

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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

TODD B. JAKSICK, INDIVIDUALLY AND 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 AND AS A FORMER
TRUSTEE OF THE SAMUEL S. JAKSICK, JR.
FAMILY TRUST, AND AS TRUSTEE OF THE
WENDY A. JAKSICK 2012 BHC FAMILY TRUST;
AND STANLEY JAKSICK, INDIVIDUALLY AND AS
CO-TRUSTEE OF THE SAMUEL S. JAKSICK, JR.
FAMILY TRUST,

Appellants/Cross-Respondents,

vs.

WENDY JAKSICK,

Respondent/Cross-Appellant.

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Case No.: 81470

Appeal from the Second
Judicial District Court,
the Honorable David
Hardy Presiding

**RESPONDENT/CROSS-APPELLANT WENDY JAKSICK'S
APPENDIX, VOLUME 24**

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Agreement and Consent to Proposed Action – Stanley Jaksick Buy in to Lake Tahoe Property - Trial Exhibit 23	11/13/2015	1	WJ 0014 - 0018
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Dated this 14th day of June, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT/CROSS-APPELLANT WENDY JAKSICK'S APPENDIX, VOLUME 24** was filed electronically with the Nevada Supreme Court on the 14th day of June, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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1 (The following proceedings were held outside
2 the presence of the jury.)

3 THE COURT: Counsel, I'll see you at 1:25, and
4 then you can put all your contemporaneous objections --
5 Mr. Lattin may put his objection on the record. I am not
6 sure if we're going to do the offensive proof in that
7 amount of time, but I fix your right to do so at some
8 point before you close your case.

9 (The midday recess was taken.)

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2 RENO, NEVADA; THURSDAY, FEBRUARY 28, 2019; 1:25 P.M.

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4

5 (The following proceedings were held outside
6 the presence of the jury.)

7 THE COURT: We'll go on the record.

8 Mr. Lattin, do you wish to be heard?

9 MR. LATTIN: I do, Your Honor. Thank you.

10 This relates to the information that I brought
11 out in the sidebar, and it was in connection with
12 Mr. Wallace's testimony regarding the accountings.

13 It is our position that we should at least be
14 able to use Mr. Campagna's deposition to impeach him as
15 he indicated that he relied upon it and Mr. Campagna was
16 the one who was designated and deposed for at least five
17 and a half or six hours regarding the accounting
18 standards, and he specifically indicated that the
19 accountings complied with Nevada law.

20 Right before trial they withdraw him as a
21 witness, and they now go into the same things with
22 Mr. Wallace regarding the accountings. Mr. Wallace, in
23 our view, is not a CPA, not qualified to talk about that,
24 and we should at a minimum be allowed to use

1 Mr. Campagna's deposition to impeach Mr. Wallace
2 regarding inconsistent opinion by an expert.

3 THE COURT: Thank you.

4 MR. SPENCER: Your Honor, in relation to
5 Mr. Wallace, first of all, we've heard numerous times in
6 front of the jury, which is prejudicial just for saying
7 it, that that's not in the report, and repeatedly it has
8 been in the report.

9 This particular issue is in the report at
10 page 13 where Mr. Wallace comments about the accountings,
11 and the testimony that was elicited was in relation to
12 his opinion regarding fiduciary duties, not GAAP,
13 generally accepted accounting principles, not whether an
14 entry should be in there or not or any of that, but
15 whether it complies with the disclosure requirements of
16 an accounting in the context of fiduciary duties, and
17 that's what he did, and it's in his report. And they had
18 five to six hours to depose him about that statement in
19 his report.

20 So the question was limited to that. I had him
21 clarify, you're not doing this as an accountant, you're
22 not qualified to do it as an accountant, you're doing it
23 as a fiduciary expert, and that's what I limited it to.

24 MR. LATTIN: May I, Your Honor?

1 MR. SPENCER: And then -- I'm sorry, if I could
2 end.

3 MR. LATTIN: Certainly.

4 MR. SPENCER: And it's not proper to use a
5 deposition that way, and we didn't call him for purposes
6 of attacking the accounting as it relates to accounting
7 principles.

8 MR. LATTIN: Well, they did. They asked him if
9 it complied with the standards, and the standards are set
10 forth in Nevada Revised Statutes, which Mr. Campagna at
11 the conclusion of his deposition indicated that it
12 complies with Nevada law.

13 So we have two experts who are diametrically
14 opposed, and we are somewhat handcuffed by not being able
15 to use Mr. Campagna's deposition to impeach him,
16 particularly in light of the fact he read it and it was
17 listed as something he relied upon.

18 MR. ROBISON: May I just add one thing, Your
19 Honor, please?

20 Mr. Wallace acknowledged reading Mr. Campagna's
21 deposition, but then he misstated to the jury that
22 Mr. Campagna only commented on the form of the filings,
23 not the substance.

24 Throughout this deposition, Your Honor,

1 Mr. Campagna testified that the form and substance comply
2 with Nevada statutes. He's been permitted to state that
3 they do not comply with Nevada statutes and that Campagna
4 only testified about form, which is inaccurate.

5 MR. CONNOT: If I may, Your Honor, I don't want
6 to double-team. Only because I worked with Mr. Campagna,
7 if I might, a couple things.

8 First of all, I think this is going to be an
9 argument when we get to instructions as well. It's come
10 up in our dialogue on this.

11 What Mr. Campagna testified to was the form of
12 the accountings met the form of the statute, okay, but
13 that is not the end of the inquiry to begin with. I
14 mean, that's not the end of the inquiry.

15 For example, I think that's something along
16 what Mr. Wallace testified to, that it depends on the
17 situation. If you own 100 shares of Apple stock, it's
18 really easy to do the accountings and say this is what's
19 in it. There's more that's beyond that.

20 Secondly, once an expert is no longer being
21 used, the other side can't call that expert.

22 THE COURT: Can or cannot?

23 MR. CONNOT: Cannot. Just like with Mr. Green.
24 You can't -- the party is entitled to not have the expert

1 testify. Once they're no longer a testifying expert, the
2 law is clear; the other side is not entitled to call
3 them.

4 Now they're trying to get in hearsay for an
5 expert that they couldn't call otherwise. It's an
6 improper use of a deposition, but they're also taking
7 what Mr. Campagna said out of context and trying to
8 basically testify themselves in cross-examination and
9 trying to get him to say yes or no.

10 MR. ROBISON: Can I put on the record what
11 Mr. Campagna testified to, sir?

12 THE COURT: You can because we're just
13 preserving our record. I can't contemplate how I'm going
14 to allow an absent deponent's words to be introduced any
15 more of this trial. I'm confident everybody has agreed
16 at various times in this trial. I felt the potential
17 prejudice, but I let it go, but then we have to move on.

18 So go ahead and --

19 MR. ROBISON: Here's our offer of proof, Your
20 Honor.

21 THE COURT: Please.

22 MR. ROBISON: Page 37 of Mr. Campagna's
23 deposition, he's asked:

24 "Question: It couldn't be in any other

1 capacity. It has to be in your capacity because you are
2 the one testifying.

3 "Answer: Well, the courts will ultimately
4 decide, but yes.

5 "Question: I understand that. Are you -- are
6 you telling me that you are giving legal opinions in
7 this?

8 "Answer: That is what I am saying expressly,
9 that I am not giving legal opinions.

10 "Question: All right. So you cannot state as
11 an opinion whether or not Mr. Riley's reports comply with
12 legal statutes in the state of Nevada; is that correct?

13 "Answer: As far as what I can see, they had
14 the form and substance.

15 "Question: Okay. When you say form and
16 substance, in just talking about the form and contents of
17 the accounting, would you agree with me that under the
18 Nevada Revised Statutes his compilation reports complied
19 with the form and contents required under Nevada
20 statutes; correct?

21 "Answer: From my knowledge, yes."

22 But wait, there's more.

23 On page 103, Your Honor, the question was:

24 "Do you know whether or not this applies to the

1 situation involving Kevin Riley or not?

2 "Answer: I don't specifically.

3 "Okay. Having looked at Exhibit 177" -- that
4 was a copy of the statute, Your Honor -- "do you think
5 that in any way Mr. Riley, in doing his compilation
6 statements, did not comply with this section?

7 "Answer: No.

8 "So you would testify that in your review he
9 has complied with this?" Again, referring to the
10 statute.

11 "To my knowledge, yes."

12 Then we go on to statute NRS 165.135.

13 And I say, "That's Exhibit 179."

14 Mr. Lattin agrees.

15 "I have reviewed it."

16 Question by Mr. Lattin: "Now, is this the
17 section in Nevada Revised Statutes that talks about form
18 and contents of accounting? Do you see that?

19 "Yes.

20 "So what is your understanding as to this
21 provision?

22 "It's" -- I'm sorry. "That it's not laid out
23 in the trust document, this form of account and the
24 requirements, minimum requirements.

1 "Question: Where does it say minimum?

2 "Answer: That's my estimation is minimum
3 requirements.

4 "Question: It doesn't say minimum, does it?

5 "That's correct.

6 "So you're not a lawyer?

7 "That's correct.

8 "So you cannot say whether or not this is a
9 minimum or not?

10 "I can't say that as far as the law goes."

11 I'm going to move forward to page 105, line 6.

12 The question was: "So you would testify that
13 if I showed you NRS 165.135 entitled "Form and Contents
14 of Account" at the time of trial, you would testify that
15 Mr. Riley complied with this; correct?

16 "Answer: Yes."

17 And there's more, but I'll leave it at that.

18 THE COURT: Okay. The record is preserved.

19 MR. ROBISON: Thank you, Your Honor.

20 MR. SPENCER: Just to forewarn you, Your Honor,
21 so you can deal with the time situation, we have two
22 exhibits here that we talked about redacting some words
23 from, so when the time is appropriate, I want to take
24 that up, and then we have an offer of proof as well.

1 THE COURT: You intend to use those exhibits
2 when?

3 MR. SPENCER: They're already admitted, and so
4 there's some prejudicial words in those admitted
5 documents that we want out.

6 THE COURT: But you're not going to broadcast
7 those in the next session of court?

8 MR. SPENCER: No.

9 THE COURT: We can get the jury?

10 MR. SPENCER: Yes.

11 (The following proceedings were held in the
12 presence of the jury.)

13 THE COURT: Counsel, you may continue.

14 MR. ROBISON: Thank you.

15

16 CROSS-EXAMINATION

17 (Resumed)

18 BY MR. ROBISON:

19 Q Mr. Wallace, I am reminded to slow down, and I
20 apologize if I've gone too quickly, particularly to the
21 court reporter. I just have a few more questions.

22 You have indicated in your report that Todd
23 prepared the Notices of Proposed Action.

24 A I don't recall the specific wording that I

1 used. There were Notices of Proposed Action that were
2 prepared, some of which were prepared by the co-trustees,
3 as I understand it, some of which were prepared by
4 Maupin Cox.

5 Q I understand. Let me read from page 12, second
6 paragraph of your report.

7 "Once again, Todd prepared a notice of proposed
8 action and again failed to satisfy the requirements."

9 And you're referring to NRS 164.725; correct,
10 sir?

11 A Yes, sir.

12 Q Are you telling us, sir, that Todd prepared
13 notices?

14 A Todd is the co-trustee. Todd put those
15 forward. I don't know that he -- I don't know whether he
16 typed the form or not. My intent, though, is that it was
17 the co-trustee that put forward the notices.

18 Q I want to ask you about what you wrote in your
19 report.

20 "Once again, Todd prepared a notice of proposed
21 action."

22 A Yes, sir. I stand by that language.

23 Q Have you ever seen in this case a notice?

24 A I'm sorry. Are you saying that I misquoted the

1 name of the document? I'm not sure what you're referring
2 to.

3 Q I'm saying that there's a statute that pertains
4 to notices, but we haven't seen any notices of proposed
5 action in this case.

6 Have you?

7 A I'm sorry, sir. I'm not following you. If I
8 misstated the name of the document, I apologize.

9 Q Well, you do know what NRS 164.725 pertains to,
10 don't you?

11 A Yes, I do.

12 Q And I'm looking at the statute, and it says
13 "NRS 164.725 Notice of proposed action."

14 That's what you're referring to?

15 A That's the statute that I understood these to
16 be attached to, if you will.

17 Q But if you look at, for example, Exhibit 14,
18 these aren't notices of proposed action. These are
19 agreements; correct?

20 A They are agreements and consent to proposed
21 action.

22 Q Right. But the statute pertains to what the
23 trustee must put in a notice; correct, sir?

24 A I believe that the statute defines what should

1 be put in a notice, yes.

2 Q All right. And you're saying Todd violated the
3 notice provisions?

4 A I believe that that document has certain
5 shortcomings in the context of 164.725.

6 Q But there are no notices that were issued in
7 this case under that statute; correct, sir?

8 A I don't know the answer to that. Again,
9 whether I've misstated the document or not, I apologize.
10 I was referring to those which were prepared in
11 accordance with 164.725.

12 Q But those are notices, not agreements.

13 A They are agreements and consent to proposed
14 action.

15 Q Right. And you say that there's never an
16 indication by Todd as to who owned Incline TSS in those
17 notices?

18 A I'm sorry. Would you ask that again.

19 Q Did you testify there was no disclosure as to
20 who owned Incline TSS in those what you call notices?

21 A Yes, sir. With respect to the underlying
22 ownership of Incline TSS.

23 Q And you're considering Exhibit 14, that ACPA,
24 you're considering that a notice, sir?

1 A I'm treating it as having been prepared under
2 the same statute, yes, sir.

3 Q Thank you.

4 And if you'd look at the signature page,
5 please, and blow up the TSS part.

6 That is Incline TSS, Ltd. That's referred to
7 as the company in the ACPA; correct?

8 A I believe that to be true. I don't recall, but
9 I think that's right.

10 Q And Incline TSS is reflected as having a
11 manager; correct?

12 A Yes.

13 Q Who?

14 A The manager is Todd Jaksick.

15 Q And the two members?

16 A Todd Jaksick, member and TBJ SC Trust, member.

17 Q And that shows the two members of Incline TSS
18 even though Todd B. Jaksick's Family Trust should be on
19 the second line; correct?

20 A Presumably it should be there as well, but,
21 again, it does not reflect the ownership, which is what I
22 was speaking to.

23 Q You know that members are owners?

24 A Members are owners, that's correct.

1 Q And there's only two members of Incline TSS;
2 correct?

3 A That is, I believe, correct, yes.

4 MR. ROBISON: Thank you, Your Honor. I'll pass
5 this witness.

6 May I sit back so there's more room for
7 counsel?

8 THE COURT: Yes.

9 MR. LATTIN: Your Honor, we've had a
10 discussion, and with your permission, I would allow
11 Mr. Hosmer-Henner to go first, and I'll follow him.

12 THE COURT: Thank you.

13

14 CROSS-EXAMINATION

15 BY MR. HOSMER-HENNER:

16 Q Good afternoon, Mr. Wallace. I'm going to try
17 to talk a little bit louder so everybody can hear me, but
18 if it's too much, let me know.

19 I didn't really want to ask you any questions
20 today, but you stuck your neck out a little bit too far
21 with respect to Bronco Billy's.

22 You don't know too much about Bronco Billy's or
23 Pioneer Group, do you?

24 A I know enough to testify to the extent I

1 testified with respect to the transaction.

2 Q But you prepared a report in this case about
3 Bronco Billy's and Pioneer Group?

4 A I prepared a report that included commentary on
5 the Bronco Billy's transactions through Pioneer, yes,
6 sir.

7 Q That's a yes?

8 A It's a clarification.

9 Q And in that report you included a lot of
10 incorrect statements, didn't you?

11 A I'm not sure. You'll have to be more specific.

12 Q You said "The gifts left the family trust an
13 88 percent ownership interest in Pioneer Group."

14 That's incorrect, isn't it?

15 A I believe it to be incorrect, but with a very
16 good reason. It's -- it's not materially incorrect, if
17 you will. I think I explained that earlier.

18 Q Well, 88 percent interest of Pioneer Group is
19 very different than 88 percent of the family trust's
20 37 percent interest of Pioneer.

21 A What I was intending to refer to was, after the
22 6 percent gifts to Todd and Stan, it was my understanding
23 that the remaining 88 percent of the family's interest in
24 Pioneer Group is what I was attempting to --

1 Q So you clarified that mistake in this report?

2 A To the extent that that is a mistake, that is
3 what I intended, yes, sir.

4 Q You also said that interest was to be divided
5 into one-third shares for generation-skipping trusts for
6 Todd, Stanley, and Wendy.

7 And that's wrong, too, pursuant to the second
8 amendment to the trust?

9 A It's my understanding that the interest from --
10 once that interest is distributed, that it was to go into
11 three generation-skipping trusts for the benefit of those
12 three individuals. That's my understanding.

13 Q Based on what document?

14 A The family trust.

15 Q Into their generation-skipping trusts? That
16 Bronco Billy's was specifically allocated to those GS(D)
17 trusts?

18 A I believe it was going to the GS(D) trusts.
19 That's my recollection right now.

20 Q You also said that "Todd and Stanley, as
21 co-trustees of the family trust, sold Bronco Billy's
22 Casino."

23 That's wrong, too, isn't it?

24 A Sir, I think you're getting bogged down in

1 semantics. The interest was sold. Pioneer sold the
2 interest. The co-trustees are the ones that represent
3 the trust's interest, and I made reference to the fact
4 that the trust's interest was sold through Pioneer Group.
5 I don't find that misleading.

6 **Q It says "Todd and Stanley, as co-trustees of**
7 **the family trust, sold Bronco Billy's Casino."**

8 A Through the interests that they represented. I
9 believe that to be accurate.

10 **Q So you're clarifying that you didn't mean that**
11 **they sold it; someone else sold it?**

12 A That's -- I did not offer that as a
13 clarification, no, sir. I stand by my wording.

14 **Q You stand by the wording that "Todd and**
15 **Stanley, as co-trustees of the family trust, sold Bronco**
16 **Billy's Casino"?**

17 A Yes, sir. The interest was sold. The
18 ownership was held by the two co-trustees, and they
19 participated in the sale.

20 Were they decision makers? That's not what I
21 intended by that. The co-trustees oversaw the sale of
22 the interest in the trust, and that's what I intended by
23 that language.

24 **Q And you say that the family trust received in**

1 **excess of \$6 million?**

2 A I said the interest was sold for in excess of
3 \$6 million.

4 Q No. Your report said it received in excess of
5 \$6 million. Would you like to clarify that?

6 A No, sir.

7 Q So there's no difference with what you just
8 testified now and what's in your report?

9 A I don't believe so, no.

10 Q You also said Wendy has never received her
11 share of any of these sale proceeds, and that's
12 incorrect, too, because you heard testimony she received
13 \$75,000 from Stan's subtrust?

14 A She never received -- no, sir, that's
15 incorrect. I stand -- the testimony that you're
16 referring to is with respect to some money that Stan gave
17 to Wendy, but that was outside the confines of the family
18 trust. Those funds were held by him individually.
19 Whether they were supposed to be a part of the trust or
20 not is open for discussion, but the monies came from
21 Stan.

22 Q You think the subtrust is out of the family
23 trust?

24 A I think the monies were being held -- based on

1 the testimony that I heard, Stan was holding those
2 trusts -- was holding those funds outside the trust, and
3 he is the one that gave the \$75,000 to Wendy. I did not
4 understand it to be through the family trust.

5 **Q So you've said you know something about trusts.**
6 **You think someone holding funds in a subtrust is holding**
7 **that in their individual capacity?**

8 A Again, I want to say for the third time, my
9 understanding was he was not holding those in the
10 subtrust. He was holding them outside the trust and made
11 a distribution to her of \$75,000. That was my
12 understanding of the testimony.

13 **Q So your knowledge that he's holding that not in**
14 **a subtrust, where does that come from?**

15 A From his testimony that I heard yesterday.

16 **Q That's contrary from the testimony of every**
17 **other witness in this case, including the person that you**
18 **were hired to speak on behalf of, Wendy.**

19 A I'm sorry. I'm standing by my understanding of
20 Stan's testimony that those funds were being held outside
21 the trust and that he conveyed \$75,000 to her, which
22 reduced what he was holding from 400- to 325- is my
23 recollection.

24 **Q This is about your understanding of Bronco**

1 Billy's, and you don't seem to have a grasp of what
2 happened with Bronco Billy's.

3 MR. SPENCER: Your Honor, argumentative.

4 THE COURT: Sustained.

5 BY MR. HOSMER-HENNER:

6 Q Does Wendy have any right to a distribution
7 from the sale of a family trust asset like the Pioneer
8 Group stock?

9 A Would you repeat the question again.

10 Q Does Wendy have any right to have those assets
11 immediately distributed to her upon sale?

12 A To her individually, no.

13 Q Does she have any right to have those
14 distributed to her subtrust?

15 A I believe so, yes.

16 Q Based on what document?

17 A Based on the family trust agreement. As a sale
18 takes place of an asset in the trust, it should be
19 allocated according to the trust document.

20 Q You've read that document?

21 A A number of times, yes.

22 Q And you think that every asset that's sold from
23 that family trust immediately gets allocated to the
24 subtrusts?

1 A Not immediately, no, but I believe that's
2 ultimately where it should -- where the accounting should
3 take place.

4 Q And that ultimate time period has not happened
5 yet?

6 A That time period --

7 Q Ultimately hasn't happened yet? The trust
8 hasn't been distributed?

9 A The trust -- I'm sorry, I'm not following.

10 Q At what point in time do you think that those
11 proceeds from the sale of the Pioneer Group stock have to
12 be put in a subtrust?

13 A Have to be put in? I think it needs to be done
14 in a reasonable period of time.

15 Q But debts come before distributions, don't
16 they?

17 A That's an overbroad statement. That's not
18 always the case, no, sir.

19 Q You think that Wendy had a right to get a check
20 for those proceeds within how long?

21 A Sir, I've already stated she did not have a
22 right to get a distribution in her individual name.
23 Please don't misstate my testimony.

24 Q And that money can't be distributed to her in

1 her individual name until the debts are paid off in the
2 family trust?

3 A No, sir. I don't believe that's accurate.
4 Once again, the debts need to be provided for, but you
5 can certainly have debts outstanding in a trust and still
6 make distributions to beneficiaries.

7 Q Based on HEMS standard?

8 A Based on the standard involved in the trust,
9 yes.

10 Q But we're talking about this block of funds
11 from Pioneer Group. She doesn't have any specific right
12 to that outside of her general rights under the family
13 trust?

14 A I'm sorry, sir. I'm not following that
15 question. She has the right to receive the share that
16 her subtrust is entitled to within a reasonable period of
17 time after the transaction closes.

18 Q You think the allocation to the subtrust is
19 based on when the underlying transaction closed and not
20 the general administration of the family trust?

21 A I believe that both are factors into when a
22 distribution can or should be made to Wendy, but I'm
23 talking about the time in which the funds are actually
24 received and accounted for within the family trust and

1 the subtrust.

2 Q In your report you admitted that the Bronco
3 Billy's funds were redeposited in the family trust;
4 right?

5 A That was my understanding. Initially they
6 were, yes.

7 Q And that's where they should go?

8 A Yes.

9 Q You have no knowledge of Colorado gaming law?

10 A I've already testified that that's not my
11 area -- may I finish? I've already testified that's not
12 my area of expertise.

13 Q So that's no knowledge of Colorado gaming law?

14 A I wouldn't say no knowledge. I have limited
15 knowledge of Colorado gaming law and I'm certainly not an
16 expert in that regard.

17 Q What knowledge do you have of Colorado gaming
18 law?

19 A That gaming licenses are required for, really,
20 all personnel that are engaged by the casino, from the
21 people that are working at the casino to the people that
22 own them, that there is a specific group within Colorado
23 that does the research, the background research and
24 ultimately issues those licenses, that there is a

1 specific process for obtaining those licenses, and an
2 application that has to be filled out and filed with the
3 gaming commission in order to achieve one.

4 **Q Could Wendy have obtained a gaming license**
5 **under Colorado law?**

6 A Could she? Sure.

7 **Q That's your opinion?**

8 A Yes. Whether she would have to do some things
9 to clean up anything that's outstanding, I don't know,
10 but your answer is could she, and the answer is
11 certainly, yes.

12 **Q You're not aware of any evidence that Todd or**
13 **Stan got any money personally from the Bronco Billy's**
14 **sale?**

15 A No. I think that there is evidence that Todd
16 and Stan received funds from the Bronco Billy's sale.

17 **Q In your report you say the funds were**
18 **redeposited in the family trust.**

19 A Yes. And then were subsequently pulled out.
20 There was a portion of the funds, as Stan testified to
21 yesterday, that were removed from the family trust is my
22 understanding, totaling, I think he said, approximately
23 \$400,000 initially.

24 **Q And that amount -- let's check your**

1 understanding there -- is held in a subtrust, and part of
2 that has been distributed to Wendy?

3 A That's not my understanding of Todd's -- of
4 Stan's testimony yesterday. I could have misunderstood
5 it, but that is not my understanding of his testimony.

6 Q Putting aside the 400,000 which Stan held out
7 for Wendy, you're not aware of either Todd or Stan
8 getting any dollar from that Bronco Billy's sale?

9 A I don't think you can exclude that, so -- there
10 was money that was -- that was outside the family trust.

11 Q And it went to Wendy?

12 A Not all of it, no, sir.

13 Q But the rest of it is still in trust?

14 A You can't administer a portion of the trust
15 outside the trust.

16 Q Have you heard of a subtrust? Because that's
17 kind of what it is, isn't it?

18 A No, sir. My understanding, again, of the
19 testimony is that this was not being held in the
20 subtrust.

21 Q And if it was in a subtrust, then you're wrong?

22 A If it was not in a subtrust, then it's entirely
23 possible I could have misunderstood Stan's testimony. It
24 was my understanding that it was being held by him

1 outside the trust. That was what I understood him to
2 testify to.

3 Q So if there are funds that are held by some
4 individual and Wendy is equalized in that ultimately
5 period where we distribute the family trust, there's no
6 harm to Wendy?

7 A Is this a hypothetical?

8 Q This is a hypothetical. If the same amounts
9 are received by the beneficiaries from the Bronco Billy's
10 transaction.

11 A If ultimately the accounting occurs and it is
12 allocated among them equally as it should be under the
13 trust, then, yes, that would be correct.

14 Q And that's not happened yet?

15 A That has not happened.

16 Q That has not happened yet?

17 A It has not happened yet is my understanding.

18 MR. HOSMER-HENNER: Thank you.

19 THE COURT: Mr. Lattin.

20 MR. LATTIN: Thank you, Your Honor.

21

22 CROSS-EXAMINATION

23 BY MR. LATTIN:

24 Q Mr. Wallace, we have met before, haven't we?

1 A We have, yes.

2 Q And that was in the same deposition that
3 Mr. Robison referred to earlier; is that correct?

4 A Correct.

5 Q And I was a part of that process, and I asked
6 you questions during that deposition; is that correct?

7 A Yes, sir, that's accurate.

8 Q Now, with regard to accountings, you are not a
9 CPA, are you?

10 A No, sir, I'm not.

11 Q And you do not prepare accountings in the
12 course of your business, do you?

13 A Not generally, although I have participated in
14 the preparation of a number of fiduciary accountings.

15 Q But you don't prepare them?

16 A No. I participate -- I provide information to
17 be included, but I'm not the accountant that prepares
18 them, no, sir.

19 Q And you would not want the jury to think that
20 you prepared them, do you?

21 A As a general rule, I do not prepare accountings
22 from scratch. I participate by providing some
23 information, but I am not an accountant and I do not
24 prepare accountings.

1 Q In that regard you have never submitted any
2 sort of accounting in any Nevada court for approval, have
3 you?

4 A That's correct.

5 Q And in regard to your occupation, you are a
6 lawyer who is licensed in Texas; is that correct?

7 A Yes, sir, I am.

8 Q And you are not licensed in the state of
9 Nevada, are you?

10 A No, sir, I'm not.

11 Q And you do not practice in the state of Nevada?

12 A I do not.

13 Q And you have not conferred in this case with
14 any Nevada lawyer who is licensed in the state, have you?

15 A Well, I've talked with Mark, so if that
16 qualifies, then yes. Other than that, no.

17 THE COURT: Would you please clarify when you
18 use the first name "Mark."

19 THE WITNESS: Mr. Connot.

20 BY MR. LATTIN:

21 Q When you refer to Mr. Connot, you're referring
22 to Wendy's lawyer?

23 A Yes, sir. But I was trying to to be exact in
24 my answer.

1 Q And he's one of the ones who has retained you
2 at \$600 an hour to testify on behalf of Wendy; is that
3 correct?

4 A Whether he participated in it or not, frankly,
5 I'm not sure.

6 Q Well, you're the one who brought the name up,
7 so did he or did he not?

8 A He was not involved in discussions with me, in
9 my engagement. That was done with the Spencer Johnson
10 firm, so he didn't -- that's why I'm not sure whether he
11 was consulted with or not. I did not talk to him.

12 Q With regard to the laws of accounting in the
13 state of Nevada and what is required, you have not
14 consulted with a Nevada lawyer, have you?

15 A No, sir, I have not.

16 Q Thank you.

17 Now, you have talked about trust agreements and
18 trust agreements being the rule book or, as you referred
19 to it, the bible for the trustees; correct?

20 A Yes, sir.

21 Q That's the rule book that the trustee goes to
22 to decide what powers they have?

23 A Well, not only the powers, but the powers and
24 the standards of care necessary to exercise those powers.

1 Q Okay. And you have talked about the family
2 trust, which I presume you have read; is that correct?

3 A Yes, sir, I have.

4 Q And you have talked about the issue trust,
5 which I presume you have read; is that correct?

6 A Correct, yes, sir.

7 Q And you have not, with regard to the issue
8 trust, done any analysis as to how much cash is in the
9 bank account, have you?

10 A No, sir.

11 Q And you have not done any analysis with regard
12 to the issue trust, as to what the complete portfolio of
13 assets are?

14 A I'm sorry. Would you repeat that, please.

15 Q Certainly. With regard to the issue trust, you
16 have not done a complete analysis as to what the full and
17 broad spectrum of assets are that are in that family
18 trust, have you?

19 A No, sir, I have not.

20 Q So you've done no analysis of that?

21 A Of the individual investments beyond the ones
22 that I've spoken to.

23 Q And, likewise, you have not ever talked to the
24 trustee of the issue trust, have you?

1 A Directly, no, sir.

2 Q And you have had no discussions with the
3 trustee with regard to what the overall investment
4 strategy is of that trust, have you?

5 A I've had no conversations with Todd Jaksick,
6 so, no, sir, I have not.

7 Q So you would not know what the overall
8 investment strategy is of that trust, would you?

9 A I know what the overall investment strategy of
10 the trust should be based on a reading of the trust
11 agreement.

12 Q Should be. What we're talking about is, do you
13 know, by having a discussion with the trustee, what the
14 overall investment strategy was of the issue trust?

15 A I have had no conversations with Todd Jaksick,
16 so the answer to your question is no, I have not.

17 Q Okay. Thank you.

18 Likewise -- I'm sitting next to Mr. Robison,
19 and that's kind of an ongoing joke --

20 A I have a case of the national crud as well.

21 Q So it's a good thing this trial is getting
22 close to the end.

23 In any regard, with regard to the family trust,
24 you do not know what the cash is in the bank accounts of

1 **that trust either, do you?**

2 A The only information I have is with respect to
3 the accountings that were filed, and those are a year or
4 two old, so currently, no, sir.

5 Q **Okay. And with regard to the assets of the**
6 **family trust, you likewise have not done an analysis of**
7 **that portfolio either, have you?**

8 A Not beyond reviewing what the assets are and
9 looking specifically at the transactions that are at
10 issue in this case.

11 Q **And you would not consider that to be a**
12 **complete analysis of a portfolio, would you?**

13 A No, sir, I would not.

14 Q **Thank you.**

15 With regard to the investment strategy of the
16 family trust, you have not had a discussion with any of
17 the trustees with regard to what their investment
18 strategy is either, have you?

19 A Just like I have had no discussions with Todd
20 in his capacity as trustee of the issue trust, I've had
21 no direct conversations with any of the three trustees of
22 the family trust either.

23 Q **And you certainly understand, to do any**
24 **analysis of investments, you need to have an**

1 understanding of the overall investment strategy and the
2 portfolio, don't you?

3 A As a general proposition, I think that's a true
4 statement, yes.

5 Q But you don't have that information, do you?

6 A I have not issued an opinion with respect to
7 the overall portfolio.

8 Q But you've reviewed some transactions in
9 isolation without knowing the overall investment strategy
10 or the portfolio, haven't you?

11 A I have reviewed some individual transactions
12 that have been undertaken that it is my opinion are not
13 in compliance with the purpose of the trust.

14 Q Can you pull up Exhibit No. 9, please? Can you
15 go to page 27 and go about halfway down and enlarge
16 paragraph 1, please, the first part.

17 Are you able to read that, sir?

18 A Yes.

19 Q Can you --

20 A Would you like me to read it aloud?

21 Q I'm going there.

22 Do you see about four lines down where it says
23 "The Trustee's investment"?

24 A I do see that, yes.

1 Q Can you read that to the jury, where it says
2 "The Trustee's investment"?

3 A "The Trustee's investment and management
4 decisions respecting individual assets and courses of
5 action are to be evaluated not in isolation, but in the
6 context of the trust portfolio as a whole and as a part
7 of an overall investment strategy, having risk and return
8 objectives reasonably suited to the trust with no types
9 of investments or courses of action being impermissible
10 or imprudent per se."

11 Q Thank you.

12 With regard to the issue trust --

13 Can you bring up Exhibit No. 10, please? Can
14 you go to page 14 of the issue trust, section 1, and
15 enlarge that section, please.

16 Now, you've already testified, with regard to
17 the issue trust, you haven't talked to the trustees about
18 their investment strategy, and you don't fully understand
19 the portfolio.

20 So with that backdrop, could you go to the
21 fourth paragraph or the fourth line -- excuse me -- where
22 it says "The Trustee's investment" and read that to the
23 jury, please.

24 A "The Trustee's investment and management

1 decisions respecting individual assets and courses of
2 action are to be evaluated not in isolation, but in the
3 context of the trust portfolio as a whole and as a part
4 of an overall investment strategy having risk and return
5 objectives reasonably suited to the trust with no types
6 of investments or courses of action being impermissible
7 or imprudent per se."

8 Q Thank you.

9 Now, you have expressed criticism of one of the
10 trustees, Todd Jaksick, so I want to talk to you a little
11 bit about that, and one of the things that you have been
12 critical of him is his investment in entities that he
13 controls.

14 Do you recall that testimony?

15 A That is a part of my testimony, yes.

16 Q Okay. And you understand, under the trust
17 provisions of the family trust and the powers, he has the
18 power to invest trust assets in entities that he manages
19 or controls, doesn't he?

20 A He has that power --

21 Q Thank you.

22 A -- subject to the standards imposed by the
23 trust agreement.

24 Q I'm sorry. I didn't mean to interrupt you.

1 Can you go to Exhibit No. 9, page 28, please?

2 On page 28, can you enlarge paragraph 2, please?

3 Can you read that, sir, just to yourself?

4 My first question is, can you see it?

5 A Yes, I can.

6 Q And with regard to paragraph 2, the first line
7 says "The Trustee" -- and that would be Todd Jaksick --
8 "may organize, participate in, invest in, and contribute
9 trust assets to all forms of legal entities."

10 Do you see that?

11 A I do.

12 Q And then if you go to the next line and read
13 where it starts out "The trustee may" --

14 A "The Trustee may acquire any form of equity
15 interest in or evidence of indebtedness from any entity
16 in which trust assets are invested, specifically
17 including, but not limited to, stocks (preferred, common,
18 voting, and nonvoting), partnership interests (both
19 limited and general), membership interests (both voting
20 and nonvoting), bonds, and promissory notes (both secured
21 and unsecured), on terms and conditions approved by the
22 Trustee."

23 Q And you understand this is a power specifically
24 given to him by Sam Jaksick?

1 A I understand that this is a power that he has
2 under the trust agreement that was executed by
3 Mr. Jaksick, yes.

4 **Q So that would be a power that Sam Jaksick gives**
5 **to the trustee?**

6 A A power that can only be exercised in
7 accordance with the balance of the trust agreement having
8 to do with investment management.

9 **Q Where does it say that in this provision?**

10 A Because that is --

11 **Q Sir, where does it say that in this provision?**

12 A The entire trust has to be looked at in
13 context, and the trust gives the standards of care that
14 must be followed in carrying out the powers of the trust.
15 That is a standard premise in the administration of any
16 trust.

17 **Q And where would the jury go in this trust**
18 **agreement to see that language?**

19 A One place they would look at is the Prudent
20 Investor Act. Another area --

21 **Q And that will have the language that you just**
22 **described to the jury?**

23 MR. SPENCER: Your Honor, can he finish his
24 answer, please?

1 THE COURT: Generally the examination is going
2 okay. Please be mindful of allowing each to complete
3 their answers or questions.

4 You may continue.

5 BY MR. LATTIN:

6 Q Let me ask another question.

7 With regard to the duty that you described that
8 a trustee has as to duty of loyalty, that is nowhere
9 mentioned in this trust agreement, is it?

10 A No, sir, that's not true. It's specifically
11 mentioned.

12 Q Where?

13 A In the provision -- in the provision that
14 recites the prudent investor language in Restatement
15 Third.

16 Q Okay. Let's go to page 27 and paragraph 1
17 under "Trustee Administrative Powers."

18 Where in that language does it say "duty of
19 loyalty" so the jury can see it?

20 A It does not specifically refer to the duty of
21 loyalty in that paragraph that I see. It refers to the
22 Restatement (Third) of Trusts and the Prudent Investor
23 Rule, which incorporates the duty of loyalty.

24 Q So if the jury wants to know where the duty of

1 loyalty is specified in here with that word, it's not in
2 there, is it?

3 A The duty of loyalty is an integral part of the
4 Prudent Investor Rule, which is referred to in that
5 language that we just reviewed.

6 Q I understand that's what you're saying. I'm
7 talking about, where would the jury see in this trust
8 agreement where it specifies duty of loyalty?

9 A The jury, in order to see that, would read the
10 Restatement (Third) of Trusts, the Prudent Investor Rule,
11 and then would have to look at the Restatement (Third) of
12 Trusts where the Prudent Investor Rule is stated, which
13 includes the implementation or the application of the
14 duty of loyalty.

15 Q Sir, it's not in this document, is it?

16 A It is, sir. The Restatement (Third) of Trusts:
17 Prudent Investor Rule specifically incorporates the duty
18 of loyalty.

19 Q Okay. I understand that's your position, and
20 I'm just trying to see where you can point that language
21 out to the jury, and we've already decided that the words
22 "duty of loyalty" are not included in that trust.

23 A It is not in that paragraph. I would have to
24 go back and review the entire trust to see if it's in

1 there other places or not.

2 Q And with regard to self-dealing, we have seen
3 that the trust allows the trustee to invest in entities
4 that the trustee manages or controls; correct?

5 A Has that power subject to the remaining
6 elements of the trust agreement with regard to the
7 standard of care for doing so.

8 Q Okay. But with regard to the power, that is a
9 power that Sam Jaksick gave his son?

10 A The power does not define the exercise.

11 Q I understand that's your position, you've told
12 the jury that, but what I'm doing is honing in on what
13 the trust agreement says, which you indicate is the rule
14 book. So I want to continue to do that.

15 And with regard to the power of the trustee to
16 invest in entities that he manages or controls, that's a
17 specific duty that Sam Jaksick gave the trustees;
18 correct?

19 A No, sir, it's not a duty that he gave the
20 trustees. It's a power.

21 Q Okay. If you want to refer to it as a power,
22 that's fine. It was a power that was given to them?

23 A Subject to -- I've got to say it every time.
24 That power is subject to exercise in accordance with the

1 balance of the trust agreement.

2 Q Okay. We understand that.

3 And Sam Jaksick, when he formed the family
4 trust, knew that there were a substantial amount of
5 entities within his portfolio; correct?

6 A I'm sure that's true.

7 Q And he knew that Todd and Stan managed some of
8 those entities; correct?

9 A Yes, he did.

10 Q Okay. And that would be a reason why he would
11 put that in there and give them the power to invest in
12 those entities; correct?

13 A Yes.

14 Q All right. Thank you.

15 Now, you responded to some questions from my
16 co-counsel regarding payment of debt.

17 The trustee has the discretion to pay debt
18 before making distributions, don't they?

19 A Well, they have the discretion to make a
20 determination of what to do, and if they -- they can
21 certainly make the determination that some debts should
22 be paid before other.

23 Q Okay. Let's go to paragraph 30 of Exhibit 9,
24 please, page 30. And if you would go to paragraph 18 and

1 enlarge that, please.

2 Do you see Section 18?

3 A I see that, yes.

4 Q And do you see where it says "The Trustee may
5 withhold from distribution in the Trustee's discretion at
6 the time for distribution of any property of the trust
7 estate, without the payment of interest, all or any part
8 of the property as long as the trustee determines in the
9 trust's discretion that the property may be subject to
10 conflicting claims."

11 Do you see that?

12 A I do.

13 Q A conflicting claim would be debt; correct?

14 A I guess it could be. I don't read it that way,
15 but perhaps that's what he intended.

16 Q Do you have any idea as to what the debt was in
17 the family trust or in Sam's estate at the time he died?

18 A I know what it was in the aggregate across all
19 of the entities. You qualified it with respect to the
20 trust, I -- the family trust, I believe.

21 Q Let's go with what you know.

22 A My understanding is that the total indebtedness
23 was approximately \$30 million across all of the entities.

24 Q Do you have an understanding of what it is

1 **today?**

2 A My understanding is that it's something less
3 than \$5 million. I've heard testimony ranging from
4 2-1/2 to 4.

5 Q So the debt has been paid down from somewhere
6 in the mid 30 million down to under 5; correct?

7 A From 30 million to approximately 5, yes.

8 Q And that would be a good thing, wouldn't it?

9 A That's -- that's an overbroad statement. There
10 is some debt that should always be reduced, but there is
11 some debt that's used for leverage that can be
12 advantageous. So you can't make a blanket statement with
13 respect to debt being reduced as always being a good
14 thing. So it is -- debt reduction was certainly needed
15 in this estate. I'll certainly go with you that far.

16 Q I know you're being paid by the other side, but
17 you are not going to argue with me over the fact that the
18 paydown of debt in this estate is a good thing, are you?

19 A The methodology used to pay down debt, I think,
20 is important and needs to be evaluated. Your statement
21 was a blanket one that the reduction of debt is always a
22 good thing, and I'm telling you that that is not always
23 the case.

24 Q Are you here to testify that the paydown of

1 **debt in this family trust in this case was a bad thing?**

2 A I believe that the reduction of debt in the
3 manner in which it was done created problems that could
4 and should have been avoided.

5 Q Are you aware of how much money was obtained by
6 way of conservation easements to pay down debt?

7 A I am, sir.

8 Q How much?

9 A My recollection is approximately \$15 million is
10 what I recall.

11 Q And that went to pay down the debt; correct?

12 A Yes, sir. And conservation easements are
13 available --

14 Q There's no question pending, sir.

15 A Yes, sir.

16 Q Thank you.

17 If the debt was paid down in a good fashion, as
18 you discuss it, that would be an indication that the
19 trustees are fulfilling their fiduciary responsibilities;
20 is that correct?

21 A It would be an element of fulfilling their
22 fiduciary responsibility, yes, sir.

23 Q And you would agree with me that if paid down
24 properly, that would be a good thing to do?

1 A Paid down -- paying down debt and doing it
2 properly is a good thing, yes.

3 Q And with regard to management of the assets, if
4 in managing the assets you increase the value, you would
5 agree with me, wouldn't you, that that would be a duty of
6 the trustee?

7 A Would you mind restating that?

8 Q That was a horrible question.

9 With regard to assets of the family trust, you
10 would agree with me it is a responsibility of the
11 trustees to do what they can to increase the value of the
12 assets; is that correct?

13 A That is an element of the overall
14 administration, yes, sir.

15 Q And if you do that and you increase the value
16 of the assets, when you get to the point where you can
17 make distribution, all of the beneficiaries have more
18 money, don't they, or more assets?

19 A Yes. If the value increases, there are more
20 assets available to the beneficiaries, that is a true
21 statement.

22 Q And, likewise, that would be a good thing,
23 wouldn't it?

24 A As a general premise, yes, it would be a good

1 thing.

2 Q Have you done any analysis as to what increase
3 in assets in the family trust has occurred since Sam's
4 death?

5 A No. Only to the extent that I reviewed the
6 accountings over several years which reflected a value,
7 but I think it was the basis value for the investment,
8 and I looked at those over time.

9 Q And speaking of the accountings, you testified
10 this morning, I believe, that it's your position that
11 there was never an accounting of the Bronco Billy's
12 money?

13 A Yes, that's my understanding. I have not seen
14 an accounting of that.

15 Q Could you pull up Exhibit No. 126, please? Can
16 you enlarge the part of the print on that so we know what
17 it is?

18 Do you see that?

19 A The family trust '16 to '17, yes.

20 Q Could you go to page 42 of that, please?

21 Is this one of the accountings you read?

22 A Yes. It's one of the ones I reviewed.

23 Q Go to page 42, and down at the bottom enlarge
24 the second half of it.

1 Do you see that, sir?

2 A I see it, yes.

3 Q And that is an accounting for the Bronco Billy
4 money, isn't it?

5 A How would you know that?

6 Q Well, you'd have to read the entire document.

7 A There is no way that I can tell from this
8 blow-up whether that's an accounting of the Bronco
9 Billy's money.

10 Q Do you recall seeing that?

11 A I do recall seeing that, and I see it now, but
12 I can't tell you what it speaks to.

13 Q All right. You can take that down.

14 So with regard to the paydown of debt, you
15 would agree with me and you would testify to the jury
16 that the trustees have the power to pay down debt, and if
17 done in a proper way, that would be a good thing for all
18 the beneficiaries of the trust?

19 A Yes.

20 Q And they have the power to pay down the debt
21 before making distributions, don't they?

22 A I believe that those equities have to be
23 balanced. I don't think it's all of one or all of the
24 other. I think you have to -- you have to balance the

1 paydown of debt with the ability to make distributions.

2 **Q Okay. And have you been provided any**
3 **information by the people who engaged you with regard to**
4 **how much money Wendy has received since date of death?**

5 **A The only thing that I'm aware of is the**
6 **testimony that I've heard with respect to distributions**
7 **that she's received.**

8 **Q And have you heard the testimony that she's**
9 **received between 5- and 600,000 since date of death?**

10 **A Over the last six years, yes.**

11 **Q Have you done any evaluation of that?**

12 **A No, sir.**

13 **Q Okay. And have you been told that those**
14 **distributions that were made to her in the amount of**
15 **between 500- and 600,000 was to the detriment of the**
16 **other beneficiaries?**

17 **A I have not seen anything that would lead me to**
18 **that conclusion, no.**

19 **Q Okay. Do you think the other beneficiaries**
20 **have received any distributions?**

21 **A It depends on how one defines distributions.**

22 **Q You're the one up here testifying. Do you**
23 **believe that the other ones have received distributions?**

24 **A I believe that they have received money for**

1 their account which I would equate with a distribution,
2 so yes.

3 Q Since you're up here on behalf of Wendy, you
4 would agree with me, wouldn't you, that a distribution of
5 between 5- and 600,000 to her would be fulfilling at
6 least a portion of the obligations to provide for her
7 health and welfare; correct?

8 A Well, I mean the distribution of a dollar is
9 going to meet that definition, so, yes, the distribution
10 of any amount is going to go towards fulfilling the
11 obligation. Whether it does or not is what needs to be
12 evaluated.

13 Q And have you done that evaluation?

14 A Well, I do not believe that she has received
15 the distributions that she should have or could have
16 received had the trust been managed properly.

17 Q Okay. And what analysis did you do of the
18 distributions that she's received?

19 A Other than looking at the amount that they
20 totaled of between 5- and \$600,000, knowing that Stan had
21 made some --

22 Q Sir, I'm just asking you if you have done an
23 analysis of the distributions made to Wendy.

24 A A cursory examination. I've looked in the

1 accountings, I've heard the testimony and read the
2 deposition testimony.

3 Q Okay. But you still haven't answered my
4 question.

5 Have you done an analysis so you could testify
6 to the jury what the distributions to Wendy have been
7 for?

8 A What they have been for?

9 Q Yes. For rent, for car payments, anything like
10 that?

11 A There is testimony in the depositions with
12 respect to some of the distributions, that there were
13 distributions for healthcare, there were distributions
14 for rent, there were car payments that were made, so yes.
15 I certainly couldn't tell you to the dollar, but
16 generally I'm aware of what those distributions were for,
17 yes.

18 Q Okay. So since you claim to have done that
19 analysis, you would agree with me, then, that the monies
20 that she has been provided by the trustees since Sam's
21 date of death have gone to her health, welfare, and
22 maintenance?

23 A I would agree with you that the distributions
24 that have been made were towards that end, yes.

1 Q Okay. Thank you.

2 And then you would also know that the tuition
3 for her son at private Catholic schools was also paid?

4 A I recall that, yes.

5 Q And you would know that some of those monies
6 went to pay her car payment; correct?

7 A I recall that, yes.

8 Q And they went to pay her rent?

9 A I think these are the things that I listed,
10 yes.

11 Q Okay. And you would agree with me, wouldn't
12 you, that with regard to payments or distributions to
13 Wendy for her health and maintenance would be a way in
14 which the trustees would fulfill their fiduciary
15 responsibilities; correct?

16 A Making distributions is an element of fiduciary
17 administration, absolutely.

18 Q And so that would be part of it?

19 A It is a part of it, yes.

20 Q Okay. Thank you.

21 Now, with regard to the Tahoe house, I believe
22 it was your testimony that the Tahoe house should have
23 remained in the family trust in your opinion; correct?

24 A Yes, sir, I do believe that.

1 Q Do you know, in the last quarter of 2012 before
2 Sam died, what the mortgage was on that house?

3 A \$6.3 million is my recollection.

4 Q Do you know what that equates to on a monthly
5 basis?

6 A Well, there were two different amounts because
7 it was interest only for a period of time, and then it
8 went to an amortizing basis, and I think it ranged from
9 25- to \$35,000 a month.

10 Q Do you know if it was an interest-only payment?

11 A Initially, but it converted to principal and
12 interest.

13 Q Okay. And do you know that it was going to be
14 approximately \$45,000?

15 A I believe that includes the escrow, does it
16 not?

17 Q It's still money that has to be paid out on a
18 monthly basis.

19 A Yes, sir. But I thought you asked me about --

20 THE COURT: Hold on. Hold on, please.

21 Were you finished with your question?

22 MR. LATTIN: I'll reask it. Thank you.

23 BY MR. LATTIN:

24 Q With regard to the house, the monthly payment

1 had to be paid; is that correct?

2 A The debt had to be paid, yes.

3 Q And do you know what the carrying costs were on
4 that house in the year 2012?

5 A I don't recall specifically. I would estimate
6 it at -- let's see -- \$375,000 a year.

7 Q Okay. And at the time of Sam's death, do you
8 know how much cash was in the family trust?

9 A I have looked at that amount. My recollection
10 is something -- somewhere in the neighborhood of \$50,000.

11 Q So if the house were to remain in the trust,
12 the family trust would be obligated to make the payments
13 on the Tahoe house, wouldn't they?

14 A That's correct, yes.

15 Q And so how are they going to make a
16 \$370,000-per-year carrying-cost payment with \$50,000 in
17 the bank?

18 A They would sell the house.

19 Q Okay. So it's your position that they would
20 have to sell the house?

21 A Yes.

22 Q And you understand, don't you, from looking at
23 the various trusts, that Sam wanted his family to benefit
24 and go up to the house where they were raised and be

1 **there?**

2 A Based on the testimony in 2006, Sam was worth
3 \$100 million. At the time that he died he was --

4 MR. LATTIN: I'm going to ask that that be
5 stricken.

6 THE COURT: I'm not sure how that detail came
7 in the answer to the question. It is sustained.

8 MR. LATTIN: Thank you.

9 THE COURT: Ms. Reporter, would you read the
10 question back, please.

11 (The record was read by the reporter.)

12 THE WITNESS: He would like for them to be able
13 to use the house, that's correct.

14 BY MR. LATTIN:

15 **Q Okay. And today, with what's transpired, they**
16 **still have the house, don't they?**

17 A No, sir, they do not own the house. The issue
18 trust owns a 54 percent interest in an entity --

19 **Q Okay. We know --**

20 THE COURT: Hold on. Hold on. Please wait for
21 the witness to finish his answer.

22 THE WITNESS: The issue trust owns a 54 percent
23 interest in an entity that they do not control that owns
24 the house.

1 BY MR. LATTIN:

2 Q And part of that entity is the SSJ Issue Trust;
3 correct?

4 A The 54 percent is held by the issue trust,
5 that's correct.

6 Q And with that ownership interest, the family,
7 the beneficiaries, are able to go use that house, aren't
8 they?

9 A No, sir, not without Todd's permission. That's
10 not something that they have the absolute right to do.

11 Q I understand that there's disputes over that,
12 but let me ask my question. I know you want to get your
13 answer out, and you'll be entitled to, and then also your
14 counsel has a chance to stand up and ask you questions as
15 well. I'm not trying to cut you off.

16 My question was just real simple. As it sits
17 today, the beneficiaries of Sam Jaksick's estate get to
18 enjoy that house on the shores of Lake Tahoe, don't they?

19 A No, sir. Phrased as you stated that, that is
20 not an accurate statement.

21 Q Do you know how many days Wendy's been up
22 there?

23 A I haven't looked at a calendar, no, sir.

24 Q Have you talked to her about how many days

1 she's been up there?

2 A I don't know how long she spent there.

3 Q Do you dispute the fact she's been up there
4 using that house?

5 A She has -- I know she has been there.

6 Q Okay. And do you dispute the fact that her
7 son, Luke, has been able to go up to the house?

8 A I believe that her family has been to the Tahoe
9 house since it was acquired, since part of it was
10 acquired by the issue trust.

11 Q She's a beneficiary of the issue trust?

12 A She is a beneficiary of the issue trust.

13 Q Thank you. And do you know that Stan and Todd
14 have also been able to use the house?

15 A Todd has the ability to control use whenever he
16 wants.

17 Q Sir, it was --

18 He's not being responsive at this point in
19 time.

20 THE COURT: Sustained. This is
21 cross-examination, and as Mr. Lattin indicated a moment
22 ago, ladies and gentlemen, petitioner's attorney has the
23 right to do a redirect examination eliciting some of the
24 information that the witness may choose to provide, but

1 at this point the witness will answer the attorney's
2 questions.

3 MR. LATTIN: Thank you, Your Honor.

4 BY MR. LATTIN:

5 Q So if the house would have remained in the
6 family trust, it would have had to have been sold, which
7 was contrary to Sam's intent because he wanted to keep
8 the house for the use and benefit of his issue, and
9 that's what has occurred, hasn't it?

10 A No, sir. What has occurred is a complete
11 undoing of what Sam wanted to have happen with respect to
12 the house and a --

13 Q So --

14 THE COURT: Hold on.

15 MR. LATTIN: I'm sorry. I thought he was done.

16 THE WITNESS: And a subsequent disposition of
17 the asset where 46 percent of it, of this 16, \$18 million
18 home, is held by Todd Jaksick, having paid nothing for
19 it, and 54 percent held by the issue trust where
20 regardless of that home's value, whether it's \$10 million
21 or \$110 million, will never be available for
22 distributions to any of the issue because the issue trust
23 does not provide for distributions.

24 Q I understand that. And you told the jury that

1 this morning.

2 What I'm just talking about is under your
3 scenario and what you think would have been best, it
4 would have been for the house to sell?

5 A I believe --

6 Q Just yes or no. I'm sorry, I thought you were
7 finished. It's just yes or no.

8 A I believe that the house should have been sold,
9 yes.

10 Q All right. But the way that things have
11 transpired, you would agree with me now that the family,
12 as Sam intended, can go up to the house, look at the
13 lake, walk out the back door, go out on the beach just
14 like Sam wanted them to; correct?

15 A No, sir, I don't agree with that statement at
16 all.

17 Q Okay. Thank you.

18 Now, with regard to the SSJ purchase, the issue
19 trust purchase of the interest in the Tahoe house, that
20 was something that was specifically allowed by the issue
21 trust, wasn't it?

22 A I'm sorry. You said the SSJ purchase. I got
23 confused.

24 Q I'm talking about the SSJ Issue Trust.

1 A The issue trust, okay.

2 Q I'm talking about the issue trust, and we've
3 already gone through and you responded to Mr. Robison's
4 questions about the purchase.

5 The life insurance proceeds could be used under
6 the issue trust to purchase assets, couldn't they?

7 A They could be, yes.

8 Q And let's go to the specific provision. It is
9 page 18, and if you could go to the issue trust, which is
10 Exhibit No. 10, and go to page 18, please. And if you
11 would enlarge paragraph 23.

12 Can you read that to the jury, please?

13 A "Other property acceptable to the trustee may
14 be added to the trust estate by any person, by the will
15 or codicil of the grantor, the Samuel S. Jaksick, Jr.
16 Family Trust, by the proceeds of any life insurance
17 policy, or otherwise."

18 Q So, sir, that is the provision that gives the
19 trustee the authority to use the life insurance to buy
20 other assets; correct?

21 A I'm not sure that that -- yes, sir. I'm sorry.
22 Yes, I agree with that, yes.

23 Q Okay. We didn't have to go any further on
24 that. Thank you.

1 Now, also, the trustee of the issue trust has
2 the authority to combine assets of the family trust with
3 the issue trust; correct?

4 A You'll have to show me what you're talking
5 about. That does not ring a bell.

6 Q Let's go to the bottom of page 18, paragraph
7 25. Would you enlarge that, please.

8 Do you see that? It says "For investment
9 purposes, the trustee" -- that would be the trustee of
10 the issue trust, Todd Jaksick -- "may, in the discretion
11 of the trustee, combine any assets of any of the trusts
12 created under this trust agreement with the assets of any
13 other trust established by the grantor pursuant to this
14 trust agreement"; correct? Do you see that?

15 A What are you saying that accomplishes?

16 Q Well, the plain language of it says you can
17 combine the assets of the trusts.

18 A No, sir, that's not what that says at all.

19 Q Well, let's look at the language. Maybe I'm
20 misreading that.

21 If you would go to the second line and yellow
22 that.

23 "Combine any assets of the trust created under
24 this trust agreement with the assets of any other trust

1 established by the grantor pursuant to this trust
2 agreement."

3 Do you see that?

4 A Yes, sir. But you've leaving out the opening
5 sentence, the opening part of the sentence, "For
6 investment purposes."

7 Q Okay. What's the value of the Tahoe house
8 right now?

9 A For sake of argument, let's say \$18 million.

10 Q So that was a pretty good investment, wasn't
11 it?

12 A No, sir. I think it was -- in the context of
13 the overall administration of the trust, I think it's
14 been a very poor investment.

15 Q So you think an asset that's gone from 6-1/2
16 million to 18 million is a bad investment; is that what
17 you're telling the jury?

18 A I think an investment that is done by virtue of
19 a self-dealing transaction which pulls 46 percent of the
20 value that was held by the Jaksick trust outside of those
21 trusts to Todd Jaksick is a horrible investment.

22 Q Okay. All right. So if you had the
23 opportunity to buy into a \$6 million asset that
24 appreciated to 18, that's an investment you would not

1 take?

2 A In this trust, under no circumstances, no, sir.

3 Q Okay. All right. Thank you.

4 A Because I never would have a return on it.

5 Q Okay. All right. Thank you.

6 Did I understand you to testify that you
7 believe Incline TSS did not have the authority to sell
8 the Tahoe house?

9 A I do not believe they have the authority to
10 sell it because they didn't own it because they never
11 purchased it.

12 MR. LATTIN: May I approach the clerk, Your
13 Honor?

14 THE COURT: Yes. You seek to mark whatever is
15 in your hand next in order?

16 MR. LATTIN: I do.

17 THE COURT: Please.

18 THE CLERK: Exhibit 551 marked for
19 identification.

20 (Exhibit 551 was marked.)

21 MR. LATTIN: May I approach the witness, Your
22 Honor?

23 THE COURT: Absolutely.

24 /////

1 BY MR. LATTIN:

2 Q Would you take a moment and look at Exhibit --

3 What was it? I'm sorry.

4 THE CLERK: 551.

5 THE WITNESS: I've gone all day without needing
6 these.

7 BY MR. LATTIN:

8 Q We don't have that in the system so I can't
9 enlarge that.

10 Would you take a moment and look through that.
11 You don't have to read the whole thing.

12 A Okay. I've obviously not read the whole thing,
13 but is there a specific portion --

14 Q Have you read it at all?

15 A I see what it is.

16 Q And what is it?

17 A It is an amendment to the operating agreement
18 for Incline TSS.

19 Q Okay. So an operating agreement, for the
20 jury's edification, is what?

21 A An operating agreement is the document under
22 which the entity itself is managed, if you will.

23 Q Okay. And so this is the document that
24 controls how Incline TSS is managed; is that correct?

1 A Yes, generally speaking.

2 Q Do you see the section about a third of the way
3 down the first paragraph that says "Class B unit"?

4 A Yes.

5 MR. SPENCER: Your Honor, this has not been
6 admitted yet.

7 THE COURT: I understand.

8 Are you going to ask this witness to testify
9 from the document, refresh recollection, lay a foundation
10 for its admission?

11 MR. LATTIN: I'm just going to have him read
12 one provision in it, but I'll offer it.

13 THE COURT: I'm just trying to understand what
14 direction you're going with this.

15 MR. LATTIN: I'm just going to ask him a couple
16 more questions about it.

17 THE COURT: Let's see where it unfolds.

18 BY MR. LATTIN:

19 Q Could you read to yourself the section on page
20 number 1 of Exhibit --

21 I'm sorry -- again? I should write this down?

22 THE CLERK: 551.

23 MR. LATTIN: Thank you.

24 THE WITNESS: The beginning, "Class B"?

1 BY MR. LATTIN:

2 Q Yes. Just read that paragraph to yourself.

3 I'm going to ask you a couple questions about it,
4 particularly the last sentence.

5 A All right. I've read it.

6 Q So your testimony was just that Incline TSS did
7 not have the authority to sell the Tahoe house.

8 Do you recall that testimony?

9 A I don't believe that I said Incline TSS didn't
10 have the authority to sell.

11 Q Okay. The issue trust?

12 A The issue trust, yes.

13 Q Okay. So going to the last part, four lines
14 up, of the paragraph that starts out "Class B unit." It
15 starts out "Further."

16 A Yes, I read that.

17 Q Could you read that to the jury, please?

18 MR. SPENCER: Your Honor, again, this has not
19 been admitted.

20 THE COURT: And so I'll need to have you seek
21 its admission, please.

22 MR. LATTIN: I would offer its admission, Your
23 Honor.

24 MR. SPENCER: Your Honor, the only issue is --

1 we don't have a problem with the document. The problem
2 we have is that it's the second amendment. We don't have
3 the original or the first amendment, so under the rule of
4 optional completeness, we would want to have all those
5 admitted.

6 THE COURT: I don't have the ability to --

7 MR. LATTIN: They can all go in. It's no
8 problem with us.

9 THE COURT: Well, let's begin with 551. It is
10 admitted.

11 MR. LATTIN: Thank you.

12 (Exhibit 551 was admitted.)

13 THE COURT: Excuse me. If you wish to seek the
14 admission of predicate documents during your recross, you
15 may do so. Excuse me. Your redirect.

16 MR. SPENCER: Thank you, Your Honor.

17 BY MR. LATTIN:

18 Q Okay. With regard to the issue trust and its
19 ability to sell the property, would you read to the jury
20 where it starts out "Further."

21 A Starting where? I'm sorry.

22 Q Fourth line up on the paragraph that you just
23 read under "Class B units."

24 A "The SSJ Issue Trust Unit B member shall have

1 the exclusive right in its sole and absolute discretion
2 to require the company to lease, sell, and determine the
3 terms of any lease and/or sale, including its listing of
4 the company property located in Incline Village, Nevada
5 at any time with 10 days' prior written notice to the
6 company and its members."

7 Q Thank you.

8 Were you not provided this document when you
9 were evaluating and preparing your opinions?

10 A No, sir. I've seen this.

11 Q Would you agree with me that the trustees of
12 the family trust have paid down a substantial amount of
13 debt, from \$33 million to under \$5 million?

14 A I'm not sure all of that debt was in the family
15 trust, but certainly the family trust debt has been
16 reduced, yes.

17 Q And that would in your mind be a substantial
18 reduction; correct?

19 A I believe that there has been a substantial
20 reduction in debt, yes.

21 Q And do you also believe that the trustees have
22 increased the value of the assets in the family trust?

23 A Well, I believe that the assets have increased
24 in value. I'm not in a position to state whether it's

1 because of the trustee's management or whether it's
2 because of an improving real estate economy. I just
3 don't know.

4 Q Okay. And you also would agree with me that
5 the trustees of the family trust have made distributions
6 to Wendy of between 500- and 600,000 since Sam's death
7 that went to her health and maintenance and welfare?

8 A Over the past six years she's received between
9 5- and \$600,000 in distributions. That's my
10 understanding, yes.

11 MR. LATTIN: Thank you. No further questions.

12 THE COURT: Thank you.

13 We're about ten minutes early, ladies and
14 gentlemen, but let's have our midafternoon break.

15 During this recess please do not discuss this
16 case amongst yourselves. Please do not form or express
17 any opinion about this matter until it's submitted to
18 you. We'll be in recess for 15 minutes.

19 (A recess was taken.)

20 (The following proceedings were held outside
21 the presence of the jury.)

22 THE COURT: Jury question. Of course, we'll
23 make a copy, make it part of the court's record and give
24 a copy to each of you.

1 "Do you have any idea of what estimated
2 completion time would be tomorrow?"

3 Counsel, you may proceed.

4 MR. SPENCER: Your Honor, I want to offer
5 Exhibits 115 and 264.

6 MR. LATTIN: No objection.

7 THE COURT: 115 and 264 are admitted.

8 (Exhibits 115 and 164 were admitted.)

9

10 REDIRECT EXAMINATION

11 BY MR. SPENCER:

12 Q Do you remember earlier when Mr. Robison was
13 asking you questions regarding the TBJ Issue Trust and
14 the TBJ SC Trust and all that?

15 A Yes, sir.

16 Q Did you ever have a copy of those trusts?

17 A No. I've never seen them.

18 Q Does it matter really why someone's appointed
19 in your analysis of breach of fiduciary duty?

20 A No. I look at what is, not why it is.

21 Q So it's the appointment and from that point
22 forward that matters in that analysis?

23 A Correct.

24 Q And you were asked earlier about the

1 responsibility of a trustee, that it was a serious
2 responsibility.

3 Do you remember that?

4 A Yes, sir.

5 Q And that would include fiduciaries in general,
6 wouldn't it?

7 A Yes, sir. It's the highest duty owed under
8 law.

9 Q In that regard, the standards that are applied
10 in analyzing a fiduciary's actions, in civil how high are
11 those?

12 A They are the highest duty owed. They are
13 duties that are owed to third parties.

14 Q And the duties that we went through this
15 morning that you were asked about, do those apply
16 regardless of whether they're specifically stated in the
17 rule book?

18 A No, sir. I'm sorry. Yes, they do apply.

19 Q The duty of loyalty, you were asked about that,
20 and the other duties you mentioned, do they have to be in
21 the rule book for those to apply?

22 A No. The rule book says what is applicable, and
23 the duty of loyalty is an applicable duty in any
24 fiduciary situation.

1 Q And the other ones that were mentioned?

2 A And all of the others, yes.

3 Q And the paragraph was put up with the
4 restatement regarding the Prudent Investor Rule.

5 A Yes.

6 Q And you wanted to say something about it
7 including the duty of loyalty. What's that?

8 A The Restatement Third is what spells out and
9 defines the Prudent Investor Act. One of the elements of
10 the Prudent Investor Act is the duty of loyalty, and so
11 that's why it applies under the Prudent Investor Act of
12 the Restatement.

13 Q And does a fiduciary have to know what those
14 are?

15 A Excuse me, but they damn well better. If
16 they're going to properly administer the trust, they need
17 to know it.

18 Q All right. And in relation to administering a
19 trust versus administering entities, is there a
20 difference?

21 A There is a difference. The fiduciary duties
22 are different. I think I mentioned in very early
23 testimony today that there are fiduciary duties that are
24 owed by corporate officers and directors and partners,

1 and they are very serious fiduciary duties, but they are
2 not to the same level as those duties that are owed by an
3 executor or trustee.

4 **Q And why is that?**

5 A It's the nature of the beast. To be a
6 fiduciary, to be a trustee, you have direct fiduciary
7 obligations specifically to the beneficiaries of the
8 trust. When you're an officer or director of the
9 corporation, the duties are owed to the corporation and
10 not to the shareholders, so there is a difference there.
11 It's owed to an outside -- in a trust, it's owed to an
12 outside third party.

13 **Q And is there a difference in power so to speak**
14 **between a fiduciary and their beneficiary?**

15 A I'm not sure I understand the question.

16 **Q Well, they're in different positions, different**
17 **levels as it relates to them dealing with each other; is**
18 **that correct?**

19 A In a trust situation?

20 **Q Yes.**

21 A Yes.

22 **Q And what is that or how do you describe that?**

23 A A fiduciary -- a trustee of a trust has
24 absolute -- has the absolute authority to control the

1 assets of the trust, and that must be done in the context
2 and confines of that underlying trust document. They are
3 held -- the fiduciary is held to an ultra high-level
4 standard of care in exercising that discretion and in
5 making those decisions on the part of the trust.

6 If I'm making it for my own account, if I screw
7 up, I'm the one that pays for it, but if I'm making it
8 for the benefit of a third party, I have the duty of good
9 faith where you must act honestly and with a belief that
10 what you are doing is in the best interest of that
11 beneficiary.

12 **Q Almost like a parent-child situation?**

13 A You could look at it that way, yes.

14 **Q What is self-dealing exactly?**

15 A Self-dealing is when you're on both sides of
16 the same transaction, you're in essence negotiating with
17 yourself. And I have said that the sale of the interest
18 from Incline TSS to the issue trust was a self-dealing
19 transaction because Todd is the manager/controller of
20 Incline TSS and he is the trustee of the issue trust, so
21 any negotiations that take place are Todd talking to
22 Todd. That is a conflict of interest. You cannot be
23 sure that he is putting his interests ahead of those of
24 the beneficiary, that duty of loyalty that we talked

1 about earlier.

2 Q And that investment in Incline TSS, was that a
3 good investment in your mind?

4 A I was asked that a few minutes ago. It was a
5 terrible investment.

6 Q And do you remember earlier when you said just
7 because you have the power, you have to run it through
8 the filter of all of the duties?

9 A The standard of care, yes.

10 Q And so would that have passed those tests?

11 A It definitely would not pass those tests, no,
12 sir.

13 Q Talking about the investment into Incline?

14 A I'm talking about the investment by the issue
15 trust.

16 Q Were you asked to evaluate the administration
17 of various entities?

18 A No, I was not.

19 Q Were you asked to evaluate the portfolio of any
20 of the trusts?

21 A Not in the aggregate, no.

22 Q You mentioned there was some discussion about
23 the estate tax implications, and you mentioned the
24 exclusion. That's the estate -- exemption, I'm sorry --

1 **the estate tax exemption?**

2 A Yes, sir.

3 **Q How does that apply?**

4 A There is no estate tax applied to the first --
5 and I believe in 2013 it was \$5,250,000 of an estate, so
6 that \$5.2 million passes tax-free. There is also the
7 ability to stack exemptions where you have a husband and
8 wife and pass assets and defer the payment of tax until
9 the -- until the surviving spouse passes away. So not
10 everything is automatically subject to estate tax.

11 **Q And one of the goals of estate planning is to**
12 **save taxes, but one of the other ones is to defer?**

13 A Is to defer, right. The time value of money.
14 If you're able to hold onto that money and not pay it out
15 in tax, it is there to earn income and increase in value
16 for the benefit of the beneficiaries.

17 **Q Okay. And you also mentioned the marital**
18 **deduction. I think you just said that. How does that**
19 **work?**

20 A The marital deduction allows you to defer taxes
21 until the second to die of a surviving spouse in
22 certain -- in certain instances, so that you defer the
23 payment of taxes, in some cases all taxes, until the
24 surviving spouse passes away.

1 Q So up to that exemption amount, 5.25 million in
2 2013, you can give that to anybody you want with no
3 taxes; right?

4 A That's correct. Now, I would say that it's
5 possible to use some of that exemption during your
6 lifetime so it can be reduced, but as a general manner,
7 it's five and a quarter or was five and a quarter million
8 dollars in 2013.

9 Q So if you give gifts during your life above a
10 certain amount per year, then that can be --

11 A It can reduce that \$5.25 million.

12 Q But then after that, as far as the marital
13 deduction, anything the spouse gets, is that taxed?

14 A No. It is not taxed until they pass away.

15 Q And was that a feature of the family trust?

16 A It was.

17 Q If the Lake Tahoe property were to sell, you
18 were told earlier the proceeds go to the issue trust; is
19 that correct?

20 A The 46 percent that the issue trust owns,
21 46 percent of the proceeds would go to the issue trust if
22 Todd decided to make that distribution out of
23 Incline TSS.

24 Q It would be 54 percent.

1 A I'm sorry. 54 percent, yes, that's owned by
2 the issue trust.

3 **Q But the proceeds would go to Incline?**

4 A The sales proceeds would go to Incline, that's
5 correct.

6 **Q And then distributions would occur only when?**

7 A Only when Todd made the decision to make a
8 distribution to the issue trust.

9 **Q And do you know whether he's required to do**
10 **that?**

11 A Well, I don't think he can abuse his discretion
12 in failing to make a distribution, so I think ultimately
13 he has to, but it is a discretionary act which he can sit
14 on for a period of time with or without justification.

15 **Q That's part of the documents we just admitted**
16 **into evidence, which would be the operating agreement of**
17 **the entity?**

18 A Yes.

19 **Q And did you know anything about Nevada**
20 **Pronghorn at all?**

21 A I saw it referred to in some of the
22 depositions, but I don't know anything about it.

23 **Q Okay. You did not do any analysis of that?**

24 A No analysis, no, sir.

1 Q You were asked questions about the notice of
2 proposed action statute.

3 Do you remember that?

4 A Yes, sir.

5 Q And those ACPAs, Agreements and Consents to
6 Proposed Action, to the extent that they would be used as
7 a notice document, is it your opinion that they failed?

8 A They do fail. They provide inadequate
9 information.

10 Q And so is there anything you want to clarify
11 regarding that description from earlier?

12 A No, sir. I stand by what that I've said with
13 respect to those failing as approvals, if you will, of
14 any proposed action. I don't think they were. I don't
15 think that in most of them that what is being proposed is
16 within the scope of the fiduciary, which is a requirement
17 of the statute.

18 Q Okay. Should a fiduciary try to get out of or
19 wiggle out of their fiduciary duties?

20 A Well, they shouldn't try and they can't.

21 Q Should not. Explain that. They should not try
22 and they can't, cannot?

23 A Once one accepts a fiduciary appointment, they
24 are bound by the fiduciary duties and they are required

1 to administer that trust in accordance with those duties.
2 It's not a use them when they suit you. It's something
3 that is there for any discretionary act, any investment
4 decision.

5 Q So if the fiduciary accepts the role or the
6 person accepts the role to become a fiduciary, they're
7 accepting those obligations and duties?

8 A That's correct, yes.

9 Q In making an effort to get out of them or to go
10 around those duties, do you have an opinion about that?

11 A Well, I think that in and of itself is a breach
12 of that fiduciary duty. If you're trying to avoid your
13 responsibilities, that is by definition a breach of your
14 duty of good faith to act honestly and in the best
15 interest of the beneficiary.

16 Q And you were asked some questions about debt
17 reduction.

18 Do you remember that?

19 A Yes.

20 Q And you said that debt reduction is good, but
21 not in every case or something to that effect?

22 A What I was trying to say is that debt reduction
23 can be good, but there are certain kinds of debt that are
24 important and are advantageous, and you have to evaluate

1 what is good debt and what is bad debt and make a
2 decision to reduce the bad debt.

3 **Q And some debts may be legitimate and some may**
4 **not be?**

5 A Well, the legitimacy to me is -- I'm assuming
6 that it is legitimate debt when I've talked about debt
7 today, but --

8 **Q What did you mean by that?**

9 A What I'm concerned about is having debt in
10 place which leverages, positively leverages an asset and
11 allows you to maintain cash in order to manage the
12 investment on an ongoing basis can be a good thing. If
13 the interest rate is correct, if the debt service is such
14 that it can be serviced through cash flow, that kind of
15 debt is good, and just paying it off for the sake of
16 paying it off is not necessarily the right thing to do.
17 That's what I was trying to get across earlier today.

18 **Q And encumbering property with a conservation**
19 **easement, do you have any thoughts on that?**

20 MR. LATTIN: Objection. Lack of foundation.

21 THE COURT: Unless you can lay a foundation as
22 to the statement.

23 BY MR. SPENCER:

24 **Q Do you know what a conservation easement is?**

1 A Yes, I do.

2 Q What's your understanding of one?

3 A A conservation easement is where you would make
4 a pledge to limit the use of a particular piece of
5 property to a certain purpose for a specific period of
6 time, many times in perpetuity.

7 Q And through your experience do you have an
8 understanding of how that affects the value of those
9 properties?

10 A It reduces the value.

11 MR. LATTIN: Objection. Lacks foundation.

12 THE COURT: Overruled.

13 THE WITNESS: The sale of a conservation
14 easement in many cases, in fact, I would say in most
15 cases, reduces the value of the underlying asset because
16 you've restricted the use of that asset going forward.
17 When and if you ever sell it, it is subject to that
18 restriction.

19 BY MR. SPENCER:

20 Q Sometimes they're for a finite period and then
21 other times --

22 A Some are in perpetuity, some --

23 MR. ROBISON: Objection. Irrelevant. It has
24 no bearing on this case and this property that was

1 encumbered. He's talking generally. It didn't happen.

2 MR. SPENCER: He was asked earlier about that.

3 THE COURT: I don't know, but I know the
4 issue -- I know the subject is appropriate for redirect
5 based upon the cross, and the attorneys will have an
6 opportunity to recross. It is overruled.

7 BY MR. SPENCER:

8 **Q Did you do an analysis of the conservation**
9 **easements in this case?**

10 A I did not, no.

11 MR. ROBISON: Move to strike the testimony,
12 Your Honor.

13 THE COURT: Overruled.

14 BY MR. SPENCER:

15 **Q The other debt that was paid down, do you know**
16 **how it was paid down in some instances?**

17 A I know in many instances how it was paid down.

18 **Q What did you understand about that?**

19 A Well, with respect to the \$6.3 million of
20 indebtedness on the Lake Tahoe house, that was reduced by
21 the \$4.9 million that was contributed by the issue trust,
22 the insurance proceeds by the issue trust. That was used
23 to reduce the debt from \$6.3 million to approximately
24 \$2 million.

1 Then there were other sales of assets. We
2 talked about the sale of Fly Geyser which reduced debt,
3 the sale of Bronco Billy's reduced debt. They sold
4 conservation easements and water rights which were used
5 to reduce debt. So generally those are the ones that I'm
6 familiar with.

7 **Q And when properties are sold, the liens against**
8 **them have to be discharged?**

9 A Correct.

10 **Q Do you have an understanding of the monthly**
11 **payment that was required to maintain Tahoe? You started**
12 **that earlier and didn't get to finish.**

13 A Yes, I was asked. The carrying costs were
14 somewhere in the neighborhood of 350- to \$400,000 a year
15 based upon debt service and taxes, insurance, and
16 repairs.

17 **Q Did you become aware of a lease agreement that**
18 **Sam signed?**

19 A Sam did sign a lease agreement after the option
20 was exercised.

21 **Q Was that for 22,000 a month?**

22 A That's my recollection, yes.

23 **Q Could the issue trust have bought into the**
24 **SSJ LLC at the time that it owned Lake Tahoe?**

1 A I'm sorry. Would you state that again?

2 Q The issue trust, if the decision was made to
3 buy into the SSJ LLC, could it have done that?

4 A Arguably, it could have done that directly,
5 yes.

6 Q That was the one that was owned 100 percent by
7 the family trust?

8 A Yes.

9 Q You were asked some questions about use of the
10 Lake Tahoe property.

11 A Correct.

12 Q And that everybody can just go use it whenever
13 they want?

14 A That is not a true statement.

15 Q What do you understand about that?

16 A That the access to the house is controlled by
17 Todd, and I think there was an example in testimony
18 yesterday about when they wanted to use the house over
19 Christmas, asked to delay by a couple of days because of
20 a football game, and Todd not agreeing to moving the days
21 a couple of days. That's an example of the type of
22 control that Todd has with respect to the use of the
23 property.

24 Q And you were shown the second amendment to the

1 operating agreement of Incline TSS?

2 A Yes, sir. Exhibit 551?

3 Q Yes. That one paragraph. Without reading -- I
4 guess it's in now, isn't it?

5 Just looking at that paragraph about Class B
6 units --

7 A Yes, sir.

8 Q -- and having the exclusive right in its
9 sole -- "SSJ Issue Trust Unit B member shall have the
10 exclusive right in its sole and absolute discretion to
11 require the company to lease, sell, and determine the
12 terms of any lease and/or sale, including its listing of
13 the company property located in Incline Village, Nevada,
14 at any time with 10 days' prior written notice of the
15 company and its members."

16 A Yes, I read that.

17 Q Who controls the SSJ Issue Trust?

18 A That is Todd as trustee telling Todd as
19 managing member of Incline TSS what to do with respect to
20 the property, Todd talking to Todd.

21 Q All right. Can we pull up Exhibit 126, please?
22 It's page 42.

23 You were shown this section at the bottom and
24 asked if that was an accounting for Bronco Billy's.

1 Did you have any idea that that's what that
2 was?

3 A I have no earthly idea what that is a summary
4 of. There's no way to tell from that page.

5 Q In fact, we saw earlier this is the April 1,
6 2016, through December 31, 2017, accounting for the
7 family trust?

8 A Yes.

9 Q And do you recall seeing the term "Bronco
10 Billy's" or "casino" or "Colorado gaming" or "Pioneer
11 Group" or any of that in that accounting?

12 A I did not and I looked for it.

13 Q And so we talked earlier about the difference
14 between accounting and then full disclosure; right? What
15 would this be an example of?

16 A That's an accounting. Those are numbers --

17 Q Numbers --

18 A -- with no notes explaining what they are or
19 what they mean.

20 Q Numbers on a page?

21 A Yes, sir.

22 Q Any way to determine what those are, for the
23 beneficiary to determine what those are?

24 A None.

1 Q Would that qualify as full disclosure in your
2 mind?

3 A No.

4 Q And to achieve full disclosure in relation to
5 those particular entities, you would expect to see what?

6 A There would have to be extensive footnoting in
7 the accounting explaining what the numbers represent and
8 the background of the transaction.

9 Q Exhibits attached that describe it or something
10 like that?

11 A Yes, sir.

12 MR. SPENCER: Pass the witness, Your Honor.

13 THE COURT: Thank you.

14 Mr. Robison.

15

16 RECROSS-EXAMINATION

17 BY MR. ROBISON:

18 Q Thank you, Your Honor.

19 Mr. Wallace, where is the conservation
20 easement?

21 A I'm sorry?

22 Q Where is the conservation easement?

23 A There were conservation easements which were
24 sold. I don't know what properties they impacted.

1 **Q Was it in Nevada?**

2 A It was either Nevada or California, but I told
3 you I don't know where.

4 **Q What was the value of the improvements that**
5 **were given as part of the easement?**

6 A I don't know.

7 **Q Is the property on which the easement exists**
8 **now developable?**

9 A Sir, I have no idea. Those are not the
10 questions I was answering.

11 **Q You were critical of selling the easements for**
12 **\$19 million.**

13 A No, sir, I was not critical.

14 **Q Do you compliment that?**

15 A I don't compliment. I said that -- I was asked
16 how debt was reduced, and I said part of the way that
17 debt was reduced was through the sale of conservation
18 easements.

19 **Q You're not criticizing that, are you?**

20 A No. All I'm saying is that they have an impact
21 on the value of the property. It is how one goes about
22 reducing debt and how do you evaluate that.

23 **Q See, what I want to ask you a question is about**
24 **your answer, impact on the value of the property.**

1 **You don't even know where the property is, do**
2 **you?**

3 A I was -- my answer was with respect to
4 conservation easements generally, not these specifically.

5 Q **Sir, your answer was with regard to the value**
6 **that the estate gave up. You don't even know where these**
7 **easements are, do you, sir?**

8 A I'm making no representations whatsoever about
9 the impact of the sale of these conservation easements on
10 Jaksick property.

11 Q **All you know is that they were sold for**
12 **\$19 million which represented debt reduction for this**
13 **troubled estate; correct?**

14 A All I know is that they sold conservation
15 easements, and I have been advised that they used those
16 proceeds to reduce debt.

17 Q **And you have no idea how that affected the**
18 **value of the family trust's interest in that property, do**
19 **you?**

20 A I am very confident that it reduced the value
21 of the underlying property, but that doesn't necessarily
22 make it the wrong thing to have done.

23 MR. ROBISON: Thank you.

24 MR. LATTIN: No questions.

1 THE COURT: Mr. Hosmer-Henner?

2 MR. HOSMER-HENNER: No questions.

3 THE COURT: Thank you. You're free to step
4 down.

5 MR. SPENCER: Your Honor, this is the time we
6 spoke of earlier, so --

7 THE COURT: Ladies and gentlemen, during this
8 recess, please do not discuss this case amongst
9 yourselves. Please do not form or express any opinion
10 about this matter until it's been submitted to you. I
11 presume a 15-minute break. We'll stand for our jury.

12 (The following proceedings were held outside
13 the presence of the jury.)

14 THE COURT: Before we take time during the
15 jury's presence in the courtroom to make offers of proof,
16 let's talk generally about the trial itself and where we
17 are.

18 Are you about to rest your case in chief?

19 MR. SPENCER: Subject to that, yes.

20 MR. ROBISON: Well, I think we could maybe get
21 done today, maybe early tomorrow, but not much later, but
22 it depends on their offer of proof. If you're going to
23 reverse yourself, that's going to of course --

24 THE COURT: As I attend state CLE, the Supreme

1 Court regularly appears at trial judge conferences and
2 predictably says the same thing every time: Trial
3 judges, show your work. In other words, speak your
4 discussion, so I'm going to speak for a moment.

5 I don't know if the timing of the case has
6 created prejudice for respondents, and if so, I want to
7 invite them to tell me. I don't know what the remedy is,
8 but we have now -- we're almost done with the 10th day of
9 trial for a 10-day trial, and the petitioner is about to
10 rest.

11 Respondents have not had time for their defense
12 in chief, and I think respondents' counsel are about to
13 tell me they're going to get their entire case done in
14 two to four hours.

15 I'm willing to hold this jury into next week.
16 In fact, I think it's inevitable that they have to come
17 back and deliberate on Monday, so I need to invite
18 respondents' counsel, what are your thoughts about where
19 we are and what the Court should do?

20 MR. ROBISON: We want to get this case to the
21 jury, and we've made some modifications in our strategies
22 to do that.

23 THE COURT: You're satisfied that we can
24 proceed with fairness to respondents?

1 MR. ROBISON: Yes. We are prepared to present
2 our case, and we'd like to get on with it promptly.

3 THE COURT: I would like to hold the
4 petitioners' offers of proof until the jury has gone
5 home.

6 Do you anticipate closing arguments and
7 deliberations tomorrow or Monday? Because I'm seeing
8 Monday, but you've made adjustments.

9 MR. ROBISON: We've made adjustments.

10 MR. SPENCER: We're saying Monday as well, Your
11 Honor. We have instruction issues we'll have to take up
12 with Your Honor.

13 MR. ROBISON: I'm only one respondent and I
14 think the other one is standing up.

15 MR. HOSMER-HENNER: Your Honor, I don't know if
16 I disagree with Mr. Robison yet, but I would like to
17 resolve that offer of proof issue now so that we know
18 what our plan is for the rest of the timing. I think a
19 lot of it depends on what they do next.

20 MR. CONNOT: We can give you a preview.

21 THE COURT: An offer of proof is just a way of
22 memorializing the disagreement with the Court's
23 evidentiary decision. I'm not going to revisit the
24 evidentiary decisions I've made. It's not a request for

1 a hearing or reconsideration. It's just if the judge
2 were right, he would have done this.

3 I don't know why we have to do that before the
4 defense case in chief while the jury is waiting.

5 MR. ROBISON: We do not as far as we're
6 concerned.

7 MR. HOSMER-HENNER: Does that hold up the
8 resting of their case?

9 MR. SPENCER: As long as we can do it -- well,
10 there's two things that are not offers of proof, and it
11 goes to that redaction issue.

12 THE COURT: That's just the cleaning of a
13 stipulated exhibit; is that correct?

14 MR. SPENCER: Yes. But apparently one of them
15 is going to require a hearing. One is agreed and one's
16 not.

17 MR. ROBISON: Both the documents counsel are
18 referring to are in evidence. One we agree should be
19 redacted that redacts any reference to molestation
20 charges that Stan's ex-wife lodged against him. We're
21 good with that. That's in accordance with the order in
22 limine that this Court entered.

23 The other one is a document that Wendy authored
24 that refers to a fat Mexican stealing Luke's bike. Can't

1 cleanse the record. We won't stipulate to redact
2 anything that Wendy wrote because the fact that it's
3 prejudicial to her is not our problem.

4 THE COURT: Do you agree with that summary,
5 that there is some racist, reprehensible, regrettable
6 language that you wish to purge from Ms. Wendy's life
7 story?

8 MR. SPENCER: Well, it's not just that. This
9 is Exhibit 23.24, and I'll read it to Your Honor.
10 There's a text that says "Okay. We saw Mexicans on
11 Luke's motorcycle that was stolen. What should I do?
12 Big fat Mexican and it's Luke's. Should I call police or
13 take Doc and try to get it back?"

14 THE COURT: What is the relevance -- well, it's
15 already stipulated in; is that correct?

16 MR. ROBISON: It's not stipulated in. I put it
17 on the screen, blew it up in front of the jury and asked
18 Todd Jaksick whether or not they had to pay for the
19 motorcycle that she claims was stolen. It's already
20 before the jury.

21 MR. SPENCER: But that issue is still going to
22 be before the jury. The reason this is an issue is
23 because, just as Your Honor said, it could create issues
24 directly with at least two of our jurors, if not more,

1 and she's not racist. It doesn't add anything to the
2 case, doesn't add anything to the trial. They just want
3 to use it to bash her over the head with it.

4 Her daughter is married to an African-American
5 man. She's not racist in any form or fashion. This was
6 probably done in a heat-of-passion thing.

7 THE COURT: So why didn't you choose to
8 rehabilitate her when she was on the witness stand, to
9 have her provide evidence as opposed to your argument?
10 Because Mr. Robison has listened to the Court when I have
11 said repeatedly I am not purging the rough edges of any
12 of the parties in this case.

13 MR. SPENCER: Well, that's true. One of the
14 things we were trying to do is submit photos that would
15 indicate that. I understand the Court's ruling on that.

16 THE COURT: Family photos of multi-racial
17 personalities, and those photos weren't produced in
18 advance of trial. The question I ask is, if you've got
19 some prejudicial evidence, why didn't you rehabilitate
20 your client when she was on the witness stand?

21 MR. SPENCER: Well, I mean, really, I guess we
22 were a little bit confounded that this is one we missed.
23 In all these documents, this is something that we
24 would --

1 THE COURT: That's fair, and I appreciate your
2 candor. I really do. I'm not going to strike the
3 material, the email.

4 Can you make your offer of proof after the jury
5 goes home?

6 MR. SPENCER: Yes. The other thing is there's
7 a few exhibits that are stipulated that we want to just
8 stipulate in before we rest, and subject to that, if we
9 can do that after.

10 THE COURT: Yes. Do you wish to use the
11 Talismanic words "We rest" in front of the jury?

12 MR. CONNOT: No, not necessarily. I mean as
13 long as --

14 THE COURT: You're both talking at the same
15 time.

16 MR. CONNOT: As long as there's some indication
17 that we're segueing into their case, the magic words
18 don't have to be stated.

19 MR. ROBISON: Someone's got to rest.

20 MR. SPENCER: I would rather say it, Your
21 Honor, yes.

22 THE COURT: Then we're going to rest subject to
23 the reservation you've placed on the record which I have
24 granted, but we're not going to do it while the jury is

1 waiting.

2 MR. HOSMER-HENNER: I would like to be heard
3 outside the presence of the jury after they rest.

4 THE COURT: Is it a motion that you're going to
5 make based upon the Rules of Procedure?

6 MR. HOSMER-HENNER: Yes, Your Honor.

7 MR. ROBISON: We, too, have a 50(a) motion, and
8 we'd simply like to lodge it with the Court now that the
9 petitioner has rested, argue it later. 50(a)'s can be
10 heard at any time by the Court, but they are based upon
11 what the petitioner presented in her case in chief.

12 THE COURT: I don't wish to argue it while the
13 jury are waiting, I don't want you to do that, and so if
14 you want to argue it to me before closing arguments to
15 the jury, you have the ability to do that.

16 MR. ROBISON: I don't think that prejudices our
17 timing or legitimacy of a 50(a) motion, to argue it after
18 the petitioner has rested.

19 MR. CONNOT: We would stipulate to that, Your
20 Honor.

21 MR. HOSMER-HENNER: I disagree somewhat because
22 our case in chief, which is now condensed to, you know, a
23 day and a half, matters a little bit in terms of whether
24 Stan's still got to be in the case.

1 MR. ROBISON: I'm not going to call him.

2 MR. HOSMER-HENNER: What I have to put on to
3 prepare his defense depends on the outcome of this
4 motion. The reason we want to argue it, Your Honor, is,
5 respectfully, at one point in time you gently discouraged
6 us from filing summary judgment motions, and unlike other
7 parties, we listened, and we think while we've waited to
8 shorten this trial because of the lack of evidence
9 against Stan, at some point we want the opportunity to be
10 heard. Unfortunately, it's happening on the 11th day of
11 a 10-day jury trial after we were expecting their case in
12 chief to be done in 60 percent of that time.

13 THE COURT: What do I do with alternates,
14 Counsel? Again, I'm inviting and I'm not ruling, but I'm
15 going to have this jury come back. I'm not entirely sure
16 if it's going to be done on Monday, to be honest with
17 you, from what I just heard because I can't legally or
18 intellectually disagree with Mr. Hosmer-Henner, but I'm
19 not going to be pushed into a three-minute decision. And
20 so I'm going to have to reflect and deliberate, and if
21 you're asking that I make a decision before you put on
22 your defense case in chief, this jury is going to come
23 back Monday or Tuesday or possibly Wednesday.

24 I have a jury that I said 10 days to. Should I

1 inquire about their conflicts, what life commitments they
2 have, and let one or two go?

3 MR. ROBISON: No. Let me think it over. No.
4 We would advocate against that, Your Honor. This jury
5 has gone through colds and long days. They deserve to
6 deliberate.

7 THE COURT: I have two that are not going to
8 deliberate anyway.

9 MR. ROBISON: Well, that's true, but that's
10 true in every case, that the alternates don't typically
11 deliberate unless you're in federal court where they do,
12 but I understand that this Court doesn't permit that, and
13 that's legitimate, but that's when -- we should excuse
14 those jurors once we have rested, the case is submitted,
15 and jury instructions are ready to be read, they should
16 then be excused.

17 THE COURT: I won't excuse them until after
18 closing arguments in the event that there is some problem
19 during deliberations.

20 MR. ROBISON: I thought you were going to
21 instruct before we argue.

22 THE COURT: I'll instruct, you'll argue, I'll
23 excuse the two, and then the eight will go to deliberate.

24 MR. ROBISON: That makes sense.

1 THE COURT: Can Todd begin his defense case
2 without harming Stan's right to argue to this Court a
3 dispositive predeliberation motion?

4 MR. HOSMER-HENNER: Your Honor, that may be the
5 only thing we can do in the interest of time, but that
6 would require not using any of the evidence after this
7 right now when considering the Rule 50 motion. It would
8 also require Stan having the right to recall some of
9 those witnesses that have gone through in Todd's case in
10 chief and the other trustee's case in chief, Your Honor,
11 for that matter.

12 So if you're saying can we pretend Stan is not
13 in the case until the very end and, if things don't go
14 well, start his case in chief after Todd's, that's
15 possible, but, again, it's day 11 and I was hoping to
16 make this motion five days ago.

17 THE COURT: We're going to all take a break
18 because the reporter has been writing for the last
19 15 minutes, and we'll stand and shake it out for five
20 minutes and we'll bring the jury in at 4:50.

21 (A recess was taken.)

22 (The following proceedings were held outside
23 the presence of the jury.)

24 THE COURT: I cannot imagine how the offers of

1 proof, the argument under Rule 50, the opposing argument
2 under Rule 50 is going to take less than an hour. I just
3 can't imagine how that's going to happen, and I am very
4 uncomfortable, in a case of this significance, pushing my
5 Rule 50 decision into minutes because I don't want to be
6 inefficient with the jury's time.

7 So I'll listen to the argument, I'll see if
8 anything changes my inclination, but if I understand the
9 motion that is soon to arrive, I have the ability to not
10 make a decision and allow it to be renewed after verdict
11 is entered.

12 With that, I want to bring the jury in. I'll
13 announce that petitioner Wendy's case is now complete,
14 and then you're going to want me to excuse the jury
15 again?

16 MR. HOSMER-HENNER: I believe so, Your Honor,
17 yes.

18 THE COURT: The jury, please.

19 (The following proceedings were held in the
20 presence of the jury.)

21 THE COURT: Petitioner's counsel.

22 MR. SPENCER: Your Honor, respondent Wendy
23 Jaksick rests her case in chief.

24 THE COURT: Thank you.

1 Ladies and gentlemen, during this overnight
2 recess, you are admonished not to converse amongst
3 yourselves or with anyone else on any subject connected
4 with this trial. You will not read, watch or listen to
5 any report of or commentary on the trial by any person
6 connected with this case or by any medium of information,
7 including without limitation newspaper, television,
8 internet or radio. You are not to conduct any form of
9 electronic research or experimentation. Please do not
10 form or express any opinion on any subject connected to
11 this trial until the case is finally submitted to you.

12 Please return to the jury deliberation room for
13 entry into the courtroom at 8:45 in the morning. Our
14 trial day has a hard stop at noon tomorrow. Your service
15 will be required at least through Monday. We are doing
16 our best to complete it by Monday, to tender the matter
17 for deliberations by Monday, though I'm not certain that
18 will happen. We're doing our best.

19 We will stand for our jury.

20 (The jury exited the courtroom.)

21 (The following proceedings were held outside
22 the presence of the jury.)

23 THE COURT: We will begin with offers of proof,
24 then we'll begin with any motions, and I invite everyone

1 to be slow and mindful of your cadence, please.

2 To the petitioner's counsel.

3 MR. SPENCER: Your Honor.

4 THE COURT: Could you all just be seated in
5 these? I know we're about to go on the court record. I
6 just need to grab something out of the chambers.

7 MR. SPENCER: Thank you, Your Honor. Our offer
8 of proof is in the form of documents.

9 First, we offer -- we previously offered and it
10 was denied the settlement agreement which is Exhibit 457.
11 The next would be the Exhibit 415. I don't know if Your
12 Honor cares what they are or not so --

13 THE COURT: I'm just giving you an opportunity
14 to create or preserve your record.

15 MR. SPENCER: Thank you. And then Exhibits 3
16 and 4 -- let me back up.

17 The settlement agreement, I think there's ample
18 record on that. Exhibit 415 is the -- is a print-off
19 regarding Todd's house, and we believe it to be relevant
20 and relating to the comparison of what he's gotten from
21 the trust compared to what Wendy has gotten from the
22 trust.

23 Next we would offer Exhibits 3 and 4, which are
24 the original pleadings requesting the approval of the

1 accountings and the ACPAs, and then Exhibits 156 and 157,
2 which are the supplemental petitions adding the later
3 accountings, the 2017 accountings, and in the alternative
4 we would -- well, those are the offers on those. Those
5 are the pleadings, so the record is clear on that.

6 And then lastly, Madam Clerk, we'll mark this
7 as the next number, next in order.

8 THE COURT: Yes.

9 THE CLERK: Exhibit 552 marked for
10 identification.

11 (Exhibit 552 was marked.)

12 MR. SPENCER: Exhibit 552 are just a series of
13 pictures of Wendy and her family and Sam and, really, the
14 whole family, and that would --

15 MR. JOHNSON: I think these are all stipulated.

16 MR. SPENCER: That ends our offer of proof.

17 And then these are the ones that are --

18 MR. JOHNSON: These were the additional
19 exhibits we wanted admitted, and I believe most of these
20 are stipulated. It's 118, 122, 128.

21 THE COURT: 128?

22 MR. JOHNSON: Yes. 133, I don't think this one
23 is stipulated. 150, it's the petition for reconveyance,
24 but we wanted to offer it.

1 MR. ROBISON: What number, please?

2 MR. JOHNSON: 150.

3 MR. ROBISON: Thank you.

4 MR. JOHNSON: And then supplemental petitions
5 156 and 157, and those were the supplemental petitions.
6 That was not stipulated.

7 And then I believe the rest of these are
8 stipulated: 158, 160, 160A, 160B, 161, 162, 165, 170,
9 171, 180, 191, and 195.

10 MR. ROBISON: Your Honor, could we ask counsel
11 which of those, if any, have been stipulated in?

12 THE COURT: So my note is that everything has
13 been stipulated except 150, 156, and 157.

14 MR. ROBISON: Which one is the petition for
15 reconveyance?

16 THE COURT: 150.

17 MR. ROBISON: That one and 156 and 157 have not
18 been stipulated to. The series of exhibits, Your Honor,
19 that were read starting with 159 through, I think, 192,
20 are they stipulated?

21 MR. JOHNSON: 191 and 195 were stipulated, I
22 believe.

23 MR. SPENCER: All the others we believe were
24 stipulated except for those three.

1 MR. ROBISON: Except for 151, 156, 157?

2 MR. SPENCER: That's right.

3 THE COURT: So if I understand, pursuant to
4 stipulation, the following documents are admitted: 118,
5 122, 128, 133, 158, 160, 160 Alpha, 160 Bravo, 161, 162,
6 165, 170, 171, 180, 191, and 195.

7 (Exhibits 118, 122, 128, 133, 158, 160, 160A,
8 160B, 161, 162, 165, 170, 171, 180, 191, and 195 were
9 admitted.)

10 THE COURT: I invite respondents' counsel to
11 respond to the request that I admit 150, which is
12 described as the petition for reconveyance, 156 and 157,
13 which are both described as supplemental petitions.

14 MR. ROBISON: You wish us to be heard?

15 THE COURT: Yes. I don't know whether I should
16 admit them or not.

17 MR. ROBISON: In the first place, Your Honor,
18 they are pleadings, one of which has been withdrawn,
19 ours -- is that right? -- our petition against Stan?

20 MR. SPENCER: Yes. That's 150.

21 MR. ROBISON: I mean, that's been withdrawn.

22 THE COURT: That's described as a petition for
23 reconveyance. That is a recording instrument.

24 MR. ROBISON: Well, we asked that Stan reconvey

1 to the family trust the \$400,000 of Bronco Billy's money.

2 That was withdrawn.

3 THE COURT: That was 150?

4 MR. SPENCER: Yes.

5 MR. ROBISON: We object to it being admitted
6 for any reason particularly in light of the ruling on the
7 settlement agreement.

8 THE COURT: Okay. 156 and 157, let me just
9 look at them real quick.

10 MR. LATTIN: With regard to 3 and 4, these are
11 just supplements -- excuse me -- 156 and 157 are
12 supplemental petitions, and, again, we believe those fall
13 in the area of pleadings, and consistent with your
14 rulings on 3 and 4, we would request those be left out as
15 well.

16 THE COURT: 150 is not admitted, 156 is not
17 admitted, 157 is not admitted.

18 Anything else?

19 MR. SPENCER: Yes, Your Honor. We'd like to
20 add Exhibit 150 to the offer of proof.

21 THE COURT: Thank you.

22 MR. SPENCER: We did have 156 and 157 in there,
23 so it's already in, but 150, we need to add that.

24 THE COURT: Thank you.

1 MR. SPENCER: Thank you, Your Honor.

2 THE COURT: Anything else from the petitioner's
3 counsel before I turn to respondents?

4 MR. SPENCER: No.

5 THE COURT: To the respondents, do you wish to
6 be heard?

7 MR. HOSMER-HENNER: Your Honor, I understand
8 that at the stage we are at in this trial, and I
9 understand that there may be absolutely some --

10 THE COURT: I can't hear you.

11 MR. HOSMER-HENNER: You're not an expert
12 witness so I don't know if I can speak to you in the same
13 tone, Your Honor.

14 There obviously is some bias, because of the
15 stage we are in this proceeding, to simply defer this
16 consideration of a motion for a directed verdict with
17 respect to Stan until the presentation of what would be
18 the last 5 percent of the case. I understand that. I
19 also understand it's within your authority to do so.

20 We believe that allowing the claims against
21 Stan to go to the jury poses a significant risk of
22 prejudice for the two global reasons of, we have a
23 continuing concern about the consolidation of the trial
24 between the *issue and the family trust and how the

1 issues become so intertwined that it appears that Stan
 2 has been a co-trustee or involved in some of these other
 3 actions, and the second issue is the same thing, which is
 4 he is only the co-trustee in a very limited capacity, as
 5 a co-trustee of the family trust, and isn't involved in
 6 all the actions in the case. And we're concerned about a
 7 verdict form going forward with the check marks next to
 8 the co-trustees: Michael Kimmel; Kevin Riley; Stan; and
 9 Todd.

10 A directed verdict is proper when the evidence
 11 is so overwhelming for one party that any other verdict
 12 would be contrary to the law. We think that here the
 13 first ground for granting the directed verdict is that
 14 there's really not a scintilla of evidence that's been
 15 presented about Stan for any of the specific claims that
 16 have been brought by Wendy against him.

17 With respect to -- there are four claims, Your
 18 Honor: Fraud; aiding and abetting; civil conspiracy; and
 19 breach of fiduciary duty.

20 I want to start quickly with fraud because
 21 there's not been a single presentation by any witness,
 22 any document that Stan made a false representation or
 23 that he knew any of his representations were false or
 24 that he concealed anything from Wendy. It requires

1 intention, it requires knowledge, and there's not any
2 evidence with respect to Stan with respect to any of
3 these allegations, documents, situations.

4 The second claim is related to aiding and
5 abetting. That, again, requires Wendy to show that Stan
6 knowingly participated with another defendant and
7 respondent in the aid and commission of a tort. Again,
8 there's no evidence -- and, in fact, it's to the
9 contrary -- that Stan knowingly participated with any
10 other respondent in this case in the commission of a
11 tort.

12 Civil conspiracy requires a meeting of the
13 minds, requires intention. Again, there's no indication
14 that Stan, with respect to any of the discrete issues in
15 this case, any one of the discrete things that happened
16 that are the basis of Wendy's claims --

17 THE COURT: Isn't the evidence before the Court
18 that there were regular meetings between the trustees, in
19 fact, so regular that they were scheduled on Mondays.
20 While they didn't occur weekly, they occurred with some
21 frequency. And couldn't the jury infer -- again, I'm not
22 speaking to what the jury may do, I'm just thinking about
23 the standard you began with. Couldn't the jury infer
24 that there were actions, conversations between those

1 three at those meetings which led to Wendy's allegations?

2 MR. HOSMER-HENNER: Your Honor, this can't be
3 addressed in the global context of the administration of
4 all of these trusts over five or six years. What we're
5 going to hear from petitioner's counsel is that they are
6 fiduciaries, everything they do is together, they're
7 jointly and severally liable, but in order to state a
8 claim for one of these things, you can't just say there's
9 a continuing enterprise. It's not a RICO claim. You
10 have to be able to point to one issue, the use of the
11 indemnification agreement, you know, the sale of a Super
12 Cub, some issue in this case and show there was a meeting
13 of the minds with respect to that issue. The meeting of
14 the minds can't be the administration of the trust.

15 And I'm going to skip ahead a little bit
16 because, in addition to the failure to show any facts
17 related to the claims against Stan, what we rely on for
18 this motion is NRS 163.110(1), and I'd just like to read
19 that in its entirety.

20 THE COURT: Hold on. I want you to read it in
21 its entirety. I also want to follow along while you do.

22 163.110(1)?

23 MR. HOSMER-HENNER: Yes, Your Honor.

24 It provides: "Unless it is otherwise provided

1 by the trust instrument or by court order, any power
2 vested in three or more trustees may be exercised by a
3 majority of the trustees. A trustee who has not joined
4 in exercising a power is not liable to the beneficiaries
5 or to others for the consequences of the exercise of
6 power and a dissenting trustee is not liable for the
7 consequences of an act in which that trustee joined at
8 the direction of the majority trustees, if the trustee
9 expressed his or her dissent in writing to any of his or
10 her cotrustees at or before the time of the joinder."

11 THE COURT: Do you anticipate presenting
12 evidence of a dissent in writing?

13 MR. HOSMER-HENNER: We already have, Your
14 Honor. We have Exhibit 32 where Stan objects to Todd's
15 use of the indemnification agreement, Exhibit 38 where
16 Stan objects to the treatment of Jackrabbit and the
17 payment of those capital calls, Exhibit 81 where he
18 objects to the provision of her getting the Geo,
19 Exhibit 242 where Stan objects to Todd's use of --

20 THE COURT: You're talking about email or text
21 communications as a written dissent?

22 MR. HOSMER-HENNER: Yes, Your Honor. There's
23 no requirement in the statute that it be done in a formal
24 proceeding or a legal document. Moreover, it's not even

1 necessary that it has to be done in writing.

2 What it says is "A trustee who has not
3 joined" -- in the first part of that clause, Your Honor,
4 "A trustee who has not joined in exercising a power is
5 not liable to the beneficiaries." Only if Stan had gone
6 along with the other beneficiaries would he be -- would
7 he need to provide something in writing prior to the
8 exercise in joining in that specific activity.

9 So this case has gone on for quite a long time,
10 and our frustration with this case has been there's a
11 failure to identify and pinpoint the specific harms and
12 sources of damage that Wendy is claiming over the course
13 of the administration of the family trust.

14 To the extent we have been able to, we've shown
15 through each and every one of these exhibits that Stan
16 was either completely unaware of the activity and
17 couldn't have joined in it, objected to it in writing
18 prior to the activity or refused to join in it, and
19 nowhere is that more evident than the petitions filed in
20 this case where the accountings were sought to be
21 approved.

22 To the extent that there's a breach in those
23 accountings, Stan not only failed to file a petition to
24 confirm those accountings, he further formally objected

1 in this court to the confirmation of those accountings
2 and all the contents therein.

3 THE COURT: It sounds like you're making a
4 closing argument to me.

5 MR. HOSMER-HENNER: Well, then I'm doing
6 something wrong, Your Honor, but this is an issue about
7 statutory immunity for a trustee who objects to something
8 that the other co-trustees did.

9 THE COURT: Don't I have to resolve competing
10 facts to land in your favor?

11 MR. HOSMER-HENNER: If we go through each one
12 of these discrete issues -- and I'm happy to do that or I
13 can address them as a global issue -- but each one of
14 these issues, such as the sale of cattle, there was an
15 objection by Stan to that in writing or he was unaware of
16 it. There are no competing issues with respect to Stan.

17 This is a burden of proof issue where you have
18 to decide whether there's an iota of evidence showing
19 that Stan committed fraud, made a false statement, that
20 Stan intended to conspire or did conspire with the other
21 co-trustees, when there's no evidence he even agreed with
22 them and, in fact, expressed his dissent in writing.

23 There's no evidence that he aided and abetted
24 any other trustee in the commission of anything related

1 to Wendy, and more importantly, Your Honor, there is no
2 evidence that any of these alleged things that Stan could
3 have done resulted in damage to Wendy.

4 Our motion is also predicated -- and I'm moving
5 around a little bit in an attempt to answer your
6 questions -- but there's nothing that they have pointed
7 to in saying Stan did this and that caused monetary harm
8 to Wendy.

9 With respect to the Bronco Billy's, there's no
10 monetary harm to Wendy, and there's no countervailing
11 evidence to that. They have no evidence that Stan did
12 anything, that he knew anything -- they have some
13 evidence that he knew something -- that he knew anything
14 that is the basis of their claim, and it's not enough at
15 this point in the litigation, as Wendy said on the stand,
16 to have some questions. It's not enough to say I don't
17 love the way the trust was administered or I don't trust
18 anything that was done. You have to point to a specific
19 issue and show the evidence that you intend to present.

20 I know we're past the summary judgment stage
21 and this is a motion for a directed verdict, but what
22 we're really looking at is, how could the jury find that
23 Stan did anything that harmed Wendy just by virtue of
24 being a co-trustee when he didn't join in the actions,

1 Your Honor, and he specifically objected and dissented
2 from each one of those actions in writing?

3 THE COURT: Please pause for just a second. I
4 want to focus on you. I'm just making a note.

5 Counsel, please continue.

6 MR. HOSMER-HENNER: Your Honor, I don't want to
7 continue with too much more of a closing statement, but I
8 will conclude and appreciate the opportunity to reply to
9 any actual issues that are brought up by Wendy's counsel,
10 but there is not enough evidence to have pled against
11 Stan in this case, let alone present those issues to the
12 jury.

13 THE COURT: I have entertained Rule 50 motions
14 frequently. I've granted one.

15 MR. ROBISON: Sorry, Your Honor. That's kind
16 of ominous.

17 THE COURT: Surprised me, too.

18 Indeed, I granted it after the verdict in
19 contravention of the verdict, so I know I'm capable of
20 reaching that far into the jury's work.

21 And so before I speak -- before I orally
22 pronounce, if at all, I will familiarize myself yet again
23 with the standards for directed verdict. There has to
24 be -- there has to be something more.

1 You began with the word "overwhelming," I
2 believe; is that correct?

3 MR. HOSMER-HENNER: Overwhelming, yes, Your
4 Honor.

5 THE COURT: Because at some point I am not a
6 stand-by alternate juror to ensure the jury does the
7 right thing. The jury returns a verdict that it returns
8 whether I might personally agree or disagree, so I have
9 to understand my role as gatekeeper for what claims go to
10 the jury, and I'm just not as clear on that right now as
11 I want to be.

12 So when you have your reply arguments, if you
13 have anything else to add about the standard by which I
14 measure your argument as opposed to just what the jury
15 could or could not find.

16 Respondents' counsel, anything more I need
17 before I turn to petitioner's counsel? Do you have any
18 motions tonight or arguments to make?

19 MR. ROBISON: Yes, we do.

20 MR. LATTIN: I do as well.

21 MR. SPENCER: Should we respond to that one or
22 go to the next one?

23 THE COURT: I'd rather just hear them all and
24 then hear your response.

1 MR. ROBISON: May it please Your Honor, as you
2 know, I represent Todd Jaksick as an individual. From
3 day one of these proceedings, there's never been an
4 articulation to any degree, even generally, of what Todd
5 did as an individual as opposed to what he has done as a
6 co-trustee of the family trust or a trustee of the issue
7 trust.

8 The evidence in this case came in with respect
9 to the issue trust and with respect to the family trust
10 and Todd's administration of those two trusts. What
11 Wendy did not do during this trial or has ever done is
12 say, wait a minute, this is on your watch, Todd, as an
13 individual, not as a trustee or as a co-trustee. There
14 is a paucity of evidence that would suggest that there's
15 an accusation against him with respect to individual
16 conduct that is not completely indistinguishable from the
17 same accusations they've made against him as a
18 co-trustee.

19 Let's take, for example, Wendy's fraud
20 accusations. As pled, they violate Rule 12 and they
21 violate Rule 9. Rule 9 requires that a claim of fraud be
22 stated with particularity. Our Supreme Court has defined
23 particularity as telling the defendant, in this case Todd
24 as an individual, what misrepresentation he made, when he

1 made that misrepresentation, to whom he made that
2 misrepresentation. There's got to be proof that he knew
3 the representation to be false and there has to be
4 evidence, Your Honor, presented in the case that the
5 accuser relied on that representation to her detriment.

6 Finally and most important, there has to be
7 evidence of damages. Now, the standard on a Rule 50(a)
8 motion is this Court's entitled, as it is on a motion for
9 summary judgment or JNOV, to construe the evidence in a
10 light most favorable to the nonmoving party. Wendy is
11 the nonmoving party, but what evidence is there to
12 construe in her favor with respect to a fraud claim
13 against Todd as an individual?

14 Your Honor, there was representations made to
15 this Court that -- we moved in limine with regard to
16 damages because we said there's a violation of Rule 16.1.
17 There has not been a computation of damages in this case.
18 And they said, well, we intend to prove that with Todd
19 and Kevin Riley. They didn't. There's not one word of
20 what damage was caused by what act, if there is any
21 damage.

22 Now, we've heard remarks about rescission and
23 setting aside things. That's on the Court's watch. This
24 jury cannot enter a verdict of rescission or reformation

1 or declaratory relief on transfers of real estate. This
2 jury is charged with assessing whether or not there's
3 been proof by a clear and convincing standard that
4 damages were caused to Wendy, and there's been no damages
5 presented, so causation is virtually moot in this case.

6 And, Your Honor, in Mahlum vs. Dow, the Court
7 said you can, as a matter of law, enter a directed
8 verdict in this case if there is not sufficient evidence
9 to support the claims alleged and presented to the jury.
10 Here there are not. And with respect to the fraud claim,
11 we know that there's a higher level, a higher standard, a
12 higher burden of proof which has not been met on this
13 case.

14 I don't think anyone can say Todd said
15 something as an individual to Wendy that was
16 intentionally false with an intent for her to rely on it
17 to her detriment. And this is just my presentation in my
18 capacity as Todd's individual lawyer because I don't
19 believe there can be a separation, the way the petitioner
20 has presented her case, with respect to that fraud claim.

21 The second part of the fraud claim is a failure
22 to disclose, but that is on a fiduciary duty standard.
23 What they have alleged is that there's a fraudulent
24 concealment of a known fact which would be relied upon by

1 the petitioner to change her position. That's where the
 2 petitioner's case fails even on a directed verdict level.
 3 There is no evidence that Todd as an individual concealed
 4 anything which would have been a material fact or would
 5 have changed Wendy's position.

6 What the Court has heard, there's meetings
 7 among the trustees on Mondays and thereafter, that
 8 there's meetings with Wendy, that Wendy had the
 9 opportunity to talk to the accountant, that Wendy was
 10 present at various meetings when these ACPAs were
 11 discussed. There's not one word from which a reasonable
 12 inference can be drawn that she would have changed her
 13 position with respect to anything that was not disclosed
 14 to her, not one word, nor is there a reasonable
 15 inference.

16 And, again, even if you segue that claim into a
 17 fraudulent concealment type of claim, what is the damage?
 18 Not one word from an expert, from an accountant, from
 19 anybody that would suggest that there was damages
 20 caused -- first of all, damages sustained, secondly,
 21 damages caused by some unknown concealment that has not
 22 been identified by Nevada Supreme Court standards of who,
 23 what, when, where, and requisite particularity of the
 24 pleading and clear and convincing presentation of the

1 proof.

2 So we submit, Your Honor, respectfully, at a
3 50(a) level the fraud claim against Todd as an individual
4 fails, but for the same reasons, if you look into the
5 conspiracy -- and let me just step back on fraud.

6 Wendy knew constructively, if not actually, on
7 December 28, 2012, that Incline TSS owned the Lake Tahoe
8 house. That is constructive knowledge to the world, the
9 recordation of that deed. That is knowledge on them.
10 They keep coming in and saying what about disclosure,
11 disclosure. I'm talking about Todd as an individual.
12 Wendy was put on constructive notice, which is a powerful
13 reason why we adopt constructive notice and why we have a
14 recorder's office, is to put the world on notice that
15 Incline TSS owns the Incline house.

16 THE COURT: But Stan testified that on the day
17 after their father's death, they got together, and at
18 that time he didn't know. Now, I don't know whether he
19 should have also constructively known through the
20 recordation, but I think they're going to argue that
21 there were some misleading statements by Todd which they
22 relied upon.

23 MR. ROBISON: What are they?

24 THE COURT: I don't know, I haven't heard the

1 arguments, but I remember clearly Stan's testimony about
2 what he knew or didn't know. The question, if he didn't
3 know it, through what source? His failure to diligently
4 pursue the ownership or his reliance upon his brother?

5 MR. ROBISON: I can address that very clearly.

6 THE COURT: Please.

7 MR. ROBISON: What we know is, Exhibit 34, Stan
8 signed the management agreement with the leasing company
9 which identifies Stan as a representative of Incline TSS.
10 Stan signed that as a representative of Incline TSS, and
11 he said, oh, I did that thinking that my father owned
12 Incline TSS when, in fact, a couple months later
13 Exhibit 14 is signed. He says, I don't know anything
14 about it even though my signature appears on the
15 signature page, and on that signature page it identifies
16 Incline TSS as the company, managed by Todd, member Todd
17 and member Todd's trust for his kids.

18 And in addition to that, the creditors' claims
19 are filed in October 2013. There is knowledge across the
20 board, constructive and actual, that Incline TSS owned
21 that house in 2013. And then they go into the
22 negotiations in 2014 for Stan's buy-in where he was
23 clearly told with regard to the B memberships and the A
24 memberships, and Stan has told this Court and this jury

1 that he disclosed everything to Wendy, and there's not
2 one word of testimony or document that refutes that.

3 So there is a serious constructive notice
4 problem on behalf of Stan, not that he's bringing a claim
5 anymore, but Wendy, because what Stan knows, according to
6 Stan's sworn testimony which is unrefuted, Wendy knew,
7 and Wendy's signature is on the ACPA.

8 They say -- and let me get back to fraudulent
9 concealment. So what is concealed when there's
10 constructive notice of the ownership of Incline TSS,
11 there's an ACPA that is signed that shows the members and
12 the manager of Incline TSS, and then there's creditors'
13 claims filed, and then in addition to that, Stan's buy-in
14 is approved by Wendy showing the composition of the
15 ownership of Incline TSS. Where is the misstatement?
16 Where is the fraudulent concealment? There is no
17 evidence of that, Your Honor.

18 And with respect to the conspiracy, Wendy has
19 to show a combination of people who have gotten together
20 and made an improper agreement. In Eikelberger vs.
21 Tolotti, Short vs. Hotel Riviera, the standards are very
22 clear in our jurisdiction. She has to show an improper
23 agreement that was entered into by people to cause her
24 damage.

1 Now, I keep coming back to damage and
2 causation. They say, oh, these people got together to
3 allow the ACPAs to be signed, to allow Todd's share of
4 the debt to be paid by the family trust. That's not a
5 fraud. That's not a conspiracy. That was an act that
6 was done and disclosed. Where is the improper agreement
7 that caused damage?

8 If I go into aiding and abetting, breach of
9 fiduciary duties or the fraud claims, there is a huge
10 hole in this case, and we brought it to their attention
11 when we objected to their 16.1 computation of damages.
12 We brought it to this Court's attention when we filed our
13 motion in limine, and the Court said, I'm going to defer
14 that and see what comes in.

15 Well, what came in was nothing, nothing on
16 damages, and that is an element, an indispensable element
17 of each claim for relief alleged by Wendy for which there
18 is no evidence, and based on that alone, there should be
19 a 50(a) directed verdict, Your Honor.

20 THE COURT: Thank you.

21 MR. LATTIN: May I, Your Honor?

22 MR. ROBISON: May I file our brief with the
23 clerk?

24 THE COURT: Yes.

1 MR. ROBISON: I will provide copies.

2 THE COURT: What is it?

3 MR. ROBISON: It's just a brief in support of
4 our 50(a) motion. We get ready for these things
5 sometimes.

6 MR. SPENCER: We haven't gotten to see it or
7 respond to it yet.

8 MR. ROBISON: You don't usually get to respond
9 after you've rested.

10 THE COURT: Hold on. Let's hear from
11 Mr. Lattin.

12 MR. LATTIN: Thank you, Your Honor. And I
13 would adopt both counsel's arguments relative to damages
14 and evidence, but particularly I would like to make a
15 motion for directed verdict on behalf of Mike Kimmel,
16 first of all, and that's Kevin Spencer -- excuse me --
17 Kevin Riley. It's not the first time I've made that
18 mistake in this case.

19 But in any regard, with regard to Mr. Kimmel,
20 Mr. Kimmel did not become a trustee -- and he's named
21 individually as well, and I would like him to be
22 dismissed on both counts -- but he did not become a
23 trustee until January of 2017. At that point in time
24 everything, all the ACPAs had been done, all of the other

1 actions which they have complained of were already
 2 completed. He came in at a point in time when basically
 3 there were lawyers involved and there was just a
 4 monitoring process, but there has been no evidence
 5 connecting him to any decision, anything, and
 6 particularly when I hear Mr. Wallace testify about breach
 7 of fiduciary duties, there was no mention of Mr. Kimmel,
 8 none. And there has been no evidence there has been any
 9 duty breached by Mr. Kimmel, and he should not be here.

10 And then with regard to the fraud claims, and I
 11 would again adopt Mr. Robison's argument, but there is
 12 nothing specifically or particularly pled against
 13 Mr. Kimmel involving any decision, let alone a fraudulent
 14 decision for which he should even be here, and he's just
 15 a gentleman that testified that, you know, he came in as
 16 a friend of the family, and there were really no
 17 decisions made on his watch, and he voted against the
 18 indemnification, so he's not even hooked into that, and
 19 submitted it to the Court for approval.

20 So with regard to Mr. Kimmel, I would ask that
 21 he be dismissed from this case individually and as a
 22 trustee.

23 With regard to Kevin Riley, not Kevin Spencer,
 24 Kevin Riley was a trustee for a very short period of

1 time, from the date of death until July 31st of 2013.

2 That was a point in time, again, when they were
3 marshaling the assets, looking at the accounting, making
4 an assessment, but no decisions were being made.

5 The testimony was that he resigned related to
6 the Bronco Billy's requirement that the trustees be
7 licensed, so at that point in time his role changed and
8 he became an accountant. He no longer had a fiduciary
9 duty after the date of resignation. So from July 31st of
10 2013 he did not even have a fiduciary duty to Wendy, so
11 he cannot be held as a matter of law responsible under a
12 fiduciary duty responsibility.

13 So I would ask that both -- and he's named
14 individually as well. So there has been no evidence from
15 Wendy regarding Kevin Riley or Mike Kimmel, and with
16 regard to the fiduciary expert who talked about breach of
17 fiduciary duties, neither name was mentioned either, but
18 particularly with Mr. Riley, he did not have a fiduciary
19 responsibility after July 31st of 2013 so as a matter of
20 law cannot be held responsible under the breach of
21 fiduciary duty.

22 So those two gentlemen should not go to the
23 jury, and I would request they be dismissed.

24 Thank you.

1 THE COURT: Thank you.

2 Will you pause for just a moment?

3 Okay, Counsel.

4 MR. SPENCER: Your Honor, it's certainly
5 natural for fiduciaries to want to minimize what they've
6 done, and the reason for that is because they are held to
7 such a high standard, and that high standard requires
8 much more of them than it does any person on the street
9 in relation to how they interact with each other.

10 Constructive notice is one of those things that
11 fiduciaries do not get the luxury of taking advantage of.
12 Again, they have to tell on themselves, and they have to
13 disclose and let their beneficiary know that X, Y or Z
14 has happened. So relying upon the beneficiary to go out
15 and do an investigation and look here and there and
16 everywhere to see or try and figure things out is not a
17 luxury that they have.

18 I see you closed your laptop, and I'm going to
19 refer to that same section that Mr. Hosmer-Henner
20 referred to, NRS 163.110. Your Honor asked about whether
21 a written dissent was made, but the section 2 is the one
22 that I point Your Honor's attention to now, and that
23 is -- and this is in relation to the Stan motion for
24 directed verdict -- "This section does not excuse a

1 cotrustee from liability for inactivity in the
2 administration of the trust nor for failure to attempt to
3 prevent a breach of trust."

4 On top of that, Your Honor has seen -- we can
5 bring it up if you need it -- on page 25 of Exhibit 9 --
6 want to bring that up? -- this is the paragraph -- TJ 31,
7 page 25, section E -- this is the paragraph that requires
8 "For any period of time where there are two or more
9 co-trustees, all of the acts of the co-trustees are to be
10 governed by the majority vote of the co-trustees."

11 And from July 2013 through January of 2017 when
12 Mr. Kimmel was added as a co-trustee, there were only
13 two, and it was Todd and Stan, and so their activity,
14 whatever it was, had to have been approved by both of
15 them, and if Stan didn't agree with something Todd did
16 or, vice-versa, Todd didn't agree with something Stan
17 did, then they needed to either write a dissent or they
18 needed to do something about it to stop it, and there's
19 no evidence that that happened.

20 And so when you look at all of that taken
21 together, and then you turn to the ACPAs, those were
22 signed by Todd and Stan as co-trustees -- and there were
23 other co-trustees on some of them -- and then each of
24 them as beneficiaries, some of them in other capacities,

1 but the ACPAs, if Stan wasn't a part of those or didn't
 2 agree with those as co-trustee, then you would expect
 3 that he would stand up and say, hey, we're not doing
 4 this, I disagree, and when there were only two of them,
 5 there wouldn't have been a majority. So during this time
 6 when there were only two trustees, the majority would be
 7 Todd and Stan, and if the action happened as the ACPAs
 8 indicate, it included both of them.

9 So to say that Stan was not involved with
 10 anything just is not accurate or, better put in this
 11 proceeding, to say that there's no evidence of Stan being
 12 involved is just not accurate because there is ample
 13 evidence both in the trust and in the ACPAs.

14 In addition, as Your Honor indicated or, I'll
 15 say, referenced, there were regular meetings, regular
 16 Monday meetings, and while Stan did not participate in
 17 all of them, he participated in a bunch of them, and
 18 decisions were made in those meetings in that group of
 19 people that participated, Stan being a part of those.

20 Stan did not object to the capital calls that
 21 were paid out of the family trust for his individual
 22 entity or his separate entity or Todd's separate
 23 entities. Of course, the family trust paid its own
 24 capital call, but what I'm talking about is where the

1 trust paid their interests' capital calls. Didn't object
2 to that.

3 They have the burden to show -- once the
4 allegation of breach of fiduciary duty is made and
5 certainly when evidence is presented that such a breach
6 occurred or could have occurred, the burden shifts to the
7 fiduciary to show that the transaction was fair, that the
8 breach did not happen.

9 They're obviously pointing -- the
10 trustees/respondents are obviously pointing the finger at
11 Wendy and saying, well, gosh, you just didn't show us.
12 That's not what she had to do. We have to just say,
13 look, this transaction was breached, show us why it
14 wasn't, and that didn't occur.

15 Another thing that didn't occur, Your Honor, is
16 Stan could have resigned. He never did resign. And if
17 he disagreed so much with what was going on, he could
18 have resigned, just like Kevin Riley did. He didn't do
19 that, he stayed in as a co-trustee, and then transactions
20 occurred that he didn't stop, inactivity, no written
21 dissent. He's on the hook for those same transactions.

22 And then, lastly, we have the petition for
23 reconveyance. There's a suit between -- by Todd against
24 Stan and then we have, before that, Stan suing Todd for

1 breaches of fiduciary duty. That could be said to have
2 been his standing up against Todd for what happened, but
3 he switched. He settled and then he switched sides, and
4 the entire trial he's been on the side of Todd, trying to
5 defeat Wendy based upon the provision that has been at
6 issue here, contingent upon a favorable outcome. And so
7 he's chosen to be in this position, and if he had not
8 done that, this trial would have been completely
9 different, and presumably he would have been sitting at
10 our table and we would have been fighting Todd and the
11 other co-trustees together, but he settled and he's taken
12 responsibility for all of the actions that happened
13 before that by doing that.

14 THE COURT: What do you mean he's taken
15 responsibility for all the actions?

16 MR. SPENCER: He basically withdrew -- you
17 heard these petitions have been withdrawn, and so now
18 he's back in the same position he would have been in had
19 he not filed that lawsuit, which is the equivalent of him
20 taking -- being a part of and taking responsibility as a
21 co-trustee for all of it.

22 And so the evidence -- the standard here is no
23 evidence, and in relation to directed verdict, there's
24 ample evidence that Stan was involved and did nothing to

1 stop it and is responsible for it.

2 I'm going to let -- I'm going to now pass the
3 podium to --

4 THE COURT: All right. So that's an argument
5 in opposition to Stan's motion?

6 MR. SPENCER: Yes.

7 THE COURT: As to Todd individually?

8 MR. CONNOT: Yes, Your Honor.

9 So as to Todd individually, you've got a
10 situation where Todd has benefited himself.

11 THE COURT: He has what?

12 MR. CONNOT: He has benefited himself. I mean,
13 he's the one who signed the ACPAs both as a trustee and
14 as a beneficiary. He's the one who's profited from these
15 transactions where he's on both sides of the transaction.
16 One side of it, he's as a fiduciary. The other side,
17 he's as an individual. He gave unsecured notes to the
18 trust for the 1.5 percent. Jackrabbit capital calls
19 enriched him in his personal position. So I mean you've
20 got that situation.

21 THE COURT: What about the elements of the
22 claims for relief, though? The question for me is not
23 whether at times in the course of trust administration he
24 was wearing a nontrustee hat, but while wearing that

1 nontrustee hat, what evidence shows that, when wearing
2 that nontrustee hat, he participated in fraud, he aided
3 and abetted, was part of a civil conspiracy?

4 MR. CONNOT: The ample evidence, Your Honor, at
5 least creates questions of fact for the jury regarding
6 manipulated documents, orphan signatures, some of these
7 documents that they stated were prepared by Maupin Cox
8 that were not, but certainly we have orphan signature
9 pages. We have situations where these documents, some of
10 them in a role as a co-trustee, but others in a role as
11 an individual. Some of these potentially predate. You
12 saw the various versions of the indemnification agreement
13 and, you know, there are at least questions of fact.

14 I know Mr. Hascheff testified to some degree
15 that he was involved, but what was Todd's involvement in
16 that? That's certainly a question of fact. You've seen
17 those issues out there where he did profit as an
18 individual on these sides and did commit fraudulent acts,
19 and I think there's sufficient basis to hold him in as an
20 individual, and as a trustee it would flow through to his
21 personal liability as well.

22 And I can segue to the -- so you've got the
23 situation where he tells them -- as an owner of
24 Incline TSS, he's got two roles there. He signs that

1 ACPA both as a trustee of the issue trust, as well as in
2 his role as a beneficiary, as well as in his role as the
3 manager of Incline TSS. You've heard the testimony even
4 from Stan that they were misled on that, but certainly
5 from Wendy. There is evidence in the record, facts that
6 a jury can make the determination on that there were
7 fraudulent representations, concealment, failure to
8 disclose the elements of fraud by Todd Jaksick in various
9 transactions, but that alone --

10 THE COURT: And are those set forth with
11 particularity in the claims for relief?

12 MR. CONNOT: I believe they're set forth, and
13 to the extent necessary, we would move to amend to
14 conform to the evidence, Your Honor. There certainly has
15 not been -- there's no motion to dismiss that somehow
16 these did not comply with Rule 9, Your Honor. There was
17 a motion to dismiss filed, but in regards to the no
18 contest clause.

19 We're at the stage of the pleadings -- we're at
20 the stage of the litigation now -- to say that those were
21 not pled with particularity, that was an issue that
22 should have been raised long ago and was not, but in any
23 event, we would move to amend to conform to the evidence
24 because there's more than ample evidence in the record,

1 both in the documents, in the deposition testimony that's
2 been taken throughout this case, but what has come
3 through the witness stand here in this courtroom over the
4 last several days.

5 And you get to the situation where it starts to
6 become intertwined. It's almost impossible to separate
7 from the individual versus what he did as a trustee.

8 And then they want to talk about the issue of
9 damages. You've got the Lake Tahoe house, which should
10 have never been in the issue trust.

11 THE COURT: Wait. Okay.

12 MR. CONNOT: You've got the use of the
13 indemnification agreements in the fashion they've been
14 used. You've got the situation where Todd is issuing
15 IOUs, not making payments to the trust at a nominal
16 interest rate, you've got the Jackrabbit capital calls
17 where they've enriched themselves that needs to come back
18 to the trust.

19 THE COURT: You've got to slow down.

20 MR. CONNOT: I'm sorry.

21 You've got the issue of the water rights. They
22 can debate what that is, but this is not the stage to
23 judge credibility or weight of evidence, I mean not at
24 the Rule 50 stage.

1 The damages that flow simply from the breach of
2 fiduciary duty. I mean, simply breaching your fiduciary
3 duty results in damages to someone separate and apart
4 from those specific elements. Todd's note to the trust,
5 the Bright Holland transaction.

6 And to say that somehow, if we switch over a
7 little bit to the statute of limitations, that
8 recordation is notice to the world, ergo everyone should
9 be on notice, the purpose of the recordation statute,
10 Your Honor, is if someone is looking at a particular
11 piece of property, if I'm looking at purchasing that
12 piece of property, if I'm looking at loaning someone
13 funds and taking that property as collateral or
14 otherwise, then, yes, I go and I look at the recorder's
15 office and see what's there. You can't utilize that to
16 say that somehow that's notice to the world to trigger
17 the statute of limitations. That's already been the
18 subject of a motion for summary judgment, the factual
19 questions. You heard the testimony from Stan as to how
20 they were misled as to what the Incline TSS is.

21 I'm sort of dumbfounded by the argument that
22 somehow, because Stan signs a rental lease agreement in
23 February of 2013 on behalf of Incline TSS, that that
24 gives him some knowledge. To me that's the absolute

1 contrary. You've got a person who thought his father
2 owned Incline TSS, even after death that his father owned
3 Incline TSS. Yes, there's an ACPA out there with an
4 orphan signature page that both Stan and Wendy say, I
5 don't recall signing it; I signed some signature page,
6 but it wasn't attached to this ACPA. So they say that
7 somehow the statute of limitations has been triggered.

8 And now as to Michael Kimmel. Michael Kimmel,
9 as you heard from Stan's testimony yesterday, he wanted
10 to squeeze Wendy out. He also made the decision -- yes,
11 he came on board in January of 2017. He made the
12 decision to join in those petitions and verify, seeking
13 to have approval of all of these ACPAs, approval of all
14 the actions and transactions of the trust from April of
15 2013 when Sam Jaksick died through the date of those
16 petitions and then again signed supplemental petitions
17 last fall in September.

18 So you've got a situation where he chose to do
19 that. He's the one who chose to put himself out there
20 and say, I'm seeking approval of all of these
21 transactions regardless of what may happen. He also
22 testified he did nothing to investigate what had happened
23 prior to him becoming a trustee.

24 They want to refer to the language of the trust

1 which says a successor trustee doesn't have to look at
2 the actions of the predecessor trustee. The only
3 successor trustee -- the only thing he was a successor
4 trustee to was perhaps Kevin Riley, and there was a huge
5 gap of time. There were two co-trustees involved, but
6 separate and apart from that, Your Honor, once again, he
7 joined seeking approval of every single transaction that
8 had occurred prior to him assuming the role as trustee.

9 THE COURT: So the act of tendering an
10 accounting prepared by the trust's CPA satisfies each of
11 the elements for each of the claims for relief that have
12 been alleged?

13 MR. CONNOT: Breach of fiduciary duty, aiding
14 and abetting breach of fiduciary duty, to the extent that
15 Todd participated in fraud, and civil conspiracy.

16 Here's the language of the petition, Your
17 Honor: "Petitioners seek" -- this is signed by Michael
18 Kimmel and Todd Jaksick as a verification under oath.
19 "Petitioners seek" -- and legal counsel couldn't do it
20 without their input.

21 THE COURT: So what would you have had him do?
22 What would Mr. Kimmel have done? He arrives in the case.
23 It's already in deep dispute. Everybody's lawyered up.
24 To conform to his fiduciary duties, what would you have

1 had him do?

2 MR. CONNOT: Either do an entire investigation
3 of what had occurred if he's going to seek the approval
4 that he sought of all of those prior transactions, resign
5 or refuse to join in the petition. I mean, he had
6 several choices, Your Honor, and despite that, despite
7 that, he chose to seek an order from this Court, and this
8 is specifically what it says, that "Such trust
9 accountings are all settled, allowed and approved as
10 filed, including all transactions reflected therein, the
11 payment of all trustees, attorney's fees and other
12 professional fees."

13 In addition, the prayer for relief to that very
14 petition says, "Request an order that the trust
15 accountings are all settled, allowed and approved as
16 filed, all of the acts and transactions of the trustees
17 is disclosed in the trust accountings, including payment
18 of all trustee fees, attorney's fees and other
19 professional fees."

20 THE COURT: It's 5 o'clock, and you're just
21 screaming. Let's all stand for a moment. You're not
22 screaming in volume, but in pace.

23 MR. CONNOT: I apologize.

24 (A brief recess was taken.)

1 THE COURT: If you'll please be mindful of your
2 pace.

3 MR. CONNOT: Absolutely, Your Honor.

4 In addition, another part of the prayer for
5 relief in that petition signed by Michael Kimmel and Todd
6 Jaksick, "An order that the agreements and consents,"
7 which are the ACPAs we're talking about, "are all
8 ratified and approved, and that the trustees are relieved
9 from any liability for actions reasonably taken or
10 reliance on such agreements and consents."

11 In addition to what I said before, the choices
12 that Michael Kimmel had, in addition he could have
13 limited it and said from January 2017 forward. He
14 didn't. I mean, he put himself in that position. And
15 likewise what I said, you know, from Stan's testimony,
16 that Michael Kimmel wanted to squeeze Wendy, and I think
17 that that's sufficient.

18 As to Kevin Riley, trustee of the BHC Trust,
19 he's been involved as part of the team, failed to
20 disclose, didn't stop Todd. He was involved in the
21 ACPAs, in fact, even as to the use of the indemnification
22 agreement, which is, I believe, Exhibit 16, and without
23 analyzing what it was. There's testimony that he wasn't
24 even aware of that indemnification agreement, yet he

1 signed off on an ACPA on July 24th of 2013 as a
2 co-trustee in that regard.

3 So I think there's more than sufficient
4 evidence as to each of the respondents to survive a
5 Rule 50 motion.

6 THE COURT: As I sit here, I'm not sure what
7 you're going to argue for damages based upon the evidence
8 presented. I really don't know. I'm trying to
9 anticipate how this case has the value that justifies its
10 energy.

11 You mentioned indemnification agreements, but
12 as you compute damages in your arguments, give me a
13 little more because I'm really puzzled by --

14 MR. CONNOT: First of all, you have the
15 Lake Tahoe transaction and the value of that and what was
16 done. You've got various versions and situations that
17 occurred there.

18 THE COURT: Excuse me for interrupting, but
19 walk me through that a little bit because we know that
20 Mr. Sam initiated the conveyance during his lifetime.
21 Whether it be for excise tax or credit protection or
22 based upon faulty advice, whatever, there was an attempt
23 to convey that real property away from the Jaksick Family
24 Trust during his lifetime, so what is the damage you'll

1 seek for that home?

2 MR. CONNOT: I think it's less about getting
3 away from that, and whether it was based on faulty advice
4 or otherwise, everyone assumed, and presumably even Sam
5 Jaksick assumed, that Incline TSS was not going to be a
6 situation where it was a Todd Jaksick 100 percent
7 interest, how that was going to be held.

8 You've got the repayment of the funds,
9 according to the indemnification agreement, come back in,
10 the Bright Holland transaction --

11 THE COURT: Wait, wait. I'm still thinking
12 about the home.

13 So the home is worth \$18 million, and you're
14 going to be asking for a third, but yet there's a life
15 estate interest, it's not really a life estate, it's a
16 HEMS beneficial interest, but not an actual cash
17 distribution. So do you stand in front of this jury and
18 say the evidence supports a request for \$6 million to
19 Wendy for the house mischief?

20 MR. CONNOT: Into her subtrust.

21 THE COURT: Okay. Even though -- okay. I
22 don't want to be a fact finder. I've got to be careful
23 how we measure this.

24 So your calculation of damages on the house,

1 you believe that's going to show that Wendy's entitled to
2 \$6 million?

3 MR. CONNOT: Probably slightly less because of
4 the outstanding indebtedness.

5 MR. SPENCER: The net would be less than that,
6 \$5 million and something, but yeah.

7 And I'm sorry to chime in, Your Honor, but we
8 consider all that to be fraudulent. There's evidence of
9 swapping out pages even on the option agreement, and so
10 setting all that aside, the lack of consideration that
11 goes back to the family trust, she would be entitled to
12 that.

13 THE COURT: Okay. What else?

14 MR. CONNOT: The indemnification agreements,
15 the notes that have been put out there, not only the
16 amounts that have been paid, but the fact of what should
17 have been a reasonable interest rate on that; the Bright
18 Holland transaction; the Bronco Billy's and the damages
19 that flow separate from that, and ultimately what they
20 did with those funds in an attempt to squeeze Wendy out.
21 I mean, you've got the testimony out there that these
22 guys were attempting to squeeze Wendy and breaching their
23 fiduciary duties at the same time by an intentional
24 malicious act.

1 Punitive damages, attorney's fees and expenses
2 that these guys have paid themselves or at least the
3 trust has paid on their behalf.

4 THE COURT: Hold on. So in settling the jury
5 instructions, I'm going to be asked to approve a punitive
6 damage instruction?

7 MR. CONNOT: We're seeking one, Your Honor.

8 THE COURT: Okay.

9 MR. CONNOT: Based on breach of fiduciary duty
10 and the fraud claims.

11 THE COURT: Okay.

12 MR. CONNOT: There's testimony in the record as
13 to the value of water rights that are out there. You
14 know, they can dispute and say what it is, but you've
15 got -- our argument is regarding the late disclosure of
16 that information, but certainly that as well is another
17 element of damages to which she would be entitled to have
18 in her subtrust, and those funds are not there, Your
19 Honor. These are funds to which she's entitled to have
20 in her subtrust, and they're not there.

21 They're actions that have been taken breaching
22 the fiduciary duties, leaving her high and dry and
23 destitute, in situations where there's testimony that she
24 was living in her car for a period of time, couldn't

1 afford life insurance. Those are damages --

2 THE COURT: Health insurance or life insurance?

3 MR. CONNOT: Health insurance. I'm sorry, I
4 misspoke.

5 So all of those categories of damages, Your
6 Honor, that a jury is entitled to award.

7 THE COURT: Okay.

8 If you can do it in five minutes I'm going to
9 have you do it, but if not, we're going to reconvene at
10 8:15 tomorrow morning.

11 MR. ROBISON: Five individually or cumulative?

12 THE COURT: I was looking at Mr. Hosmer-Henner.

13 Get started, if you would, please. We're going
14 to have to finish these arguments tomorrow morning at
15 8:15. There's a limit to how far I'm willing to go
16 tonight.

17 MR. HOSMER-HENNER: Your Honor, you first asked
18 for some analysis for what standard you're supposed to
19 use in gatekeeping, and it is a little indefinite under
20 Rule 50, but there's the Chowdhry case from the Nevada
21 Supreme Court that says when you fail as a matter of law
22 to present sufficient evidence to sustain verdicts,
23 that's when a directed verdict can be granted.

24 And what I heard from Mr. Spencer was it's not

1 up to a beneficiary to figure out what's wrong, the
2 trustees have to tell on themselves, and so the
3 beneficiary doesn't have to actually be the one to
4 establish the claim, they should be told about it, but
5 we're not at that stage of the litigation anymore.

6 We're at the stage where the jury is going to
7 be asked to make a decision, and they have to make a
8 decision based on something, a single act and whether
9 that act caused damages and what those damages were.
10 They still have not been able to pinpoint anything in
11 this case that Stan did that falls into any of their four
12 or five claims for legal relief.

13 Under the Chowdhry analysis -- I think it's
14 five -- under the Chowdhry analysis, it was a situation
15 with the intentional infliction of emotional distress,
16 and the Court held that as a matter of law, if you only
17 present evidence of this type of emotional distress, I'm
18 upset, rather than the severe emotional, that can't go to
19 the jury in terms of damages or liability.

20 And what we're saying is, Stan's role in this
21 case is so narrow and their claims against him are
22 basically he's a co-trustee so he's liable. The question
23 we've never heard answered is, for what? It can't just
24 be for trust administration. You can't sue someone for

1 trust administration and say because you're a
2 co-trustee --

3 THE COURT: If I take the evidence in the light
4 most favorable to the nonmoving party and Stan was a
5 co-trustee between July 1st of -- one of two co-trustees
6 between July 2013 and January of 2017, why can the jury
7 not -- I'm not foreshadowing any opinion I might have,
8 but can the jury impute to Stan, as one of two serving
9 trustees, all trust actions, all trust administration
10 actions that occurred?

11 MR. HOSMER-HENNER: For two reasons, Your
12 Honor. The first is, go back to this. You still have to
13 say what that action was and how that caused damages to
14 Wendy. There has to be something that occurred during
15 that time period that they have an objection to that they
16 can source the evidence damages to. For example, the
17 ACPAs, signing an ACPA doesn't lead to damage. It's the
18 action that results from that ACPA. Four of those ACPAs
19 relate to the issue trust. Stan's not involved in that.
20 So there has to be something in the family trust that
21 Stan did and joined in the exercise of power. They can't
22 point to something that Stan --

23 THE COURT: What about the Bronco Billy's
24 transaction?

1 MR. HOSMER-HENNER: Your Honor, that Bronco
2 Billy's transaction was something that Wendy signed, and
3 the money went back to the family trust. The only person
4 who's received money from that -- and there's no contrary
5 evidence on this, that anyone got money other than that.
6 The money is sitting in the family trust.

7 What they object to is the use of those funds
8 to pay Todd's indemnification agreement, but Stan
9 objected to the use of those funds to pay the
10 indemnification agreement. There's no evidence that that
11 money has gone anywhere, that she sustained any damages,
12 other than it should have been put back in the family
13 trust. Their expert said in his report that money should
14 have gone back to the family trust. It did go back to
15 the family trust, and then he testified on the stand
16 today that money did go back in the family trust and it
17 should have gone there.

18 Their only complaint is what happened
19 afterwards with Todd's indemnification agreement which
20 Stan specifically objected to, the use of those funds.
21 Further, Stan even objected to the Bronco Billy's
22 proceeds, and, again, you can object in writing and then
23 not be liable to the beneficiaries for joining the
24 exercise of the powers of the other trustees.

1 He objected in writing and he held back
2 400,000, saying I don't think this is right, I think
3 Wendy should be equalized, and I'm going to keep some
4 money out so she can satisfy her HEMS standard before we
5 resolve everything else. So that gets us again to
6 163.110(1).

7 163.110(2) is a provision that says "This
8 section does not excuse a cotrustee from liability for
9 inactivity in the administration of the trust nor for
10 failure to attempt to prevent a breach of trust."

11 There's no evidence that Stan was ever
12 inactive, no evidence that she sustained damages as a
13 result of something Stan did not do. With respect to the
14 failure to prevent a trust, Stan objected in writing and
15 tried to convince not only his other co-trustees to take
16 certain action, but tried to convince the trust advisors,
17 Kevin Riley and the other attorneys, to protect Wendy.
18 That statute provides a statutory basis to grant this --
19 basically an immunity from liability for what Stan did
20 during that period.

21 When you go through the list of damages, Your
22 Honor -- and I want to talk about why -- well, first I'm
23 going to go through the claims, and then I'm probably
24 going to finish up tomorrow morning.

1 Fraud. Didn't hear a statement that Stan
2 committed a fraud. Didn't hear why, who, what, where,
3 when, nothing. Even if he's responsible for trust
4 activity, that limits it to the breach of fiduciary duty
5 claim.

6 Oh, that's what that means?

7 THE COURT: That's what this means
8 (indicating). I should have told you before trial. When
9 I make this motion, it's like my finger is on a dial,
10 slowing the dial down, please.

11 MR. HOSMER-HENNER: No evidence of fraud.
12 There has to be some evidence, some pattern, some basis
13 of theory that says Stan misled Wendy in this way. No
14 evidence of that.

15 Aiding and abetting. There has to be some
16 point at which they can say Stan aided and abetted this
17 person. On what? There's not even that argument, let
18 alone evidence.

19 Civil conspiracy. If anything, Stan disagreed
20 with everyone else, and I'm sure the other co-trustees
21 would have liked him to agree. He disagreed, but you
22 have to have a meeting of the minds in order to do that.

23 With respect to the breach of fiduciary duty,
24 that's where NRS 163 really gets into it and his

1 existence as a trustee.

2 I want to talk about the damages that they just
3 went through because they have to attach something to go
4 back in time and show that Stan's liable as a co-trustee,
5 not just for breach of fiduciary duty, but for something
6 that caused damages to Wendy.

7 I believe Mr. Connot said simply breaching a
8 fiduciary duty results in damages. That's collapsing the
9 theory of the case, Your Honor. You have to have a
10 breach, you have to have causation, you have to have
11 damages. There's no way that this jury can award damages
12 for a simple breach of the fiduciary duty. It has to be
13 tied to something.

14 These are the categories of damages they talked
15 about. Lake Tahoe, I'll leave a lot of this to my
16 co-counsel or near-proximity counsel, but there's no
17 appraisal on what the current value of the Tahoe house
18 is. There's no evidence on what the current value of the
19 Tahoe house is. They've failed so shockingly in their
20 ability to prove up damages that they are just talking
21 about what could be a valuation of the house and turning
22 it over to that jury to make a sob story about Wendy's
23 life, saying she should get some amount of something. No
24 appraisal, but I'll leave that to them because Stan

1 wasn't involved in that transaction. He's not the
2 trustee of the issue trust.

3 The indemnification agreement. Stan never used
4 his indemnification agreement and objected to the use of
5 Todd's indemnification agreement. No evidence there.

6 Todd's IOUs to the trust. Stan didn't issue
7 IOUs, he didn't agree with the issuance of those IOUs or
8 the payment of those IOUs, and he objected in writing.

9 Water rights. No evidence of Stan having water
10 rights. No evidence of water rights transfers to or from
11 Stan, nothing.

12 The Bright Holland transaction. That's not
13 even something that's in the trust. Stan is not a
14 manager of Bright Holland, he's not involved with Bright
15 Holland. That can't be a source of damages for Stan.

16 The Bronco Billy's transaction. They said that
17 those damages were not really from the money because they
18 don't have a case to show that the money actually
19 shouldn't have been distributed the way it was. They
20 said withholding it was a way to squeeze Wendy. Again,
21 Stan objected to that squeeze. He didn't file a
22 petition, he didn't join the petition, and he certainly
23 is not liable for that transaction because he withheld
24 400,000 in funds.

1 The last thing that is tangentially related to
2 what they said are Jackrabbit capital calls. That's a
3 payment of a capital call on the 25 percent trust
4 interest. Stan objected to that in Exhibit 38, and he
5 said the only person whose capital calls should be paid
6 are Wendy's. That cannot be the basis of someone who
7 tried -- for liability of someone who tried to do the
8 right thing and objected.

9 These aren't factual issues that are in
10 dispute. There's nothing on the other side saying Stan
11 didn't object. There's nothing on the other side saying
12 that Wendy actually did suffer damages as a result of
13 what Stan said.

14 This is not an issue where you're asked to
15 resolve a disputed issue of material fact. They've
16 presented nothing on their side. They haven't impeached
17 Stan. They haven't disagreed with what I've said. They
18 haven't provided a witness to argue against what he said
19 happened. They haven't provided a witness to show that
20 our story of the case is wrong. They haven't provided
21 any sort of evidence to show that anything nefarious or
22 wrong happened as a result of what Stan did.

23 Probably I'll have to finish tomorrow, Your
24 Honor, but I will say there was one indication that what

1 Stan should have done is to resign as co-trustee of the
2 family trust. One, that would have made the situation
3 worse. Two, they are still suing Kevin Riley, who
4 resigned as co-trustee of the family trust in 2013, based
5 on actions he may or may not have taken in 2013.

6 We know who they're really upset with. We know
7 who their experts talked about. We know what their
8 claims are in this case, but they're not tied to the
9 other defendants that they've just taken a shotgun
10 approach with and thrown claims against everyone in this
11 case that are -- well, I'm getting a little too
12 controversial -- but everyone they could possibly involve
13 in this case other than the core actors, and that core
14 actor is not Stan, and in fact he objected.

15 So I actually think I can conclude real quickly
16 by saying that one of the things Mr. Spencer talked about
17 was that Stan and Todd reached a settlement agreement,
18 but Stan didn't join Todd's position. They revolved
19 their differences in an amicable way, and he seemed to
20 indicate that that's the source of liability, that
21 because they settled, all of a sudden he's responsible
22 for what Todd did. That's not legally correct, and even
23 though they may have some heartburn about Stan switching
24 tables, the fact is they are still suing him, and that

1 settlement agreement can't be the basis of any source of
2 damages, prejudice or liability for Stan because it was
3 entered into after they filed their petition and they've
4 never amended, and secondly, that's not something that
5 should have ever been presented to the jury.

6 THE COURT: I predicted arguments would take an
7 hour an hour and a half ago.

8 We will reconvene tomorrow morning at 8:15,
9 and, Counsel, you will have an opportunity to complete
10 your arguments then. The jury will come into the
11 courtroom at 8:45.

12 Ms. Reporter, I would like a transcript, but
13 only when you can. Not heroically. Not tonight. Not
14 tomorrow if you are writing for us.

15 Thank you. We will see you in the morning.

16 (Proceedings adjourned.)
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1 STATE OF NEVADA)
) ss.
2 COUNTY OF WASHOE)
3

4 I, PEGGY B. HOOGS, Certified Court Reporter in
5 and for the State of Nevada, do hereby certify:

6 That the foregoing proceedings were taken by me
7 at the time and place therein set forth; that the
8 proceedings were recorded stenographically by me and
9 thereafter transcribed via computer under my supervision;
10 that the foregoing is a full, true and correct
11 transcription of the proceedings to the best of my
12 knowledge, skill and ability.

13 I further certify that I am not a relative nor
14 an employee of any attorney or any of the parties, nor am
15 I financially or otherwise interested in this action.

16 I declare under penalty of perjury under the
17 laws of the State of Nevada that the foregoing statements
18 are true and correct.

19 Dated this 10th day of June, 2019.
20

21 /s/ Peggy B. Hoogs

22 Peggy B. Hoogs, CCR #160, RDR
23
24

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