

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'S
ANSWERING AND OPENING BRIEF**

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NRAP 26.1 DISCLOSURE

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

1. Wendy Jaksick (“Wendy”) is an individual and not an entity.
2. Spencer & Johnson, PLLC and Mark J. Connot of Fox Rothschild LLP appeared on behalf of Wendy in the District Court. Marquis Aurbach Coffing and Spencer & Johnson, PLLC represent Wendy in this Court. Mark J. Connot of Fox Rothschild LLP previously represented Wendy in this Court.

Dated this 23rd day of August, 2021.

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ANSWERING BRIEF

I. JURISDICTIONAL STATEMENT

The is an appeal from a final judgement. Wendy's Notice of Appeal was timely filed on July 13, 2020. TJA3639-3646. Jurisdiction is proper pursuant to Nevada Rule of Appellate Procedure ("NRAP") 3A(b)(1).

II. ROUTING STATEMENT

This matter is presumptively retained in the Supreme Court of Nevada because it is litigation involving trusts whose corpus are in excess of \$5,430,000. NRAP 17(b)(14). NRAP 17(a)(11) and (12) also support Supreme Court retention because of potential issues of first impression and issues of statewide interest.

III. ISSUES ON APPEAL

1) Did the District Court abuse its discretion by awarding \$300,000 to Wendy's attorneys for fees and costs?

2) Did the District Court abuse its discretion by ordering disgorgement of all trustee fees from Todd Jaksick?

3) Did the District Court abuse its discretion by requiring Todd Jaksick, Individually, to repay the Family Trust and Issue Trust 25% of all attorney fees paid to Maupin, Cox & LeGoy for its representation of Todd, as Trustee of the SSJ Issue Trust and Co-Trustee of the Samuel S. Jaksick Jr. Family Trust?

4) Did the District Court abuse its discretion by denying Michael Kimmel's and Kevin Riley's request for fees and costs?

IV. STATEMENT OF THE CASE

On August 2, 2017, Appellants Todd Jaksick (“Todd”) and Michael Kimmel (“Kimmel”), in their capacities as Co-Trustees of the Samuel S. Jaksick Jr. Family Trust (“Family Trust”), and Todd, in his capacity as Trustee of the SSJ Issue Trust (“Issue Trust”), filed *Petitions* instituting this litigation and seeking confirmation of purported accountings and all their actions administering the Family Trust and Issue Trust from April 2013 through December 31, 2016. TJA0001-0585.

Stanley Jaksick (“Stan”), as Co-Trustee of the Family Trust, refused to join the purported accountings and filed objections to the *Petitions*. WJ0019-0025.

Because Wendy would forfeit her claims if she did not assert them, she filed objections and claims concerning the Trusts. TJA0586-0614; TJA0632-0671; TJA0731-0752.

Stan filed a *Counter-Petition* also asserting claims against Todd mirroring Wendy’s claims. WJ0030-0048. Todd then filed a *Petition* asserting claims against Stan for receiving and using Family Trust funds for personal benefit. WJ0063-0089.

A *Pre-Trial Order* was entered establishing the procedure for the bifurcated trial of the legal and equitable claims, confirming the equitable claims would be tried to the bench. TJA0949-000953.

After a short 9-day continuance granted because of the last-minute production of over 23,000 records by Trustees and third parties controlled by Trustees, the jury trial began on February 14, 2019, and concluded on March 4, 2019. TJA2094-2118; WJ0302, lines 12-22. Just days before the original February 4th start of trial, Todd and Stan entered a settlement resolving their disputes and dismissed their claims against each other totally realigning the Parties and changing the trial and prejudicing their beneficiary, Wendy. WJ0194-0201; WJ0282-0284; WJ0285-0288.

The Jury concluded Todd breached his fiduciary duties but found against Wendy on her claims against the other Trustees. TJA0954-0957; TJA2094-2118.

The Court then heard the equitable claims trial and entered the *Order After Equitable Trial*. TJA2094-2118. The Court concluded “[t]his Court does not confirm the accountings,” “[t]his Court does not confirm the ACPAs or indemnification agreements.” TJA2145, lines 19 & 27 (emphasis added). The Court awarded Wendy additional equitable relief. TJA2094-2118.

The Court denied Wendy’s request to amend the judgment or to grant a new trial on the Court’s abdication of its role to the jury on the equitable claims and the award of fees to Todd. TJA3639-3638.

V. STATEMENT OF THE FACTS

Todd, Stanley, and Wendy are siblings. TJA2124. Their father Samuel Jaksick (“Sam”) amassed a substantial amount of wealth, real estate, and other property

rights. *Id.* Sam died on April 21, 2013, leaving the bulk of his Estate in the Family and Issue Trusts. TJA2125.

Following Sam's death, Todd and Stan hid the administration of the Trusts from Wendy providing her information only when it benefited them in violation of their fiduciary duty of full disclosure. Wendy was kept in the dark about the assets and the accountings "provided inadequate information," were "untimely" and "failed to provide full and fair notice to Wendy as a beneficiary." TJA2127. Additionally, some of the "estate planning documents are disorganized, internally inconsistent, and complicated by notarial mischief and neglect." TJA2125.

Over 4 years after Sam died, Todd and Kimmel, as Co-Trustees of the Family Trust, and Todd, as Trustee of the Issue Trust, filed *Petitions* instituting this litigation and seeking confirmation of: (i) trust accountings for April 2013 through December 31, 2016, (ii) a release of all liability for actions taken pursuant to purported Agreements and Consents for Proposed Actions ("ACPAs"), (iii) payments benefiting Todd based upon a purported Indemnification Agreement, and (iv) the Court's blessing of all Trustee actions since April 2013. TJA0001-0585.

Stan, as Co-Trustee of the Family Trust, refused to join the accountings and instead filed oppositions objecting to the *Petitions*. WJ0019-0021; WJ0022-0025. As a Co-Trustee with insider knowledge, Stan knew the purported accountings were deficient, the actions of the Trustees were improper, and objected to Todd's improper

use of his purported Indemnification Agreement to pay personal expenses from the Family Trust. *Id.*

Wendy was broke and desperate for money, so the Co-Trustees' goal in filing the lawsuit as confirmed by Co-Trustee Stan's testimony was to force Wendy to sell out cheap:

Yeah, I just think you know he really did not want Wendy to get anything. I mean, he was not willing as you know, as your counsel is aware, wanted to settle for a few hundred thousand dollars and get her to sign off on everything she was involved in. I don't think that's fair. ... I think Wendy is entitled to more than that, and as I don't think she's – he's looking out for the best interest of the beneficiary with that mindset.

WJ3363-3365. Stan confirmed Trustees forced Wendy to object or forfeit her claims/rights. *Id.* Todd, Stan, and their families benefited greatly with Wendy out of the picture.

All the while Stan was in Wendy's ear telling her how Todd and his family were benefiting from the Trusts at Wendy and her family's expense and encouraging Wendy to pursue her claims. WJ0019-0025; WJ0030-0048. Todd, then, filed a *Petition* asserting claims against Stan for receiving and using Family Trust funds for personal benefit and refusing to return the funds. WJ0063-0089.

Stan later filed a *Counter-Petition* mirroring Wendy's *Petition*, including claims against Todd concerning: (i) Todd's Indemnification Agreement, (ii) the

transfer of the Lake Tahoe Property, (iv) the ACPAs, (v) the Accountings, (vi) Todd's breaches of fiduciary duties, duty of impartiality, duty to fully disclose, (vii) deceptive trade practices, and (e) fraud. WJ0040-0044. Stan requested Todd be restrained from using Trust assets, Todd's removal, and damages, attorney's fees and costs. WJ0045.

Discovery was extensive because of the complexity of the Trusts and assets, the number of parties, and the years and transactions involved. TJA2100. At the outset of litigation, Todd's request to enlarge discovery was granted allowing Todd 60 interrogatories to Wendy, 3 days for Wendy's deposition, with enlargement reciprocal for all Parties. WJ0027-0028.

Throughout, Wendy was prevented from obtaining the discovery she needed to develop her case and prepare for trial. WJ4427-4763; WJ0206-0218; WJ0400, line 7-WJ0402, line 15. Trustees objected to virtually all her requests and only produced documents that benefited them, while preventing non-parties from producing subpoenaed documents. *Id.* Trustees deliberately excluded Wendy from exchange of documents subpoenaed from Trustees' personal entities until Wendy accidentally discovered what they had done. WJ0213-0214.

More than 23,000 pages of records were produced in December 2018, one month before the original start date of the jury trial and production occurred through the start of trial. WJ0302, lines 12-22; WJ0400, line 7-WJ0402, line 15.

After repeated motions to compel and discovery hearings, the Court delayed the trial just 9 days while Trustees and non-parties controlled by Trustees produced thousands of pages of records. WJ419-0420; WJ0302, lines 12-22; TJA2100. Wendy and her counsel were forced to try to do the impossible – review thousands of documents just days before trial and well after witnesses had been deposed. *Id.* Wendy again sought but was denied a sufficient continuance to review and process the massive last-minute “document dump.” *Id.*; WJ2103-2128; WJ2133; WJ002240.

Then, just days before trial, Todd and Stan settled their disputes and joined forces. WJ0194-0202. At trial, Wendy’s fiduciaries, sat together in a united front against Wendy successfully keeping their settlement hidden from the jury, except to the extent it benefited them. WJ2169, line 2-WJ2171, line 15; WJ2227, lines 12-29; WJ3068, line 22-WJ3070, line 5; WJ3215, line 13-WJ3216, line 13; WJ3312, line 21-WJ3328, line 15; WJ3362, line 13-WJ3363, line 4; WJ3464, line 1-WJ3490, line 7. The jury was presented with the picture that Todd and Stan had minor disagreements they were able to reasonably resolve, while Wendy was an unreasonable and vexatious litigant. WJ2415, lines 7-12, WJ2416, line 8-WJ2417, line 9; WJ3068, line 22-WJ3070, line 5; WJ3215, line 13-WJ3216, line 13.

Prior to the trials, the *Pre-Trial Order* was entered confirming the “equitable issues” including the sufficiency of the accountings and the validity of the

Indemnification Agreement and ACPAs and would be tried in a separate bench trial. TJA0949-000953. During the jury trial, evidence was presented concerning these documents,¹ but the Jury was repeatedly told the Court would decide these issues, not the Jury. TJA2107, Lines 20-22. Todd's counsel affirmatively told the jurors the following:

But, ladies and gentlemen, the scope, bindingness, validity and effectiveness of that document is before Judge Hardy to be determined, yet they want to keep coming back to the Indemnification Agreement like the jury has something to do with it. I'm sorry, but you don't.

WJ3940. The Jury was not presented with jury questions concerning the validity of these documents. TJA0954-0957. The Jury returned its verdict in favor of Wendy against Todd for breach of fiduciary duty as Trustee of the Issue and Family Trusts and awarded Wendy \$15,000.00 in damages. TJA0954-0957.

The Court then presided over the equitable claims trial and entered the *Order After Equitable Trial*, confirming:

- 1) "The complexity of Sam's estate warranted extraordinary disclosures, explanations, ..." TJA2100.

¹ The *Pre-Trial Order* directed the Parties "present evidence relevant to all legal issues. To the extent this evidence is relevant to equitable issues, this Court shall simultaneously consider it for this purpose."

- 2) The accountings were “untimely,” “provided inadequate information” and “failed to provide full and fair notice to Wendy as a beneficiary.” TJA2099.
- 3) “The trusts before this Court are complex because of the multiple layers of entity and fractional ownership. They are further complicated by fluid and often unknown value.” TJA2106.
- 4) “This Court generally agrees with Wendy that the accountings fail to provide adequate notice because they reveal only a portion of Sam’s complex affairs—they are mere pieces in a much larger puzzle and are ineffective when only reviewed in isolation. Instead the accounting created confusion and engendered suspicion.” TJA2106.
- 5) “Wendy’s beneficial expectancy is not apparent from the accounting or evidence of the trustees’ pre-trial explanations.” *Id.*
- 6) “Stan and Wendy had cause to seek answers to questions, created by documents anomalies, inadequate disclosures, and transactions inuring to Todd’s benefit.” TJA2098.
- 7) There was “only marginal evidence in the record that the trustees invested their own personal efforts to satisfy Wendy’s concerns.” *Id.*
- 8) “This dispute was exacerbated by inadequate information and self-interested perspectives.” *Id.*

- 9) “With more effortful disclosures, neutral access to information, and a little sibling patience, they might have worked through the messiness of Sam’s estate to reach a non-litigation resolution.” *Id.*
- 10) “Wendy’s litigation zeal does not extinguish her probable cause to seek answers and formulate claims based upon the information she had at the time – the same information that led to Stan’s allegations against Todd.” TJA2099.
- 11) “Despite the settlement, this Court is aware of the allegations made against Todd in his deposition and trial testimony. The settlement does not extinguish Stan’s pleading allegations and testimony...”. *Id.*
- 12) “Todd particularly grew weary of Wendy, which affected his neutral trusteeship, as illustrated by his hope to satisfy Wendy’s beneficial interest at a discount that inured to his benefit.” TJA2099.
- 13) “Todd breached his fiduciary duties to Wendy.” TJA2101.
- 14) “The jury agreed Todd breached his fiduciary duties. Further, based upon the information she possessed, she had probably cause to seek invalidation of transfers and other act of trust administration.” TJA2108.

In the *Order After Equitable Trial*, the Court (i) refused to approve the accountings, ACPAs and Indemnification Agreement, (ii) awarded Wendy equitable

relief including the disgorgement of Todd Trustees' fees, requiring Todd to reimburse 25% of the attorney's fees paid by the Trusts, and awarding \$300,000.00 to Wendy's attorneys. *Id.*

The Court entered the *Judgment* after the equitable trial, confirming it decided to neither confirm nor deny the ACPAs and Indemnification Agreement. TJA2220-2254.

VI. SUMMARY OF THE ARGUMENT

“[I]t will not be presumed that the district court erred.” *Schwartz v. Estate of Greenspun*, 881 P.2d 638, 644 (1994). The Trustees bear the affirmative burden of proving that the District Court abused its discretion. *See, e.g., Weber v. State*, 119 P.3d 107, 119 (2005) (“[A]n appellant carries the heavy burden of showing that the court abused [its] discretion.”); *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 194 P.3d 1214, 1219 (2008) (“[P]rejudice must be established in order to reverse a district court judgment; it is not presumed.”).

Trustees cannot satisfy their difficult burden. The award of \$300,000 to Wendy's counsel for attorneys' fees was based on the Court's consideration and analysis of the *Brunzell* factors and was confirmed by the Court to be inseparable from the Court's entire analysis in resolving the equitable disputes. TJA2094-2118; TJA3642-3643. After Wendy's counsel incurred \$1,726,072.74 in attorneys' fees

and costs through June 30, 2019, the award of \$300,000.00 was not an abuse of discretion. TJA1465, lines 6-7.

The Jury found Todd breached his fiduciary duties. TJA2101; TJA2108; TJA0954-0957. The Court refused to approve the accountings, ACPAs and Indemnification Agreement that were central to the Trustees' *Petitions* and administration of the Trusts and that formed the basis of Wendy's and Stan's claims. TJA2108; TJA2137, line 29-TJA2138, line 1. The Court's equitable remedies denying Todd trustee compensation and denying his ability to utilize trust funds to defend his breaches were appropriate and within the Court's power and discretion.

The denial of fees and costs to Kimmel and Riley was appropriate and not an abuse of discretion because, as the Court confirmed Kimmel and Riley failed to establish they were entitled to such awards. TJA3641-3642; TJA2101. All their fees and costs were paid by the Family Trust, and they could not segregate any fees and costs from those incurred in common representation of the aligned Trustees. TJA2142, lines 24-25; TJA3641-3642.

VII. LEGAL ARGUMENT

A. AWARD OF \$300,000 NOT ABUSE OF DISCRETION.

1. Standard of review.

Nevada's Appellate Courts generally review an award of attorney's fees for an abuse of discretion. *See, e.g., Thomas v. City of North Las Vegas*, 127 P.3d 1057,

1063 (2006); *Frazier v. Drake*, 357 P.3d 365, 372 (Nev. Ct. App. 2015). “In Nevada, ‘the method upon which a reasonable fee is determined is subject to the discretion of the court,’ which ‘is tempered only by reason and fairness.’” *Shuette v. Beazer Homes Holdings Corp.*, 124 P.3d 530, 548-49 (2005).

2. Authority – Abuse of Discretion.

“An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.” *Jackson v. State*, 17 P.3d 998, 1000 (2001); *see also MB Am. Inc. v. Alaska Pac. Leasing*, 367 P.3d 1286, 1292 (2016) (“An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law.”); *State v. Hambright*, 388 P.3d 613, 619 (Kan. Ct. App. 2017) (“A judicial action constitutes an abuse of discretion if the action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact.”) (emphasis added); *State v. Montiel*, 122 P.3d 571, 575 (Utah 2005) (“A failure to exercise discretion is generally encompassed within the meaning of abuse of discretion.”).

3. Argument.

The *Order After Equitable Trial* details the history and complexity of the two-year litigation:

**The file materials compose more than 17,000 pages. ...
[P]arties produced tens of thousands of documents ...
marked 677 exhibits for the two trials, ... The**

**substantive papers ... filed since the jury's verdict
compose more than 4,000 pages.**

TJA2095-2096. It also confirms Sam's Estate "is exceedingly complex because he used tens of different corporate entities as holding companies for his wealth," and "partnered with non-family business entities." TJA2124. And the "complexity of Sam's Estate warranted extraordinary disclosures, explanations, and compliance with discovery rules," and that "[t]he trusts before this Court are complex because of the multiple layers of entity and fractional ownership...[t]hey are further complicated by fluid and often unknown values. TJA2100, lines 12-13; TJA2106, lines 9-11.

The *Order After Equitable Trial* details the financial and documentary complexity involved and substantial efforts expended fighting to obtain discovery:

**[G]iven the financial and documentary complexity,
discovery delays and disputes ... untimely accountings,
incomplete discovery, and amounts in controversy...**

TJA2113.

**There were significant discovery disputes... This
Court also ordered the production of disputed
discovery. Discovery continued to the very eve of trial
and Wendy was still attempting to discern her
beneficial interests when trial began.**

TJA2100.

Wendy detailed grounds supporting her attorney's fees and various reasons her attorney's fees were so substantial in *Wendy Jaksick's Brief of Opening*

Arguments in the Equitable Claims Trial (“Wendy’s Opening Brief”). TJA1464–1465. The *Order After Equitable Trial* confirms the litigation involved “tens of millions in controversy,” “at least seven lawyers zealously advocating for their clients,” and “several million dollars of fees.” TJA2098; TJA2100, lines 13-17.

Finally, the *Order After Equitable Trial* confirms Todd breached his fiduciary duties to Wendy. TJA2101. Considering the above, the Court addressed attorney’s fees beginning on page 16 of the *Order After Equitable Trial*:

This Court’s discretionary resolution of the fees requests is bound by all facts of record and influenced by the entirety of the pre-trial, legal, and equitable proceedings (including the settlement agreement between Todd and Stan) and uncertainties created by notarial malfeasance.

TJA2110.

The Court acknowledged the “decision regarding Wendy and Todd’s fees (both as trustee and individually) are more complicated,” and “[t]here are competing facts and legal principals, which this Court analyzes in the aggregate and not in isolation.” *Id.* Following 6 pages of analysis, the Court confirmed its consideration of the *Brunzell* factors finding the fees sought by Todd individually were reasonable considering his “experienced and effective attorneys, duration and scope of litigation, and the result obtained.” TJA2114 (emphasis added). “For these

reasons” the Court also awarded \$300,000 to Wendy’s attorneys for prevailing against Todd. TJA2114, line 23; TJA21145.

The Court subsequently entered the *Order Resolving Submitted Matters* denying and detailing the basis for its denial of Trustees’ request to remove the \$300,000 awarded to Wendy’s attorneys based on the same arguments Trustees now make on appeal. TJA3642-3643.

District courts may take “almost any sensible approach or apply any logical method to calculate ‘a reasonable fee’ to award as long as the Court weighs the *Brunzell* factors.” *O’Connell v. Wynn Las Vegas, LLC*, 429 P.3d 664, 672 (Nev. Ct. App. 2018) (citing *Shuette*, 121 Nev. at 548-549). “In this manner, whichever method the court ultimately uses, the result will prove reasonable as long as the court provides sufficient reasoning and findings in support of its ultimate determination.” *Id.* at 671.

A court may determine and award a “reasonable fee” without considering or reviewing the contract for services or billing records. *O’Connell*, 134 Nev. at 670 (“Nevada law does not require billing records with every attorney fees request.”); *Cooke v. Gove*, 114 P.2d 87, 88 (1941) (upholding fees award based on “reasonable value” of attorney’s services even though the case was taken on a contingency basis with no formal agreement). In the *Cooke v. Gove*, the Court noted the record showed the reasonable fee was based on the trial court’s evaluation of “the

reasonable value of plaintiff's services from all the facts and circumstances" after the court considered how the plaintiff's "work, thought and skill contributed" to the successful outcome. *Id.* In determining a reasonable fee, the "district courts can look at the facts before them, such as what occurred at trial and the record a party produced in litigation the matter." *O'Connell*, 429 P.3d at 672.

A review of the *Order After Equitable Trial*, which was incorporated into the *Judgment* and the *Order Resolving Submitted Matters*, confirms the Court considered and applied the *Brunzell* factors in making the \$300,000.00 award. The Court's *Order After Equitable Trial* states the "Court elects to make general findings, which are substantially supported by the evidence of record," because "[i]t cannot resolve the arguments in minutia." TJA2096. It further confirmed the "Court's discretionary resolution of the fees requests is bound by all facts of record and influenced by the entirety of the pre-trial, legal and equitable proceedings (including the settlement agreement between Todd and Stan) and uncertainties created by notarial malfeasance." TJA2110 (emphasis added). Finally, the Court states, "[t]he attorneys' fees provisions in this order reflect the entirety of this Court's intentions regarding fees." TJA2118.

The Court's analysis and support detailed in the *Order After Equitable Trial* resulting in its conclusion the fees sought by Todd individually were reasonable considering his "experienced and effective attorneys, duration and scope of

litigation, and the result obtained,” is the same detail and analysis for its \$300,000.00 award to Wendy’s attorneys. The Court has extensive first-hand knowledge of the qualities, abilities and skill of Wendy’s attorneys having reviewed the many pleadings and extensive briefing and presided over numerous hearings and the two-week jury trial. This was a hard-fought case. The Court’s *Order After Equitable Trial* confirms the complexity of the subject of the litigation and its voluminous documentation, the difficulty and intricacy of the work, time and skill required of Wendy’s attorneys preparing for and trying Wendy’s claims and, finally, confirms that Wendy’s attorneys were successful in prevailing in their claim against Todd for breach of fiduciary duties.

The award of attorney’s fees to Wendy’s counsel, who had incurred \$1,365,024.00 in fees and expenses in the amount of \$361,048.74 through June 30, 2019, is supported and inseparable from the Court’s entire analysis of the case and the *Brunzell* factors and was not an abuse of discretion. TJA3642-3643; TJA1465, lines 6-7.

The award of attorney’s fees to Wendy’s counsel is supported and inseparable from the Court’s entire analysis of the case and the *Brunzell* factors. TJA3642-3643. Accordingly, the award to Wendy’s counsel, who had incurred \$1,365,024.00 in attorney’s fees and expenses and costs in the amount of

\$361,048.74 through June 30, 2019, was not an abuse of discretion. TJA1465, lines 6-7.

B. (1) THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ORDERING TODD TO DISGORGE TRUSTEE FEES.

(2) THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REQUIRING TODD, INDIVIDUALLY, TO REPAY THE FAMILY AND ISSUE TRUSTS 25% OF ATTORNEY FEES PAID TO MAUPIN, COX & LEGOY FOR ITS REPRESENTATION OF TODD, AS TRUSTEE OF THE ISSUE TRUST AND FAMILY TRUSTS.

1. Standard of review.

This Court reviews a district court's decision granting or denying an equitable remedy for an abuse of discretion. *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 245 P.3d 535, 538–39 (2010) (citing *Douglas Disposal Inc. v. Wee Haul, LLC.*, 170 P.3d 508, 512 (2007)). “An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.” *Jackson*, 17 P.3d at 1000.

2. Argument.

Todd argues awarding equitable relief against him violated his constitutional rights because the Court disregarded the *Jury Verdict* alleging it was punitive and resembles an award of damages. He also argues the equitable remedies ordered

against him cannot be damages because the award of consequential damages was the jury's responsibility and the jury awarded \$15,000.

The Court made clear in its *Pre-Trial Order* that this lawsuit involved a trial of legal claims to the jury and a trial of equitable claims to the bench. TJA0949-0953. The Court based this procedure on authority confirming in Nevada, the constitutional right to a jury trial does not extend to equitable matters. TJA0951, lines 3-7 (citing *Harom v. Tanner Motor Tours*, 377 P.2d 622, 630 (1963); *Musgrave v. Casey*, 235 P.2d 729, 731 (1951) ("It is elemental that in a suit in equity the judgment or decree must be based upon finding of the court rather than a jury verdict.")). The *Pre-Trial Order* specifically confirmed the "equitable issues," would be tried to the bench during the trial of the equitable claims. TJA0952, line 18-TJA0953, line 16. Todd did not object to the procedure outlined in *Pre-Trial Order* and did not object to the procedure during trial.

At the conclusion of the trial, the Jury was provided a Verdict form including only the following claims:

- a) Breach of Fiduciary Duty,
- b) Civil Conspiracy and Aiding and Abetting,
- c) Aiding and Abetting Breach of Fiduciary Duty, and
- d) Fraud.

TJA0955-0956. If the Jury found for Wendy on any of the above claims, the Verdict included a question for awarding Wendy damages. TJA0957. The Jury was not asked and did not consider the claims for equitable relief. Nevada authority is clear, that granting and fashioning appropriate equitable relief is exclusively for the Court. *Harom*, 377 P.2d at 630; *Musgrave*, 235 P.2d at 731.

Equitable remedies are not damages (or punitive damages). In the context of trusts, the purpose of equitable remedies is to restore the trust to what it would have been had the breach or mismanagement not occurred. RESTATEMENT (THIRD) OF TRUSTS § 100 (2012). “A court of equity, having jurisdiction over the administration of trust, will give the beneficiaries of a trust such remedies as are necessary for the protection of their interests.” *Scott on Trusts* (Fourth Edition), §199 (emphasis added). The focus of equitable remedies is the protection and restoration of the trust and the beneficiaries’ interest in the trust, not the recovery of compensation by beneficiaries in their personal capacities. In fact, the Court may grant equitable relief even in cases where there are no damages. *Barnes v. Sabron*, 10 Nev. 217 (1875) (where, in an equitable action, a clear violation by a defendant of plaintiff’s right is shown, to be entitled to equitable relief, a plaintiff need not show he suffered actual damage); *Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999); *see also* RESTATEMENT (THIRD) OF AGENCY § 801 cmt. d (2006).

NRS 153.031 permits the court to redress a breach of trust using its “full equitable powers.” *See Diotallevi v. Sierra Dev. Co.*, 591 P.2d 270, 272 (1979). The Supreme Court has expressly stated District Courts have full discretion to fashion and grant equitable remedies, and courts’ decisions granting, denying and fashioning equitable remedies will only be set aside on a finding of abuse of discretion. *See Am. Sterling Bank*, 245 P.3d at 538.

Nevada specifically provides the following equitable remedies when a breach is found, “the court may, in its discretion, order any or all of the following additional relief if the court determines such additional relief is appropriate to redress or avoid an injustice: (i) order a reduction in the trustee’s compensation[, and] (ii) order the trustee to pay to the petitioner or any other party all reasonable costs incurred by the party to adjudicate the affairs of the trust pursuant to this section, including, without limitation, reasonable attorney’s fees.” NRS 153.031(3). The court may hold the trustee personally liable for the payment of such costs when the trustee was negligent in the performance of or breached his or her fiduciary duties. NRS 153.031(3)(b).

After Todd initiated this litigation to attempt to squirm out of liability for his bad acts and self-serving administration of the Trusts and to confirm the enforceability of the Purported Accountings, the ACPAs, the Indemnification Agreement, Wendy objected and sought to enforce her rights as a beneficiary to remedy his breaches. The jury agreed Todd had breached his fiduciary duties.

TJA0954-000957; TJA2108, lines 16-17. The Court refused to confirm Todd's accountings, the ACPAs and Indemnification Agreement. TJA2117.

Since the Court's role is to protect the Trusts and all beneficiaries when breach of fiduciary duty and mismanagement occurs, the Court is not constrained by the amount of the jury's award for Todd's breaches, *i.e.*, the legal award. It has total discretion to grant and fashion equitable remedies necessary to restore the Trusts to their condition prior to the breaches of fiduciary duty, which is exactly what the Court did.

a. Disgorgement of Fees Appropriate and Warranted.

Todd should not have received compensation for his failure to properly administer the Trusts. The jury found Todd breached his fiduciary duties in administering the Trusts. TJA0954-0957. The Court has the equitable power to disgorge all his trustee fees to prevent him from being rewarded for his mismanagement. The disgorgement is not an award of damages to Wendy or an additional penalty for his breaches, but to avoid compensating him for failing to do his job properly. *See* RESTATEMENT (THIRD) OF TRUSTS §243.

Todd argues this Court should remove its ability to protect the Trusts when a beneficiary did not recover "enough" consequential damages. In other words, Todd wants to be allowed to breach his Trust and get paid for it, which is nonsense.

The Court is empowered to protect the trusts from such abuse through its equitable remedies.

b. Requiring Todd to Reimburse the Trusts 25% of Attorney's Fees is Appropriate and Warranted.

The *Order After Equitable Trial* provides, “The trusts shall pay 100% of the fees incurred by their attorneys in representation of the trustees. However, Todd shall reimburse the trusts from his personal resources for 25% of the amount paid because the jury determined he breached his fiduciary duties.” TJA2114, lines 24-25. “All fees ordered shall be treated as general trust administration expenses and not allocated to any beneficiary’s distributive share.” TJA2115, lines 21-22. “The attorneys’ fees provisions in this order reflect the entirety of this Court’s intentions regarding fees.”

The Trusts spent approximately \$2 million in attorney’s fees defending the Trustees from their non-approvable accountings and other bogus documents; all inferences are against the fiduciaries, not the beneficiaries. The very fact the Trustees could not verify their own accountings, relied upon their accountant that could not vouch for the information he was given and then expected the Court to bless their ill-conceived accountings, i.e., their inability to disclose all information that materially affected their beneficiaries’ interests, alone is a breach of fiduciary duty. WJ5203, line 4-WJ5204, line 16; WJ5212, line 13-WJ5216. The documents that

were supposed to exonerate the Trustees and justify Todd stealing the Family Trust assets via a bogus Indemnity Agreement were also not approvable and indicate further breaches of trust. Add the Jury's finding of breach of fiduciary duty by Todd, and the Trusts should not bear the burden of the significant legal fees and costs incurred to defend Todd. *See, e.g., Estate of Bowlds*, 102 P.3d 593, 600 (2004) (An attorney's services must benefit the estate to justify compensation from estate assets); *see also Sierra v. Williamson*, 784 F. Supp. 2d 774, 777 (W.D. Ky. 2011) (“[W]hether a trustee is entitled to attorney's fees from the trust corpus is not a matter of right, but is warranted where the trustees were not at fault in the litigation and the amount of attorney expenses was reasonable”); *see also Jacob v. Davis*, 738 A.2d 904, 921 (Md. App.1999) (“The general rule is that a trustee is entitled to attorneys' fees paid from the trust if it successfully defends an action brought by the beneficiary.”).

It would be inequitable for the Trusts to pay Todd's attorneys for defending his breaches of fiduciary duties. The Court was more than justified in fashioning its equitable remedy to avoid such an unjust result.

C. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING MICHAEL KIMMEL'S AND KEVIN RILEY'S REQUEST FOR FEES AND COSTS.

1. Standard of review.

Wendy incorporates the “**Standard of Review**” Section VII(B)(1), *supra*, as

if fully stated here.

2. **Argument.**

a. **Attorney's Fees Addressed in Order After Equitable Trial and the Order Resolving Submitted Matters**

In response to the *Order After Equitable Trial*, Kimmel and Riley both filed *Motions for Attorneys' Fees and Costs* and the Court issued its *Order Resolving Submitted Matters*, ordering the following:

[Kimmel and Riley] tacitly concede they cannot segregate their fees and costs from the fees and costs incurred in representation of all aligned trustees. ... Their proposed allocation does not accommodate the consistent and overwhelming observation this Court made throughout this proceeding: Mr. Lattin (and other attorneys associated with Mr. Lattin ...) provided a single, common representation for similarly situated trustees. But Todd is at the core of the representation and Todd's fees and costs would be the same or only imperceptibly different if Riley and Kimmel were not parties. ... They have failed to "clearly distinguish and articulate costs associated with their defense that do not overlap into the costs associated with Todd's defense."

TJA3641-3642.

b. **Costs Under NRS 18.020.**

Kimmel and Riley argue each is a prevailing party against Wendy, so the Court must award them costs under NRS 18.020, but they ignore that any award of costs under that statute is subject to the Court's discretion in determining

whether such amounts are reasonable. *Schwartz*, 881 P.2d at 643 (“The district court retains discretion, however, in determining the reasonableness of the amounts and the items of cost to be awarded.”). To support their separate requests for costs, Kimmel and Riley relied on *Petitioners’ Verified Memorandum of Costs and Disbursements* (“Petitioners’ Memo of Costs”). TJA2293-2409. *Petitioners’ Memo of Costs* was filed by Todd Jaksick, in both Trustee capacities, Kimmel, Individually and as Co-Trustee of the Family Trust, and Kevin Riley, Individually, as former Trustee of the Family Trust, and Trustee of the Wendy’s BHC Trust and, apparently, includes all costs incurred in the litigation by all of them, the SSJ’s Issue Trust, the Family Trust, and the BHC Trust. *Id.*

Instead of segregating the amount each incurred in defending against Wendy’s claims, both Kimmel and Riley divided the total costs included in *Petitioners’ Memo of Costs* by 4 and argued each was entitled 1/4th without any support. *Id.* Neither Kimmel nor Riley distinguished fees or costs incurred by them Individually from each of them as Trustee and former Trustee, respectively, and Todd did not differentiate and segregate his fees and costs in his Trustee capacities. The Court recognized these deficiencies in the *Order Denying Wendy Jaksick’s Costs*, stating:

The problem this Court anticipates is that Messrs. Kimmel and Riley will be unable to clearly distinguish and articulate costs associated with their defense that

do not overlap into the costs associated with Todd's defense. Thus, it is unlikely the Court will order Wendy to pay their costs.

WJ4290. Since neither Kimmel, Riley, nor Todd segregated fees and costs between their capacities, it was impossible for the Court to determine whether the amounts sought were reasonable and necessary as confirmed in the Court's *Order Resolving Submitted Matters*. TJA3641-3642. Neither Kimmel nor Riley (nor Todd) is entitled to an award of costs under NRS 18.020.

c. Fees Under NRS 18.010(2)(b).

Kimmel and Riley argue for an award of attorney's fees under NRS 18.010(2)(b). Under NRS 18.010(2)(b), the Court may award attorney's fees only if the Court finds Wendy's claims or defenses "were brought or maintained without reasonable ground or to harass the prevailing party." Their arguments are laughable because it is fundamental that the Co-Trustees sued Wendy to confirm their non-approvable accountings and their mismanagement of the Trusts. TJA01-0585. In other words, Kimmel could not even support the lawsuit he filed, and Riley did not join in at all until it came time to request fees. Kimmel argues he was not a Co-Trustee until January 2017, and Wendy's claims are before he accepted the office of Trustee. Also, fundamentally, Kimmel vouched for all actions of his predecessors by joining the original *Petitions* adopting the accountings and suing Wendy. Riley participated in them.

The Family Trust required all acts of the Co-Trustees to be governing by majority vote. TJA0244. Accordingly, Riley while he was Co-Trustee and Kimmel, while he was Co-Trustee, would have been involved of the Trust administration, either actively or by acquiesce, especially if Stan abstained, objected, or was not included. Todd testified the administration of the Family Trust done in consultation and reliance on the “Trust Team,” which included the attorneys, accountant, and Co-Trustees. WJ2289, line 17-WJ2290, line 3; WJ5118, line 7-WJ5119, line 10; WJ5183, lines 10-15. Kimmel is also an attorney, so he knows better. The Co-Trustees represented to Wendy that Riley, during his tenure, and Kimmel were involved in the administration of the Family Trust, including the preparation of the accountings and the lack of disclosure they represent. Riley was part of the “Trust Team” and prepared the accountings. Kimmel had an affirmative obligation to verify the predecessor administration was done properly, which he either did not do or supported. Riley and Kimmel during their tenures also had a fiduciary duty to be involved an ensure the Family Trust was being administered properly.

Riley was supposedly in charge of determining application of the Indemnity Agreement. Kimmel was Co-Trustee when interpretation and application of Todd’s Indemnification Agreement came to a head, causing Stan to include those claims in this lawsuit. This was a major issue for the Family Trust that could

bankrupt it, and substantially affected Wendy's interest. Stan confirmed the huge impact the Indemnification Agreement had on the Estate Plan saying, "Bob thank you for your efforts in trying to get us to resolve these disputes, but Todd's indemnification agreement has a far bigger impact on the Trust than any Lawsuit or attorney fees ever will." WJ4421.

Ultimately, the jury returned a verdict confirming that Todd breached his fiduciary duties and awarded Wendy damages and the Court awarded equitable relief, and entered the *Judgment* disgorging Todd's Trustees' fees, requiring him to reimburse attorneys' fees to the SSJ Issue Trust and to pay \$300,000.00 to Wendy's attorneys. Also, in the *Order After Equitable Trial*, the Court confirmed that Wendy's claims against Todd as Trustee "were brought in good faith" as "countenanced, in large part, by the questions raised by the accountings, Stan's separate allegations against Todd, document anomalies, and Todd's disproportionate benefit from Sam's business and trust affairs." TJA2112, line 4-10.

Based on the above, Wendy had plenty of reason beyond being statutorily required to avoid waiving her claims and they were not to harass a prevailing party. Riley and Kimmel as a Co-Trustee was responsible for the proper administration of the Trust, was responsible to ensure that other Co-Trustees did not breach their fiduciary duties and was responsible to pursue any of the Co-Trustees for any

breaches of fiduciary duty. Instead, Kimmel supported Co-Trustee Todd's efforts to confirm actions he took, as Co-Trustee, that Stan would not vouch for, objected to and over which he countersued. Stan also aggressively encouraged Wendy to file her claims because of the issues with the accountings until he betrayed her by settling with Todd and "climbed back in bed with them" vouching for their breaches of trust a week before trial began. Egregious conduct by all the Co-Trustees, yet, Riley and Kimmel try to pin the expense of the litigation started by the Trustees on Wendy. Unconscionable! Riley and Kimmel are not entitled to an award of costs under 18.010(2)(b).

d. Fees Under NRCP 68.

Riley and Kimmel argue, in the alternative, that each is entitled to recover reasonable fees and costs under NRCP 68. The Court may award attorney's fees and costs under NRCP 68 to a party who makes an offer of judgment and when the offeree rejects the offer and the judgment ultimately obtained by the offeree is less favorable than the amount offered. NRCP 68 is a mechanism to encourage settlement however it is not to be used to "force plaintiffs to unfairly forego legitimate claims." *See Beattie v. Thomas*, 668 P.2d 268, 274 (Nev. 1983), citing *Armstrong v. Riggi*, 549 P.2d 753 (1976). An offer of judgment must be an authentic attempt to settle a dispute and is not automatically conferred. TJA2111,

lines 13-14. The District Court applied and analyzed the NRCP 68 argument in the *Order After Equitable Trial*:

[O]ffers that are appropriate in time and amount will cause the non-offering party to become realistic and engage in genuine risk/benefit analyses. To be an effective mechanism to resolve disputes before trial, they should be in an amount to non-offering party cannot decline in good faith. On the other side, offering parties sometimes make time and amount-inappropriate offers *they expect to be rejected*. These offers do not facilitate settlement-they are strategic devices to shift the risk of fees by offering illusory consideration to end litigation.

TJA2111-02112.

Riley and Kimmel's offer of judgment was for \$500.00. TJA2635-002637. This fails the "legitimate offer" element of the statute because, not only was it silly, but it would also, arguably, not be legitimate in an eviction proceeding, much less this multi-million-dollar Trust dispute. Based on the issues with the accountings and failure to disclose information, Kimmel, as an attorney, knew, or should have known, Wendy would incur fees greater than this amount just to file an answer to the *Petition* and seek additional documents and information to protect her rights. Wendy had no enticement to accept such a ridiculous offer, which illegitimizes it. Riley and Kimmel knew Wendy would not accept because her objection to the accountings alone cost more than their offers combined.

Riley's and Kimmel's offers of judgment were made on April 30, 2018 well

before the Parties exchanged discovery responses and took depositions and, therefore, were not reasonable and was not made in good faith as to timing or amount.² Worse, Wendy did not receive a substantial amount of discovery until Trustees and other nonparties controlled by Trustees were forced to produce approximately 23,000 pages just weeks before trial. WJ0302, lines 12-22; WJ0400, line 7-WJ0402, line 15; WJ0404, line 24. The offer of judgment was designed solely to attempt to force Wendy to forego legitimate claims, and a fiduciary should not play games with his beneficiary or force her to make such decisions. Wendy's decision to reject the offer was not grossly unreasonable or in bad faith. Besides Riley and Kimmel did not prove up or segregate their fees and expenses, so neither is entitled to them under NRCP 68 or any other law.

e. Fees and Costs Under NRS 7.085.

Riley and Kimmel each argue, in the alternative, he is entitled to recover reasonable fees and costs from Wendy's attorneys under NRS 7.085. Under NRS 7.085, the Court may award attorney's fees from Wendy's attorneys only if the Court finds they "failed, maintained or defended a civil action or proceeding" . . . "and such action or defense is not well-grounded in fact or is not warranted by

² If Kimmel's Offer of Judgment was served in Kimmel's Individual and Co-Trustee capacities, it is even more unreasonable as to amount and Wendy's decision to reject it is even more reasonable.

existing law or by an argument for changing the existing law that is made in good faith; or unreasonably and vexatiously extended a civil action or proceeding ...”. Wendy’s initial pleadings were defensive, and her affirmative claims were well grounded in law based upon all the reasons stated above related to the accountings that were not approvable and were not approved, the other bogus documents sought to be enforced, the breaches of trust and failures within the Family Trust administration and the fact that Riley participated in the mismanagement during the accounting periods and Kimmel vouched for Todd’s breaches of Trust.

Also, on October 23, 2018, Kimmel filed and sought a summary judgment on Wendy’s claims against him as Co-Trustee and in his Individual capacity. On January 14, 2019, the Court denied Kimmel’s summary judgment on Wendy’s claims “arising from alleged accounting deficiencies and related breaches of fiduciary duty, including conspiracy to commit such breaches, as to Mr. Kimmel in both his capacities as trustee and individually.” WJ0131. The authority included in the Court’s *Order* confirmed Kimmel had personal liability for his alleged failures as a Co-Trustee and was a proper party in that capacity based on Wendy’s claims against him. *Id.*

Both Riley and Kimmel argue that Wendy did not verify her Counter-Petition against Kimmel verifying her allegation against him. Wendy filed a *Notice of Errata* on December 26, 2018, which including a Verification of Wendy

verifying her *First Amended Counter-Petition*. WJ0111-0114. Kimmel also argues Wendy could not testify during her deposition why Kimmel was named in the lawsuit in his Individual capacity. Wendy is not a lawyer and is not expected to fully understand the legal differences in capacities and know and understand that a Trustee can be held personally liable for breaches of fiduciary duty.

Wendy and her counsel had a reasonable basis to believe Kimmel and Riley could and would be found liable for the breaches of fiduciary duty that he participated in and/or that he allowed to occur during his time as Co-Trustee of the Family Trust, aiding and abetting breach of fiduciary duties, award damages and equitable relief against Riley and Kimmel in his Individual capacity. They are not entitled to an award of costs under NRS 7.085.

VIII. CONCLUSION

This Court should deny all relief sought by Appellants for all of the aforementioned reasons.

OPENING BRIEF

I. JURISDICTIONAL STATEMENT

Wendy incorporates the Jurisdiction Statement included in Section I of her *Answering Brief*.

II. ROUTING STATEMENT

Wendy Incorporates the *Routing Statement* included in Section II of her *Answering Brief*.

III. ISSUES ON CROSS-APPEAL

1) Did the District Court err by deferring to the jury its findings and rulings in the Equitable Phase of the trial concerning the insufficiency of the Accountings and the invalidity of the purported ACPAs and Indemnification Agreement after (i) it issued the Pretrial Order notifying the Parties the trial would be bifurcated between legal (jury) and equitable (bench) issues, (ii) after the jury was instructed these determinations were not within the scope of its review and determination causing (iii) no jury questions about the documents to be included in the jury charge?

2) Did the District Court abuse its discretion: (i) by refusing to read and review the *Settlement Agreement* during the jury trial to determine its relevance, (ii) by denying the admission of the *Settlement Agreement* into evidence and (iii) by severely restricting Wendy's counsel's ability to disclose or even mention the *Settlement Agreement* and its terms to the jury during the jury trial?

3) Did the District Court abuse its discretion by refusing to grant a continuance of the jury trial when Wendy was ambushed by (i) Todd, the Trustees and third parties controlled by the Trustees producing more than 23,000 pages of records less than two months before trial and Wendy and her counsel and (ii) by Todd and Stan entering a *Settlement Agreement* and dismissing their claims against each other just days before trial, which completely changed the alignment of the Parties and dramatically changed the jury trial, which denied Wendy the opportunity to conduct discovery regarding the new documents and the settlement before trial?

4) Was Wendy denied due process when the Court denied Wendy the opportunity to seek discovery regarding the new documents produced and regarding the settlement and its ramifications on the Trusts and her interests?

5) Did the District Court err by awarding attorney fees and costs to Todd, in his Individual capacity, against Wendy Jaksick?

IV. STATEMENT OF THE FACTS

Wendy incorporates the *Statement of the Facts* included in Section V of her *Answering Brief*.

V. SUMMARY OF THE ARGUMENT

The Court abused its discretion when it (1) allowed the jury verdict to dictate its findings and rulings on the equitable claims, (2) refused to review and determine relevance of the *Settlement Agreement* and then severely restricted the mention and use of the *Settlement Agreement* and refused its admission at trial, (3) refused to grant a continuance of jury trial, allowing a trial by ambush, when it denied Wendy the opportunity seek discovery about 23,000 pages of documents and the *Settlement Agreement* before trial, and (4) awarding attorneys' fees and costs to Todd, in his Individual capacity, against Wendy.

First, the Court abused its discretion when it abdicated to the Jury its role and function as the trier of the equitable claims concerning the sufficiency of the Accountings and the validity of the ACPAs and Indemnification Agreement. The pretrial order bifurcating the trial of legal and equitable claims confirmed the determination of these equitable issues were to be decided by the Court in the equitable phase of the trial. The Jury was told the determinations of these equitable issues would be decided by the Court and were not within their purview. As a result, no jury questions concerning these equitable issues were included in the jury charge.

Second, the Court abused its discretion by refusing to review the Settlement Agreement and its terms to determine relevance and by severely restricting Wendy's ability to mention the last-minute *Settlement Agreement* and to fully disclose and

explore its terms during the Jury Trial, and by refusing to admit the *Settlement Agreement* into evidence. With these restrictions, it was impossible for Wendy to counter the prejudice caused by the last-minute realignment of the parties or to show the true motivations for the Trustees to settle and whether it was a breach of their fiduciary duties to do so and to dismiss their claims against each other to provide a united front against Wendy at trial and how the settlement affected Wendy's interest.

Third, the Court abused its discretion by refusing to grant a continuance of the Jury Trial. Todd, Stan, and the Trustees abused and gamed the discovery process so that most of the production of records (more than 23,000 pages) was not provided to Wendy until less than two months before trial when there was no legitimate opportunity to review the documents and conduct discovery on the information produced denying her due process. Wendy's due process rights were violated when Todd, Stan and the Trustees settled just days before trial, completely changing the presentation of the trial and denying Wendy the ability to conduct discovery concerning the settlement. Granting a continuance of the jury trial would have avoided the prejudice caused to Wendy and the unfair advantage provided to Todd, Stan and the Trustees.

Finally, the Court abused its discretion by awarding attorney's fees and costs to Todd, Individually, against Wendy. Wendy successfully established Todd

breached his fiduciary duties in his administration of the Trusts and awarded hundreds of thousands of dollars in equitable relief against Todd.

VI. LEGAL ARGUMENT

A. THE DISTRICT COURT ERRED BY DEFERRING ITS FINDINGS AND RULINGS TO THE JURY ON THE EQUITABLE CLAIMS CONCERNING THE SUFFICIENCY OF THE ACCOUNTINGS AND THE VALIDITY OF THE ACPAS AND PURPORTED INDEMNIFICATION AGREEMENT AFTER THE JURY WAS TOLD THESE DETERMINATIONS WERE TO BE MADE BY THE COURT.

1. Standard of review.

This Court reviews a district court's decision granting or denying an equitable remedy for an abuse of discretion. *Am. Sterling Bank*, 245 P.3d at 538–39 (citing *Douglas Disposal Inc. v. Wee Haul, LLC.*, 170 P.3d 508, 512 (2007)).

2. Argument.

The Court entered the *Pre-Trial Order* establishing that the legal claims would be tried to the jury and the equitable claims to the bench. TJA0949-0953. The Court based this procedure on authority confirming the constitutional right to a jury trial does not extend to equitable matters. TJA0951 (citing *Harom*, 377 P.2d at 630; *Musgrave*, 235 P.2d at 731 (“*It is elemental that in a suit in equity the judgment or decree must be based upon finding of the court rather than a jury verdict.*”) (emphasis added)).

The *Pre-Trial Order* specifically confirmed the validity and application of the Indemnification Agreement and ACPAs would be tried to the bench. TJA0952-0953. The *Pre-Trial Order* further required the Parties to “present evidence relevant to all legal issues. To the extent this evidence is relevant to equitable issues, this Court shall simultaneously consider it for this purpose.” TJA0952, lines 13-15.

During the Jury Trial, evidence was presented concerning the Accountings, purported Indemnification Agreement and ACPAs, but the jury was repeatedly told the Court would decide the insufficiency of the Accountings and invalidity of the purported Indemnification Agreement and ACPAs and that these issues were not for the jury to consider and decide. TJA2135, lines 20-22; WJA2898, lines 19-22. Todd’s counsel specifically told the jurors they had nothing to do with the purported Indemnification Agreement in his closing argument:

But, ladies and gentlemen, the scope, bindingness, validity and effectiveness of that document is before Judge Hardy to be determined, yet they want to keep coming back to the Indemnification Agreement like the jury has something to do with it. I’m sorry, but you don’t.

WJ3940. The Court specifically confirmed these representations were made to the jury, “the attorney’s argued to the jury that this Court would decide the validity of the ACPAs and indemnification agreements...” TJA2135, lines 20-21. Consistent

with the *Pre-Trial Order*, the jury was not presented with jury questions concerning the equitable claims or validity of these documents. TJA000954-0957.

In the *Order After Equitable Trial* the Court concluded “[t]his Court does not confirm the accountings,” and “[t]his Court does not confirm the ACPAs or indemnification agreements.” TJA2145, lines 19 & 27 (emphasis added). Despite the above, the Court decided to neither confirm nor deny the Accountings, ACPAs and purported Indemnification Agreement. TJA002135-002136. The Court refused to rule on the purported Indemnification Agreement and ACPAs is directly contrary to its *Pre-Trial Order* and the decisions in *Harom* and *Musgrave*.

If the Court rules it cannot make any decision about a fact issue that would fall within the jury verdict, then the Court has eliminated the equitable trial completely and left issues hanging. There is no precedent for a jury award to eviscerate the Court's jurisdiction to make equitable rulings. The Court cannot tell the Parties and the Jury one thing and then do another; doing so is fundamentally unfair. The Court cannot tell the Jury it is not to rule on an issue because the Court will do so, then turnaround and refuse to rule on that very issue.

Because of the instructions of the Court and counsel for Todd and the Trustees throughout trial and the lack of jury questions concerning same, the *Verdict* could not and would not reflect any decision on those equitable issues. TJA0954-0957. Without a specific question about invalidity, it is impossible for the jury to

have ruled, expressly or constructively, one way or the other. It is improper and Todd is estopped from arguing to the jury that it cannot decide these equitable issues because that decision is up to the Court and, now, argue those decisions were decided by the jury. He, certainly, cannot accept the benefits of his incorrect application of the law.

It is unfathomably unfair for the Parties to be placed in limbo prior to and during the trials. Should Wendy have argued to the Jury the purported Indemnification Agreement and ACPAs are invalid and presented the Jury a question on the subject or not? According to the Court's *Pre-Trial Order*, she should not and did not; yet the Court now refuses to rule on them either. The error in the Court telling the Parties one thing and doing another is inherent. There is no way Wendy could have even known to object at the Jury Trial because she relied on and expected the Court's representation and instruction in the *Pre-Trial Order* to be accurate and control. The harm to Wendy was prejudicial and has caused an incorrect result, which – in the interests of justice – can only be cured by a reversal and new trial. Because the jury and equitable trials were tainted by this unfairness, Wendy was denied a fair trial and should be granted a new trial. NRCP 59(a)(1)(A).

B. DISTRICT COURT ABUSED ITS DISCRETION BY: (I) DENYING ADMISSION OF THE *SETTLEMENT AGREEMENT* INTO EVIDENCE AND (II) SEVERELY RESTRICTING WENDY’S ABILITY TO MENTION AND DISCLOSE THE TERMS OF THE SETTLEMENT DURING JURY TRIAL.

1. Standard of review.

This Court reviews a district court's decision on a motion for continuance for an abuse of discretion. *Bongiovi v. Sullivan*, 138 P.3d 433, 444 (2006).

This Court reviews a district court’s decision to admit or deny evidence for an abuse of discretion. *Norton Co. v. Fergestrom*, 35719, 2001 WL 1628302, at *3 (Nev. Nov. 9, 2001) (*citing Dow Chemical Co. v. Mahlum*, 970 P.2d 98, 123 (1998)).

All relevant evidence is admissible at trial unless otherwise excluded by law or the rules of evidence. NRS 48.025. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” NRS 48.015; *FGA, Inc. v. Giglio*, 278 P.3d 490, 498 (2012).

Wendy incorporates the “**Authority – Abuse of Discretion**” Section VII(A)(2), *supra*, as if fully stated here.

2. Argument.

a. Stan Opposes Trustees.

When Todd and Kimmel filed their *Petition* on August 2, 2017, Stan, the third

and only remaining Co-Trustee of the Family Trust, refused to join the *Petition*. TJA0204-0585. More than refusing to join, on October 10, 2017, Stan filed objections opposing: (i) the Family and Issue Trust *Petitions* (ii) the approval of the Accountings and trust administrations and (iii) specifically objected to the Lake Tahoe Property transaction and Todd's purported Indemnity Agreement. WJ0019-0025. Stan was a Co-Trustee with insider knowledge and knew the purported Accountings were deficient, was aware of the bogus transactions concerning the Lake Tahoe Property that benefitted Todd and his family over the other beneficiaries, knew Todd's use of his purported Indemnification Agreement to pay his personal expenses from the Family Trust was improper and would deplete the Trust, and knew of other improper actions. WJ0063-0089.

Stan encouraged Wendy to pursue claims the entire time, telling her how Todd and his family were benefiting from the Trusts at Wendy's and her family's expense. WJ0019-0025; WJ0063-0089. Wendy filed her *Objections* on October 10, 2017, and, later, her *Counter-Petitions* against the Trustees on January 19, 2018 and February 23, 2018 based on such scant knowledge about the Trust administrations and Stan's encouragement. TJA000586-000614; TJA000632-000671; TJA000713-000752. Wendy should have been better informed. TJA2098.

b. Stan Sues Todd Alleging Wendy's Claims.

As an insider, Stan knew more than Wendy and filed a *Counter-Petition* against Todd mirroring Wendy's claims, including various claims for breach of fiduciary duty, contesting the sufficiency of the Accountings, and contesting the validity of the Lake Tahoe Property transactions, the purported ACPAs and Todd's purported Indemnification Agreement. WJ0030-0048. Stan's *Counter-Petitioner* sought: (i) Todd's removal as Trustee, (ii) to enjoin Todd from using Trust assets, (iii) damages and punitive damages, and (iv) attorney's fees and costs. WJ0044-0045. In support of his claim for punitive damages, Stan alleged Todd's breaches of fiduciary duty were done "maliciously and with the intent to defraud Stan, and in conscious and willful disregard of Stan's property rights." *Id.* For the entire lawsuit and trial preparation leading up to the trial, Stan was on Wendy's side accusing Todd and the Co-Trustees of breaching their fiduciary duties. Stan participated in the discovery from that perspective and discussed strategy with Wendy related to the lawsuit in which they were both aligned. Wendy pursued less discovery against Stan and was less inquisitive of him at his deposition because he was aligned.

c. Todd Sues Stan.

In response to Stan's *Counter-Petition*, Todd filed *Todd's Petition for Reconveyance*, in which Todd accused Stan of receiving \$434,000 in Family Trust

funds, putting the funds in an entity wholly controlled by Stan to be used for Stan's personal benefit and refusing to convey the funds to the Family Trust. WJ0063-0089.

The claims asserted between Todd and Stan, who were administering the Trust and privy to the asset information, confirm they were breaching their fiduciary duties as they each maneuvered to maximize their own personal interests. WJ0063-0089.

d. Trustees' Competing Self-Interests.

Todd stole a 46% interest in the Lake Tahoe property, leaving Stan and Wendy with no interest in the property. WJ0034-0036; WJ2295, line 18-WJ2296, line 9. At the time of trial, the agreed approximate value of the Lake Tahoe Property was \$18 million, with approximately \$2.5 million in outstanding debt. WJ2280, lines 9-25. Accordingly, Todd's family's interest in the Lake Tahoe Property at the time of trial was \$6,780,000. Stan wanted an interest in the Tahoe Property at a substantial discount like the interest stolen by Todd. WJ0195-0196.

Todd's goal was to eliminate any opposition or impediment to his use of his purported *Indemnification Agreement* to pay millions of dollars of his personal debt and obligations from the Family Trust. WJ0196; TJA000376; TJA00312; TJA000436. Although the exact value of Todd's claimed indemnification is never specified in the Accountings or otherwise disclosed to the beneficiaries, Todd

planned to pay millions of dollars of his personal debt based on the purported *Indemnification Agreement*. WJ0001-0010; TJA000376; TJA00312; TJA000436.

The 2016 Family Trust accounting confirms the Family Trust's obligation to pay Todd's personal debt:

Indemnification and Contribution Agreement which substantively indicates that Todd and Dawn Jaksick, TBJ SC Trust, and TBJ Investment Trust are indemnified against the Samuel S Jaksick Jr Family Trust from having to perform on obligations and debts. There are many amounts listed in the agreement and have been claimed against the trust. The total amount of the claim has yet to be determined. The following unpaid balances are as follows:	
Note Payable - in the amount of \$7,825,000 by Jackrabbit Properties, LLC in favor of Metropolitan Life Insurance Company.	4,305,000.00
Note Payable - in the amount of \$4,020,000 by Winnemucca Ranch LLC (now known as Buckhorn Land & Livestock, LLC) in favor of Metropolitan Life Insurance Company.	598,000.00
Mortgage - by Todd Jaksick in favor of Bank of America.	2,350,000.00
Note Payable - American AgCredit FLCA (51% of joint obligation) also listed above in the amount of \$716,092.50	-

TJA000436.

e. Settlement on Eve of Trial.

The jury trial was originally scheduled to begin on February 4, 2019. TJA000949. On January 31, 2019, Stan and Todd, in numerous capacities, entered into the *Settlement Agreement* (the "Settlement Agreement"). WJ0194-0201. Just days before trial, Todd and Stan, apparently, resolved all issues between them, dismissed their claims against each other and appeared at trial on the same side of the courtroom as a united front aligned against Wendy. *Id.*; WJ0282-0288. The jury trial changed indelibly. Instead of having a Co-Trustee next to Wendy in front of the jury accusing the other Co-Trustees of malfeasance, it was now Wendy all by herself.

f. Todd Bought Off Stan.

The Lake Tahoe Property is held in an entity called Incline TSS, LLC (“Incline”), and Incline was owned 54% by the Issue Trust and 46% by Todd and Todd’s family trusts. WJ2294, line 19-20; WJ2295, lines 15-25. The *Settlement Agreement* allows Stan to buy a 27.595% interest in Incline for \$1,630,000.00. WJ0196. Stan’s buy in would dilute the Issue Trust’s interest from 54% to 44.81%, harming all beneficiaries. *Id.* To obtain the 27.595% interest, Stan is only required make measly interest payments at rate of 3% until 2026. *Id.* Additionally, Stan’s interest in Incline vests immediately, and that upon a sale, the proceeds would immediately be distributed to Stan. *Id.* If the Lake Tahoe Property were sold soon, Stan would receive \$2,882,225 in profit for nothing.

Contrast that with Stan’s attempt to buy an interest in TSS, LLC in 2015. At that time, Stan was to pay \$1,500,000 for a 17.02% interest in Incline. WJ2302, line 2-3; WJ0014-0018. Stan’s buy in would have diluted the Issue Trust’s interest from 54% to 44.81%. *Id.* At the time, the Lake Tahoe Property was appraised at \$11.5 million. WJ0011. By the time of trial, the property had increased \$6.5 million from the \$11.5 million value used to calculate Stan’s 2015 attempted buy in. Despite this considerable increase, the *Settlement Agreement* requires essentially the same buy in of \$1.6 million for a significantly increased interest (**27.595%** interest valued at **\$4.3 million** versus a **17.02%** interest valued at **\$1.53 million**). The personal benefit to

Stan and his family trusts was substantial and resulted in Stan sitting at Todd's table in trial condoning Todd's prior and continuing breaches of fiduciary duty Stan knew existed and had not been rectified. Strengthening the conspiracy, the settlement was contingent on Todd and Stan defeating Wendy at trial or obtaining a settlement with Wendy. WJ0194, Section III. Stan had to support Todd and his bad acts. The Jury was deceived by the entire thing, and should have been told of the details of this sweetheart deal to understand the situation and Trustees' true motivation for settling their claims and appearing aligned at trial.

How is it possible that Stan can pay essentially the same amount of consideration to buy into Incline for a higher percentage interest when the value of Incline had increased by \$6.5 million? Based upon the scheming of the Trustee of Issue Trust and Todd and Stan, all of whom are Wendy's fiduciaries, the Issue Trust lost its majority ownership interest in the Tahoe Property. While the *Settlement Agreement* reserves the Issue Trust's remaining 44.81% shares for the exclusive right to determine when the Lake Tahoe Property sells (Todd retained total power to control the sale), all other decisions relating to Incline and the Tahoe Property may only be made with the unanimous approval of Stan and Todd. WJ0194.

None of this is in the best interest of the Issue Trust. Todd and Stan, in various capacities, colluded with each other to obtain substantial personal benefit, instead of performing as fiduciaries and protecting the Trust's assets for their beneficiaries.

Simply put, Todd needed Stan on his side and Stan was willing to be bought to shirk his fiduciary duties and look the other way. Disgusting! The *Settlement Agreement* was a *per se* breach of Todd's and Stan's fiduciary duties, and Wendy was not allowed to present their bad acts to the Jury to confirm Todd's and Stan's true motivations for "resolving their disputes" before trial.

g. Prejudice to Wendy was Inherent.

Incredibly, the Trustees refused to provide Wendy and her counsel a copy of the *Settlement Agreement* until after Todd's supplemental deposition. WJ0316, line 15-WJ0317, line 11. Despite the deposition's purpose, Wendy's counsel could only ask Todd general questions about his memory of the terms of the *Settlement Agreement* with no ability to refer him to it or to explore its terms more thoroughly. *Id.* No supplemental deposition of Stan was allowed, and Wendy was not allowed to file new claims against Stan for his breaches of trust. Wendy was not permitted a meaningful opportunity to conduct discovery on the *Settlement Agreement*, which was extremely prejudicial to Wendy and provided an unfair advantage to Todd and Stan.

During trial, to support the image of a united front and the appearance that the Trustees were and had always been united against Wendy, the Trustees made every effort to suppress the disclosure of the *Settlement Agreement* and its terms to the Court and the Jury. WJ2169-2171; WJ0227, lines 12-20; WJ3069-3070; WJ3312, line 21-WJ3328, line 15; WJ3362, line 13-WJ3363, line 4; WJ3464, line 1-WJ3490, line 7.

The Trustees fought its admission and, even, its mention because they wanted the Jury and the Court to misrepresent that Stan had some small misunderstandings about Todd's administration of the Family Trust and Issue Trust, but they were able to work out their differences. WJ2415, lines 7-12; WJ2416, line 8-WJ2416, line 9. They also wanted to hide the fact that Stan had improperly acquired and kept funds belonging to the Family Trust, utilized the trust funds for his own personal benefit, refused to disclose financial information and to fund the Family Trust from trust assets Stan controlled. WJ0065-0067. They wanted the Jury and the Court to hear and believe that Todd had gratuitously agreed not to seek the payment of the \$2.35 million mortgage on his personal residence under his purported Indemnification Agreement. WJ2416, line 8-WJ2416, line 9; TJA000436. The effect was to make Todd and Stan appear as reasonable brothers and responsible Trustees, while painting Wendy as the crazy sister with no basis for any of her claims. It was all deception and unfair ambush.

The incentive for Todd to enter into the *Settlement Agreement* with Stan was great. It is not difficult to imagine the starkly different impression the jury would have received and the vastly different trial that would have played out if Stan and his counsel were sitting on Wendy's side of the courtroom and were seeking to establish many of the same claims as Wendy against Todd. The dramatic effect of the last-minute settlement and realignment on the trial is undisputed by the Parties

and the Court:

- a) Stan confirms that the settlement between him and Todd altered the factual landscape that was considered by the jury and the Court. WJ4293, lines 12-14.
- b) Kent Robison, Todd's personal counsel, confirmed during the October 14, 2020 hearing, "Stan gave up his claims against Todd in exchange for that *Settlement Agreement*, which clearly changed the landscape of the jury trial. We know that." WJ4357, lines 17-22.
- c) the Court confirmed that "[t]he decision to withdraw their claims against each other dramatically altered the dispute dynamic, ... [i]nstead of two siblings offering evidence against Todd, Wendy was the lone sibling making allegations while Stanley was able to transcend the dispute and present in a more neutral manner." WJ4321, lines 19-24.

Stan and Todd both understood this and used it as leverage to obtain substantial personal benefits for entering the *Settlement Agreement*.

h. Wendy Harmed by the Prejudice.

The Court's comments during the hearing on the pretrial motions in limine seeking to prevent the disclosure of the *Settlement Agreement* to the Jury confirm how important the settlement was and the real harm its exclusion would cause to Wendy, as follows:

The change of position on the eve of trial will weaken Wendy's claims, It's very important. You know, we talk about harmless and harmful, this is important.

WJ2175.

We can pretty much conclude that evidence is prejudicial in some way to somebody and I just need to

think about it, because if Stan at some point had sued Todd and said Todd has done all of these things wrong, to pretend that position was not taken seems difficult for me.

WJ2176.

Despite the importance of this issue, the Court never even reviewed the entire *Settlement Agreement* to inform itself when it restricted Wendy's ability to mention or use it and denied its admission as an exhibit in the jury trial. WJ2409, lines 14-20; WJ3327, lines 6-8. One of the Court's main concerns about the settlement was whether it was conditioned on the outcome of trial:

So the bias and motivation is why I asked the question does Stan's settlement, is Stan's settlement affected by the jury verdict or this Court's decision. ... if Stan has an interest in the outcome of this case, it could affect his approach to this case and that is very relevant.

WJ2182-2182. The Court confirmed the *Settlement Agreement* should be fair game if it were in fact contingent on the outcome of trial:

So if it truly were contingent and it reflects bias, which is a different evidentiary analysis, particularly with specific Supreme Court decisional authority, I would say have at it. But I keep hearing from counsel that it doesn't implicate bias, that it's not contingent. And I don't know which of the two is accurate.

WJ2364. However, even after reviewing a version of the *Settlement Agreement* that was fully redacted except for paragraph 3, which confirms it is contingent on the outcome of the trial, the Court continued its severe restrictions and to deny the

admission of the *Settlement Agreement* as an exhibit. WJ3327, lines 6-8; WJ3331, lines 9-13; WJ3489, lines 6-10; WJ3490, lines 5-7; WJ5530, lines 9-18; WJ3770. This makes little sense, especially when the Court admitted the *Settlement Agreement* as an exhibit in the equitable trial over objections that it was not relevant and inadmissible. WJ4217-4218.

The *Settlement Agreement* was as material to Wendy's case before the jury as it was in the equitable trial. The Court's severe restrictions on the mention, use and admission of the *Settlement Agreement* prejudiced Wendy and provided an unfair advantage to Todd, Stan and the Trustees because she was not able to discover more about it or show the Jury their true motivations. WJ2415, lines 7-12, WJ2416, line 8- WJ2417, line 9; WJ3331, lines 9-13; WJ3489, lines 6-10; WJ3490, lines 5-7; WJ5530, lines 9-18; WJ3770. The *Settlement Agreement* was never admitted into evidence or fully disclosed to the Jury despite repeated attempts by Wendy's counsel. *Id.* Absent the settlement, Stan would have been sitting on the same side of the courtroom as Wendy. There are few actions that could be more prejudicial. The Trustees were able to make it appear that Wendy was a disgruntled beneficiary, which would have been impossible if Stan had been sitting next to her pointing the finger at the other Trustees. Instead, Wendy was cast as the lone crazed beneficiary that was greedy, totally unreasonable and without basis suing her brothers. WJ4321, lines 19-24.

The jury was unaware of the trial preparation history, which cannot be discounted in the prejudice analysis. Wendy sent discovery requests, took depositions, and prepared for the trial for more than two years. Nothing could be more of a betrayal than a brother and worse, a Trustee and fiduciary, than to – in the most cowardly way possible – be a traitor and likely a mole for the other side. The moral issues of Stan’s betrayal of his sister is for him to deal with the rest of his life, but his betrayal as Wendy’s fiduciary must be addressed and cannot be ignored.

From the jury’s perspective the entire lawsuit and trial appeared as Wendy against everyone. The appearance of that alone was prejudicial to Wendy and that prejudice was irreconcilably harmful and she was unable to overcome it.

Because the last-minute settlement so completely and dramatically changed the entire landscape of the jury trial, it was an abuse of discretion to not grant a continuance of the jury trial so, at a minimum, Wendy could conduct discovery on (i) the effects and implications of the settlement and (ii) Todd’s and Stan’s motivations for “resolving their disputes,” dismissing their claims and appearing aligned at trial. Additionally, it was an abuse of discretion to have so severely restricted the ability of Wendy’s counsel from mentioning the settlement, disclosing the terms of the *Settlement Agreement*, fully questioning the witnesses on the terms of the *Settlement Agreement*, and refusing to admitting the *Settlement Agreement* into evidence. The Court’s restrictions on the use and admission of the *Settlement*

Agreement left Wendy with no ability to counter Todd, Stan and the Trustees' appearance as the innocent responsible Trustees united against Wendy as the lone crazed litigant "pursuing frivolous claims."

C. DISTRICT COURT ABUSED ITS DISCRETION BY REFUSING TO GRANT A CONTINUANCE OF THE JURY TRIAL AFTER (I) NUMEROUS PARTIES AND THIRD PARTIES PRODUCED APPROXIMATELY 23,000 RECORDS LESS THAN TWO MONTHS BEFORE TRIAL WHEN DISCOVERY WAS LARGELY CLOSED AND WENDY'S COUNSEL WAS PREPARING FOR TRIAL AND (II) TODD AND STAN ENTERED INTO A *SETTLEMENT AGREEMENT*, WHICH COMPLETELY CHANGED THE ALIGNMENT OF THE PARTIES, DENIED WENDY THE OPPORTUNITY TO CONDUCT DISCOVERY REGARDING THE SETTLEMENT AND DRAMATICALLY CHANGED THE JURY TRIAL.

1. Standard of review and relevant law.

This Court reviews a district court's decision on a motion for continuance for an abuse of discretion. *Bongiovi*, 138 P.3d at 444. "The trial judge must exercise his discretion with due regard to all interests involved, and the refusal of a continuance which has the practical effect of denying the applicant a fair hearing is reversible error." *See In re Marriage of Hoffmeister*, 161 Cal.App.3d 1163, 1169 (Cal. App. 3rd 1984). While a court has discretion to manage its own docket, absent a lack of diligence or abuse by the applicant, a request for continuance upon a showing of good cause should be granted. *See Oliveros v. County of Los Angeles*, 16

Cal.App.4th 1389, 1396 (Cal App. 4th 2004) (citing *Estate of Meeker*, 13 Cal.App.4th 1099, 1105 (Cal App. 4th 1993)).

In determining whether the trial court has abused its discretion, the appellate court should consider the length of time the case has been on filed, the materiality of the discovery sought, and whether the moving party exercised due diligence in obtaining discovery. *See Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004).

In instances where a party has stalled and caused unnecessary delays in the discovery process causing extreme and inappropriate prejudice, the Nevada Supreme Court has ordered continuance of the trial as a sanction. *See Bahena v. Goodyear Tire & Rubber Co.*, 235 P.3d 592, 595–96 (2010). The Supreme Court of Nevada has approved sanctions far more dramatic than trial continuance when parties have engaged in discovery abuses. *E.g., Havas v. Bank of Nevada*, 613 P.2d 706, 707-708 (1980).

2. Argument.

This case involves complex issues based on transactions that occurred over the span of at least the last 5 to 8 years. TJA002100; TJA000586-000614; TJA000632-000671; TJA000731-000752. Such issues and transactions involve multiple Trusts and numerous entities. *Id.* Todd’s counsel argued and relied on this very fact when they: (i) requested and obtained the enlargement of discovery limits

at the outset of the litigation, which included 3 days of deposition time for each party, and (ii) sought to compel production/depositions from approximately 11 of Stan's entities that were not parties to this lawsuit. WJ0049-0050; WJ0027-0028. At the January 4, 2018 scheduling conference, the Court set this matter for trial for February 4, 2019. WJ0025-0026. An order was later entered including an October 31, 2018 deadline to complete discovery. WJ4415-4420.

During the litigation, Todd, Stan, Trustees, and their counsel abused the discovery process, failed to comply with their disclosure and discovery obligations and made every effort to prevent Wendy from obtaining discovery and information. Their actions are detailed in the following motions to extend discovery deadlines and to continue trial filed by Wendy: (1) *Motion to Extend Discovery Deadlines and Continue Trial* (WJ4427-4763), (2) *Emergency Motion for Continuance of Trial* (WJ0202-0281) and (3) *Supplemental Declaration in Support of Continuance* (WJ2103-2128). Wendy expressly incorporates these pleadings and the evidence, arguments and authorities included therein as if fully set forth herein.

The Trustees, Todd, Stan, and their various entities had all the information or had access and authority to obtain and provide all the information. The Trustees owed fiduciary duties, apart from the litigation, that required the full disclosure of all information concerning his administration of the Trusts that materially affected Wendy's interests. So, the information concerning the assets and administration of

the Trusts should have been readily available to provide and produce. Really, Wendy should have already had it.

The behavior of Todd, Stan, the Trustees and their counsel prevented Wendy from obtaining the discovery she was entitled to and needed to prepare and try her case. WJ4427-4763; WJ0206-2019; WJ2103-2128. Wendy made every effort to force Todd, Stan and Trustees to comply with their discovery obligations and to produce the records and information. *Id.*

On September 21, 2019, Wendy filed a *Motion to Extend Discovery Deadlines and Trial*, detailing the discovery abuses of Todd, Stan, the Trustees and their counsel and their refusal to produce documents and information, seeking to extend discovery deadlines, and to continue the trial date to provide sufficient time to obtain seek and obtain relief through motions. WJ4427-4763.

On November 26, 2018, the Court entered the *Order After Hearing* (i) denying Wendy's motion to continue the February 4, 2019 trial date; (ii) extending the initial expert disclosure date to December 17, 2018, the rebuttal expert disclosure date to December 31, 2018 and the close of expert discovery to February 1, 2019; (iii) extending the close of fact discovery to January 18, 2019; and (iv) detailing other deadlines prior to the start of the February 4, 2019 trial. WJ0108-0110.

Despite Wendy's efforts, Todd, the Trustees and various third parties they controlled withheld a majority if not all their production responsive to Wendy's

requests and their automatic disclosures until ordered to do so in December 2018 and January 2019. WJ0400, line 7-WJ0402, line 15; WJ0403, lines 7-18. By this time, most of the depositions had been taken and discovery was essentially closed. Certainly, Wendy had no opportunity to conduct additional discovery based on any information found in the approximately 23,000 pages of documents produced in December 2019, just over a month before trial; her counsel could barely review and attempt to digest the production, much less set the necessary depositions.

As a result, on February 1, 2019, Wendy filed her *Emergency Motion for Continuance* seeking a continuance of the February 4, 2021 trial of at least sixty (60) days after the Court finds the parties have disclosed and complied with their discovery obligations. WJ0202-0281. During the February 4, 2021 hearing on her *Motion*, the Court confirmed the serious discovery issues and abuses of Todd and Trustees:

And the greatest problem I have is this idea that since December more than 23,000 pages have been produced. If there were 23, 000 pages to be produce in December there should have been ongoing production along the way to that which was, obviously, within the scope of pretrial discovery and so I have concerns – it seems to me that Todd produced 1700 pages just Thursday night in advance of the deposition, and that is not the way we prepare a case for trial. We’re in the week of trial, and we are still having discovery disputes, it’s very troubling to this Court.

WJ0302. Despite this acknowledgement and confirmation and the Court's finding that the "pretrial process of this case defective," the Court postponed the trial for just 9 days, resetting the trial on February 14, 2018. WJ0419-0420.

On February 11, 2019, Wendy filed the *Supplemental Declaration in Support of Continuance* in support of the continuance of the February 14, 2019 trial. WJ2103-2128. On February 13, 2019, the Court heard and denied Wendy's supplemented motion for continuance. WJ2240-2241. At the hearing, the Court made statements that the Court: (i) "may very well allow questions ... that reflect some of the late production," (ii) would "keep the discovery process in mind as [it] rules on the evidence," (iii) "carefully follow [certain witnesses] testimony in light of the production concerns that have been raised," (iv) "cross-examination will flush out some of the absence of documents, for example water rights issues and verification, water rights ownership, and things of that nature," (v) was "open to exceeding the scope of Wendy's experts, if appropriate" and (vi) was "open to on several issues curative instructions for the jury." WJ2134-2135.

"The cornerstone of discovery is to 'seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed.'" *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex.1984); *Johnson v. Berg*, 848 S.W.2d 345, 349 (Tex. App.—Amarillo 1993, no writ). "The discovery process prevents trial by ambush." *Clark v. Trailways, Inc.*, 774 S.W.2d 644, 646 (Tex. 1989), *cert.*

denied, 493 U.S. 1074, 110 S.Ct. 1122 (1990). As the Texas Supreme Court has explained, a trial should be based upon the merits of the parties' claims and defenses, rather than on an advantage obtained by one side through a surprise attack. *Smith v. Southwest Feed Yards*, 835 S.W.2d 89, 90 (Tex.1992); *Johnson*, 848 S.W.2d at 349.

Despite the Court's acknowledging Todd's and the Trustees' failure to comply their discovery obligations and despite the Trustees producing thousands of pages after December 17, 2018 along with a privilege log describing 1,500 pages only weeks prior to the start of the jury trial and well after discovery had ended, the Court still somehow believed there could be a "fair trial in light of the voluminous file materials, pre-trial efforts, and issues that will be presented." WJ2133, lines 20-22. Apparently, the Court's plan was to cure the failures of the Trustees to abide by the discovery orders and to produce documents by widening the breadth of admissible evidence, expanding the scope of Wendy's expert's testimony and to offer curative instructions. WJ2133, line 23-WJ2135, line 9.

In *Clark County Sch. Dist. v. Richardson Const., Inc.*, 168 P.3d 87 (2007), this Honorable Court concluded "that substantial evidence supports the district court's decision to sanction CCSD by striking CCSD's affirmative defenses. McPartlin signed an affidavit representing to the district court that all pertinent files had been produced. But during his trial testimony, he indicated that at least one file still existed that had not been produced as required, and the next day, McPartlin turned

over approximately 1,700 documents to the district court, 500 to 700 of which had not been previously produced, even though they were subject to NRCP 16.1 production provisions and were relevant to the litigation. This dispute resulted in nearly a one-week delay in the trial. *Id.*, at 93. In the *Clark County Sch. Dist.* Case, just 1,700 documents were withheld causing a one-week delay.

By comparison, Wendy got a one-week delay in the trial after 23,000 pages were produced and a privilege log of withheld documents after discovery closed, expert reports were done and most of the depositions had been taken. She had no opportunity to thoroughly review these documents and update her expert reports and take new depositions related to newly found information, which the “document dump” within six weeks of trial undisputedly contained. This is trial by ambush in violation of Wendy’s due process rights. *See Land Baron Inv. v. Bonnie Springs Family LP*, 356 P.3d 511, 522 (2015), citing, *Clark v. Trailways, Inc.*, at 646; *Johnson*, 848 S.W.2d at 349. Yet, the words “trial by ambush” minimize and trivialize the injustice thrust upon Wendy at the hands of her Trustees put in charge of protecting her and her inheritance, then lying to her and the Court about the documents produced and allowing deposition and other discovery to proceed knowing they had 23,000 or more pages they had not produced eliminating her opportunity for a fair trial to the point of being laughable – calling this a trial by ambush is like calling a Boeing 747 Jetliner a model airplane.

This case involved a Will, Trusts, numerous entities, deeds, option agreements, indemnification agreements, ACPAs and many more documents directly related to Sam's estate plan that lies at the heart of this entire case. TJA2100; TJA0586-0614; TJA0632-000671; TJA0731-0752. In other words, everyone involved in this case is claiming by and through the same Decedent and his estate planning file is as important as any other evidence in this case.

The law firm of Maupin, Cox & Legoy ("MCL"), were attorneys for Sam for many years for Estate planning and other matters and represented Todd in various capacities including in his Trustee capacities. WJ3593; WJ3654. The Court confirmed MCL "is integral to the estate issues before this Court." WJ0403 (emphasis added). Additionally, MCL has and continues to represent the Trustees in the trust administration and litigation. Although MCL was duly served with a subpoena on August 6, 2018, it did not produce any documents until December 14, 2019, after Wendy filed a motion to compel. *Id*; WJ0211. MCL's initial production of just 1,108 pages occurred nearly four months after the deadline to respond to Wendy's Subpoena and just over a month before trial. *Id*. After MCL's initial production, MCL made the following additional productions: (i) 29 pages on December 18, 2018, (ii) 21 pages on December 21, 2018, (iii) 604 pages on December 26, 2018, and (iv) 111 pages on January 29, 2019. WJ0211. MCLs production through January 29, 2019 included trust and estate documents and

accountings produced by other parties, and documents related to random lawsuits not relevant to pending litigation. Lastly and incredibly, with the January 29, 2019 production, MCL disclosed for the first time the existence of thousands of pages of documents withheld on the basis of privilege. WJ0403, line 10-WJ0404, line 19; WJ0211; WJ0227-0280; WJ0115-0118; WJ0132-0193. This occurred after Wendy deposed MCL attorneys Robert LeGoy on January 21, 2019 and Brian McQuaid on January 24, 2019. The production was a joke and, by their actions, they scoffed at the Court and at Wendy and made a mockery of the entire discovery process.

MCL, finally, produced the “privileged records” on February 8, 2019, just seven days before trial, after all discovery had closed and after all MCL attorneys had been deposed. WJ2032-2094; WJ2095-2102. The February 8, 2019 production included 1,610 pages of records consisting of correspondence, attorney notes and other important records that had never been produced before. *Id.*

One such document is a June 17, 2010 correspondence from Robert LeGoy, Sam’s longtime Estate planning attorney, to Sam and Todd advising Sam against entering into an Option Agreement for the sale of the Lake Tahoe Property to Todd’s family entities and providing Mr. LeGoy’s reasoning for this advice. WJ0426-0432. After receiving this correspondence in 2010, Todd brought in attorney Pierre Hascheff to complete the Option Agreement transactions against the advice of MCL. WJ2474, lines 4-6. The correspondence includes critical information concerning the

\$18 million Lake Tahoe Property transaction and supports Wendy's claim that the transaction was a sham. Wendy and her counsel were not aware of this correspondence and did not have it for the depositions of the MCL attorneys or Pierre Hascheff. Accordingly, Wendy was prevented from conducting discovery about the document, the reasoning for MCL's advice not to proceed with the Option Agreement, Pierre Hascheff's knowledge of MCL's advice not to proceed with the transaction, and his reasoning for proceeding against that advice.

MCL's February 8, 2019 production also included 137 pages of illegible or barely legible handwritten notes of Robert LeGoy and Brian McQuaid. WJ1754-1891. Because Wendy's counsel had already deposed Mr. LeGoy and Mr. McQuaid, they were denied the opportunity to work through the notes with either of them to decipher the handwriting and conduct discovery once they understood the content. Based on MCL's longtime representation of Sam and the Trustees there is no question MCL had far more than 3,510 documents responsive to Wendy's Subpoena that were never produced.

As extensively detailed in her pleadings seeking a continuance of trial, Wendy faced similar issues obtaining production from Todd, the Trustees and others controlled by them including Pierre Hascheff, Kevin Riley, and Jessica Clayton. WJ4427-4763; WJ0202-0281; WJ2103-2129. Ultimately, Wendy was unable to sift through the approximately 23,000 pages of last-minute production in such a short

amount of time, decipher the information, develop a strategy on what to do next with the newly discovered information and proceed with all she needed to do. Then, of course, being put to trial without being able to develop her case further by additional discovery requests, potentially additional subpoenas and, certainly, additional depositions or deposition time. There was no way Wendy could get a fair trial under these circumstances, and she did not.

The trial court in this case did not grant a meaningful continuance and did not impose any sanction or consequence on Wendy's Trustees of any kind. Their plan was calculated to withhold information from Wendy, so she could not properly prepare her case against her Trustees. They refused to produce requested records in discovery that they should have produced as a matter course in the administration as her fiduciaries and as mandatory disclosures in the litigation. When one side refuses to abide by the discovery rules, there can be no fair opportunity to resolve disputes by settlement or trial and the system fails. Their and their counsel's behavior cannot be condoned lest it encourage similar behavior in the future.

The production of so much new evidence after the discovery cut-off, so Wendy would be unable to inquire further was so fundamentally unfair that it violated her due process rights and deprived her of due process. The due process violation could not have been corrected and was not corrected by any curative jury instruction or allowing an expert to testify beyond his report. What would the

instruction have been anyway? Something like, “Jury, you are to understand that Wendy did not get documents until just within the last month before trial and she did not get to find out more about that newly disclosed information. So, give her a break!” That would be silly and meaningless to a jury that does not know the trial preparation process. The only possible cure for this type of misconduct would have been a continuance to avoid the surprise and allow Wendy the opportunity to seek further discovery regarding the information that had been withheld. The continuance request was denied. Wendy was only granted a one-week delay to the start of trial, which violated her due process rights. Now, it can only be cured by granting Wendy a new trial and allowing new and additional discovery.

D. THE DISTRICT COURT ABUSED ITS DISCRETION BY IMPROPERLY AWARDING ATTORNEY FEES AND COSTS TO TODD JAKSICK, IN HIS INDIVIDUAL CAPACITY, AGAINST WENDY JAKSICK

1. Standard of review and relevant law.

Nevada’s Appellate Courts generally review an award of attorney’s fees for an abuse of discretion. *See, e.g., Thomas*, 127 P.3d at 1063; *Frazier*, 357 P.3d at 372. However, district courts may not award fees “absent authority under a statute, rule, or contract.” *Albios v. Horizon Communities, Inc.*, 132 P.3d 1022, 1028 (2006); *see also Bobby Berosini, Ltd. v. PETA*, 971 P.2d 383, 386 (1998). Moreover, the Appellate Courts will not hesitate to overturn fee awards where a district court fails

to properly consider the factors enumerated in binding case law. *See, e.g., Miller v. Wilfong*, 119 P.3d 727, 730 (2005) (reversing for failure to analyze the *Brunzell* factors); *Yamaha Motor Co., U.S.A. v. Arnoult*, 955 P.2d 661, 673 (1998) (reversing an award of fees premised on NRCP 68(f) where the district court considered outdated factors); *Schouweiler v. Yancey Co.*, 712 P.2d 786 (1985) (reversing an order awarding attorney fees and remanding for consideration of the *Brunzell* factors).

2. Argument.

On March 13, 2019, Todd, Individually, Incline, Ltd. and Duck Lake Ranch, LLC filed the *Motion for Order Awarding Costs and Attorney's Fees for Todd Jaksick, Individually, Duck Lake Ranch, LLC, and Inline TSS, Ltd.* (“Motion for Fees and Costs”). TA0958-001157. The *Motion for Fees and Costs* sought an award from Wendy of the attorney’s fees of Todd, Individually, Duck Lake and Incline (i) in the amount \$705,690.50 and costs in the amount of \$68,834.07 based on **NRS 18.010** and **NRS 18.020** or, alternatively, (ii) attorney’s fees in the amount of \$436,331 and costs in the amount of \$68,834.07 based on **NRCP 68**. On March 25, 2019, Wendy filed Petitioner *Wendy A. Jaksick’s Opposition to Motion for Attorney’s Fees*.

In the *Amended Judgment*, Todd, Individually was awarded a judgment against Wendy in the amount of \$436,331.00 for attorneys’ fees and \$68,834.07 in

costs, for a total of \$505,165.07. TJA003800. The Court's award of fees and costs to Todd, Individually, was an abuse of discretion.

a. **Todd Not Entitled to Costs Under NRS 18.020.**

To recover under NRS 18.020, a party must be determined to be a "prevailing party." NRS 18.020. Additionally, under NRS 18.020, any award of costs to a prevailing party is subject to the Court's discretion in determining the reasonableness of the amounts to be awarded. *Schwartz*, 881 P.2d at 643 ("The district court retains discretion, however, in determining the reasonableness of the amounts and the items of cost to be awarded.")

On March 23, 2023, Wendy filed a *Verified Memorandum of Costs* seeking to recover her costs from the Family Trust and SSJ's Issue Trust because of the *Judgment*. On April 21, 2020, this Court entered the *Order Denying Wendy Jaksick's Costs*. TJA002846-002847. In the *Order*, the Court states: "Here, several competing parties could argue for prevailing party status. ... Given the entirety of this case proceeding, this Court intends to conclude that **neither Wendy Jaksick nor Todd Jaksick is the prevailing party.**" TJA002847, lines 5-8 (emphasis added). Because the Court confirmed Todd is not a prevailing party in its *Order Denying Wendy Jaksick's Costs*, Todd is not entitled to an award of costs under NRS 18.020.

b. Todd Not Entitled to Fees Under NRS 18.010.

Under NRS 18.010(2)(b), the Court may award attorney's fees only if the Court finds Wendy's claims or defenses "were brought or maintained without reasonable ground or to harass the prevailing party." The Court confirmed Wendy's claims against Todd as trustee were brought in good faith. TJA002112, lines 6-7. Because Wendy's claims against Todd in his capacities as Trustees were brought in good faith and Todd had exposure to satisfy some or all the liability for these claims in his Individual capacity (and in fact was a necessary party in his Individual capacity to obtain a valid and enforceable judgment),³ the good faith finding must also apply to Wendy's decision to bring and maintain her claims against Todd, in his Individual capacity.

c. Todd Not Entitled to Fees and Costs Under NRCP 68.

Todd, in his Individual capacity, was not and is not entitled to an award of costs under NRCP 68. NRCP 68 is a mechanism to encourage settlement however it is not to be used "force plaintiffs to unfairly forego legitimate claims." *See Beattie*, 668 P.2d at 274 (citing *Armstrong v. Riggi*, 549 P.2d 753 (1976)). An offer of judgment must be an authentic attempt to settle a dispute. TJA002111, lines 13-

³ *See* WJ0119-0132.

14. The offer of judgment is not automatically conferred. *Id.* The Court applied NRCP 68 in the *Order After Equitable Trial*, as follows:

[O]ffers that are appropriate in time and amount will cause the non-offering party to become realistic and engage in genuine risk/benefit analyses. To be an effective mechanism to resolve disputes before trial, they should be in an amount to non-offering party cannot decline in good faith. On the other side, offering parties sometimes make time and amount-inappropriate offers *they expect to be rejected*. These offers do not facilitate settlement-they are strategic devices to shift the risk of fees by offering illusory consideration to end litigation.

TJA002111-002112. The Offer of Judgment from Todd, in his Individual Capacity, was for \$25,000. WJ0058-0062. Based on the circumstances, including the amount in controversy, this cannot be considered a legitimate offer to settle Wendy's claims. This is especially true considering Stan, had also sued Todd in his individual capacity based on the same claims Wendy filed and pursued against Todd and considering the findings and conclusions included in the *Order After Equitable Trial*. See *Supra* Statement of the Facts, pp. 7-9; WJ0030-0048.

(1) Fiduciary Has Individual Liability.

Wendy's claims against Todd, in his various capacities, included claims arising from the accounting deficiencies, breaches of fiduciary duty, conspiracy to commit breach of fiduciary duty and aiding and abetting breach of fiduciary duty. TJA000586-000614; TJA000632-000671; TJA000731-000752. One of the main

reasons Todd was joined as a party to this lawsuit was to ensure that any judgment resulting from these claims against Todd, in his fiduciary capacities, but payable or enforceable against Todd, in his Individual capacity, would be valid, enforceable, and collectable against Todd, Individually.

The Co-Trustees in their Individual capacities are separate and distinct legal persons from the Co-Trustees in their fiduciary capacities. *Mona v. Eighth Judicial District Court*, 380 P.3d 836, 842 (2016) (holding the Co-Trustee was, in her individual capacity, distinct legal person and stranger to Co-Trustee in her representative capacity as Co-Trustee of the Trust). NRS 153.031 and other Nevada authority allows recovery of damages, attorney's fees and costs from a trustee personally under certain circumstances, such when a trustee is determined to be negligent in the performance of or breached his or her fiduciary duties. Because a district court is empowered to render a judgment either for or against a person or entity only if it has jurisdiction over the parties and the subject matter, the failure to sue and make the Co-Trustees parties in their individual capacities would render any judgment against the Co-Trustees personally void. *C.H.A. Venture v. G.C. Wallace Consulting Engineers, Inc.*, 794 P.2d 707, 708 (1990) (confirming that district court was powerless to enter any form of valid judgment imposing liability against person or entity not properly served and made party to the lawsuit).

The Court considered this very issue when it ruled on the Kimmel's motion for summary judgment. Kimmel filed a motion for summary judgment seeking the dismissal of Wendy's claims against him in his Individual and Co-Trustee capacities. WJ0131, lines 3-5. On January 14, 2019, the Court entered an *Order* denying Kimmel's summary judgment in relation to Wendy's claims "arising from alleged accounting deficiencies and related breaches of fiduciary duty, including conspiracy to commit such breaches, as to Mr. Kimmel in both his capacities as trustee and individually." *Id.* The *Order* confirmed Kimmel, as a Co-Trustee, could have personal liability for his failures as a Co-Trustee and, therefore, was a proper party in his Individual capacity based on Wendy's claims and included authority confirming same. WJ0119-0132.

Because fiduciaries can and are held liable in their Individual capacities for certain actions, including breaches of fiduciary duty, the individual liability resulting from or associated with fiduciary claims must be considered in the NRCP 68 analysis. In other words, when considering an award of fees under NRCP 68, the fiduciary's exposure to individual liability for its fiduciary acts must be considered. A failure to include this individual liability exposure when considering an offer of judgment made by a fiduciary in their Individual capacity results in an incomplete assessment. This is prejudicial to the offeree and would discourage beneficiaries or others suing fiduciaries from joining the fiduciaries to lawsuits in

their Individual capacities when doing so is necessary to obtain a valid and enforceable judgment.

(2) **Wendy Obtained More Favorable Judgment than Offer of Judgment.**

The penalties of NRCF 68 apply to an offeree “[i]f the offeree rejects an offeree and fails to obtain a more favorable judgment.” NRCF 68(f)(1) (emphasis added). Todd’s Offer of Judgment in his Individual capacity was \$25,000.00. The *Judgment* requires the following payments by Todd, in his **Individual capacity**:

- i. \$15,605.34 to Wendy;
- ii. all fees paid to Todd by the SSJ’s Issue Trust and the Family Trust to the SSJ’s Issue Trust and the Family Trust; and
- iii. twenty-five percent (25%) of all attorney’s fees paid by the SSJ’s Issue Trust and the Family Trust in this litigation to SSJ’s Issue Trust and the Family Trust.

WJ0058-0062.

Based on the accountings, Todd, in his Individual capacity, must pay \$58,250.00 to the SSJ’s Issue Trust and \$20,790.00 to the Family Trust for a total amount of \$79,040.00⁴ to repay the Trustee’s fees he received. TJA000067, 82, 94, 109, 330, 392. Todd, in his Individual capacity, must pay, at a minimum,

⁴ These numbers are not intended to be an admission of the maximum amount owed by Todd.

\$124,661.56, in attorney's fees to the Family Trust and an additional amount of attorney's fees to the Issue Trust. TJA00002618, lines 21-23. In *Todd B. Jaksick's Motion to Amend Judgment*, which was filed on April 29, 2020, Todd admits that "[a]ccording to the math involved in various filing in this matter, **Todd could be required to pay \$500,000 or more to the two trusts as an individual.**" TJA003003 (emphasis added).

As a result of Wendy's claims, Todd, in his Individual capacity, must pay \$219,306.90 or more (according to Todd's own calculations) that directly benefits Wendy and/or her beneficial interests in the SSJ's Issue Trust and Family Trust. This is far more than Todd's \$25,000.00 Offer of Judgment. WJ0058-0062.

(3) Offer of Judgment Not Authentic Attempt to Settle Claims.

When Todd's Individual liability exposure arising and resulting from his breaches of fiduciary duty and other fiduciary wrongdoing are included in the NRCP 68 analysis under the *Beattie* factors, Todd's Offer of Judgment in his Individual capacity was not an authentic attempt to settle Wendy's claims and cannot be the basis for an award of fees and costs.

(4) Claims Brought in Good Faith.

The Court concluded in the *Order After Equitable Trial* that Wendy's claims against Todd in his capacities as trustees were brought in good faith. TJA002112,

lines 6-7. The Court stated, “Wendy’s concerns are countenanced, in large part, by the questions raised by the accountings, Stan’s separate allegations against Todd, document anomalies, and the optics of Todd’s disproportionate benefit from Sam’s business and trust affairs.” *Id.*; *See supra* Statement of the Facts, pp. 7-9. Because Wendy’s claims against Todd in his capacities as Trustees were brought in good faith and Todd had exposure to satisfy some or all the liability for these claims in his Individual capacity (and was a necessary party in his Individual capacity), the good faith finding must also apply to Wendy’s decision to bring and maintain her claims against Todd, in his Individual capacity.

(5) Offer Not Reasonable and Good Faith in Timing and Amount.

The Court also concluded that Todd’s Offers of Judgments were not reasonable and in good faith. TJA002112, lines 20-21. The Offers of Judgement were made six months after Wendy filed her *Amended Counter-Petition*, when discovery was in its infancy. TJA002112, lines 18-19. The Court supported its conclusion stating, “given the financial and documentary complexity, discovery delays and disputes (including Todd’s continued depositions long after the offer of judgment were made), the untimely accountings, incomplete discovery, and the amounts in controversy, the offer does not appear to be made with good-faith intention of settling Wendy’s claims.” TJA002141, lines 22-26.

Because the Court determined the Todd's Offer of Judgment was not made with the good-faith intention to settle Wendy's claims against him and Todd knew Wendy would not accept \$25,000 to resolve her claims against him in his capacity as Trustee, it is logically inconsistent to conclude it does not apply to Wendy's claims against Todd, in his Individual capacity. A settlement with Todd, Individually, based upon the Offer of Judgment may have foreclosed some or all her claims against him as Trustees, which is another reason it was impossible for her to accept.

(6) Decision to Reject Offer was Reasonable.

The Court further concluded that Wendy's decision to reject Todd's offer in his capacity as Trustee was not grossly unreasonable or in bad faith. TJA002142, lines 3-6. The Court states, "Todd knew, or should have known, the fees incurred through continuing litigation alone would substantially overshadow the offered amounts. Todd knew, or should have known, that Wendy would never accept \$25,000 to resolve her claims against him as trustee." TJA002140, lines 22-25. Again, accepting the Offer of Judgment by Todd, Individually, could foreclose her claims against him as Trustee, making it reasonable for her to reject it.

(7) Fees Sought are Not Reasonable and Justified in Amount.

Todd's fees and costs awarded were not reasonable and justified in amount. Todd filed Memos of Costs in support of fees on March 11, 2019 and a supplement on March 21, 2019. WJ4162-4196. Note, on March 25, 2019, Todd filed his *Notice of Withdrawal*, withdrawing the two *Memorandum of Costs* filed on March 11, 2019 and the *Supplement to Memorandum of Costs* filed on March 21, 2019. WJ4197-4200. The *Memos* and *Supplemental Memo* were the supporting documents for the fees and expenses sought in Todd's *Motion for Fees and Costs*, and were never resubmitted or refiled by Todd. Meaning, the fees and costs sought in Todd's *Motion for Fees and Costs* were not and are not supported by documents and other support sufficient to for the Court to determine the fees were reasonable and actually incurred or reasonable and necessarily incurred. TJA000958-001157; *see Cadle Co. v. Woods & Erickson, LLP*, 345 P.3d 1049 (2015).

Beyond failing to include information necessary to support the fees and costs sought, Todd failed to establish the fees incurred by him Individually did not overlap those incurred by him as Trustee. Todd was paying separate law firms to represent him in each separate capacity, and most of the representation overlapped causing such fees to be a "double-dip." Some expenses were paid by his Individual attorney and some by his Trustee attorney. None of the Trusts had any business

paying Todd's Individual attorneys' fees, unless the Indemnification Agreement was incorrectly applied, which Todd did regularly for his personal benefit. All fees Todd, Individually, paid by Todd, as Trustee of the SSJ Issue Trust or as Co-Trustee of the Family Trust, – once again – a breach of his fiduciary duties because each beneficiary loses their share of each dollar spent improperly. Todd's *Motion for Fees and Costs* never segregates the fees and never justifies paying his Individual fees out of the Trust.

d. Award of Fees and Costs was Error.

Todd, in his Individual capacity, was not entitled to an award of fees or costs. The Court's *Order Denying Wendy Costs* confirms Todd was not a "prevailing party" entitled to an award under NRS 18.020. TJA002847, lines 5-8. There are no findings or orders that Wendy brought or maintained her claims against Todd without reasonable ground or to harass Todd, so he was not entitled to an award of fees under NRS 18.010.

Based on Todd's own admission, he could be required to pay \$500,000 or more in his Individual capacity. TJA003003, lines 3-4. This \$500,000 in Individual liability is the result of claims brought by Wendy. Ignoring this Individual liability exposure results in an incomplete NRCP 68 analysis and is the only way to find that Wendy did not obtain a "more favorable judgment" than Todd's \$25,000 Offer of Judgment, when Todd, Individually, is required to pay \$500,000 or more to Wendy

or to Trusts Wendy has a beneficial interest. If Todd had been an honest fiduciary that performed and provided Wendy full disclosure of all information that materially affected her interest, more than likely, there would have been any claims filed against him. He cannot pin his failures on Wendy – the law does not allow it. It was error and a manifest abuse of discretion to ignore this Individual liability exposure associated with Wendy’s fiduciary claims when the Court conducted its NRCP 68 analysis.

VII. CONCLUSION

For the reasons set forth above, Wendy requests and this Court should grant Wendy a new trial.

Dated this 23rd day of August, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 18,444 words; or

☐ does not exceed _____ pages.

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

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23rd day of August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT/CROSS-APPELLANT'S ANSWERING AND OPENING BRIEF** was filed electronically with the Nevada Supreme Court on the 23rd day of August, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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