

IN THE SUPREME COURT OF NEVADA

In the MATTER OF THE TRUST
AGREEMENT, 23 PARTNERS TRUST I.

Electronically Filed
Apr 18 2022 04:14 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

MICHAEL T. NEDDER, Independent Trustee,
and DOUGLAS DELUCA, Family Trustee,

Appellant / Cross-Respondents,

v.

JOANNE S. BRIGGS, as Parent and Legal
Guardian of ALEXANDER IAN DELUCA,
Primary Beneficiary; JULIA ANN DELUCA,
Primary Beneficiary,

Respondents / Cross-Appellants.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable Gloria J. Sturman, District Judge
District Court Case No. P-20-104279-T

RESPONDENTS / CROSS-APPELLANTS' REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. Respondents / Cross-Appellants, Joanne S. Briggs and Julia Ann DeLuca (collectively, “Respondents”), are individuals.
2. Alexander G. LeVeque and Roberto M. Campos of Solomon Dwiggin Freer & Steadman, Ltd. represented Respondents in the District Court and have appeared before this Court.
3. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Dated this 18th day of April, 2022.

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TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE STATEMENT	ii
ARGUMENT in reply to response to cross-appeal	1
1. <i>Primary Beneficiaries' interests are vested under the Trust's § 5.2(A).</i>	1
i. <i>The Primary Beneficiaries are the beneficiaries under the Trust's § 5.2(A) because their interests are executory, i.e., vested interests.</i>	1
ii. <i>The Primary Beneficiaries are the vested beneficiaries under the Trust's § 5.2(A) because any other reading would be nonsense.</i>	5
2. <i>Because the Primary Beneficiaries have vested interests/rights under the Trust, they are also entitled to an accounting under NRS 165.</i>	8
3. <i>The Trust as a whole and its specific terms grant the Primary Beneficiaries a right to a copy of the Trust.</i>	12
CONCLUSION	16
ATTORNEY'S CERTIFICATE	18
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

NRS 165	2, 8, 10
NRS 132.180	8, 9
NRS 132.185	8
NRS Chapters.....	8
NRS 165.1207	8, 9, 11
NRS 132	9
NRS 165.1207(1)(b)(5).....	9, 10, 11
NRS 165.020(1)(g).....	9
NRS 165.1207(1)(a).....	9, 16
NRS 132.050	9
NRS 163.4185	10
NRS 163.4185(1)(c).....	10
NRS 165.1207(1)(b)(3).....	10
NRS 165.149	11
NRS 164.021(2)(c).....	14
NRS 165.180	16
NRS 165.147	16

CASE LAW

<i>In re Wachter</i> , 314 B.R. 365 (Bankr. E.D. Tenn. 2004)	1, 2, 4, 7, 8
<i>Matter of Brinley Amicon Property Trust</i> , 2018 WL 1448494 (Nev. March 21, 2018) (unpublished disposition).....	2, 4, 8, 11
<i>Henderson v. Collins</i> , 267 S.E.2d 202 (Ga. 1980)	2, 3
<i>Matter of W. N. Connell and Marjorie T. Connell Living Trust</i> , 133 Nev. 137, 393 P.3d 1090 (Nev. 2017)	5, 6, 14
<i>Sharp v. First Nat’l Bank of Nev.</i> , 75 Nev. 355, 343 P.2d 572 (Nev. 1959)	6
<i>Bradley v. Romeo</i> , 102 Nev. 103, 716 P.2d 227 (1986).....	9
<i>Fox v. Warren</i> , Nos. 80668, 81212, 2021 WL 4205697 (Nev. Sept. 15, 2021) (unpublished disposition).....	9
Antonin Scalia & Bryan A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> 167 (2012)	12
<i>GEO Group, Inc. v. Newsom</i> , 15 F.4th 919 (9th Cir. 2021)	12, 13
<i>Matter of Estate of Ella E. Horst Revocable Trust, U/A/D 05/21/1991</i> , 136 Nev. Adv. Op. 90, 478 P.3d 861 (Nev. 2020).....	14
<i>Nev. Rest. Svcs., Inc. v. Clark Cty.</i> , 981 F.Supp.2d. 947 (D. Nev. 2013).....	14

OTHER AUTHORITIES

BOGERT’S, § 1061	4
Code (“UTC”)	11
BOGERT’S, § 973	11
UTC	11
Ausness, Richard C., <i>Discretionary Trusts: An Update</i>	11
RESTATEMENT (THIRD) OF TRUSTS § 50 (2003), comment <i>c</i>	11

ARGUMENT IN REPLY TO RESPONSE TO CROSS-APPEAL

1. The Primary Beneficiaries' interests are vested under the Trust's § 5.2(A).

Whether or not the Primary Beneficiaries' distribution interests in the Trust are *vested* turns not on whether they can compel a distribution, or whether creditors can reach their interests. Instead, these interests are vested because: (i) Julia and Alex are the Primary Beneficiaries, with the present *right to receive* all distributions (one or both Primary Beneficiaries *must* receive the distributions) if and when the Trustee decides to take the executory act of making a distribution; and (ii) no subsequent occurrence and no one, including the Trustee, can ever extinguish such rights. At most, Julia and Alex would have to share their rights to receive any such distributions with other permissible distributees that *might* be born, *i.e.*, Julia's and Alex's respective children. Accordingly, Julia and Alex have executory interests, which are vested, and thus not contingent interests. The Trust's terms, including the repeated differentiation of the Primary Beneficiaries from the contingent beneficiaries, confirms the settlor's intent that Julia and Alex are the vested beneficiaries entitled to accounting rights under the Trust's § 5.2(A).

i. The Primary Beneficiaries are the beneficiaries under the Trust's § 5.2(A) because their interests are executory, i.e., vested interests.

“Generally, upon the creation of a spendthrift trust, the trustee is vested in legal title to the trust property, while the beneficiary is vested in equitable title.” *In re Wachter*, 314 B.R. 365, 373 (Bankr. E.D. Tenn. 2004). *See* Resp. at 15 (“the

Trust ... its status as a spendthrift trust”). In fact, “[r]estrictions creating a pure spendthrift trust—that is, mere restraints upon alienation and anticipation[—]do not necessarily operate to prevent the vesting of an equitable estate in fee in the beneficiaries.” *Wachter*, 314 B.R. at 373-74 (concluding that a beneficiary “held a vested equitable interest in the ... Trust’s income and corpus” where his distribution share was subject to the trustees’ “uncontrolled discretion”). *See also, Matter of Brinley Amicon Property Trust*, 2018 WL 1448494, *1 (Nev. March 21, 2018) (unpublished disposition) (“the trust *vested* the [sole] beneficiary with a *present* interest, which provided [purely discretionary distributions];” separately, “[t]he trust also provided the beneficiary with the following future remainder interest [in distribution that was mandatory in part]”) (emphases added).¹

The only case Trustee cites in his Response, at 18, for his conclusion that the Primary Beneficiaries’ interests are not vested is misquoted, to misleading effect, and actually supports the opposite view. *See Id.* (citing *Henderson v. Collins*, 267 S.E.2d 202 (Ga. 1980) as purportedly saying “a vested interest [is that] portion of the trust which was within the reach of creditors”). In fact, no such quote is found in *Henderson*, nor did such court define *vested interest*.² Instead, the court found

¹ In *Amicon*, the beneficiary sought accounting rights solely under NRS 165 and not, as here, where the rights are also sought under the terms of the trust.

² The most similar quote in *Henderson* is: “We therefore hold Hunt holds a vested interest in a portion of the trust.” *Id.* at 206.

that the beneficiaries’ particular interests there were (i) vested **and** (ii) non-discretionary, and it was for this sum of factors that those interests were reachable by creditors. *See Id.* at 206 (rejecting “conten[tion] that the trust in question is a discretionary trust and, therefore, beyond the reach of creditors”).

Separately, the *Henderson* court did (broadly) define an “executory trust, [as] one in which something remains to be done by the trustee,” *e.g.*, the trustee exercising his discretion to make a distribution. *Id.*, at 206. And, unlike a contingent interest, “[a]n executory interest is a vested interest,” with a key distinction being that executory interests cannot be taken away:

Executory interests are vested and, while they can terminate if the condition subsequent cannot occur, they cannot be eliminated. However, contingent interests are not vested and can be eliminated.

GEORGE G. BOGERT, ET AL., LAW OF TRUSTS AND TRUSTEES § 1061. (June 2020).

Here, as Trustee admits, Julia and Alex already are the Primary Beneficiaries, and such status is not contingent on any act or occurrence.³ Their interests in receiving distributions are executory because they merely await the executory act of the Trustee deciding to make distributions. But once the Trustee chooses to make

³ *See Resp.* at 18 (Julia and Alex are “the two current beneficiaries ... they are the primary beneficiaries”) (emphases added).

distributions, regardless of amount, timing or source, the Primary Beneficiaries have the exclusive, lifetime right to receive all such distributed amounts.

The Trustee's discretion to forego any distributions cannot convert Julia's and Alex's interests into contingent interests. Executory interests *can* terminate if the condition subsequent, *e.g.*, Trustee deciding to distribute, does not occur. *See* BOGERT'S, § 1061. Yet, crucially, no one (including Trustee) and no occurrence can terminate Julia's and/or Alex's right to receive any and all distributed amounts. *See Id.* As such, the Primary Beneficiaries' interests in rights to *receive* distributions of Trust income and principal are executory, *i.e.*, vested. *See Amicon*, 2018 WL 1448494, *1 ("the trust *vested* the [sole] beneficiary with a *present* interest, which provided [purely discretionary distributions]"); *Wachter*, 314 B.R. at 373-74.

Also, the Trust's § 5.2(A) does not require that the beneficiaries entitled thereunder have a vested right to compel distributions. Instead, § 5.2(A) requires only that the beneficiaries be the "[REDACTED]
[REDACTED]" FUS 29-30. Thus, the Primary Beneficiaries with executory interests, *i.e.*, vested rights to receive income and principal (and remainder) if and when any distributions are made, are the beneficiaries referred to in § 5.2(A).⁴

⁴ Also, the Trustee ignores the Primary Beneficiaries' argument that their interests must be vested because "[h]aving a beneficiary with vested rights in trust property is one of the five essential elements of settling a trust," and so without at least one vested interest, there can be no trust. BOGERT'S, § 1061 (emphasis added).

ii. The Primary Beneficiaries are the vested beneficiaries under the Trust's § 5.2(A) because any other reading would be nonsense.

Confirming the settlor's intent, that the Primary Beneficiaries' interests in receiving any distributions are executory, *i.e.*, vested, are the many times the Trust distinguishes the present (or primary) beneficiaries from contingent beneficiaries. *See* Trust, § 5.7(B), FUS 32 (“[REDACTED]”) (emphasis added); § 5.9(A), FUS 33 (“[REDACTED]”) (emphases added); § 6.12(C)(5), FUS 48 (“[REDACTED]”); § 7.10(A), FUS 55 (“[REDACTED]”); § 7.12.1, FUS 56 (“[REDACTED]”); § 8.3(A), FUS 61 (“[REDACTED]”); § 8.4.1, FUS 63 (“[REDACTED]”); and § 9.4, FUS 67 (“[REDACTED]”); *see also* Resp. at 18 (Julia and Alex are “the two current beneficiaries ... they are the primary beneficiaries”).

Given the above distinctions in the Trust, and when reading the Trust “as a whole ... the most fair and reasonable interpretation” is that the Primary Beneficiaries' interests in receiving Trust income and principal, when distributions are made, must not be contingent; hence they are executory and thus presently vested. *See Matter of W. N. Connell and Marjorie T. Connell Living Trust, dated May 18, 1972*, 134 Nev. 613, 616, 426 P.3d 599, 602 (Nev. 2018) (emphasis added). A reading ignoring this distinction, that is repeatedly made in the Trust, would

render all such language as superfluous. *See Matter of W. N. Connell and Marjorie T. Connell Living Trust*, 133 Nev. 137, 140, 393 P.3d 1090, 1092 (Nev. 2017) (rejecting interpretation rendering trust language as “superfluous”).

Further, if the settlor intended no beneficiary to have rights under § 5.2(A), there would have been no mention thereunder of any beneficiary, vested or otherwise. Yet § 5.2(A) lists, as the only beneficiaries entitled to rights thereunder, the “[REDACTED]” FUS 29-30. Again, no future Primary Beneficiary or descendant, if any, will ever have interests under the Trust that exceed those of Julia and Alex. Thus, the necessary implication from a whole reading of the Trust is that the vested beneficiaries referenced in § 5.2(A) must be the Primary Beneficiaries. *See Sharp v. First Nat’l Bank of Nev.*, 75 Nev. 355, 360, 343 P.2d 572, 574 (Nev. 1959). A contrary reading would render the inclusion of the “[REDACTED]” in § 5.2(A) as superfluous. *See Connell*, 133 Nev. at 140, 393 P.3d at 1092.

Such erroneous reading might also render the provision granting the Primary Beneficiaries [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁵

Finally, the Trust also provides that the Primary Beneficiaries have [REDACTED]

[REDACTED]

[REDACTED] See Trust § 5.15(B)(2)

([REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED])

[REDACTED]) FUS 37, § 9.5 ([REDACTED])

[REDACTED]) FUS 67, § 9.6 ([REDACTED])

[REDACTED]) FUS 67-68. Accordingly,

Julia and Alex each hold a vested equitable interest in the Trust, [REDACTED]

[REDACTED] See *Wachter*, 314 B.R. at 373-74 (concluding

that a beneficiary “held a vested equitable interest in the ... [REDACTED]

[REDACTED]

⁵ Trustee’s argument that the Family Trustee, Doug De Luca, is a sufficient check on the Independent Trustee does not explain the settlor’s inclusion of “beneficiar[ies]” in § 5.2(A). Also, such contention is only theoretical, as the record does not show the non-attorney Mr. DeLuca ever acting meaningfully as to the Trust, questioning the attorney Independent Trustee, or of informing Julia and Alex of *any* of their present rights under the Trust, *e.g.*, [REDACTED]

[REDACTED] See APP 224 (“MR. GEIST: ... I believe Mr. Nedder is the one who has been primarily connecting with the beneficiaries”); *see, e.g.*, APP 22-24, 271-360 (emails from 2019-20 only with Mr. Nedder’s office). Mr. DeLuca never even informed the Primary Beneficiaries that Mr. Nedder has formally been Trustee since 2018, as such role was not discovered until this litigation commenced.

_____).⁶ Hence, Julia and Alex are the “_____” of their respective sub-trusts. Trust, § 5.2(A).

2. Because the Primary Beneficiaries have vested interests/rights under the Trust, they are also entitled to an accounting under NRS 165.

In purportedly contrasting *interest* as defined in NRS 132.180, the Trustee relies on a “definition of the term ‘interest’ in [NRS] Chapter 165,” yet nowhere is the term defined in NRS 165. Resp., at 21. Further, Trustee tries to anchor *interest* as defined in NRS 132.180, to “the context of determining who is an ‘interested person’ as defined under NRS 132.185.” Resp. at 22. But, NRS 132.180 does not refer to *interested person*; nor is there a reason it should be so necessarily tied. Even if so, such connection between the definitions of *interest* and *interested persons*, respectively under NRS 132.180 and NRS 132.185, would not limit the definition of *interest* in NRS 132.180 and its applicability to all NRS Chapters under Titles 12 and 13 (NRS 132.180 falls within Title 12). Indeed, NRS 165.1207, the trustee accounting statute, falls within Title 13. Further, *trust* and *trustee* are defined

⁶ In *Wachter*, the beneficiary's distribution share would eventually at trust termination be given to him or, if then deceased, his children. As such the settlor (his mother) "clearly intended" such vesting of the son's interest. *Id.* The court further concluded that, although vested with an equitable interest, the debtor son had no right to compel a distribution as of the date of the bankruptcy filing and thus his interest was not part of the bankruptcy estate, *i.e.*, it could not be reached by creditors. *Id.* at 377.

precisely under NRS 132, respectively at 132.350 and 132.355. Hence, the definition of *interest* in NRS 132.180 applies to NRS 165.1207.⁷

Further, Trustee’s statement, Resp., at 22, that *interest* “never” includes rights beyond compelling distributions is belied by Trustee’s own cited examples. *See, e.g.*, NRS 165.020(1)(g) (referring to *interest* but silent on distributions, thus permitting *interest* to include, *e.g.*, [REDACTED]). The Trustee also cites NRS 165.1207(1)(b)(5), but that is the statute at issue.

Indeed, Trustee would have the limited exception under NRS 165.1207(1)(b)(5) swallow the rule under NRS 165.1207(1)(a) that a trustee must account to beneficiaries. But that is not what the Legislature enacted, nor what reason and common law hold. The rule is that a trustee must account not only to beneficiaries who hold certain distribution rights but “to each current beneficiary, and to each remainder beneficiary of the trust.” NRS 165.1207(1)(a). Meanwhile, NRS 132.050 defines *beneficiary* “as it relates to: 1. [a] trust [to] include[] a person who has a present or future interest, vested or contingent, and the owner of an interest by assignment or other transfer.” In turn, NRS 132.180 defines *interest* to

⁷ In response to Trustee’s argument that the Court should not consider the argument on the meaning of *interest* in NRS 165.1207(1)(b)(5), the Primary Beneficiaries note that the “ability of this court to consider relevant issues *sua sponte* in order to prevent plain error is well established.” *Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986). *See, e.g., Fox v. Warren*, Nos. 80668, 81212, 2021 WL 4205697, n. 1 (Nev. Sept. 15, 2021) (unpublished disposition).

include the “power to appoint” and “any other right ... relating to property,” *e.g.*, the power to remove trustee over trust property. Further, Trustee admits the Primary Beneficiaries here have certain “present rights” that are “not discretionary,” including the aforementioned powers. Resp., at 16-17.

In contrast, the exception for the Trustee to not have to account would kick in solely if the Primary Beneficiaries’ “[1] only interest in the trust estate [2] is a discretionary interest, [3] as described in NRS 163.4185 [“Classification of distribution interests”].”⁸ Here, the Primary Beneficiaries have distribution interests and non-distribution interests, *e.g.*, t [REDACTED] [REDACTED]. That fact alone precludes the exception under NRS 165.1207(1)(b)(5) to not have to account to beneficiaries. Indeed, one might surmise from references in NRS 165 that the Legislature enacted NRS 165.1207(1)(b)(5) as written precisely to keep the trustee’s duty to account so long as beneficiaries held at least [REDACTED] [REDACTED] [REDACTED];

⁸ See NRS 163.4185(1)(c) (“A distribution interest may be ... A discretionary interest if the trustee has discretion to determine whether a distribution should be made, when a distribution should be made and the amount of the distribution.”).

3. *The Trust as a whole and its specific terms grant the Primary Beneficiaries a right to a copy of the Trust.*

Trustee’s denial to the Primary Beneficiaries of a copy of the Trust is based on the negative-implication canon: the expression of one thing implies the exclusion of the other. Thus, because § 5.1(c), FUS 29, grants Julia and Alex specific Trust-related instruments, but omits ‘original instrument’ or a similar formulation, the settlor supposedly intended to withhold the same from them:

[REDACTED]

The negative-implication canon, however, is highly contextual, requiring “great caution.” *See*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) (“Virtually all the authorities who discuss the negative-implication canon emphasize that it must be applied with great caution, since its application depends so much on context.”). Thus, the canon “properly applies only when ... the thing specified can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved.” *Id.* (emphasis in original). *See GEO Group, Inc. v. Newsom*, 15 F.4th 919, 933 (9th Cir. 2021) (“negative inference canon generally does not apply if the list of powers is not exclusive”). Indeed, without *only*, *exclusively* or similar words, “the negative

inference canon can apply only ‘if it is fair to suppose that [the drafter] considered the unnamed possibility and meant to say no to it.’” *Id.* (quoting *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381, 133 S.Ct. 1166, 1175, 185 L.Ed2d. 242 (2013)).

Here, § 5.1(c) contains neither *only*, *exclusively* nor any other limiting words. In fact, the provision signals the opposite: “[REDACTED] ... etc.” *Id.* (emphases added). Further, “etc.” confirms the list is not exclusive and includes “other things,” *i.e.*, unnamed Trust-related instruments. *See* Black’s Law Dict. (11th ed. 2019) (*etc.* is abbreviation for *et cetera*, defined as “And other things. The term usu[ally] indicates additional unspecified items in a series.”). Indeed, § 5.1(c) also omits [REDACTED]

[REDACTED] *etc.*... As § 5.1(c) is confirmed to include other, unnamed Trust-related instruments, great caution is especially called for in considering applying the negative-implication canon here, if it can be applied at all.

Further, it is unreasonable to infer that though the settlor granted the Primary Beneficiaries the right to receive promptly upon request all copies of instruments—some as material and confidential as amendments to the Trust itself—he considered the original Trust instrument yet decided to withhold it from them. Surely, a copy of an amendment would be for naught without the original instrument it is amending. The right to all other Trust related instruments would also be of little to

no value if the Primary Beneficiaries were kept in the dark on the document to which all the instruments refer and/or from where they derive.

In a different context, providing a copy of an amendment but not the original trust instrument would certainly violate this Court’s decision in *Matter of Estate of Ella E. Horst Revocable Trust, U/A/D 05/21/1991*, 136 Nev. Adv. Op. 90, 478 P.3d 861, 867 (Nev. 2020) (when interpreting NRS 164.021(2)(c), “only a complete disclosure of all provisions of a trust instrument pertaining to a beneficiary will ... give a beneficiary all the information he or she needs to decide whether to contest a trust”). See *Nev. Rest. Svcs., Inc. v. Clark Cty.*, 981 F.Supp.2d. 947 (D. Nev. 2013) (negative inference canon in Nevada “properly applied only when it makes sense”).

This last citation invokes this Court’s mandate in *Connell* to comply with the cardinal rule of ascertaining the settlor intent by reading the Trust “as a whole” and drawing out “the most fair and reasonable interpretation” of the Trust. 134 Nev. at 616, 426 P.3d at 602. Having included the various rights the Primary Beneficiaries hold, *e.g.*, [REDACTED], a copy of the original Trust must have been one of the additional instruments the settlor included in the “etc.” in § 5.1(c). A contrary reading would render those provisions meaningless,

as there is no other way the Primary Beneficiaries would learn of such rights.¹²

Finally, the Trustee's Response, at 25, is confusing or disingenuous in claiming that "there are already many documents and information that the Trust does require be provided to the Cross-Appellants, and those documents are sufficient for the Cross-Appellants to be able to exercise their rights." If Trustee really believed that 'there are many documents that the Trust requires be provided to Julia and Alex' *and* if he had provided them, we likely wouldn't be here.

Instead, Trustee has all along vehemently argued the opposite. If the Trustee is referring to the documents and information the District Court ordered him to produce, he is *appealing* such Order. Most tellingly, the Trustee identifies none of those 'many documents.' Nor will he identify them because doing so would be admitting that he failed to provide them, as the "Trust does require," to Julia and Alex. Indeed, for years, the Trustee inaccurately claimed the Primary Beneficiaries were entitled to virtually nothing and certainly no portions of the Trust. *See* Appellant's Br., at 14 ("the terms of the trust were 'explicitly private'"). It was only through this litigation that merely counsel for the Primary Beneficiaries learned of their power of appointment and to remove the Trustee, as the Trustee has never

¹² Again, any contention that the Family Trustee was a sufficient check and could be the source of such valuable information is belied by his own failure to ever relay such information to the Primary Beneficiaries.

shared such, and other, present rights with the Primary Beneficiaries.

In sum, the District Court erred in applying the negative-implication and/or otherwise not requiring the Trustee to merely turn over a copy of the original Trust instrument to the Primary Beneficiaries. This deprivation is further vexing given that nothing in the Trust or in Nevada law has ever prohibited the Trustee from *voluntarily* providing to Julia and Alex a copy of the Trust (or an accounting), as they have requested for years. *See* NRS 165.180 (“This chapter does not preclude the trustee from accounting voluntarily even if he or she is not required to do so.”)

CONCLUSION

That the Connecticut attorney, appointed as Trustee weeks before the settlor’s death, has long exploited a single provision, § 5.1(E), FUS 29, though null for years (as Trust’s existence has been known), to deny the Primary Beneficiaries’ requests, for a mere copy of the Trust and an accounting, is a disgrace. That the Trustee has refused the requests, while generating fees off this \$20+ million Trust, is alarming.¹³

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¹³ The Primary Beneficiaries are also entitled to a copy of the Trust under NRS 165.147 as they are entitled to an accounting under NRS 165.1207(1)(a).

For the reasons herein, the Primary Beneficiaries request that this Court provide the relief they seek on counter-appeal as stated in their Opening Brief.

DATED this 18th day of April, 2022.

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ATTORNEY'S CERTIFICATE

1. I 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 it has been prepared in a proportionally spaced typeface using Word in 14-point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 28.1(e)(2)(C) because, excluding any parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 4155 words.

3. Finally, I certify that I have read this reply 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 18th day of April, 2022.

SOLOMON DWIGGINS FREER & STEADMAN, LTD.

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CERTIFICATE OF SERVICE

I certify that I am an employee of SOLOMON DWIGGINS FREER & STEADMAN, LTD. and that on the 18th day of April, 2022, a redacted version of the **RESPONDENTS / CROSS-APPELLANTS' REPLY BRIEF** ("Brief") was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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I further certify that on the 18th day of April, 2022, I caused an unredacted copy of the above Brief, to be deposited into the USPS First Class mail addressed to Nevada Supreme Court and to the recipients and addresses noted above.

/s/ Alexandra Carnival
An Employee of Solomon Dwiggin Freer & Steadman, Ltd.