factor, the court must consider the Brunzell factors. See Shuette v.  
26 Beazer Homes Holdings Corp., 121 Nev. 837, 864-65, 124 P.3d 530, 548-49 (2005). These factors include the  
27 following: "(1) the qualities of the advocate: his or her ability, training, education, experience, professional  
28 standing, and skill; (2) the character of the work to be done: its difficulty, intricacy, importance, time and  
skill required, the responsibility imposed and the prominence and character of the parties where they affect  
the importance of litigation; (3) the work actually performed by the lawyer: the skill, time, and attention  
given to the work; and (4) the result: whether the attorney was successful and what benefits were derived."  
Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

1 fees, and payment of other professional fees and administrative expenses.<sup>7</sup> Wendy  
2 opposes and asks this Court to order the trustees to prepare statutory compliant  
3 accountings that disclose assets, values, transactions, and other acts of trust  
4 administration. Wendy further argues that if the amended accountings are untimely or  
5 noncompliant, this Court should find and remedy the trustees' breach of fiduciary duties.

6       The timing and form of accountings are prescribed by statute. But an accounting is  
7 more than a formulaic compilation of data. An accounting is given to provide notice. Just  
8 as facts in controversy vary from case to case, an accounting must be adjusted as the trust  
9 estate requires. The trusts before this Court are complex because of the multiple layers of  
10 entity and fractional ownership. They are further complicated by fluid and often  
11 unknown values. This Court generally agrees with Wendy that the accountings fail to  
12 provide adequate notice because they reveal only a portion of Sam's complex affairs – they  
13 are mere pieces in a much larger puzzle and are ineffective when only reviewed in  
14 isolation.<sup>8</sup> Instead, the accountings created confusion and engendered suspicion. The  
15 trustees attempted to answer Wendy's questions informally and made their professionals  
16 available to answer Wendy's questions. But the accountings should have included more  
17 explanatory details. The best example of how the accountings failed to provide actual and  
18 adequate notice occurred when Todd testified Wendy could expect to receive \$4 million  
19 from a variety of sources. While the trustees may have provided explanations through  
20 accountants and settlement offers, Wendy's beneficial expectancy is not apparent from the  
21 accountings or evidence of the trustees' pre-trial explanations.

22       However, this Court also notes that Wendy's complaints about the content and  
23 general timing of the accountings were presented to the jury in the legal phase of trial and  
24 are therefore facts common to the equitable claims. The jury presumably considered all  
25 evidence when deliberating its verdict. The verdict is an express or implicit rejection of

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26  
27 <sup>7</sup> The relevant accountings are for the Issue and Family Trusts (April, 2013 through December, 2017) and  
Wendy's subtrust (2013 – 2016).

28 <sup>8</sup> Wendy argues: "While in some circumstances, preparing and delivering accountings in the format  
provided by NRS 165.135 may fully satisfy a fiduciary's requirement to account and fully disclose, that is not  
and cannot be the case for these very complex trusts."

1 Wendy's complaints about the accountings. Accordingly, this Court will not provide  
2 equitable relief regarding the accountings, which were constructively approved and  
3 confirmed by the jury's verdict. In so doing, this Court does not countenance the trustees'  
4 arguments that all accountings and disclosures complied with Nevada law, to include  
5 NRS 165.135(4)(a), which allows for a statement prepared by a CPA containing summaries  
6 of the information required by NRS 165.135(1). This Court simply orders that all litigation  
7 regarding the accountings in existence at the time of the jury trial must end.<sup>9</sup> The nature of  
8 the accountings influence this Court's decision regarding attorneys' fees and the no-  
9 contest provisions of the trust.

10 2. *Validity of the Agreements and Consents to Proposed Actions (ACPAs) and*  
11 *Indemnification Agreements*

12 Todd as trustee of the Issue Trust, and Todd and Michael Kimmel as co-trustees of  
13 the Family Trust, ask this Court to ratify and approve the ACPAs, thus relieving them of  
14 liability for actions reasonably taken in reliance upon them. They (and Todd individually)  
15 also ask this Court to affirm the indemnification agreements. Wendy opposes and asks  
16 this Court to invalidate the ACPAs and rescind any transactions accomplished through  
17 them. She also contests Stan and Todd's indemnification agreements and asks that any  
18 transactions accomplished through them be invalidated and set aside. Each party presents  
19 substantial arguments supporting their respective positions. This Court again returns to  
20 the scope and content of the jury trial and the facts common to legal and equitable claims.  
21 While the attorneys argued to the jury that this Court would decide the validity of the  
22 ACPAs and indemnification agreements, each of the challenged documents and related  
23 transactions were thoroughly presented and argued to the jury – including document  
24 preparation, execution, and other formation irregularities. Thus, at least, the jury verdict is  
25 an implicit rejection of Wendy's arguments.

26 Having considered all arguments, this Court concludes it will neither affirm nor

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27  
28 <sup>9</sup> The trustees may wish to modify the form of future accountings to provide better notice and explanations  
to the beneficiaries. Otherwise, they risk objections this Court may be inclined to grant, including an award  
of attorney's fees.

1 reject the ACPAs and indemnification agreements. They cannot be segregated from the  
2 legal claims presented to the jury and now subsequently argued in support of equitable  
3 relief. The jury constructively approved and affirmed the ACPAs and indemnification  
4 agreements when it reached its verdict. The verdict prevents additional litigation and  
5 precludes liability exposure for actions taken in reliance upon these documents. All claims  
6 involving the disputed ACPAs and indemnification agreements shall end with the jury's  
7 verdict. Nonetheless, the ACPAs and indemnification agreements also influence this  
8 Court's decision regarding attorneys' fees and the no-contest provisions.

9       3.       *Violation of the no-contest provisions of the trusts*

10       All trustees except Stan ask this Court to declare that Wendy violated the no-contest  
11 provisions of the trusts when she initiated and maintained this litigation. Wendy opposes  
12 and asks this Court to declare that Todd violated the no-contest provisions when he filed  
13 the initial petition and later moved to dismiss her litigation. The trustees' request deserves  
14 analysis, whereas Wendy's request is retaliatory and made with little legal basis or  
15 support from the trust instruments.

16       Wendy sought to enforce her rights, obtain instructions, and remedy a breach of  
17 fiduciary duties. The jury agreed that Todd breached his fiduciary duties. Further, based  
18 upon the information she possessed, she had probable cause to seek invalidation of  
19 transfers and other acts of trust administration. This Court must distinguish between the  
20 *existence* of probable cause for initiating and maintaining this action with the manner in  
21 which the probable cause was *litigated*. As noted elsewhere, Wendy and Stan had  
22 probable cause to seek answers to questions raised by the accountings and other events of  
23 trust administration. Thus, while Wendy's litigation zeal and overreaching jury demand  
24 may implicate Sam's intention to disincentivize litigation, Wendy's legal actions were  
25 authorized and do not create a bar to her beneficial rights.

26       4.       *Unjust enrichment and constructive trust*

27       Wendy asks this Court to impress a constructive trust to cure unjust enrichment  
28 caused by fraud, breach of fiduciary duty, and self-dealing. Todd, Stan, and the trustees

1 make several arguments in opposition to Wendy's request. This Court disagrees with  
2 Wendy's position. Wendy's allegations of misconduct, document impropriety, and self-  
3 dealing underlying her request for equitable relief are inseparable from the legal claims  
4 she presented to the jury. Wendy has been awarded damages for Todd's breach of  
5 fiduciary duties. Any other equitable relief would constitute double recovery and alter the  
6 jury's verdict in violation of the Seventh Amendment and its interpretative decisions.

- 7       5.     *Removal of trustees*  
8             *Disgorgement of trustee fees*  
9             *Use of trust funds to initiate petition and defend against Wendy's counterpetition*  
              *Award of attorneys' fees*

10       Wendy relies upon her same arguments when asking this Court to remove the  
11 trustees, order the trustees to disgorge trustee fees, and deny the use of trust funds to  
12 present their petitions and defend against her counterpetition. The parties present  
13 substantial authorities and arguments (and other moving papers) relating to attorneys'  
14 fees.

15       There is no basis to consider the removal of any trustee except Todd. The two bases  
16 to remove Todd are 1) the jury's verdict that Todd breached his fiduciary duties, and 2)  
17 this Court's observation that Todd's neutrality is conflicted by his own interests and  
18 animus towards Wendy. This Court concludes removal would be unjust and  
19 incommensurate for several reasons: 1) Todd is Sam's designated and preferred trustee, 2)  
20 other trustees will diffuse Todd's conflicts and reduce the personal contact between Todd  
21 and Wendy, 3) the remedy against Todd's breaches and conflicts are made through other  
22 orders regarding attorneys' fees, disgorgement of trustee's fees, and inapplicability of the  
23 no-contest provisions, 4) Todd's own affairs are inseparable from trust administration and  
24 his removal as trustee will not sever him from trust business; he will remain involved in  
25 Jaksick family affairs through his ongoing management and ownership of several other  
26 related entities, 5) the expenses of removing Todd and educating a successor trustee  
27 would be expensive and inefficient, and 6) Wendy's suggestion that a commercial trustee  
28 serve as successor trustee for all trustees is neither warranted nor workable.

          However, based upon the jury's verdict that Todd breached his fiduciary duties

1 (and secondarily, this Court's findings about the timing and content of the accountings),  
2 this Court grants Wendy's request that Todd disgorge or disclaim all trustee's fees from  
3 the inception of his trusteeship through the date when final judgment is entered. The  
4 amount disgorged or otherwise forfeited may serve as an offset against the 25% of  
5 trustees' attorneys' fees Todd is ordered to pay, as set forth below. This Court confirms  
6 trustee fees to all other trustees.

7 There are several requests regarding attorney's fees as a trust expense. This Court's  
8 discretionary resolution of the fees requests is bound by all facts of record and influenced  
9 by the entirety of the pre-trial, legal, and equitable proceedings (including the settlement  
10 agreement between Todd and Stan) and uncertainties created by notarial malfeasance.

11 This Court first orders that Stan Jaksick and Michael Kimmel's attorneys' fees be  
12 chargeable to the trust and paid from trust corpus. This Court's decision regarding  
13 Wendy and Todd's fees (both as trustee and individually) are more complicated. There  
14 are competing facts and legal principles, which this Court analyzes in the aggregate and  
15 not in isolation. In particular, the NRCP 68 request cannot be considered narrowly, but  
16 instead, must be viewed by a totality of the case proceedings and statutory authorities  
17 governing trustees. There are several options before this Court:

- 18 - Order the trust to pay all, some, or none of Wendy's fees  
19 because she successfully obtained a verdict that Todd breached  
20 his fiduciary duties as trustee.
- 21 - Order the trust to pay all, some, or none of the fees Todd  
22 incurred as trustee because, even though he breached his  
23 fiduciary duties, he qualitatively and quantitatively prevailed  
24 against other claims asserted by Wendy.
- 25 - Order Wendy to pay fees Todd incurred because she brought  
26 or maintained her action without reasonable grounds or to  
27 harass.
- 28 - Order Wendy to pay fees Todd incurred as trustee of the Issue  
Trust because she rejected his \$25,000 offer of judgment.
- Order Wendy to pay fees Todd incurred individually because



1 she rejected his \$25,000 offer of judgment.

- 2 - Discretionarily decline to order Wendy to pay fees pursuant to  
3 the offers of judgment.

4 On August 29, 2018, Todd offered Wendy to have judgment entered against him  
5 individually in the amount of \$25,000. He also offered Wendy to have judgment entered  
6 against him as trustee of the Issue Trust in the amount of \$25,000. The jury did not make  
7 any adverse findings against Todd individually, but it concluded Todd breached his  
8 fiduciary duties as trustee and awarded \$15,000 to Wendy. With adjustments for interest,  
9 the amount Wendy will receive is almost indistinguishable from the \$25,000 Todd offered  
10 as trustee. To the extent there is a *de minimis* distinction, the difference is not enough in a  
11 dispute that incurred several million dollars of fees and involved tens of millions in  
12 controversy.

13 An offer of judgment must be an authentic attempt to settle a dispute. The offer of  
14 judgment benefit is not automatically conferred. Instead, this Court must carefully  
15 analyze the offer and discretionarily apply it to the unique facts of each case. This Court  
16 and counsel are familiar with the American Rule of attorneys' fees and discretionary  
17 application of NRCP 68. This Court's discretion exists to encourage parties to convey  
18 legitimate offers to resolve their disputes. Of course, judicial discretion is controversial to  
19 those who are aggrieved, and it is unpredictable to all.

20 On one side, offers that are appropriate in time and amount will cause the non-  
21 offering party to become realistic and engage in genuine risk/benefit analyses. These  
22 offers shift a calculated risk as trial approaches. To be an effective mechanism to resolve  
23 disputes before trial, they should be in an amount the non-offering party cannot decline in  
24 good faith. Defendants who perceive no liability exposure chafe against making time- and  
25 amount-appropriate offers because they resent the payment of any money to a party they  
26 perceive will not prevail at trial. On the other side, offering parties sometimes make time-  
27 and amount-inappropriate offers *they expect to be rejected*. These offers do not facilitate  
28 settlement--they are strategic devices to shift the risk of fees by offering illusory

1 consideration to end litigation.

2 This Court's discretion is guided by the unique facts and procedural history of this  
3 case. This Court analyzes the Beattie factors as follows:

4 *Whether Wendy's claims were brought in good faith?* Wendy believed in good faith that  
5 she suffered damages from Todd's individual and fiduciary misconduct. She trusted the  
6 court system and exercised her constitutional right to jury trial. This Court concludes that  
7 Wendy's claims against Todd as trustee of the Issue Trust were brought in good faith.

8 Wendy's concerns are countenanced, in large part, by the questions raised by the  
9 accountings, Stan's separate allegations against Todd, document anomalies, and the optics  
10 of Todd's disproportionate benefit from Sam's business and trust affairs. The good-faith  
11 nature of Wendy's claims against Todd individually are more difficult to discern. In the  
12 final analysis, Wendy had some cause to initiate the claims against Todd individually, but  
13 as discovery progressed, Wendy's cause to pursue Todd individually diminished. This  
14 factor weighs slightly in Wendy's favor regarding the Issue Trust offer of judgment and is  
15 neutral regarding Todd's individual offer of judgment.<sup>10</sup>

16 *Whether Todd's offers were reasonable and in good faith in both timing and amount?* This  
17 Court has wrestled with the question of whether the offers of judgment were brought in  
18 good faith in both timing and amount. These offers of judgment were made six months  
19 after Wendy filed her amended counter-petition, when discovery was still in its infancy.  
20 This Court concludes the amounts offered were neither good faith/reasonable nor  
21 strategic bad faith/unreasonable. They fall within the continuum between those two  
22 categories. Todd knew, or should have known, the fees incurred through continuing  
23 litigation alone would substantially overshadow the offered amounts. Todd knew, or  
24 should have known, that Wendy would never accept \$25,000 to resolve her claims against  
25 him as trustee of the Issue Trust.

26 However, Todd also had cause to believe he would prevail at trial, a fact now  
27

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28 <sup>10</sup> Because this Court finds Wendy brought her claims in good faith, this Court concludes fees under NRS  
18.010(2)(b) are not warranted.

1 proven with respect to the claims against him individually. Todd's subjective belief about  
2 the strength of his position is legally relevant. "[W]here the offeror has a reasonable basis  
3 to believe that exposure to liability is minimal, a nominal offer is appropriate." Arrowood  
4 Indem. Co. v. Acosta, Inc., 58 So. 3d 286, 289 (Fla. Dist. Ct. App. 2011) (discussing the good  
5 faith prong of an offer of judgment from a Florida statute analogous to NRCP 68). At the  
6 time Todd made his individual offer, Wendy had been unable to present coherent facts  
7 underlying her claims against him personally. He therefore had reason to believe  
8 Wendy's claims against him individually were weak or lacked merit. See Beach, 958 F.  
9 Supp. at 1171 (holding defendant's offer was reasonable even though plaintiff's alleged  
10 damages exceeded the offer's amount "given the weaknesses defendant perceived in  
11 plaintiff's case."); see also Scott-Hop v. Bassek, Nos. 60501, 61943, 2014 WL 859181 at \*6  
12 (Feb. 28, 2014) (holding reasonable an offer of \$25,000 even though plaintiff's alleged  
13 medical expenses were over \$150,000 because of the uncertainty of plaintiff's case and  
14 defendant's summary judgment motion); Max Bear Productions, Ltd. v. Riverwood  
15 Partners, LLC, No. 3:09-CV-00512-RCJ-RAM, 2012 WL 5944767 (D. Nev. Nov. 26, 2012)  
16 ("The token \$1,000 offer may appear to have been made simply for the procedural purpose  
17 of preserving rights to fees . . . should Defendant win a judgment. However, the  
18 weaknesses of Plaintiff's case made this token offer reasonable."); Arrowood, 58 So. 3d at  
19 289-90 (holding a court is required to consider an offeror's subjective belief that an offer is  
20 reasonable and not just objective factors).

21 This Court concludes the second factor to consider is neutral regarding the Issue  
22 Trust and does not inure to any party's favor or disfavor. Todd hoped he would prevail at  
23 trial, but given the financial and documentary complexity, discovery delays and disputes  
24 (including Todd's continued depositions long after the offers of judgment were made), the  
25 untimely accountings, incomplete discovery, and the amounts in controversy, the offer  
26 does not appear to be made with the good-faith intention of settling Wendy's claims. In  
27 contrast, Todd's offer to settle Wendy's claims against him individually for the payment of  
28 \$25,000 appears more reflective of the circumstances and was made with a good-faith

1 intention to settle the claims. Thus, this factor favors Todd individually.

2       *Whether Wendy's decision to reject the offer and proceed to trial was grossly unreasonable*  
3 *or in bad faith?* Wendy's decision to reject Todd's offer as trustee of the Issue Trust was not  
4 grossly unreasonable or in bad faith. The offer arrived early in discovery. Wendy had  
5 incurred substantially more in fees than the offered amount and she was entitled to  
6 examine her legal position after discovery was received. In contrast, her decision to reject  
7 Todd's individual offer is less reasonable, yet this Court cannot conclude her rejection was  
8 grossly unreasonable or made in bad faith. Her decision was simply unwise in retrospect  
9 and she cannot now be relieved of its consequences. This third factor weighs in favor of  
10 Wendy regarding the Issue Trust and is neutral regarding Todd's personal liability.

11       *Whether the fees sought are reasonable and justified in amount?* Todd's individual and  
12 trustee attorneys are experienced in law and trial. They have exemplary records of service  
13 in our legal community and they obtained a positive outcome for their clients. After  
14 considering each of the Brunzell factors, this Court finds the fees sought by Todd  
15 individually from the date of the offer are reasonable in light of his experienced and  
16 effective attorneys, duration and scope of litigation, and the result obtained. However,  
17 the aggregate fees this Court expects Todd to seek as trustee of the Issue Trust are not  
18 justified when the offered \$25,000 is compared to the jury verdict. Shifting substantial  
19 attorneys' fees to Wendy is unjustified in this instance. Regarding Todd's individual fees,  
20 the amounts are reasonable and justified when charged against Wendy. This factor is  
21 neutral with respect to the Issue Trustee offer and favors Todd with respect to his  
22 individual offer of judgment.

23       For these reasons, this Court orders as follows:

- 24           a.     The trusts shall pay 100% of the fees incurred by their attorneys in  
25                   representation of the trustees. However, Todd shall reimburse the  
26                   trusts from his personal resources for 25% of the amount paid because  
27                   the jury determined he breached his fiduciary duties. Provided,  
28                   however, Todd is entitled to reduce this 25% personal obligation by

1 the amount of trustee's fees he is ordered to disgorge.

- 2 b. Wendy is *not* required to pay fees Todd incurred as trustee because  
3 she rejected the \$25,000 offer of judgment.
- 4 c. Wendy *shall* pay 100% of fees Todd incurred individually from the  
5 date the offer of judgment was made. Provided, however, Todd shall  
6 be Wendy's judgment creditor and have no greater access to payment  
7 than any other judgment creditor. Todd may attach or anticipate  
8 Wendy's distributive share only if there are no spendthrift provisions  
9 within the trust instruments that prohibit such creditor collection  
10 efforts. If such spendthrift provisions exist, distributions shall be  
11 made to Wendy and Todd may seek collection efforts against Wendy  
12 personally, subsequent to the distribution. The trustees (including  
13 Todd) shall carefully measure Todd's rights as an individual  
14 judgment creditor with their fiduciary duties owed to Wendy as a  
15 beneficiary.
- 16 d. The Trusts shall pay a combined attorneys' fee of \$300,000 to Wendy's  
17 attorneys for prevailing in the claim against Todd for breach of  
18 fiduciary duties. This payment shall be made directly to Wendy's  
19 attorneys without Wendy's signatory participation as a client or trust  
20 beneficiary.
- 21 e. All fees ordered shall be treated as general trust administration  
22 expenses and not allocated to any beneficiary's distributive share.
- 23 f. Todd is not required to indemnify the trust for the \$300,000 payable to  
24 Wendy's attorneys because he is already ordered to pay 25% of the  
25 aggregate fees incurred in representation of the trustees.
- 26 g. The request for oral arguments is denied.

27 **Other Issues**

- 28 1. *Second supplement to first amended counterpetition*

1 On May 9, 2019 (after the legal phase of trial but before the equitable trial), Wendy  
2 filed a Second Supplement to her First Amended Counterpetition in which she continued  
3 her theme about untimely accountings. Wendy asks this Court to consider the new fact  
4 allegation the Family Trust co-trustees failed to prepare and deliver accountings for the  
5 Family Trust and Wendy Subtrust for the period from January 1, 2018, to December 31,  
6 2018. She requests the production and delivery of these accountings and asks that the  
7 trustees be sanctioned. The trustees (including Todd and Stan individually) moved to  
8 strike Wendy's supplement because it was filed after the August 2, 2018, deadline to file  
9 motions to amend pleadings and violated NRCP 15(d).<sup>11</sup> The 2018 accountings were  
10 provided to Wendy in early July, 2019, thus rendering Wendy's request to compel moot.

11 It appears the accountings were untimely and this Court agrees Wendy could not  
12 have filed the supplement until after the deadline for providing the 2018 accountings had  
13 passed. However, the 2018 accountings are not part of the underlying litigation. This  
14 Court declines Wendy's invitation to enlarge this litigation to satisfy judicial economy.  
15 This litigation is bounded by the pleadings and cannot remain an open receptacle to  
16 receive real-time allegations of inappropriate trust administration. The supplement is  
17 stricken as beyond the scope of claims before this Court. Wendy may file a separate action  
18 challenging the timing and content of the 2018 accountings if she is so inclined. This Court  
19 neither encourages nor discourages such litigation.

## 20 2. *The Lake Tahoe property*

21 Though not placed within a certain claim for relief within her pleadings, Wendy  
22 asks this Court to rescind all transactions involving the Lake Tahoe home and restore title  
23 to the SSJ LLC, which was 100% owned by the Family Trust. Wendy continues to  
24 overwhelm this Court with repetitive and lengthy arguments about the option  
25 agreements, forgery, fraud, fiduciary duties, unjust enrichment, trustor intentions,  
26 consideration, etc. All of Wendy's arguments were presented to the jury and rejected in  
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28 <sup>11</sup> Stan filed an additional Motion to Dismiss or Motion to Strike, arguing Wendy's supplement alleged a new claim for breach of fiduciary duty that has not been discovered. Todd joined in Stan's motion.

1 the jury's verdict. This Court will not enter any order granting relief to Wendy regarding  
2 the Lake Tahoe home.

3 3. *Future distributions*

4 On July 23, 2019, Wendy filed an Emergency Motion to Compel Distribution from  
5 the Family Trust. She alleged she was being evicted from her home in Texas and needed  
6 money to relocate to either Arizona or Reno. Wendy asked this Court to order the trustees  
7 of the Family Trust to distribute \$6,000 for a deposit on a new apartment and \$5,000 per  
8 month for living expenses. Wendy further asks this Court to advise the trustees regarding  
9 the schedule of other distributions for living expenses. Wendy's motion is denied. This  
10 Court will not supervise trust administration on an ongoing basis. It will not provide  
11 advisory guidance or otherwise order the trustees regarding administration and  
12 distributions. Instead, it will adjudicate disputes through normal judicial processes.  
13 Wendy may initiate separate litigation if she is so inclined.

14 4. *Costs.*

15 Todd Jaksick as an individual, Duck Lake Ranch, LLC, and Incline TSS, are the  
16 prevailing parties entitled to statutory and reasonable costs. All other parties may file cost  
17 memoranda as authorized by law.

18 **Conclusions**

19 1. This Court does not confirm the accountings. However, the substance of the  
20 accountings were presented to the jury and fall within the jury's verdict. Thus, this Court  
21 will not allow additional litigation as to any accounting that formed the basis for Wendy's  
22 legal claims. All future accountings shall be timely and formulated to provide the  
23 beneficiaries with adequate notice of values, transactions, and other acts of trust  
24 administration. The trustees are authorized to pay, at Wendy's request, a portion of  
25 Wendy's distributive shares to Wendy's designated financial professional who will assist  
26 her to understand the accountings and interact with the trustees.

27 2. This Court does not confirm the ACPAs or indemnification agreements.  
28 However, the substance of the ACPAs and indemnification agreements were presented to

1 the jury and fall within the jury's verdict. This Court will not allow additional litigation as  
2 to any of the ACPAs and indemnification agreements that formed the basis for Wendy's  
3 legal claims.

4 3. The trustees' request to impose no-contest penalties against Wendy is  
5 denied.

6 4. Wendy's claims for unjust enrichment and constructive trust are denied.

7 5. Todd is confirmed as trustee of Issue Trust and co-trustee of Family Trust.  
8 All other trustees are also confirmed.

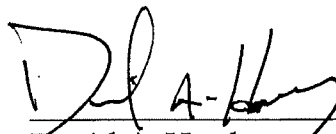
9 6. Todd shall disgorge all trustee fees he received or otherwise earned, subject  
10 to the fees award provisions.

11 7. This Court anticipates the parties will seek clarification and other relief  
12 through additional motion work. The attorneys' fees provisions in this order reflect the  
13 entirety of this Court's intentions regarding fees. This order also reflects the entirety of  
14 this Court's intentions regarding all other pending matters.

15 8. Todd and the trustees may submit a proposed judgment consistent with the  
16 jury's verdict and this order on equitable claims.

17 **IT IS SO ORDERED.**

18 Dated: March 12, 2020.

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21 David A. Hardy  
22 District Court Judge  
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