IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

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.	**CASE NO.: 81470** **District Court Case No.: PR17-00445/PR17-00446**

APPELLANT/CROSS-RESPONDENT TODD B. JAKSICK'S APPENDIX TO OPENING BRIEF

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Stanley S. Jaksick's Answer to First Amended Counter-petition 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	8.2.18	5	TJA000832-000844
Supplemental Brief by Stanley Jaksick, Co-Trustee of the Samuel S. Jaksick, Jr. Family Trust	2.18.20	12	TJA002078-002085
Supplemental Motion in Support of Award of Attorney's Fees to Wendy Jaksick's Attorneys	5.12.20	19	TJA003206-003324
Todd B. Jaksick's and Michael S. Kimmel's Answer to First Amended Counter-Petition to Surcharge Trustees for Breach of Fiduciary Duties, For Removal of Trustees and Appointment of Independent Trustees, and for Declaratory Judgment and Other	4.13.18	4	TJA000780-000795

Relief			
Todd B. Jaksick's Answer and Objections to First Amended Counter-Petition 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	4.9.18	4	TJA000767-000779
Todd B. Jaksick's Closing Argument Brief	7.1.19	7	TJA001282-001362
Todd B. Jaksick's Closing Argument Brief	7.31.19	9	TJA001536-001623
Todd B. Jaksick's Opposition to Wendy Jaksick's Motion to Alter or Amend Judgment, or, Alternatively, Motion for a New Trial	5.8.20	18	TJA003152-003189
Todd B. Jaksick's Opposition to Wendy Jaksick's Supplemental Motion in Support of Award of Attorney's Fees	5.21.20	21	TJA003609-003617
Todd B. Jaksick's, Individually, Opposition to Wendy Jaksick's Motion for Leave to Join Indispensable Parties	12.6.18	5	TJA000856-000872

Todd Jaksick's Motion to Strike Wendy Jaksick's Verified Memorandum of Costs or, in the Alternative, Motion to Retax Costs	3.25.20	13	TJA002190-002194
Todd B. Jaksick's Motion to Amend Judgment	4.29.20	18	TJA003001-003043
Todd Jaksick's Supplemental Brief in Response to the Court's February 6, 2020 Order for Supplemental Briefing	2.18.20	12	TJA001980-002043
Trial Transcript	5.13.19	7	TJA001190-001202
Trustees' Supplemental Brief	2.18.20	12	TJA002044-002077
Verdicts	3.4.19	5	TJA000954-000957
Verified Memorandum of Costs	3.23.20	13	TJA002165-002189
Wendy Jaksick's Brief of Closing Arguments in the Equitable Claims Trial	7.31.19	10	TJA001662-001757
Wendy Jaksick's Brief of Opening Arguments in the Equitable Claims Trial	7.1.19	8	TJA001363-001470
Wendy Jaksick's Motion for Leave to Join Indispensable Parties	11.15.18	5	TJA000848-000855
Wendy Jaksick's Omnibus Reply in Support of Motion for Leave to	12.17.18	5	TJA000899-000933

Join Indispensable Parties			
Wendy Jaksick's Reply in Support of her Motion to Alter or Amend Judgment, or, Alternatively, Motion for New Trial	5.15.20	19	TJA003349-003357
Wendy Jaksick's Response to Todd Jaksick's Motion to Strike Wendy Jaksick's Verified Memorandum of Costs, or in the Alternative, Motion to Retax Costs	4.8.20	14	TJA002446-002450
Wendy Jaksick's Supplemental Brief in the Equitable Claims Trial	2.25.20	12	TJA002086-002093

Dated this 13th 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 APPENDIX TO OPENING BRIEF- VOL. 10,** 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:

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

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SECOND JUDICIAL DISTRICT COURT

WASHOE COUNTY, NEVADA

In the Matter of the Administration of the SSJ'S ISSUE TRUST,	CASE NO.: PR17-00445 DEPT. NO. 15
In the Matter of the Administration of the SAMUEL S. JAKSICK, JR. FAMILY TRUST,	CASE NO.: PR17-00446 DEPT. NO. 15
WENDY JAKSICK, Respondent and Counter-Petitioner, v. 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; AND STANLEY S. JAKSICK, INDIVIDUALLY AND AS CO-TRUSTEE OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST; KEVIN RILEY, INDIVIDUALLY AND AS FORMER TRUSTEE OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST AND TRUSTEE OF THE WENDY A. JAKSICK 2012 BHC FAMILY TRUST, Petitioners and Counter-Respondents.	**WENDY JAKSICK'S BRIEF OF CLOSING ARGUMENTS IN THE EQUITABLE CLAIMS TRIAL**

Respondent Wendy A. Jaksick ("Wendy" or "Respondent"), by and through her attorneys of record, the law firm of Fox Rothschild LLP and Spencer & Johnson, PLLC, submits the following *Brief of Closing Arguments in the Equitable Claims Trial*.

Procedural Background

1. On January 22, 2019, Judge Hardy entered the *Pre-Trial Order Regarding Trial Schedule* (the "*Pre-Trial Order*") dictating the organization and trial plan for the trial of the legal and equitable claims in this matter. In accordance with the *Pre-Trial Order*, the Parties and their counsel appeared and tried the legal claims to the jury beginning on February 14, 2019 and ending when the jury rendered its verdict on March 4, 2019.

2. On May 13, 2019, the Parties and their counsel appeared in open court for trial of the equitable claims to the bench. At that time, the Parties entered into stipulations to conclude the evidentiary presentation of the trial to complete the record and for closing arguments. On May 20, 2019, Judge Hardy entered the *Order Addressing Evidence at Equitable Trial*, resolving all remaining issues concerning the admission of additional documentary evidence in the equitable phase of trial. The Parties were then provided thirty (30) days to prepare and file briefs including their opening arguments, which was subsequently extended ten (10) days by the Court.

3. The following Briefs were filed on July 1, 2019:

   a. *Wendy Jaksick's Brief of Opening Arguments in the Equitable Claims Trial* ("Wendy's Brief");

   b. *Stanley Jaksick's Written Closing Arguments* ("Stan's Brief");

   c. *Todd B. Jaksick's Closing Argument Brief* ("Todd's Brief"); and

   d. *Petitioner's Trial Brief on Equitable Claims* ("Petitioners' Brief").

Todd's Brief and *Petitioners' Brief* shall collectively be referred to herein as "Todd's and Petitioners' Briefs". *Wendy's Brief*, *Stan's Brief*, *Todd's Brief* and *Petitioners' Brief* shall collectively be referred to herein as the "Opening Briefs".

4. Following the filing of the *Opening Briefs*, the Parties were then provided thirty (30) days to prepare and file briefs including their closing arguments. Accordingly, Wendy makes the following arguments in support of her claims against the *Petitioners* and *Counter-Respondents* in the

equitable phase of the trail.

I. Objection and Motion to Strike and Disregard Evidence Not Before the Court

5. On May 13, 2019, the Parties and their counsel appeared for trial of the equitable claims to the bench. At that time, instead of proceeding with the trial of the equitable claims in person, the Parties agreed on a framework to submit briefs including opening and closing arguments. As a part of this framework, the Parties stipulated to the admission of certain Exhibits for all purposes and agreed to submit argument on fifteen (15) disputed Exhibits. After the Court considered and ruled on the admissibility of the fifteen (15) disputed Exhibits, the evidence for trial of the equitable claims would be closed and the Parties would rely on such evidence in the opening and closing briefs.

6. Despite the agreed upon framework and the close of evidence, *Petitioners' Brief* relies on and even attaches evidence outside of the trial record as follows:

Petitioners' Brief Page	Evidence	Deposition Pages	Petitioners' Brief Exhibit
P. 11, Line 2	Deposition of Frank Campagna, CPA	37:14-38:1	Exhibit 1
P. 11, Lines 4-5	Deposition of Kevin Riley, CPA	Vol. III 490:22-24	Exhibit 2
P. 13, Line 20	Deposition of Wendy Jaksick	Vol. V 1181:12-18	Exhibit 3
P. 15, Lines 7-8	Deposition of Kevin Riley, CPA	Vol. III 508:1-513:19; 543:10-13	Exhibit 4
P. 17, Line 4-5	Deposition of Wendy Jaksick	Vol. II 277:17-19; 302:15-304:3; 326:1-6; 344:14-345:18	Exhibit 5

7. Frank Campagna and Kevin Riley were not called and did not testify at trial in person or by deposition. Kevin Riley is the accountant for the Trusts, and someone Todd repeatedly deferred to during his testimony in trial and in his *Opening Brief*. Despite Kevin Riley's apparent central role in the administration of the Trusts, Trustees made a strategic decision not to call him to testify during trial. Wendy was present and testified during the jury trial for several hours. Trustees counsel questioned Wendy during that time.

8. All of the Parties rested, and the evidence is closed. The trial record for the jury trial and equitable claims trial is complete and closed and does not include the portions of the depositions cited by Trustees. Trustees' citing to cherry picked deposition testimony and attaching excerpts of the corresponding deposition transcripts that are not part of the trial record is improper and must not be

permitted. Trustees' counsel knows this is improper and that the introduction and attempted use of this evidence that is not part of the trial record is highly prejudicial to Wendy.

9. Wendy objects to the Trustees' introduction and attempted reliance on this deposition testimony that is not a part of the trial record because it is inappropriate and highly prejudicial. Wendy requests the Court strike and exclude all citations to such evidence that is not a part of the trial record, including but not limited to the above identified citations and Exhibits 1 through 5 of *Petitioners' Brief*. Wendy also requests the Court disregard all of such evidence and any argument of Trustees that is associated with or that relies on such evidence. In the alternative, Wendy requests leave of Court to submit deposition testimony excerpts to support the positions in her Opening and Closing Briefs.

II. Misrepresentations of Evidence to the Court

10. Wendy and her counsel devoted a substantial amount of time and effort citing to trial evidence supporting her positions and arguments throughout her *Opening Brief*. On the other hand, Todd, Trustees and their counsel made arguments throughout *Todd's and Petitioners' Briefs* that are either not supported by any evidence or are blatantly contrary to the evidence in the trial record. Because a prohibitive amount of time and effort would be required to address each and every instance of this, Wendy will address a few of the more critical instances.

a. Misrepresentation: Sam's Plan, Todd Not Involved

11. From the very outset of *Todd's Brief*, Todd argues that Wendy is suing Todd for the acts and conduct of Sam. *Todd's Brief*, p.2, line 6-20. Todd further argues that, "Todd cannot be found liable for the acts, conduct, actions documents and transactions done by Sam by, with and through his lawyer, Pierre Hascheff", and documents that were "***created, negotiated and implemented*** by Sam, not Todd," and then lists documents the following documents:

- The 2006 Family Trust Agreement;
- The 2007 Issue Trust Agreement;
- The 2007 Indemnification Agreement;
- The 2010 creation of Incline TSS, LLC;
- The Option Agreement given by the Family Trust to Incline TSS;
- The December 4, 2012 Water Deed;
- The December 10, 2012 Second Amendment to Family Trust;
- The December 17, 2012 Durable Power of Attorney;
- The December 17, 2012 General Power of Attorney;
- The December 28, 2012 Water Deeds; and
- Sam's agreement to pay $22,000 per month rent in 2013.

Id. (emphasis added).

12. This is directly contrary to the evidence in the trial record in relation the documents and transactions that occurred after Sam executed the Family Trust Agreement in 2006 and the Issue Trust Agreement in 2007. The evidence confirms that Todd was involved in most if not all of the transactions concerning the Trusts. Todd Testified that Pierre Hascheff and Maupin, Cox & LeGoy were also his lawyers throughout this time period he argues he was not involved with Sam's Estate plan or the related transactions. Transcript, 02/19/2019, 60:14-61:12; 114:2-8. Pierre Hascheff also confirmed he personally represented Todd. Transcript 02/22/2019, 45:16-18*. Bob LeGoy of Maupin, Cox & LeGoy also confirmed that Maupin, Cox & LeGoy represented Todd personally and Todd's entities as early as 2006. Transcript, 03/01/2019, pp. 115-17, lines 10-9; Exhibit 523. Additionally, throughout his trial testimony, Pierre Hascheff says "they" when discussing work he did in relation to Sam's Estate planning and the associated documents and transactions. Transcript 02/22/19, 194:5-7.

13. Todd's Purported Indemnification Agreement. Todd was involved in preparing his

Purported Indemnification in 2007, 2008, or whenever it was actually created.[1] Pierre Hascheff confirmed he did not prepare Exhibit A to the agreement, but instead testified "they helped prepare that exhibit, so, I mean, I got, I didn't do all of this. I did, I did the ones I knew about, the obligations I knew about, and then they basically backfilled it with everything else." Transcript, 02/22-2019, 68:21-69:2. There is no way Sam prepared Exhibit "A" or had the information concerning Todd's personal obligations, such as Todd's personal home mortgages and vehicles, necessary to prepare Exhibit A. That information could have only come from Todd. Additionally, Todd was required to sign the purported Indemnification Agreement multiple times in multiple capacities. Exhibits 11, 11a and 11b. Finally, Pierre Hascheff sent a letter to Jessica Clayton on May 11, 2017 apparently forwarding a copy of an Indemnification Agreement for Stan. Exhibit 114. The letter is as follows:

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[1] There are multiple versions of the document, they are not dated and Pierre Hascheff confirmed the documents were manipulated after they were purportedly signed.

email
Ms. Jessica Clayton
4005 Quail Rock Lane
Reno, Nevada 89511

Subject: Note Payments
File: 48652.004

Dear Jessica:

Please find enclosed, a draft copy of the Samuel S. Jaksick Jr. Family Trust Agreement Indemnification Agreement wherein Mr. Sam Jaksick will indemnify Mr. Stanley Jaksick for the family obligations similar to Mr. Todd Jaksick's indemnity agreement. Please note, in addition to the obligations you mentioned in your email, I included LSC. Please have Mr. Samuel Jaksick execute the Stanley S. Jaksick indemnification agreement and provide me with the original.

I also enclose the executed Todd B. Jaksick indemnification agreement wherein Samuel S. Jaksick Jr. Family Trust agreed to indemnify Mr. Todd Jaksick for the various family obligations. Please note, I made some changes to Mr. Todd Jaksick's agreement consistent with Mr. Stan Jaksick's changes and you should throw away of the prior drafts. Thank you for your consideration in this matter.

As I mentioned to Mr. Sam Jaksick when he executed the Todd Jaksick indemnification agreement by executing this document, he has agreed to accept the substantial liability by indemnifying both Mr. Todd Jaksick and Mr. Stan Jaksick for any of these obligations. As always, he has the right to have an independent counsel review the indemnification agreement to make sure his interests are protected. He has agreed to indemnify both Mr. Todd Jaksick and Mr. Stan Jaksick for the company obligations irrespective of the parties fault.

As always, should you have any questions, please feel free to contact my office.

Very truly yours,

Pierre A. Hascheff, Chtd

By: ***Pierre***

Id. Of course whatever document was enclosed with the correspondence was never produced. The letter sent **to Jessica Clayton** requests that she have Sam sign the enclosed Indemnification Agreement. The letter copies Sam, Todd and Stan and includes the following disclaimer: "As always, he has the **right to have an independent counsel** review the indemnification agreement to make sure his interests are protected." Id. (emphasis added). This email and statement confirms Pierre Hascheff was representing Todd, Stan and Sam in connection with the preparation of the purported Indemnification Agreements. Otherwise, there would be no need for Sam to consult with independent

counsel. There is no doubt Todd was involved in the creation and execution of various versions of Indemnification Agreement.

14. The Tahoe Property Transaction. Todd was involved in every step of the Tahoe Transaction. This is discussed in detail in *Wendy's Brief*. *Wendy's Brief*, pp. 60-71. Todd was involved in developing and implementing the Tahoe Transaction. The trial record confirms both Todd and Sam were represented by Maupin Cox & LeGoy and Pierre Hascheff throughout this time period. On June 17, 2010, Robert LeGoy of Maupin, Cox & LeGoy sent correspondence addressed to Sam and **Todd** concerning their advice against proceeding with the proposed Option Agreement plan. Exhibit 465. When asked about the June 17, 2010 correspondence during trial, Todd testified, "[w]ith their continued guidance, **we** decided to move forward with the option – **we** decided to move forward with the option with their continued guidance." Transcript, 02/19/2012, 168:8-16 (emphasis added). This confirms Todd was involved in developing the plan. On June 1, 2012, Pierre Hascheff prepared a Memorandum concerning the Tahoe Property and options for addressing the loan on the property. Exhibit 52. The Memorandum was only addressed to **Todd and Kevin Riley**, Sam was not included. Id. In the Memorandum, which states that it is "Attorney-Client Privilege", Pierre Hascheff advises his client Todd of various issues related to the refinance of the Bank of America loan on the Tahoe Property and discussed the TBJ Issue Trust (Todd's Family Trust) being a potential purchaser of Tahoe Property. Id. On December 6, 2012, Pierre Hascheff sends an email to Todd and Jessica Clayton attaching correspondence. Exhibit 23.15. The correspondence attached to the email is a December 2, 2012 letter to **Todd Jaksick** enclosing Pierre Hascheff's "proposed letter to Kathleen Newby **for your review and approval**." Exhibit 23.15, p. 3. (emphasis added). The proposed letter is to Bank of America addressing the effort to accomplish the exercise of the Option Agreement. The proposed correspondence starts "**I spoke to Mr. Todd Jaksick** concerning Mr. Sam Jaksick's Lake Tahoe Home and it is my understanding you need a letter from my office explaining the proposed

transaction." Exhibit 23.15, p. 4 (emphasis added). It is clear from this email and proposed correspondence that Todd was not only involved in the transaction and accomplishing the transaction, he was the point person. Todd was speaking directly to Bank of America and coordinating with Pierre Hascheff to implement and accomplish the transaction in early December 2012, weeks before Sam's heart surgery. In connection with Exhibit 23.15 and Todd's actions in 2012, *Todd's Brief* further confirms Todd's involvement in Sam's Estate planning and associated transactions stating "Trial Exhibit 23.1 5 is further evidence Sam, Pierre Hascheff, Kevin Riley and **Todd** were attempting to facilitate and accomplish, in good faith, Sam's testamentary intent." *Todd's Brief*, p. 11, line 15-17 (emphasis added).

15. Todd then exercised his option to purchase the Tahoe Agreement on December 21, 2012, just two days after Sam's open-heart surgery. Exhibit 23.18. Sam had no involvement in this. Todd then argues the fact Jenene, Sam's wife, faxed Sam's executed letter of December 27, 2012 with Sam's signature shows Sam's was actively doing business and his active involvement in estate matters immediately after his heart surgery. *Todd's Brief*, 15-16. There is no evidence Sam was actively doing business at that time while he was recovering form his surgery. Only the signature page of Exhibit 23.19 includes fax transmittal information and that information confirms only the signature page was faxed from the Bonaventure Bell Desk (Page "0001/0001"). There is no evidence Sam actually received and reviewed the complete letter. Additionally, all of the evidence presented at trial and in the trial record confirms Todd, not Sam, was communicating with the Bank and Pierre Hascheff to accomplish these transactions. Todd's own *Brief* confirms his involvement and active role following Sam's surgery in 2012, "Sam attempted to conduct business and was in contact with **Todd** to effectuate the ingredients of his estate plan before the end of 2012." *Todd's Brief*, p. 15, lines 1-3. *Todd' Brief* further confirms Todd's central role in the 2012 Documents and accomplishing the preparation, execution and implementation of same stating, "**Todd** was being used as the 'instrument' to effectuate

Sam's intent that was formulated as a result of legal advice given to him by Pierre Hascheff." *Todd's Brief*, p. 18, 13-14. Todd also argues, "**Todd** was the only one that could handle these complicated and stressful transactions that occurred in December 2012 ... **Todd** had to carry the burden to be a vital component to implementing Stam's testamentary intent." *Todd's Brief*, p. 19, lines 11-16. Therefore, Todd's argument that he cannot be held liable for documents and transactions done by Sam, by, with and through his lawyer, Pierre Hascheff, is misleading, not supported by the trial record and explicitly contradicted by statements and admissions included throughout *Todd's Brief*.

b. <u>Misrepresentation: "His Attorney"</u>

16. Throughout *Todd's Brief*, Todd refers to Pierre Hascheff and Maupin, Cox & LeGoy as Sam's attorneys in an attempt to create the misleading impression that Sam was independently represented, and Todd had no involvement or influence in various transactions. Examples of this include:

a. In relation to the purported Indemnification Agreement, Todd argues, "As a result, Sam, through **his then attorney, Pierre Hascheff**, created Todd's Indemnification Agreement. ... It was done by Sam, not Todd. Todd was not involved in in drafting the document and had no influence whatsoever over Sam or Pierre Hascheff concerning its contents." *Todd's Brief*, p. 3, lines 5-9 (emphasis added).

b. In relation to Incline TSS, Todd argues, "As a result, Sam and **his attorney Pierre Hascheff** created Incline TSS, Ltd. ... Sam created Incline TSS with the advice of Kevin Riley and Pierre Hascheff, not Todd" *Todd's Brief*, p. 3, lines 12-16 (emphasis added).

c. In relation to the Option Agreement, Todd argues, "In 2010, Sam, together with **his attorney Pierre Hascheff**, created an Option Agreement, which allowed Incline TSS to purchase the Tahoe Property. ... The idea, plan and the Option Agreement,

itself, were created and implemented by Sam, not Todd. *Todd's Brief*, p. 3, lines 17-20 (emphasis added).

d. In relation to Estate planning changes in 2010, Todd argues, "In December 2012, Sam and **his attorney Pierre Hascheff** were confronted with a stressful and urgent series of events." *Todd's Brief*, p. 9, lines 4-5 (emphasis added).

e. In relation to the transfer of the Tahoe Property from the Family Trust to Sam, Todd argues, "All of this was devised by Sam and Pierre Hascheff, not Todd." *Todd's Brief*, p. 17, line 8.

f. Todd argues, "These are documents negotiated by and between Sam and **his attorney Pierre Hascheff**." *Todd's Brief*, p. 21, line 4 (emphasis added).

As discussed above, Todd testified during trial that Pierre Hascheff and Maupin, Cox & LeGoy were also Todd's personal attorneys. In fact, Pierre Hascheff sent Todd memoranda designated "Attorney Client Privileged" during this time period that excluded Sam. Exhibit 52. Pierre Hascheff also sent correspondence to Sam (by email through Jessica Clayton) in relation to the purported Indemnification Agreements that advised Sam he should consult with an independent attorney concerning the transaction. Exhibit 114. There is no question conflicts existed in Pierre Hascheff's and Maupin, Cox & LeGoy's representation of both Sam and Todd during the time period, and that Sam was not receiving independent advice in regards to the various transactions that all benefitted Todd. It is important the Court is not misled by these repeated misleading statements.

c. <u>Misrepresentation: Jessica Clayton "His Notary" or "His Employee"</u>

17. Throughout *Todd's Brief*, Todd refers to Jessica Clayton as Sam's notary or Sam's employee in a similar attempt to create the misleading impression that Jessica Clayton was independent, only responsible to Sam, and Todd was not involved and had no influence over the transactions or Jessica's involvement in the transactions. Examples of this include:

a. In relation to the December 2012 documents, Todd argues, "Todd had virtually no involvement in the 2012 document. Todd did nothing that Sam did not want Todd to do. **Jessica Clayton worked for Sam**. Todd should not be punished for the acts of **Sam's notary**." *Todd's Brief*, p. 7, lines 23-25 (emphasis added).

b. In relation to the Water Rights Deeds, Todd argues, "Jessica Clayton **worked for Sam** at the time she notarized his signature, and her notarial acts were done at the request of, and on behalf of, Sam." *Todd's Brief*, p. 10, lines 23-25(emphasis added).

c. "Notaries employed by Pierre Hascheff and Sam." *Todd's Brief*, p. 41, line 28 – p. 42, line 1 (emphasis added).

18. Jessica Clayton testified as follows concerning her employment with the Jaksick Family and Jaksick Family entities, confirming she currently works for Todd and has worked for Todd since 2008:

Q What is your current employment?
A I work for several different entities owned by the Jaksicks, the Jaksick family.
Q And primarily, Todd Jaksick. Would that be correct?

A I don't know if it's primarily him, but, I mean, he manages most of them, but there are other partners, yes.

Q And you -- Todd Jaksick signs your paychecks; is that correct?

A Yes.

Q How long have you worked for the Jaksick family?

A In March, it will be 16 years.

Q And so that would begin in about 2003, and you would have worked both with Sam and Todd up until Sam's death. Would that be correct?

A In 2003, I was hired as Sam's executive administrative assistant, so he was my boss.

Q And -- but during the time between 2003 and 2013, you would have worked for both Sam and Todd or at least taken direction from both Sam and Todd. Would that be accurate?

A It wouldn't have been until about five years after I started working that I would have started working more closely with Todd.

Q Okay. Just so we get the date frame right, about 2008, you started to work with Todd as well?

A As well, yes.

Q And that would have been continued through 2013 and the date of Sam's death. Would that be accurate?

A Correct.

Transcript, 02/27/2019, 6:20-7:24. Jessica Clayton's testimony confirms she worked for Todd from 2008 through the time of Sam's death. The trial record also confirms Jessica Clayton was Todd's

righthand woman in his administration of the Trusts and the Jaksick Family entities. Jessica Clayton was involved in drafting ACPAs and other documents. Exhibit 205 ("Todd and I scurried last night to try and write up a "similar" Agreement and Consent to Proposed Action with regard to the trust making the loan payments"). Jessica also appeared multiple days of the jury trial, including several dates after she testified and when the jury returned its verdict late in the evening on March 4, 2019. It is clear Jessica was not a disinterred notary, but instead had a vested interest in protecting herself for her highly problematic, illegal and unethical actions during her employment for Sam and Todd, and protecting her employer Todd for his actions. Therefore, it is important the Court is not misled by Todd's repeated misleading statements that Jessica was Sam's employee.

d. <u>Misrepresentation: Wendy Lied About Signing Life Insurance ACPA Day After Sam's Death</u>

19. To attack Wendy's credibility and support his position that the Life Insurance ACPA (Exhibit 14) is valid and should be enforced against the beneficiaries, Todd argues throughout his *Brief* that Wendy lied in her testimony about signing the Life Insurance ACPA (Exhibit 14) the day after Sam died. *Todd's Brief*, p. 22-23, lines 21-17; p. 24, lines 4-9. Todd further argues that "[t]his must be part of the Court's observation that Wendy lacks credibility. *Todd's Brief*, p. 23, line 16. The problem with Todd's argument is that Stan's testimony was consistent with and supported Wendy's testimony that whatever was signed related to the $6 million life insurance proceeds payable to the Issue Trust was presented to Wendy and Stan by Todd the day after Sam's death and was not the Life Insurance ACPA (Exhibit 14). Stan's testimony was as follows:

Q And if we look at Exhibit 14, and if we go to the third page, the signature page -- and Exhibit 14 is the ACPA for the life insurance proceeds -- I believe your testimony -- I believe your testimony is that you don't recall signing the ACPA for the life insurance proceeds?

A Again, there was never an ACPA for the life insurance proceeds.

Q But there's a signature page here and you don't dispute that your signature is on this signature page?

A That's my signature, yes.

Q Do you see a problem with orphan signature pages, Stan?

A Yeah.

Q Is this a classic example of an orphan signature page and the problems it creates?

A Sure.

Transcript, 02/27/2019, 202:21-203:10.

Q Now, you now believe that that was not part of a document, it was just a thing you signed?

A It's possible that I signed that, that day, after my dad passed away.

Transcript, 02/27/2019, 167:6-9.

Q Did you notice that?

A Again, I never saw this agreement.

Q And then your signature, that you admit is yours, is on

the signature page as a primary beneficiary.

What did you think you were signing as a primary beneficiary on June -- in the June time frame?

A I -- the only time I recall signing this document was the day after my dad died.

Transcript, 02/27/2019, 167:23-168:5.

Q Had you had any discussions with the trust lawyers, in your capacity as cotrustee, the night after your father died?

A I did not. I signed this, thinking it was for -- to release the insurance funds.

Q All right. Release it for what?

A So that we could use them in Tahoe.

Q And that, I think, is reflected in the second paragraph at page 2.

And then this is a consent signed by the primary beneficiaries, at least as reflected by the document, that the beneficiaries and the cotrustees consent that -- to the use by the company -- and that's Incline TSS, correct?

A Again, I did not review this document. Obviously, there's no way they could have produced that document in 12 hours.

Q Correct.

A So, Todd was asking us to sign a life insurance policy -- or, a -- to release the life insurance funds so we could, you know, buy into the Tahoe house or pay off the debt.

Transcript, 02/27/2019, 168:8-25.

Q That's the ACPA for Incline TSS and the Lake Tahoe house. Do you recognize that?
A Yes.
Q Okay. Let's go to the third page of that. Do you see your signature there, Stan?
A Yes.
Q So did you sign the ACPA, which is Exhibit 14?
A Well, I never saw it, so I don't know how I signed it.

Transcript, 02/27/2019, 93:16-23.

Q But you dispute that that signature page was attached to Exhibit 14?
A Again, I never saw Exhibit 14, so I don't --
Q Would you -- I'm sorry to interrupt you.
A I don't know how I would have signed.
Q At some point in time after June of 2013, did you see Exhibit 14, though?
A Yeah, I saw it when the petition was filed.
Q So prior to the time the petition was filed sometime in 2017, you had not seen Exhibit 14?
A No.

Transcript, 02/27/2019, 94:5-15.

Q Would you have signed the Lake Tahoe ACPA, Exhibit 14, had you known that Todd owned 100 percent of Incline and that Incline owned the Lake Tahoe house at that time, or at least, the deed was in its name?

A No.

Transcript, 02/27/2019, 91:4-8.

e. <u>Misrepresentation: ACPAs Prepared By the Co-Trustees</u>

20. Todd argues in his *Brief* , "Pursuant to advice given to **Stan, Todd and Kevin Riley** by Maupin, Cox & LeGoy, the Co-Trustees of the Family Trust created agreements and consent to proposed actions "ACPAs" to memorialize their important business decisions. **Todd, Stan, and Kevin**, with the advice of counsel, created the ACPAs." *Todd's Brief*, p. 23, lines 19-22 (emphasis added). This is blatant misrepresentation of the evidence presented at trial. In relation to the Life Insurance ACPA (Exhibit 14), Stan testified (see above) he did not that ACPA until Todd and Michael Kimmel, as Co-Trustees of the Family Trust filed their *Petition for Confirmation* in August 2017. Transcript, 02/27/2019, p. 94, lines 5-15. If Stan had not seen the Life Insurance ACPA (Exhibit 14) until August 2017, then he was not involved in the preparation of the ACPA in 2013 when it was purportedly prepared. Stan further confirmed during trial he was not involved in the preparation of many of the ACPAs as follows:

Q Did you ever know Jessica Clayton to switch out or manipulate pages of documents?

A Not at the time, no.

Q When you say "not at the time," I mean, have you come to an opinion any time between then and now?

A Well, yeah, I would say after the -- you know, this -- looking through documents and stuff, it seems as though there were things that I don't recall taking place.

Q And what does that consist of, sir? What's changed your opinion, or has your opinion changed?

A Well, again, I was not aware of the -- that they were doing those ACPAs, that Todd and her were doing those.

Q And, in fact, your email that we looked at earlier, you had concerns about them, you know, forging or having fraudulent documents?

A Yeah, I just wasn't aware that -- you know, I was not in the loop on that one, that we were doing that in-house.

Q And, in fact, some of the ACPAs say that they were prepared by the cotrustees. Are you aware of that?

A Yes.

Q And you were a cotrustee, right?

A Yes.

Q In fact, you have been a cotrustee since your father died in April of 2013, through today, correct, of the family trust?

A Correct.

Q And so the ones that say that they were prepared by the cotrustees, were you involved in the preparation of those ACPAs?

A Yes.

Q So that would be inaccurate to say that they were prepared by the cotrustees?

A Correct.

Transcript, 02/27/2019, 94:16-5:22.[2]

[2] There is a mistake in the transcription of Stan's testimony at Transcript, 02/27/2019, p. 95, line 19. Stan's "Yes" answer should be "No." The "Yes" answer is not consistent with the testimony immediately prior to and after the "Yes" answer on line 16.

21. In relation to the Ag Credit and MetLife Loan ACPA (Exhibit 16), Stan's trial testimony confirms he had no involvement in preparing the ACPA, he was simply presented with it by Todd as Stan was leaving the office and asked to sign it.

> Q All right. And that was for what purpose?
>
> A So this is the one that I mentioned that was given to me as I was leaving the office one day, and I did not have time to fully review it. I just kind of glanced at it. And it was from Maupin Cox LeGoy. And Todd says hey, can you sign this? And I said okay.
>
> So I never had -- at that point on that day, I did not review this document.

Transcript, 02/27/2019, 180:2-9.

22. Additionally, Jessica Clayton's July 25, 2013 email to Kevin Riley and Bob LeGoy confirms Todd and Jessica prepared ACPAs without advice of counsel and without the involvement of all of the Co-Trustees. Exhibit 205.

From: Jessica Clayton <jtclaytone@aol.com>
To: kevin <kevin@rmb-cpa.com>; lrlegoy <lrlegoy@mclrenolaw.com>
Cc: tjaksick <tjaksick@gmail.com>
Subject: Agreement and Consent to Proposed Action
Date: Thu, Jul 25, 2013 7:54 am
Attachments: Agreement and Consent_loan payments.pdf (270K)

Hi Bob and Kevin,

Todd and I scurried last night to try and write up a "similar" Agreement and Consent to Proposed Action with regard to the trust making the loan payments. Bob, sorry for copying your form but we weren't sure what to do and we already sent the checks out yesterday.

Please let us know if this is acceptable. Todd and Wendy have signed it and if it's proper form I will forward to Stan.

We left the legal paragraph thinking we shouldn't include if you (Bob) didn't write.

Thank you both,

Jess
for Todd

Id. The email confirms Stan was not involved in the preparation of the ACPA because he was not

copied on the email, and it states "Todd and Wendy have signed it and if it's proper form I will forward to Stan." Id.

23. Further confirmation Stan was not involved in the preparation of many of the ACPAs is included in his February 27, 2018 email to his attorney Adam Hosmer-Henner, which is as follows:

From: Stan Jaksick <ssj3232@aol.com>
Date: February 27, 2018 at 9:59:20 AM PST
To: ahosmerhenner@mcdonaldcarano.com

Hey Adam
I called Bob LeGoy today to ask him how these "Notice of proposed actions" came about, trying to understand the process that took place, who initiated it, who drafted it etc.
He mentioned that their firm put together a couple of them to deal with certain Trust matters, which makes sense and there were certain documents that dealt specifically with Trust issues.
HOWEVER, he said after that occurred that
TODD AND JESSICA DRAFTED MOST OF THE OTHER ONE'S, which now make total sense. They would put these agreements together also with the help of NIK PALMER.

I just assumed they came from LeGoy's office, He would always get me to sign them in that hurry-rush time frame and then get them back to McQuaid to hold and file at the appropriate time

EXHIBIT
111
JAMIESON
depotbook.com

SO this is a perfect example of how Todd and Jessica would FORGE FRAUDULENT documents for the benefit of Todd

(Whether it was me signing them or they were FORGING my Dads signature)

AND ALL ALONG I ASSUMED THEY ALL CAME FROM LEGOY'S OFFICE

Definitely need to take McQuaid, LeGoy, Palmer, Todd and Jessica depositions regarding this

Thanks
Stan

Sent from my iPhone

Exhibit 111. The fact that in 2018, years after all of the ACPAs were prepared, Stan, a Co-Trustee, is asking Trust counsel about how the ACPAs came about, including "trying to understand the process that took place, who initiated it, who drafted it etc.," confirms Stan had no involvement in the preparation of most of the ACPAs and simply signed the documents when they were presented to him by Todd or Jessica. Id.

24. Therefore, Todd's representations and arguments to the Court that all of the ACPAs were prepared by Stan, Todd and Kevin with advice of counsel, is absolutely not true and is blatantly contrary to the trial record, including Stan's testimony.

f. Misrepresentation: Hyphens in Accounting Represented Negative Values

25. Petitioners' argue that "It is undisputed that the hyphens represented negative, non-income producing assets." *Petitioners' Brief*, pp.14-5, lines 21-4. In support of this, they cite to Todd's trial testimony stating that the purpose of the hyphens "was because those debts outweighed the value of the land so it shows like zero value." Id.

26. Wendy addresses the Trustees' use of the hyphens in their accounting extensively in her *Brief*. *Wendy's Brief*, p. 9-12, lines 21-20. The information included in *Wendy's Brief* confirms that Samuel S. Jaksick, Jr. LLC, which owned Jackrabbit Properties, LLC and which was one of the most valuable assets of the Trust, was valued with a hyphen on the accounting even though it was worth far more than zero. *Wendy's Brief*, p. 10-11, lines 22-6. On December 31, 2011, Kevin Riley valued Jackrabbit Properties, LLC at $16,586.000 ($23,496,000 in assets minus $6,910,000 in liabilities) on an accounting prepared for Sam. Exhibit 214, p. 8. Just over a year later, when Sam died, Samuel S. Jaksick, Jr. LLC was valued with a hyphen on the initial Family Trust accounting. Exhibit 72, pp. 4 & 12. Additionally, all of the Trustees' accountings valued Samuel S. Jaksick, Jr. LLC with a hyphen, until Wendy's share of Samuel S. Jaksick, Jr. LLC showed up in Wendy's Subtrust (after disappearing from the Family Trust during the period November 11, 2015 through October 11, 2017). *Wendy's Brief*, p. 16-17; Exhibit 72, pp. 4 & 12; Exhibit 73, pp. 5 & 18; Exhibit 74, p. 11; Exhibit 540, p.4.

27. Accordingly, Petitioners' argument that the hyphens in the accountings represented, negative, non-income producing assets is blatantly contrary to the trial record and Todd's testimony misrepresenting same to the Court and the jury was perjury meant to intended to mislead the Court

and the jury.

g. <u>Misrepresentation: Todd Provided Wendy Second Amendment in 2013</u>

28. Todd argues in his *Brief*, that it is undisputed that Todd provided the Second Amendment to Wendy in June 2013 in a three-ring binder. *Todd's Brief*, p. 13, lines 15-16. However, Wendy testified during trial that she did not recall the Second Amendment being included in the binder. Transcript, 02/26/2019, 91:3-8; 92:12-93:9. Additionally, Todd has no way to confirm the Second Amendment was included in the Binder, because he never produced the binder to Wendy although it was responsive to Wendy's requests for production. In relation to the binder, Todd testified as follows:

Q And the binders that you speak of, you didn't have a copy of that yourself, did you?
A Yes.
Q Why didn't you produce it to us?
A We did produce all the documents that were in the binder.
Q Why didn't you provide the binder -- the documents in the production as what was in the binder itself?
A I believe I did. I gave that binder to counsel.
Q If it's all mixed in, how are we supposed to know to what was in the binder back in October of 2013?
A I would have to, I guess, talk to counsel about that, but I gave them the binder.

Transcript, 02/20/2019, 139:21-140:8.

Q And all of that was mixed in to the production as a whole, rather than as this is the binder that was produced, right?
A Likely.

Transcript, 02/20/2019, 140:23-5.

29. Todd's repeated statement that the evidence is undisputed that Todd provided the Second Amendment to Wendy in June 2013 in a three-ring binder is not true. Because Todd did not produce a copy of the binder, which he apparently had and provided to his attorneys, there is no evidence other than Todd's testimony that he provided Wendy the Second Amendment in the binder in June 2013. Wendy disputes Todd provided her the Second Amendment in the binder in 2013, and Todd has not produced evidence confirming that the Second Amendment was provided to Wendy in 2013.

h. <u>Misrepresentation: Pay Down of $30,000,000 in Debt</u>

30. Throughout the trial Todd, in all his capacities, bragged about the great job he did as Trustee, as evidenced by paying down $30,000,000.00 in family debt. While he was praising himself for his work, he failed to provide the jury, the Court or anyone associated with this case with any proof that he actually did pay down that much debt. The only evidence presented was from his self-serving testimony, no documentary evidence was presented proving that much debt was paid down. To the extent anything was paid down it was from the sale of assets securing the debt, which must be discharged, and his negotiating permanent conservation easements, which forever encumbers and reduces the value of the family property. When asked directly where that much debt was reflected in the Accountings, i.e., his disclosure to the beneficiaries, he had no response. When shown that only $7.5 million in debt was reflected on the Accountings, he said that was direct debt, and that the rest was contingent debt that was "well known." He claimed he provided disclosure in the form of a binder, but had no copy of it and could not state with any certainty what it contained. Transcript, 03/01/2019,

22:10 to 31:16.

31. Todd testified the water rights – possibly the single largest asset of the entire Jaksick Family property – were not separately disclosed, but were included in the real estate disclosure. So, perhaps the single largest asset in the entire Jaksick Family Estate/Enterprise was never separately disclosed as a value item on any Accounting or written disclosure of any kind, as follows:

> **Q Where on earth, where are the water rights mentioned in the accountings that you say are such great disclosure?**
> A The water rights are on each individual piece of property as part of each individual property. Water rights are not separated from the land. The water rights are all represented in the appraisals of the properties that Wendy was provided.
> **Q I asked you a question about where the water rights are represented in the accountings.**
> **And the answer is they're not, correct?**
> A Because you don't segregate the water rights. The value, if you look at the value of, let's just say Buckhorn Land & Livestock, which is in the accountings, and it has the value of Buckhorn Land & Livestock. That value
> Page 36
> on the, on the more current -- once I got the debt paid down, and we start showing the value that was in excess of the debt, the value shows the land and the water rights.
> **Q You're saying that the accountings show the value of Buckhorn?**
> A The earlier ones did because the debt exceeded the value of the land. In the more current Buckhorn Land & Livestock, after we have got the debts paid down, I'd say the 2017 accountings, the 2018 accountings, the values are, shows Buckhorn, and that value includes the land and the water.

Transcript, 03/01/2019, 35:10-36:11.

32. Todd then testified he had no proof of the $30 million in debt, that it had never been fully disclosed and had no idea what was said in any meeting, nor was it documented, as follows:

> **Q And where's the $30 million that you claim was owed in debt in the accountings?**
> **Where is that?**
> A The $30 million in debt, it is -- Kevin Riley,

from my understanding, has two different ways of accounting for the debt.

He has direct debt obligations, which are direct debts of dad's family trust, and then he carries the other debt obligations as contingent obligation, and a lot of that value of the debt that you're talking about are contingent obligations.

For example, the loan that he just talked about that we were talking about at Buckhorn, Buckhorn Land &

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Livestock, is a personal guarantee that dad had of $4 million, and it isn't shown as a direct debt, it shows as a contingent obligation through the entity.

Q So you don't bother to tell the beneficiaries about the contingent obligations, is that right?

A No, we did tell the beneficiaries about the contingent obligations.

Q Pull up Exhibit 17, please.

Do you know how much debt is reported in that accounting? This is April 21st, 2013, through March 31st of 2014.

Do you know how much debt is accounted for in that?

A I don't recall off the top of my head, no.

Q The testimony you've given that you claim there's $30 million of debt outstanding around the time of your father's death, you report seven and a half million dollars of debt in the accounting.

Do you know that?

A That is the direct debt obligations. The contingent obligations fall outside.

Q Answer my question then.

You don't bother to tell the beneficiaries about the contingent debt, do you?

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A We did have discussions about all of the contingent obligations.

Q Convenient that they're just discussions, right? You don't have anything memorializing you sending something to the beneficiaries about those discussions, do you?

A I don't recall.

Q Right. So it's just you saying oh, we had discussions about it, and I can tell you that it happened, but nothing that memorializes it, right?

A I'd have to look at the entire accountings. And, Kevin Riley, I'm not sure exactly where he puts the contingent obligations, but it was well known that those obligations were out there.

Q That's my point, sir.
You keep saying it's well known, we discussed it, we had meetings about it, not a single thing memorializing what was said in any of those meetings, is there?
A I'm not sure.
Q You know there's not, sir? You know there's not, right?
A All I can tell you is that we had a lot of meetings with Wendy, Kevin Riley would come into town, and he'd go through the financial statements line by line, and

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the contingent obligations that aren't shown there, for example, Buckhorn Land & Livestock, Buckhorn Land & Livestock, Wendy knew exactly what we were doing with the conservation easement to try to get that debt obligation paid down.
Jackrabbit Properties, 7.8 million dollar note, is shown as the fact that it's a contingent obligation, to pay down that debt.
So all of those discussions relating to those entities, which were very detailed, explained to Wendy what those obligations were.
And I also mentioned that before dad passed away, in February and March, there was meetings with dad and Wendy and Stan and I to directly go over those debt obligations.
Q Back to my question.
You don't have a single thing that memorializes what was said in any of those discussions, do you?
A I can't recall anything right now.
Q Because if you had had something that did you would have produced it, correct?
A I would think so.

Transcript, 03/01/2019, 36:12-39:22.

33. Despite being duty bound to come forward with evidence that these fiduciaries disclosed information regarding the debt outstanding or its pay-down, they did not bother to do so. There is no evidence that anything was disclosed to the beneficiaries about the debt, other than the $7.5 million in the Accounting, which is far short of the amount Todd bragged had been paid down. These misrepresentations were yet another ploy to deceive the jury and the Court into believing the Trustees had done a much better job than that had. There is also no evidence that forever encumbering

the property was in the best interests of the beneficiaries of the Trusts or that doing so comported with Sam's intent as they paraded throughout their briefs as being of primary importance. Todd never wants the Court to look at the things he did wrong or that were in violation of his father's intent, but, instead, only denigrates Wendy as being a problem, a person he was supposedly appointed by his father to protect.

34. On top of all that, grotesquely, Todd cannot even say that he "likes" his sister, Wendy:

> **Q Okay. And you don't like Wendy, do you?**
> A Yes, I, I mean, Wendy, we have to treat everything like a business transaction because Wendy has said a lot of nasty things, obviously, but she's done that to all of our family at times over the years. And you have to treat everything as a business transaction. You can't put any emotion into it.
> **Q Answer my --**
> THE COURT: Would --
> MR. SPENCER: Sorry, Judge.
> THE COURT: Would you read the last question back, please, Ms. Reporter.
> (The record was read back by the court reporter.)
> THE COURT: Does the witness have an answer?
> THE WITNESS: I do not discuss things with Wendy on a regular basis lately. But I care for Wendy. She's
> Page 35
> family, but she does say a lot of upsetting things. And like I said, I have to treat this stuff as business transactions.
> BY MR. SPENCER:
> **Q You'd be upset, too, if you were not getting information from your trustee, wouldn't you?**
> A Sir, I believe we have given Wendy all the information that was necessary to provide her so she knew where she stands.

Transcript, 03/01/2019, 34:8-35:09.

35. There was no disclosure of the true value of assets or liabilities to the beneficiaries and no accurate rendition of either to this Court. Todd must face it: There was no disclosure in this administration; certainly, no legally sufficient disclosure. It is the burden of the fiduciary, not of a

beneficiary, to prove what was disclosed. If a binder was produce, there is no evidence of what is in the binder. There is no evidence of $30,000,000.00 in debt pay-down that does not come as self-serving testimony from Todd or people from his team; certainly no documentary evidence to corroborate that testimony. This is all a big farce in an effort to advance the fraudulent agenda of Todd to steal the inheritance of his brother, his sister and their families.

36. Mismanagement by a fiduciary is one thing, but there can be nothing worse in civil law than misappropriation of property by a fiduciary. The concept of trust being imparted to a person to be a good steward of property entrusted to them, for the benefit, in this case of the family for many generations to come, whose judgment is tainted by bias and greed that the trust becomes meaningless in lieu of taking the property for himself or themselves. The latter is exactly why there is an equitable portion of this proceeding. The Court is duty bound to apply equity and fairness to achieve what was supposed to have been done in the first place by the Trustees. Trustees cannot run rough-shod over all the rights of their beneficiaries, and then argue to the Court "it is OK" or that the beneficiaries should have protected themselves from me. The equivalent of the wolf arguing the sheep should have done something to keep him from eating them or the proverbial fox arguing the hens should never have let him in the henhouse. Fiduciaries cannot steal from their beneficiaries, malign their beneficiaries reputation over twenty year old issues, sue their beneficiaries (Todd initiated this entire litigation with his filings to approve the accountings, the ACPAs and all of his actions as Trustees, which forced Wendy to object and respond or lose her rights), fail to disclose information that would inform the beneficiary of their rights, the right to object and the effect of everything on their rights and then claim a "GOTCHA" to whatever they may file, and, worst of all, that they did nothing wrong. The law cannot allow such a position, else there is no law at all.

i. <u>Misrepresentation: Wendy Benefitted Much More than Todd from the Second Amendment</u>

37. Todd argues, "Stan and Wendy gained much more than Todd as a result of Sam's execution of the Second Amendment and the Successor Trustee's enforcement thereof. Exhibit No. 1." *Todd's Brief*, p. 5. First, the statement is blatantly false. Second, Todd then attaches a document to his brief he refers to as Exhibit No. 1, that, apparently, was Exhibit 577 on the Master Trial Exhibit List that is not evidence, was never admitted into evidence, and was to be used for demonstrative purposes only. So, not only does Todd blatantly make a false statement to the Court, but he cites to a document he concocted that was and is outside the record as support for the false statement, which is a misrepresentation to the Court from start to finish. Todd of all people, who, at least in title, serves a Co-Trustee should know as well or better than anyone that Sam wanted to and his intent clearly was to benefit his family, particularly his children equally, as evidenced by the Issue Trust and the Family Trust. There is no evidence that Stan and Wendy received more than Todd throughout this entire case; the evidence is exactly the opposite.

j. <u>Misrepresentation: Todd and Stan Have Not Received Distributions from the Trust</u>

38. Todd argues, "Neither Todd nor Stan have received monetary distributions from the Family Trust. Why Wendy believes she is "entitled" now to that which other beneficiaries are not remains a mystery." *Todd's Brief*, p. 6. The Family Trust Accountings and other Exhibits admitted at trial, including Exhibits 72, 73, 74 and 126 (or 180), include evidence confirming Todd and Stan received distributions that Wendy did not receive. It is undisputed they received fees as Trustees. It is undisputed they received the benefit of the Family Trust paying their attorneys' fees, which are distributions. Todd and Stan, as Co-Trustees of the Family Trust – both agreed to pay their own personal capital calls for the Jackrabbit investment in blatant breach of their fiduciary duties; and then attempted to con this Court into believing they have received nothing. Exhibit 38; Exhibit 411 and Exhibit 412. It is fine for Todd to capitalize on the trust he is supposed to be administering, but when Wendy requests distributions so she can survive financially, she is a "criminal" with a "dubious

motivation … to prosecute these claims." This is indescribably hypocritical and disingenuous considering these statements are being made to the Court with the expectation that they be believed.

III. Rebuttal Argument and Authority

a. Reliance on Professionals

39. Todd argues that he cannot be liable for his actions because he relied on professionals for "many of his decisions." *Todd's Brief*, p. 38, line 13-14. Todd further argues, "the law is clear that Todd, as a Trustee, cannot be held liable to beneficiaries for a professional's decision or actions provided that Todd, Stan, Mike and Kevin exercise reasonable care in selecting the professional." Id. at 38, lines 22-24. To support this position, Todd cites to Jury Instruction No. 11. Id. 39, lines 4-5.

40. Todd's reliance on Jury Instruction No. 11 is misplaced. Jury Instruction No. 11 is based on NRS 164.770, which applies when trustees delegate investment and management of a trust to an agent. NRS 164.770 ("A Trustee may delegate functions of investment and management that a prudent trustee of comparable skills could properly delegate under the circumstances."). Todd and the other Trustees did not delegate any aspects of the investment or management of the Trusts to Maupin, Cox & LeGoy or any other agents and there is no evidence in the trial record supporting same. Instead, Todd, mainly, and sometimes the other Trustees administered the Trusts and involved Maupin, Cox & LeGoy and Kevin Riley in some of the administration decisions.

41. Todd repeatedly argues in his *Brief* that "Sam's intent must be the primary focus." *Todd's Brief*, p. 5, line 2. Todd and Pierre Hascheff testified that Sam's intent was that Todd serve as Trustee of both Trusts, and Stan serve as Trustee of the Family Trust. Everyone testified and is undisputed that Sam did not intend Wendy to serve as Trustee of the Issue Trust and Family Trust. Therefore, Todd and the other Trustees were responsible for the administration of the Trusts. They do not get to claim and rely on the powers provided to them as Trustees, while at the same time disclaiming or deflecting the obligations that come with their positions and powers.

42. This is exactly what Todd attempted to do in relation to the annual accountings for the Trust. *Wendy's Brief*, p. 20-28, lines 24-14. Todd attempted to shift all responsibility to prepare and delivery proper accountings to Kevin Riley, the accountant for the Trusts. Id. Todd testified when he submitted the accountings to the Court for confirmation and approval, he was just verifying the that "Mr. Riley had prepared them and that then we were submitting them to the court. ... it was our obligation that we were verifying that our accountant had provided them." Transcript, 02/21/2018, 188:4-189:16. The problem is that the cover letter on all of the accountings including a disclaimer stating that the accountings were just compilations of information provided by the Trustees and Kevin Riley and had not audited the information and were not responsible for the content. Exhibit 72, p. 1.

43. Bob LeGoy of Maupin, Cox & LeGoy testified that he fully informed Todd, Stan and Kevin of their duties as Trustees of the Trusts. Transcript, 03/01/2019, p. 100, lines 9-21. Despite having done this, the Trustees repeatedly failed to timely prepare and deliver annual accountings, which are explicitly required by Nevada statute and the terms of each of the Trusts. *Wendy's Brief*, pp. 2-7, 19-22. Wendy was forced to compel the production of certain annual accountings, which this Court ordered the Trustees to prepare and delivery just days before the jury trial. The Trustees have once again refused to deliver accountings they are required to produce and deliver, with full knowledge the accountings are required by Nevada law, the terms of the Trusts and this Court. *Wendy's Brief*, pp. 6-7, lines 6-13. These are per se breaches of trust. It impossible to imagine the "'Who's Who' of this community's best estate planning lawyers" are advising the Trustees to commit continuous and repeated breaches of the most basic requirements of disclosure mandated by Nevada law and the Trusts. *Todd's Brief*, p. 22, line 17. In addition, the annual accountings filed for approval and confirmation in this matter are deficient on their face. *Wendy's Brief*, p. 7-20.

44. Beyond the accountings, Mr. LeGoy confirmed that Maupin, Cox & LeGoy was not responsible for disclosing information concerning the Trust administration to the beneficiaries, that

was the Trustees' job. Transcript, 03/01/2019, pp. 98-9, lines 20-16. Accordingly, the Trustees' failure to disclose to Wendy was the Trustees' responsibility and cannot be deflected on Trustees' counsel.

45. Finally, the trial record confirms the Trustees did not rely on the advice on counsel in many aspects of the administration of the Trusts. This is true in relation to some of the most critical aspects of the administration, including Todd's purported Indemnification Agreement and the administration of the Family Trust in relation to same. Todd's purported Indemnification Agreement was one of the most critical aspects of the Trust administration. Stan confirmed the importance and impact Todd's purported Indemnification had on the Family Trust stating, it "has a far bigger impact on the Trust then [sic] any lawsuit or attorney fees ever will," and that it had the potential to completely wipe out the trust. Exhibit 38; Transcript, 02/27/2019, 58:23-59:1. However, because questions and disputes arose over the validity, scope and application of the purported Indemnification Agreement, Maupin, Cox & LeGoy refused to advise the Trustees concerning the Agreement. Bob LeGoy's testified concerning this, as follows:

Q And do you recall the indemnification agreement?
A Yes.
Q And do you recall that you were asked at one point to determine the scope of that indemnification agreement and how it would apply in the administration of the family trust?
A Yes.
Q And you refused to do that, didn't you?
A Yes.

Transcript, 03/01/2019, 101:6-12.

Q And that, that conflict created or creates a situation where you could not determine or opine about the application of the indemnity agreement?

A That was the conclusion we reached.

Transcript, 03/01/2019, 102:4-7. Because Maupin, Cox & LeGoy refused to advise the Trustees concerning Todd's purported Indemnification Agreement and the scope and application of same, it is clear the Trustees were not relying on the advice of counsel in all aspects of their administration of the Trusts.

46. The validity, scope and application of Todd's purported Indemnification Agreement should have been addressed immediately after Sam's death in 2013. However, because it was not resolved, it affected all other aspects of the Trust administration. The manner in which the it was addressed in the accountings was deficient causing the accountings to be deficient. Additionally, it was impossible for the Trustees to disclose to Wendy concerning their administration of the Family Trust, because they themselves did not understand and resolve the validity, scope and application of Todd's purported Indemnification Agreement.

47. Todd and the other Trustees did not delegate any aspects of investment or the administration of the Trusts to professionals, and, therefore, cannot and must not be permitted to deflect and escape responsibility for their failures as Trustees.

b. Unjust Enrichment and Constructive Trust Claims

48. Wendy has asserted claims for Unjust Enrichment and Constructive Trust.

49. **Unjust Enrichment.** The elements of a claim for unjust enrichment are:

1. A benefit has been conferred upon the defendant;

2. Defendant appreciated the benefit;

3. Defendant accepted and retained the benefit under circumstances where it would be inequitable for Defendant to retain the benefit without the payment of value for the same; and

4. Absence of an express, written contract.

Robinson v. Coury, 115 Nev. 84, 976 P.2d 518 (1999); Leasepartners Corp. v. Robert L. Brook Trust, 13 Nev. 747, 942 P.2d 182, 187 (1997) ("The Doctrine of unjust enrichment … applies to situations where . . . the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another [or should pay for]"). Unjust enrichment is the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. Topaz Mut. Co., Inc. v. Marsh, 108 Nev. 845, 856, 839 P.2d 606, 613 (1992). Fraud and wrongdoing are not required elements to prevail on a claim for unjust enrichment. Leasepartners Corp., 13 Nev. at 942; see also Waldman, 124 Nev. At 1132.

50. **Constructive Trusts.** The following elements must be established for a court to impose a constructive trust:

1. A confidential relationship between the parties;
2. Retention of legal title by defendant against plaintiff would be inequitable under the circumstances; and
3. Existence of trust is essential to the effectuation of justice.

Schmidt v. Merriweather, 82 Nev. 372, 375, 418 P.2d 991, 993 (1966).

51. While a constructive trust is usually invoked when property has been acquired by fraud, such a trust may also be imposed where it is against the principles of equity that a certain person retain the property even though the property was acquired without fraud. See Waldman v. Maini, 124 Nev. 1121, 1132, 195 P.3d 850, 858 (2008) (confirming Nevada does not require fraud or wrongdoing to

impose a constructive trust, just an inequitable act or result); see also Bemis, 114 Nev. at 1027, 967 P.2d at 441 (explaining that constructive trusts are no longer limited to fraud and misconduct, but are implemented to redress any unjust enrichment). Therefore, a constructive trust is a remedial device not solely arising in cases of wrongdoing. See Id.

52. **Ordering Equitable Remedies Does Not Violate Seventh Amendment.** Todd and Trustees argue that Wendy is not entitled to recover on her equitable claims for unjust enrichment and constructive trust because her claims are based on the same facts considered by the jury and, therefore, the Court is bound by the Seventh Amendment of the United States Constitution to follow the jury's implicit or explicit factual determinations. *Todd's Brief*, p. 40-1; *Petitioners' Brief*, p. 4-6.

53. "To bind the district court's equitable powers, a jury finding must be on an issue 'common' to the action's legal and equitable claims; otherwise the court is free to treat the jury's findings as 'merely advisory' under Federal Rule of Civil Procedure 39(c)." Sturgis Motorcycle Rally, Inc. v. Rushmore Photo & Gifts, Inc., 908 F.3d 313, 343 (8th Cir. 2018). "If the jury's findings were on a common issue, the court, in fashioning equitable relief, 'may take into account facts that were not determined by the jury, but it may not base its decision on factual findings that conflict with the jury's findings.'" Id. at 344. "Equity demands flexibility and eschews mechanical rules." Id. at 345.

54. The jury's findings were not on an issue "common" to the action's legal and equitable claims. Wendy's constructive trust and unjust enrichment claims were not tried during the Legal Claims Trial. Wendy's legal claims tried to the jury were limited to: (i) breach of fiduciary duties, (ii) civil conspiracy and aiding and abetting, (iii) aiding and abetting breach of fiduciary duty and (iv) fraud. The *Pre-Trial Order Regarding Trial Schedule* (the "Pre-Trial Order"), the Verdict and *Todd's and Petitioners' Briefs* confirm Wendy's equitable claims for constructive trust and unjust enrichment would be tried separately and after Wendy's legal claims. While it is true that evidence and facts presented at the Legal Claims Trial are relevant to the claims at the Equitable Claims Trial, Wendy's

constructive trust and unjust enrichment claims are separate and distinct from the previously tried claims and were not considered by the jury.

55. Even if Wendy's unjust enrichment and constructive trust claims are considered to be based on an issue "common" to the legal and equitable claims, the Court may still fashion equitable relief as long as it does not base its decision on factual findings that conflict with the jury's findings. Sturgis, 908 F.3d at 344. The requirements and standards for the imposition of a constructive trust and the finding of unjust enrichment are very different than those for the claims tried during the Legal Claims Trial. During the Legal Claims Trial, the jury was asked to determine if Wendy's fiduciaries breached their fiduciary duties to Wendy, aided in the breach of fiduciary duties to Wendy or committed fraud, entitling Wendy to damages/compensation. To prevail on the claim, the jury was required to find bad acts or wrongful conduct by Wendy's fiduciaries and award damages from Wendy's fiduciaries to Wendy. During the equitable phase of the trial, this Court will be asked to determine if Todd's, his entities' and/or his Family Trusts' retention of property is unequitable under the circumstances, and if such property should be restored to the Family Trust and Issue Trust. These are completely different requirements and standards. The jury was never asked and did not have the opportunity to consider whether the circumstances warranted the return of property to the Trusts. This is the kind of judgment that is reserved for the Court and within the Court's discretion in formulating and fashioning equitable relief. Therefore, a finding by the Court that Todd's actions in relation to the Tahoe Property prior to Sam's death warranted the return of the Tahoe Property to the Trust would rest on findings not precluded by the jury's verdict.

56. In relation to the use of the Issue Trust life insurance proceeds, Todd was acting as Trustee of the Issue Trust when he used the life insurance proceeds to buy in and reduce the debt on the Tahoe Property. As detailed in *Wendy's Brief*, this transaction was a self-dealing transaction that benefited Todd, his entities and his Family Trusts. Where a personal representative has profited

through a breach of trust, a plaintiff is entitled to equitable relief without having to show that the breach caused damages. *Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999) (emphasis added); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509 (Tex. 1942); *see also* RESTATEMENT (THIRD) OF AGENCY § 801 cmt. d (2006). This is particularly true in a case in which damages are unavailable or there is no to little monetary damages, so the breach cannot be remedied through monetary compensation. Instead, the court will grant equitable relief based on the "equity of the circumstances." In such cases, the contested fact issues are resolved by the jury (whether there was a breach), and the court decides whether to grant equitable relief. *Burrow*, 997 S.W.2d at 245.

57. While the Court may find unjust enrichment or impose a constructive trust without a finding of bad acts or wrongful conduct, in this case the jury found Todd breached his fiduciary duties as Trustee of the Family Trust and the Issue Trust. Jury Verdict, p. 2. NRS 153.031 permits the court to redress a breach of trust using its "full equitable powers." *See Diotallevi v. Sierra Dev. Co.*, 95 Nev. 164, 591, P.2d 270, 272 (Nev. 1979). Therefore, the imposition of equitable remedies would be consistent with and would follow the jury's implicit or explicit factual determinations.

58. **Unjust Enrichment: Benefits Conferred By Wendy.** Todd and Trustees argue that to prevail on her claim for unjust enrichment, Wendy must demonstrate that Todd or the Trustees received "a benefit which in equity and good conscience belongs to another." *Todd's Brief*, p. 42-3; *Petitioners' Brief*, p. 20-1. Todd and Trustees further argue that Wendy's claim for unjust enrichment fails because she personally did not transfer any benefit directly to Todd or the Trustees.

59. It is undisputed that Wendy is a beneficiary of the Family Trust and the Issue Trust. Wendy's beneficial interest in both Trusts was and is directly affected because: (i) Todd diverted the Tahoe Property out of the Family Trust to an entity wholly owned by Todd, his entities or his Family Trust and (ii) nearly $6 million in life insurance proceeds payable to the Issue Trust were used to buy an interest in Incline TSS. Wendy's fiduciaries' defense is that Todd's breach of trust in

accomplishing this transaction should be ignored because the value of the Tahoe Property has increased. This completely ignores the fact that Todd completed this transaction for the benefit of himself, his entities and his Family Trusts, not the Issue Trust. Additionally, it ignores the fact that the purpose of the $6 million life insurance proceeds was to be available to maintain the vast rural real estate of the Issue Trust, with the potential to build or maintain homes for the beneficiaries.

60. If the Tahoe Property is returned to the Family Trust or an entity owned by the Family Trust, the value of the Tahoe Trust would increase by at a minimum $10 million ($18 million value - $8 million paid for the property). If the life insurance proceeds are returned to the Issue Trust, the Issue Trust would have cash to invest, to use to maintain the real estate it owns and to potentially build or maintain houses for its beneficiaries. Wendy would directly benefit under both of these scenarios because here beneficial interest in the Family Trust would increase substantially and the Issue Trust would have the means to purchase and/or maintain a home for Wendy.

61. Todd and the Trustees did not cite and cannot cite any authority confirming that a person with a beneficial interest in a Trust cannot pursue and recover on behalf of a Trust based on a claim for unjust enrichment because such authority does not exist. Additionally, unjust enrichment and equitable claims in general are appropriate where a party has no other means of remedy. *Burrow*, 997 S.W.2d at 245; Sturgis at 345 ("Equity demands flexibility and eschews mechanical rules.").

62. In this case, Todd and Wendy's fiduciaries have no interest and will never pursue the return of the Tahoe Property to the Family Trust or the life insurance proceeds to the Issue Trust. Todd, his entities and/or his Family Trust's benefit far more if the property and cash are not returned. Additionally, Stan previously attempted to buy into the Tahoe Property and just days before trial reached a new agreement with Todd to buy into the Tahoe Property on very favorable terms in return for dropping his claims against Todd in this lawsuit. Exhibit 457; *Wendy's Brief*, 85-7, lines 18-16. As a result, Wendy has no other means to protect her beneficial interest in the Family Trust and Issue

Trust.[3]

63. **Unjust Enrichment: Benefits Received by Todd.** Petitioner's argue "...Todd did not receive a personal benefit, aside from the benefit each sibling received as a beneficiary, from paying down the Tahoe Property debt with the life insurance proceeds." *Petitioners' Brief*, p. 22, lines 13-14. Wendy addressed the Tahoe Property transaction in depth in her *Brief*, but believes it is necessary briefly address this statement. *Wendy's Brief*, p. 85-7, lines 18- 16; 60-72, lines 22-28. To maintain and exercise the Option Agreement, Todd, his entities or his Family Trusts paid approximately $146,744.68 over a two-year period. *Wendy's Brief*, p. 63, lines 13-23; Exhibit 89. During this time, Todd had trouble making the $50,000 option payments timely and had to pay $500.00 for an extension to make the payment late. Id. The fact that Todd had difficultly timely making the option payments ($50,000 a year), confirms there was no way he and his entities could afford to service the $6.3 million in debt owed on the Tahoe Property following the exercise of the Option Agreement.

64. Incline TSS obtained a 100% ownership interest in the Tahoe Property as a result of the exercise of the purported Option Agreement. So, for $7.25 million, Incline TSS was able to acquire a property worth $12 million with outstanding debt of $6.3 million. This was an immediate gain of $4.75 million ($12 million - $7.25 million) to Todd and his entities if he could service or resolve the outstanding debt. By using the Life Insurance proceeds, Todd was able to reduce the outstanding debt from $6.3 million to approximately $2.5 million, which was more far more manageable for Todd and

[3] Other jurisdictions have recognized the right of a beneficiary to pursue claims on behalf of trusts when the trustee cannot or will not enforce the cause of action it has against a third person. Ginther v. Bank Of Am., N.A., 01-08-00430-CV, 2010 WL 2244098, at *8 (Tex. App. May 28, 2010); *Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864, 874 (Tex.App.-Houston [1st Dist.] 1985, writ ref'd n.r.e.).

his entities to service.[4] Aa a result of this transaction, Todd and his entities' interest in Incline TSS dropped from 100% to 46%. At trial, it was established that the value of the Tahoe Property was $18 million. Transcript, 02/20/2019, 32:9-25. If the property were sold now, Todd and his entities would realize a gain of approximately $5.78 million (($18 million x .46) - $2.5 million). Todd and his entities would never have been able to realize this gain if Todd had not used the Issue Trust funds to pay down the debt. To say that Todd and his entities did not receive a personal benefit from this transaction is blatantly false and contrary to the trial record.

65. Next, Todd argues that the benefits Wendy has identified were received by entities and trust in which Todd or his family may have an interest, but she has not asserted claims against the entities. *Todd's Brief*, p. 43, lines 20-21. On November 15, 2018, Wendy filed *Wendy Jaksick's Motion for Leave to Join Indispensable Parties*. On January 16, 2019, this Court issued the *Order Granting in Part and Denying in Part Motion for Leave to Join Indispensable Parties* (the "Order Jointing Parties"). In the *Order Joining Parties*, this Court provides as follows:

> However, the interests of Incline TSS, Ltd. present a different set of facts. Wendy's first request for relief with respect to the Lake Tahoe Property is that all transactions

[4] In an effort to further reduce the amount of debt Todd and his entities were required to service, Todd was also attempting to have Stan buy an interest in Incline TSS for approximately $1.5 million and personally guarantee the remaining debt. Exhibit 23.

> resulting in its transfer outside of the Family Trust be set aside. Were a finder of fact to determine such a remedy is warranted, it could require conveyance of title from the present owner of the property, Incline TSS, back to the Family Trust. In addition, Wendy requests the ACPA regarding payment of Lake Tahoe Property debt be invalidated. It is possible a finder of fact could find the ACPA to be invalid, resulting in an order returning the life insurance proceeds used to pay the Lake Tahoe Property debt to the Issue Trust. In such a case, it would again be Incline TSS who would be required to relinquish its assets for the benefit of the Trusts. If Incline TSS refused in either situation, which it would be entitled to do if not afforded the opportunity to participate and be heard on these issues, relitigation would be necessary. As such, complete relief cannot be afforded without joinder of Incline TSS as a party in this matter. Though Todd may be manager of Incline TSS, the two are separate legal entities. Incline TSS, not Todd, holds title to the Lake Tahoe Property and it is Incline TSS from whom property would potentially be taken. Thus the fact that Todd has been sued in his individual capacity opening his personal assets to liability is immaterial.
>
> While this Court finds Incline TSS is a necessary party, the same cannot be said for the TBJ and TBJ Family Trusts. Even if these trusts have partial ownership interests in Incline TSS, they need not be included to accomplish any possible return of real sproperty or life insurance proceeds. Accordingly, Wendy's motion to join is granted with respect to Incline TSS, Ltd., and denied with respect to SSJ, LLC; TBJ Trust; and TBJ Family Trust.

Order Joining Parties, pp. 6-7, lines 27-20. As confirmed by the Court's Order, Wendy's requested relief includes setting aside all transactions resulting in the transfer of the Tahoe Property outside the Family Trust. The current owner of the Tahoe Property is Incline TSS. Incline TSS filed the *Answer/Response to Wendy's First Amended Count Petition* in this matter on February 8, 2019. Therefore, all parties necessary for the Court to grant Wendy's requested relief related to the Tahoe Property are before the Court.

66. **Wendy's Pleadings and Claims Are Sufficient to Support Restoration of Tahoe Property to Family Trust.** Todd argues that Wendy is essentially asking the Court to quiet title in the Tahoe Property without complying with any of the procedural requirements to do so. *Todd's Brief*,

p. 47, lines 14-18. NRS 40.010, which codifies the claim, states as follows:

> An action may be brought by any person against another who claims an estate or interest in real property, adverse to the person bringing the action, for the purpose of determining such adverse claim.

NRS 40.010. Deutsche Bank Nat'l Tr. Co. v. SFR Investments Pool 1, LLC, 382 F. Supp. 3d 1114, 1118 (D. Nev. 2019), the case cited by Todd in support of his argument confirms, "[a] plea to quiet title does not require any particular elements...". Id. at 1119.

67. As confirmed in the Court's January 16, 2019 *Order Granting in Part and Denying in Part Motion for Leave to Join Indispensable Parties*, Wendy's first request for relief in respect the Tahoe Property is that all transactions resulting in the transfer outside of the Family Trust be set aside. *Order Joining Parties*, pp. 6-7, lines 27-20. Therefore, Wendy has attacked the transfers of the Tahoe Property and has pleaded for the return of the Tahoe Property to the Family Trust. The Court's *Order Jointing Parties* further confirms that Incline TSS, the current owner of the Tahoe Property, was the only additional necessary party required to be joined to the lawsuit for the Court to grant Wendy's requested relief related to the Tahoe Property. Id. Inline TSS has been sued and made a party to this lawsuit. Wendy's pleadings and claims are sufficient to support the return of the Tahoe Property to the Family Trust if the Court determines same is warranted. Nothing included in NRS 40.010 or Deutsche Bank or argued by Todd establishes otherwise.

68. **Unjust Enrichment: Claim Not Barred Because Trust is Not a Contract.** Todd argues, because the Family Trust and Issue Trust are contracts, Wendy cannot assert a claim for unjust enrichment. *Todd Brief*, 44, lines 6-7. Todd's argument fails because trusts are not contracts. There is no authority in Nevada establishing trusts are contracts or that trusts are to be treated as contracts in relation to or for purposes of unjust enrichment claims. Courts in other jurisdictions faced with the question of whether trusts are contracts have confirmed that trusts are not contracts.

69. An Arizona Court in Schoneberger v. Oelze, confirmed that under Arizona law trusts

are not contracts. 96 P.3d 1078, 1082 (Ct. App. 2004), superseded by statute, 2008 Ariz. Sess. Laws, ch. 247, § 16 (2d Reg. Sess.) (current version at A.R.S. § 14–10205 (2012))[5]. In reaching this conclusion, the Court explained that "a beneficiary of a trust receives a beneficial interest in trust property while the beneficiary of a contract gains a personal claim against the promisor." Id. "Moreover, a fiduciary relationship exists between a trustee and a trust beneficiary while no such relationship generally exists between parties to a contract." Id. Drawing on the Restatement (Second) of Trusts (1959), the Court further noted: "... The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract." Id. Because the Court determined trusts are not contracts, it affirmed the trial court's refusal to compel arbitration. Id. at 1084.

70. A Texas Court in Rachal v. Reitz, also found that trusts were not contracts. 347 S.W.3d 305, 311 (Tex. App. 2011), rev'd, 11-0708, 2013 WL 1859249 (Tex. 2013)[6]. In support of its position, the Court explained:

> Texas, like Arizona and California, recognizes distinctions between the formation of a contract and the creation of a trust. As set out above, for a valid contract to exist in Texas, there must be an offer, an acceptance, a meeting of minds between the parties, each party's consent to the terms of the contract, and execution and

[5] The Arizona trial court denied trustees' motion to compel arbitration under mandatory arbitration provision included in the trusts. The Arizona appellate court confirmed the trial court's ruling holding that trusts are not contracts subject to statute enforcing contractual arbitration provisions. The Arizona Legislature subsequently enacted Arizona Revised Statutes section 14–10205, which provides: "A trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust." Section 14-10205 did not change or affect the appellate court's holding that trusts are not contracts.

[6] The Texas trial court denied trustee's motion to compel arbitration on the grounds that arbitration provisions in trusts are not enforceable under the Texas Arbitration Act. The Texas appellate court confirmed the trial court's ruling holding that trusts were not contracts subject to the Texas Arbitration Act. The Texas Supreme Court reversed the trial court's judgment based on a broader interpretation of the Texas Arbitration Act. The Texas Supreme Court's holding did not change or affect the intermediate appellate court's holding that trusts are not contracts.

> delivery of the contract with the intent that it be mutual and binding on the parties to the agreement. Gables Cent. Constr., 2009 WL 824732, at *2. Further, consideration "is also a fundamental element of every valid contract." Id.

Because the Court determined trusts are not contracts, it also affirmed the trial court's refusal to compel arbitration. Id. at 312.

71. The first case cited by Todd in support for his argument that Trusts are contracts is France v. Thermo Funding Co., LLC, 989 F. Supp. 2d 287, 294 (S.D.N.Y. 2013). This case involves the Court's determination of considerations for determining alienage diversity of citizenship in relation to a Colorado testamentary trust. In describing various types of trusts, the Court states that a "trust is best defined as a contract or fiduciary relationship between a holder of property (called the grantor, settlor, or trustor) and one or more trustees." Id. The authority cited by the Court in support of this statement does not include any support for the proposition that a Trust is a contract. Footnote 34, states as follows:

> "A trust ... is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of ... one or more persons, at least one of whom is not the sole trustee." *Restatement (Third) of Trusts* § 2 (2003). *See also Black's Law Dictionary*1647 (9th ed.2009) (defining a trust as "a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*)").

In fact, this authority actually supports the holdings in Schoneberger v. Oelze and Rachal v. Reitz that trusts are relationships not contracts.

72. The second case cited by Todd, simply provides support for the proposition that Trusts are treated as contracts for purposes of interpreting and constructing their provisions. Key v. Tyler, 246 Cal. Rptr. 3d 224, 253 (Ct. App. 2019), as modified on denial of reh'g (May 7, 2019), review filed (June 17, 2019). The third case cited by Todd is the Matter of Chaney, 596 B.R. 385, 402 (Bankr. N.D. Ala. 2018). This case involves interpreting the concept of technical trusts for very narrow and

specific application of 11 USCA § 523, which describes the exceptions to the discharge of certain debtors in bankruptcy. The final case cited by Todd, is based on claims of Hartford Fire Insurance Company that its contract with a general contractor created a trust requiring the general contractor to hold progress payments in trust for the subcontractors. Hartford Fire Ins. Co. v. Columbia State Bank, 334 P.3d 87, 91 (2014). The ultimate finding of the Court was that, while express trusts can be created by contract, the contract at issue between the Harford and the general contractor did not include an intention by the parties to create a trust. Despite including comments that trusts are contracts, none of the cases cited establish or purport to establish that trusts are contracts for purposes of unjust enrichment claims.[7]

73. **Unjust Enrichment, Constructive Trust and Other Equitable Remedies: Not Double Recovery.** Todd and Petitioners argue that Wendy is not entitled to recover on her claims of unjust enrichment and constructive trust because she has already recovered for her harm as a result of the jury's award of $15,000. *Todd's Brief*, p. 44; *Petitioners' Brief*, p. 20-26. As support for their position, both Todd and Petitioners cite to Elyousef v. O'Reilly & Ferrario, LLC, 126 Nev. 441, 444 (2010). Todd and Petitioners misstate the case's holding by attempting to extend it to all available types of recovery, when the language of the case limits its application to damages or compensatory damages. Id. 443-444. ("[a] plaintiff may not recover **damages** twice for the same injury simply because he or she has two legal theories. ... We noted that when a plaintiff asserts claims under different legal theories, he or she is not entitled to a separate **compensatory damage** award under each legal theory. ... [T] plaintiff is entitled to only one **compensatory damage** award on one or both

[7] Fireman's Fund Ins. Co. v. Maryland Cas. Co., 77 Cal. Rptr. 2d 296, 309 (1998). ("...we are not bound by dicta, particularly where it is unpersuasive and contrary to the overwhelming weight of precedent. In every case, it is necessary to read the language of an opinion in light of its facts and the issues raised, in order to determine which statements of law were necessary to the decision, and therefore binding precedent, and which were general observations unnecessary to the decision. The latter are dicta, with no force as precedent.")

theories of liability.") (internal citations omitted) (emphasis added). Wendy is not seeking to recover damages and the Court cannot award damages based on Wendy's equitable claims. Wendy's equitable claims seeks recovery for actions that cannot be compensated by damages. Accordingly, the imposition of equitable remedies by the Court is not a double recovery by Wendy.

c. Wendy Did Not Waive Right to Challenge Accountings.

74. Petitioners argue that Wendy has waived the right to challenge the accountings at issue because she failed to object within 180 days of receipt of the accountings. *Petitioners' Brief*, p. 15-6.

75. The Accountings filed in this case were grossly insufficient, cannot be relied upon because the Trustees cannot verify the information contained in them are accurate. In addition to the Trustees' failure to verify the Accountings of the own trust administrations, they rely upon Kevin Riley, the accountant, to do so because, as they say, he is competent at his job. But, do not forget the disclaimer Kevin Riley made concerning every single accounting he has prepared relating to the Jaksick trusts, which read as follows:

> We have compiled the accompanying summary of account of the Samuel S Jaksick Jr Family Trust, and the related schedules as of March 31, 2014, and for the period April 21, 2013 to March 31, 2014. **We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or provide any assurance about whether the financial statements are in accordance with accounting principles generally accepted in the United States of America**. ¶ **The trustees of the are responsible for the preparation and fair presentation of the financial statements** in accordance with accounting principles generally accepted in the United States of America and for designing, implementing, and maintaining internal control relevant to the preparation and fair presentation of the financial statements. ¶ Our responsibility is to conduct the compilation in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants. The objective of a compilation is to assist the trustees of the … Trust in presenting financial information in the form of financial statements without undertaking to obtain or provide any assurance that there are not material modifications that should be made to the financial statements. ¶ **The TRUSTEES HAVE ELECTED TO OMIT substantially all of the disclosures required by accounting principles generally accepted in the United States of America. If the omitted disclosures were included**

> **in the financial statements, they might influence the user's conclusions about the trust's financial position, results of trust activities, and cash flows. <u>Accordingly, the financial statements are not designed for those who are not informed about such matters.</u> ¶ We are not independent with respect to the Samuel S Jaksick Jr. Family Trust.** (Emphasis added).[8]

Exhibit 72, at JSK 001118.

76. The disclaimer itself admits the Accountings are not audited (verified for accuracy), do not comply with generally accepted accounting principles, rely on the trustees to fair presentation of the Accountings, intentionally omit normally required disclosures, and that they are "not designed for those who are not informed about such matters," like Wendy. Id. If it were not bad enough for the Trustees that filed the Accountings to misrepresent their contents, they now assert in their Closing Arguments Brief Wendy is barred from challenging the accountings because Wendy failed to object within 180 days of her receipt of the accountings. The Trustees fail to cite to any evidence that shows what they actually told Wendy and whether she was told anything more than the content of the bogus accountings. Their failure to prove their disclosure precludes their ability to bar Wendy's claims and challenge of the accounting.

77. **<u>Authority</u>.** The duty to speak does not necessarily depend on the existence of a fiduciary relationship. *Central States Stamping Co. v. Terminal Equipment Co.*, (C.A.6, 1984), 727 F.2d 1405, 1409. ' * * * It may arise in any situation where one party imposes confidence in the other because of that person's position, and the other party knows of this confidence. * * * ' " *Id.* ... *Mackintosh v. California Fed. Sav. & Loan Ass'n*, 113 Nev. 393, 401, 935 P.2d 1154, 1159 (1997).

> With respect to fraudulent concealment, a duty to disclose arises from the relationship of the parties. A fiduciary relationship, for instance, gives rise to a duty of disclosure. *See, e.g., Foley v. Morse & Mowbray*, 109 Nev. 116, 125–26, 848 P.2d 519, 525 (1993). A duty to disclose may also arise where the parties enjoy a "special relationship," that is, where a party reasonably imparts special confidence in the defendant

[8] All the Financial Statements (Accountings) contained the same or substantially the same disclaimer. Exhibit 73, Exhibit 74 and Exhibit 126 (or Exhibit 180) and Exhibits 129-133.

> and the defendant would reasonably know of this confidence. *See Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 634–35, 855 P.2d 549, 553 (1993) (citing *Mancini v. Gorick*, 41 Ohio App.3d 373, 536 N.E.2d 8, 10 (Ohio Ct.App.1987)). A party's superior knowledge thus imposes a duty to speak in certain transactions, depending on the parties' relationship. "Nondisclosure will become the equivalent of fraudulent concealment when it becomes the duty of a person to speak in order that the party with whom he is dealing may be placed on an equal footing with him." *Mackintosh*, 109 Nev. at 634–35, 855 P.2d at 553 (quoting *Mancini*, 536 N.E.2d at 9–10). Even when the parties are dealing at arm's length, a duty to disclose may arise from "the existence of material facts peculiarly within the knowledge of the party sought to be charged and not within the fair and reasonable reach of the other party." *Villalon v. Bowen*, 70 Nev. 456, 467–68, 273 P.2d 409, 415 (1954) (failure of purported widow to tell the executor of her purported husband's estate that her prior marriage had not been terminated).

Dow Chem. Co. v. Mahlum, 114 Nev. 1468, 1486, 970 P.2d 98, 110 (1998), disagreed with on other grounds, *GES, Inc. v. Corbitt*, 117 Nev. 265, 271, 21 P.3d 11, 15 (2001) (*"To the extent that our holding in Mahlum suggests that concert of action requires no more than an agreement along with tortious conduct, it is disfavored."*).

78. The *Villalon* holding requires a personal in any transaction to "speak" – read, to "disclose" – information that affects the transaction or the decision parties are making within the transaction. "Yet, even in absence of a fiduciary or confidential relationship and where the parties are dealing at arm's length, an obligation to speak can arise from the existence of material facts peculiarly within the knowledge of the party sought to be charged and not within the fair and reasonable reach of the other party. Under such circumstances the general rule is that a deliberate failure to correct an apparent misapprehension or delusion may constitute fraud. This would appear to be particularly so where the false impression deliberately has been created by the party sought to be charged." *Villalon v. Bowen*, 273 P.2d 409, 414–15 (1954).

79. The duty of disclosure is even more stringent for a fiduciary. In the event the party relied upon in a fiduciary situation fails to fulfill his obligations, and if it also fails to tell the other

party of this failure, there is said to be fraudulent concealment and constructive fraud, so the statute of limitations may be tolled until the party discovers or should have discovered his or her damages. *Allen v. Webb*, 87 Nev. 261, 269, 485 P.2d 677, 681 (1971). A fiduciary has a duty to make a full and fair disclosure of all facts which materially affect the rights and interest of the parties, and, where a fiduciary relationship exists, facts which would ordinarily require investigation may not excite suspicion. *Bennett v. Hibernia Bank*, 47 Cal. 2d 540, 559–60 (1956).

80. **Argument.** As an initial matter, Trustees' argument fails because the Trustees do not establish when Wendy received any of the Issue Trust financials relied on in their argument to bar Wendy's claims, but, more importantly, there is no evidence regarding what she was told at the time any of the Accountings may have been conveyed. Many of the accountings were provided during the litigation, so Wendy's objections are duly noted in her pleadings. As Wendy's fiduciaries, the burden is on the Trustees to (a) establish when Wendy received the Issue Trust Accountings and, separately, Family Trust Accountings, (b) what each of those Accountings contained, (c) what the Trustees disclosed to Wendy to inform her she must act to protect her rights, (d) when the time period for making her objections would have been triggered, (e) what the Trustees disclosed to Wendy to inform her that she must act and (d) whether they ever told her any specific time-frame for a deadline to act. That Todd, as Trustee of the Issue Trust or the Co-Trustees of the Family Trust were in a position of power over Wendy is undisputed, and cannot be disputed. That Todd, as Trustee of the Issue Trust, and Co-Trustees of the Family Trust was in a position to and did have superior knowledge regarding all transactions in the Accountings or in relation to the Issue Trust or Family Trust is undisputed, and cannot be disputed. The Trustees provide no evidence of any of the latter, but just blanketly say she did not complain timely. The Trustees (and fiduciaries in general) do not get that luxury, so without evidence of the above they cannot avail themselves to the time-bar mentioned in the Trusts.

81. The Trustees even try to assert the transactions involving the Issue Trust insurance

money and the Issue Trust's Buy-in to Incline TSS and how the insurance money was used and where it all ended up was disclosed in the Issue Trust Accounting, which could not be further from the truth. The full use of the insurance money has never been disclosed to this Court, Wendy or any of the Issue Trust beneficiaries. Beyond their conclusory assertion, the Trustees cite to no evidence that the referenced financial statements do in fact disclose the "the Issue Trust insurance money" or how it was used or that explains, in full, the "Issue Trust's buy-in to Incline TSS with the proceeds of the insurance money." The Trustees do not attach the financial statements or identify where and how such transactions are "set forth" in the financial statements, nor do they offer any supporting documentation. Accordingly, Trustees fail to meet their burden to show any claim expired, because they cannot meet their burden to show that Wendy was told everything she needed to be told to make a decision about her best next course. In fact, Todd and the other Trustees reassured her that she had nothing to worry about and that she did not need to look into it further.

82. Next, the language in the Trust Agreements that the Trustees are not liable to any beneficiary of the trust who fails to object to the accountings **specifically excludes the Trustees' intentional wrongdoing or fraud**. Issue Trust, p. 14, Family Trust, p. 27. The provisions in the Issue Trust and the Family Trust are exculpation provisions aimed to limit the liability of the Trustees. While NRS 163.004 generally allows for exculpation provisions and the expansion, restriction or elimination of beneficiaries' rights and trustees' liability, the terms of the trust cannot alter such rights in any manner that is illegal or against public policy. *See* NRS 163.004(1).

83. A breach of fiduciary duty is analogous to fraud, and thus, Nevada applies the three-year statute of limitation set forth in NRS 11.190(3)(d). *In re Amerco Derivative Litig.*, 127 Nev. 196, 228, 252 P.3d 681, 703 (2011); *see also Shupe v. Ham*, 98 Nev. 61, 64, 639 P.2d 540, 542 (1982) ("A breach of fiduciary duty is a fraud giving rise to the application of a three year statute of limitations."). A fiduciary has a duty to make a full and fair disclosure of all facts which materially affect the rights

and interest of the parties, and, where a fiduciary relationship exists, facts which would ordinarily require investigation may not excite suspicion. *Bennett v. Hibernia Bank*, 47 Cal. 2d 540, 559–60 (1956). As a result, Nevada has established additional protections for beneficiaries when applying limitations to claims against fiduciaries as follows:

> **The statute of limitations for a claim for breach of fiduciary duty does not begin "to run until the aggrieved party knew, or reasonably should have known, of the facts giving rise to the breach." *Id.* at 800, 801 P.2d at 1382. When a fiduciary "fails to fulfill his obligations" and keeps that failure hidden, the statute of limitations will not begin to run until the failure of the fiduciary is "discovered, or should have been discovered, by the injured party." *Golden Nugget, Inc. v. Ham*, 95 Nev. 45, 48–49, 589 P.2d 173, 175 (1979). "Mere disclosure of a transaction by a director, without disclosure of the circumstances surrounding the transaction, is not sufficient, as a matter of law, to commence the running of the statute." *Id.* at 48, 589 P.2d at 175.**

In re Amerco, 127 Nev. at 228. (emphasis added). In the event the party relied upon in a fiduciary situation fails to fulfill his obligations, and if it also fails to tell the other party of this failure, there is said to be fraudulent concealment and constructive fraud. *Allen v. Webb*, 87 Nev. 261, 269, 485 P.2d 677, 681 (1971). Any attempt by the terms of the Trusts to eliminate these protections or shorten the limitations period established by Nevada law for breaches of fiduciary duty is contrary to Nevada law and against public policy. If this were allowed, it would provide fiduciaries a loophole to escape liability for breaches of fiduciary by simply including a vague or innocuous line item in a financial statement concerning the transaction associated with or underlying the fiduciary's breach of fiduciary duty. This is completely contrary to the law that places the burden of full disclosure on the fiduciary and would encourage minimal disclosure and shift the burden of obtaining full disclosure to the beneficiary. Accordingly, the Trustees' reliance on these provisions to support of their position that Wendy's claims for breach of fiduciary duty concerning the Tahoe Property are time-barred is improper, not consistent with Nevada law and against public policy.

84. Notwithstanding the above, Wendy's claims against the Trustees are excluded from the application of these provisions by the terms of the provisions themselves and NRS 163.004(3)(a). NRS 163.004 provides that the terms of a trust cannot authorize the exculpation or indemnification of a fiduciary for the fiduciary's willful misconduct or gross negligence. NRS 163.004(3)(a). Therefore, in addition to the provisions' explicit exclusion of any claims for intentional wrongdoing and fraud, all of Wendy's claims based on willful misconduct and gross negligence are also excluded. Therefore, even if the exculpation provisions relied on by the Trustees can shorten the limitations period and eliminate the Trustees' duty of full disclosure in contravention of Nevada law and public policy, the provisions would not apply to or bar any of Wendy's claims related to the Tahoe Property because such claims are excluded by the terms of the provisions and NRS 163.004(3)(a).

85. As addressed in detail in *Wendy's Brief* and elsewhere in this *Brief*, the accountings are patently inaccurate and deficient, which is exactly why Todd, as Trustee of the Issue Trust, nor Todd and Michael Kimmel, as Co-Trustees of the Family Trust, would not swear to them under oath in their verifications or in open court. Frankly, the accountings are a fraud upon the beneficiaries and this Court and the Court should be offended by the perpetration of this fraud upon it. They, then have the audacity to ask the Court to approve the accountings, as being fact, effectively, asking this Court to extend and bless their fraud, and, then, to make matters worse, claim Wendy let her right to complain about the accountings expired. This is not and cannot be how the law words. These Trustees destroy even the concept of trust that accompanies that office. If this behavior is allowed to stand there will be no such thing as a trust or trustee in Nevada because this case will set precedent that no one has authority over them to stop or prevent them from raiding the trust for their own benefit.

d. <u>Disclosure, Adequacy of Accountings and ACPAs Decided by the Court</u>

86. Petitioners argue that the sufficiency of the accountings and validity of the ACPAs were argued during trial, and therefore an award of additional damages against the Trustees in relation

to the accountings and would violate Trustees' Seventh Amendment rights and provide Wendy double recovery. *Petitioners' Brief*, pp. 4-7. The Parties and the Court agreed and stipulated that the sufficiency of the accountings and the validity of the ACPAs were equitable issues that would be heard and decided by the Court following the jury trial. *Pre-Trial Order*. The determination of whether the accountings were sufficient and the ACPAs were valid is strictly an issue for the Court to decide. The jury was not provided with guidance or instruction from the Court on the requirements of an accounting, an ACPA or the disclosure required and associated with same. Therefore, the jury had no basis or ability to consider and make findings regarding these issues.

87. Therefore, Wendy is entitled to have the Court consider and determine if the accountings were sufficient and the ACPAs were valid. If the Court determines that the accountings were deficient and/or the ACPAs were invalid and void, Wendy is entitled to all of the relief the Court can award as a result of such finding including, but not limited to, removing the Trustees, compelling the Trustees to prepare and deliver sufficient accountings, awarding Wendy attorneys fees and costs, denying/disgorging Trustees compensation, denying/disgorging payment of Trustees' attorney's fees and expenses from the Trusts. An award of all of this relief by the Court would not be inconsistent with the jury verdict, would not violate the Trustees' Seventh Amendment rights and would not be a double recovery by Wendy. This is true for Stan, Michael Kimmel and Kevin Riley. As a result of Stan's settlement with Todd and his withdrawal of his objections to the accountings and his other claims, Stan has joined the other Trustees in and adopted the accountings. If the Court determines the accountings are deficient, all of the Trustees are responsible and subject to any remedies available to the Court.

e. <u>Wendy Did No Violate No-Contest Provision</u>

88. **<u>Objection - Lack of Standing</u>.** Wendy objects to Todd's and Petitioners' pursuit of claims seeking to enforce the no-contest provisions of the Family Trust and Issue Trust, because Todd, as Co-Trustee of the Family Trust and Individually, and Petitioners violated the no-contest provision of the

Family Trust, forfeited their interest in the Family Trust and the Issue Trust and have no interest in the Family Trust or the Issue Trust. Article II, Section D, Paragraph 4, Subparagraph d of the Family Trust provides:

> **It is the sole intent and desire of the Grantor that the reductions and reallocations described in this subparagraph D.4.d. are the only actions and/or remedies to be pursued against Wendy Ann Jaksick Smrt. Accordingly, the Trustees and beneficiaries are instructed not to pursue any additional form of legal actions or otherwise against Wendy Ann Jaksick Smrt, either in their capacity as Trustee or beneficiary, and any such action(s) shall be construed as a contest of the provisions of this Trust Agreement for subject to paragraph O. of Article VIII below. (emphasis added).**

Of course, Paragraph O, Article VIII is the no-contest provision of the Family Trust.

89. Todd's and Petitioners' pursuit of the enforcement of the no-contest provision, against Respondent to obtain a dismissal of her lawsuit alleging violation of the no-contest provision of the Trusts and forfeiture of her interest in the Family Trust directly violates the latter provision, Sam's intent concerning the administration of the Trusts, and Sam's intent for the treatment of Wendy. As a result, Todd, Individually and as Trustee of the Family Trust, and Petitioners must be treated as if they predeceased Sam.

90. Additionally, the language of the provision instructs the Trustees not to pursue any other legal action against Respondent. Accordingly, the Co-Trustees of the Family Trust do not have authority under the terms of the trust to pursue a legal proceeding against Wendy to find and establish forfeiture. As a result of their actions, Trustees have forfeited their office and must be removed immediately. Therefore, Wendy objects to the Trustees of the Family Trust pursuing a finding of forfeiture against Wendy and pursuing the forfeiture until determination is made by the Court of: (i) forfeiture by Todd, Individually, as Co-Trustee of the Family Trust and Trustee of the Issue Trust, and by the other Trustees who participated in prosecuting the claims for forfeiture and (ii) any of their standing to proceed on the claims for forfeiture or any other matter related to the Family Trust and the Issue Trust.

91. **Authority.** NRS 163.00195 controls the application and enforcement of no-contest clauses in trusts. NRS 163.00195(1) specifically provides that, "because public policy does not favor forfeitures, a no-contest clause must be strictly construed by the court and must not be extended beyond

the plain meaning of the express provisions of the trust." (emphasis added). NRS 163.00195 further provides that "[a] no contest clause must be construed to carry out the settlor's intent to the extent such intent is clear and unambiguous." (emphasis added). "The purpose of a no-contest clause is to enforce the settlor(s)' wishes, not to discourage a beneficiary from seeking his or her rights." *Matter of ATS 1998 Tr.*, 403 P.3d 684 (Nev. 2017) (unpublished opinion).

92. NRS 163.00195(3) provides:

> **3. Notwithstanding any provision to the contrary in the trust, a beneficiary's share must not be reduced or eliminated because of any action taken by the beneficiary seeking only to:**
> **(a) Enforce the terms of the trust, any document referenced in or affected by the trust, or any other trust-related instrument;**
> **(b) Enforce the beneficiary's legal rights related to the trust, any document referenced in or affected by the trust, or any trust-related instrument;**
> **(c) Obtain court instruction with respect to the proper administration of the trust or the construction of or legal effect of the trust, the provisions thereof or any document referenced in or affected by the trust, or any other trust-related instrument; or**
> **(d) Enforce the fiduciary duties of the trustee.**

93. NRS 163.00195(4) provides:

> **4. Notwithstanding any provision to the contrary in the trust, a beneficiary's share must not be reduced or eliminated under a no-contest clause in a trust because the beneficiary institutes legal action seeking to invalidate a trust, any document referenced in or affected by the trust, or any other trust-related instrument if the legal actions is instituted and maintained in good faith and based on probable cause that would have led a reasonable person, properly informed and advised, to conclude that the trust, any document referenced in or affected by the trust, or other trust-related instrument is invalid.**

94. To obtain forfeiture under NRS 163.00195, Todd and Petitioners must first establish that Wendy violated the no-contest provisions of the Trusts.

95. The following no-contest provision appears in Article VIII, Section O (page 52) of the Family Trust:

> **INCONTESTABILITY. If any beneficiary under this Trust Agreement, singularly or in conjunction with any other person,**

> **contests in any court the validity of this Trust Agreement or of the Will of the Grantor, or seeks to obtain an adjudication in any proceeding in any court that this Trust Agreement or any of its provisions of that such Will or any of its provisions are void, or seeks to otherwise void, nullify, or set aside this Trust Agreement or any of its provisions, then the right of the beneficiary to take any interest given to the beneficiary under this Trust Agreement is to be determined as it would have been determined had the beneficiary died prior to the date of execution of this Trust Agreement.**

96. The following no-contest provision appears in Article VIII, Section O (page 36) of the Issue Trust:

> **INCONTESTABILITY. If any beneficiary under this Trust Agreement, singularly or in conjunction with any other person, contests in any court the validity of this Trust Agreement, the Will of the Grantor, or The Samuel S. Jaksick, Jr. Family Trust Agreement, or seeks to obtain an adjudication in any proceeding in any court that this Trust Agreement, the Will of Grantor, or The Samuel S. Jaksick, Jr. Family Trust Agreement, or any of the provisions of those documents are void, or seeks otherwise to void, nullify, or set aside this Trust Agreement or any of its provisions, then the right of the beneficiary to take any interest given to the beneficiary under this Trust Agreement is to be determined as it would have been determined had the beneficiary died prior to the date of execution of this Trust Agreement.**

97. The No-Contest Provision of the Family Trust Not Applicable to Wendy. Article II, Section D, Paragraph 4, Subparagraph d of the Family Trust provides:

> **It is the sole intent and desire of the Grantor that the reductions and reallocations described in this subparagraph D.4.d. are the only actions and/or remedies to be pursued against Wendy Ann Jaksick Smrt. Accordingly, the Trustees and beneficiaries are instructed not to pursue any additional form of legal actions or otherwise against Wendy Ann Jaksick Smrt, either in their capacity as Trustee or beneficiary, and any such action(s) shall be construed as a contest of the provisions of this Trust Agreement for [sic] subject to paragraph O. of Article VIII below. (emphasis added).**

98. The latter provision of the Family Trust, specifically, exempts Wendy from the application of the no-contest provision, by directly communicating Sam's intent that, other than the reallocations applicable to Wendy's share of the Family Trust, no legal actions of any form shall be pursued against

Wendy by the Trustees or the beneficiaries of the Trust. The language of the provision affirmatively instructs the Trustees not to pursue any additional form of legal actions against Wendy, thereby eliminating any authority the Trustees have to do so. Based on the plain language of this provision, this includes an action by the Trustees or beneficiaries against Wendy to establish forfeiture based on the no-contest provision of the Trust. It is apparent that Sam contemplated the interplay of this provision with the no-contest provision of the Trust, because (i) this provision specifically references the no-contest provision and (ii) this provision makes the punishment for failing to follow the instructions not to pursue any other legal action against Wendy forfeiture under the no-contest provision. Additionally, NRS 163.00195 clearly provides for the application of a no-contest provision under the circumstances here. NRS 163.00195(2) provides as follows:

> **[A] beneficiary's share may be reduced or eliminated under a no-contest clause based upon conduct that is set forth by the settlor in the trust. Such conduct may include, without limitation:**
> **...**
> **(b) Conduct which is unrelated to the trust itself, including, without limitation:**
> **(1) The commencement of civil litigation against the settlor's probate estate or family members. (emphasis added).**

This provision is clear and unambiguous and precludes the application of the no-contest clause against Wendy and requires the application of the no-contest provision to any Trustee or beneficiary who violates the provision and pursues legal action against Wendy.

99. Alternatively, there exists, at a minimum, an ambiguity concerning Sam's intent and a dispute about the meaning of these Trust provisions. As a result, Sam's intent could not be considered to be clear and unambiguous, which precludes the application of the no-contest provision against Wendy. NRS 163.00195 requires "[a] no contest clause must be construed to carry out the settlor's intent to the extent such intent is clear and unambiguous." (emphasis added).

100. **Alternatively, Wendy has Not Violated the No-Contest Provisions.** Alternatively, even if the No-Contest provision is found to allow the Co-Trustees to continue their frivolous claim of forfeiture

and are determined to have the authority to pursue legal action against Wendy to seek a finding of forfeiture despite the clear terms of the Trust providing otherwise, Wendy has not violated the terms of the no-contest provisions.

101. Strict Construction Nullifies Claims for Forfeiture. A beneficiary's share may be reduced or eliminated under a no-contest clause based upon conduct that is set forth by the settlor in the trust. NRS 163.00195(2) (emphasis added). NRS 163.00195(1) is clear that "because public policy does not favor forfeitures, a no-contest clause **must be strictly construed** by the court and must not be extended beyond the plain meaning of the express provisions of the trust." (emphasis added).

102. In relation to the Family Trust, the no-contest provision included in the original Family Trust Agreement, meaning the Family Trust Agreement, which was executed on June 29, 2006, prohibits the contest of "this Trust Agreement" or "the Will of the Grantor." The plain meaning of the express provisions of the no-contest provision indicates Wendy has not violated the no-contest provision. The language is not ambiguous and, therefore, its application is clear.

103. The no-contest provision does not include any language prohibiting the contest of amendments to the Family Trust Agreement. Had Sam intended for the no-contest provision to apply to amendments to the Family Trust Agreement or other documents, he could have and would have included language in the no-contest provision directing same. In fact, when Sam later established the Issue Trust, the no-contest provision included in the Issue Trust included a prohibition against contesting the Family Trust Agreement. Obviously, Sam was aware of his right to direct the application of the no-contest provision and did so as he desired and intended; he did not include any change to the no-contest provision in the original Family Trust Agreement. The record is devoid of any pleading contesting the original Family Trust Agreement or Grantor's Will.

104. Petitioners argue that the following language included in paragraph 4, on page 5 of the Purported Second Amendment makes the no-contest provision applicable to the Purported Second

Amendment:

> **Except for the terms of this Second Amendment, Settlor reaffirms the Restated Family Trust Agreement and such terms, except as otherwise amended herein, shall remain in full force and effect.**

This language makes no change to the no-contest provision in the original Family Trust Agreement. Instead, this language actually confirms and reaffirms Sam's intent that the terms included in the no-contest provision of the original Family Trust Agreement remain in effect unchanged, both in (i) its exemption of Wendy from the no-contest provision and in granting her immunity from this very type of lawsuit from a beneficiary or Trustee and (ii) its application to only the original Family Trust Agreement and Grantor's Will. Had Sam intended to apply the no-contest clause to the Purported Second Amendment or other amendments, under strict construction law, he would have had to specifically include that language in the Purported Second Amendment. In other words, for a contest of the Purported Second Amendment to violate a no-contest provision, the Purported Second Amendment would have had to include its own no-contest provision prohibiting such a contest or a specific amendment to the no contest provision in the original Family Trust Agreement specifying that the no-contest provision applied to the Purported Second Amendment. It would have also had to include a nullification of Wendy's exemption and immunity under the no-contest clause included in the original Family Trust Agreement. The law abhors a forfeiture which is why such specific language would have been and is required. *See* NRS 163.00195; *Matter of ATS 1998 Tr.*, 403 P.3d 684 (unpublished opinion).

105. In relation to the Issue Trust, the no-contest provision included in the Issue Trust prohibits the contest of "this Trust Agreement" or "the Will of the Grantor" or "The Samuel S. Jaksick, Jr. Family Trust Agreement". Wendy has not sought to obtain an adjudication in a court proceeding to invalidate the Issue Trust Agreement or any of its provisions. The plain meaning of the express provisions of the no-contest provision indicates Wendy has not violated the no-contest provision. The language is not ambiguous and, therefore, its application is clear.

106. **Wendy's Actions Have Not Violated the No-Contest Provisions.** Alternatively, even if the no-contest provision applies to the Purported Second Amendment, Wendy has not violated the no-

contest provision.

107. This litigation was instituted by the Petitioners. Petitioners filed and served Wendy with the *Petitions* seeking Court approval of the Purported Trust Accountings for the period April 2013 through December 31, 2016, and ratification and Court approval of numerous actions taken by Trustees in order to relieve the Trustees from liability from such actions. After years of being kept in the dark by the Trustees, Wendy was forced to respond, answer and object to the *Petitions* or risk losing her rights to complain about Trustee actions and administrations. As a result, on October 10, 2017, Wendy filed her *Answers and Objections.*

108. Wendy's *Answers and Objections* were defensive pleadings aimed at preserving claims Wendy may have at the outset of the litigation that her Trustees filed against her. Wendy's *Answer and Objections* were based on Petitioners' *Petitions*, Petitioners' and Todd's behavior over the years and the very limited information Wendy has received concerning the Trusts, trust assets and the Petitioners' administration of the Trusts. Although language concerning the validity of the Purported Second Amendment and the validity of the attachments to the Issue Trust appears in the *Answers and Objections*, there is no language including or pursuing affirmative claims seeking to invalidate such documents. For instance, Wendy's *Opposition and Objection to the Petition for Confirmation of Trustees and Admission of Trust to the Jurisdiction of the Court, and for Approval of Accountings and Other Trust Administrative Matters*, which was filed in the Family Trust matter (Cause No. PR17-0446) (the "Opposition and Objection – Family Trust") seeks the following relief:

> **Relief Requested**
> **Wendy requests the Court sustain her opposition and objections, refuse to approve the purported "Trust Accountings" and refuse to ratify and approve and release the Co-Trustees from any liability for actions taken pursuant to the purported "Agreements & Consents" until deficiencies in the purported "Trust Accountings" and disputes concerning the purported "Trust Accountings" and the purported "Agreements & Consents" are resolve and the liability, if any, of the Co-Trustees is determined. Wendy also requests the Court order the Co-Trustees to amend their purported "Trust Accountings" to include**

> **all statutorily required information and support and to comply with their duties of full disclosure to the Trust beneficiaries.**

Opposition and Objection, Paragraph 1, Page 2.

> **Conclusion**
> **Based on the foregoing, Wendy respectfully requests that the Court refuse to approve the purported "Trust Accountings" and refuse to ratify and approve and release the Co-Trustees from any liability for actions taken in pursuant to the purported "Agreements & Consents" until deficiencies in the purported "Trust Accountings" and disputes concerning the purported "Trust Accountings" and the purported "Agreements & Consents" are resolve and the liability, if any, of the Co-Trustees is determined. Wendy further requests the Court order the Co-Trustees to amend their purported "Trust Accountings" to include all statutorily required information and support and to comply with their duties of full disclosure to the Trust beneficiaries.**

Opposition and Objection, Paragraph 21, Page 7. This language is virtually identical to the "Relief Requested" and "Conclusion" paragraphs included in Wendy's *Opposition and Objection to the Petition for Confirmation of Trustees and Admission of Trust to the Jurisdiction of the Court, and for Approval of Accountings and Other Trust Administrative Matters*, which was filed in the Issue Trust matter (Cause No. PR17-00445) (the "Opposition and Objection – Issue Trust").

109. Wendy's *Answers and Objections* do not include any request to invalidate the Purported Second Amendment or the attachments to the Issue Trust. In fact, the Court could not properly grant relief invalidating the Purported Second Amendment or the attachments to the Issue Trust based on the language, claims and requests for relief included in the *Answers and Objections* or any other pleading filed by Wendy in this matter. Instead, the relief sought by Wendy focuses on deficiencies and disputes concerning; (i) the Purported Trust Accountings (ii) issues concerning the purported "Agreements and Consent", (iii) issues concerning the Trustees actions administering the Trusts and (iv) Wendy's need for full disclosure and all statutorily required information and support for the Purported Trust Accountings. All o! the latter are ad" inistrative in nature and could never #e considered a contest; other$ ise the Trustees would have unfettered ability to abuse their office and breach their trust without the beneficiary having any ability to stop it. This makes no sense logically and is not the law.

110. Accordingly, Wendy has not contested the Family Trust Agreement or the Issue Trust Agreement, and therefore, the *Motion to Dismiss* and the *Supplement* must be denied.

111. **Alternatively, Wendy's Actions Fall Within the Exceptions to the Enforcement of the No-Contest Provisions.** Even if it is determined that Wendy's actions have violated the terms of the no-contest provision, which they do not, her actions fall within the exceptions provided by NRS 163.00195 for certain situations in which the court must not reduce or eliminate a beneficiary's share of the trust. NRS 163.00195(3) & (4).

112. Wendy's Actions Fall Under NRS 163.00195(3). "The purpose of a no-contest clause is to enforce the settlor(s)' wishes, not to discourage a beneficiary from seeking his or her rights." *Matter of ATS 1998 Tr.*, 403 P.3d 684 (unpublished opinion) (emphasis added). Consistent with this, NRS 163.00195(3) provides:

> **3. Notwithstanding any provision to the contrary in the trust, a beneficiary's share must not be reduced or eliminated because of any action taken by the beneficiary seeking only to:**
> **(e) Enforce the terms of the trust, any document referenced in or affected by the trust, or any other trust-related instrument;**
> **(f) Enforce the beneficiary's legal rights related to the trust, any document referenced in or affected by the trust, or any trust-related instrument;**
> **(g) Obtain court instruction with respect to the proper administration of the trust or the construction of or legal effect of the trust, the provisions thereof or any document referenced in or affected by the trust, or any other trust-related instrument; or**
> **(h) Enforce the fiduciary duties of the trustee.**

113. A review of Wendy's *Answers and Objections* and other live pleadings confirms Wendy's actions have all sought to (a) enforce the terms of the Family Trust Agreement and Issue Trust Agreement, (b) enforce her legal rights related to the Trusts, and (d) enforce the fiduciary duties of the Trustees. NRS 163.00195(3). Sam specifically intended to provide for and support Wendy through the Family Trust and the Issue Trust. Wendy's actions to enforce her rights under the terms of the Trust, including forcing the Trustee to fully disclose, forcing the Trustees to properly administer the Trusts, and seeking to hold the

Trustees liable for their breaches of fiduciary duties are all consistent with and further Sam's intent and fall within the safe harbor provisions of NRS 163.00195(3).

114. Wendy's Actions Fall Under NRS 163.00195(4). Alternatively, if the Court determines any of Wendy's actions violate the no-contest provisions of the Trusts and such actions do not fall under the exceptions included in NRS 163.00195(3), Wendy's interest in the Trusts must not be eliminated because such actions were instituted and maintained in good faith and based on probable cause. NRS 163.00195(3).

115. While Wendy has not asserted any affirmative claims contesting or seeking to invalidate the Purported Second Amendment or the attachments to the Issue Trust in her *Answers and Objections* or any of her live pleadings, language concerning the validity of the Purported Second Amendment and the validity of the attachments to the Issue Trust does appear in the *Answers and Objections.* Additionally, Wendy's *First Amended Counter-Petition* includes language stating that Wendy believes the Purported Second Amendment may be invalid and that she may file affirmative claims contesting it.

116. Wendy's concerns about the validity of the Purported Second Amendment were and are based on Wendy's understanding of her father and his intent concerning his family and the passage of his property on his death, Todd's and the Petitioners' behavior over the years and the very limited disclosure provided by her fiduciaries concerning the Trusts, the assets of the Trusts and Petitioners' administration of the Trusts. Over the years, Wendy has personally witnessed Todd's efforts to maximize his and his family's benefit and control of Sam's assets, the Trusts, and the trust assets, while minimizing the benefits Wendy, Stanley, and Wendy's children have received and are to receive from Sam, the Trusts, and the related businesses. During this time, Wendy witnessed numerous documents appear out of nowhere when convenient for Todd to support his effort to consolidate and maintain control the Trusts and Trust property and to maximize his and his family's receipt of benefits and property from Sam and the Trusts to the detriment of the Trusts and the beneficiaries of the Trusts.

117. Jessica Clayton served as Sam's assistant for many years. Toward the end of Sam's life, she also worked with Todd. Following Sam's death, Todd hired Ms. Clayton and, Ms. Clayton has worked for Todd ever since. Wendy has been aware of Ms. Clayton signing Sam's name on documents when Sam was not in her presence. In fact, Wendy has been aware of Ms. Clayton signing Sam's signature on documents and then notarizing the signature. Also, Wendy has personal experience with Todd or someone acting on Todd's behalf and at his direction signing Wendy's and her daughter's names on documents related to the Trusts when it suited his needs. Accordingly, serious questions remain regarding who actually signed Sam's name.

118. Based on the very limited information she has been provided by her own fiduciaries who had and continue to have an obligation of full disclosure, Wendy has included claims related to some of these documents in her *First Amended Counter-Petition*. One critical document Wendy has contested and sought to have declared invalid is the Purported Indemnification Agreement, dated January 1, 2008. Although the Purported Indemnification Agreement was allegedly created and executed in 2008, and supposedly requires Sam and the Family Trust to pay and indemnify Todd individually for various obligations of Todd, the Family Trust and family businesses, no one was aware of the existence of the Purported Indemnification Agreement until Todd produced it approximately two (2) years after Sam's death, when it became convenient for Todd to attempt to explain, allow or exonerate his bad acts or bogus payments to himself or to justify avoidance of his obligations and expenses. Prior to Wendy filing her *Answers and Objections*, Stanley had communicated to Wendy that he disputed the Purported Indemnification Agreement and planned to object to it and other issues alleged in the Petitioners' *Petitions*. As communicated to Wendy before she filed this lawsuit, Stanley's basis for objecting to the Purported Indemnification Agreement was his position that it was manufactured by Todd for Todd's benefit like many other documents related to the Trusts. Consistent with this, Stanley specifically objected to the Purported Indemnity Agreement in his *Objection to Approval of*

Accountings and Other Trust Administration Matters, which Stanley filed in this matter just before Wendy filed her *Answers and Objections*.

119. At the time Wendy filed her *Answer and Objections*, she shared Stanley's position that Todd manufactured the purported Indemnification Agreement and was using it to pay off any obligations he incurred or incurs in relation to the Trusts in addition to his personal obligations. The purported Indemnification Agreement attached as *Exhibit "**10**"* to the *Petition for Confirmation in Cause No. PR17-00445* has, apparently, been used by Todd and his family to fund his lifestyle, and includes the payment by the Family Trust of personal obligations of Todd including, but not limited to the following:

a. Home Loan – WAMU: Mortgage Loan for 4505 Alpes Way in favor of Wells Fargo in the original principal amount of $1,435,000.00 with monthly payments of $7,281.67 with Todd, individually, as the 100% responsible party;
b. Line of Credit: Home Equity in favor of Wells Fargo: The original principal amount of $485,000.00 with approximate monthly payments of $1,400.00 with Todd, individually, as the 100% responsible party;
c. Mortgage Construction Loan in Favor of First Independent Bank: The original principal amount of $3,060,000.00 with monthly payment on the 1st of each month of $5,774.00 with maturity date of August 1, 2008, with Todd, individually, as the 100% responsible party; and
d. Cadillac automobile loan: Note in favor of GMAC in the original principal amount of $33,600.00 with monthly payments of $700.00 due on the 20th of each month with maturity date of May 20, 2010, with Todd, individually, as the 100% responsible Party.

Wendy had this information and relied on this information when she filed her *Answers and Objections*.

120. Additionally, another purported indemnification agreement recently surfaced that was purportedly executed in favor of Stanley ("Stanley's Purported Indemnification"). Like the Purported

Indemnification Agreement benefiting Todd, no one was aware of Stanley's Purported Indemnification, **not even Stanley himself**, until Todd recently produced it out of nowhere in 2017. This is a document that was purportedly signed by Sam in 2008, but that is appearing for the first time in 2017. The fact that Stanley was not even aware of the document leads Wendy to believe it is another document manufactured by Todd.

121. The Purported Second Amendment, like the Purported Indemnification Agreement, Stanley's Purported Indemnification and many other documents created during Todd's involvement with Sam's Trusts and various businesses, all appeared out of nowhere and are contrary to Sam's intent as expressed to Wendy over the years. Although the Purported Second Amendment was allegedly executed on December 10, 2012, Wendy was not aware of its existence until sometime in 2016. From conversations with Stan, a Co-Trustee and beneficiary of the Family Trust, it was Wendy's understanding that Stan also felt that the Purported Second Amendment also appeared out of nowhere.

122. Additionally, at the time Wendy filed her *Answers and Objections*, Wendy was aware of an email sent by Pierre A. Hascheff to Jessica Clayton on February 19, 2013 in connection with the execution of what appeared to be the Purported Second Amendment. Exhibit 164. It is Wendy's understanding that Mr. Hascheff was one of Sam's attorneys. The subject of the email is "Second Amendment to Sam's Trust" and includes an attachment titled "Sam_Jaksick_Second_Amendment.pdf." The body of the email includes the following:

> **Jessica, please have Sam sign the attached amendment and return the original. The date is already on the notary. I believe it was sent in December but I don't think it was every [sic] signed. Thank you and have a wonderful week. Nano**

123. This email was and is concerning to Wendy for several reasons. Mr. Hascheff apparently forwarded the Purported Trust Amendment to Ms. Clayton for Sam's execution. Sam was not included or copied on the email. The email confirms that Mr. Hascheff, Sam's attorney, never sat down and discussed the Purported Second Amendment with Sam at the time it was purportedly executed, and Mr.

Hascheff did not supervise or witness the execution of the Purported Second Amendment. In fact, the email confirms that, at least as of the time the email was sent on February 19, 2013, Mr. Hascheff had no confirmation of whether Sam ever actually received the Purported Second Amendment, reviewed it or signed it.

124. Equally concerning is that, in February 2013, Mr. Harscheff directs Ms. Clayton to have Sam execute the Purported Second Amendment, when Mr. Harscheff has already dated the Purported Trust Amendment for December 10, 2012 and the notary jurat states "on this 10th day of December, 2012, personally appeared before me, a Notary Public, Sam S. Jaksick, Jr. ... whose name is subscribed to the Fourth Amendment, who acknowledged to me that he executed same." (emphasis added). If the Purported Trust Amendment was signed on any date other the December 10, 2012, the statements in the Purported Second Amendment, including the jurat, were false when it was signed. A public notary in Nevada is prohibited from certifying an instrument containing a statement known by the notary public to be false. At the time Mr. Harscheff sent this email in February 2013, he knew or should have known that the document included false statements and a false jurat. Additionally, the jurat states that the Sam signed "the foregoing Fourth Amendment," when the document that was purportedly executed was the Second Amendment. If Sam actually read and reviewed the six (6) page document, he would have caught and corrected that mistake

125. The information from the email was and is very concerning to Wendy because it evidences that the attorney who prepared the Purported Second Amendment failed to properly protect the preparation and execution process of the Purported Second Amendment. Wendy's concerns about Hascheff and his actions as an attorney were substantiated at trial. Additionally, the individual Mr. Harscheff sent the document to was known by Wendy to have signed and notarized Sam's name on other documents. This is wholly improper, a violation of rules of notary publics, and evidences Ms. Clayton may have signed the Purported Second Amendment without Sam ever knowing about it.

126. Finally, Wendy is personally familiar with Sam's signature having witnessed his handwriting and his execution of numerous documents over the many years she was raised by and maintained a relationship with Sam through the time of his death. Based on her familiarity with Sam's signature, Wendy is confident the signature included on the Purported Second Amendment is not Sam's signature. Wendy discussed this with Stanley, who is also very familiar with Sam's handwriting and signature. Prior to Wendy filing her *Answers and Objections*, Stanley confirmed to Wendy that he was confident that Sam did not sign the Purported First Amendment and the signature that appears on the Second Amendment is not Sam's signature. *See* Transcript, 02/27/2019, 91:1-3.

127. Wendy has never questioned or disputed that the Issue Trust Agreement attached to Petitioners' *Petition* is the Issue Trust Agreement signed by Sam on February 21, 2007. However, at the time Wendy filed her *Answers and Objection*, there appeared to be issues with the attachments to the Issue Trust. Based on Wendy's familiarity with Sam's signature, she is confident that the purported signature of Sam that appears on one of the pages of the attachments is not Sam's signature. The document including Sam's purported signature is dated November 27, 2011 and, therefore, was created many years after the Trust Agreement was executed. It is not clear which of the attached documents were originally attached to the Issue Trust Agreement when it was executed or whether any of the documents that were later attached were ever intended to be included as attachments to the Issue Trust Agreement.

128. Sam's handwriting does not appear on any of the attachments. Instead, all of the handwriting on the attachments is Todd's handwriting. Below the Assessor's Map on the first page of the attachments is the following writing: "water rights – keep 120 acres fees of underground rights for irrigating the Alfalfa Fields. It's ok to sell the remaining underground rights." Sam would never have authorized this sale. Sam treated water rights like diamonds. Over the course of his life, he would never sell water rights unless he was also selling the surface property. Additionally, it is Wendy's understanding that these water rights are worth more than the land.

129. On page four of the attachments, a certain section of the ranch property located near the main Jaksick Ranch House is not designated as property that cannot be sold. This section includes the barn, the above ground gas tanks, the facilities for the employees and the cattle facilities. Wendy is absolutely confident that Sam never would have authorized the sale of this section of the ranch. First and foremost, if someone outside the family purchased this property, they would have the ability to build and operate within a hundred yards of the main Jaksick Ranch House and where Sam's ashes are buried. One of the main purposes of the Issue Trust is to preserve the ranch property for the use of Sam's family for many generations. Having an unrelated family or entity as a neighbor less than 100 yards from the main Jaksick Ranch House absolutely defeats this purpose and Sam's long expressed intent for the ranch property. Additionally, if this section sold, the Trust would have to buy new gas tanks, build a new barn, build new facilities for the employees including the equipment and repair shop and build new cattle facilities. Sam always wanted cattle run on the property and insisted that continued after his death. Sam and his family helped create the herd of cattle operated on the ranch over thirty years ago. The cattle operation at the ranch was very important to Sam and he was adamant that Wendy and his family were involved in the cattle operation while they were growing up. Allowing the sale of this certain section of the ranch would end the cattle operations unless Trust funds were invested to rebuild the facilities elsewhere on the property. This would be a substantial and unnecessary cost to the Issue Trust. Accordingly, certain of the attachments to the Issue Trust are absolutely contrary to Sam's intent for the ranch property expressed by Sam during his life and in the Issue Trust Agreement itself and cannot be reconciled with such intent.

130. If it is determined that Wendy contested the Purported Second Amendment or the attachments to the Issue Trust, based on the above it is clear that Wendy did so in good faith and based on probable cause that would have led a reasonable person, properly informed and advised, to conclude the documents were invalid. As a result, any such actions fall under NRS 163.00195 and Wendy's

share in the Trusts must not be reduced.

131. Finally, Todd argues in his *Brief* that probable cause "is also based on what [Wendy] should have known had she conducted the most minimal inquiry, i.e., what a 'reasonable person, properly informed and advised' would have known." *Todd's Brief*, p, 49, lines 22-24. Wendy believes the information described above establishes that Wendy did conduct a reasonable inquiry before she filed her *Answer and Objections*. Nevertheless, Todd criticizes Wendy for not consulting with a handwriting expert. Despite Todd's criticism, had Wendy consulted with a handwriting expert it would have confirmed her concerns about Purported Second Amendment. Jim Green, the handwriting/document examiner Todd retained in this matter, issued a report that was admitted into evidence as Exhibits 220 and 221. Pages 867 through 873 of Exhibit 221 include various findings of Mr. Green's examination of the Purported Second Amendment. Mr. Green found the Purported Second Amendment had non-conforming staple holes and the last page of the document (the signature page) had many more staple holes than the first five pages. Exhibit 221, pp. 869-870. Mr. Green found the level of paper brightness was consistent between pages one through five, but the last page (the signature page) had a different level of optic brighteners. Id. at 871. Mr. Green found the first five pages were numbered, but the last page (the signature page) was not. Id. at 872. Finally, Mr. Green found that the left margins on the first five pages were consistent, but the last page (the signature page) had a wider margin. Id.

f. <u>Wendy's Claims Not Barred By Limitations</u>

132. Todd's argument that Wendy's claim for unjust enrichment concerning the Tahoe Property is time-barred because she knew or should have known about this claim as of July 2013 is unsupported by law and the facts. *Todd's Brief*, pp. 50-3. The key question is when did Wendy know or when should have Wendy known of her claims against Todd for his actions in relation to the Tahoe Property? The Tahoe Property has been owned directly or indirectly by Sam or one of his trusts for

over thirty (30) years. Transcript, 02/19/2019, 28:14-18; 28:23-29:4; Exhibit 9, p. 3. It was Sam's longtime intention and plan to essentially split equally his estate between his three children, Todd, Wendy and Stanley Jaksick ("Stan"). (Stan) Transcript, 02/27/2019, 44:13-17; (LeGoy) Transcript, 97:11-98:4; (Wendy) Transcript, 02/26/2019, 53:19-54:6*. This plan remained unchanged through the time of Sam's death. Id. Exhibit 9; Exhibit 10; Exhibit 13. Wendy had always understood this to be Sam's longtime intention for the Tahoe Property. (Wendy) Transcript, 02/26/2019, 53:19-54:6*; Exhibit 9. Wendy did not know and had no reason to know that Sam or his trusts did not own, directly or indirectly, the Tahoe Property at the time of his death or after Sam's death or that she had claims against or had been damaged by Todd in relation to the Tahoe Property, until, at the earliest, 2016 or 2017 when she finally received information and documents concerning Todd's actions in relation to the Tahoe Property and Incline TSS.

133. **Authority.**

> The general rule concerning statutes of limitation is that a cause of action accrues when the wrong occurs and a party sustains injuries for which relief could be sought. An exception to the general rule has been recognized by this court and many others in the form of the so-called "discovery rule." Under the discovery rule, the statutory period of limitations is tolled until the injured party discovers or reasonably should have discovered facts supporting a cause of action.
>
> The rationale behind the discovery rule is that the policies served by statutes of limitation do not outweigh the equities reflected in the proposition that plaintiffs should not be foreclosed from judicial remedies before they know that they have been injured and can discover the cause of their injuries.

Bemis v. Estate of Bemis, 114 Nev. 1021, 1024, 967 P.2d 437, 440 (1998).

134. In a discovery based cause of action, a plaintiff must use due diligence in determining the existence of a cause of action. Id. Whether plaintiffs exercised reasonable diligence in discovering their causes of action "is a question of fact to be determined by the jury or trial court after a full hearing." Id. Dismissal on statute of limitations grounds is only appropriate "'when uncontroverted

evidence irrefutably demonstrates plaintiff discovered or should have discovered'" the facts giving rise to the cause of action. Id.

135. Additionally, in the event the party relied upon in a fiduciary situation fails to fulfill his obligations, and if it also fails to tell the other party of this failure, there is said to be fraudulent concealment and constructive fraud, so the statute of limitations may be tolled until the party discovers or should have discovered his or her damages. Allen v. Webb, 87 Nev. 261, 269, 485 P.2d 677, 681 (1971). A fiduciary has a duty to make a full and fair disclosure of all facts which materially affect the rights and interest of the parties, and, where a fiduciary relationship exists, facts which would ordinarily require investigation may not excite suspicion. Bennett v. Hibernia Bank, 47 Cal. 2d 540, 559–60 (1956).

136. **Argument.** The trial record and testimony confirms it was Todd's practice not to disclose information to Wendy or Stan concerning his actions including his actions in relation to the Tahoe Property. Additionally, absent from the evidence cited by Todd in support of his argument that Wendy's unjust enrichment claim is barred by limitations, is correspondence, email or other writings confirming Todd, Wendy's fiduciary, disclosed to Wendy the details of his actions in relation to the Tahoe Property, including that Todd and his family wholly owned Incline TSS, Ltd. at the time it was formed at the time it purportedly purchased the Tahoe Property or that Sam or his trusts did not own a direct or indirect interest in Incline TSS, Ltd. at any time prior to the Issue Trust buy in to Incline TSS, Ltd. Instead, Todd attempts to rely on written communications with Wendy that include language treating Wendy as an owner or future owner of the Tahoe Property, which support and confirm Wendy's belief and expectation that she was a future owner of the Tahoe Property, whether individually or through trusts.

137. First, Todd argues that Wendy was placed on inquiry notice concerning the purported Tahoe Property transaction on December 28, 2012, when the deed transferring the Tahoe Property

from SSJ, LLC to Incline TSS. Ltd. (Exhibit 23.21) (the "Deed") was recorded in the real property records. During the course of Sam's and his trusts' ownership of the Tahoe Property, numerous deeds transferring title to the Tahoe Property had been recorded in the deed records. In fact, prior to the filing of the Deed, the following six (6) deeds had been recorded in the deed records related to the Tahoe Property:

Grantor	Grantee	Date	Exhibit Number
Sam	Family Trust	December 5, 2003	
Family Trust	Sam	February 26, 2007	Exhibit 23.1
Sam	Family Trust	February 27, 2007	
Family Trust	Sam	May 29, 2008	Exhibit 23.2
Sam	Family Trust	May 29, 2008	Exhibit 23.2
Family Trust	SSJ, LLC	December 5, 2011	Exhibit 23.8

SSJ, LLC was wholly owned by the Family Trust when the December 5, 2011 deed was recorded transferring title to the Tahoe Property. Exhibits 23.2 and 23.8. Therefore, despite the recording of all of these deeds, Sam or his trusts always remained the direct or indirect owners of the Tahoe Property. This was consistent and with Wendy's understanding of Sam's intent for the Tahoe Property during his life and after he passed.

138. Exhibit 23.21, the deed transferring the Tahoe Property from SSJ LLC to Incline TSS, identifies the grantor as SSJ, LLC and the grantee as Incline TSS, Ltd. There is nothing in Exhibit 23.21 indicating that Sam or his Trusts were no longer the indirect owners of the Tahoe Property (as was the case when the title was held by SSJ, LLC). There is also nothing in Exhibit 23.21 indicating Todd, his family or any of Todd's family trusts owned Incline TSS, Ltd. or the Tahoe Property. Sam had previously discussed with Wendy that he had transferred title back and forth to certain entities to refinance the Tahoe Property. Therefore, even if Wendy had received Exhibit 23.21 on the day it was recorded or is deemed to have constructive notice of Exhibit 23.21, nothing in Exhibit 23.21 indicates

or would have led Wendy to believe or understand that the Tahoe Property was no longer owned by Sam or his trusts as it had been for many years. Based on Sam's many years of ownership of the property, Wendy's understanding of Sam's intent for the property during and after he passed and the numerous deeds that were previously filed over the years that did not change this, as well as the content of the Deed, the recording of the Deed does not establish Wendy knew or should have known the Tahoe Property was no longer owned directly or indirectly by Sam or his trusts and, therefore, discovered or should have discovered any claims she may have had against Todd in relation to the Tahoe Property.

139. Next, Todd argues that Wendy's execution of the ACPA, dated June 5, 2013, (Exhibit 14) confirms Wendy was aware that Incline TSS, Ltd. was the owner of the Tahoe Property and that the Issue Trust would be acquiring an interest in the Tahoe Property. *Todd's Brief*, p. 50, lines 16-22. As an initial matter, the validity of Exhibit 14 had been challenged by both Stan and Wendy, until Stan settled with Todd a week before trial. *Wendy*'s *First Amended Counter-Petition* ¶¶ 39-42 ("*Wendy admits that she and Stanley signed a consent allowing the use of the $6 million in insurance proceeds, but first, the consent they signed was the result of misrepresentations and fraud by Todd and possibly others and, second, the consent they signed is not the purported consent attached to Exhibit "7" to the Petition for Confirmation in Cause No. PR17-00446.* "); Stan's Counter-Petition re: Issue Trust ¶¶ 38-39; Stan's *Opposition to MSJ* PP 7-8.

140. Although Stan settled with Todd and nonsuited his claims, Stan testified at trial he never signed Exhibit 14 in its current form, and, at the time Exhibit 14 was purportedly signed, he "believed, actually, that Todd, Wendy and I owned the house equally." Transcript, 02/27/2019, 165:16-21; 93:16-23; 94:5-15. Stan further testified he did not see Exhibit 14 in its current form until it was filed with Petitioners' *Petition for Confirmation*. Transcript, 02/27/2019, 94, 5-15. Finally, Stan testified he would have never signed Exhibit 14 if had known that Todd owned 100 percent of

Incline TSS and that Incline TSS owned the Tahoe Property.

> Q Would you have signed the Lake Tahoe ACPA, Exhibit 14, had you known that Todd owned 100 percent of Incline and that Incline owned the Lake Tahoe house at that time, or at least, the deed was in its name?
>
> A No.

Transcript, 02/27/2019, 91:4-8. Stan's testimony is consistent with Wendy's testimony that she was never presented with and never signed Exhibit 14 in its current form, and at the time Exhibit 14 was sign she believed that Tahoe Property was owned equally, directly or indirectly, by Todd, Stan and Wendy. Transcript, 02/26/2019, 52:17-21*. Stan also testified that at the time Exhibit 14 was purportedly signed, Todd never disclosed to him or Wendy that Todd or his entities owned 100 percent of Incline TSS.

> Q And was it your understanding, then, that you and Wendy and Todd would then have an equal interest in the Lake Tahoe house?
>
> A I mean, we didn't talk about that, but that's -- I left there thinking that.
>
> Q Did Todd ever disclose to you at that time, or -- well, let's say, did Todd ever disclose to you at that time that he

owned 100 percent of Incline TSS and that Incline TSS was claiming 100 percent ownership of the property?

A No.

Q In your presence, did Todd ever disclose that same information to Wendy?

A Not that I'm aware of.

Transcript, 51:19-52:6.

141. Even if the Exhibit 14 were determined to be valid, there is nothing in the Exhibit 14 that indicates: (i) Sam or his Trusts were no longer the direct or indirect owners of the Tahoe Property or (ii) Todd, his family or any of Todd's family trusts owned Incline TSS, Ltd. or the Tahoe Property. At that time, Wendy was struggling to pay her rent and provide for and feed her minor son Luke Jaksick. Wendy's and Stan's testimony and simple logic confirms Wendy would never have agreed to use the $6 million in insurance proceeds to pay down debt in order to facilitate Todd and his family's buy in to the Tahoe Property when she and her family received no real benefit. Transcript, 02/26/2019, 52:17-21*; Transcript, 02/27/2019, 91:4-8. Wendy would not have agreed and it was not in Wendy's best interest to deplete the $6 million in liquid assets of the Issue Trust, which could have been used to purchase a home for Wendy, so she and her family could use the Tahoe Property a few weeks a year at Todd's sole discretion. Therefore, it is clear that at the time, Wendy did not know and there was no reason that Wendy should have known that the Tahoe Property was not owned by Sam or his trusts or that she had been damaged by any actions of Todd in relation to the Tahoe Property. Again, Stan, a Co-Executor of Sam's Estate and Co-Trustee of the Family Trust, testified that, at the time, it was his understanding the Tahoe Property was owned equally by Todd, Wendy and him. Transcript, 02/27/2019, 165:16-21. If that was Stan's understanding and Wendy did not have any more information than Stan had, how could Wendy have known this information.

142. Additionally, Todd was Wendy's fiduciary as sole Trustee of the Issue Trust and Co-Trustee of the Family Trust. Todd, in his capacity as Wendy's fiduciary, was the party seeking approval for the action included in Exhibit 14. Stan was also Wendy's fiduciary as Co-Trustee of the Family Trust. Wendy trusted and relied on Todd and Stan and had no reason to know or suspect that the proposed transaction would harm or damage her, her interest in the Tahoe Property or her interest the trusts. *Bennett*, 47 Cal. 2d at 559–60 (1956) ("A fiduciary has a duty to make a full and fair disclosure of all facts which materially affect the rights and interest of the parties, and, where a fiduciary relationship exists, facts which would ordinarily require investigation may not excite suspicion."). Instead, Wendy simply expected her fiduciaries to carry out what she understood to be Sam's longtime intent that the Tahoe Property benefit Todd, Wendy and Stan. Exhibit 9, p. 3; Transcript, 53:16-18*; (Stan) Transcript, 02/27/2019, 44:13-17; (LeGoy) Transcript, 97:11-98:4. Wendy is not sophisticated in business, estate planning and trusts and did not understand the mechanics of how Sam's intent was to be accomplished and what entities and trusts would be involved. She reasonably relied on and trusted that her fiduciaries would accomplish Sam's intent.

143. Next, Todd argues that multiple writings by Wendy confirm she was "well aware of her claims against Todd for the Tahoe Property." *Todd's Brief*, p. 51-2. Todd first cites to a text exchange between Wendy and Stan dated January 18, 2014 that is not in evidence and not a part of the trial record. Although Wendy disputes this text exchange supports Todd's position, the text exchange (Exhibit 23.44) was not admitted into evidence at trial and is not a part of the trial record. *Non Jury Trial Exhibits*, p. 11 (which was circulated by email to the Parties by Amanda Dick on April 13, 2019). Therefore, the text exchange is not evidence before the Court, Todd cannot rely on this text exchange as evidence, and this Court cannot consider this text exchange for any purpose. Accordingly, Wendy request the court disregard any reference or argument related to or based on this text exchange.

144. The next writing Todd relies on is an email dated March 13, 2014 from Todd

concerning Tahoe. Exhibit 139. The body of the email includes the following language:

> Remodel is continuing to go well – **we** are still relatively close to being on track for the improvements from **our** initial meeting, **wendy** and my second meeting with Pam and Stan and I had a quick discussion with Pam at the office – obviously had to shuffle a few items around to stay closer to budget but **we** are still currently close for house improvements of 100k ... **we** also need outside commercial type beach chairs ...
>
> Still need to do work on the driveway – and additional items on **our** wish list that we won't be able to get to this time.
>
> Regarding the refinance finally I did get the loan approved – so this will give **us** the Option to move forward with **our** plans – with the ssj issue funds we are paying down debt from approx. 7,200,000 to 2,400,000 plus costs, remodeled items ...
>
> Let me know if you have any more ? – also when we meet next we can discuss this in more detail – kevin is currently working on percentage ownership worksheets

Exhibit 139 (emphasis added).

145. Todd writes the email to Wendy using the terms "we", "our" and "us" concerning the Tahoe Property. This language is consistent with Wendy being an owner or future owner of the property and/or Todd trying to deceive Wendy into thinking she was an owner or future owner of the property. The fact that Todd discusses the loan and "**our** plan – with the ssj issue funds **we** are paying down the debt" is not significant because this is the same information Todd has been communicating to Wendy since the day after Sam died. On the other hand, this information confirms Wendy was being treated as an owner or future owner of the property. Todd, Stan and Wendy were going to use the $6 million in life insurance proceeds to pay down the debt on the Tahoe Property to save it for Todd, Stan and Wendy. Transcript, 02/27/2019, 165:16-21; 93:16-23; 94:5-15; Transcript, 02/26/2019, 52:17-53:18. There is no indication in the information included in the body of the email that Wendy was not an owner or would not eventually be an owner or that any action of Todd had or would harm or damage her, her interest in the Tahoe Property or her interest in any Trust may have owned the Tahoe Property. The same holds true about the email attachment. Wendy did not know or

have any reason to suspect her fiduciaries were doing anything other than working to accomplish Sam's intent for the Tahoe Property. As previously stated, Wendy is not sophisticated in business, estate planning and trusts and did not understand the mechanics of how Sam's intent was to be accomplished and what entities and trusts would be involved. She reasonably relied on and trusted that her fiduciaries would accomplish Sam's intent.

146. The next writing is an email dated March 17, 2014 from Todd concerning Tahoe. Exhibit 23.31. The same arguments applicable to the March 13, 2014 email (Exhibit 139) are applicable to this email, and Wendy incorporates those arguments here. There is no indication in the information included in the email that Wendy was not an owner or would not eventually be an owner or that any action of Todd in relation to the Tahoe Property harmed or damaged Wendy, her interest in the Tahoe Property or her interest in any trusts.

147. The next writing is a text exchange with Todd dated April 14, 2014 that is not in evidence and not a part of the trial record. Although Wendy disputes this text exchange supports Todd's position, the text exchange (Exhibit 269) was not admitted into evidence at trial and is not a part of the trial record. *Non Jury Trial Exhibits*, p. 41 (which was circulated by email to the Parties by Amanda Dick on April 13, 2019). Therefore, the text exchange is not evidence before the Court, Todd cannot rely on this text exchange as evidence, and this Court cannot consider this text exchange for any purpose. Accordingly, Wendy request the court disregard any reference or argument related to or based on this text exchange and the cited text from the text exchange that Todd included in his *Brief*.

148. The next writing is an email dated May 21, 2014 from Wendy that is not in evidence and not part of the trial record. Although Wendy disputes this email supports Todd's position, the email (Exhibit 270) was not admitted into evidence at trial and is not a part of the trial record. *Non Jury Trial Exhibits*, p. 42 (which was circulated by email to the Parties by Amanda Dick on April 13,

2019). Therefore, the email is not evidence before the Court, Todd cannot rely on this email as evidence, and this Court cannot consider the email for any purpose. Accordingly, Wendy request the court disregard any reference or argument related to or based on the email and the cited text from the email that Todd included in his *Brief*.

149. The final writing is an email dated May 28, 2014 from Kevin Riley. Exhibit 57. Todd alleges that this email confirms Mr. Riley specifically informed Wendy about the Tahoe Property ownership. *Todd's Brief*, p. 52, lines 7-11. In support of this, Todd points to the following language in the email "Sam was ultimately able to place the 49 mountain property, the Eagleville ranch and 54% interest in the Tahoe House into **this trust**." Id. (emphasis added). The full paragraph reads as follows:

> I am having trouble understanding where the accounting for the 6 million life insurance is. I know we put much of that into tahoe home and I think Todd has the rest. **I would like some documentation that 1/3rd of that insurance money was to benefit my portion and if it went into tahoe, how much my contribution gave me in ownership.**
>
> The life insurance policy was owned by a sperate trust. **That trust it is the SSJ Issue Trust**. This particular trust is not your average trust. Your father set it up such that his children and grandchildren an their children would be able to use property inside the trust, but there is no provision to ever make a distribution to any other beneficiaries. It is a very restrictive trust. In fact, certain assets are not even able to be sold without violating the trust agreement itself. Todd is the trustee. The life insurance proceeds were used to refinance the $6.3m mortgage own the tahoe home. Since the insurance proceeds were only $6m and the debt was $6.3 it was not possible to pay it off. There is now less than $1m of life insurance money remaining. Todd is holding these funds in reserve. Sam was ultimately able to place the 49 mountain property, the Eagleville ranch, and a 54% interest in the Tahoe house in **this trust**.

Exhibit 57 (emphasis added).

150. The first paragraph of the except above is Wendy's writing to Mr. Riley. This text confirms Wendy's belief and understanding that the insurance proceeds were used to reduce the debt on the Tahoe Property, and she was or would be an owner of the Tahoe Property, individually or

through one or more trusts. This is consistent with Wendy's understanding of her father's intent and what Todd had continued to lead her to believe was happening. This text also confirms Wendy was seeking more information from Mr. Riley so she could better understand the transaction. Her request for this information is consistent with any beneficiary seeking information concerning the administration of the beneficiary's trust and does not confirm that Wendy knew or should have known that Todd's actions in relation to the Tahoe Property had given rise to claims or damages against Todd. In fact, in the first paragraph of the email, Mr. Riley confirms the complexity of the situation and transactions involved stating "You SHOULD have many questions because this process is VERY complex. There are significant and substantial debts that are unresolved and will have to be resolved. I would ask you to be patient." Exhibit 57.

151. Mr. Riley responded to Wendy's questions concerning the transaction by providing her limited and very basic information concerning the Issue Trust, its purpose, the general mechanics of the refinance. Id. Mr. Riley then indicated that 54% of the Tahoe Property was placed in **the Issue Trust**. Id. Mr. Riley's explanation only confirms a percentage of the Tahoe Property was in the Issue Trust. It does not address where the other percentage was and who owned it. Sam had multiple trusts during his life and at the time he died. The Tahoe Property was owned directly by the Family Trust. It was then owned by an entity owned entirely by the Family Trust. Nothing in this cited exchange confirmed that Wendy would not receive her expected ownership interest in the Tahoe Property, whether individually or through one or more trusts. This is similar to the prior writings relied on by Todd in support of his Motion. Bits of information concerning the transaction are provided to Wendy in general terms, but she is never provided information that would fully inform her or cause her to know or to suspect that she would not receive her ownership in the Tahoe Property, whether individually or through the trusts. During this time, Wendy reasonably continued to rely on and trust her fiduciaries to accomplish Sam's intent and they had represented to her was the plan for the Tahoe

Property.

152. Finally, in some of the writings Todd relies on in support of his limitations argument, Wendy asked questions and requested information about Sam, his Estate, the trusts, the entities and other issues related to the administration of the trusts and the Tahoe Property transaction. A beneficiary asking for information concerning trusts benefiting the beneficiary, the assets of those trusts and the administration of those trusts is not confirmation the beneficiary knew that or should have known that there were claims or damages caused by such requests. If that were the case, limitations would start to run the instant beneficiaries sought information concerning their trusts or the administration of their trusts. This is not and cannot be the law. Additionally, Todd and Trustees repeatedly argue that Wendy was a very sophisticated businessperson, while at the same time arguing that Sam never intended Wendy be involved in the business and Trusts because was not good with business or money. Todd and the Trustees do not get to have it both ways.

153. Even if the March 13, 2014 email (Exhibit 139), which is the earliest written communication Todd cites to in support of his position (that is in evidence and part of the trial record), is found to have put Wendy on notice of her unjust enrichment claim, the limitation for Wendy to file her claim would have been March 2018. Wendy filed her *Counter-Petition* that included her claim for unjust enrichment in this matter on January 2018. *Counter-Petition to Surcharge Trustees*, p. 30. Therefore, her unjust enrichment claim was filed well within the statute of limitations.

g. <u>Trustees Not Entitled to Use Assets of Trusts to Prosecute/Defend Lawsuits</u>

154. Petitioners argue that Trustees are entitled to pay their commission, attorney's fees and expenses from the Trust because the language of the Trusts indemnifies them unless their actions or omissions are in bad faith. *Petitioner's Brief*, 29-30. Then Petitioners cite to certain provision of the Trusts in support their position selectively excluding language. The terms of the Trusts actually state that "the Trustee is to be personally liable or subject to surcharge only if the Trustee should **act without**

reason, in bad faith, or in violation of specific provisions of this Trust Agreement." Exhibit 9, p. 33, L; Exhibit 10, p. 10, ¶ L. The Trust further states:

> The Trustee is entitled to indemnification against any claims, liabilities, and expenses, including attorneys' fees and amounts paid in settlement, resulting from the acts or omissions of the Trustee, so long as the Trustee's acts or omissions are **not without reason, are not in bad faith, and are not in violation of specific provisions of this Trust Agreement**.

Id. The Court heard evidence throughout the trial and there is evidence throughout the trial record that confirms the Trustees acted repeatedly without reason, in bad faith and in violation of specific provisions of the Trust. For example, the Trustees have never returned and annual accounting timely and are currently refusing to return the annual accountings for the Family Trust and Wendy Subtrust that were due on March 31, 2019. Refusing to timely return the annual accountings are actions without reason, in bad faith and specifically violate terms of the Family Trust that require annual accountings. Exhibit 9, p. 26, ¶ J; Exhibit 10, p. 13, ¶ 13. Additionally, all of the accountings the Trustees have returned are deficient. For example, the Trustees' decision throughout their administration of the Family Trust to report the value of the Family Trust's interest in Samuel S. Jaksick, Jr. LLC, one of the Family Trust's most valuable assets, was an action in bad faith. *Wendy's Brief*, p. 9-12, lines 21-20. The only reason to do this was to suppress the value of the Trust, so Wendy would believe her interest in the trust was worth far less than it was. This was part of their plan to buy out Wendy's interest in the Family Trust and associated property cheap. Transcript, 02/27/2019, 117:22–118:17. Stan testified confirming this during his deposition on August 15, 2018 and during trial as follows:

> Question: "Okay. So we talked about the Buckhorn option and your belief that that's a breach of fiduciary duty by Todd.
>
> "Is there anything else that you can identify that you

believe is a breach of fiduciary duty by Todd?"

Your answer, "Yeah, I just think, you know, he really did not want Wendy to get anything. I mean, he was not willing -- as you know, as your counsel is aware, wanted to settle for a few hundred thousand dollars and get her to sign off on everything that she was involved in.

"I don't think that's fair. I don't -- I don't think -- I think Wendy is entitled to more than that, and as I don't think she's -- he's looking out for the best interest of the beneficiary with that mindset."

That was your testimony just a few months ago, correct?

A Correct.

Q Do you still believe that today?

A Yes.

Additionally, the creation and use of the ACPAs to attempt to shield Trustees from liability from self-dealing transactions and without providing full disclosure were also actions without reason and done in bad faith.

155. Finally, the Petitioners argue that the jury already determined that no willful misconduct or bad faith occurred. *Petitioners' Brief*, p. 30, lines 24-25. Nothing in the Jury Verdict supports this argument. *Jury Verdict*. The jury found that Todd breached his fiduciary duties as Trustee and of the Family Trust and the Issue Trust. *Jury Verdict*. The Court has yet to consider and rule on the sufficiency of the accountings, the validity of the ACPAs, the validity, application and scope of Todd's and Stan's purported Indemnification Agreements and other issues. Therefore, the Court may make findings in relation to these and other issues that the Trustees acted without reason, in bad faith or in violation of the terms of the Trusts. Based on the trial record, the breaches of fiduciary

duty found by the jury and the remaining issue to be determined by the Court, there is ample evidence confirming the Trustees acted repeatedly without reason, in bad faith and in violation of specific provisions of the Trust.

h. Stan's Role and Liability

156. One of the big ironies of this proceeding is the behavior of Stan, both Individually and in his capacity as Co-Trustee of the Family Trust. Stan, as a beneficiary of the Issue Trust and as Co-Trustee of the Family Trust, pretended for more than a year to be against Todd, in all capacities, and with Wendy – meaning, on her side. He had a lawsuit filed against Todd from October 10, 2017 up until a week before trial. Stan's lawsuit appears to have been nothing more than a total con. A week before trial, Stan entered into a settlement agreement with his Co-Trustees, dismissed his case against them and "switched tables in the well of the Court." Could there be a bigger sand-bag play? What makes it worse is that Stan is Wendy's fiduciary. He never once suggested to Wendy he was going to sabotage her case like he did. Without a doubt, Stan revealed confidences of conversations between him and Wendy and their attorneys that aided his other Co-Trustees. There can be no other inference.

157. The Co-Trustees want the Parties and this Court to believe they – SUDDENLY – decided resolve their minor differences and settle. As fiduciaries, this position cannot be believed because the mandatory inference is the co-fiduciaries planned this against their beneficiary. The reason there can be no other inference and this conspiracy inference is mandatory is because they are fiduciaries; they must – as a matter of law – inform their beneficiary and fully disclose to her all material information that affects her interest. Negotiating a deal where Stan moves his target off Todd and moves it over to Wendy without telling her necessarily requires a finding of collusion between them because if it was an honest, arms-length negotiation and transaction, there would be no reason to hide it from Wendy. Wendy knew nothing of the deal or agreement until she took Todd's deposition on February 1, 2019, just a week before the jury trial was to begin. This type of manipulation of the

court system is not only disgusting, but should not be tolerated by this Court. Co-fiduciaries should not be allowed to collude and conspire together to harm their beneficiary like these co-fiduciaries did.

158. The question is: was Wendy prejudiced by her co-fiduciaries' behavior? She absolutely was in, at least, the following ways:

i. There can be no doubt that fiduciaries colluding and conspiring to harm their beneficiary is a breach of fiduciary duty that is prejudicial to a beneficiary, which is why the law indulges a presumption against those fiduciaries, which they must overcome – not the beneficiary. It is presumed that Stan's behavior and the behavior of her Co-Trustees in relation to settling just before trial prejudiced Wendy as a matter of law;

ii. Stan "settling" with Todd on the eve of trial was the ultimate example of trial by ambush that this Court, in equity, can never abide:

1. Pleading Deadline Passed. When the Co-Trustees announced their settlement days before the jury trial, the pleading deadline had passed, so Wendy could not have then filed suit or pleaded any new causes of action against Stan;

2. Discovery Deadline Passed. No discovery could have been sent or obtained by Wendy against Stan, and Stan could not have been deposed in relation to new causes of action against him or regarding the settlement or his position against Wendy in the jury trial;

3. Wendy Treated Stan Differently. Throughout the trial preparation, Stan was "on Wendy's side" with allegations of breach of fiduciary pending against Todd, in his various capacities, and the other Co-Trustees, so she treated him differently in his deposition and other discovery than she would have if he had been her opponent. If Wendy had known all along it was her against her Co-Trustees, her discovery would have been different, and she would have prepared her case differently.

4. Conveyance of Confidences. Because Wendy and Stan were, essentially, aligned against Todd, she had discussions with Stan that she would not have otherwise, and her attorneys had discussions with Stan's attorneys that they could not have had otherwise conveying confidences that could have and were undoubtedly used against Wendy during the trial.

iii. The Jury perception of the Parties was set, and was completely changed, by the settlement of Stan and the Co-Trustees:

1. Perception – Wendy with Stan v. Wendy Alone. Imagine if the Jury

was presented a case where Wendy, along with her brother, beneficiary and Co-Trustee, were the parties on one side versus Wendy alone against all the Co-Trustees. A Co-Trustee supporting Wendy's position against the other Co-Trustees would have enhanced Wendy's credibility and the Jury would have perceived the case differently. It would have clearly been a different trial.

2. Prejudice as a Matter of Law. It also cannot be denied that change in jury perception unfairly and prejudiced and harmed Wendy.

159. Effect of Stan switching sides and then arguing he is not responsible for the misdeeds of his Co-Trustees (fiduciaries) that he "crawled in bed" with is blatant, unadulterated hypocrisy. After all of the above, on July 1, 2019, Stan filed *Stan's Brief* in accordance with this Court's briefing schedule. In it, he makes the following false or inaccurate claims:

a. No Immunity. "*As Stanley Jaksick disagreed with several of the actions challenged by Wendy Jaksick, he is immunized from liability by NRS 163.110.*" *Stan's Brief*, p. 4. He waived any supposed immunity and is estopped from claiming any supposed immunity when he endorsed and agreed with all actions taken by his Co-Trustees by joining their side in the Jury Trial; he cannot have it both ways, either he is with the Co-Trustees or against them – he chose to be with them.

b. Failure to Disclose. "*To date, Wendy Jaksick has not identified any instances where Stanley Jaksick failed to disclose information in his possession or knowledge to Wendy Jaksick. Stanley Jaksick will respond to any such identification in the Closing Brief, but Wendy Jaksick should not be permitted to specifically identify, for the very first time in this litigation, the substance of her claims in the Closing Brief.*" *Stan's Brief*, p 4. This is so unfair and disingenuous it is indescribable. It also highlights as bright as a neon sign Stan's goal in waiting until a week before trial to settle. This position cannot stand. The Court does not need argument to know the unfairness of such a statement or position by Wendy's fiduciary, it is

blatantly obvious.

c. Accountings. "*With respect to the Family Trust accountings Stanley Jaksick will respond with respect to his involvement, if any, in the claims related to the accountings in his Closing Brief.*" *Stan's Brief*, p. 4. Again, this is totally unfair and Stan is, again, estopped from taking any position contrary to the Accountings – he bought them and their consequences when he signed-up to be on the same team as his co-conspirator fiduciaries. He has to own every bit of what they did in their accountings and all the failures in the Accountings. Stan's position is exactly why estoppel exists. He either accepts the actions of his Co-Trustees or he has "unclean hands" and taking a position opposite of the Co-Trustees equates to "unclean hands."

d. ACPAs. "*Wendy Jaksick should be required to identify which ACPAs she is currently contesting.*" *Stan's Brief*, p. 4. Wendy is contesting all the ACPAs, even the ones Stan contested before settling with his brother, which is crystal clear in her pleadings and this is yet another disingenuous allegation by Stan, who is taking advantage of his "sandbagging," hiding behind his misrepresentation of his position for more than a year in this case, then claiming he is on the Co-Trustee's side and Wendy has not given him notice. This is total nonsense and should be rebuked by the Court.

e. Indemnity Agreement – Stan is correct when he alleges, "*Wendy Jaksick has not identified any instance of Stanley Jaksick invoking this indemnification agreement.*" *Stan's Brief*, p. 4. Wendy has requested the Court find all the Indemnity Agreements invalid, including Stan's, *ab initio*, so, since it is invalid and Stan knew it was invalid because he never invoked it, this point in Stan's Brief is moot.

f. No Contest Provision. "*Wendy Jaksick neither claims that Stanley Jaksick violated a no-contest provision nor that Stanley Jaksick has asserted that Wendy violated a no-contest provision.*" Stan, once again, is using his 11th hour settlement against his beneficiary, since he knows Wendy was unable to plead any new claims against him. Unfortunately, he is wrong! Because all actions of the Co-Trustees are imputed to each other, so too do the pleadings implicate Stan's violation of the "No Contest" provision in the Family Trust. Stan must take the burdens of his settlement with his brother with the benefits. He cannot lie behind the log, settle at the last minute, then claim a "gotcha" against Wendy, his beneficiary. The latter is, in and of itself, a breach of fiduciary duty, but worse, is deliberate action to violate the terms of the Family Trust and the rights of Wendy, his beneficiary.

g. Unjust Enrichment. "*To date, Wendy Jaksick has not identified any instances of unjust enrichment by Stanley Jaksick as co-trustee of the Family Trust.*" *Stan's Brief*, p. 5. FALSE! The unverified accountings Co-Trustees have submitted show Stan withdrew and held Wendy's property for more than a year outside her sub-trust and in a separate entity owned by Stan. Stan also objected to using Family Trust money to pay Todd's personal capital calls for Jackrabbit, until the Co-Trustees agreed to pay Stan's personal capital calls out of the Family Trust too. Todd as Trustee of the Issue Trust negotiated the sale of an interest in Incline TSS with himself as the Manager of Incline TSS, who had negotiated a deal with himself, Individually and as Manager of SSJ, LLC to exercise the Option Agreement. You think Stan appeared at trial and challenged Todd about Todd negotiating deals with himself in multiple capacities? Of course not, because by the time of the trial Stan was defending and advocating for the transactions because he

would benefit from same as a result of his settlement with Todd. Stan is a master at claiming it is not proper unless I get the same benefit; personal benefit by both Co-Trustees to the exclusion of Wendy. Stan, of course, did not disclose any of this or that he used Wendy's money for his own personal benefit, nor did he make Wendy's money that he was holding outside her sub-trust available for her and her family's use; none of the other Co-Trustees told her either. Stan's view of his fiduciary duties is grossly skewed in his own favor to the detriment of Wendy; he has unjustly enriched himself as stated, but also, by virtue of the settlement with Todd wherein they both colluded to divert title of the Lake Tahoe Property into Todd's entity, Incline TSS, then to "sell" part of it back to Stan, thereby depriving Wendy out of her one-third (1/3rd) share of the Lake Tahoe Property that was owned by the Family Trust. Throughout this case, the Co-Trustees of the Family Trust have ignored when they benefit personally like it was meant to be all along. The Lake Tahoe House transaction resulted in tens of millions of dollars being moved into the names of or for the benefit of the Co-Trustees, which unjustly enriched both of them. The water rights transfers resulted in tens and, potentially, hundreds of millions of dollars moved into the names of or for the benefit of the Co-Trustees. It is up to this Court to restore the property to the Family Trust where it should have stayed and never been transferred in the first place.

h. Passivism = Acquiescence – Disgorgement of Fees & Removal of Stan. (Disgorgement of Fees) "*As the jury verdict absolved Stanley Jaksick of any liability for breaches of fiduciary duty, there is no basis to order Stanley Jaksick to disgorge any trustees' fees.*" Stan's Brief, Pg. 5. And (Removal of Trustees/Appointment of Independent Trustee for Family Trust) "*As the jury*

verdict absolved Stanley Jaksick of any liability for breaches of fiduciary duty, there is no basis to order Stanley Jaksick to disgorge any trustees' fees. Wendy Jaksick also alleges that the co-Trustees had a 'strong bias against Wendy and her family,' but this has not been evidenced in relation to Stanley Jaksick." *Stan's Brief*, p. 5. Again, Stan is flat wrong. Stan thinks he can sit back as a Co-Trustee, watch his brother and colleagues breach every fiduciary duty possible, do nothing to stop it and then claim, he knew nothing about it or is not responsible for it. His passivism is acquiescence in their actions and behavior, if it is not affirmatively promoting it. His "Colonel Klink, 'I see nothing'" act does not work and is not allowed under Nevada law or fiduciary law in general and all claims and remedies filed against any of the Co-Trustees is attributable to Stan as well. His actions are direct evidence of his bias against Wendy and her family. In fact, his may be worse than any of them because he hid his position from Wendy – he was a mole for the Co-Trustees gathering information and feeding it back to them, only to switch sides at the end. Stan is the ultimate traitor of Wendy and her interests and he betrayed her and her trust morally and as her brother, beyond the trust he owed her as her Co-Trustee. Stan held the office of Trustee and it is called Trustee for a reason. All Stan's fees should be disgorged, and all attorneys' fees and expenses paid by Stan out of the Family Trust to his attorneys should be disgorged, because he is just as guilty of and liable for the breaches by Wendy's Trustees, as any other of her Trustees. His attempt to absolve himself of their actions, while he sat passively by and allowed them to happen triggers disgorgement and grounds for his immediate removal as Co-Trustee of the Family Trust. Stan violated every trust possible, and, in equity, should not be allowed to do so or to benefit by his behaviors.

160. When Stan switched sides he hitched his box car to the train of the other Co-Trustees' and he committed himself to going everywhere they did, including their failures and misrepresentations in their deficient accountings. By settling with the Todd and the Trustees, he withdrew his written objections to their actions, giving up and liability protection he may have been afforded by NRS 163.110(2). You do not get to object in writing, settle, withdraw your objections and then enjoy the protections afforded by the objections.

161. By settling and withdrawing all of his claims and objections, Stan adopted their accountings, which the other Trustees could not verify under oath. He also adopted their refusal to make distributions to Wendy to starve her out to get her to agree to a settlement out of desperation, their manipulation of the jury – it is exactly the same as if Stan did it himself. Stronger than the latter logic, legally he is estopped from now claiming he is not part of the Co-Trustees' team. Stan must own what he did by entering into the settlement agreement, and, now, must own what all the Co-Trustees did as well because he was advocating each and every one of their acts before the Jury. Stan cannot pick and choose what he wants to be a part of – he is either all-in or all-out; he chose to be all-in! He is now liable for all the consequences of his action.

162. Stan's encouragement of Wendy to act to protect her rights in the Trust from "Todd's bad acts" was a major factor in Wendy filing and pursuing her claims. Wendy fought for herself and Stan throughout the litigation and her preparation for trial. Prior to and throughout the litigation, Stan let Wendy believe or even convincing her to believe he was fighting for her as well, all while planning and then turning around and switches sides a week before trial. Ultimately, Wendy ended up serving as a pawn to fight Stan's battles with Todd, which provided Stan leverage to obtain a far more beneficial resolution of with Todd. Notwithstanding that it is the ultimate betrayal by a brother and by a fiduciary (Co-Trustee of the Family Trust) of Wendy, this "win-at-all costs" mentality by the Trustee and Co-Trustees, underscores their behavior in this litigation, taints their entire administration

of all trusts and indicates it will continue and prevents their ability to continue to serve as fiduciaries and trustees in the future.

WHEREFORE, Wendy requests the Court consider this *Brief of Closing Arguments*, the arguments and evidence included and cited herein and enter judgment against the Counter-Respondents consistent with Wendy's pleadings.

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that this document does not contain the social security number of any person.

DATED this 31st day of July, 2019.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of FOX ROTHSCHILD LLP and that on this 31st day of July, 2019, I served a true and correct copy of **WENDY JAKSICK'S BRIEF OF CLOSING ARGUMENTS IN THE EQUITABLE CLAIMS TRIAL** by the Court's electronic file and serve system addressed to the following:

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I declare under penalty of perjury that the foregoing is true and correct.

DATED this 31st day of July, 2019.

/s/ Doreen Loffredo
An Employee of Fox Rothschild LLP