PEAK TRUST COMPANY
Elevated Trust & Wealth Management Solutions

Honorable Mia Costello
Chairman, Senate Labor & Commerce Committee
State Capitol, Room 504
Juneau, AK 99801

Re: Shaftel Law Offices – Letter in Opposition of Senate Bill 94 – Response

Dear Madam Chair Costello and Members of the Senate Labor and Commerce Committee:

This letter is in response to the letter dated April 3, 2017 that was received from Dave Shaftel and the Shaftel Law Offices regarding his opposition to Senate Bill 94, specifically the decanting provisions contained therein.

We would first like to note that Mr. Shaftel is a well-respected trust and estate planning practioner who has considerable experience in this area. His comments are not disregarded. In fact, the decanting provision of this bill has been in the making for over three years, mostly due to Mr. Shaftel's comments, suggestions and concerns.

As Mr. Shaftel writes, there is a group of attorneys, accountants, financial advisors and trust professionals who have worked with the Legislature since 1995 to improve Alaska's trust and estate planning laws. This same group composed the pieces of the bill before you. Unfortunately, for the first time in the group's history, the majority felt it was necessary to proceed without unanimous agreement on a particular provision. However, this was not done without substantial consideration to Mr. Shaftel's comments.

We would like to address each of the concerns raised in Mr. Shaftel's letter. To best address these concerns, it is helpful to provide a some background regarding the duties of a trustee.

Trustees, by virtue of being a trustee, are given broad authority, discretion and power to exercise their duties. Of course, when any power is given, there is the potential for abuse. To combat this potential abuse, all trustees are held to what is known as a fiduciary standard. The fiduciary standard is the highest under the law and has been quoted as "the punctilio of honor the most sensitive". This superb standard comes with considerable liability. Nothing in this bill, especially the decanting provisions, limit or reduce this liability and standard.

In addition to the fiduciary standard, all trustees are bound to uphold a number of other duties, such as the duty of loyalty. The duty of loyalty is considered the cardinal principal of a fiduciary's powers. This duty requires one to act solely in the best interests of the beneficiaries, without regard to the trustee's self-interests. This duty is owed to all beneficiaries and cannot be exercised in the sole

consideration of only one. The idea that a trustee might arbitrarily exercise discretion in favor of one beneficiary, with no regard for others, goes against this duty.

It is possible that a trustee will not fully understand his or her duties or that he or she may choose to ignore their duties. However, doing so will subject them to severe liability. Additionally, there is no statute of limitations for such liability.

Furthermore, decanting is a powerful, but complex tool. Certainly, any trustee wanting to do a decanting would seek the advice of a competent attorney. The attorney, for his or her own protection, is not going to assist a trustee in a breach of trust. In addition, it seems doubtful that any trustee would intentionally engage in a breach of trust as that would make the trustee personally liable for the damage caused. Moreover, a beneficiary who is unhappy because of action taken in a decanting is in a much stronger position to reverse the action taken then if the distribution by the trustee had been directly to another beneficiary. In other words, with a decanting, the assets remain in trust and a court can easily reverse what has been done. If the distribution were outright to a beneficiary, the trust assets may have been already expended or squandered. As a consequence, an invasion in further trust by decanting provides much greater protection for beneficiaries than an invasion where the assets do not remain in trust.

Therefore, we believe that Mr. Shaftel's concerns about decanting should have been more focused on any trust that permits the trustee to make distributions. We are unaware of anyone, including Mr. Shaftel, who is proposing that trusts not authorize discretionary distributions by trustees.

Below we look to address each concern raised by in the letter.

1. There is a concern regarding the abuse of decanting by a trustee. Specifically, that a trustee may appoint the original trust's assets to a new trust for the benefit of only one beneficiary, with complete disregard for any other beneficiary (present or future). If the trustee holds this ability, they also hold the ability to distribute the assets to only one beneficiary. Thus, virtually eliminating any chance of recourse by an injured beneficiary. If a nefarious trustee is intent on getting assets to one beneficiary, he or she would not go through the technical and time-consuming process of decanting. Nevertheless, the trustee could be sued and held liable for such actions.

2. The letter provides an example of where a trustee could thwart the intent of a grantor by decanting to a trust that cuts out the grantor's children from a previous marriage. As previously discussed, a trustee is held liable for its action or inaction. Unless the trustee has sufficient justification, they would not undertake such an action. Additionally, no ethical lawyer would engage in such a process with a trustee.

3. There is a concern in regard to the ability for a trustee to decant and change the distribution standard in a document. For background, three of the most common distribution standards are an income standard, a standard for health, education, maintenance and support (also,

known as HEMS or an ascertainable standard) and a discretionary standard. An income standard is where the beneficiary is eligible (maybe even required) to receive a distribution of part or all the trust income. The HEMS standard is one where a beneficiary may receive distributions for his or her health, education, maintenance or support. The discretionary standard is where the beneficiary may receive distributions for any reason at the sole discretion of the trustee.

None of these standards, unless mandated in the trust agreement, require the trustee to make any distributions. In fact, Alaska law states that a beneficiary does not have a legal right, unless provided in the document, to the trust, its assets or distributions. Under Alaska law, a beneficiary has a mere expectancy interest in the trust.

In the specific example cited in the letter, there may be a good reason why a trustee would want to change this standard. For example, and this is already permitted under Alaska law, the trust might be decanted to permit distributions only for "special needs" which would prevent the mere existence of the trust from disqualifying the beneficiary from receiving certain government assistance. In addition, changing the standard for payments from a ridged one, such as for HEMS, to a broader one, such as for a beneficiary's best interest, may make it easier to directly aid the beneficiary whom the property owner cared about.

4. The letter states a concern that a trustee could eliminate a beneficiary's mandatory right to a distribution of principal. While this would be an ability if this bill were enacted, it would only be done for proper reasons. For example, perhaps this beneficiary has developed a substance abuse problem which was unforeseen when the trust was drafted. In this instance, the trustee would want to change this mandatory right to protect the beneficiary. The trust could be decanted to a new trust where the trustee had discretion to pay for treatment and/or health care for the beneficiary. After all, trustees are given the duty to act in the best interests of a beneficiary.

5. There is a concern raised that there could be manipulation by a beneficiary, second spouse or nefarious trustee to achieve the above actions. This potential already exists under not only Alaska law, but the laws of other jurisdictions. As we previously discussed, under many trust documents, trustees have the ability to make unequal distributions to beneficiaries, including all to one beneficiary. Second, if a nefarious person was intent on such an action, they could do so under the laws of a number of other states, such as Nevada and South Dakota. Not that Alaska should follow in the footsteps of others, but why limit the ability of our residents to engage in great planning based on fear of wrongdoing? There is no way to regulate bad actors.

6. There is a concern that only one beneficiary must be notified of a decanting action. This is not a change from Alaska's current notification standard and is higher than the notification standards of other jurisdictions. This notification standard is useful when dealing with situations, such as those described in point 4 (substance abuse) where the affected beneficiary will most certainly object.

7. The letter raises a concern that there is not "adequate fiduciary duty imposed on the trustee." This statement is simply untrue. Trustees must weight their actions against the benefit of all beneficiaries. However, this is not to say that proper facts and circumstances may warrant the exercise of action that limits a particular beneficiary's interests. Again, a trustee would only take this action with adequate rationale and proper care, skill and caution as required by law.

8. There are comments that this act does not match the Uniform Trust Decanting Act (2015). It is correct that this bill does not match this act, nor does Alaska's existing decanting statutes. Alaska's trust and estate laws in general are not uniform and that is one of the many reasons that Alaska is the premier trust planning jurisdiction. Adoption of a uniform standard would sacrifice the uniqueness of Alaska's place in this industry and would limit planning options for Alaskans.

In summary, we do not disregard or take lightly the comments and concerns presented. These concerns have been thoroughly discussed and reviewed among all members who have reviewed this language. It is regrettable that we were unable to achieve unanimous support for these provisions as we have been able to in the past. We believe that adequate safeguards are in place in both Alaska law and Federal law to limit the potential for abuse to the greatest extent possible without constraining planning flexibility for Alaskans. Furthermore, for any person who wishes, he or she may prohibit decanting in general, or specific actions, when drafting their trust. This proposal does not try to estop potential unjustified and incorrect behavior on the part of ill meaning beneficiaries and/or trustees. At the same time, it does not remove any liability for such actions and actually sets up an easier path for remedy, should a wrong action occur.

Thank you for your consideration of this matter.

Sincerely,

Matthew Blattmachr

Matthew D. Blattmachr, on behalf of Peak Trust Company