

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD BAYUK LIVING TRUST; SALVATORE MORABITO, an individual; and SNOWSHOE PETROLEUM, INC., a New York corporation,

Petitioners,

vs.

THE SECOND JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, AND THE HONORABLE CONNIE J. STEINHEIMER,

Respondents,

and

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito,

Real Party in Interest.

Case No.

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**PETITION FOR WRIT OF
MANDAMUS OR PROHIBITION**

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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 Justices of this Court may evaluate possible disqualification or recusal.

1. Petitioner, Superpumper, Inc. is an Arizona corporation.
2. Snowshoe Petroleum, Inc. is a New York corporation and has no parent company or publicly held company that owns 10% or more of its stock.
3. Snowshoe Petroleum, Inc. owns 100% of the stock of Superpumper, Inc.
4. The Edward Bayuk Living Trust is a Nevada spendthrift trust and has no parent company or publicly held company that owns 10% or more of its stock.

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5. Petitioners are or have been represented by Robison, Sharp, Sullivan & Brust; Hartman & Hartman; Michael C. Lehnert; Marquis Aurbach Coffing; and Claggett & Sykes Law Firm.

Dated this 2nd day of December, 2020.

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I. ROUTING STATEMENT

The Supreme Court should retain this original proceeding. This writ petition asks the Court to interpret several provisions of NRS Chapter 166 (Spendthrift Trusts) involving issues of first impression. *See* NRAP 17(a)(11)&(12). First, Petitioners (collectively “Defendants”) ask this Court to conclude that there is no disclosure requirement for self-settled spendthrift trusts (“SSSTs”) to be valid, contrary to the District Court’s ruling. 53 Petitioners’ Appendix (“PA”) 9358; *Klabacka v. Nelson*, 394 P.3d 940, 943 (Nev. 2017) (recognizing that trusts can be converted into valid SSSTs).

Second, Defendants ask this Court to construe NRS 166.015 to conclude that the Bayuk Trust is a valid SSST. The District Court improperly concluded that the Bayuk Trust would not be treated as an SSST according to NRS 166.015 because Edward Bayuk (“Bayuk”) “is the settlor and beneficiary during his lifetime of the Bayuk Trust, and neither Bayuk nor his co-trustee Paul Morabito are domiciles of Nevada.” 53 PA 9358 (citing NRS 166.015(2)). But, the text of the Bayuk Trust recognizes that former Governor James A. Gibbons, a Nevada resident, is a co-trustee of the Bayuk Trust. 54 PA 9447.

Third, this petition asks the Court to construe NRS 166.170. The District Court determined that Real Party in Interest, William A. Leonard, Trustee for the Bankruptcy Estate of Paul Anthony Morabito (the “Trustee”), was not untimely in

seeking relief against the Bayuk Trust because he had allegedly complied with the limitations periods of transfers, as outlined in NRS 166.170. 53 PA 9359. But, the District Court's own calculation acknowledges that the Trustee's complaint was untimely. *Id.*

Fourth, Defendants ask this Court to determine that transfers from one SSST to another SSST are protected from the Trustee's fraudulent transfer claims. This is an unsettled issue of Nevada law, which this Court accepted as an NRAP 5 certified question in *Magliarditi v. TransFirst Grp., Inc.*, Order Answering Questions and Remanding, 2019 WL 5390470, Dkt. No. 73889 (Oct. 21, 2019) (unpublished), but did not answer.

In the related appeal in Case No. 80214, Defendants have raised issues of subject matter jurisdiction to vacate the final judgment, or alternatively, to order a new trial before a new District Court Judge on remand, due to the improper admission of privileged information during the bench trial. If the Court grants Defendants any relief in Case No. 80214, and either vacates the judgment or orders a new trial, the issues in this original proceeding will become moot. However, if the Court does not grant Defendants any relief in Case No. 80214, the issues in this writ petition should be considered. Therefore, Defendants urge the Supreme Court to retain this original proceeding and assign it to the same panel of Justices as Case No. 80214.

II. ISSUES PRESENTED

- A. WHETHER THE DISTRICT COURT ERRED BY REFUSING TO RECOGNIZE THE VALIDITY OF SPENDTHRIFT TRUSTS UNDER NRS CHAPTER 166 BY ADDING EXTRA-STATUTORY CONDITIONS.**
- B. WHETHER THE DISTRICT COURT ERRED BY REFUSING TO APPLY THE PLAIN LANGUAGE OF THE LIMITATIONS PERIOD IN NRS 166.170.**
- C. WHETHER A TRANSFER BETWEEN TWO SPENDTHRIFT TRUSTS IS PROTECTED FROM FRAUDULENT TRANSFER CLAIMS.**
- D. WHETHER THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER THE BAYUK TRUST SINCE NO *IN REM* ACTION WAS FILED AGAINST IT.**

III. OVERVIEW AND SUMMARY OF ARGUMENT

This is an original proceeding challenging the District Court’s refusal to acknowledge and enforce key provisions of NRS Chapter 166 (Spendthrift Trusts). In ruling on claims of exemption and a third-party claim, the District Court erroneously concluded that the Edward Bayuk Living Trust (“Bayuk Trust”) would not be treated as a Nevada spendthrift trust because it “was not disclosed prior to the Claim of Exemption.” 53 PA 9358. But, this Court has recognized that trusts can be converted into valid self-settled spendthrift trusts (“SSSTs”). *See Klabacka v. Nelson*, 394 P.3d 940, 943 (Nev. 2017). Despite the controlling nature of *Klabacka*, the District Court’s order did not mention *Klabacka*, let alone attempt to

apply it to this case. 53 PA 9357–9360. Moreover, nothing within NRS Chapter 166 identifies a time when an SSST must be disclosed. As such, the District Court’s ruling on this issue was simply an attempt to add new requirements to the statutory language. *See McKay v. Bd. of Cnty. Comm’rs*, 103 Nev. 490, 492, 746 P.2d 124, 125 (1987) (explaining that when a statute is silent, “it is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the [L]egislature would or should have done”). Upon Defendants’ motion for reconsideration, the District Court once again denied their requested relief to enforce the statutory provisions and once again ignored *Klabacka*, as well as the controlling provisions of NRS Chapter 166. 57 PA 10011–10019.

The District Court’s order then concluded that the Bayuk Trust would not be treated as an SSST according to NRS 166.015 because Edward Bayuk (“Bayuk”) “is the settlor and beneficiary during his lifetime of the Bayuk Trust, and neither Bayuk nor his co-trustee Paul Morabito are domiciles of Nevada.” 53 PA 9358 (citing NRS 166.015(2)). But, this misplaced construction avoided the fact that former Governor James A. Gibbons, a Nevada resident, is a co-trustee of the Bayuk Trust. 54 PA 9447. Thus, the Bayuk Trust is not disqualified as an SSST according to NRS 166.015(1)(d) and (2)(a).

The District Court additionally determined that the Trustee was not untimely in seeking relief against the Bayuk Trust because he had allegedly complied with

the limitation periods of transfers, as outlined in NRS 166.170. 53 PA 9359. To reach this determination, the District Court concluded that there was a tolling agreement that allowed for the filing of a complaint until June 18, 2013. *Id.* But, the District Court's order simultaneously acknowledged that the complaint was not filed until December 2013. *Id.* Thus, the Trustee's entire action against the Bayuk Trust should have been barred by the limitations period in NRS 166.170.

Since the Bayuk Trust, as an SSST, received transfers from the Arcadia Living Trust, which is also an SSST, the transfers should have been protected from the Trustee's fraudulent transfer claims. 54 PA 9448–9484. This is an unsettled issue of Nevada law, which this Court accepted as an NRAP 5 certified question in *Magliarditi v. TransFirst Grp., Inc.*, Order Answering Questions and Remanding, 2019 WL 5390470, Dkt. No. 73889 (Oct. 21, 2019) (unpublished). However, the Court did not answer this particular certified question among the others that were presented. *Cf. In re Contrevo*, 123 Nev. 20, 23, 153 P.3d 652, 654 (2007) (explaining that Nevada's constitutional directive would be thwarted if 'dormant' judgment liens could attach to fully exempt homestead property).

Finally, this writ petition repeats the issue already presented in the related appeal, Case No. 80214, involving the District Court's lack of subject matter jurisdiction over the Bayuk Trust, due to the Trustee's failure to name the Bayuk Trust as a Defendant, but only Bayuk, as the trustee. *See In re Aboud Inter Vivos*

Tr., 129 Nev. 915, 922, 314 P.3d 941, 945–946 (2013). This issue is repeated in this writ petition because the Trustee’s answering brief in Case No. 80214 has questioned whether this issue involves subject matter jurisdiction. Since this issue was raised in the District Court proceedings that are within the scope of this original proceeding, the Court should consider the merits of the issue in this proceeding.

In summary, Defendants ask this Court to conclude that: (1) the validity of SSSTs does not depend upon disclosure; (2) the provisions of NRS 166.015 do not invalidate the Bayuk Trust based upon the language of the trust; (3) according to NRS 166.170, the Trustee’s claims against the Bayuk Trust are time-barred; (4) transfers between two SSSTs are protected as a matter of law; and (5) the District Court lacked subject matter jurisdiction over the Bayuk Trust for the Trustee’s failure to name it as a Defendant. Based upon these reasons, and those more fully articulated in this petition, Defendants ask this Court to order that the Trustee’s fraudulent transfer judgment cannot be enforced against Defendants.

IV. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. THE ORIGINAL COMPLAINT, CLAIMS, AND PARTIES.

This litigation began with the filing of a complaint in December 2013. 1 PA 1–17. The complaint was filed by JH, Inc.; Jerry Herbst; and Berry-Hinckley Industries (collectively the “Herbst Parties”) against Paul Morabito, individually

and as trustee of the Arcadia Living Trust; Superpumper, Inc.; Edward Bayuk, individually and as trustee of the Edward Bayuk Living Trust; and Snowshoe Petroleum, Inc. *Id.* This original complaint alleged claims for (1) fraudulent transfers (1 PA 10–11); (2) breach of contract (1 PA 12); (3) breach of the implied covenant of good faith and fair dealing (1 PA 13); (4) fraudulent inducement/misrepresentation (1 PA 13–14); (5) civil conspiracy (1 PA 14–15); and (6) aiding and abetting fraudulent misrepresentation (1 PA 16).

The Herbst Parties alleged that following an oral ruling finding fraud in a separate case against Paul Morabito and non-party Consolidated Nevada Corporation (“CNC”) for \$149,444,777.80, Paul Morabito and CNC agreed to settle the case for \$85,000,000 to be paid over a period of time. 1 PA 4. The Herbst Parties further alleged that Paul Morabito and CNC failed to abide by the terms of the settlement agreement by failing to make payments. 1 PA 4–7. The Herbst Parties then alleged that Paul Morabito engaged in a series of fraudulent transfers involving the remaining Defendants. 1 PA 7–10.

B. PAUL MORABITO’S INVOLUNTARY CHAPTER 7 BANKRUPTCY.

In February 2015, the Herbst Parties provided notice to the District Court that they had filed involuntary Chapter 7 bankruptcy petitions for both Paul

Morabito and CNC. 3 PA 495–574. These notices still listed the Herbst Parties as the plaintiffs. *Id.*

C. THE STIPULATIONS AND THE TRUSTEE’S AMENDED COMPLAINT, ABANDONMENT OF CERTAIN CLAIMS, AND PARTIES.

The parties stipulated to remove the Herbst Parties and substitute in the Trustee as the plaintiff. 4 PA 608–611. In this stipulation, the parties also removed Paul Morabito, individually and as a trustee of the Arcadia Living Trust, as defendants. *Id.* In a separate stipulation, the parties agreed to allow the Trustee to file an amended complaint, which referred to Paul Morabito as the “Debtor,” but alleged the same underlying facts, and abandoned all claims except for the claimed fraudulent transfers. 4 PA 575–607. The parties filed a further stipulation to substitute parties to remove the Arcadia Living Trust as a defendant. 4 PA 624–627.

D. THE DISTRICT COURT’S DENIAL OF THE TRUSTEE’S MOTION FOR PARTIAL SUMMARY JUDGMENT.

Prior to the bench trial, the Trustee filed a motion for summary judgment. 11 PA 1754–17 PA 2726. The Trustee asked the District Court to grant summary judgment on his sole claim for fraudulent transfer, including minimum monetary amounts to be awarded that could be increased at trial. 11 PA 1791–1793. The Trustee alternatively asked to be awarded real properties for certain transfers. *Id.*

In denying the Trustee's motion for summary judgment, the District Court found that "a material issue of fact exists as to whether Bayuk should be considered an insider for the purpose of NUFTA [Nevada Uniform Fraudulent Transfer Act]." 19 PA 2994. The District Court also determined that "a material issue of fact exists as to whether Paul [Morabito] maintained possession or control of all the transferred property." 19 PA 2994. The District Court further found that "the inclusion of appraisers and lawyers to the various transaction[s] cuts against the evidence that the transfers were concealed. Therefore, the Court finds a material issue of fact exists as to this badge of fraud." 19 PA 2995.

Elaborating on additional factual issues, the District Court found that "there are [] material issues of fact as to whether Paul [Morabito] received reasonably equivalent value for the various transfers." 19 PA 2995. The Court detailed additional factual issues, including the "transfer of the Laguna Properties for the Reno Property was a transfer of reasonable equivalent value, as well as the value of the Reno Property being in dispute." *Id.* The District Court also recognized, with respect to Paul Morabito's interest in the Baruk Properties, that there is a material issue of fact as to whether the Baruk Note was a 'sham note' and whether the Baruk Note has been paid." *Id.* The District Court reasoned that since "some evidence has been provided that Paul [Morabito] was compensated for the Sparks Property, the Court cannot find because the Property was not considered in the

appraisal matrix, that this alone shows fair value was not given for the Baruk Transfer.” *Id.*

The District Court similarly found “multiple issues of fact concerning whether fair value was received in regard to [the] Superpumper Transfer.” 19 PA 2995. There were material issues of fact with regard to both “the value of Superpumper at the time of the transfer,” “whether the promissory notes issued in connection with the transfer were illusory,” and “whether [the] promissory notes were paid.” *Id.* Due to these several factual issues, the District Court denied the Trustee’s motion for summary judgment. 19 PA 2996.

E. THE DISTRICT COURT’S JUDGMENT.

The District Court’s decision entered judgment against Bayuk and the Bayuk Trust, as follows: (1) avoiding the transfer of the El Camino Property and the Los Olivos Property, and awarding the Trustee damages in the amount of \$884,999.95, with offset for amounts collected on account of the El Camino Property and the Los Olivos Property; (2) avoiding the transfer of Baruk LLC and awarding Plaintiff damages in the amount of \$1,654,550 with offset for amounts collected on account of Baruk LLC; (3) avoiding the transfer of \$420,250 and awarding the Trustee damages in the amount of \$420,250 with offset for amounts collected on account of the \$420,250; and (4) avoiding the Superpumper transfer and awarding

the Trustee damages in the amount of \$4,949,000 with offset for amounts collected on account of the Superpumper transfer. 48 PA 8331.

Against Sam Morabito as follows: (1) avoiding the transfer of \$355,000 and awarding the Trustee damages in the amount of \$355,000 with offset for amounts collected on account on account of the \$355,000; and (2) avoiding the Superpumper transfer and awarding the Trustee damages in the amount of \$4,949,000 with offset for amounts collected on account of the Superpumper transfer. *Id.*

Against Snowshoe, avoiding the Superpumper transfer and awarding the Trustee damages in the amount of \$9,898,000 with offset for amounts collected on account of the Superpumper transfer. *Id.*

F. THE POST-TRIAL PROCEEDINGS.

Following the District Court's decision, Defendants filed motions for new trial or to alter or amend the judgment. 49 PA 8638–50 PA 8777. Within these motions, Defendants reasserted, among other issues, an unfair trial due to evidence that was admitted, even though it contained hearsay information and lacked foundation. 49 PA 8638–8657; 50 PA 8658–8676. The District Court generally considered Defendants' arguments but rejected them in a written denial order. 52 PA 9122–9124.

The District Court also granted attorney fees and costs to the Trustee in the amount of \$764,987.33 for attorney fees based upon an offer of judgment and \$109,427 in costs. 51 PA 8983–8988.

G. THE DISTRICT COURT’S ENFORCEMENT OF VOID WRITS OF EXECUTION.

After the resolution of the post-trial proceedings, the Trustee issued separate writs of execution to Bayuk, as the trustee of the Bayuk Trust, and Bayuk individually. 51 PA 8871–8896. The Trustee issued additional writs of execution to Defendant Salvatore (“Sam”) Morabito. 51 PA 8958–8970. However, these writs of execution did not identify the specific property that was being levied upon, as required by NRS 21.075 and NRS 21.112(1).

Bayuk and Sam Morabito individually filed claims of exemption, and Bayuk, as trustee, filed a third-party claim to property levied upon, as outlined in NRS 31.070. 51 PA 8865–8970, 8973–8982. The Trustee then filed objections to these claims of exemption. 52 PA 8989–9121, 9142–9146. Defendants then filed their separate replies. 52 PA 9147–9190, 9191–9194.

The District Court held a hearing in which it denied Defendants’ claims of exemption. 53 PA 9253; 56 PA 9775–9835. The District Court entered separate orders on the two sets of claims of exemptions and the third-party claim. 53 PA 9254–9255, 9357–9360.

H. DEFENDANTS' MOTION FOR RECONSIDERATION AND THE DISTRICT COURT'S DENIAL.

During the course of the hearing on the claims of exemption and the third-party claim, the District Court requested additional documentation. 56 PA 9832. Based upon the District Court's request, Defendants filed a motion for reconsideration, including the additional documentation. 54 PA 9377–57 PA 9893. The Trustee opposed Defendants' motion. 57 PA 9894–9938. Defendants then filed a reply in support of their motion for reconsideration. 57 PA 9939–10010.

Without a hearing, the District Court considered the merits of Defendants' motion for reconsideration and denied Defendants any relief in a written order. 57 PA 10011–10019.

I. THE TRUSTEE'S ACQUIESCENCE IN DEFENDANTS' CHALLENGES TO THE VOID WRITS OF EXECUTION.

Dissatisfied with its initial round of writs of execution, the Trustee issued an additional writ of execution against Bayuk, both individually and as the trustee of the Bayuk Trust. 58 PA 10123–10130. Similar to his prior writs of execution, the Trustee's more recent writ of execution also suffered from the same legal and constitutional flaws. As such, Bayuk, in his two capacities, once again filed a claim of exemption and third-party claim to property levied upon. 58 PA 10112–10190. Tellingly, the Trustee failed to object to the claim of exemption or the

third-party claim to property levied upon, thus acquiescing in Defendants' arguments.

V. STANDARDS OF REVIEW

A writ of mandamus is available “to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion.” *Int’l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Where there is no plain, speedy, and adequate remedy in the ordinary course of law, extraordinary relief may be available. *Id.*

“A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the jurisdiction of the district court.” *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). “A writ of prohibition is an extraordinary remedy, and therefore, the decision to entertain the petition lies within [this Court’s] discretion.” *Daane v. Eighth Judicial Dist. Court*, 127 Nev. 654, 655, 261 P.3d 1086, 1087 (2011).

This Court will exercise its discretion to consider writ petitions, when an important issue of law needs clarification, and this Court’s review would serve considerations of public policy, sound judicial economy, and administration. *See Dayside Inc. v. First Judicial Dist. Court*, 119 Nev. 404, 407, 75 P.3d 384, 386 (2003), *overruled on other grounds by Countrywide Home Loans, Inc. v.*

Thitchener, 124 Nev. 725, 192 P.3d 243 (2008). “One such instance is when a writ petition offers this court a unique opportunity to define the precise parameters of . . . a statute that this court has never interpreted.” *Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000).

Issues of statutory interpretation are questions of law that this Court reviews de novo, even in the context of a writ petition. *State v. Second Judicial Dist. Court (Ayden A.)*, 132 Nev. 352, 355, 373 P.3d 63, 65 (2016) (citing *Int’l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559).

VI. LEGAL ARGUMENT

A. THE DISTRICT COURT ERRED BY REFUSING TO RECOGNIZE THE VALIDITY OF SPENDTHRIFT TRUSTS UNDER NRS CHAPTER 166 BY ADDING EXTRA-STATUTORY CONDITIONS.

1. The Trustee’s Writs of Execution Are Void as a Matter of Law, Due to the Lack of Procedural Due Process.

NRS 21.075 and NRS 21.112(1) recognize that a writ of execution and the accompanying notices must identify the specific property that is being levied upon. However, the Trustee’s various sets of writs of execution do not identify any specific property that is being levied upon. 51 PA 8871–8896, 8958–8970; 58 PA 10123–10130. Without the Trustee’s identification of the property being levied, Defendants had no opportunity to more particularly assert their claims of exemption since different exemption apply to different types of property. *See, e.g.*,

NRS 21.090, NRS 21.095, NRS 21.105, NRS 21.107, NRS 21.118, and NRS 21.130. Indeed, by enforcing the Trustee’s writs of execution without the proper notice, Defendants were deprived of procedural due process. *See Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007) (applying procedural due process to civil cases); *Fuentes v. Shevin*, 407 U.S. 67, 82, 92 S.Ct. 1983 (1972) (a later hearing does not remedy a prior deprivation); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53, 114 S.Ct. 492 (1993) (“[T]he right to prior notice and a hearing is central to the Constitution’s command of due process” absent extraordinary circumstances.). Therefore, the Court should first determine that the Trustee’s writs of execution are void, and therefore unenforceable, for failure to identify any specific property was being levied upon.

2. The District Court’s Added Condition of Disclosure of the SSST Is Not Required by Nevada Law.

In ruling on claims of exemption and a third-party claim, the District Court erroneously concluded that the Bayuk Trust would not be treated as a Nevada spendthrift trust because it “was not disclosed prior to the Claim of Exemption.” 53 PA 9358. But, this Court has recognized that trusts can be converted into valid SSSTs. *See Klabacka v. Nelson*, 394 P.3d 940, 943 (Nev. 2017). Despite the controlling nature of *Klabacka*, the District Court’s order did not mention *Klabacka*, let alone attempt to apply it to this case. 53 PA 9357–9360. Moreover,

nothing within NRS Chapter 166 identifies a time when an SSST must be disclosed. Notably, the District Court’s order denying reconsideration also does not mention *Klabacka* or identify a statutory provision that would require disclosure. 57 PA 10011–10019.

Indeed, the nature of an SSST must be derived from the written trust documents. *See* NRS 166.015 (referencing the controlling nature of the “writing”). In a similar case involving the non-disclosure of a spendthrift trust, a Pennsylvania Bankruptcy Court ruled that even though a spendthrift trust was not disclosed in bankruptcy schedules, it would still be treated as a spendthrift trust, despite the bankruptcy trustee’s arguments of estoppel and law of the case. *See In re Katz*, 220 B.R. 556, 565 (Bankr. E.D. Penn. 1998) (“Only the language of the Trust, evidencing as it does the testator’s intent, can bestow upon or deny a trust spendthrift status.”); *In re Allan*, 449 B.R. 628, 638 (Bankr. S.D. Ga. 2009) (concluding that the failure to disclose a spendthrift trust did not change its nature).

According to NRS 21.080, “[t]his chapter does not authorize the seizure of, or other interference with, any money, thing in action, **lands or other property held in spendthrift trust** or in a discretionary or support trust governed by chapter 163 of NRS for a judgment debtor, or held in such trust for any beneficiary, pursuant to any judgment, order or process of any bankruptcy or other court directed against any such beneficiary or trustee of the beneficiary.” (emphasis

added). Likewise, NRS 21.090(1)(cc) and (dd) allow a judgment debtor to assert exemptions based upon a spendthrift clause in a trust. As such, the District Court's conclusion that disclosure was required prior to the execution proceedings was erroneous.

Thus, the District Court's ruling on this issue was simply an attempt to add new requirements to the statutory language. *See McKay v. Bd. of Cnty. Comm'rs*, 103 Nev. 490, 492, 746 P.2d 124, 125 (1987) (explaining that when a statute is silent, "it is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the [L]egislature would or should have done"). Therefore, the Court should determine that the Bayuk Trust is a valid SSST.

3. The District Court's Interpretation of NRS 166.015 Similarly Violates the Purpose of Spendthrift Trusts and Is Not Supported by the Evidence Presented.

The District Court erroneously concluded that the Bayuk Trust would not be treated as an SSST according to NRS 166.015 because, as the District Court asserted, Bayuk "is the settlor and beneficiary during his lifetime of the Bayuk Trust, and neither Bayuk nor his co-trustee Paul Morabito are domiciles of Nevada." 53 PA 9358 (citing NRS 166.015(2)). But, this misplaced construction avoided the fact that former Governor James A. Gibbons, a Nevada resident, is a co-trustee of the Bayuk Trust. 54 PA 9447.

The pertinent parts of NRS 166.015 state as follows:

1. Unless the writing declares to the contrary, expressly, this chapter governs the construction, operation and enforcement, in this State, of all spendthrift trusts created in or outside this State if:

(a) All or part of the land, rents, issues or profits affected are in this State;

(b) All or part of the personal property, interest of money, dividends upon stock and other produce thereof, affected, are in this State;

(c) The declared domicile of the creator of a spendthrift trust affecting personal property is in this State; or

(d) At least one trustee qualified under subsection 2 has powers that include maintaining records and preparing income tax returns for the trust, and all or part of the administration of the trust is performed in this State.

2. If the settlor is a beneficiary of the trust, at least one trustee of a spendthrift trust must be:

(a) A natural person who resides and has his or her domicile in this State;

* * * *

Importantly, to satisfy Section 1 for the recognition of the Bayuk Trust as an SSST, only one of the subsections (a) through (d) needs to be satisfied because they are joined together by “or.” The Bayuk Trust declares that Bayuk, as the “creator” of the trust, has a domicile in Reno, Nevada. 54 PA 9408. Thus, subsection (c) is satisfied. The District Court’s reliance upon information outside of the trust document violates the parol evidence rule that this Court reconfirmed in *Klabacka*.

See Klabacka, 394 P.3d at 946 (“Where a written contract is clear and unambiguous on its face, extraneous evidence cannot be introduced to explain its meaning.”) (citing *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21 (2001); *Frei v. Goodsell*, 129 Nev. 403, 409, 305 P.3d 70, 73 (2013)). Subsection (d) of Section 1 of this statute is also satisfied because former Governor Gibbons, a Nevada resident, is a co-trustee of the Bayuk Trust. 54 PA 9447.

With respect to the District Court’s conclusion that the Bayuk Trust does not qualify as an SSST under Section 2, subsection (a) (53 PA 9358), Governor Gibbons’ status as a co-trustee of the Bayuk Trust also satisfies this subsection. 54 PA 9447. Thus, the District Court erroneously refused to enforce the Bayuk Trust as an SSST.

4. **The Trustee Has Acquiesced in the Arguments Presented in this Writ Petition by Failing to Respond to Sam Morabito’s Claim of Exemption on Reconsideration and Defendants’ Subsequent Claims of Exemption.**

During the hearing on Defendants’ claims of exemption and the Trustee’s objections, counsel inquired of the District Court whether Sam Morabito’s claim of exemption would be granted, given that he is domiciled in Canada. 56 PA 9829–9830. The Trustee did not oppose this argument. *Id.* Subsequently, to call this issue to the District Court’s attention, Defendants pointed out in their motion for reconsideration that the Trustee could not obtain a general execution order against

Sam Morabito, without specifically identifying any property that would be subject to execution. 54 PA 9397–9398. Under the principle of international comity, courts should give effect to executive, legislative, or judicial acts of another nation. *See Philadelphia Gear Corp. v. Philadelphia Gear de Mexico*, 44 F.3d 187, 191 (3d Cir. 1994). Comity is the “recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 163, 16 S.Ct. 139 (1895).

With the Trustee’s general execution order, however, Sam Morabito could be subject to unlawful extraterritorial execution, which he would have to again challenge. *Cf. City of Oakland v. Desert Outdoor Adver., Inc.*, 127 Nev. 533, 537, 267 P.3d 48, 51 (2011) (“[D]efenses such as lack of personal or subject-matter jurisdiction of the rendering court, fraud in the procurement of the judgment, **lack of due process**, satisfaction, or other grounds that make the judgment invalid or unenforceable may be raised by a party seeking to reopen or vacate a foreign judgment.”) (emphasis added and citations omitted). Since the Trustee’s opposition to reconsideration did not address this argument (57 PA 9894–9910), this Court should treat the failure to oppose as a concession that Sam Morabito’s claim of exemption should have been granted. *See, e.g.*, DCR 13(3) (“Failure of

the opposing party to serve and file his written opposition may be construed as an admission that the motion is meritorious and a consent to granting the same.”); *Bates v. Chronister*, 100 Nev. 675, 681–682, 691 P.2d 865, 870 (1984) (treating the respondent’s failure to respond to the appellant’s argument as a confession of error); *A Minor v. Mineral Co. Juv. Dep’t*, 95 Nev. 248, 249, 592 P.2d 172, 173 (1979) (determining that the answering brief was silent on the issue in question, resulting in a confession of error).

Likewise, when the Trustee served its second round of execution paperwork (58 PA 10123–10130), Defendants filed their similar claim of exemption according to NRS 21.112. 58 PA 10112–10190. Yet, the Trustee failed to object to any of Defendants’ arguments, thus acquiescing in Defendants’ arguments, including those presented in this writ petition. *See* BLACK’S LAW DICTIONARY, 29 (11th ed. 2019) (defining “acquiescence” as “[a] person’s tacit or passive acceptance; implied consent to an act”); DCR 13(3); *Bates*, 100 Nev. at 681–682, 691 P.2d at 870; *A Minor*, 95 Nev. at 249, 592 P.2d at 173. Therefore, the Court should treat the Trustee’s failure to respond as concession that Defendants are entitled to the relief they seek in this original proceeding.

B. THE DISTRICT COURT ERRED BY REFUSING TO APPLY THE PLAIN LANGUAGE OF THE LIMITATIONS PERIOD IN NRS 166.170.

The District Court improperly determined that the Trustee was not untimely

in seeking relief against the Bayuk Trust because he had allegedly complied with the limitation periods of transfers, as outlined in NRS 166.170. 53 PA 9359. To reach this determination, the District Court concluded that there was a tolling agreement that allowed for the filing of a complaint until June 18, 2013. *Id.* But, the District Court’s order simultaneously acknowledged that the complaint was not filed until December 2013. *Id.* Thus, the District Court’s own order constitutes a judicial admission that the Trustee’s complaint was untimely. *Cf. Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 343, 255 P.3d 268, 276 (2011) (“Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge.”) (citation omitted). Statutes outlining “time and manner” requirements must be strictly construed. *See Leven v. Frey*, 123 Nev. 399, 407–408, 168 P.3d 712, 717–719 (2007). Thus, the Trustee’s entire action against the Bayuk Trust should have been barred by the limitations period in NRS 166.170.

C. A TRANSFER BETWEEN TWO SPENDTHRIFT TRUSTS IS PROTECTED FROM FRAUDULENT TRANSFER CLAIMS.

1. Spendthrift Trusts Cannot Be Lightly Tossed Aside.

According to NRS 166.050, “[n]o specific language is necessary for the creation of a spendthrift trust. It is sufficient if by the terms of the writing (construed in the light of this chapter if necessary) the creator manifests an

intention to create such a trust.” In *Klabacka*, this Court explained, “Breaching trust formalities of an otherwise validly created SSST does not invalidate a spendthrift trust; rather, it creates liability upon the trustee(s) for that breach. Indeed, if, after an SSST is validly formed, the trust formalities are breached by a trustee, the proper remedy is a civil suit against the trustee—not an invalidation of the trust itself.” *Id.* at 948 (citing NRS 163.115). The District Court’s order enforcing the writs of execution runs contrary to *Klabacka* as it is “such a court order [that] would require the trustee to make a distribution outside the scope of the trust agreement and, perhaps more importantly, would run afoul of NRS 166.120(2), which prohibits payments made pursuant to or by virtue of any legal process.” *Id.* at 950 (citing NRS 163.417(1)(c)(1)).

Further, “[t]he legislative history of SSSTs in Nevada supports this conclusion. It appears that the Legislature enacted the statutory framework allowing SSSTs to make Nevada an attractive place for wealthy individuals to invest their assets, which, in turn, provides Nevada increased estate and inheritance tax revenues. *See* Hearing on A.B. 469 Before the Assembly Judiciary Comm., 70th Leg. (Nev., Mar. 26, 1999) (statement of Assemblyman David Goldwater). When crafting the language to allow SSSTs, the Legislature contemplated a statutory framework that protected trust assets from unknown, future creditors, as opposed to debts known to the settlor at the time the trust was created.” *See id.* at

951. “This rigid scheme makes Nevada’s self-settled spendthrift framework unique; indeed, the “key difference” among Nevada’s self-settled spendthrift statutes and statutes of other states with SSSTs, including Florida, South Dakota, and Wyoming, is that Nevada abandoned the interests of child- and spousal-support creditors, as well as **involuntary tort creditors**, seemingly in an effort to attract the trust business of those individuals seeking maximum asset protection.” *Id.* (emphasis added) (citing Michael Sjuggerud, *Defeating the Self-Settled Spendthrift Trust in Bankruptcy*, 28 FLA. ST. U. L. REV. 977, 986 (2001)).

2. The Trustee Cannot Attach Property that Is Transferred Between Two Protected SSSTs.

Since the Bayuk Trust, as an SSST, received transfers from the Arcadia Living Trust, which is also an SSST, the transfers should have been protected from the Trustee’s fraudulent transfer claims. 54 PA 9448–9484. This is an unsettled issue of Nevada law, which this Court accepted as an NRAP 5 certified question in *Magliarditi v. TransFirst Grp., Inc.*, Order Answering Questions and Remanding, 2019 WL 5390470, Dkt. No. 73889 (Oct. 21, 2019) (unpublished). However, the Court did not answer this particular certified question among the others that were presented. *Cf. In re Contrevo*, 123 Nev. 20, 23, 153 P.3d 652, 654 (2007) (explaining that Nevada’s constitutional directive would be thwarted if ‘dormant’ judgment liens could attach to fully exempt homestead property).

Notably, NRS 112.230(2), which is in the Nevada Uniform Fraudulent Transfer Act, carves out an exception for spendthrift trusts. As mentioned, NRS 21.080 and NRS 21.090(1)(cc) and (dd) also provide an exemption from execution for spendthrift trusts. According to *Klabacka* and the discussion on the legislative intent of NRS Chapter 166, it is undeniable that spendthrift trusts were intended to shield assets from even involuntary tort creditors. In order for these policies to have any meaning, the protected status of the assets must be maintained, which is analogous to the protection of proceeds from the sale of real property with a homestead exemption. Otherwise, “[p]ermitt[ing] creditors to attach judgment liens to exempt homestead property would allow them to cloud the title to property that they have no legal right to execute against.” *In re Contrevo*, 123 Nev. at 24, 153 P.3d at 655; *see also Klabacka*, 394 P.3d at 950 (“We conclude the statutory framework governing SSSTs does not allow a court to equalize spendthrift trust assets between or among different SSSTs.”); *In re Wachter*, 314 B.R. 365, 377 (Bankr. E.D. Tenn. 2004) (protecting both the corpus and income transferred between two spendthrift trusts).

Therefore, Defendants ask this Court to clarify that, as a matter of public policy regarding the unique law on spendthrift trusts in Nevada, transfers from one valid spendthrift trust to another valid spendthrift trust will maintain the protected status of transferred assets. *See Westpark Owners’ Ass’n v. Eighth Judicial Dist.*

Court, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007) (“[W]hen the Legislature has addressed a matter with ‘imperfect clarity,’ it becomes the responsibility of this court to discern the law.”) (citation omitted).

D. THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER THE BAYUK TRUST SINCE NO *IN REM* ACTION WAS FILED AGAINST IT.

The District Court lacked subject matter jurisdiction over the Bayuk Trust since no *in rem* action was filed against it. The District Court never acquired subject matter jurisdiction over the Bayuk Trust because it was not named as a defendant. 4 PA 594–607. Instead, the Trustee only named Bayuk, as the trustee of the Bayuk Trust. *Id.* BLACK’S LAW DICTIONARY, 1019 (11th ed. 2019) defines “*in rem* jurisdiction” as “[a] court’s power to adjudicate the rights to a given piece of property, including the power to seize and hold it.” An *in personam* judgment against the trustee is not the same as an *in rem* judgment against the trust. NRS 166.170(1) and (8) establish clear time limits to bring an action under NRS 164.010. And, NRS 164.010 specifies that the action must be one *in rem* against the trust. *See In re Aboud Inter Vivos Tr.*, 129 Nev. 915, 922, 314 P.3d 941, 945–946 (2013).

NRS 164.010(1) confers *in rem* jurisdiction on a district court over trust property in all trust administration actions. NRS 164.015(6) also provides that a district court’s order in a trust administration action is binding *in rem* upon the

trust estate and upon the interests of all beneficiaries. But, a trustee in his representative capacity is a different legal person than the person in his individual capacity, or the trust itself. *Cf. Mona v. Eighth Judicial Dist. Court*, 380 P.3d 836, 842, 132 Nev. 719, 728 (2016) (“[Petitioner], in her individual capacity, is a distinct legal person and is a stranger to [Petitioner] in her representative capacity as a trustee of the Mona Family Trust.”) (citing *Alexander v. Todman*, 361 F.2d 744, 746 (3d Cir. 1966)). Thus, Bayuk, as trustee, is not the same as Bayuk, individually, or the Bayuk Trust. The United States Supreme Court recognized the same distinction in *Hanson v. Denckla*, 357 U.S. 235, 250, 78 S.Ct. 1228, 1238 (1958): “Since a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction. Therefore, so far as it purports to rest upon jurisdiction over the trust assets, the judgment of the Florida court cannot be sustained.”

This Court explained that once a court obtains *in rem* jurisdiction, “*in personam* jurisdiction is not necessary to enter a judgment.” *In re Aboud Inter Vivos Tr.*, 129 Nev. at 921, 314 P.3d at 945. However, the opposite is not supported by any legal authority. This Court continued, “Because the district court’s order was a judgment against Betty Jo and I.C.A.N., and not against any trust property, it exceeded the *in rem* jurisdiction over trust assets provided by

NRS 164.010(1) and NRS 164.015(6) and is void.” *Id.*, 129 Nev. at 922, 314 P.3d at 946. Since the District Court did not have subject matter jurisdiction over the Bayuk Trust, the corresponding portions of the judgment are void. *See Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) (noting that when the district court lacks subject matter jurisdiction, the judgment rendered is void) (citations omitted). These portions of the judgment that should be vacated, include: (1) avoiding the transfer of the El Camino Property and the Los Olivos Property, and awarding the Trustee damages in the amount of \$884,999.95, with offset for amounts collected on account of the El Camino Property and the Los Olivos Property; (2) avoiding the transfer of Baruk LLC and awarding Plaintiff damages in the amount of \$1,654,550 with offset for amounts collected on account of Baruk LLC; (3) avoiding the transfer of \$420,250 and awarding the Trustee damages in the amount of \$420,250 with offset for amounts collected on account of the \$420,250; and (4) avoiding the Superpumper transfer and awarding the Trustee damages in the amount of \$4,949,000 with offset for amounts collected on account of the Superpumper transfer. 48 PA 8331.

VII. CONCLUSION

In summary, Defendants ask this Court to conclude that: (1) the validity of SSSTs does not depend upon disclosure; (2) the provisions of NRS 166.015 do not invalidate the Bayuk Trust based upon the language of the trust; (3) according to

NRS 166.170, the Trustee's claims against the Bayuk Trust are time-barred; (4) transfers between two SSSTs are protected as a matter of law; and (5) the District Court lacked subject matter jurisdiction over the Bayuk Trust for the Trustee's failure to name it as a Defendant. Based upon these reasons, and those more fully articulated in this petition, Defendants ask this Court to order that the Trustee's fraudulent transfer judgment cannot be enforced against Defendants.

Dated this 2nd day of December, 2020.

CLAGGETT & SYKES LAW FIRM

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**DECLARATION OF MICAH S. ECHOLS, ESQ., IN SUPPORT OF
PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**

Micah S. Echols, Esq., being first duly sworn, deposes and says:

1. I am an attorney with the law firm of Claggett & Sykes and attorney of record for Petitioners, Superpumper, Inc.; Edward Bayuk, individually and as Trustee of the Edward Bayuk Living Trust; Salvatore Morabito; and Snowshoe Petroleum, Inc., in the above-captioned case. I have personal knowledge of the matters stated in this declaration, except for those stated upon information and belief. To those matters stated upon information and belief, I believe them to be true. I am competent to testify as to the facts stated herein in a court of law and will do so if called upon.

2. I certify and affirm that this petition for writ of mandamus or prohibition is filed in good faith, and that the Petitioners, Superpumper, Inc.; Edward Bayuk, individually and as Trustee of the Edward Bayuk Living Trust; Salvatore Morabito; and Snowshoe Petroleum, Inc., have no plain, speedy, and adequate remedy in the ordinary course of law that Petitioners could pursue in absence of the extraordinary relief requested.

Dated this 2nd day of December, 2020.

/s/ Micah S. Echols
Micah S. Echols

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 2016 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 6,902 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 2nd day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** and **PETITIONERS' APPENDIX (VOLUMES 1–58)** were filed electronically with the Supreme Court of Nevada on the 3rd day of December 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that the foregoing documents were deposited in the United States Mail, postage prepaid, addressed as follows:

Honorable Connie J. Steinheimer, District Court Judge
Second Judicial District Court, Department 4
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/s/ Anna Gresl

Anna Gresl, an employee of
Claggett & Sykes Law Firm