IN THE SUPREME COURT OF THE STATE OF NEVADA

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SHELDON FREEDMAN MD, PANKAJ BHATANAGAR MD, MATHEW NG MD, and DANIEL BURKHEAD MD, Petitioners, vs. THE HONORABLE JOSEPH HARDY, District Court Judge, Eighth Judicial District Court of the State of Nevada, in and for County of Clark, Respondent. MARK J. GARDBERG, ESQ., in his capacity as Receiver for and acting on behalf of, FLAMINGO-PECOS SURGERY CENTER, LLC a Nevada limited liability company, Real Party in Interest	**Supreme Court Case No.:** **District Court Case No. A-17-750926-B** **APPELLANTS' APPENDIX II of IV**

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ALPHABETICAL ORDER

Filed / Hearing Date	Document	Vol	Pages
06/12/2017	Affidavit of Service Upon Daniel Burkhead, M.D.	I	AA000011-AA000012
06/12/2017	Affidavit of Service Upon Mathew Ng, M.D.	I	AA000013-AA000014
06/12/2017	Affidavit of Service Upon Pankaj Bhatanagar, M.D.	I	AA000015-999916
06/12/2017	Affidavit of Service Upon Sheldon Freedman, M.D.	I	AA000009-AA000010
12/06/2017	Answer to Second Amended Complaint	I	AA000834-AA000855
02/10/2017	Complaint	I	AA000001-AA00008
06/26/2017	Defendant Daniel Burkhead M.D.'s Motion to Dismiss Complaint	I	AA000030-AA000115
10/25/2017	Defendant Daniel Burkhead M.D.'s Motion to Dismiss Second Amended Complaint	IV	AA000733-AA000744
11/21/2017	Defendant Daniel Burkhead M.D.'s Reply in Support of Motion to Dismiss Second Amended Complaint	IV	AA000811-AA000820
07/20/2017	Defendant Daniel Burkhead M.D.'s Reply to Plaintiff's Opposition to Motion to Dismiss Complaint	II	AA000334-AA000341

06/12/2017	Defendants Dr. Matthew Ng and Dr. Pankaj Bhatnagar's Motion to Dismiss	I	AA000017-AA000029
10/23/2017	Defendants Dr. Matthew Ng and Dr. Pankaj Bhatnagar's Motion to Dismiss Second Amended Complaint	IV	AA000659-AA000675
08/25/2017	Defendants Dr. Matthew Ng and Dr. Pankaj Bhatnagar's Reply in Support of Motion to Dismiss	II	AA000374-AA000383
12/15/2017	Defendant Sheldon J. Freedman's Motion for Stay	IV	AA000914-AA000926
06/27/2017	Defendant Sheldon J. Freedman's Motion to Dismiss Pursuant to N.R.C.P. 12(b)(5) and 12(b)(6) and for Attorney's Fees Pursuant to NRS 18.020	I	AA000116-AA000236
08/16/2017	Defendant Sheldon J. Freedman's Reply to Opposition to Motion to Dismiss Pursuant to N.R.C.P. 12(b)(6) and 12(b)(6) and Reply to Opposition for Attorney's Fees Pursuant to NRS 18.020	II	AA000354-AA000373
11/20/2017	Defendant Sheldon J. Freedman's Reply to Plaintiffs Omnibus Supplemental Opposition to Defendants Various Motions to Dismiss and Associated Joinders	IV	AA000796-AA000796

10/24/2017	Defendant Sheldon J. Freedman's Supplement to Motion to Dismiss Complaint, First Amended Complaint and Second Amended Complaint Pursuant to N.R.C.P. 12(b)(5) and 12(b)(6) and for Attorneys Fees Pursuant to NRS 18.020	IV	AA000676-AA000732
12/08/2017	Errata to Answer to Second Amended Complaint	IV	AA000868-AA00893
10/26/2017	Errata to Marjorie Belsky MD's Opposition to Motion to Extend Time and Counter-Motion to Dismiss	IV	AA000761-AA00783
07/14/2017	Flamingo-Pecos Surgery Center, LLC's Opposition to Defendant Daniel Burkhead M.D.'s Motion to Dismiss Complaint	II	AA000299-AA000310
07/17/2017	Flamingo-Pecos Surgery Center, LLC's Opposition to Defendant Sheldon J. Freedman's Motion to Dismiss Pursuant to NRCP 12(b)(5) and 12(b)(6) and for Attorney's Fees Pursuant to NRS 18.020	II	AA000311-AA000333
07/13/2017	Flamingo-Pecos Surgery Center, LLC's Opposition to Dr. Matthew Ng and Dr. Pankaj Bhatnagar's Motion to Dismiss	II	A000237-AA000298
10/25/2017	Marjorie Belsky, M.D.'s Opposition to Motion to Extend Time and Counter-Motion to Dismiss	IV	AA000745-AA000760

12/08/2017	Notice of Entry of Order regarding Consolidated Motions to Dismiss	IV	AA000861-AA000868
10/10/2017	Notice of Entry of Order Regarding Defendants Motions to Dismiss	II	AA000388-AA000394
07/24/2017	Notice of Errata to Defendant Daniel Burkhead M.D.'s Reply to Plaintiff's Opposition to Motion to Dismiss Complaint	II	AA000342-AA000353
12/07/2017	Order Regarding Consolidated Motions to Dismiss	IV	AA000856-AA000860
10/10/2017	Order Regarding Defendants' Motions to Dismiss	II	AA000384-AA000387
11/21/2017	Pankaj Bhatnagar, MD and Matthew Ng, MD's Reply in Support of Their Motion to Dismiss Second Amended Complaint	IV	AA000821-AA000833
12/12/2017	Pankaj Bhatnagar, MD and Matthew Ng, MD's Answer to Second Amended Complaint	IV	AA000894-AA000913
11/07/2017	Plaintiff's Omnibus Supplemental Opposition to Defendants' Various Motions to Dismiss and Associated Joinders	IV	AA000784-AA000795
10/10/2017	Second Amended Complaint	III	AA000395-AA000658

CHRONOLOGICAL ORDER

Filed / Hearing Date	Document	Vol	Pages
02/10/2017	Complaint	I	AA000001-AA00008
06/12/2017	Affidavit of Service Upon Sheldon Freedman, M.D.	I	AA000009-AA000010
06/12/2017	Affidavit of Service Upon Daniel Burkhead, M.D.	I	AA000011-AA000012
06/12/2017	Affidavit of Service Upon Mathew Ng, M.D.	I	AA000013-AA000014
06/12/2017	Affidavit of Service Upon Pankaj Bhatanagar, M.D.	I	AA000015-AA0000916
06/12/2017	Defendants Dr. Matthew Ng and Dr. Pankaj Bhatnagar's Motion to Dismiss	I	AA000017-AA000029
06/26/2017	Defendant Daniel Burkhead M.D.'s Motion to Dismiss Complaint	I	AA000030-AA000115
06/27/2017	Defendant Sheldon J. Freedman's Motion to Dismiss pursuant to N.R.C.P. 12(b)(5) and 12(b)(6) and for Attorney's Fees Pursuant to NRS 18.020	I	AA000116-AA000236
07/13/2017	Flamingo-Pecos Surgery Center, LLC's Opposition to Dr. Matthew Ng and Dr. Pankaj Bhatnagar's Motion to Dismiss	II	A000237-AA000298

10/23/2017	Defendants Dr. Matthew Ng and Dr. Pankaj Bhatnagar's Motion to Dismiss Second Amended Complaint	IV	AA000659-AA000675
10/24/2017	Defendant Sheldon J. Freedman's Supplement to Motion to Dismiss Complaint, First Amended Complaint and Second Amended Complaint Pursuant to N.R.C.P. 12(b)(5) and 12(b)(6) and for Attorneys Fees Pursuant to NRS 18.020	IV	AA000676-AA000732
10/25/2017	Defendant Daniel Burkhead M.D.'s Motion to Dismiss Second Amended Complaint	IV	AA000733-AA000744
10/25/2017	Marjorie Belsky, M.D.'s Opposition to Motion to Extend Time and Counter-Motion to Dismiss	IV	AA000745-AA000760
10/26/2017	Errata to Marjorie Belsky MD's Opposition to Motion to Extend Time and Counter-Motion to Dismiss	IV	AA000761-AA00783
11/07/2017	Plaintiff's Omnibus Supplemental Opposition to Defendants' Various Motions to Dismiss and Associated Joinders	IV	AA000784-AA000795
11/20/2017	Defendant Sheldon J. Freedman's Reply to Plaintiffs Omnibus Supplemental Opposition to Defendants Various Motions to Dismiss and Associated Joinders	IV	AA000796-AA000796

11/21/2017	Defendant Daniel Burkhead M.D.'s Reply in Support of Motion to Dismiss Second Amended Complaint	IV	AA000811-AA000820
11/21/2017	Pankaj Bhatnagar, MD and Matthew Ng, MD's Reply in Support of Their Motion to Dismiss Second Amended Complaint	IV	AA000821-AA000833
12/06/2017	Answer to Second Amended Complaint	IV	AA000834-AA000855
12/07/2017	Order Regarding Consolidated Motions to Dismiss	IV	AA000856-AA000860
12/08/2017	Notice of Entry of Order regarding Consolidated Motions to Dismiss	IV	AA000861-AA000868
12/08/2017	Errata to Answer to Second Amended Complaint	IV	AA000868-AA00893
12/12/2017	Pankaj Bhatnagar, MD and Matthew Ng, MD's Answer to Second Amended Complaint	IV	AA000894-AA000913
12/15/2017	Defendant Sheldon J. Freedman's Motion for Stay	IV	AA000914-000926

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DISTRICT COURT
CLARK COUNTY, NEVADA

FLAMINGO-PECOS SURGERY CENTER, LLC a Nevada limited liability company; Plaintiff, vs. William Smith MD, Pankaj Bhatnagar MD, Marjorie Belsky MD, Sheldon Freedman MD, Mathew Ng MD, Daniel Burkhead MD, Manager MD, DOE MANAGERS, DIRECTORS AND OFFICERS 1-25, ROE BUSINESS ENTITIES 1-25; Defendants.	Case No.: A-17-750926-B Dept. No.: XV **FLAMINGO-PECOS SURGERY CENTER, LLC'S OPPOSITION TO DR. MATTHEW NG AND DR. PANKAJ BHATNAGAR'S MOTION TO DISMISS** Date: August 27, 2017 Time: 9:00 AM

Plaintiff Flamingo-Pecos Surgery Center, LLC ("Plaintiff"), through Todd E. Kennedy of the law firm of Black & LoBello as attorney for the Receiver Timothy Mulliner Esq., hereby opposes Defendants Dr. Matthew Ng and Dr. Pankaj Bhatnagar's ("Defendants") Motion to Dismiss ("Motion").

I. SUMMARY

Defendants were practicing surgeons in a small group LLC which was robbed blind over several years by an unsupervised, do-it-all office manager Defendants hired and completely failed to supervise. Defendants' failures exceed the willful disregard standard of intentionality and, separately, constitute breaches of their fiduciary duties to Plaintiff. In subsequent criminal proceedings the office manager, Robert Barnes, admitted to embezzling at least $1.3 million from Plaintiff while the Defendants – Plaintiff's managers, directors and/or officers owing duties to Plaintiff – ***did nothing***. Not only did Defendants fail to supervise Barnes or timely uncover his looting, Defendants failed to immediately fire Barnes once they did discover it – and, instead,

allowed the criminal to remain in his position for a year after discovery. Eventually, Barnes was either fired, or left on his own accord, well after his criminal acts were discovered, with sufficient time and unsupervised access and autonomy to abscond with the computer system, empty his office, and take ***all files*** associated with his looting. Defendants failed to perform an audit or even pursue Barnes on Plaintiff's behalf, and failed to file a complaint against Barnes. Shockingly, according to defendant Dr. Smith, it took Defendants six (6) months ***after Barnes absconded*** to approach the FBI. As such, Defendants breached fiduciary duties they owed to Plaintiff as managers, directors, and/or officers, allowing Plaintiff to be looted by Barnes' operation over several years and doing nothing to protect Plaintiff's interests once the embezzlement was discovered.

Defendants' latest and most explicit ***intentional breaches*** of their fiduciary duties to Plaintiff are evidenced—in writing—within the Restitution List attached to the U.S. District Court for the District of Nevada's March 28, 2017 Amended Judgment in Barnes' criminal case.[1] Defendants failed to submit any claims on behalf of Plaintiff, the actual victim of Barnes' criminal acts, despite knowing of Plaintiff's insolvency and that Plaintiff's creditors remained unpaid and left in the cold. Accordingly, Plaintiff is not listed as a recipient of assets forfeited by

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[1] *See* attached to the Declaration of Todd E. Kennedy ("Kennedy Decl.") as **Exhibit 1**, the "Amended Judgment in a Criminal Case", Document 41 in *U.S. v. Robert W. Barnes*, case no. 2:16-cr-00090-APG-GWF-1, at 14-15. Pursuant to Federal Rule of Evidence 201, the Court can may take judicial notice of "matters of public record" without converting a motion to dismiss into a motion for summary judgment. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). The filed Amended Judgment is a readily-available matter of public record familiar to and unopposed by Defendants – who received personal awards (to Plaintiff's detriment) therein. Plaintiff requests that the Court take judicial notice of the Amended Judgment.

This evidence is also relevant to Plaintiff's alternative request for leave to amend – leave to amend should only be denied if the amendment to the complaint would be futile. *Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev. Adv. Rep. 42, 302 P.3d 1148, 1152 (2013) (observing that leave to amend a complaint should be denied if the proposed amendment would be futile but otherwise recognizing the longstanding principle that "leave to amend a complaint shall be 'freely given when justice so requires'" (quoting NRCP 15(a)). Exhibit 1 alone, in evidencing Defendants' willful and intentional disregard for Plaintiff's rightful claims (by their individual and collective failure to file any claims on Plaintiff's behalf), and personal enrichment to the direct detriment of Plaintiff, is sufficient basis for granting a leave to amend.

its former larcenous employee, that it alone is entitled to. ***Even worse***, the list evidences Defendants' ***naked self-interest***:

> Defendant Bhatnagar/Bhatnagar Family Trust was awarded $81,187.89
> Defendant Ng was awarded $31,787.89
> Dr. William Smith was awarded $126,687.89
> Dr. Sheldon Freedman was awarded $61,287.89
> Dr. Daniel Burkhead/Burkhead Irrevocable Trust was awarded $39,587.89[2]

As such, Defendants not only ignored and failed to protect Plaintiff's interests in Barnes' criminal forfeiture matter, Defendants intentionally allowed the substitution of their own personal self-interest for Plaintiff's interests – in other words, being personally enriched by their willful and intentional disregard of their affirmative duties to Plaintiff. Defendants also plainly violated the letter of Nevada law against distributions of LLC funds where the LLC is insolvent. *See* NRS 86.343. Moreover, Defendants' improper distributions could also be categorized as fraudulent transfers of corporate assets. *See* NRS Chapter 112. There is also evidence that Defendants intentionally and actively prevented an investigation into Barnes' embezzlement by other managers and/or directors.[3]

After allowing Plaintiff to be gutted, and after doing nothing about the gutting for several months, Defendants put Plaintiff into a bankruptcy that was ultimately dismissed and, thereafter, abandoned Plaintiff—leaving only an insolvent shell, to the obvious detriment of Plaintiff and Plaintiff's creditors.

Plaintiff's complaint sufficiently pleads, and the evidence reflects, the intentional, willful acts of Defendants such that the Motion's economic loss doctrine and business judgment rule defenses fail as a matter of law. Defendants' Motion separately fails for relying on false inferences outside the four corners of the Plaintiff's complaint, when Plaintiff's assertions must be accepted instead,[4] and for failing to satisfy the rigorous standards required for a dismissal of

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[2] *Id.*

[3] *See* Section II(C), *infra*.

[4] Plaintiff's complaint asserts that each Defendant was "a manager, director and/or officer of Plaintiff and owed certain duties to Plaintiff," (Complaint at ¶ 23), and Defendants collectively hired the criminal office manager. *Id.* at ¶ 21. The Motion's Section C claims – with

all claims. If the Court is inclined to grant any portion of the Motion, Plaintiff requests leave to amend the complaint, which should be granted freely unless there is no possible chance of success. *Halcrow, Inc.*, 302 P.3d at 1152. That is not the case here, considering the overwhelming evidence of Defendants' intentional breaches of their fiduciary duties to Plaintiff, and Defendants' improper distributions in violation of NRS Chapter 86. To be sure, with the surfacing of new evidence recently (e.g., Defendant Freedman's Opposition attaches the relevant Operating Agreement), Plaintiff intends to move to amend the complaint in any event to incorporate additional causes of action, including, without limitation, breach of contract, improper distributions and unjust enrichment.

II. FACTS

A. Defendants Hired Office Manager Robert Barnes, Who Looted Plaintiff Over Several Years While Defendants Willfully and Intentionally Ignored His Actions and Their Obligations to Plaintiff

Plaintiff has conducted business in Clark County for many years as an entity controlled by a group of surgeons practicing in Clark County, Nevada, including at an ambulatory surgery center located at 10195 West Twain Avenue, Las Vegas, Nevada 89147. Complaint at ¶ 19. Barnes was hired on or about October 5, 2006 by Defendants for the position of Plaintiff's office manager. *Id.* at ¶ 21. Barnes functions extended to Plaintiff's "full financial workings, accounts, and books." *Id.* at ¶ 22. Individually and collectively, Defendants failed to conduct the necessary due diligence regarding Barnes and negligently hired Barnes as Plaintiff's office manager – placing a criminal in a position to easily embezzle and steal from Plaintiff. *Id.* at ¶¶ 23-24. Barnes admitted in subsequent criminal proceedings (brought by the U.S. Government against Barnes), that Barnes embezzled at least $1.3 million during the course of his crime spree over many years. *Id.* at ¶ 28.

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no basis in the Complaint – that Defendants were mere "employees". Motion at 8-9. Plaintiff's reasonable assertions must be accepted as true and Defendants' assertions fail. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28 (2008) (a decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the complainant).

Managing Member Charles H. Tadlock testified under oath that Barnes' hiring was a majority decision by the surgeons. *See* attached to the Kennedy Decl. as **Exhibit 2** a relevant portion of Charles H. Tadlock's January 19, 2016 Rule 2004 Examination Transcript, at 19:11-17; 24:6-8.[5] The "entire group" talked to Barnes about coming to work for them. *Id.* at 23:22-24:2; 24:22-25:2, and everyone had an equal say. *Id.* at 24:3-5.

Individually and collectively, Defendants failed to supervise, oversee and/or monitor Barnes for many years during his crime spree, allowing him to formulate and execute a pattern of criminal embezzlement and theft from Plaintiff – resulting in substantial damages to and against Plaintiff. Complaint at ¶¶ 25-28. The warning signs were abundant and sustained: Barnes was "not forthcoming" with the [financial] reports for ***18 months to two years***. Exhibit 2, at 27:17-20.

Defendants did nothing to safeguard Plaintiff's interests and indeed actively sought to stymie any effort to keep tabs on Barnes. As the complaint alleges, Defendants ***"omitted"*** and grossly neglected their duties to Plaintiff as managers, directors and officers with respect to Barnes for many years. Complaint at ¶ 27 (emphasis added).

B. Upon Discovering Barnes' Embezzlement and Theft, Defendants Failed to Take Action to Protect Plaintiff, Intentionally Hindered Any Oversight of Barnes, and Actually Allowed Barnes to Remain in His Position and Remove Files and a Computer System when He Decided to Abscond

Upon discovering Barnes' embezzlement and theft, Defendants individually and collectively failed to appropriately audit, investigate, and determine the extent of Barnes' crimes,

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[5] Plaintiff respectfully requests, on the same grounds as in Footnote 1, *supra*, that this Court take judicial notice of Exhibit 2 (Tadlock Rule 2004 Examination Transcript), Exhibit 3 (Smith Rule 341 Meeting Transcript) and Exhibit 4 (Tadlock Rule 341 Meeting Transcript) attached to the Kennedy Decl. All three exhibits are from two (2) bankruptcy proceedings with which all defendants ***are imminently familiar***: *In re Charles H. Tadlock and Mary E. Tadlock*, case no. 15-13135-ABL (the bankruptcy of Managing Member Charles H. Tadlock), and *In re Flamingo-Pecos Surgery Center, LLC dba Surgery Center of Southern Nevada*, case no. 14-18480-ABL (the eventually-dismissed bankruptcy of Plaintiff). All three exhibits reflect matters known to all defendants and constitute/are associated with matters of public record. *MGIC Indem. Corp.*, 803 F.2d at 504. Accordingly, Plaintiff requests that this Court take judicial notice of all three of these exhibits, and all four exhibits attached to the Kennedy Decl.

resulting in substantial damages against Plaintiff. *Id.* at ¶ 32. Moreover, Defendants individually and collectively "***ignored and failed to adhere*** to their responsibilities and obligations to Plaintiff." *Id.* at ¶ 33 (emphasis added). Dr. William Smith, at the Rule 341 Meeting associated with Plaintiff's ill-fated bankruptcy, admitted that nothing was done to safeguard Plaintiff's interests after Barnes' embezzlement was discovered in 2012 – indeed, Barnes was not even fired until 2013. *See* attached to the Kennedy Decl. as **Exhibit 3** a relevant portion of William D. Smith's July 15, 2015 Rule 341 Meeting Transcript (second meeting), at 5-9. Defendants failed to hire a forensic accountant or other professionals to conduct an internal investigation. *Id.* Managing Member Charles H. Tadlock testified under oath that Barnes just left and was not fired – and that Barnes took the computer system and all the records. *See* attached to the Kennedy Decl. as **Exhibit 4** a relevant portion of Charles H. Tadlock's September 10, 2015 Rule 341 Meeting Transcript, at 22:1-15. It took Defendants six (6) months ***after Barnes absconded*** to approach the FBI. Exhibit 3, at 5:24-25.

C. Not Only Did Defendants Fail to Take Any Actions to Protect Plaintiff's Interests, but defendants on the Board of Directors Intentionally Interfered with a Managing Member's Efforts to Investigate Barnes' Embezzlement

The complaint asserts that defendants individually and collectively ignored and failed to adhere to their responsibilities and obligations to Plaintiff, and failed to protect and preserve Plaintiff's assets, funding and interests. *Id.* at ¶ 33. They failed to demand that Barnes return Plaintiff's funds and assets, they failed to pursue Barnes, and they failed to even file a complaint against Barnes. *Id.* at ¶ 35.

Moreover, there's evidence of defendants' intentional acts to prevent others from satisfying their obligations and fiduciary duties to Plaintiff: Tadlock claimed that directors screamed at Tadlock when he attempted to get Barnes to attend meetings and discuss Barnes' embezzlement (Exhibit 2, at 28:2-15), and they "were shouting at [Tadlock] to leave [Barnes] alone" when Tadlock raised the issue of Barnes' performance. *Id.* at 28:12-15. Defendants who were board members hindered Tadlock's efforts to investigate Barnes, ignored the fact that

Barnes did not show up to meetings, and engaged in general obstruction that lasted for more than 18 months. *Id.* at 28:3-19.

D. After Allowing Plaintiff to be Gutted Over Several Years and Doing Nothing, Defendants Intentionally Failed to Advocate For and Protect Plaintiff's Interests in Barnes' Restitution Action and Were Personally Enriched by Further Breaching of their Fiduciary Duties to Plaintiff

The complaint alleges that:

> Defendants individually and collectively breached Defendants' fiduciary duty of care to Plaintiff by, among other things, failing to: (a) oversee, supervise, monitor and discipline Plaintiff's Office Manager, who was embezzling and stealing from Plaintiff; (b) supervise, care for, monitor or review Plaintiff's books, accounts, and finances while Barnes was Plaintiff's Office Manager; (c) expeditiously remove Barnes from the position of Plaintiff's Office Manager upon the discovery of Barnes' embezzlement and theft; (d) audit, investigate and/or determine the extent of Barnes' embezzlement and theft; (e) pursue Barnes on behalf of Plaintiff in order to recover Plaintiff's assets, funding and interests from Barnes; and (f) take appropriate, reasonable and necessary steps to protect Plaintiff's interests vis-à-vis Barnes and certain Defendants. Complaint at ¶ 53.

In sum, Defendants did ***nothing*** with respect to Barnes – there was no audit, no investigation, and no efforts to recover Plaintiff's assets from the criminal office manager. Defendants compounded this failure by intentionally acting to personally benefit from their breaches of duties to Plaintiff. Despite having notice from the U.S. District Court for the District of Nevada (Exhibit 1, at 8-10), Defendants failed to submit any claims on behalf of Plaintiff, the actual victim of Barnes' criminal acts, despite knowing of Plaintiff's insolvency and that Plaintiff's creditors remained unpaid and left in the cold. The Restitution List contains no claim on behalf of Plaintiff – but does contain claims reflecting Defendants' ***naked self-interest***:

> Defendant Bhatnagar/Bhatnagar Family Trust was awarded $81,187.89
> Defendant Ng was awarded $31,787.89
> Dr. William Smith was awarded $126,687.89
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Id. at 14-15. The Restitution List identifies substantial sums awarded to, among others, the defendant surgeons named in this action – sums rightfully belonging to Plaintiff – at a time when Defendants knew Plaintiff was a gutted, post-failed-bankruptcy shell incapable of satisfying its

obligations to its creditors. Defendants also plainly violated the letter of Nevada law against distributions of LLC funds where the LLC is insolvent. *See* NRS 86.343.

III. LEGAL STANDARDS

A. The Rigorous Standards for a Rule 12(b)(5) Motion

When deciding a motion to dismiss for failure to state a claim, the court "must construe the pleadings liberally and accept all factual allegations in the complaint as true," drawing every fair inference in favor of the non-moving party. *Blackjack Bonding v. Las Vegas Mun. Ct.*, 116 Nev. 1213, 1217 (2000), *citing Simpson v. Mars Inc.*, 113 Nev. 188, 190 (1997). It thus is not enough to say the complaint is wrong; the moving defendant must show beyond a doubt that the plaintiff could prove no set of facts, which, if true, would entitle it to relief. *Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 228 (2008). This is, as the Nevada Supreme Court has noted, a "rigorous standard of review." *Id.; see also Hampe v. Foote,* 118 Nev. 405, 408 (2002).

B. The Economic Loss Doctrine – And Its Exceptions

The Economic Loss Doctrine ("ELD") "arose, in large part, from the development of products liability jurisprudence." *Calloway v. City of Reno*, 116 Nev. 250, 257 (2000)(Calloway II) (superseded, in part, by statue as stated in *Olson v. Richard*, 120 Nev. 240 (2004)). The doctrine generally bars "unintentional tort actions" seeking recovery for "purely economic losses." *Terracon Consultants Western, Inc. v. Mandalay Resort Group*, 125 Nev. 66, 72 (2009) *citing Local Joint Exec. Bd. v. Stern*, 98 Nev. 409, 411 (1982).

The ELD is not an iron-clad rule, nor is it meant to be. *Terracon* contemplated allowing exceptions to the ELD in certain categories of negligence cases against "attorneys, accountants, real estate professionals, and insurance brokers." *Id.* at 75 (internal citations omitted). Even third parties may be successful with negligent supervision and management claims against directors and officers in cases involving purely economic loss. *Sergeants Benevolent Ass'n Annuity Fund v. Renck*, 796 N.Y.S.2d 77, 80-81 (N.Y. App. Div. 2005); *Keams v. Tempe Tech. Inst., Inc.*, 993 F.Supp. 714, 724-26 (D. Ariz. 1997).

The ELD also does not bar claims "where the defendant had a duty imposed by law rather than by contract and where the defendant's intentional breach of that duty caused purely monetary harm to the plaintiff." *Giles v. General Motors Acceptance Corp.*, 494 F.3d 865, 879 (9th Cir. 2007). Notably, causes of action for intentional torts are not precluded under the ELD, so long as the supporting facts are pled. *Calloway II*, at 267 (internal citations omitted); *Terracon*, 125 Nev. at 73 *citing Stern*, at 411(in the context of intentional interference allowing for the recovery of purely economic losses).

Exceptions can also be appropriate where "strong countervailing considerations weigh in favor of imposing liability." *Barber Lines A/S v. M/V Donau Maru* 764 F.2d 50,56 (1st Cir. 1985). As such, policy considerations are important. The Nevada Supreme Court believes analysis of the ELD should examine "the relevant policies in order to ascertain the proper boundary between the distinct civil law duties that exist separately in contract and tort." *Calloway II*, 116 Nev. at 261 n. 3. The Court enforced the ELD in Calloway II to prevent creating a "general, societally imposed duty [upon builders] to avoid such losses." *Id.*

C. Breach of Fiduciary Duty

Under NRS 78.138(1), Directors and officers "shall exercise their powers in good faith and with a view to the interests of the corporation." NRS 78.138(3) establishes the presumption that directors and officers, in making business decisions, "act in good faith, on an informed basis, and with a view to the interests of the corporation." This is Nevada's embodiment of the business judgment rule.

Defendants had and have both a duty of care and a duty of loyalty to Plaintiff. "In essence, the duty of care consists of an obligation to act on an informed basis; the duty of loyalty requires the board and its directors to maintain, in good faith, the corporation's and its shareholders' best interests over anyone else's interests." *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632 (2006); *Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 127 Nev. 196, 223-224 (2011). NRS 78.138(7) holds that a breach of a fiduciary duty requires proving that a director's "act or failure to act constituted a breach of his or her fiduciary duties" and that such breaches

involve "intentional misconduct, fraud or a knowing violation of the law." *Kahn,* 127 Nev. 196, 223 (2011) *citing* NRS 78.138. The fiduciary duties case law applies to directors and officers in a number of contexts, including, without limitation:

- Directors can be liable for failing to monitor the company or abdicating all responsibility for oversight (*Henderson v. Buchanan (In re W. World Funding, Inc.)*, 52 B.R. 743, 767 (Bankr. D. Nev. 1985) *citing Francis v. United Jersey Bank*, 432 A.2d 814 (NJ 1981)), and need to take affirmative care of the corporation; *Francis,* 432 A.2d at 823-824.
- Directors can be liable for refusing or neglecting cavalierly to perform their duty as a director, or for ignoring either willfully ***or*** "through inattention obvious danger signs of employee wrongdoing" *Graham v. Allis-Chalmers Manufacturing Co.*, 188 A.2d 125, 130 (Del. 1963); *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006).
- Directors can have oversight liability if the directors "utterly failed to implement any reporting or information system or controls" ***or*** "[having such] system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *Stone*, 911 A.2d at 370 (internal citations omitted).

IV. ARGUMENT

A. The Motion's ELD Argument Fails for Ignoring Established Exceptions, Defendants' Intentional Conduct, and the Policy Considerations relevant to the case-by-case application of the ELD

1. Defendants' Motion Ignores the Exceptions to the ELD and, Instead, Relies Only on Overbroad Blanket Assertions

Defendants' Motion's substantive review of the ELD fails to consider any of its recognized exceptions. Instead, the Motion posits blanket statements – such as "[a]bsent injury to person or property, a plaintiff may not recover in negligence for economic loss" (Motion at 6:22-23) – that are simply wrong. The Nevada Supreme Court explicitly contemplated in *Terracon* allowing exceptions to the ELD in certain categories of negligence cases against "attorneys, accountants, real estate professionals, and insurance brokers." *Id.* at 75 (internal

citations omitted). Indeed, ***even third parties*** may be successful with negligent supervision and management claims against directors and officers in cases involving purely economic loss. *Sergeants Benevolent Ass'n Annuity Fund v. Renck*, 796 N.Y.S.2d 77, 80-81 (N.Y. App. Div. 2005); *Keams v. Tempe Tech. Inst., Inc.*, 993 F.Supp. 714, 724-26. In *Sergeants,* the court found a cognizable claim against an investment firm's officers for their alleged mismanagement regarding investment advice and negligent supervision of a portfolio manager. *Sergeants*, 796 N.Y.S.2d at 80-81.

Here, the complaint alleges that Defendants collectively hired Barnes for the role of office manager. Complaint at ¶ 21. Barnes' role encompassed the full financial scope of Plaintiff's operations (*Id.* at ¶ 22); thus, he was placed in a position to steal millions from Plaintiff over a number of years. Given this hiring and setup, Defendants' subsequent collective decision not to supervise and manage Barnes are especially alarming. The complaint alleges that Defendants failed to supervise, oversee and/or monitor Barnes for many years during Barnes' crime spree, allowing him to plan and execute his embezzlement and theft from Plaintiff and resulting in substantial damages to and against Plaintiff. Complaint at ¶¶ 25-28. Additionally, even though Barnes was "not forthcoming" with reports for 18 months to two years, Exhibit 2, at 27:17-20, Defendants continued to give him unfettered and unsupervised control over Plaintiff's funds. Even ***after*** Barnes' embezzlement was discovered, Defendants perversely persisted in their hands-off management – keeping Barnes in place – ***to the next calendar year***. Exhibit 3, at 5-9 (emphasis added). It took Defendants six (6) months ***after Barnes absconded*** to approach the FBI. *Id.* In line with *Sergeants,* Plaintiff's claims based on Defendants' failures to supervise and manage Barnes over the several years of his looting spree survives the Motion's ELD challenge at this stage of the litigation.

Defendants also ignore the ELD exception where a duty is imposed by law rather than by contract. The ELD does not bar claims "where the defendant had a duty imposed by law rather than by contract and where the defendant's intentional breach of that duty caused purely monetary harm to the plaintiff." *Giles v. General Motors Acceptance Corp.*, 494 F.3d 865, 879

(9th Cir. 2007). Here, the complaint asserts negligent hiring, mismanagement and supervision claims that are connected to Defendants' independent fiduciary duties as managers, officers and/or directors to supervise and manage employees/subordinates.

The complaint also asserts Defendants' gross negligence and intentional misconduct in the breaches of fiduciary duties by pleading Defendants' utter lack of action over the span of years – even after Barnes' looting was discovered. Following that discovery, Defendants did nothing to pursue Barnes or recover Plaintiff's funds, and Defendants failed to take any steps to remove Barnes from his position and to shield Plaintiff from further harm. Indeed, Defendants did not even contact the FBI until well after Barnes cleaned out his office and absconded with the computer system linked to his looting. A failure to act that extends to the level of "conscious disregard" can be deemed willful and deliberate – or, in other words, intentional. *See* NRS 42.001(1)(conscious disregard means "the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences"). Defendants had knowledge of Barnes' actual, not just "probable," harmful acts and consequences (as they discovered their company had been and was being robbed), and Defendants did nothing to further avoid those consequences. Barnes lingered in his same position until the next calendar year and eventually absconded with the computer system and all files associated with his embezzlement, and Defendants did ***nothing*** to mitigate or reverse the damages from that embezzlement.

2. <u>The Motion Ignores Defendants' Intentional Conduct as Asserted by the Complaint and Supported by the Facts, and Yet Another Exception to the ELD</u>

Causes of action for intentional tort are not precluded under the ELD, so long as the supporting facts are pled. *Calloway II*, 116 Nev. at 267 (internal citations omitted); *Terracon*, 125 Nev. at 73, *citing Stern*, 98 Nev. at 411 (in the context of intentional interference allowing for the recovery of purely economic losses). The complaint has sufficiently pled, and the facts support, Defendants' many intentional acts and interference:

- Defendants "failed to conduct the necessary due diligence"; Complaint at ¶ 23.

- Defendants "***omitted***" their duties to Plaintiff as managers, directors and officers with respect to Barnes for many years; *Id.* at ¶ 27 (emphasis added).
- Defendants "failed" to audit, investigate, and determine the extent of Barnes' crimes after having knowledge of his embezzlement; *Id.* at ¶ 32.
- Defendants individually and collectively "***ignored and failed to adhere*** to their responsibilities and obligations to Plaintiff"; *Id.* at ¶ 33 (emphasis added).
- Defendants who were on the board of directors screamed at Tadlock when he attempted to get Barnes to attend meetings and discuss Barnes' embezzlement. Exhibit 2, at 28:2-15.
- Following discovery of Barnes' crimes, Defendants failed to remove Barnes from his position immediately, and Barnes simply left the next calendar year, taking with him the computer system and all of the records and emptying out his office; Exhibit 4, at 22.
- Defendants who were board members hindered Tadlock's efforts to investigate Barnes, ignored the fact that Barnes did not show up to meetings, and engaged in general obstruction that lasted for more than 18 months; Exhibit 2, at 28:3-19.
- Defendants who were board members "were shouting at [Tadlock] to leave [Barnes] alone" when Tadlock raised the issue of Barnes' performance; *Id.* at 28:12-15.
- Defendants waited for six months after Barnes absconded to approach the FBI; Exhibit 3, at 5-9.
- Defendants, with knowledge of Barnes' embezzlement from Plaintiff, failed to submit any claims on behalf of Plaintiff to the U.S. District Court for the District of Nevada, and, indeed, Defendants intentionally received awards of funds to enrich themselves personally pursuant to the Amended Judgment's Restitution List and did not correct the record or ensure that Plaintiff would be the recipient of any such awards. Exhibit 1, at 14-15.

The foregoing examples of Plaintiff's intentional acts and failures to act amounting to intentional interference; the complaint's allegations and the evidence which support them, are sufficiently particular and substantive to render inapplicable the ELD and foreclose dismissal of Plaintiff's negligence-styled claims.

3. Defendants' Motion Completely Ignores the Policy Implications and Analyses the Nevada Supreme Court Applies to the ETD on a Case-by-Case Basis

The Nevada Supreme Court has stated that analysis of the ELD should examine "the relevant policies in order to ascertain the proper boundary between the distinct civil law duties that exist separately in contract and tort." *Calloway II*, 116 Nev. at 261 n. 3. The Calloway II

court enforced the ELD there to prevent the creation of a "general, societally imposed duty [upon builders] to avoid such losses." *Id.* Here, conversely, by exempting Plaintiff's supervision and management claims from the ELD, the Court would not be creating a "general" duty – but, rather, reinforcing explicit and limited duties that only apply to officers and directors. Exceptions to the ELD also may be appropriate where "strong countervailing considerations weigh in favor of imposing liability." *Terracon,* 125 Nev. at 73, *citing generally Barber Lines A/S v. M/V Donau Maru* 764 F.2d 50 (1st Cir. 1985)).

When the statutory importance, autonomy and power join with the obligations and duties of directors and officers – as enumerated in Chapters 78 and 86 – there emerge clear policy implications that strongly militate against categorical application the ELD. A broad ELD enforced in every tort action with purely economic damages – as Defendants would have this Court exercise – would eliminate critical causes of action and protections against officers and directors' intentional wrongdoing such as fraud and conversion. *See Giles*, 494 F.3d at 875, *citing Grynberg v. Questar Pipeline Co.*, 2003 UT 8, 70 P.3d 1, 11 (Sup. Ct.) for the proposition that claims against a defendant's intentional wrongdoing, "such as fraud and conversion exist to remedy purely economic losses."

These exceptions provide a basis for not applying the ELD here, as the Defendants' actions, including, *inter alia*, failing to provide oversight of Barnes, interfering with Tadlock's inquiry, continuing to employ Barnes, and failing to restrict his access to company IT systems and financial records until he absconded – were all willful and deliberate acts.

B. The Motion's Argument that Plaintiff's Negligent Hiring/Supervision/Retention Claims Do Not Apply to "Employees" is a Failed Strawman – Plaintiff's Complaint Alleges Each Defendant to be a "Manager", "Director", and/or "Officer"

Plaintiff's complaint asserts that each Defendant was "a manager, director and/or officer of Plaintiff and owed certain duties to Plaintiff." Complaint at ¶ 23. Defendants collectively hired the criminal office manager. *Id.* at ¶ 21. Managing Member Charles Tadlock testified that Barnes' hiring was a majority decision by the surgeons. Exhibit 2 at 19:11-17; 24:6-8. The "entire group" talked to Barnes about coming to work for them (*Id.* at 23:22-24:2; 24:22-25:2),

and everyone had an equal say. *Id.* at 24:3-5. The complaint and the facts establish that Defendants were responsible for hiring Barnes and completely failed in their duties of hiring, supervision, and retention. The case law is equally clear with respect to such failures. Directors can be liable for refusing or neglecting cavalierly to perform their duty as a director, or for ignoring "either willfully" ***or*** "through inattention obvious danger signs of ***employee wrongdoing.***" *Graham v. Allis-Chalmers Manufacturing Co.*, 188 A.2d 125, 130 (Del. 1963); *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006)(emphasis added). Only one prong is needed, and Plaintiff has alleged sufficient facts to support both prongs.

Defendants refused to perform their supervisory and management duties as directors and officers by, *inter alia*, positioning Barnes at the controls of Plaintiff's finances without supervision or oversight, and then failing to exercise any oversight or management over Barnes' actions for several years – during which time Barnes looted Plaintiff repeatedly. Barnes failed to produce reports for at least 18 months (Exhibit 2 at 27:17-20) and avoided appearing at meetings – "obvious danger signs of employee wrongdoing" that Defendants willfully ignored during their refusal to perform their duties to Plaintiff. Indeed, this failure to do their duty and ignorance of obvious danger signs continued ***after*** Defendants discovered Barnes' embezzlement.

Defendants allowed Barnes to maintain his role and only approached the FBI several months after he absconded. Moreover, there's evidence of defendants intentionally preventing others from satisfying their own fiduciary duties to Plaintiff: Managing Member Tadlock claimed that directors screamed at Tadlock when he attempted to get Barnes to attend meetings and discuss Barnes' embezzlement (Exhibit 2, at 28:2-15), and they "were shouting at [Tadlock] to leave [Barnes] alone" when Tadlock raised the issue of Barnes' performance. *Id.* at 28:12-15. Defendants who were board members hindered Tadlock's efforts to investigate Barnes, ignored the fact that Barnes did not show up to meetings, and engaged in general obstruction that lasted for more than 18 months. *Id.* at 28:3-19. Defendants' failures to perform their duties and ignorance of obvious danger signs meet the "conscious disregard" standard for willfulness and constitute intentional acts, and satisfy both *Graham* prongs for director/officer liability.

Against this evidence, Defendants only present a strawman argument. The Motion's Section C claims – with no basis in the Complaint – that Defendants were mere "employees." Motion at 8-9. Plaintiff's reasonable assertions must be accepted as true and Defendants' assertions fail. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28 (2008) (a decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the complainant).

C. The Motion's Reliance on the Business Judgment Rule Is Wholly Inappropriate With these Facts, Which Reflect Multiple Egregious Breaches of Defendants' Fiduciary Duties to Plaintiff

Defendants' first defense against the numerous and explicit assertions of breaches of fiduciary duty in Plaintiff's complaint and the facts is the standard safe harbor of the business judgment rule, codified in NRS 78.138(3)'s presumption that directors and officers, in making business decisions, "act in good faith, on an informed basis, and with a view to the interests of the corporation."

However, the business judgment rule defense does not protect Defendants here. This rule does not apply when there has been no exercise of judgment resulting in a decision. *See In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 748 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006); in other words, inaction alone is not protected by the business judgment rule. *Francis*, 432 A.2d 814. Additionally, when a decision is taken it must meet the "minimum standards of rationality" for the rule to apply. *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971). Inaction whether negligent, willful or reckless succinctly describes a large percentage of Defendants' conduct:

- Defendants failed to conduct the necessary due diligence regarding Barnes – placing a criminal in a position to easily embezzle from Plaintiff. Complaint at ¶ 23.
- Defendants failed to supervise, oversee and/or monitor Barnes for many years during his crime spree, allowing him to formulate and execute a pattern of criminal embezzlement and theft from Plaintiff – resulting in substantial damages to and against Plaintiff. *Id.* at ¶¶ 25-28.
- Defendants omitted and grossly neglected their duties to Plaintiff as managers, directors and officers with respect to Barnes for many years. *Id.* at ¶ 27.

- Upon discovering Barnes' embezzlement and theft, Defendants individually and collectively failed to appropriately audit, investigate, and determine the extent of Barnes' crimes, resulting in substantial damages against Plaintiff. *Id.* at ¶ 32.
- Defendants failed to hire a forensic accountant or other professionals to conduct an internal investigation. Exhibit 3, at 5-9.
- Defendants failed to adhere to their responsibilities and obligations to Plaintiff, and failed to protect and preserve Plaintiff's assets, funding and interests. Complaint, at ¶ 33.
- Defendants failed to demand that Barnes return Plaintiff's funds and assets, they failed to pursue Barnes, and they failed to even file a complaint against Barnes. *Id.* at ¶ 35.
- Critically, Defendants failed to immediately terminate Barnes' position after discovery of his crimes, and Defendants failed to address Barnes' continued controls of Plaintiff's finances for several months following such discovery.
- Defendants failed to implement and/or enforce IT protections and record retention policies after Barnes' crimes were discovered – and Barnes simply absconded the computer system, all the files, and everything of value in his office.
- Defendants failed, for six (6) months ***after Barnes absconded***, to approach the FBI. Exhibit 3, at 5:24-25 (emphasis added).

Each and every one of the failures to act whether characterized as negligent, willful or reckless listed in the above bullet points ***deny*** Defendants the protection of the business judgment rule. Indeed, some of failures and inactions rise to the level of gross negligence and willful misconduct.

Furthermore, Defendants' failures to act do not satisfy the minimum standards of rationality that would avail Defendants to the business judgment rule's defenses. There is no rationality or business purpose to, among many other things, allowing a criminal continued and prolonged access to a business's funds, financial documents and records, and computer system, after discovering his looting – or to waiting six months after the criminal absconds before approaching the FBI. The business judgment rule cannot save Defendants from their breaches of their fiduciary duties to Plaintiff.

D. The Motion's Final Attack on Plaintiff's Breach of Fiduciary Duty Claims as Failing Heightened Pleading Standards, Fails in Light of the Complaint's Assertions and the Facts – and, in Any Case, would be Rendered Moot by an Amended Complaint

NRS 78.138(7) requires that a plaintiff prove a breach of a fiduciary duty by establishing two elements: (1) a director's "act or failure to act constituted a breach of his or her fiduciary duties" and (2) such breaches involve "intentional misconduct, fraud or a knowing violation of the law". *Kahn,* 127 Nev. at 223 (2011) *citing* NRS 78.138. Defendants had and have two primary duties to Plaintiff – a duty of care ("an obligation to act on an informed basis") and a duty of loyalty (which requires directors to maintain, in good faith, the corporation's and its shareholders' best interests over anyone else's interests). Defendants' actions and failures to act, as pled in the complaint and evidenced by the facts (*see, e.g.,* Complaint at ¶ 53, where failures of the duty of care and of loyalty are alleged), constituted breaches of both duties, and such breaches involved all three actionable bases: intentional misconduct, fraud, and a knowing violation of the law.

1. Plaintiff's Complaint and the Facts Sufficiently Plead Defendants' Failures of their Duty of Loyalty

The duty of loyalty required Defendants to maintain, in good faith, the corporation's and its shareholders' ***best interests*** over anyone else's interests. As pled in the complaint and evidenced by the facts, the following partial list of Defendants' actions and failures to act illustrate breaches of their duty of loyalty to Plaintiff:

- Defendants' (1) failure to file a claim on behalf of Plaintiff in Barnes' criminal case; (2) affirmative receipt of monetary awards to Plaintiff's direct detriment and Defendants' direct benefit; and (3) failure to inform the Federal Government and/or the U.S. District Court that the awards actually belonged to Plaintiff, each constitute separate breaches of their duty of loyalty to Plaintiff. Plaintiff's best interests were not served by Defendants failing to assert Plaintiff's rights during the claims process – rather, Plaintiff was materially damaged by Defendants' failures to file any claim. Moreover, for Defendants to usurp then benefit personally from their failure to file a claim on Plaintiff's behalf manifests a classic breaches of the duty of loyalty. Here, Defendants' actions constitute both intentional misconduct (actively taking, or failing to take, steps to the detriment of Plaintiff) and a known violation of law, specifically NRS 86.343, as the awards are

improper distributions that Defendants knew they were not entitled to (given that by the initiation of Barnes' criminal matter, Plaintiff was insolvent, had been placed into bankruptcy, and abandoned by Defendants). Indeed, Defendants' improper distributions could also be categorized as fraudulent transfers of corporate assets. *See* NRS Chapter 112.

- Defendants' failure to appropriately audit, investigate, and determine the extent of Barnes' crimes ***following*** discovery of them (Complaint at ¶ 32), and failure to pursue Barnes and file suit against him (*Id.* at ¶ 35), and complete inactivity for at least several months, also constitute separate breaches of their duty of loyalty to Plaintiff and its shareholders. Having a criminal maintain his position and access to Plaintiff's funds, financial documents, and computer system ***after his looting*** of Plaintiff from that position was discovered is not in Plaintiff's best interests – in fact, just the opposite. Barnes' interests were served by Defendants' actions in lieu of Plaintiff's interests, which violates the duty of loyalty. Plaintiff's and shareholders' best interests would have been served, upon the discovery of Barnes' embezzlement, with the immediate termination of Barnes, the retention of forensic accountants to investigate the extent of Plaintiff's losses, and the retention of legal counsel to pursue immediate recourse and disgorgement from Barnes. Defendants failed to take any of these essential and ***basic*** steps. Here, Defendants' breaches of their fiduciary duty to Plaintiff and failures to disclose Barnes' actions (or their own breaches) for several months to the FBI and others, constitutes constructive fraud. *Allen v. Webb*, 87 Nev. 261, 485 P.2d 677 (1971).
- Defendants' intentional acts to ***prevent*** others from satisfying their fiduciary duties to Plaintiff breached Defendants' duty of loyalty to Plaintiff and Plaintiff's shareholders. Managing Member Tadlock claimed that directors screamed at Tadlock when he attempted to get Barnes to attend meetings and discuss Barnes' embezzlement (Exhibit 2, at 28:2-15), and they "were shouting at [Tadlock] to leave [Barnes] alone" when Tadlock raised the issue of Barnes' performance; *Id.* at 28:12-15. Defendants who were board

members hindered Tadlock's efforts to investigate Barnes, ignored the fact that Barnes did not show up to meetings, and engaged in general obstruction that lasted for more than 18 months. *Id.* at 28:3-19. Not just failing to investigate, but actively interfering with the investigation of others attempting to safeguard Plaintiff's best interests, explicitly violates both the duty of loyalty and the duty of care. Here, Defendants' actions constituted intentional interference and/or willful misconduct.

2. Plaintiff's Complaint and the Facts Sufficiently Plead Defendants' Failures of their Duty of Care

The duty of care is structured as an affirmative one. Directors can be liable for failing to monitor the company or abdicating all responsibility for oversight (*Henderson v. Buchanan (In re W. World Funding, Inc.)*, 52 B.R. 743, 767 (Bankr. D. Nev. 1985) *citing Francis v. United Jersey Bank*, 432 A.2d 814 (NJ 1981)), and need to take ***affirmative care of the corporation***. *Francis,* 432 A.2d at 823-824 (emphasis added).

- Defendants failed to supervise, oversee and/or monitor Barnes for many years during his crime spree, allowing him to formulate and execute a pattern of criminal embezzlement and theft from Plaintiff – resulting in substantial damages to and against Plaintiff. Complaint at ¶¶ 25-28. The warning signs were abundant and sustained: Barnes was "not forthcoming" with the [financial] reports for ***18 months to two years***. Exhibit 2, at 27:17-20. As such, Defendants failed in their duty to "take affirmative care of the corporation", by abdicating "all responsibility for oversight." *Francis*, 432 A.2d at 823-824.
- Defendants did nothing to safeguard Plaintiff's interests and indeed actively sought to stymie any effort to keep tabs on Barnes. Indeed, Defendants ***"omitted"*** and grossly neglected their duties to Plaintiff as managers, directors and officers with respect to Barnes for many years. Complaint at ¶ 27 (emphasis added). Moreover, Defendants individually and collectively "***ignored and failed to adhere*** to their responsibilities and obligations to Plaintiff." *Id.* at ¶ 33 (emphasis added). Defendant Dr. William Smith testified that nothing was done to safeguard Plaintiff's interests after Barnes'

embezzlement was discovered in 2012 – indeed, Barnes was not even fired until 2013. *See* Exhibit 3, at 5-9. Defendants failed to hire a forensic accountant or other professionals to conduct an internal investigation. *Id.* Managing Member Charles H. Tadlock testified that Barnes just left and was not fired – and that Barnes took the computer system and all the records, and cleaned out his office. *See* Exhibit 4, at 22:1-15. It should not escape notice that two important directors, Defendant Dr. Smith and Tadlock, separately testified to completely different understandings about one of the most important issues impacting Plaintiff's overall health, and this inconsistency underscores the directors and all the defendants' multiple breaches of their duty of care.

Each of the above-referenced assertions evidence – in sufficient detail – Defendants' breaches of their duty of care. Here, the vehicle was intentional misconduct (through extreme inaction and a willful disregard for Defendants' duties and obligations).

Indeed, the duty of care precedent herein aligns with the Directors' actions and their failures to act precisely. Directors have been found liable for refusing or neglecting cavalierly to perform their duty as a director, or for ignoring either willfully ***or*** "through inattention [to] obvious danger signs of employee wrongdoing." *Graham v. Allis-Chalmers Manufacturing Co.*, 188 A.2d 125, 130 (Del. 1963); *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006). Here, there were numerous and obvious danger signs of employee wrongdoing – including the Barnes' failure to present reports for more than 18 months, and Defendants breached their duty of care to Plaintiff for ignoring such signs and failing to supervise Barnes – to the substantial harm of Plaintiff.

Directors have been found to have oversight liability if the directors "utterly failed to implement any reporting or information system or controls" ***or*** "[having such] system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *Stone*, 911 A.2d at 370 (internal citations omitted). Here, we have Defendants with no controls and a willful failure to monitor. For all of the reasons stated herein, the Motion fails to defeat Plaintiff's breach of fiduciary duty claims.

V. CONCLUSION

For all the reasons and basis discussed, Defendant's Motion should be denied in its entirety as to all claims. If the Court is inclined to grant the Motion or any portion, then Plaintiff will seek leave to amend the complaint as mentioned in footnote 1 above.

Respectfully Submitted,

By: /s/ Todd E. Kennedy
Todd E. Kennedy (NSB# 6014)
BLACK & LOBELLO
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tkennedy@blacklobellolaw.com
Las Vegas, Nevada 89135

Attorneys for Receiver Timothy Mulliner, Esq., acting on behalf of Plaintiff Flamingo-Pecos Surgery Center LLC

DECLARATION OF TODD E. KENNEDY

I, TODD E. KENNEDY, hereby declare as follows:

1. I am over the age of 18 and competent to testify. I am counsel of record for Receiver, Tim Mulliner, Esq., acting on behalf of Flamingo-Pecos Surgery Center LLC in the above-captioned proceeding, and make this declaration subject to penalty of perjury under the laws of the United States and the State of Nevada, in support of the Plaintiff's Opposition to Defendants' Motion to Dismiss.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the "Amended Judgment in a Criminal Case", Document 41 in *U.S. v. Robert W. Barnes*, case no. 2:16-cr-00090-APG-GWF-1. The Restitution List is located on pages 14 and 15.

3. Attached hereto as **Exhibit 2** is a true and correct copy of a portion of Charles H. Tadlock's **January 19, 2016** Rule 2004 Examination Transcript. Exhibit 2 contains, in the interest of brevity and relevance, the following page ranges of the Transcript: pages 19 to 28. Upon request, undersigned counsel will provide the Court and/or the parties with a complete copy of this Transcript.

4. Attached hereto as **Exhibit 3** is a true and correct copy of a portion of William D. Smith's July 15, 2015 Rule 341 Meeting Transcript (second meeting). Exhibit 3 contains, in the interest of brevity and relevance, the following page ranges of the Transcript: pages 5 to 9. Upon request, undersigned counsel will provide the Court and/or the parties with a complete copy of this Transcript.

5. Attached hereto as **Exhibit 4** is a true and correct copy of one (1) page of Charles H. Tadlock's September 10, 2015 Rule 341 Meeting Transcript: page 22. Upon request, undersigned counsel will provide the Court and/or the parties with a complete copy of this Transcript.

Dated this 13th day of July, 2017.

By: 

Todd E. Kennedy

EXHIBIT 1

UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA
v.
ROBERT W. BARNES

Date of Original Judgment: December 28, 2016
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☑ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 2:16-cr-00090-APG-GWF-1
USM Number: 53822-048
Daniel Albregts
Defendant's Attorney

- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☑ pleaded guilty to count(s) 1 of the Information
- ☐ pleaded nolo contendere to count(s) which was accepted by the court.
- ☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 669	Embezzlement in Connection with Health Care	2013	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
- ☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

December 28, 2016
Date of Imposition of Judgment

Signature of Judge
ANDREW P. GORDON, UNITED STATES DISTRICT JUDGE
Name and Title of Judge

March 28, 2017
Date

DEFENDANT: ROBERT W. BARNES
CASE NUMBER: 2:16-cr-00090-APG-GWF-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of :

18 months

☑ The court makes the following recommendations to the Bureau of Prisons:

Due to the proximity of family, the court recommends the defendant be permitted to serve his term of incarceration at a facility in Victorville.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☑ by 12 p.m. on June 30, 2017 .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ROBERT W. BARNES
CASE NUMBER: 2:16-cr-00090-APG-GWF-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: 3 years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court, not to exceed 104 tests annually.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: ROBERT W. BARNES
CASE NUMBER: 2:16-cr-00090-APG-GWF-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: ROBERT W. BARNES
CASE NUMBER: 2:16-cr-00090-APG-GWF-1

SPECIAL CONDITIONS OF SUPERVISION

1. Gambling Addiction Treatment - You shall refrain from any form of gambling and shall participate in a program for the treatment of gambling addiction, at your own expense, as approved and directed by the probation officer, based upon your ability to pay.

2. Debt Obligations - You shall be prohibited from incurring new credit charges, opening additional lines of credit, or negotiating or consummating any financial contracts without the approval of the probation officer.

3. Access to Financial Information - You shall provide the probation officer access to any requested financial information, including personal income tax returns, authorization for release of credit information, and any other business financial information in which you have a control or interest.

4. Gambling Prohibition - You shall not enter, frequent, or be involved with any legal or illegal gambling establishment or activity, except for the purpose of employment, as approved and directed by the probation officer.

5. Warrantless Search - You shall submit your person, property, residence, place of business and vehicle under your control to a search, conducted by the United States probation officer or any authorized person under the immediate and personal supervision of the probation officer, at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of supervision; failure to submit to a search may be grounds for revocation; the defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.

DEFENDANT: ROBERT W. BARNES
CASE NUMBER: 2:16-cr-00090-APG-GWF-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$	$	$ 1,500,000.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
(see attached restitution list)		$1,500,000.00	

TOTALS	$	0.00	$	1,500,000.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☑ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ROBERT W. BARNES
CASE NUMBER: 2:16-cr-00090-APG-GWF-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☑ Lump sum payment of $ 1,500,100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:

(see attached final order of forfeiture)

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, v. ROBERT W. BARNES, Defendant.	2:16-CR-090-APG-(GWF) Final Order of Forfeiture

The United States District Court for the District of Nevada entered a Preliminary Order of Forfeiture pursuant to Fed. R. Crim. P. 32.2(b)(1) and (2); Title 18, United States Code, Section 981(a)(1)(C) with Title 28, United States Code, Section 2461(c); Title 18, United States Code, Section 982(a)(7); and Title 21, United States Code, Section 853(p) based upon the plea of guilty by defendant Robert W. Barnes to the criminal offense, forfeiting the property and imposing an in personam criminal forfeiture money judgment set forth in the Plea Agreement and the Forfeiture Allegations of the Criminal Information and shown by the United States to have the requisite nexus to the offense to which defendant Robert W. Barnes pled guilty. Criminal Information, ECF No. 4; Plea Agreement, ECF No. 6; Arraignment and Plea, ECF No. 9; Preliminary Order of Forfeiture, ECF No. 12.

This Court finds the United States of America published the notice of forfeiture in accordance with the law via the official government internet forfeiture site, www.forfeiture.gov, consecutively from June 20, 2016, through July 19, 2016, notifying all potential third parties; and notified known third parties by personal service or by regular mail and certified mail return

receipt requested, of their right to petition the Court. Notice of Filing Proof of Publication, ECF No. 16.

On July 8, 2016, the United States Marshals Service personally served Hutchison & Steffen, LLC, as Registered Agent for Epiphany Surgical Solutions, LLC, with copies of the Preliminary Order of Forfeiture and the Notice. Notice of Filing Service of Process – Personal Service, ECF No. 14.

On July 6, 2016, the United States Marshals Service personally served William D. Smith, M.D., as Managing Member for Epiphany Surgical Solutions, LLC, with copies of the Preliminary Order of Forfeiture and the Notice. Notice of Filing Service of Process – Personal Service, ECF No. 14.

On July 6, 2016, the United States Marshals Service personally served William D. Smith, M.D., as Managing Member for Flamingo-Pecos Surgery Center, LLC, with copies of the Preliminary Order of Forfeiture and the Notice. Notice of Filing Service of Process – Personal Service, ECF No. 14.

On July 6, 2016, the United States Marshals Service personally served Charles H. Tadlock, M.D., as Managing Member for Epiphany Surgical Solutions, LLC, with copies of the Preliminary Order of Forfeiture and the Notice. Notice of Filing Service of Process – Personal Service, ECF No. 14.

On July 6, 2016, the United States Marshals Service personally served Charles H. Tadlock, M.D., as Managing Member for Flamingo-Pecos Surgery Center, LLC, with copies of the Preliminary Order of Forfeiture and the Notice. Notice of Filing Service of Process – Personal Service, ECF No. 14.

On July 12, 2016, the United States Marshals Service personally served Gregory J. Morris, Ltd., as Registered Agent for VIP Surgery Center LLC, with copies of the Preliminary Order of Forfeiture and the Notice. Notice of Filing Service of Process – Personal Service, ECF No. 14.

On July 6, 2016, the United States Marshals Service personally served Eddy H. Luh, as Managing Member for VIP Surgery Center LLC., with copies of the Preliminary Order of Forfeiture and the Notice. Notice of Filing Service of Process – Personal Service, ECF No. 14.

On July 6, 2016, the United States Marshals Service personally served Thomas C. Yee, as Managing Member for VIP Surgery Center LLC., with copies of the Preliminary Order of Forfeiture and the Notice. Notice of Filing Service of Process – Personal Service, ECF No. 14.

On July 12, 2016, the United States Marshals Service personally served Lottie Barnes, with copies of the Preliminary Order of Forfeiture and the Notice. Notice of Filing Service of Process – Personal Service, ECF No. 14.

On July 8, 2016, the United States Marshals Service personally served Michelle Barnes with copies of the Preliminary Order of Forfeiture and the Notice. Notice of Filing Service of Process – Personal Service, ECF No. 14.

On June 28, 2016, the United States Attorney's Office served Charles Tadlock, M.D., as Managing Member for Flamingo-Pecos Surgery Center, LLC and Epiphany Surgical Solutions, LLC, with copies of the Preliminary Order of Forfeiture and the Notice through regular mail and certified mail, return receipt requested. Notice of Filing Service of Process – Mailing, ECF No. 13.

This Court finds no petition was filed herein by or on behalf of any person or entity and the time for filing such petitions and claims has expired.

This Court finds no petitions are pending with regard to the property named herein and the time for presenting such petitions has expired.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that all right, title, and interest in the property hereinafter described is condemned, forfeited, and vested in the United States of America:

1. 2007 Honda Accord EX Gray 4D Sedan, VIN 1HGCM56857A164507, Nevada License Plate 452WVU;

2. 2011 EXP Limited 5.4L 4X4 Ford Expedition, Color: Sterling Gray Metallic, VIN 1FMJU2A53BEF36389, Nevada License Plate 929VJR;
3. 14k white gold cluster stud earrings with four princess cut diamonds surrounded by 16 round diamonds;
4. Ladies stainless steel Breitling Lady Colt A72345 Watch with blue Mother of Pearl dial, diamond bezel (28 diamonds), Serial No. 386210;
5. Ladies 14k white gold ring centered with one rectangle blue Tourmaline with 45 diamonds;
6. Ladies Tanzanite (approx. 40 carats) platinum ring with 152 brilliant diamonds;
7. Ladies 14k white gold with violetish red Garnet surrounded by 74 brilliant diamonds;
8. Ladies platinum oval shaped bluish green Tourmaline with 92 brilliant diamonds;
9. Ladies 14k white gold ring, pear shaped cabochon cut black opal with blue play of color and 50 diamonds;
10. Movado Womans watch with black in color face;
11. Tag Heuer lady's Watch silver in color;
12. Gucci Watch gold in color;
13. Necklace, silver in color, with Tiffany pendant heart shaped;
14. Necklace, silver in color, with floral design pendant;
15. Bracelet gold in color with green in color stones;
16. Bracelet gold in color appeared to be broken at time of seizure;
17. Bracelet clear stone type;
18. Pair of Earrings with green in color stones;
19. Metal ring, yellow in color with green in color stones;
20. Pair of Earrings tear drop shaped;
21. Pair of Earrings heart shaped;

22. Braided necklace, yellow in color;

23. Ring, silver in color with clear stones;

24. Pair of Earrings flower shaped;

25. Ring, silver in color with clear stones;

26. Pair of Earrings hoop shaped yellow in color;

27. Pair of Earrings, yellow in color with round white in color stones;

28. Thick Bracelet yellow in color;

29. Pair of Earrings, yellow in color;

30. Three (3) rings, yellow in color: One (1) with clear type stones, Two (2) with heart shaped designs;

31. Ring, white in color with clear stones;

32. Two (2) Rings yellow in color with blue in color stones;

33. Ring, yellow in color with green in color stone;

34. Ring, heart shaped with clear stones;

35. One (1) Ring yellow in color with white in color stones;

36. Five Bracelets: Two (2) yellow in color; Two (2) yellow in color with name plates on them "Lucas" and "Joshua"; One (1) yellow in color with green stones;

37. Necklace, white in color;

38. Necklace, white in color with tear drop pendant;

39. One (1) Necklace, white in color with pink in color stone; One (1) pair of earrings with pink in color stones;

40. One (1) round pendant yellow in color; and

41. Pair of Earrings, orange in color

(all of which constitutes property); and

that the United States recover from Robert W. Barnes the in personam criminal forfeiture money judgment of $1,300,000, not to be held jointly and severally liable with any codefendants,

and that the property will be applied toward the payment of the money judgment; and the forfeiture of the money judgment and the property is imposed pursuant to Fed. R. Crim. P. 32.2(b)(4)(A) and (B); Fed. R. Crim. P. 32.2(c)(2); Title 18, United States Code, Section 981(a)(1)(C) with Title 28, United States Code, Section 2461(c); Title 18, United States Code, Section 982(a)(7); Title 21, United States Code, Section 853(p); and Title 21, United States Code, Section 853(n)(7); that the money judgment shall be collected; and that the property and the collected amount shall be disposed of according to law.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that any and all forfeited funds, including but not limited to, currency, currency equivalents, certificates of deposit, as well as any income derived as a result of the United States of America's management of any property forfeited herein, and the proceeds from the sale of any forfeited property shall be disposed of according to law.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Clerk send copies of this Order to all counsel of record and three certified copies to the United States Attorney's Office, Attention Asset Forfeiture Unit.

DATED this 28th day of December, 2016.

UNITED STATES DISTRICT JUDGE

U.S. v ROBERT W. BARNES
2:16-CR-00090-APG-GWF
Restitution List

Bhatnagar Family Trust Pankaj Bhatnagar, MD	$81,187.89
Burkhead Irrevocable Trust Daniel Burkhead, MD	$39,587.89
Cubs Win, LLC Randall Weingarten, MD Dodd Hyer, MD	$70,787.89
Epiphany Surgery Centers Charles Tadlock, MD	$309,787.52
Grabow Family Trust Ryan Grabow, MD	$22,687.89
Luong Estate Major LLC Minh Luong, DDS	$52,587.89
Mercury Group, LLC Andrew Cash, MD	$61,287.89
SAS Consulting LLC Scott Slavis, MD	$31,787.89
The Julian Trust David Biesinger, DPM	$12,287.89
Douglas Seip, MD	$12,287.89
Fred Redfern, MD	$12,287.89
George Gluck, MD	$17,487.89
Howard Hack, MD	$42,187.89
James Vahey, MD	$61,287.89
Jason Garber, MD	$64,287.89
John Anson, MD	$49,987.89
Marjorie Belsky, MD	$70,787.89
Matthew Ng, MD	$31,787.89
Michael Valpiani, MD	$42,187.89

Laurie Larson, MD	$31,787.89
Larry Goldstein, MD	$22,687.89
Ming Wei Wu, DO	$9,687.89
Noah Levine, MD	$22,687.89
R. Allen Byrd, PC	$5,787.89
Sheldon Freedman, MD	$61,287.89
Steve Becker, MD	$42,187.89
Stuart Kaplan, MD	$12,287.89
Terrance Kwiatkowski, MD	$12,287.89
Timothy Wilson, DDS	$5,787.89
T.J. O-Lee, MD	$22,687.89
Thomas Vater, MD	$25,287.89
William Muir, MD	$12,287.89
William Smith, MD	$126,687.89
	==========
TOTAL:	$1,500,000.00

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, v. ROBERT W. BARNES, Defendant.	2:16-cr-0090-APG-GWF **ORDER CONTINUING SELF-SURRENDER DATE**

The District Court having considered the Stipulation of the parties and the circumstances surrounding this case,

IT IS HEREBY ORDERED that the self-surrender date for defendant BARNES currently scheduled for Friday, March 31, 2017 is vacated and same is continued to Friday, June 30, 2017, by 12:00 noon.

DATED this 28th day of March, 2017.

UNITED STATES DISTRICT JUDGE

EXHIBIT 2

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:	)	
	)	
CHARLES H. TADLOCK and MARY E. TADLOCK,	)	Case No. 15-13135-ABL
	)	
Debtors-in-Possession.	)	
	)	

2004 EXAMINATION OF CHARLES TADLOCK, M.D.

Taken at the Offices of Iqbal Law PLLC
714 South Fourth Street
Las Vegas, Nevada

On Tuesday, January 19, 2016
At 1:01 p.m.

Reported by: Jane V. Efaw, CCR #601, RPR

Actually, I've been chief somewhere pretty much my entire career until about the last year when my health has deteriorated too much.

Q. So Robert Barnes suggested forming Epiphany going to the west side?

A. Correct. He was originally hired by Regent for running.

Q. And I'll get to Barnes specifically. Right now I want to talk about Flamingo Pecos. But we'll have a number of questions on Barnes.

So Barnes approached you and a few of the other surgeons about joining and creating Epiphany. Who ultimately said yes to him? More than ten surgeons, as you had said?

A. Pretty much -- I cannot recall the exact number of people that voted for him, but it was a majority.

Q. And were there any minutes or memos from those discussions that took place between Barnes and you and several other surgeons? Did you guys have formal meetings?

A. Yeah. We had formal meetings, meetings occasionally; however, the secretary for those meetings was Barnes.

Q. Okay. So he prepared those minutes?

A. Correct.

Q. Do you have any idea where those documents are now?

A. No.

Q. How many times did you meet before the vote was taken and everyone said yes to Barnes?

A. I don't know that everyone said yes to Barnes. There may have been some people that voted against it. I don't recall the exact number. There was relatively few against.

Q. Was it a long process, or was it, you know, one meeting and all the surgeons said yes?

A. It was a period of years.

Q. Where Barnes was recruiting you and a number of surgeons to start Epiphany?

A. Actually, I had the original idea doing of Epiphany in Kingman. Barnes decided to bring Epiphany in here, to Las Vegas, and to start the surgery center over at Flamingo Pecos. In the meantime, we had also done one -- it had to be voted on by the existing membership at 2020 Goldring.

Q. And Barnes was involved in that as well?

A. Not very much. Somewhat. I believe they hired another administrator for that one.

Q. How did you meet Robert Barnes?

A. He was brought in by Regent.

Q. By Regent. Who specifically at Regent knew him?

A. I don't know.

Q. Did you interview Robert Barnes when you joined Regent?

A. No, I interviewed Regent before we took Regent.

Q. And before you took Regent, did you interview Barnes?

A. No. I don't believe that he was -- that he had been hired by Regent. There were several administrators prior to Barnes.

Q. So how was he hired?

A. He was a Regent hire.

Q. Who made the decisions at Regent regarding HR and hiring?

A. I don't really know.

Q. Was there a CEO of Regent?

A. Yes.

Q. Do you recall who that was?

A. I'm horrible at names. It's Tom something or another. If you look on the website, I think it pretty much stayed.

Q. Regent still exists?

A. Still exists, and it's still with the same general folks.

Q. So the CEO is Tom, and you don't know the last name?

A. Tom somebody or another. I can't remember Tom's last name.

Q. Would it, to the best of your recollection, have been this Tom CEO figure who hired Barnes?

A. I don't know. I wasn't present at that meeting, so...

Q. So when you purchased Regent -- I just want to clarify. Barnes was or was not there at the time you purchased Regent?

A. He was there at the time we purchased Regent.

Q. Okay. And then he worked with Regent, and you had purchased Regent. Did you at some point start talking to Barnes about Epiphany?

A. Yes. The entire group did. Whether he was going to come along with us or just go with Regent. Regent wanted to keep him.

Q. And you just stated that Regent wanted to keep him.

A. As far as I'm aware, yeah.

Q. When you started Epiphany, did you formally

offer him a job with Epiphany to pull him from Regent?

A. I formally offered him to be able to buy in shares in Epiphany as an incentive to get Epiphany going.

Q. Do you recall the arrangement?

A. No. Not the exact arrangement.

Q. And when was the offer roughly made for him to buy in shares in Epiphany? Was it during Epiphany's formation in 2009 or 2010?

A. The first thing I did was cut the Kingman contract, and then after that, we bought out Regent. Which wasn't actually primarily my idea. It was the other folks who were tired of it.

And then at that juncture, we decided to go ahead and use the already existing management company to go ahead and do it. And Mr. Barnes expressed interest in staying and becoming the operating officer for the company.

Q. For Epiphany?

A. Correct.

Q. Were there any other candidates, or it was just Mr. Barnes for this position?

A. No. I did not have a lot of selection or say in who we could get or who we couldn't get at

that juncture. It was basically up to the group of surgeons who were doing cases to make the selection.

Q. So you did not have a say in Robert Barnes being hired at Epiphany?

A. No more than any of the other folks did.

Q. Who would you say had the primary say in hiring Robert Barnes?

A. It had to be a majority decision.

Q. Did you vote against hiring him?

A. No.

Q. And what was Barnes' official position with Epiphany?

A. Well, with Epiphany, he was essentially the operating officer. He did day-to-day tasks. I was basically -- my major position with Epiphany was to try to recruit the surgeons and try to get them to actually do cases.

Q. I understand that you were recruiting surgeons, but what was your official title with Epiphany?

A. CEO.

Q. CEO, okay. You were CEO, but ultimately the decision to hire Barnes was a group decision?

A. Yeah. He was the administrator of the surgery centers. In order to become administrator of

the surgery centers, you have to have the vote of the existing surgeons.

Q. As the operating officer, who did he report to?

A. He reported to the entire group.

Q. The group, you mean all 10 to 20 to 30 surgeons?

A. He reported, actually, to more than that because they would be the Kingman surgeons and the Las Vegas surgeons and to me. And eventually the Plaza surgeons.

Q. How often was his performance evaluated?

A. In the beginning I was meeting with him weekly, and in the last couple of years he started not showing up.

Q. So in the beginning you were meeting with him weekly. What were your weekly meetings consisting of?

A. I was going over how well the different surgery centers are doing.

Q. And you'd look at account ledgers and information, or would he just simply verbally tell you?

A. Both.

Q. These weekly meetings and the records that

he presented you with, both in discussion and report form, do you have any idea where those reports are now?

A. No, and I think at this point I've got to mention the fact that the FBI has told me to keep my mouth shut on all the rest of it, so that I really feel limited in discussing any further anything to do with Robert Barnes.

Q. When did the FBI tell you to keep your mouth shut?

A. Oh, gosh. It's been two years now. They said I needed to not discuss it with anyone because it's an ongoing investigation.

Q. Okay.

A. With regard to that and the banks.

Q. Right. Barnes, in terms of his HR record, he didn't have any formal evaluations?

A. No, he was evaluated. Actually, even the last year he was evaluated. Well, he had to do formal reports to the boards of each of the surgery centers, and he had to do meetings with me, and he had to do -- go over all of the income with the accountants, which -- because of the fact that I was the largest surgeon with the most years with most of the surgery centers, no one felt comfortable with me

also using my accountant. That may have proved to be an error, but I used a different accountant.

Q. Now, the formal reports you just talked about, do you still have access to those?

A. No. They were in the office.

Q. Did you read the reports?

A. Certainly.

Q. Anything stick out to you as inappropriate or fishy or didn't add up mathematically?

A. I contacted the FBI, that did.

Q. Let's get back to that. Let's finish that thought. When did you contact the FBI?

A. Two or three years ago. I had five spine surgeries, and Mr. Barnes was never forthcoming with regard to information that he had previously been forthcoming with, and then he disappeared.

Q. So this period of not being forthcoming, how long did that last?

A. Worsening probably over 18 months or two years.

Q. When he wasn't forthcoming for months and months and months, and then more than a year and up to two years, did you do anything?

A. Sure. I brought it to the board's attention, and I was getting complaints from other

board members.

Q. What did the board do?

A. When I told Barnes that he needed to come in and discuss it, I would then get screamed at by the board members that I was chasing him off. Even the board members who had sent me texts saying that they weren't happy with the fact that he was gone too long and not answering questions would suddenly decide that I was being too mean to Barnes.

Q. During this 18 months when he was not being forthcoming and he wasn't showing up to meetings, you were raising his performance with other board members, and they were shouting at you to leave him alone?

A. Correct.

Q. For 18 months?

A. Longer.

Q. Other than raise his recent behavior with the board, did you do anything else?

A. No. I was busy having six -- I don't know if it was five or six -- well, five major spinal surgeries, so it wasn't my major focus at the time. It was whether I was going to be able to walk or not. So I pretty much turfed it to Dr. Smith, who was the board chief and a member of Epiphany.

EXHIBIT 3

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:	)	
	)	
FLAMINGO-PECOS SURGERY CENTER, LLC dba SURGERY CENTER OF SOUTHERN NEVADA	)	
	)	BK-S-14-18480-ABL
	)	Chapter 7
Debtors-in-Possession,	)	
	)	

AUDIO TRANSCRIPTION

341 MEETING OF CREDITORS

DR. WILLIAM DOUGLAS SMITH

HELD July 15, 2015

TRANSCRIBED BY: Kathy Hoffman

two or three times a month, sometimes not for one, every other month to handle what just is going on.

MR. IQBAL: Okay. So you found out about Barnes in 2012. He gets fired in 2013. You folks filed for bankruptcy at the very end of 2014. Did Flamingo Pecos bring suit against Mr. Barnes?

DR. SMITH: The FBI has all the information. They're considering criminal charges against him. So that's the last I heard.

MR. IQBAL: So no civil actions by Flamingo Pecos?

DR. SMITH: We talked about it, but we've had word that he's -- he's actually in bankruptcy, has no -- anything of value to sue for.

MR. IQBAL: Okay. No civil action for fraud?

DR. SMITH: I talked to Dr. Belsky and she and I met three weeks ago, talked about it, you know. Again, we're just not sure if it's worth paying an attorney to go after things that aren't there.

MR. IQBAL: Okay. But in 2013, once he got fired, no civil action was brought against him?

DR. SMITH: Again, we went to the FBI within six months.

MR. IQBAL: Okay. Six months after finding out or six months after firing him?

DR. SMITH: After firing him.

MR. IQBAL: It took six months to uncover what he did?

DR. SMITH: Well, I'm still finding stuff out, you know, as of now. I mean, it's a very tangled web, and I'm not an expert at this.

MR. IQBAL: Okay. After you fired him and in that six-month interim before you went to the FBI, did Flamingo Pecos hire anyone to look into what Barnes did?

DR. SMITH: No. We didn't have money to do it. We were trying to operate, operate the center.

MR. IQBAL: So he gets fired. You guys don't hire anyone to look into how much he took --

DR. SMITH: We couldn't hire anybody. We didn't have the money.

MR. IQBAL: Okay. And then six months later you went to the FBI. Did you give the FBI a number?

DR. SMITH: A number?

MR. IQBAL: Of how much he --

DR. SMITH: No. We gave them all the

information we had, and they've done multiple interviews and asked for more information.

MR. IQBAL: When was the last time you talked to the FBI?

DR. SMITH: Me personally it's probably six months ago, eight months ago.

MR. IQBAL: And to the best of your knowledge that's still an active investigation with the FBI?

DR. SMITH: I was told about two or three weeks ago.

MR. IQBAL: Now, you mentioned draws or distributions of 5,000 a year at that time. I'm assuming you worked in other hospitals, with other entities?

DR. SMITH: Yes.

MR. IQBAL: At that time how many other entities or hospitals did you work with?

DR. SMITH: I'm the chief neurosurgeon at the University Medical Center. That's probably where I do 95 percent of my work.

MR. IQBAL: And the accounts receivable, is it common practice to carry two, 2.2 million, two and a half million in ARs for an entity that size?

DR. SMITH: Yes.

MR. IQBAL: And so the last few years, the accounts receivable have roughly been in the same two million range?

DR. SMITH: I would think so, yes.

MR. IQBAL: Okay. What have you done personally since the end of 2014 to try and recover the accounts receivable?

DR. SMITH: I have personally done nothing.

MR. IQBAL: Okay. What did you do in the six months before the entity filed bankruptcy?

DR. SMITH: Again, I have done nothing personally, but we have a billing team, a collection team. We had an outside company come in and try to work the accounts. And, again, from what they've told us that in general medical accounts receivable go stale very quickly, so. And that 2 to $3 million in accounts receivable, there's probably very little that's actually active.

MR. IQBAL: And how much of that did you recover, do you think or guess?

DR. SMITH: I think very little. It's been diminishing return. I'm sure we can go

through the bank accounts and see.

MR. IQBAL: Okay. And are you doing any kind of new business with any of the 30 shareholders of Flamingo now? Are you joining or creating any new groups, surgery groups or anything like that?

DR. SMITH: No.

MR. IQBAL: So right now you're just employed by UMC?

DR. SMITH: I'm not employed by UMC.

MR. IQBAL: Okay. You're an independent contractor?

DR. SMITH: No.

MR. IQBAL: What are you --

DR. SMITH: I'm a physician, and I bring my patients there. I don't have any type of financial (inaudible) with UMC.

MR. IQBAL: Okay. That is all I have for now. Thank you, sir.

DR. SMITH: Thank you.

TRUSTEE: All right. Mr. Limon?

MR. LIMON: Just a few questions (inaudible).

Any of the medical equipment that was at either the Twain location or the Burnham location,

EXHIBIT 4

UNITED STATE BANKRUPTCY COURT

DISTRICT OF NEVADA

In Re: Charles H. Tadlock and Mary E. Tadlock, Debtors.	)	Case No. 15-13135

AUDIO TRANSCRIPTION OF

341 MEETING OF CREDITORS (continued)

SEPTEMBER 10, 2015

APPEARANCES:

JONAS ANDERSON, Trial Attorney

For the Debtors:
THOMAS CROWE, Esq.

For National Loan Acquisitions Company:
AMY TIRRE (appearing via telephone)

For Patriot Reading Associates, LLC:
MOHAMED A. IQBAL

TRANSCRIBED BY: LISA TRONCOSO, CSR 13351
TRANSCRIBED ON: July 16, 2016

MR. TADLOCK: Right.

MR. IQBAL: -- how long did it take before he was relieved, or he was fired, or you took action?

MR. TADLOCK: He left before we even knew. He just took off with the computer system and all the records. He emptied out his office and left.

MR. IQBAL: Okay. So you found out before he left or after he left?

MR. TADLOCK: After he left.

MR. IQBAL: Okay. So until he left you had no personal knowledge or awareness of --

MR. TADLOCK: No.

MR. IQBAL: Okay. At that time were you a director of Flamingo Pecos?

MR. TADLOCK: I was on the board.

MR. IQBAL: You were on the board, okay. Were you on the board from the beginning of Flamingo Pecos?

MR. TADLOCK: It was my idea for the original entity going back more than ten years.

MR. IQBAL: Okay.

MR. TADLOCK: So, yeah, I've been on the board intermittently.

MR. IQBAL: Okay. And when was the last time you were on the board, or when did you -- when were you replaced on the board?

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Attorneys for Receiver Timothy Mulliner, Esq., acting on behalf of Plaintiff Flamingo-Pecos Surgery Center LLC

DISTRICT COURT
CLARK COUNTY, NEVADA

FLAMINGO-PECOS SURGERY CENTER, LLC a Nevada limited liability company; Plaintiff, vs. William Smith MD, Pankaj Bhatnagar MD, Marjorie Belsky MD, Sheldon Freedman MD, Mathew Ng MD, Daniel Burkhead MD, Manager MD, DOE MANAGERS, DIRECTORS AND OFFICERS 1-25, ROE BUSINESS ENTITIES 1-25; Defendants.	Case No.: A-17-750926-B Dept. No.: XV **FLAMINGO-PECOS SURGERY CENTER, LLC'S OPPOSITION TO DEFENDANT DANIEL BURKHEAD M.D.'S MOTION TO DISMISS COMPLAINT** Date: July 27, 2017 Time: 9:00 AM

Plaintiff Flamingo-Pecos Surgery Center, LLC ("Plaintiff"), through Todd E. Kennedy of the law firm of Black & LoBello as attorney for the Receiver Timothy Mulliner Esq., hereby opposes Defendant Dr. Daniel Burkhead's ("Defendant Burkhead" or "Defendant") Motion to Dismiss Complaint ("Motion").[1]

I. SUMMARY

Defendant and other defendants named in this action (collectively, "Defendants") were practicing surgeons in a small group LLC which was robbed blind over several years by an unsupervised, do-it-all office manager Defendants hired and completely failed to supervise.

[1] Defendant's Motion is one of three filed in response to Plaintiff's complaint. In order to avoid redundant/repetitive filings, this Opposition and the forthcoming Opposition to Defendant Sheldon J. Freedman's Motion to Dismiss Pursuant to NRCP 12(b)(5) and 12(b)(6) and for Attorneys (sic) Fees Pursuant to NRS 18.020, shall rely on and incorporate by reference Plaintiff's Opposition to Dr. Matthew Ng and Dr. Pankaj Bhatnagar's Motion to Dismiss ("Ng Opposition") and the Declaration of Todd E. Kennedy ("Kennedy Decl.")(and all four of the Exhibits thereto) filed with the Ng Opposition on Thursday, June 13, 2017 (yesterday).

Defendants' failures exceed the gross negligence standard, the willful disregard standard of intentionality and, separately, constitute breaches of their fiduciary duties to Plaintiff. In subsequent criminal proceedings the office manager, Robert Barnes, admitted to embezzling at least $1.3 million from Plaintiff while the Defendants – Plaintiff's managers, directors and/or officers owing duties to Plaintiff – ***did nothing***. Not only did Defendants fail to supervise Barnes or timely uncover his looting, Defendants failed to immediately fire Barnes once they did discover it – instead, they ***allowed the criminal to remain in his position for a year after discovery***. Eventually, and well after his criminal acts became known, Barnes was either fired or left on his own accord, with sufficient time, unsupervised access, and autonomy to abscond with the computer system, empty his office, and take all files associated with his looting. Defendants failed to perform an audit or even pursue Barnes on Plaintiff's behalf, and failed to file a complaint against Barnes. Shockingly, according to defendant Dr. Smith, it took Defendants six (6) months ***after Barnes absconded*** to approach the FBI. As such, Defendants were grossly negligent and breached fiduciary duties they owed to Plaintiff as managers, directors, and/or officers, in allowing Plaintiff to be looted by Barnes' operation over several years and doing nothing to protect Plaintiff's interests upon discovery.

Defendants' latest intentional breaches of their fiduciary duties to Plaintiff are evidenced—in writing—within the Restitution List attached to the U.S. District Court for the District of Nevada's March 28, 2017 Amended Judgment in Barnes' criminal case.[2] Defendants failed to submit any claims on behalf of Plaintiff, the actual victim of Barnes' criminal acts, despite knowing of Plaintiff's insolvency and that its creditors remained unpaid and left in the cold. Accordingly, Plaintiff is not listed as a recipient of assets forfeited by its former larcenous employee—that it alone is entitled to. ***Even worse***, the list evidences Defendants' ***naked self-interest***:

[2] *See* attached as **Exhibit 1** to the Ng Opposition and Kennedy Decl., the "Amended Judgment in a Criminal Case", Document 41 in *U.S. v. Robert W. Barnes*, case no. 2:16-cr-00090-APG-GWF-1, at 14-15 (the "Amended Judgment").

Dr. Daniel Burkhead/Burkhead Irrevocable Trust was awarded $39,587.89
Defendant Bhatnagar/Bhatnagar Family Trust was awarded $81,187.89
Defendant Ng was awarded $31,787.89
Dr. William Smith was awarded $126,687.89
Dr. Sheldon Freedman was awarded $61,287.89[3]

As such, Defendants not only ignored and grossly failed to protect Plaintiff's interests, they intentionally usurped those interests in favor of their own, by allowing the substitution of their own personal self-interest over Plaintiff's. In other words, Defendants were personally enriched by their disregard of their affirmative duties to Plaintiff. Defendants also plainly violated the letter of Nevada law against distributions of LLC funds where the LLC is insolvent. *See* NRS 86.343.[4] There is also evidence that Defendants intentionally and actively prevented an investigation into Barnes' embezzlement by other managers and/or directors.[5]

After allowing Plaintiff to be gutted, and after doing nothing about the gutting for several months, Defendants put Plaintiff into a bankruptcy that was ultimately dismissed and, thereafter, abandoned Plaintiff—leaving only an insolvent shell, to the obvious detriment of Plaintiff and its creditors.

The Motion's primary contention is that Plaintiff failed to plead gross negligence and willful misconduct. Motion at 5-6. This contention fails on the ***explicit*** wording of the complaint,[6] and on the inferences under and pleading standards of Nevada law. Plaintiff's complaint sufficiently pleads, and the evidence supports, Defendants' gross negligence and

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[3] *Id.*

[4] As evidenced by Exhibit 1 to Defendant Burkhead's Motion (entity information from the Nevada Secretary of State), Defendants plainly continue to violate multiple provisions of Chapter 86, including, *inter alia*, the failure to properly dissolve Plaintiff and to maintain a registered agent. Moreover, Defendants' improper distributions could also be categorized as fraudulent transfers of corporate assets. *See, e.g.*, NRS 112.180, NRS 112.190, and NRS 112.210.

[5] *See* Section II(C), *infra*.

[6] *See*, e.g., "Individually and collectively, Defendants ***omitted and grossly neglected*** their duties to Plaintiff as managers, directors and officers with respect to Barnes for many years, resulting in substantial damages to and against Plaintiff," Complaint at ¶ 27 (emphasis added); "Upon discovering Barnes' embezzlement and theft, Defendants individually and collectively ***failed – for an unreasonably lengthy period of time – to remove Barnes*** from his position…," *Id.* at ¶ 31) (emphasis added).

willful misconduct. Notwithstanding the irony of the person responsible for an entity's revoked status now arguing he cannot be pursued because that entity is revoked, Defendant's alternative argument that Plaintiff lacks standing is also easily defeated. In sum, Defendant Burkhead's Motion utterly fails to meet the rigorous standards required for dismissal – and even more so considering Defendant seeks dismissal with prejudice.[7]

II. FACTS

A. The Complaint and the Facts establish that Defendants Hired Office Manager Robert Barnes, Who Looted Plaintiff Over Several Years While Defendants Were Grossly Negligent and Willfully/Intentionally Ignored His Actions and Their Obligations to Plaintiff

Plaintiff has conducted business for many years as an entity controlled by a group of surgeons practicing in Clark County, Nevada, including at an ambulatory surgery center located at 10195 West Twain Avenue, Las Vegas, Nevada 89147. Complaint at ¶ 19. Defendants hired Barnes in 2006 to be Plaintiff's office manager, and his functions extended to Plaintiff's "full financial workings, accounts, and books." *Id.* at ¶¶ 21-22. Defendants failed to conduct the necessary due diligence regarding Barnes and negligently hired Barnes – placing a criminal in a position to easily steal from Plaintiff. *Id.* at ¶¶ 23-24. Barnes admitted in subsequent criminal proceedings that he embezzled at least $1.3 million during the course of his crime spree over many years. *Id.* at ¶ 28.

Managing Member Charles H. Tadlock testified under oath that Barnes' hiring was a majority decision by the surgeons. *See* attached to the Kennedy Decl. as **Exhibit 2** a relevant

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[7] If the Court is inclined to grant any portion of the Motion, Plaintiff shall seek leave to amend, which should only be denied if the proposed amendment would be futile, and which should be "freely given when justice so requires." *Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev. Adv. Rep. 42, 302 P.3d 1148, 1152, *citing* NRCP 15(a).

Rejecting a leave to amend would not be appropriate here, considering the overwhelming evidence of just Defendants' intentional breaches of their fiduciary duties to Plaintiff and Defendants' improper distributions and other violations of NRS Chapter 86. To be sure, with the surfacing of new evidence recently (*e.g.*, Defendant's Motion attaches the relevant Operating Agreement), Plaintiff intends to move to amend the complaint in any event to incorporate additional causes of action, including, *inter alia*, breach of contract, improper distributions and unjust enrichment.

portion of Charles H. Tadlock's January 19, 2016 Rule 2004 Examination Transcript, at 19:11-17; 24:6-8. The "entire group" talked to Barnes about coming to work for them. *Id.* at 23:22-24:2; 24:22-25:2, and everyone had an equal say. *Id.* at 24:3-5.

Individually and collectively, Defendants failed to supervise, oversee and/or monitor Barnes for many years during his crime spree, allowing him to formulate and execute a pattern of criminal embezzlement and theft from Plaintiff – resulting in substantial damages to and against Plaintiff. Complaint at ¶¶ 25-28. The warning signs were abundant and sustained: Barnes was "not forthcoming" with the [financial] reports for ***18 months to two years***. Exhibit 2, at 27:17-20. Defendants did nothing to safeguard Plaintiff's interests and indeed actively sought to stymie any effort to keep tabs on Barnes. As the complaint alleges, Defendants "***omitted"*** and ***"grossly neglected"*** their duties to Plaintiff as managers, directors and officers with respect to Barnes for many years. Complaint at ¶ 27 (emphasis added).

B. Upon Discovering Barnes' Embezzlement and Theft, Defendants Failed to Take Action to Protect Plaintiff, Intentionally Hindered Any Oversight of Barnes, and Allowed Barnes to Remain in His Position and Remove Files and a Computer System when He Decided to Abscond

Upon discovering Barnes' embezzlement, Defendants failed to appropriately audit, investigate, and determine the extent of Barnes' crimes, resulting in substantial damages against Plaintiff. *Id.* at ¶ 32. Moreover, Defendants individually and collectively "***ignored and failed to adhere*** to their responsibilities and obligations to Plaintiff." *Id.* at ¶ 33 (emphasis added). Dr. William Smith admitted that nothing was done to safeguard Plaintiff's interests after Barnes' embezzlement was discovered in 2012 – indeed, Barnes was not even fired until 2013. *See* attached to the Kennedy Decl. as **Exhibit 3** a relevant portion of William D. Smith's July 15, 2015 Rule 341 Meeting Transcript (second meeting), at 5-9. Defendants failed to hire a forensic accountant or other professionals to conduct an internal investigation. *Id.* Tadlock testified that Barnes just left and was not fired – and that Barnes took the computer system and all the records. *See* attached to the Kennedy Decl. as **Exhibit 4** a relevant portion of Charles H. Tadlock's

September 10, 2015 Rule 341 Meeting Transcript, at 22:1-15. It took Defendants six (6) months ***after Barnes absconded*** to approach the FBI. Exhibit 3, at 5:24-25.

C. Not Only Did Defendants Fail to Take Any Actions to Protect Plaintiff's Interests, but defendants on the Board of Directors Intentionally Interfered with a Managing Member's Efforts to Investigate Barnes' Embezzlement

The complaint asserts that defendants ignored and failed to adhere to their responsibilities and obligations to Plaintiff, and failed to protect and preserve Plaintiff's assets, funding and interests. *Id.* at ¶ 33. They failed to demand that Barnes return Plaintiff's funds and assets, failed to pursue Barnes, and failed to even file a complaint against Barnes. *Id.* at ¶ 35.

Moreover, defendants intentionally prevented others from satisfying their fiduciary duties to Plaintiff: Tadlock testified that directors screamed at him when he attempted to get Barnes to attend meetings and discuss Barnes' embezzlement (Exhibit 2, at 28:2-15), and they "were shouting at [Tadlock] to leave [Barnes] alone" when Tadlock raised the issue of Barnes' performance. *Id.* at 28:12-15. Defendants who were board members hindered Tadlock's efforts to investigate Barnes, ignored the fact that Barnes did not show up to meetings, and engaged in general obstruction that lasted for more than 18 months. *Id.* at 28:3-19.

D. After Allowing Plaintiff to be Gutted Over Several Years and Doing Nothing, Defendants Intentionally Failed to Advocate For and Protect Plaintiff's Interests in Barnes' Restitution Action and Were Personally Enriched by Further Breaching of their Fiduciary Duties to Plaintiff

The complaint alleges that:

> Defendants individually and collectively breached Defendants' fiduciary duty of care to Plaintiff by, among other things, failing to: (a) oversee, supervise, monitor and discipline Plaintiff's Office Manager, who was embezzling and stealing from Plaintiff; (b) supervise, care for, monitor or review Plaintiff's books, accounts, and finances while Barnes was Plaintiff's Office Manager; (c) expeditiously remove Barnes from the position of Plaintiff's Office Manager upon the discovery of Barnes' embezzlement and theft; (d) audit, investigate and/or determine the extent of Barnes' embezzlement and theft; (e) pursue Barnes on behalf of Plaintiff in order to recover Plaintiff's assets, funding and interests from Barnes; and (f) take appropriate, reasonable and necessary steps to protect Plaintiff's interests vis-à-vis Barnes and certain Defendants. Complaint at ¶ 53.

In sum, Defendants did ***nothing*** with respect to Barnes – there was no audit, no investigation, and no efforts to recover Plaintiff's assets from the criminal office manager. Defendants compounded this failure by intentionally acting to personally benefit from their breaches of duties to Plaintiff. Despite having notice from the U.S. District Court for the District of Nevada (Exhibit 1, at 8-10), Defendants failed to submit any claims on behalf of Plaintiff, despite knowing Plaintiff was the actual victim, and of Plaintiff's insolvency and that Plaintiff's creditors remained unpaid and left in the cold. The Restitution List contains no claim on behalf of Plaintiff – but does contain claims reflecting Defendants' ***naked self-interest***:

> Defendant Bhatnagar/Bhatnagar Family Trust was awarded $81,187.89
> Defendant Ng was awarded $31,787.89
> Dr. William Smith was awarded $126,687.89
> Dr. Sheldon Freedman was awarded $61,287.89
> Dr. Daniel Burkhead/Burkhead Irrevocable Trust was awarded $39,587.89

Id. at 14-15. The Restitution List identifies substantial sums awarded to, among others, the defendant surgeons named in this action – sums rightfully belonging to Plaintiff – at a time when Defendants knew Plaintiff was a gutted, post-failed-bankruptcy shell incapable of satisfying its obligations to its creditors. Defendants also plainly violated the letter of Nevada law against distributions of LLC funds where the LLC is insolvent. *See* NRS 86.343.

III. LEGAL STANDARDS

A. The Rigorous Standards for a Rule 12(b)(5) Motion

When deciding a motion to dismiss for failure to state a claim, the court "must construe the pleadings liberally and accept all factual allegations in the complaint as true," drawing every fair inference in favor of the non-moving party. *Blackjack Bonding v. Las Vegas Mun. Ct.*, 116 Nev. 1213, 1217 (2000), *citing Simpson v. Mars Inc.*, 113 Nev. 188, 190 (1997). It thus is not enough to say the complaint is wrong; the moving defendant must show beyond a doubt that the plaintiff could prove no set of facts, which, if true, would entitle it to relief. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 (2008). This is, as the Nevada Supreme Court has noted, a "rigorous standard of review." *Id.; see also Hampe v. Foote*, 118 Nev. 405, 408 (2002).

B. Gross Negligence and Willful/Conscious Disregard

In Nevada, gross negligence is "very great negligence, or absence of slight diligence, or the want of even scant care." *Johns v. McAlteer*, 85 Nev. 477, 481 (1969). Similarly, in Delaware gross negligence is conduct that constitutes reckless indifference or actions that are without the bounds of reason. *McPadden v. Sidhu*, 964 A.2d 1262 (Del. Ch. 2008).

A failure to act that extends to the level of "conscious disregard" can be deemed willful and deliberate – or, in other words, intentional. *See* NRS 42.001(1) (conscious disregard means "the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences"). Directors can be liable for refusing or neglecting cavalierly to perform their duty as a director, or for ignoring either willfully ***or*** "through inattention obvious danger signs of employee wrongdoing" *Graham v. Allis-Chalmers Manufacturing Co.*, 188 A.2d 125, 130 (Del. 1963); *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006).

C. "Revoked" LLCs

In Nevada, a "revoked" LLC has the same rights as a dissolved entity with respect to standing to bring claims and litigate. *See* NRS 86.274(5) (stating that "the same proceedings may be had with respect to its property and assets as apply to the dissolution of a limited liability company pursuant to NRS 86.505"); *AA Primo Builders, Ltd. Liab. Co. v. Washington*, 126 Nev. 578, 586-7 (2010) (internal citation omitted).

IV. ARGUMENT

A. The Motion's Primary Contention that Plaintiff Failed to Plead Gross Negligence and Willful Misconduct is Defeated Upon Even a Cursory Review of the Complaint and the Evidence

The complaint has sufficiently pled, and the facts support, Defendants' gross negligence and willful misconduct – including in explicit and detailed terms:

- "Individually and collectively, Defendants ***omitted and grossly neglected*** their duties to Plaintiff as managers, directors and officers with respect to Barnes for many years, resulting in substantial damages to and against Plaintiff." Complaint at ¶ 27 (emphasis

added). Here, the complaint explicitly defeats the Motion. Defendants' utter avoidance of their duties allowed Barnes to formulate and execute a pattern of embezzlement from Plaintiff. Additionally, Defendants individually and collectively "***ignored and failed to adhere*** to their responsibilities and obligations to Plaintiff"; *Id.* at ¶ 33 (emphasis added).

- Barnes was "not forthcoming" with [financial] reports for ***18 months to two years*** (Exhibit 2 at 27:17-20), and avoided appearing at meetings – "obvious danger signs of employee wrongdoing" under *Graham* that Defendants willfully ignored during their refusal to perform their duties to Plaintiff. In the parlance of *Sidhu*, these actions are very far outside the "bounds of reason." In other words, it is profoundly irrational ***to do nothing*** while the employee who's effectively in charge of the entity's entire financial well-being ignores his duties for ***well over a year***. Amazingly, these actions and failures to act are not even the most outrageous components of Defendants' gross negligence and willful misconduct.
- "Upon discovering Barnes' embezzlement and theft, Defendants individually and collectively ***failed – for an unreasonably lengthy period of time – to remove Barnes*** from his position…," *Id.* at ¶ 31 (emphasis added). Defendant Dr. William Smith testified that nothing was done to safeguard Plaintiff's interests after Barnes' embezzlement was discovered in 2012 – indeed, Barnes was not even fired until 2013. *See* Exhibit 3, at 5-9. These facts may indeed be the most outrageous and powerful evidence of Defendants' gross negligence and willful misconduct. All three components of *McAlteer* are met in spectacular fashion: Defendants committed "very great negligence," showed absolutely no diligence, and failed to manifest even "scant care" by allowing the criminal who stole millions and bankrupted their company to continue in the same position – with no controls, no penalty, no oversight/leash, and no protections for the looted entity.
- Defendants failed to hire a forensic accountant or other professionals to conduct an internal investigation. Exhibit 3, at 5-9. Defendants failed to demand that Barnes return

Plaintiff's funds and assets, they failed to pursue Barnes, and they failed to even file a complaint against Barnes. *Id.* at ¶ 35. ***Critically***, upon discovering his crimes, Defendants failed to address Barnes' continued controls of Plaintiff's finances for several months. Defendants failed to implement and/or enforce IT protections and record retention policies after Barnes' crimes were discovered. Barnes simply left the next calendar year, taking with him the computer system and all of the records and emptying out his office; *See* Exhibit 4, at 22:1-15. These actions and failures to act reflect Defendants' reckless indifference and "want of even scant care." Here, Defendants acted without reason or interest in Plaintiff's financial health. The "bounds of reason" would have dictated upon the discovery of Barnes' embezzlement (and at a minimum): the immediate termination of Barnes, the retention of forensic accountants to investigate the extent of Plaintiff's losses, and the retention of legal counsel to pursue immediate recourse and disgorgement from Barnes. Defendants failed to take any of these essential and ***basic*** steps, and such failures go well beyond the admittedly rigorous standards for finding gross negligence and willful misconduct.

- Defendants who were board members hindered Tadlock's efforts to investigate Barnes, ignored the fact that Barnes did not show up to meetings, and engaged in general obstruction that lasted for more than 18 months; Exhibit 2, at 28:3-19. Defendants failed, for six (6) months ***after Barnes absconded***, to approach the FBI. Exhibit 3, at 5:24-25 (emphasis added).

Each and every one of these acts and failures to act exceed the burden of proof and standards for gross negligence and willful misconduct. Defendants' failures to perform their duties and ignorance of obvious danger signs also meet the "conscious disregard" standard for willfulness and constitute intentional acts, and satisfy both *Graham* prongs for director/officer liability. A failure to act that extends to the level of "conscious disregard" can be deemed willful and deliberate – or, in other words, intentional. *See* NRS 42.001(1) (conscious disregard means "the knowledge of the probable harmful consequences of a wrongful act and a willful and

deliberate failure to act to avoid those consequences"). Defendants had knowledge of Barnes' actual, not just "probable," harmful acts and consequences, as they discovered their company was being looted, and Defendants did nothing to further avoid those consequences.[8]

For the multiple bases set forth above, Plaintiff's complaint easily survives the Motion's failure-to-plead contention.

B. The Motion's Second and Last Basis – that Plaintiff is a Revoked Entity that Lacks Standing to Sue Defendant – Also Fails

As an initial matter, it is ironic that the person responsible for the entity's revoked status, on the basis of his gross negligence and breaches of his duties to the entity, is now claiming the entity's revoked status bars it from pursuing him. This position is, to be sure, untenable and preposterous. Strangely, Defendant Burkhead argues that Plaintiff's complaint should be stayed because Plaintiff's revoked status deprives it of standing and, if the Receiver does not change that status after 30 days (or some other reasonable time period), Plaintiff's complaint should be dismissed ***with prejudice***. Motion at 6 (emphasis added). This is an awkward and draconian tact to take, given that an entity can be reinstated up to five (5) years after revocation.

More importantly, it is inconsistent with Nevada law. *See* NRS 86.274(5); *AA Primo Builders, Ltd. Liab. Co.*, 126 Nev. at 588 (where the court held that a "revoked" LLC may "sue and be sued" in the same capacity as dissolved LLCs). Dissolved entities have two years after the articles of dissolution to bring known (at the time of dissolution) claims and three years for unknown claims. NRS 86.505. Accordingly, this timeframe applies to "revoked" entities and Defendant's contention fails as a matter of law.

/ / /

[8] Directors have been found to have oversight liability if the directors "utterly failed to implement any reporting or information system or controls" ***or*** "[having such] system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *Stone*, 911 A.2d at 370 (internal citations omitted). Here, we have Defendants with no controls and a conscious failure to monitor.

With all of that being said, if the Court is so inclined, Plaintiff will seek to alter its status during a stay of reasonable duration in this action. What should not happen, of course, is a dismissal with prejudice, which is reserved for far different actions that lack evidentiary support.

V. CONCLUSION

For all the reasons and bases detailed above, Plaintiff respectfully requests that Defendant's Motion should be denied in its entirety. If the Court is inclined to grant the Motion, or any portion thereof, then Plaintiff will seek leave to amend the complaint. *See generally* Footnote 7, *supra*.

Respectfully Submitted,

By: _/s/ Todd E. Kennedy_____

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DISTRICT COURT
CLARK COUNTY, NEVADA

FLAMINGO-PECOS SURGERY CENTER, LLC a Nevada limited liability company; Plaintiff, vs. William Smith MD, Pankaj Bhatnagar MD, Marjorie Belsky MD, Sheldon Freedman MD, Mathew Ng MD, Daniel Burkhead MD, Manager MD, DOE MANAGERS, DIRECTORS AND OFFICERS 1-25, ROE BUSINESS ENTITIES 1-25; Defendants.	Case No.: A-17-750926-B Dept. No.: XV **FLAMINGO-PECOS SURGERY CENTER, LLC'S OPPOSITION TO DEFENDANT SHELDON J. FREEDMAN'S MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5) and 12(b)(6) and FOR ATTORNEYS FEES PURSUANT TO NRS 18.020** Date: August 1, 2017 Time: 9:00 AM

Plaintiff Flamingo-Pecos Surgery Center, LLC ("Plaintiff"), through Todd E. Kennedy of the law firm of Black & LoBello as attorney for the Receiver Timothy Mulliner, Esq., hereby opposes Defendant Sheldon J. Freedman's ("Defendant Freedman" or "Defendant") Motion to Dismiss Pursuant to NRCP 12(b)(5) and 12(b)(6) and for Attorneys [sic] Fees Pursuant to NRS 18.020 (collectively, "Motion"). Defendant's Motion is one of three filed in response to Plaintiff's complaint, and this is the third and final opposition.[1]

I. SUMMARY[2]

[1] In order to avoid redundant/repetitive filings, this Opposition shall rely on and incorporate by reference Plaintiff's Opposition to Dr. Matthew Ng and Dr. Pankaj Bhatnagar's Motion to Dismiss ("Ng Opposition") and the Declaration of Todd E. Kennedy ("Kennedy Decl.") (and all four of the Exhibits thereto) filed with the Ng Opposition on Thursday, June 13, 2017, and Plaintiff's Opposition to Defendant Daniel Burkhead's Motion to Dismiss Complaint filed on July 14, 2017 ("Burkhead Opposition"). Footnote 2 contains portions of the summary identical to those in the Burkhead Opposition.

[2] Defendant and other defendants named in this action (collectively, "Defendants") were practicing surgeons in a small group LLC which was robbed blind over several years by an

The only ***new*** ground Defendant Freedman's Motion covers – specifically, its contentions that defendants cannot be held accountable here under NRS Chapter 86, the operating agreement, and Nevada's statute of limitations grounds, and its motion for attorneys' fees – are each

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unsupervised, do-it-all office manager Defendants hired and completely failed to supervise. Defendants' failures exceed the gross negligence standard, the willful disregard standard of intentionality and, separately, constitute breaches of their fiduciary duties to Plaintiff. In subsequent criminal proceedings the office manager, Robert Barnes, admitted to embezzling at least $1.3 million from Plaintiff while the Defendants – Plaintiff's managers, directors and/or officers owing duties to Plaintiff – ***did nothing***. Not only did Defendants fail to supervise Barnes or timely uncover his looting, Defendants failed to immediately fire Barnes once they did discover it – instead, they ***allowed the criminal to remain in his position for a year after discovery***. Eventually, and well after his criminal acts became known, Barnes was either fired or left on his own accord, with sufficient time, unsupervised access, and autonomy to abscond with the computer system, empty his office, and take all files associated with his looting. Defendants failed to perform an audit or even pursue Barnes on Plaintiff's behalf, and failed to file a complaint against Barnes. Shockingly, according to defendant Dr. Smith, it took Defendants six (6) months ***after Barnes absconded*** to approach the FBI. As such, Defendants were grossly negligent and breached fiduciary duties they owed to Plaintiff as managers, directors, and/or officers, in allowing Plaintiff to be looted by Barnes' operation over several years and doing nothing to protect Plaintiff's interests upon discovery. *See* attached as **Exhibit 1** to the Ng Opposition and Kennedy Decl., the "Amended Judgment in a Criminal Case", Document 41 in *U.S. v. Robert W. Barnes*, case no. 2:16-cr-00090-APG-GWF-1, at 14-15 (the "Amended Judgment").

Defendants failed to submit any claims on behalf of Plaintiff, the actual victim of Barnes' criminal acts, despite knowing of Plaintiff's insolvency and that its creditors remained unpaid and left in the cold. Accordingly, Plaintiff is not listed as a recipient of assets forfeited by its former larcenous employee—that it alone is entitled to. ***Even worse***, the list evidences Defendants' ***naked self-interest***:

> Dr. Daniel Burkhead/Burkhead Irrevocable Trust was awarded $39,587.89
> Defendant Bhatnagar/Bhatnagar Family Trust was awarded $81,187.89
> Defendant Ng was awarded $31,787.89
> Dr. William Smith was awarded $126,687.89
> Dr. Sheldon Freedman was awarded $61,287.89

Id. Defendants' latest intentional breaches of their fiduciary duties to Plaintiff are evidenced—in writing—within the Restitution List attached to the U.S. District Court for the District of Nevada's March 28, 2017 Amended Judgment in Barnes' criminal case. As such, Defendants not only ignored and grossly failed to protect Plaintiff's interests, Defendants intentionally usurped those interests in favor of their own, by allowing the substitution of their own personal self-interest over Plaintiff's. In other words, Defendants were personally enriched by their disregard of their affirmative duties to Plaintiff. Defendants also plainly violated the letter of Nevada law against distributions of LLC funds where the LLC is insolvent. *See* NRS 86.343. As evidenced by Exhibit 1 to Defendant Burkhead's Motion (entity information from the Nevada Secretary of State), Defendants plainly continue to violate multiple provisions of Chapter 86, including, *inter alia*, the failure to properly dissolve Plaintiff and to maintain a registered agent. Moreover, Defendants' improper distributions could also be categorized as fraudulent transfers of corporate assets. *See* NRS Chapter 112. There is also evidence that Defendants intentionally and actively prevented an investigation into Barnes' embezzlement by other managers and/or directors.

disposed of by the complaint's assertions and the evidence, and by Nevada law – when it is properly read.

Defendant first plainly ***misreads*** NRS 86.381 (Motion at p. 7:4-7); the statute the Motion relies on actually allows for the defendants to be proper parties "when they owe a liability to the company." That is exactly what Plaintiff's complaint claims: defendants are liable to Plaintiff for a list of actions and failures to act, including, *inter alia*, allowing Plaintiff to be looted and doing ***nothing*** despite knowing of the looting. Moreover, appointment of the receiver here is fully consistent with and appropriate under NRS 32.010, which provides for appointment of a receiver in aid of a judgment. Defendant ***also*** plainly ***misreads*** NRS 86.391 (Motion at 7:8-14),[3] and ignores the fact that while NRS 86.391 imposes liability for certain specified claims, it does not limit liability to those claims alone.

Defendant's arguments based on the Operating Agreement rely on Defendant (again) ***misreading*** Section 3.4, which references only liabilities of the ***company***, not the defendants, as the Motion claims, and ***misreading*** Section 7.8, which excludes indemnification for the "gross negligence or willful misconduct" of members.[4]

The statute of limitations argument is even more futile and nonsensical. First, Defendant seems to argue that the statute runs before a cause of action exists. Motion at 8:18-21; 9:4-7. Defendant also argues that ***now:***

- <> ***after*** hiring the looter as an office manager and giving him *carte blanche* over Plaintiff's finances;
- <> ***after*** allowing Plaintiff to be looted for several years;
- <> ***after*** failing to supervise or manage the looter in any capacity;
- <> ***after*** ignoring disastrous warning signs (including but not limited to the looter office manager failing to issue ***reports for 18 months***);
- <> ***after*** doing nothing to stop Plaintiff from being looted;
- <> ***after*** doing nothing to protect Plaintiff's rights after the looting was discovered;
- <> ***after failing to terminate the looter immediately*** after discovery of his embezzlement of millions from Plaintiff;

[3] *See* Section IV(A), *infra* (addressing where the Motion argues on the basis of an "only" in the statute where there is no such "only", and for a position that does not exist).

[4] *See* Section IV(B), *infra.*

- <> ***after*** allowing the looter to linger in his same position with Plaintiff for at least several months or to a new calendar year, and remain in control of Plaintiff's finances ***after*** discovery;
- <> ***after*** failing to restrict the looter in any way after discovering his embezzlement;
- <> ***after*** failing to set up IT protections and preserve the files of the looter's actions;
- <> ***after*** failing to conduct an audit or investigation into the looter's crimes;
- <> ***after*** allowing the looter to abscond with all the files and the computer system associated with his crimes;
- <> ***after*** failing to hire the necessary professionals to address and mitigate the looter's crimes;
- <> ***after*** dithering about for several months after the looter absconded before even approaching the FBI;
- <> ***after*** failing to file even a civil action against the looter on behalf of the entity;
- <> ***after*** allowing years to pass with little or no vigilance in the interests of the company;
- <> ***after*** dropping Plaintiff into a bankruptcy that was ultimately dismissed;
- <> ***after*** abandoning Plaintiff and leaving only an insolvent shell, to the obvious detriment of Plaintiff and its creditors;
- <> ***after*** intentionally and/or incompetently failing to protect Plaintiff's interests in the looter's criminal forfeiture and restitution matter (by failing to file any claims on Plaintiff's behalf); and, indeed,
- <> ***after*** intentionally usurping Plaintiff's interests by allowing personal awards to defendants directly to be issued in the criminal case's Amended Judgment; allowing the awards to stand and not informing the Federal Government or the U.S. District Court; and not appealing the Amended Judgement and Restitution List therein (all of which occurred in 2017);

it is ***too late*** for Plaintiff to sue the responsible managers, directors, and/or officers responsible for ***these very same acts and failures to act because they were in command of Plaintiff while the statute was running***. This position is preposterous and antithetical to Nevada law on excusable delay and equitable tolling – and common sense.

Defendant's Motion continues on in its lack-of-standing contention to – again – ***misread*** and ***ignore*** obvious bases for Plaintiff's claims. *See* Section IV(D), *infra* (discussing the Receivership Order's explicit authorization for the Receiver's present complaint against Flamingo's directors and officers).

Remarkably, Defendant Freedman's final effort, the Motion for Attorneys [sic] Fees Pursuant to NRS 18.020 ("Fees Motion"), may be the most lacking and baseless of Defendant's

contentions. The Fees Motion requires that a complaint have "no reasonable grounds" and allegations "which are not supported by any credible evidence at trial." Motion at 13:2-10 (citing various Nevada precedent) (internal citations omitted). The "no reasonable grounds" and "any credible evidence" stance is futile against the complaint's assertions and all the evidence here, including, *inter alia*, the sworn testimony of multiple managing members and controlling directors (Drs. Smith and Tadlock), and waves of evidence (including party admissions) from both criminal proceedings before the U.S. District Court for the District of Nevada, and multiple bankruptcy proceedings before the U.S. Bankruptcy Court for the District of Nevada. In the end, Defendant Freedman's Fees Motion and the overall Motion utterly fail, and the rigorous standards required for dismissal are not met.[5]

II. FACTS

A. The Complaint and the Facts Establish that Defendants Hired Office Manager Robert Barnes, Who Looted Plaintiff Over Several Years While Defendants Were Grossly Negligent and Willfully/Intentionally Ignored His Actions and Their Obligations to Plaintiff

Plaintiff has conducted business for many years as an entity controlled by a group of surgeons practicing in Clark County, Nevada, including at an ambulatory surgery center located at 10195 West Twain Avenue, Las Vegas, Nevada 89147. Complaint at ¶ 19. Defendants hired Barnes in 2006 to be Plaintiff's office manager, and his functions extended to Plaintiff's "full financial workings, accounts, and books." *Id.* at ¶¶ 21-22. Defendants failed to conduct the necessary due diligence regarding Barnes and negligently hired Barnes – placing a criminal in a

[5] If the Court is inclined to grant any portion of the Motion, Plaintiff shall seek leave to amend, which should only be denied if the proposed amendment would be futile, and which should be "freely given when justice so requires." *Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev. Adv. Rep. 42, 302 P.3d 1148, 1152, *citing* NRCP 15(a).

That is not the case here, considering the overwhelming evidence of just Defendants' intentional breaches of their fiduciary duties to Plaintiff and Defendants' improper distributions and other violations of NRS Chapter 86. To be sure, with the surfacing of new evidence recently (*e.g.*, Defendant's Motion attaches the relevant Operating Agreement), Plaintiff intends to move to amend the complaint in any event to incorporate additional causes of action, including, without limitation, breach of contract, improper distributions and unjust enrichment.

position to easily steal from Plaintiff. *Id.* at ¶¶ 23-24. Barnes admitted in subsequent criminal proceedings that he embezzled at least $1.3 million during the course of his crime spree over many years. *Id.* at ¶ 28.

Managing Member Charles H. Tadlock testified under oath that Barnes' hiring was a majority decision by the surgeons. *See* attached to the Kennedy Decl. as **Exhibit 2** a relevant portion of Charles H. Tadlock's January 19, 2016 Rule 2004 Examination Transcript, at 19:11-17; 24:6-8. The "entire group" talked to Barnes about coming to work for them. *Id.* at 23:22-24:2; 24:22-25:2, and everyone had an equal say. *Id.* at 24:3-5.

Individually and collectively, Defendants failed to supervise, oversee and/or monitor Barnes for many years during his crime spree, allowing him to formulate and execute a pattern of criminal embezzlement and theft from Plaintiff – resulting in substantial damages to and against Plaintiff. Complaint at ¶¶ 25-28. The warning signs were abundant and sustained: Barnes was "not forthcoming" with the [financial] reports for ***18 months to two years***. Exhibit 2, at 27:17-20. Defendants did nothing to safeguard Plaintiff's interests and indeed actively sought to stymie any effort to keep tabs on Barnes. As the complaint alleges, Defendants "***omitted"*** and ***"grossly neglected"*** their duties to Plaintiff as managers, directors and officers with respect to Barnes for many years. Complaint at ¶ 27 (emphasis added).

B. Upon Discovering Barnes' Embezzlement and Theft, Defendants Failed to Take Action to Protect Plaintiff, Intentionally Hindered Any Oversight of Barnes, and Allowed Barnes to Remain in His Position and Remove Files and a Computer System When He Decided to Abscond

Upon discovering Barnes' embezzlement, Defendants failed to appropriately audit, investigate, and determine the extent of Barnes' crimes, resulting in substantial damages against Plaintiff. *Id.* at ¶ 32. Moreover, Defendants individually and collectively "***ignored and failed to adhere*** to their responsibilities and obligations to Plaintiff." *Id.* at ¶ 33 (emphasis added). Dr. William Smith admitted that nothing was done to safeguard Plaintiff's interests after Barnes' embezzlement was discovered in 2012 – indeed, Barnes was not even fired until 2013. *See* attached to the Kennedy Decl. as **Exhibit 3** a relevant portion of William D. Smith's July 15,

2015 Rule 341 Meeting Transcript (second meeting), at 5-9. Defendants failed to hire a forensic accountant or other professionals to conduct an internal investigation. *Id.* Tadlock testified that Barnes just left and was not fired – and that Barnes took the computer system and all the records. *See* attached to the Kennedy Decl. as **Exhibit 4** a relevant portion of Charles H. Tadlock's September 10, 2015 Rule 341 Meeting Transcript, at 22:1-15. It took Defendants six (6) months ***after Barnes absconded*** to approach the FBI. Exhibit 3, at 5:24-25.

C. Not Only Did Defendants Fail to Take Any Actions to Protect Plaintiff's Interests, but defendants on the Board of Directors Intentionally Interfered with a Managing Member's Efforts to Investigate Barnes' Embezzlement

The complaint asserts that defendants ignored and failed to adhere to their responsibilities and obligations to Plaintiff, and failed to protect and preserve Plaintiff's assets, funding and interests. *Id.* at ¶ 33. They failed to demand that Barnes return Plaintiff's funds and assets, failed to pursue Barnes, and failed to even file a complaint against Barnes. *Id.* at ¶ 35.

Moreover, defendants intentionally prevented others from satisfying their fiduciary duties to Plaintiff: Tadlock testified that directors screamed at Tadlock when he attempted to get Barnes to attend meetings and discuss Barnes' embezzlement (Exhibit 2, at 28:2-15), and they "were shouting at [Tadlock] to leave [Barnes] alone" when Tadlock raised the issue of Barnes' performance. *Id.* at 28:12-15. Defendants who were board members hindered Tadlock's efforts to investigate Barnes, ignored the fact that Barnes did not show up to meetings, and engaged in general obstruction that lasted for more than 18 months. *Id.* at 28:3-19.

D. After Allowing Plaintiff to be Gutted Over Several Years and Doing Nothing, Defendants Intentionally Failed to Advocate For and Protect Plaintiff's Interests in Barnes' Restitution Action and Were Personally Enriched by Further Breaching of their Fiduciary Duties to Plaintiff

The complaint alleges that:

> Defendants individually and collectively breached Defendants' fiduciary duty of care to Plaintiff by, among other things, failing to: (a) oversee, supervise, monitor and discipline Plaintiff's Office Manager, who was embezzling and stealing from Plaintiff; (b) supervise, care for, monitor or review Plaintiff's books, accounts, and finances while Barnes was Plaintiff's Office Manager; (c) expeditiously remove Barnes from the position of Plaintiff's Office Manager upon the discovery of Barnes' embezzlement and theft; (d) audit, investigate and/or determine the

> extent of Barnes' embezzlement and theft; (e) pursue Barnes on behalf of Plaintiff in order to recover Plaintiff's assets, funding and interests from Barnes; and (f) take appropriate, reasonable and necessary steps to protect Plaintiff's interests vis-à-vis Barnes and certain Defendants. Complaint at ¶ 53.

In sum, Defendants did ***nothing*** with respect to Barnes – there was no audit, no investigation, and no efforts to recover Plaintiff's assets from the criminal office manager. Defendants compounded this failure by intentionally acting to personally benefit from their breaches of duties to Plaintiff. Despite having notice from the U.S. District Court for the District of Nevada (Exhibit 1, at 8-10), Defendants failed to submit any claims on behalf of Plaintiff, despite knowing Plaintiff was the actual victim, and of Plaintiff's insolvency and that Plaintiff's creditors remained unpaid and left in the cold. The Restitution List contains no claim on behalf of Plaintiff – but does contain claims reflecting Defendants' ***naked self-interest***:

> Defendant Bhatnagar/Bhatnagar Family Trust was awarded $81,187.89
> Defendant Ng was awarded $31,787.89
> Dr. William Smith was awarded $126,687.89
> Dr. Sheldon Freedman was awarded $61,287.89
> Dr. Daniel Burkhead/Burkhead Irrevocable Trust was awarded $39,587.89

Id. at 14-15. The Restitution List identifies substantial sums awarded to, among others, the defendant surgeons named in this action – sums rightfully belonging to Plaintiff – at a time when Defendants knew Plaintiff was a gutted, post-failed-bankruptcy shell incapable of satisfying its obligations to its creditors. Defendants also plainly violated the letter of Nevada law against distributions of LLC funds where the LLC is insolvent. *See* NRS 86.343.

III. LEGAL STANDARDS

A. The Rigorous Standards for a Rule 12(b)(5) Motion

When deciding a motion to dismiss for failure to state a claim, the court "must construe the pleadings liberally and accept all factual allegations in the complaint as true," drawing every fair inference in favor of the non-moving party. *Blackjack Bonding v. Las Vegas Mun. Ct.*, 116 Nev. 1213, 1217 (2000), *citing Simpson v. Mars Inc.*, 113 Nev. 188, 190 (1997). It thus is not enough to say the complaint is wrong; the moving defendant must show beyond a doubt that the plaintiff could prove no set of facts, which, if true, would entitle it to relief. *Buzz Stew, LLC v.*

City of N. Las Vegas, 124 Nev. 224, 228 (2008). This is, as the Nevada Supreme Court has noted, a "rigorous standard of review." *Id.; see also Hampe v. Foote,* 118 Nev. 405, 408 (2002).

B. NRS 86.381 and NRS 86.391 – A Member's Liability and Place as a Proper Party to Proceedings by the Company

Under NRS 86.381, a member of an LLC can be sued by the company, and can be a proper party "when they owe a liability to the company." Moreover, NRS 86.391 imposes liability for certain specified claims, and does not limit members' liability.

C. Gross Negligence and Willful/Conscious Disregard

In Nevada, gross negligence is "very great negligence, or absence of slight diligence, or the want of even scant care." *Johns v. McAlteer*, 85 Nev. 477, 481 (1969). Similarly, in Delaware gross negligence is conduct that constitutes reckless indifference or actions that are without the bounds of reason. *McPadden v. Sidhu*, 964 A.2d 1262 (Del. Ch. 2008).

A failure to act that extends to the level of "conscious disregard" can be deemed willful and deliberate – or, in other words, intentional. *See* NRS 42.001(1) (conscious disregard means "the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences"). Directors can be liable for refusing or neglecting cavalierly to perform their duty as a director, or for ignoring either willfully ***or*** "through inattention obvious danger signs of employee wrongdoing" *Graham v. Allis-Chalmers Manufacturing Co.*, 188 A.2d 125, 130 (Del. 1963); *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006). Meeting this standard triggers the Operating Agreement here in Plaintiff's favor (in that Defendants must face the consequences of, and cannot be indemnified for, their gross negligence and willful misconduct).

D. Statute of Limitations

Under Nevada law, "A statute of limitations requires a lawsuit to be filed within a specified period of time after a legal right has been violated." *FDIC v. Jones*, No. 2-13-cv-168-JAD-GWF, 2014 U.S. Dist. LEXIS 131738 (D. Nev. Sep. 19, 2014) *citing McDonald v. Sun Oil Co.*, 548 F.3d 774, 779 (9th Cir. 2008). Typically, a claim accrues "when the plaintiff has a

complete and present cause of action." *Id.* at 12-13; *citing* ***Wallace v. Kato***, 549 U.S. 384, 388, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007); *see also* Black's Law Dictionary 23 (9th ed. 2009)("accrue" means "[t]o come into existence as an enforceable claim or right."). The common understanding is that statutes of limitation are personal defenses, subject to waiver, estoppel and equitable tolling exceptions. *Johnson v. Lucent Technologies Inc.*, 653 F.3d 100, 1009 (9th Cir. 2011). "Except where by statue limitations do not begin to run until knowledge of the cause of action is acquired by the person in whom the cause of action lies, ***and except where that has been fraudulent concealment of the cause of action by the person liable***…the rule is generally established that mere ignorance of the existence of the cause of action or of the facts which constitute the cause will not postpone the operation of the statute of limitations; the statute runs from the time the cause of action first accrues notwithstanding such ignorance, if the facts may be ascertained by inquiry or diligence, ***or if the ignorance is not willful and does not result from negligence or lack of diligence***. *Sierra Pac. Power Co. v. Nye*, 80 Nev. 88, 94-95 (1964) (emphasis added). Likewise, equitable tolling of a statute of limitations "when the interest of justice require" is also always available. *State Dept. of Taxation v. Masco Builder Cabinet Group*, 127 Nev. 730, 739 (2011).

E. The Economic Loss Doctrine – And Its Exceptions

The Economic Loss Doctrine ("ELD") "arose, in large part, from the development of products liability jurisprudence." *Calloway v. City of Reno*, 116 Nev. 250, 257 (2000) (Calloway II) (superseded, in part, by statue as stated in *Olson v. Richard*, 120 Nev. 240 (2004)). The doctrine generally bars "unintentional tort actions" seeking recovery for "purely economic losses." *Terracon Consultants Western, Inc. v. Mandalay Resort Group*, 125 Nev. 66, 72 (2009) *citing Local Joint Exec. Bd. v. Stern*, 98 Nev. 409, 411 (1982).

The ELD is not an iron-clad rule, nor is it meant to be. *Terracon* contemplated allowing exceptions to the ELD in certain categories of negligence cases against "attorneys, accountants, real estate professionals, and insurance brokers." *Id.* at 75 (internal citations omitted). Even third parties may be successful with negligent supervision and management claims against

directors and officers in cases involving purely economic loss. *Sergeants Benevolent Ass'n Annuity Fund v. Renck*, 796 N.Y.S.2d 77, 80-81 (N.Y. App. Div. 2005); *Keams v. Tempe Tech. Inst., Inc.*, 993 F.Supp. 714, 724-26 (D. Ariz. 1997).

The ELD also does not bar claims "where the defendant had a duty imposed by law rather than by contract and where the defendant's intentional breach of that duty caused purely monetary harm to the plaintiff." *Giles v. General Motors Acceptance Corp.*, 494 F.3d 865, 879 (9th Cir. 2007). Notably, causes of action for intentional tort are not precluded under the ELD, so long as the supporting facts are pled. *Calloway II*, at 267 (internal citations omitted); *Terracon*, 125 Nev. at 73 *citing Stern*, at 411(in the context of intentional interference allowing for the recovery of purely economic losses).

Exceptions can also be appropriate where "strong countervailing considerations weigh in favor of imposing liability." *Barber Lines A/S v. M/V Donau Maru* 764 F.2d 50,56 (1st Cir. 1985). As such, policy considerations are important. The Nevada Supreme Court believes analysis of the ELD should examine "the relevant policies in order to ascertain the proper boundary between the distinct civil law duties that exist separately in contract and tort." *Calloway II*, 116 Nev. at 261 n. 3. The Court enforced the ELD in Calloway II to prevent creating a "general, societally imposed duty [upon builders] to avoid such losses." *Id.*

F. The High Bar for a Granting of Attorney's Fees

To prevail on a motion for attorney's fees, there "must be evidence in the record supporting the proposition that the complaint was brought without reasonable grounds or to harass the other party." *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095 (1995), *citing Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 486 (1993). The Nevada Supreme Court has held that a claim is groundless if the complaint contains allegations which are not supported by any credible evidence at trial. *Bergmann v. Boyce*, 109 Nev. 670, 674 (1993). Such motions should be assessed by determining whether the plaintiff had reasonable grounds for its claims. *Id.* at 675.

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IV. ARGUMENT

A. The Motion's Multiple NRS Chapter 86 Arguments Fail Immediately For Defendant's Plain Misreading of NRS 86.381 and NRS 86.391's *Actual* Language, and Ignorance of NRS Chapter 32 and Case Law

The Motion contends that Plaintiff's complaint violates NRS 86.371 because it supposedly seeks to hold the members of Plaintiff liable for "the debts or liabilities of the company." Motion at 7:1-7.

However, NRS 86.381 provides that a member of an LLC can be sued by the company for their liability ***to*** the company – which is precisely what Plaintiff's complaint seeks to do here (*see, e.g.*, complaint's fourth cause of action regarding defendants' breaches of their fiduciary duties ***owed to*** Plaintiff). The fact that the company has a judgment that may ultimately be satisfied in part through its recovery in this case is not only immaterial for Chapter 86; it is fully consistent with NRS 32.010, which provides for appointment of a receiver in aid of a judgment.

The Motion further contends that NRS 86.391 "only" allows an LLC to sue its members for a deficiency in their capital contribution. Motion at 7:8-14. Defendant Freedman again misreads the statute. The word "only" does not appear in the statute. In fact, NRS 86.391 ***imposes liability*** for certain specified claims; it does not limit liability. The waiver provisions cited in the Motion ***permits*** a waiver of the statutorily-imposed liability; it does not ***require*** a waiver for other causes of action to proceed.

Finally, insofar as the Motion argues that defendants (including Defendant Freedman) owe no duties to and cannot be pursued for the benefit of the company's creditors, they are wrong, again. Such a duty exists if the corporation is insolvent. *See Summit Growth Mgmt., LLC v. Marek*, 2013 U.S. Dist. LEXIS 73389 at 20-21, *citing JPMorgan Chase Bank, N.A. v. K.B. Home*, 632 F.Supp.2d 1013, 1026 (D. Nev. 2009) (internal citations omitted). Here, defendants have known for years – and especially when Barnes' embezzlement was discovered – of Plaintiff's insolvency. In fact, defendants placed Plaintiff into an ill-fated chapter 11 bankruptcy and ultimately abandoned the entity as a gutted, insolvent mess once that bankruptcy petition was dismissed (indeed, defendants' very abandonment separately violated Nevada's

procedures for the proper dissolution of a Nevada LLC under Chapter 86). There is no doubt that defendants owe duties to Plaintiff and to Plaintiff's creditors.

B. The Motion's Contentions Regarding the Operating Agreement Fail for *Misreading (Again)* that Agreement; More Importantly, Plaintiff's Gross Negligence and Willful Misconduct Claims Are Allowed Under the Operating Agreement and Deprive Defendant of Its Indemnification Protections

The Motion argues Section 3.4 of the Operating Agreement bars personal liability of Plaintiff's members, "[e]xcept to the extent otherwise provided by law" as to "liabilities or obligations" of the Company; thus, they cannot have any obligations to Plaintiff. Motion at 7:27-8:6. This is yet another ***misread*** – this time of the relevant agreement, versus a relevant statute. In fact, Section 3.4 references only the liabilities *of* the company; its plain language makes no provision for members to escape their liabilities *to* the company. There is no reason for the Court to interpolate words the signatories to the Operating Agreement elect to leave out. Even if it did, the prefatory clause "Except to the extent otherwise provided by law" would plain allow causes of action permitted at law, including, *inter alia*, negligence and gross negligence, as alleged in the complaint.

Defendant Freedman's Motion further argues that Section 7.8 of the Operating Agreement would require Plaintiff to indemnify the defendants as members for their defense and any judgment, thus making the entire case "an exercise in futility." 8:8-14. As argued in prior oppositions, Plaintiff's complaint has sufficiently pled, and the facts support, Defendants' gross negligence and willful misconduct – including in explicit and detailed terms:

- "Individually and collectively, Defendants ***omitted and grossly neglected*** their duties to Plaintiff as managers, directors and officers with respect to Barnes for many years, resulting in substantial damages to and against Plaintiff." Complaint at ¶ 27 (emphasis added). Here, the complaint explicitly defeats the Motion. Defendants' utter avoidance of their duties allowed Barnes to formulate and execute a pattern of criminal embezzlement and theft from Plaintiff. Additionally, Defendants individually and collectively "***ignored and failed to adhere*** to their responsibilities and obligations to Plaintiff"; *Id.* at ¶ 33 (emphasis added).
- Barnes was "not forthcoming" with [financial] reports ***18 months to two years*** (Exhibit 2 at 27:17-20) and avoided appearing at meetings – "obvious danger signs of employee

wrongdoing" under *Graham* – that Defendants willfully ignored during their refusal to perform their duties to Plaintiff. In the parlance of *Sidhu*, these actions are very far outside the "bounds of reason." In other words, it is profoundly irrational ***to do nothing*** in the face of the head of finance – who's in charge of the entity's entire financial wellbeing — ignoring his duties for ***well over a year***. Amazingly, these actions and failures to act are not even the most outrageous and irrational components of Defendants' gross negligence and willful misconduct.

- "Upon discovering Barnes' embezzlement and theft, Defendants individually and collectively ***failed – for an unreasonably lengthy period of time – to remove Barnes*** from his position…," *Id.* at ¶ 31) (emphasis added). Defendant Dr. William Smith testified that nothing was done to safeguard Plaintiff's interests after Barnes' embezzlement was discovered in 2012 – indeed, Barnes was not even fired until 2013. *See* Exhibit 3, at 5-9. These facts may indeed be the most outrageous and most powerful evidence of Defendants' gross negligence and willful misconduct. All three components of *McAlteer* are met in spectacular fashion: Defendants committed "very great negligence," showed absolutely no diligence, and failed to manifest even "scant care" by allowing the criminal who stole millions and bankrupted their company to continue in the same position.
- Defendants failed to hire a forensic accountant or other professionals to conduct an internal investigation. Exhibit 3, at 5-9. Defendants failed to demand that Barnes return Plaintiff's funds and assets, they failed to pursue Barnes, and they ***failed to even file a complaint*** against Barnes. *Id.* at ¶ 35. ***Critically***, upon discovering his crimes, Defendants failed to address Barnes' continued controls of Plaintiff's finances for several months. Defendants failed to implement and/or enforce IT protections and record retention policies after Barnes' crimes were discovered. Barnes simply left the next calendar year, taking with him the computer system and all of the records and emptying out his office; *See* Exhibit 4, at 22:1-15. These actions and failures to act reflect Defendants' reckless indifference and "want of even scant care." Here, Defendants acted with no rational basis. The "bounds of reason" would have dictated, upon the discovery of Barnes' embezzlement, the immediate termination of Barnes, the retention of forensic accountants to investigate the extent of Plaintiff's losses, and the retention of legal counsel to pursue immediate recourse and disgorgement from Barnes. Defendants failed to take any of these essential and ***basic*** steps, and such failures go well beyond the admittedly rigorous standards for finding gross negligence and willful misconduct.
- Defendants who were board members hindered Tadlock's efforts to investigate Barnes, ignored the fact that Barnes did not show up to meetings, and engaged in general

obstruction that lasted for more than 18 months; Exhibit 2, at 28:3-19. Defendants failed, for six (6) months ***after Barnes absconded***, to approach the FBI. Exhibit 3, at 5:24-25 (emphasis added).

Each and every one of these acts and failures to act exceed the burden of proof and standards for gross negligence and willful misconduct. Plaintiff's complaint thus easily survives the Motion's contentions regarding the Operating Agreement and Defendant Freedman's chronic misreading of that Agreement, and pleads gross negligence and willful misconduct sufficiently to deprive defendants of the indemnification protections of the Operating Agreement.

C. The Motion's *Nonsensical* Statute of Limitations Arguments Fail As a Matter of Nevada Law, Common Law Equitable Principles, and Common Sense

The Motion alleges the 2-year statute of limitations on most negligence claims (NRS 11.190(4)(e)) bars negligent hiring claims because Barnes was hired in 2006; the complaint was filed in 2017, and that was more than 2 years after 2006. Motion at 8:18-21. ***This is nonsensical.*** By this argument, a claim for negligent hiring was time-barred as of 2008; but no cause of action accrued until the embezzlement began, which the Motion alleges was not until 2010. *Id.* at 9:4-7. The statute cannot run out before a cause of action exists.

The Motion further alleges the other claims are barred by limitation and contends "Plaintiff is clearly aware of the statute of limitations issue as its [*sic*] refused to provide and specificity as to when the alleged acts occurred instead using [*sic*] the phrase 'for many years'." Says that the latest the cause of action could have accrued was 2013, the year referenced in the Barnes plea agreement; asserts there "is no mechanism in which [*sic*] this Complaint can be considered timely" for any claim of negligence. *Id. at* 8:22-9:11.

Defendants controlled Plaintiff until the appointment of the Receiver; thus, any delay in bringing the company's claims against them prior to the creation of the Receivership is attributable to them and should equitably toll the statute. *See Donell v. Mojtahedian*, 976 F. Supp. 2d 1183 (C.D. Cal. 2013). Plaintiff was so dominated by defendants who would never bring claims against themselves (and who allowed it to be gutted over several years and failed to take action on Barnes' acts for several months, if not years), that there was no way the entity

could realistically bring an action prior to an independent receiver being appointed. This position is supported by Nevada law, which allows for tolling where there has been "fraudulent concealment of the cause of action." *Sierra Pac. Power Co. v. Nye*, 80 Nev. 88, 94-95 (1964) (which would not allow tolling where the ignorance is not willful and does not result from negligence or lack of diligence). Here, Defendants both concealed (by obstructing any investigation) and did nothing about causes of action against Barnes and themselves, fraudulently, and they also demonstrated willful ignorance and gross negligence, as alleged by the complaint and supported by the facts:

- <> ***Defendants*** hired the looter as an office manager and gave him carte blanch over Plaintiff's finances;
- <> ***Defendants*** allowed Plaintiff to be looted for several years;
- <> ***Defendants*** failed to supervise or manage the looter in any capacity;
- <> ***Defendants*** ignored disastrous warning signs (including but not limited to the looter office manager failing to issue reports for 18 months);
- <> ***Defendants*** did nothing to stop Plaintiff from being looted;
- <> ***Defendants*** did nothing to protect Plaintiff's rights after discovering the looting;
- <> ***Defendants*** failed to terminate the looter after discovering his embezzlement of millions from Plaintiff;
- <> ***Defendants allowed*** the looter to ***linger in his same position*** with Plaintiff, and to remain in control of Plaintiff's finances, for at least several months or to a new calendar year ***after discovering his crimes***;
- <> ***Defendants*** failed to restrict the looter in any way after discovery;
- <> ***Defendants*** failed to set up IT protections and preserve the records of the looter's actions;
- <> ***Defendants*** failed to conduct an audit or investigation into the looter's crimes;
- <> ***Defendants*** allowed the looter to abscond with all the files and the computer system associated with his crimes;
- <> ***Defendants*** failed to hire the necessary professionals to address and mitigate the looter's crimes;
- <> ***Defendants*** dithered about for several months after the looter absconded before even approaching the FBI;
- <> ***Defendants*** failed to file even a civil action against the looter on behalf of the entity;
- <> ***Defendants*** allowed years to pass with little or no vigilance for the benefit of the entity;
- <> ***Defendants*** dropped Plaintiff into a bankruptcy that was ultimately dismissed;

- <> ***Defendants*** abandoned Plaintiff and left only an insolvent shell, to the obvious detriment of Plaintiff and its creditors;
- <> ***Defendants*** intentionally and/or incompetently failed to protect Plaintiff's interests in the looter's criminal forfeiture and restitution matter (by failing to file any claims on Plaintiff's behalf); and, indeed,
- <> ***Defendants*** intentionally usurped Plaintiff's interests by allowing personal awards to defendants directly to be issued in the Amended Judgment; allowed the awards to stand and did not inform the Federal Government or the U.S. District Court; and did not appeal the Amended Judgment and the Restitution List therein.

Defendant's argument that Plaintiff is now time-barred from pursuing defendants – who were the very source of the delays – is an attack on Nevada law, principles of equity, and common sense. In the words of the Nevada Supreme Court in *Masco*, the "interest of justice" ***requires*** equitable tolling here. *Masco*, 127 Nev. at 739.

D. The Motion's Standing Argument Fails – Quickly – Upon A Cursory Review of the Receivership Order, Which Defendant Both *Misreads* and Ignores

The Motion contends that Plaintiff's complaint should have been brought in the name of the Receiver, as opposed to the company, alleges that there are no provisions for him to bring suit against the members of the company, and argues the Receiver should have obtained specific permission to sue. Motion at 10:1-15. If nothing else, Defendant's misreading and ignoring of clear bases for Plaintiff's claims are consistent and omnipresent throughout the Motion.

The Receiver did bring Plaintiff's complaint. Moreover, Section A(3) of the Receiver's Appointment Order (*see* A-16-733627-B, entered on September 13, 2016, at 3:4-5), specifically directs the Receiver to: "Pursue Flamingo's claims and causes of action against third parties, ***including but not limited to Flamingo's directors and officers*****."** (emphasis added). Section B(5) allows him to institute legal actions and Section B(7) authorizes him to bring and prosecute actions "for the collection of debts owed to Flamingo" and "recovery of the Receivership Property." The Receiver has standing plainly based on the terms of the Receivership Order issued by the court, and Defendant Freedman's contention here fails badly.

E. The Motion's Blanket ELD Argument Fails for Ignoring Established Exceptions, Defendants' Intentional Conduct, and the Policy Considerations Relevant to the case-by-case application of the ELD

1. The Motion's Scant ELD Argument Ignores the Exceptions to the ELD

The Nevada Supreme Court explicitly contemplated in *Terracon* allowing exceptions to the ELD in certain categories of negligence cases against "attorneys, accountants, real estate professionals, and insurance brokers." *Id.* at 75 (internal citations omitted). Indeed, ***even third parties*** may be successful with negligent supervision and management claims against directors and officers in cases involving purely economic loss. *Sergeants Benevolent Ass'n Annuity Fund v. Renck*, 796 N.Y.S.2d 77, 80-81 (N.Y. App. Div. 2005); *Keams v. Tempe Tech. Inst., Inc.*, 993 F.Supp. 714, 724-26. In *Sergeants*, the court found a cognizable claim against an investment firm's officers for their alleged mismanagement regarding investment advice and negligent supervision of a portfolio manager. *Sergeants*, 796 N.Y.S.2d at 80-81.

Here, the complaint alleges that Defendants collectively hired Barnes for the role of office manager. Complaint at ¶ 21. Barnes' role encompassed the full financial scope of Plaintiff's operations (*Id.* at ¶ 22); thus, he was placed in a position to steal millions from Plaintiff over a number of years. Given this hiring and setup, Defendants' subsequent collective decision not to supervise and manage Barnes are especially alarming. The complaint alleges that defendants failed to supervise, oversee and/or monitor Barnes for many years during Barnes' crime spree, allowing him to plan and execute his embezzlement and theft from Plaintiff and resulting in substantial damages to and against Plaintiff. Complaint at ¶¶ 25-28. Additionally, even though Barnes was "not forthcoming" with reports for 18 months to two years, Exhibit 2, at 27:17-20, Defendants continued to give him unfettered and unsupervised control over Plaintiff's funds. Even ***after*** Barnes' embezzlement was discovered, Defendants perversely persisted in their hands-off management – keeping Barnes in place – ***to the next calendar year***. Exhibit 3, at 5-9 (emphasis added). It took Defendants six (6) months ***after Barnes absconded*** to approach the FBI. *Id.* In line with *Sergeants*, Plaintiff's claims based on Defendants' failures to supervise and manage Barnes over the several years of his looting spree survives the Motion's ELD challenge at this stage of the litigation.

Defendant also ignores the ELD exception where a duty is imposed by law rather than by contract. The ELD does not bar claims "where the defendant had a duty imposed by law rather than by contract and where the defendant's intentional breach of that duty caused purely monetary harm to the plaintiff." *Giles v. General Motors Acceptance Corp.*, 494 F.3d 865, 879 (9th Cir. 2007). Here, the complaint asserts negligent hiring, mismanagement and supervision claims that are connected to defendants' independent fiduciary duties as managers, officers and/or directors to supervise and manage employees/subordinates.

The complaint also asserts defendants' gross negligence and intentional misconduct in the breaches of such duties by pleading defendants' utter lack of action over the span of years – even after Barnes' looting was discovered. Following that discovery, defendants did nothing to pursue Barnes or recover Plaintiff's funds, and defendants failed to take any steps to remove Barnes from his position and to shield Plaintiff from further harm. Indeed, defendants did not even contact the FBI until well after Barnes cleaned out his office and absconded with the computer system linked to his looting. A failure to act that extends to the level of "conscious disregard" can be deemed willful and deliberate – or, in other words, intentional. *See* NRS 42.001(1) (conscious disregard means "the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences"). Defendants had knowledge of Barnes' actual, not just "probable," harmful acts and consequences (as they discovered their company had been and was being robbed), and defendants did nothing to further avoid those consequences. Barnes lingered in his same position until the next calendar year and eventually absconded with the computer system and all files associated with his embezzlement, and defendants did ***nothing*** to mitigate or reverse the damages from that embezzlement.

2. <u>The Motion Ignores Defendants' Intentional Conduct as Asserted by the Complaint and Supported by the Facts, and Yet Another Exception to the ELD</u>

Causes of action for intentional tort are not precluded under the ELD, so long as the supporting facts are pled. *Calloway II*, 116 Nev. at 267 (internal citations omitted); *Terracon*,

125 Nev. at 73, *citing Stern*, 98 Nev. at 411 (in the context of intentional interference allowing for the recovery of purely economic losses). The complaint has sufficiently pled, and the facts support, Defendants' many intentional acts and interference:

- Defendants "failed to conduct the necessary due diligence"; Complaint at ¶ 23.
- Defendants "***omitted"*** their duties to Plaintiff as managers, directors and officers with respect to Barnes for many years; *Id.* at ¶ 27 (emphasis added).
- Defendants "failed" to audit, investigate, and determine the extent of Barnes' crimes after having knowledge of his embezzlement; *Id.* at ¶ 32.
- Defendants individually and collectively "***ignored and failed to adhere*** to their responsibilities and obligations to Plaintiff"; *Id.* at ¶ 33 (emphasis added).
- Defendants who were on the board of directors screamed at Tadlock when he attempted to get Barnes to attend meetings and discuss Barnes' embezzlement. Exhibit 2, at 28:2-15.
- Following discovery of Barnes' crimes, Defendants failed to remove Barnes from his position immediately, and Barnes simply left the next calendar year, taking with him the computer system and all of the records and emptying out his office; Exhibit 4, at 22.
- Defendants who were board members hindered Tadlock's efforts to investigate Barnes, ignored the fact that Barnes did not show up to meetings, and engaged in general obstruction that lasted for more than 18 months; Exhibit 2, at 28:3-19.
- Defendants who were board members "were shouting at [Tadlock] to leave [Barnes] alone" when Tadlock raised the issue of Barnes' performance; *Id.* at 28:12-15.
- Defendants waited for six months after Barnes absconded to approach the FBI; Exhibit 3, at 5-9.
- Defendants, with knowledge of Barnes' embezzlement from Plaintiff, failed to submit any claims on behalf of Plaintiff to the U.S. District Court for the District of Nevada, and, indeed, Defendants intentionally received awards of funds to enrich themselves personally pursuant to the Amended Judgment's Restitution List and did not correct the record or ensure that Plaintiff would be the recipient of any such awards. Exhibit 1, at 14-15.

The foregoing examples of Plaintiff's intentional acts, failures to act, and intentional interference, the complaint's allegations and the evidence which support them, are sufficiently particular and substantive to render inapplicable the ELD and foreclose dismissal of Plaintiff's negligence-styled claims.

3. Defendant's Motion Completely Ignores the Policy Implications and Analyses the Nevada Supreme Court Applies to the ETD on a Case-by-Case Basis

The Nevada Supreme Court has stated that analysis of the ELD should examine "the relevant policies in order to ascertain the proper boundary between the distinct civil law duties that exist separately in contract and tort." *Calloway II*, 116 Nev. at 261 n. 3. The Calloway II court enforced the ELD there to prevent the creation of a "general, societally imposed duty [upon builders] to avoid such losses." *Id.* Here, conversely, by exempting Plaintiff's supervision and management claims from the ELD, the Court would not be creating a "general" duty – but, rather, reinforcing explicit and limited duties that only apply to officers and directors. Exceptions to the ELD also may be appropriate where "strong countervailing considerations weigh in favor of imposing liability." *Terracon*, 125 Nev. at 73, *citing generally Barber Lines A/S v. M/V Donau Maru* 764 F.2d 50 (1st Cir. 1985)).

When the statutory importance, autonomy and power, and obligations and duties, of directors and officers – as enumerated in Chapters 78 and 86 – are considered, there are clear policy implications that strongly militate against applying the ELD. A broad ELD enforced in every tort action with purely economic damages – as defendants would have this Court exercise – would eliminate critical causes of action and protections against officers and directors' intentional wrongdoing such as fraud and conversion. *See Giles*, 494 F.3d at 875, *citing Grynberg v. Questar Pipeline Co.*, 2003 UT 8, 70 P.3d 1, 11 (Sup. Ct.) for the proposition that claims against a defendant's intentional wrongdoing, "such as fraud and conversion exist to remedy purely economic losses."

These exceptions provide a basis for not applying the ELD here, as the Defendants' actions, including, *inter alia*, failing to provide oversight of Barnes, interfering with Tadlock's inquiry, continuing to employ Barnes, and failing to restrict his access to company IT systems and financial records until he absconded – were willful and deliberate acts.

Defendant Freedman's ELD argument completely fails for ignoring the basic foundations and nuances of Nevada law.

F. The Motion's Attorneys [sic] Fees Motion Is Utterly Groundless, as Plaintiff's Complaint and the Evidence *Immediately Invalidate* Defendant Freedman's Contentions; Moreover, It Seeks an *Illogical* and Inequitable Result

Attorney's fees may be granted under Nevada law, but the standard is high; there must be "no reasonable grounds" for the complaint and the allegations must lack "any credible evidence" at trial. For Defendant Freedman to take such a stance here is futile, considering the complaint's assertions and all the evidence in this matter, including, *inter alia*, the sworn testimony of multiple managing members and controlling directors (Drs. Smith and Tadlock), and waves of evidence (including party admissions under oath) from both criminal proceedings before the U.S. District Court for the District of Nevada, and multiple bankruptcy proceedings before the U.S. Bankruptcy Court for the District of Nevada. Indeed, ***just one prong of evidence*** – the Restitution List alone from the Amended Judgment – is more than enough to support the complaint's breach of fiduciary duties claim (including duty of loyalty)[6] and intentional misconduct claims, and defeat Defendant Freedman's Fees Motion.

Taking a step back, the Fees Motion also seeks an illogical and inequitable result: Defendant is asking for fees against an entity Defendant (and other defendants) controlled, for not bringing what Defendant argues is a timely claim (Motion at 12:26-28 ("well after the statute

[6] *See* Ng Opposition, at 9. "In essence, the duty of care consists of an obligation to act on an informed basis; the duty of loyalty requires the board and its directors to maintain, in good faith, the corporation's and its shareholders' best interests over anyone else's interests." *Shoen v. SAC Holding Corp.,* 122 Nev. 621, 632 (2006); *Kahn v. Dodds (In re AMERCO Derivative Litig.),* 127 Nev. 196, 223-224 (2011). Defendants' (1) failure to file a claim on behalf of Plaintiff in Barnes' criminal case; (2) affirmative receipt of monetary awards to Plaintiff's direct detriment and Defendants' direct benefit; and (3) failure to inform the Federal Government and/or the U.S. District Court that the awards actually belonged to Plaintiff, each constitute separate breaches of their duty of loyalty to Plaintiff. Plaintiff's best interests were not served by Defendants failing to assert Plaintiff's rights during the claims process – rather, Plaintiff was materially damaged by Defendants' failures to file any claim. Moreover, for Defendants to usurp then benefit personally from their failure to file a claim on Plaintiff's behalf manifests a classic breach of the duty of loyalty. Here, Defendants' actions constitute both intentional misconduct (actively taking, or failing to take, steps to the detriment of Plaintiff) and a known violation of law, specifically NRS 86.343, as the awards are improper distributions that Defendants knew they were not entitled to (given that by the initiation of Barnes' criminal matter, Plaintiff was insolvent, had been placed into bankruptcy, and abandoned by Defendants).

of limitations")), ***when the only reason it was not brought sooner*** was Defendant's ***failure*** to do so in accordance with Defendant's ***own fiduciary duties*** to the entity. As a matter of equity, an entity cannot be held responsible and barred when the very people responsible for the loss were the ones in charge and failed to act. For all intents and purposes, Plaintiff was effectively operating under a disability until independent management, through the Receiver, took over. *See generally Donell v. Mojtahedian,* 976 F. Supp. 2d 1183 (C.D. Cal. 2013).

In the end, for the independent bases raised above, Defendant Freedman's Fees Motion must be denied.

V. CONCLUSION

For all the reasons and bases detailed above, Plaintiff respectfully requests that Defendant's Motion and Defendant's Fees Motion should be denied in their entirety. If the Court is inclined to grant either Motion, or any portion thereof, then Plaintiff will seek leave to amend the complaint. *See generally* Footnote 5, *supra*.

Respectfully Submitted,

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

FLAMINGO-PECOS SURGERY CENTER, LLC a Nevada limited liability company; Plaintiff. vs. William Smith MD, an individual; Pankaj Bhatanagar MD, an individual; Marjorie Belsky MD, an individual; Sheldon Freedman MD, an individual; Mathew Ng MD, and individual; Daniel Burkhead MD, an individual; and DOE MANAGERS, DIRECTORS AND OFFICERS 1-25, ROE BUSINESS ENTITIES 1-25; Defendants.	CASE NO. A-17-750926-B DEPT. NO.: XV **DEFENDANT DANIEL BURKHEAD M.D.'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT**

DEFENDANT DANIEL BURKHEAD M.D.'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT

Defendant, DANIEL L. BURKHEAD, M.D., (hereinafter "Dr. Burkhead" or "Defendant") by and through his attorney of record, Robert E. Schumacher, Esq., of the law firm of GORDON & REES SCULLY MANSUKHANI, LLP, hereby submits this REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT ("Reply") filed by Plaintiff FLAMINGO-PECOS SURGERY CENTER, LLC ("Plaintiff").

This Reply is brought pursuant to Nevada Rules of Civil Procedure 12(b)(5) and is based upon the attached Memorandum of Points and Authorities and any exhibits attached thereto, the pleadings and papers on file herein and any oral argument that may be presented at the time of hearing on this matter.

Dated: July 20th, 2017

GORDON & REES SCULLY MANSUKHANI, LLP

By:

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION & STATEMENTS OF FACTS

Plaintiff claims that it should have recovered monies ordered in restitution to the above named defendants after Robert Barnes' criminal conviction for embezzlement. Essentially, Plaintiff concedes that this action is derivative in nature. However, Plaintiff failed to meet the statutory prerequisites for maintaining a derivative action before filing the instant lawsuit. As such, this case should be dismissed.

Further, Plaintiff lacks standing to pursue the instant action. Plaintiff is not the real party in interest since this action is being undertaken for the benefit of a receiver who is suing on behalf of a creditor of Plaintiff. More importantly, Plaintiff claims is may maintain this action

II. DISCUSSION

A. This Court Should Dismiss the Claims Against Defendant

1. Plaintiff's Claims Fail as a Matter of Law

Defendant was a member of the Board of managers for Plaintiff. Plaintiff claims that Defendant is liable for negligent training, supervision, and retention of Plaintiff's former office manager Robert Barnes. Plaintiff also claims that Defendant breached his fiduciary duty of care to Plaintiff. However, these actions allegedly undertaken by Defendant were clearly within the scope of authority granted under Plaintiff's Operating Agreement since hiring, supervising, and retaining an office manager is clearly within the scope of duties given to members of the Board of Managers. The Board of Managers has the power to employ and retain persons to act as employees. See **Exhibit 2 to Motion**, Section 7.3(c). Further, any power not specifically enumerated under the operating agreement rests with the Board of Managers. See **Exhibit 2 Motion**, Section 7.1.

Any actions taken by Defendant with respect to his alleged negligent hiring, supervision, and retention of Mr. Barnes were performed within the scope of the authority conferred to him under the operating agreement. Further, causes of action for negligent hiring, training, and supervision implicate liability of the employer, not an employee or member of an LLC. See

Helle v. Core Home Health Services of Nevada, 2008 WL 6101984 at * 3 (Nov. 20, 2008, Nev.); See also *ETT, Inc. v. Delgada*, 2010 WL 3246334 at * 8 (April 29, 2010, Nev.). Defendant cannot be held liable for these torts as a matter of law since he was not the employer of Barnes, which was in fact, Plaintiff.

Additionally, Plaintiff has failed to plead with particularity pursuant to NRCP 9(b) how Defendants actions amounted to "intentional misconduct, fraud or a knowing violation of law." Without doing so, Plaintiff fails to overcome the presumption that Defendant acted in good faith when performing actions what are within his authority and scope of employment under the Operating Agreement. See NRS 78.138(3). Further, Plaintiff's Complaint does not show on its face what actions undertaken by Defendant amounted to gross negligence or intentional misconduct. One reference to alleged gross misconduct in the Complaint does not meet this standard. Plaintiff asserts essentially that Defendant should have undertaken another course of action with respect to Robert Barnes embezzlement. However, Plaintiff failed to plead with particularity under the heightened pleading standard of NRCP 9(b) what conduct of Defendant amounted to intentional misconduct, fraud or a knowing violation of law." Plaintiff's claim must fail as a matter of law since it cannot overcome the business judgment rule's good faith presumption and it has not met the heightened pleading standard of NRCP 9(b).

Finally, Plaintiff cannot maintain causes of action based on negligence theories due to the economic loss doctrine. Plaintiff has not alleged any physical injury or property damage in its Complaint. See Complaint, generally. The Nevada Supreme Court has applied the economic loss doctrine to prevent plaintiffs from recovering damages for purely economic loss under negligence theories. See *Arco Prods. Co. v. May*, 113 Nev. 1295 (1997). Here, Plaintiff has alleged purely economic damages and seeks to recover under theories of negligence. This is precisely the type of action that is barred under the economic loss doctrine. As such, the claims against Defendant should be dismissed.

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2. Plaintiff Failed to Adhere to Statutory Prerequisites to Maintain a Derivative Action

Plaintiff claims that it "was the actual victim" of Barnes embezzlement. Opposition to Burkhead Motion to Dismiss, p.7:6. Further, Plaintiff claims that the restitution awards to Defendants after Barnes was convicted of embezzlement were "sums rightfully belonging to Plaintiff." Opposition, p.7:13-14. These arguments frame Plaintiff's claims in the instant action as derivative claims. Nevada law is clear that certain statutory prerequisites must be met in order to maintain a derivative action.

A member … may bring an action in the right of a limited-liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed. NRS 86.483. In a derivative action, the plaintiff must be a member at the time of the transaction of which the plaintiff complains. NRS 86.485. In a derivative action, the complaint must set forth with particularity: (1) the effort of the plaintiff to secure initiation of the action by a manager or member; or (2) the reasons for the plaintiff not making the effort to secure initiation of the action by a manager or member. NRS 86.487.

Plaintiff is asserting the instant claims on behalf of itself, when this action is truly a derivative action. Upon information and belief, a bankruptcy receiver hired the law firm of Black & Lobello to file this action. Importantly, this derivative action cannot be maintained since the receiver is not a current member of Plaintiff ass required by NRS 86.485. Further, Plaintiff failed to meet the statutory requirements for pleading a derivative action under NRS 86.487. Plaintiff's Complaint does not set forth with particularity the effort of the plaintiff to secure initiation of the action by a manager or member or the reasons for the plaintiff not making the effort to secure initiation of the action by a manager or member. NRS 86.487; see also, Complaint generally.

Since Plaintiff's Complaint is truly a derivative action it cannot maintain this suit since it failed to comply with NRS 86.486 and NRS 86.487. Accordingly, this suit should be dismissed.

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3. Alternatively, the Claims Against Dr. Burkhead Should be Stayed Since Plaintiff Lacks Standing to Maintain this Action

When the revoked corporate status is brought to the attention of the court by a motion, a reasonable period of time should be allowed to the entity to bring its status back to current. See *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 245 P.3d 1190, 2010 Nev. LEXIS 55, 126 Nev. Adv. Rep. 53 (Nev. Dec. 30, 2010). Plaintiff's corporate status is currently revoked. See **Exhibit 1 to Motion**. Plaintiff is required to bring its corporate status to current when its revoked corporate status is brought to the Court's attention. Without doing so, it is unable to maintain this action. If Plaintiff fails to do so within a reasonable period of time, then this Court should dismiss the Complaint.

AA Primo Builders holds that a LLC must be reinstated to restore "the entity's capacity to conduct itself as a limited liability company retroactively to the date of revocation; this includes the right to litigate ***pending*** cases to conclusion." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 585, 245 P.3d 1190, 1195, 2010 Nev. LEXIS 55, *14, 126 Nev. Adv. Rep. 53 (Nev. Dec. 30, 2010) (emphasis added). Further, "[a]dministrative revocation of a domestic limited liability company's charter suspends the entity's right to transact business, not its ability to prosecute an ***ongoing*** suit." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 580, 245 P.3d 1190, 1192, 2010 Nev. LEXIS 55, *2, 126 Nev. Adv. Rep. 53 (Nev. Dec. 30, 2010) (emphasis added). Importantly, *AA Primo Builders* recognizes the ability of a revoked LLC to maintain an ongoing/pending lawsuit, rather than maintain an action that was not filed until after the revocation occurred. Here, the lawsuit was not filed until after the Plaintiff's charter was revoked. For this reason, Plaintiff is required to bring its corporate status to current in order to maintain this action.

Plaintiff claims that it is able to maintain this action since dissolved LLCs may bring known claims up to two years after dissolution. Opposition, p.11:18-21. However, Plaintiff's corporate charter was revoked on January 31, 2015. The instant action was filed February 10, 2017. This is more than two years after the date of revocation. Thus, Plaintiff failed to timely file the instant action, which is a known claim since the allegations of misconduct stretch back

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far before the date of Plaintiff's revocation. As such, this Complaint should be dismissed as untimely if Plaintiff fails to reinstate its corporate charter.

4. Plaintiff's Claims are Precluded by the Applicable Statutes of Limitations

Plaintiff alleges four causes of action based on negligence theories. The statute of limitations for negligence based claims is four years. NRS 11.190(4)(e). Barnes' plea deal in the embezzlement criminal action states that his activities continues to 2013. See Exhibit C to Freedman Motion to Dismiss. Plaintiff does not allege in the Complaint that any criminal activities continued after 2013. Plaintiff's Complaint was filed on February 10, 2017. This is more than two years after the criminal activity by Barnes too place. As such, all of the causes of action in the Complaint are barred by NRS 11.190(4)(e). This Court should dismiss all of the causes of action with prejudice since they are barred by the applicable statute of limitations. See *Bemis v. Estate of Bemis*, 114 Nev. 1021, 967 P.2d 437 (1998) (dismissing action for failure to state a claim when cause of action barred by applicable statute of limitations).

III. CONCLUSION

Based on the foregoing, Defendant respectfully requests that this Court dismiss all of Plaintiff's claims. Alternatively, Plaintiff should be required to reinstate its corporate charter in order to maintain this action.

Dated: July 20th, 2017

GORDON & REES SCULLY MANSUKHANI, LLP

By: */s/ Robert E. Schumacher*

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, effective June 1, 2014, and N.E.F.C.R. Rule 9, I certify that I am an employee of GORDON & REES SCULLY MANSUKHANI LLP and that on this 20th day of July, 2017, I did cause a true correct copy of **DEFENDANT DANIEL BURKHEAD M.D.'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT** to be served via the Court's electronic filing service on all parties listed below (unless indicated otherwise):

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/s/ Andrea Montero
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Attorney For: Defendant
DANIEL L. BURKHEAD, M.D.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

FLAMINGO-PECOS SURGERY CENTER, LLC a Nevada limited liability company; Plaintiff. Vs. William Smith MD, an individual; Pankaj Bhatanagar MD, an individual; Marjorie Belsky MD, an individual; Sheldon Freedman MD, an individual; Mathew Ng MD, and individual; Daniel Burkhead MD, an individual; and DOE MANAGERS, DIRECTORS AND OFFICERS 1-25, ROE BUSINESS ENTITIES 1-25; Defendants.	CASE NO. A-17-750926-B DEPT. NO.: XV **NOTICE OF ERRATA TO DEFENDANT DANIEL BURKHEAD M.D.'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT**

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NOTICE OF ERRATA TO DEFENDANT DANIEL BURKHEAD M.D.'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT

PLEASE TAKE NOTICE that Defendant, DANIEL L. BURKHEAD, M.D., (hereinafter "Dr. Burkhead" or "Defendant") hereby files this Notice of Errata to address a clerical error in the Introduction of the Reply to Plaintiff's Opposition to Motion to Dismiss Complaint, which was filed July 20, 2017. The closing paragraph of the Introduction should read as follows:

Further, Plaintiff lacks standing to pursue the instant action. Plaintiff is not the real party in interest since this action is being undertaken for the benefit of a receiver who is suing on behalf of a creditor of Plaintiff. More importantly, Plaintiff claims are barred by the applicable statute of limitations for negligence actions. Finally, Plaintiff improperly seeks to hold its former members liable for claims that must be asserted against an employer when Plaintiff itself was the employer of the employee whose actions are the basis of the Complaint.

Additionally, one typographical error on Page 5, line 19 of the original filing was corrected.

Corrected Reply is attached hereto as **Exhibit "1".**

Dated: July 24, 2017

GORDON & REES SCULLY MANSUKHANI LLP

By:

/s/ Robert E. Schumacher

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DANIEL L. BURKHEAD, M.D.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, effective June 1, 2014, and N.E.F.C.R. Rule 9, I certify that I am an employee of GORDON & REES SCULLY MANSUKHANI LLP and that on this 24th day of July, 2017, I did cause a true correct copy of **NOTICE OF ERRATA TO DEFENDANT DANIEL BURKHEAD M.D.'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT** to be served via the Court's electronic filing service on all parties listed below (unless indicated otherwise):

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EXHIBIT 1

EXHIBIT 1

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

FLAMINGO-PECOS SURGERY CENTER, LLC a Nevada limited liability company; Plaintiff. vs. William Smith MD, an individual; Pankaj Bhatanagar MD, an individual; Marjorie Belsky MD, an individual; Sheldon Freedman MD, an individual; Mathew Ng MD, and individual; Daniel Burkhead MD, an individual; and DOE MANAGERS, DIRECTORS AND OFFICERS 1-25, ROE BUSINESS ENTITIES 1-25; Defendants.	CASE NO. A-17-750926-B DEPT. NO.: XV **DEFENDANT DANIEL BURKHEAD M.D.'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT**

DEFENDANT DANIEL BURKHEAD M.D.'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT

Defendant, DANIEL L. BURKHEAD, M.D., (hereinafter "Dr. Burkhead" or "Defendant") by and through his attorney of record, Robert E. Schumacher, Esq., of the law firm of GORDON & REES SCULLY MANSUKHANI, LLP, hereby submits this REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT ("Reply") filed by Plaintiff FLAMINGO-PECOS SURGERY CENTER, LLC ("Plaintiff").

This Reply is brought pursuant to Nevada Rules of Civil Procedure 12(b)(5) and is based upon the attached Memorandum of Points and Authorities and any exhibits attached thereto, the pleadings and papers on file herein and any oral argument that may be presented at the time of hearing on this matter.

Dated: July 24th, 2017

GORDON & REES SCULLY MANSUKHANI, LLP

By:

/s/ Robert E. Schumacher

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION & STATEMENTS OF FACTS

Plaintiff claims that it should have recovered monies ordered in restitution to the above named defendants after Robert Barnes' criminal conviction for embezzlement. Essentially, Plaintiff concedes that this action is derivative in nature. However, Plaintiff failed to meet the statutory prerequisites for maintaining a derivative action before filing the instant lawsuit. As such, this case should be dismissed.

Further, Plaintiff lacks standing to pursue the instant action. Plaintiff is not the real party in interest since this action is being undertaken for the benefit of a receiver who is suing on behalf of a creditor of Plaintiff. More importantly, Plaintiff claims are barred by the applicable statute of limitations for negligence actions. Finally, Plaintiff improperly seeks to hold its former members liable for claims that must be asserted against an employer when Plaintiff itself was the employer of the employee whose actions are the basis of the Complaint.

II. DISCUSSION

A. This Court Should Dismiss the Claims Against Defendant

1. Plaintiff's Claims Fail as a Matter of Law

Defendant was a member of the Board of managers for Plaintiff. Plaintiff claims that Defendant is liable for negligent training, supervision, and retention of Plaintiff's former office manager Robert Barnes. Plaintiff also claims that Defendant breached his fiduciary duty of care to Plaintiff. However, these actions allegedly undertaken by Defendant were clearly within the scope of authority granted under Plaintiff's Operating Agreement since hiring, supervising, and retaining an office manager is clearly within the scope of duties given to members of the Board of Managers. The Board of Managers has the power to employ and retain persons to act as employees. See **Exhibit 2 to Motion**, Section 7.3(c). Further, any power not specifically enumerated under the operating agreement rests with the Board of Managers. See **Exhibit 2 Motion**, Section 7.1.

Any actions taken by Defendant with respect to his alleged negligent hiring, supervision, and retention of Mr. Barnes were performed within the scope of the authority conferred to him under the operating agreement. Further, causes of action for negligent hiring, training, and supervision implicate liability of the employer, not an employee or member of an LLC. See *Helle v. Core Home Health Services of Nevada*, 2008 WL 6101984 at * 3 (Nov. 20, 2008, Nev.); See also *ETT, Inc. v. Delgada*, 2010 WL 3246334 at * 8 (April 29, 2010, Nev.). Defendant cannot be held liable for these torts as a matter of law since he was not the employer of Barnes, which was in fact, Plaintiff.

Additionally, Plaintiff has failed to plead with particularity pursuant to NRCP 9(b) how Defendants actions amounted to "intentional misconduct, fraud or a knowing violation of law." Without doing so, Plaintiff fails to overcome the presumption that Defendant acted in good faith when performing actions what are within his authority and scope of employment under the Operating Agreement. See NRS 78.138(3). Further, Plaintiff's Complaint does not show on its face what actions undertaken by Defendant amounted to gross negligence or intentional misconduct. One reference to alleged gross misconduct in the Complaint does not meet this standard. Plaintiff asserts essentially that Defendant should have undertaken another course of action with respect to Robert Barnes embezzlement. However, Plaintiff failed to plead with particularity under the heightened pleading standard of NRCP 9(b) what conduct of Defendant amounted to intentional misconduct, fraud or a knowing violation of law." Plaintiff's claim must fail as a matter of law since it cannot overcome the business judgment rule's good faith presumption and it has not met the heightened pleading standard of NRCP 9(b).

Finally, Plaintiff cannot maintain causes of action based on negligence theories due to the economic loss doctrine. Plaintiff has not alleged any physical injury or property damage in its Complaint. See Complaint, generally. The Nevada Supreme Court has applied the economic loss doctrine to prevent plaintiffs from recovering damages for purely economic loss under negligence theories. See *Arco Prods. Co. v. May*, 113 Nev. 1295 (1997). Here, Plaintiff has alleged purely economic damages and seeks to recover under theories of negligence. This is

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precisely the type of action that is barred under the economic loss doctrine. As such, the claims against Defendant should be dismissed.

2. Plaintiff Failed to Adhere to Statutory Prerequisites to Maintain a Derivative Action

Plaintiff claims that it "was the actual victim" of Barnes embezzlement. Opposition to Burkhead Motion to Dismiss, p.7:6. Further, Plaintiff claims that the restitution awards to Defendants after Barnes was convicted of embezzlement were "sums rightfully belonging to Plaintiff." Opposition, p.7:13-14. These arguments frame Plaintiff's claims in the instant action as derivative claims. Nevada law is clear that certain statutory prerequisites must be met in order to maintain a derivative action.

A member … may bring an action in the right of a limited-liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed. NRS 86.483. In a derivative action, the plaintiff must be a member at the time of the transaction of which the plaintiff complains. NRS 86.485. In a derivative action, the complaint must set forth with particularity: (1) the effort of the plaintiff to secure initiation of the action by a manager or member; or (2) the reasons for the plaintiff not making the effort to secure initiation of the action by a manager or member. NRS 86.487.

Plaintiff is asserting the instant claims on behalf of itself, when this action is truly a derivative action. Upon information and belief, a bankruptcy receiver hired the law firm of Black & Lobello to file this action. Importantly, this derivative action cannot be maintained since the receiver is not a current member of Plaintiff as required by NRS 86.485. Further, Plaintiff failed to meet the statutory requirements for pleading a derivative action under NRS 86.487. Plaintiff's Complaint does not set forth with particularity the effort of the plaintiff to secure initiation of the action by a manager or member or the reasons for the plaintiff not making the effort to secure initiation of the action by a manager or member. NRS 86.487; see also, Complaint generally.

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Since Plaintiff's Complaint is truly a derivative action it cannot maintain this suit since it failed to comply with NRS 86.486 and NRS 86.487. Accordingly, this suit should be dismissed.

3. Alternatively, the Claims Against Dr. Burkhead Should be Stayed Since Plaintiff Lacks Standing to Maintain this Action

When the revoked corporate status is brought to the attention of the court by a motion, a reasonable period of time should be allowed to the entity to bring its status back to current. See *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 245 P.3d 1190, 2010 Nev. LEXIS 55, 126 Nev. Adv. Rep. 53 (Nev. Dec. 30, 2010). Plaintiff's corporate status is currently revoked. See **Exhibit 1 to Motion**. Plaintiff is required to bring its corporate status to current when its revoked corporate status is brought to the Court's attention. Without doing so, it is unable to maintain this action. If Plaintiff fails to do so within a reasonable period of time, then this Court should dismiss the Complaint.

AA Primo Builders holds that a LLC must be reinstated to restore "the entity's capacity to conduct itself as a limited liability company retroactively to the date of revocation; this includes the right to litigate ***pending*** cases to conclusion." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 585, 245 P.3d 1190, 1195, 2010 Nev. LEXIS 55, *14, 126 Nev. Adv. Rep. 53 (Nev. Dec. 30, 2010) (emphasis added). Further, "[a]dministrative revocation of a domestic limited liability company's charter suspends the entity's right to transact business, not its ability to prosecute an ***ongoing*** suit." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 580, 245 P.3d 1190, 1192, 2010 Nev. LEXIS 55, *2, 126 Nev. Adv. Rep. 53 (Nev. Dec. 30, 2010) (emphasis added). Importantly, *AA Primo Builders* recognizes the ability of a revoked LLC to maintain an ongoing/pending lawsuit, rather than maintain an action that was not filed until after the revocation occurred. Here, the lawsuit was not filed until after the Plaintiff's charter was revoked. For this reason, Plaintiff is required to bring its corporate status to current in order to maintain this action.

Plaintiff claims that it is able to maintain this action since dissolved LLCs may bring known claims up to two years after dissolution. Opposition, p.11:18-21. However, Plaintiff's corporate charter was revoked on January 31, 2015. The instant action was filed February 10,

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2017. This is more than two years after the date of revocation. Thus, Plaintiff failed to timely file the instant action, which is a known claim since the allegations of misconduct stretch back far before the date of Plaintiff's revocation. As such, this Complaint should be dismissed as untimely if Plaintiff fails to reinstate its corporate charter.

4. Plaintiff's Claims are Precluded by the Applicable Statutes of Limitations

Plaintiff alleges four causes of action based on negligence theories. The statute of limitations for negligence based claims is four years. NRS 11.190(4)(e). Barnes' plea deal in the embezzlement criminal action states that his activities continues to 2013. See Exhibit C to Freedman Motion to Dismiss. Plaintiff does not allege in the Complaint that any criminal activities continued after 2013. Plaintiff's Complaint was filed on February 10, 2017. This is more than two years after the criminal activity by Barnes too place. As such, all of the causes of action in the Complaint are barred by NRS 11.190(4)(e). This Court should dismiss all of the causes of action with prejudice since they are barred by the applicable statute of limitations. See *Bemis v. Estate of Bemis*, 114 Nev. 1021, 967 P.2d 437 (1998) (dismissing action for failure to state a claim when cause of action barred by applicable statute of limitations).

III. CONCLUSION

Based on the foregoing, Defendant respectfully requests that this Court dismiss all of Plaintiff's claims. Alternatively, Plaintiff should be required to reinstate its corporate charter in order to maintain this action.

Dated: July 24th, 2017

GORDON & REES SCULLY MANSUKHANI, LLP

By:

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, effective June 1, 2014, and N.E.F.C.R. Rule 9, I certify that I am an employee of GORDON & REES SCULLY MANSUKHANI LLP and that on this 24th day of July, 2017, I did cause a true correct copy of **DEFENDANT DANIEL BURKHEAD M.D.'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT** to be served via the Court's electronic filing service on all parties listed below (unless indicated otherwise):

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Attorney for Defendants
MATTHEW NG MD, incorrectly named MATHEW NG MD and
PANKAJ BHATNAGAR MD incorrectly named PANKAJ BHATANAGAR MD

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DISTRICT COURT

CLARK COUNTY, NEVADA

FLAMINGO-PECOS SURGERY CENTER, LLC a Nevada limited liability company, Plaintiff, vs. WILLIAM SMITH MD, an individual; PANKAJ BHATANAGAR MD, an individual; MAJORIE BELSKY MD, an individual; SHELDON FREEDMAN MD, an individual; MATHEW NG MD, an individual; DANIEL BURKHEAD MD, an individual; and DOE MANAGERS, DIRECTORS, AND OFFICERS 1-25, ROE BUSINESS ENTITIES 1-25; Defendant.	CASE NO. A-17-750926-B DEPT. NO. XV **DEFENDANT SHELDON J. FREEDMAN'S REPLY TO OPPOSITION TO MOTION TO DISMISS PURSUANT TO N.R.C.P. 12(b)(5) and 12(b)(6) AND REPLY TO OPPOSITION FOR ATTORNEYS FEES PURSUANT TO NRS 18.020** Hearing Date: 9/26/17 Hearing Time: 9:00 am

COMES NOW, Defendant Sheldon J. Freedman, by and through his attorney of record, Marc P. Cook, Esq., of the law firm of Cook & Kelesis, Ltd., files the following Reply to Opposition to Motion to Dismiss and Reply to Opposition for Attorney's Fees.

This Reply is made and based on papers and pleadings on file herein, the following points

and authorities, and upon oral argument of counsel at the time of the hearing of the motion.

Dated this 15 day of August, 2017.

COOK & KELESIS, LTD.

By: _____
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Nevada State Bar No. 004574
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POINTS AND AUTHORITIES

I.

ARGUMENT

A. Plaintiff is barred by the Nevada Revised Statutes from pursuing this action

1. NRS 86.371 - 86.391 does not permit liability in this case

An LLC member cannot be held liable for the debts of the company, as set forth in NRS 86.371 - unless it is an action to enforce the member's liability to the company as indicated by NRS 86.391 - Plaintiff incorrectly argues that this is a matter which would impose liability pursuant to NRS 86.391. Plaintiff is wrong. The specific liabilities intended by NRS 86.381 are identified in NRS 86.391 and do not include liability for debts of the LLC.

NRS 86.391 provides only the following liabilities of a member to the LLC:

1. A member is liable to a limited-liability company:

(a) For a difference between the member's contributions to capital as actually made and as stated in the articles of organization or operating agreement as having been made; and

(b) For any unpaid contribution to capital which the member agreed in the articles of organization or operating agreement to make in the future at the time and on the conditions stated in the articles of organization or operating agreement.

2. A member holds as trustee for the company specific property stated in the articles of organization or operating agreement as contributed by the member, but which was not so contributed.

3. The liabilities of a member as set out in this section can be waived or compromised only by the consent of all of the members, but a waiver or compromise does not affect the right of a creditor of the company to enforce the liabilities if the creditor extended credit or the creditor's claim arose before the effective date of an amendment of the articles of organization or operating agreement effecting the waiver or compromise.

These liabilities do not include holding a member liable for company debt in situations where an LLC is insolvent. This omission creates a negative inference that the Nevada legislature did not intend for it to apply to LLCs since omissions of subject matters from statutory provisions are presumed to have been intentional."); *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) ("The maxim 'EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS', the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State.").

Since there is no basis for finding Freedman liable for the debts of the LLC, dismissal of the Complaint is warranted.

2. As pled, this Complaint does not allow Plaintiff to argue this matter is being sought to recover sums owed by an insolvent entity to a creditor

Plaintiff opposed Defendant's Chapter 86 argument stating that Freedman owed duties to the LLC's creditors since the LLC was insolvent. However, even if the District Court accepts Plaintiff's proposition that creditors of an LLC could potentially have claims against members of an insolvent LLC as set forth in *JPMorgan Chase Bank, NA v. KB Home,* 632 F.Supp.2d 1013 (D.Nev. 2009),[1] that does not change the fact that based on the facts pled in the Complaint, this claim is still subject to dismissal. Here, the named Plaintiff is the LLC itself, not a creditor. In fact, no creditor of Flamingo-Pecos is listed as a plaintiff and the relief sought is limited to the recovery of damages to the surgery center only. There can be no doubt this action does not seek sums from LLC members to compensate a creditor for debts of an insolvent entity. As stated in the Complaint:

> 1. At all times relevant herein, Plaintiff [Flamingo-Pecos Surgery Center] is and has been a limited liability company, organized under the laws of the state of Nevada doing business in Clark county, Nevada.
>
> . . .
>
> 19. Plaintiff has conducted business in Clark County for many years as an entity associated with a group of surgeons performing surgeries in Clark County, Nevada, including at an ambulatory surgery center located at 10195 West Twain Avenue, Las Vegas, Nevada 89147.
>
> . . .

The Complaint's sole request for damages for each of the stated causes of action is the same and clearly seeks sums to be paid to the company:

> 41, 45, 49 Defendants' breaches of Defendants' duties to Plaintiff in this regard resulted in substantial damages to and against Plaintiff, in an amount greater than $50,000.
>
> . . .
>
> 54. Defendants' individual and collective breaches of Defendants' fiduciary duty of care to Plaintiff resulted in substantial damages to and against Plaintiff, in

---

[1] As set forth in *JPMorgan*, liability against a member would be absolutely dependent on whether or not the member had actually controlled the LLC or caused managers of the LLC to breach fiduciary duties and not by virtue of his mere status as an LLC member.

an amount greater than $50,000.[2]

Based on this fact, Plaintiff cannot rely on insolvency as means to assert liability in favor of the LLC against Freedman. As pled, this Complaint does not allow Plaintiff to stand in the shoes of a creditor for purposes of recovering against the Defendant. Plaintiff has pled its allegations and a breach of fiduciary duty by the LLC members which was owed to the company. Since Nevada statutory law limits the liability of a member to a LLC, Plaintiff cannot recover on its claims and this matter must be dismissed.

2. There is no ability for the Receiver to pursue a derivative action on behalf of Plaintiff

a. The has been no attempt to satisfy the pleading requirements

This matter is clearly derivative in nature as it seeks to collect on behalf of the LLC for alleged breaches of fiduciary duty to the entity.[3] This Complaint should be dismissed because the Receiver is unable to satisfy any of the statutory requirements regarding the initiation of a derivative action. First, NRS 86.487 requires that a derivative action must set forth with particularity "(1) the effort of the plaintiff to secure initiation of the action by a manager or a member; or (2) the reasons for the plaintiff not making the effort to secure initiation of the action by a manager or a member." This standard is consistent with the standard in Nevada for a corporation. Additionally, this is the same heightened pleading burden adopted in the Delaware Chancery Rule 23.1.

Pleadings in derivative suits are governed by Chancery Rule 23.1, [which] . . .must comply with stringent requirements of factual particularity that differ substantially from the permissive

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[2] See Complaint, incorporated herein with this reference at page 2, 4, 6, 7 and 8.

[3] A derivative action is a suit by a shareholder to enforce a corporate cause of action. The corporation is a necessary party to the suit and the relief which is granted is a judgment against a third person in favor of the corporation. *Price v. Gurney*, 324 U.S. 100, 65 S.Ct. 513, 89 L.Ed. 776 (1945). Derivative suits allow shareholders to "compel the corporation to sue" and to thereby pursue litigation on the corporation's behalf against the corporation's board of directors and officers, in addition to third parties. *Shoen v. SAC Holding Corp.*, 122 Nev. 621 137 P.3d 1171 (2006); *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 95–96, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991); see also *Cohen v. Mirage Resorts. Inc.*, 119 Nev. 1, 19, 62 P.3d 720, 732 (2003).

notice pleadings governed solely by Chancery Rule 8(a). Rule 23.1 is not satisfied by conclusory statements or mere notice pleadings . . .

> . . .The rationale for Rule 23.1 is two-fold. On the one hand, it would allow a plaintiff to proceed with discovery and trial if the plaintiff complies with this rule and can articulate a reasonable basis to be entrusted with a claim that belongs to the corporation. On the other hand, ***the rule does not permit a stockholder to cause the corporation to expend money and resources*** *in discovery and trial in the stockholder's quixotic pursuit of a purported corporate claim* ***based solely on conclusions, opinions or speculation . . .***
>
> . . .
>
> "The demand requirement serves a salutory purpose. First, by requiring exhaustion of intracorporate remedies, the demand requirement invoke a species of alternative dispute resolution procedures which might avoid litigation altogether. Second, if litigation is beneficial, the corporation can control the proceedings. Third, if demand is excused or wrongfully refused, the stockholder will normally control the proceedings."

Brehm v. Eisner, 746 A.2d 244, 254 (De. 2000) (emphasis added) (quoting *Grimes v. Donald*, 673 A.2d 1207, 1216-17 (Del. 1996); *see also Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 62 P.3d 720, 726 n.10 (Nev. 2003) (acknowledging that Nevada courts look to Delaware and New York case law to interpret similar Nevada corporate statutes); *Guttman v. Huang*, 823 A.2d 492, 501 (Del. Ch. 2003) (noting that "[m]ere notice pleading is insufficient to meet the plaintiff's burden to show demand excusal in a derivative case").

In order to create a reasonable doubt that a director is disinterested, a derivative plaintiff must plead particular facts to demonstrate that a director "will receive a personal financial benefit from a transaction that is not equally shared by the stockholders" or, conversely, that "a corporate decision will have a materially detrimental impact on a director, but not on the corporation and the stockholders." In these situations, a director cannot be expected to act "without being influenced by the . . . personal consequences" flowing from the decision. At the other end of the spectrum, a board member is considered to be disinterested when he or she neither stands to benefit financially nor suffer materially from the decision whether to pursue the claim sought in the derivative plaintiff's demand. *In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 354 (Del. Ch. 1998) (internal citations omitted); *see also Brehm*, 746 A.2d at 257 (similarly explaining that to evaluate the "issues of disinterestedness and independence" requires considering whether the board members were

"incapable, due to personal interest or domination and control, of objectively evaluating a demand, if made").

"At a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief." *Carolina First Corporation v. Whittle*, 539 S.E.2d 402, 409 (2000) quoting *Alison v. General Motors Corp.*, 604 F.Supp. 1116, 1117 (Del. 1985). The "pre-suit demand must be alleged not in a conclusory fashion, but through particularized allegations." *Carolina First*, 539 S.E.2d at 409-10. "It is not sufficient merely to name a majority of the directors as parties defendant with conclusory allegations of wrongdoing or control by wrongdoers to justify failure to make demand." Mark v. Akers, 644 N.Y.S.2d 121 (1996) (citations omitted). (emphasis added).

In *Shoen v. SAC Holding Corporation*, 122 Nev. 621, 132 P.3d 1171 (2006) the Nevada Supreme Court clarified the pleading requirement for demand futility and avoiding the business judgment rule. The Nevada Supreme Court emphasized the requirement of making a demand on the board, noting that "because the power to manage the corporation's affairs resides in the board of directors, a shareholder must, before filing suit, make a demand on the board, or if necessary, on the shareholders, to obtain the action the shareholder desires." 137 P.3d at 1179. Thereafter, the court stated:

> In light of the demand requirement, NRCP 23.1 imposes heightened pleading imperatives in shareholder derivative suits. Under this Rule, a derivative complaint must state, with particularity, the demand for corrective action that the shareholder made on the board of directors (and, possibly, other shareholders) and why he failed to obtain such action, or his reasons for not making a demand. Thus, as the Delaware Supreme Court has recognized in a similar shareholder demand context, a shareholder must "set forth . . . . particularized factual statements that are essential to the claim" that a demand has been made and refused, or that making a demand would be futile or otherwise inappropriate. We note, however, that NRCP 8(e) requires pleadings to be "simply, concise, and direct." Accordingly, "the pleader is not required to plead evidence." Nonetheless, mere conclusory assertions will not suffice under NRCP 23.1's "with particularity" standard. 137 P.3d at 1179, 1180 (citations omitted) (emphasis added). Furthermore, the Court recognized that "[a] shareholders failure to sufficiently to plead compliance with the demand requirement deprives the shareholder of standing and justifies dismissal of the complaint for failure to state a claim upon which relief may be granted."

Moreover, the *Shoen* court rejected as insufficient the directive articulated in *Johnson v. Steel, Inc.*, 100 Nev. 181, 184, 678 P.2d 676, 679 (1984), that "[w]here the board participated in the wrongful acts. . . . it is generally held that no demand is needed." *Shoen*, 137 P.3d at 1180.

Further, where the alleged wrongs constitute a business decision by a director of the entity, the *Shoen* court adopted a two (2) prong demand futility analysis set forth in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), to determine if a complaint has created a reasonable doubt as to whether the directors, having made a business decision, were disinterested and independent, or likely entitled to the business judgment rules protection: "in determining demand futility the [trial court] . . . .must decide whether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." *Shoen* 137 P.3d at 182 (citations omitted). Therefore, a plaintiff challenging a business decision and asserting demand futility must sufficiently show that either the board is incapable of invoking the business judgment rules protection of that the business judgment rules protection are not likely to in fact protect the decision. *Id.*

Here, there is no statement indicating either a demand was made by the Receiver or stating the reason why one was not made upon the managing member of the LLC. There is no statement regarding business judgment exceptions either. It appears Plaintiff either did not know of or ignored the pleading requirements for a derivative claim by an LLC. Again, since the case law is clear that either the demand or demand futility *must be pled*, and were not, the Complaint must be dismissed.

b. The Receiver has no standing to bring a derivative claim

NRS 86.483 mandates that a member has the authority to bring a derivative action unless otherwise prohibited by the LLC's documents. NRS 86.485 states that in a derivative action, "*the plaintiff **must** be a member at the time of the transaction of which the plaintiff complains.*" (Emphasis added). This has been interpreted to mean creditors of an insolvent LLC cannot sue derivatively for breaches of fiduciary duty. In *CML V, LLC v. Bax*, 6 A.3d 238 (Delware, 2010), Delaware held that creditors of an insolvent Delaware LLC do not have standing to sue derivatively since the state's law limits those rights to members of the LLC and creditors are not members of the LLC. The Court recognized that "[t]o limit creditors to their bargained-for rights and deny them the

additional right to sue derivatively ... comports with the contractarian environment created by the LLC Act."

In *Bax,* the Plaintiff, CML loaned JetDirect, a private jet management and charter company, nearly $35 million. JetDirect defaulted on the CML loan and then became insolvent. CML alleged the board of managers acted without sufficient knowledge of the company's finances when it expanded the company. CML further alleged that after JetDirect's default, its managers negotiated sales of JetDirect assets to entities they controlled and that the board failed to exercise proper oversight of the sales. Accordingly, CML asserted derivative claims for breaches of fiduciary duties as well as a direct claim for breach of the loan agreement.

The court held that, as a creditor, CML lacked standing to assert a derivative claim. It did so by focusing on the language of the state's "right to bring action" provision which stated, "a member ... may bring an action" on behalf of an LLC.[4] It also looked to the wording of the Delaware LLC's derivative action "proper plaintiff" statute which held:

> In a derivative action, the plaintiff must be a member or an assignee of a limited liability company interest at the time of bringing the action and ... [a]t the time of the transaction of which the plaintiff complains.[5]

The court decided that the statutory clauses required the plaintiff to be a member, not a creditor. Thus, the court held that it could not grant derivative standing to creditors based on the plain language of the statute.[6] In so doing, the court was aware its ruling would be considered a

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[4] Notably, NRS 86.483 utilizes the same language:

> A member, including a noneconomic member unless otherwise prohibited by the terms of the articles of organization or operating agreement, may bring an action in the right of a limited-liability company to recover a judgment in its favor ...

[5] This is nearly identical to the language of NRS 86.485 "Qualifications of plaintiff":

> In a derivative action, the plaintiff must be a member at the time of the transaction of which they plaintiff complains.

[6] In Nevada, it is well settled that words in a statute should be given their plain meaning unless this violates the spirit of the act. *Application of Filippini*, 66 Nev. 17, 24, 202

surprise because certain court opinions and articles had assumed creditors of insolvent LLCs could obtain derivative standing, however, this did not convince the court to depart from the plain meaning rule of statutory construction.

There is no doubt that the same rationale applies in this case based on these facts. Nevada LLC derivative actions are subject to the same statutory requirements as those in Delaware. The Nevada Revised Statutes do not permit a derivative action to be initiated by anyone other than a member who held his interest at the time of the complained of acts. There is no argument that the receiver for a company does not have the proper standing to pursue a claim derivatively on behalf of an LLC and therefore dismissal is warranted.

B. The Operating Agreement for Flamingo-Pecos does not permit recovery against its members but even if it did and allowed claims for gross negligence and/or willful misconduct, Plaintiff's Complaint still fails

Limited-liability companies (LLCs) are business entities created "to provide a corporate-styled liability shield with pass-through tax benefits of a partnership." *White v. Longley*, 244 P.3d 753, 760 (Mont.2010); *Gottsacker v. Monnier*, 697 N.W.2d 436, 440 (Wis.2005) (stating that "[f]rom the partnership form, the LLC borrows characteristics of informality of organization and operation, internal governance by contract, direct participation by members in the company, and no taxation at the entity level. From the corporate form, the LLC borrows the characteristic of protection of members from investor-level liability." (internal citation omitted)); *Elf Atochem N. America, Inc. v. Jaffari*, 727 A.2d 286, 287 (Del.1999) (LLCs allow "tax benefits akin to a partnership and limited liability akin to the corporate form").

In Nevada, an LLC is formed by signing and filing the articles of organization, together with the applicable filing fees, with the Secretary of State. NRS 86.151; NRS 86.201. An LLC may, but is not required to, adopt an operating agreement, NRS 86.286, which is defined as "any valid written agreement of the members as to the affairs of a limited-liability company and the conduct of its

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P.2d 535, 538 (1949). Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent. *Thompson v. District Court*, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984); *Robert E. v. Justice Court*, 99 Nev. 443, 664 P.2d 957 (1983).*McKay v. Board of Sup'rs of Carson City*, 102 Nev. 644730 P.2d 438 (1986).

business." NRS 86.101.6.

As discussed in Freedman's Motion, the Surgery Center is governed by its Operating Agreement which indicates its members are not personally liable for any liabilities or obligations of the company. Plaintiff has not provided any case or statutory law to demonstrate that the allegations of the Complaint would be sufficient to warrant setting aside the plain language of the Operating Agreement which precludes the very liability sought here. Instead, it points to the pleadings to and allegations outside the Complaint thereby relying on unproven, untrue and defamatory statements in an effort to smear Freedman in an attempt to convince this Court to overlook both statutory law and the plain terms of the Operating Agreement.

As was outlined hereinabove, there is no other circumstances that would provide for any liability asserted by the Plaintiff here. Accordingly, this Complaint fails as a result of the Surgery Center's Operating Agreement.

Plaintiff has argued the terms of the Operating Agreement do not insulate Freedman for actions constituting gross negligence or willful misconduct. However, even if this was true, dismissal of the Complaint is still justified because Plaintiff has not properly pled either claim. In fact, its Opposition relies heavily on alleged facts which do not appear in the Complaint and which are contained in documents not referenced in the Complaint.[7]

The Nevada Supreme Court has long held that "gross negligence" is substantially and appreciably higher in magnitude and more culpable than ordinary negligence. *Hart v. Kline*, 61 Nev. 96, 116 P.2d 672 (1941). Gross negligence is the failure to exercise even a slight degree of care. *Id.* It is materially more want of care than constitutes simple inadvertence. *Id.* It is an act or

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[7] Plaintiff states that the Exhibits relied upon were attached to the affidavit of Todd E. Kennedy which was filed with oppositions to motions to dismiss filed by other Defendants in this action. See Flamingo-Pecos Opposition to Defendant Sheldon J. Freedman's Motion to Dismiss at 1: 23-26. NRCP 12 (b) provides that matters outside the pleadings are not properly considered in a motion to dismiss. A court may only consider unattached evidence upon which a complaint relies if: (1) the complaint refers to the document; (2) the document is central to plaintiff's claim; and (3) no party questions the authenticity of the document. *Baxter v. Dignity Health*, 131 Nev.Adv.Op. 76, 357 P.3d 927 (2015) (citing *United States v. Corinthian Colleges*, 655 F.3d 984 (9thCir.2011).

omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. *Id.* It is very great negligence or the absence of slight diligence, or the want of even scant care. *Id.*

Plaintiff has failed to allege that Freedman committed gross negligence. In conclusory fashion it alleged negligence by Freedman which the Nevada Supreme Court has long held is materially different from gross negligence. Here, the Complaint reads that the individual Defendants:

> . . .
> 24. ... Defendants failed to conduct the necessary due diligence ... and negligently hired Barnes ...
>
> 25. ... failed to supervise, oversee and/or monitor Barnes ...
>
> 26. ... negligently supervised, retained, oversaw and/or monitored Barnes ...
>
> 27. ... omitted and grossly neglected their duties to Plaintiff ...
>
> . . .
> 30. ... failed to take any reasonable steps to protect Plaintiff ...
>
> 31. ... failed – for an unreasonably lengthy period of time - to remove Barnes ...
>
> 32. ... failed to appropriately audit, investigate, and determine the extent of Barnes' crimes ...
>
> 33. ... ignored and failed to adhere to their responsibilities and obligations to Plaintiff ...
>
> 34. ... failed to protect and preserve Plaintiff's assets, funding and interests ...
>
> 35. ... failed to: (1) demand that Barnes return Plaintiff's funds and assets; (b) pursue Barnes; and (c) file a cause of action against Barnes.[8]

Further, the causes of action pled, negligent hiring, negligent supervision, negligent retention and breach of fiduciary duty, contain similarly cursory and vague allegations of wrondgoing which certainly do not rise to the level of *gross negligence* that reflects negligence of a high magnitude:

> 38. Defendants hired Barnes without conducting a reasonable background check ...
>
> . . .
> 44. Defendants failed to supervise, train or discipline Barnes ... failed to protect Plaintiff ...

---

[8] See Complaint at pages 4-6.

. . .

48. Defendants failed to remove Barnes and negligently retained Barnes ...

. . .

52. Defendants were 'asleep at the wheel' in completely neglecting this duty ...

53. Defendants ... [failed] to: (a) oversee, supervise, monitor and discipline ... [9]

Plaintiff cannot overcome the very real fact that the Complaint as written does not actually state - either directly or indirectly - a claim for gross negligence. The same is true for its argument that the Complaint states a claim for willful misconduct.

This court has consistently distinguished the concepts of either ordinary or gross negligence from the concepts of willful or wanton misconduct.[10] *Davies v. Butler*, 95 Nev. 763, 602 P.2d 605 (1970). In fact, even gross negligence falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injury (Emphasis added.) *Hart v. Kline*, 61 Nev. 96, 101, 116 P.2d 672, 674 (1941). "Wanton misconduct involves an intention to perform an act that the actor knows, or should know, will very probably cause harm." *Rocky Mt. Produce v. Johnson*, 78 Nev. 44, 369 P.2d 198 (1962). The Nevada Supreme Court has also said: "To be wanton such conduct must be beyond the routine. There must be some act of perversity, depravity or oppression."

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[9] *Id.* at pages 6-7.

[10] As set forth in Johnson, 78 Nev. 44, 369 P.2d 198 (1962):

> Negligence is an unintentional tort, a failure to exercise the degree of care in a given situation that a reasonable man under similar circumstances would exercise to protect others from harm. Rest. Torts, secs. 282, 283, 284; Prosser, Torts, sec. 30, et seq. A negligent person has no desire to cause the harm that results from his carelessness. Rest. Torts, sec. 282(c). And he must be distinguished from a person guilty of willful misconduct such as assault and battery, who intends to cause harm. Prosser, Torts, p. 261. Wilfulness and negligence are contradictory terms ... If conduct is negligent, it is not willful; if it is willful, it is not negligent ... Thus we see that wanton misconduct involves an intention to perform an act that the actor knows, or should know, will very probably cause harm ... the party doing the act ... must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury.

Bearden v. City of Boulder City, 89 Nev. 106, 110, 507 P.2d 1034, 1036 (1973). In light of these decisions, it is clear that the legislature, by the use of the term "gross negligence", could not have contemplated that the term would include the distinct concepts of willful or wanton misconduct. See *Draney v. Bachman*, 138 N.J.Super. 503, 351 A.2d 409 (1976).

The allegations set forth in the Complaint, wholly fail to allege that Freedman engaged in any intentional conduct designed or intended to injure. He is not alleged to have engaged in acts of perversity, depravity or oppression which he knew or should have known would cause harm. Plaintiff has not properly pled a claim for willful misconduct. Since no relief under theories of gross negligence or willful misconduct have been pled, this Court is not entitled to overlook the stated terms of the Operating Agreement and dismissal is warranted.

C. Plaintiff is time barred from pursuing this claim and is not saved by the discovery rule

By all accounts, Barnes' spree began in 2010 and ended in 2013. By that time, roughly $1.3 million dollars had been embezzled from the Plaintiff's accounts. In responding to Freedman's argument that the statute of limitations ran long before this action was initiated in 2017, Plaintiff relies on the "discovery rule" tolling exception to allege that there was no way it could have "realistically brought an action prior to an independent receiver being appointed." Not only is this argument flawed, because a creditor could certainly have initiated an action without the appointment of a receiver, but the fact is the allegations of the Complaint do not in any way support a finding by this Court that could actually relied upon in order to apply the discovery rule.

The Nevada Supreme Court has previously recognized a distinction between the "discovery rule" and the "general rule" of accrual of a cause of action for statute of limitations purposes:

> The general rule concerning statutes of limitation is that a cause of action accrues when the wrong occurs and a party sustains injuries for which relief could be sought. An exception to the general rule has been recognized by this court and many others in the form of the so-called "discovery rule." Under the discovery rule, the statutory period of limitations is tolled until the injured party discovers or reasonably should have discovered facts supporting a cause of action.
>
> The rationale behind the discovery rule is that the policies served by statutes of limitation do not outweigh the equities reflected in the proposition that plaintiffs should not be foreclosed from judicial remedies before they know that they have been injured and can discover the cause of their injuries.

Petersen v. Bruen, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990) (emphasis added) (citations omitted).

The discovery rules delays accrual of a cause of action until the plaintiff has "discovered it" which includes when the litigant first knows or *with due diligence should know* facts that will form the basis for an action. *Merck & Co. v. Reynolds*, 559 U.S. 633, 130 S.Ct. 1784, 176 L.Ed.2d 582 (2010). However, the exception is not available to plaintiffs who fail to pursue their claims with reasonable diligence. *Id.*

Plaintiff argues that the Defendants "concealed ... by obstructing any investigation" and blames the Defendants for "delays" that apparently prevented Plaintiff from discovering the basis for the present claims. Again, as it has repeatedly done however, Plaintiff failed to make any such allegations in the Complaint. It has not plead facts to support any discovery rule applicability here. Since the allegations of criminal activity by Barnes, would have ceased more than two years before this Complaint was filed, Plaintiff is time-barred from pursuing the claims set forth therein and dismissal should be granted.

D. The plead claims violate the Economic Loss Doctrine

The economic loss doctrine's foundational principal is that a plaintiff cannot recover both in tort and contract for damages arising from a contract or commercial activity such as a vendor and vendee transaction (products liability) if such damages are a "purely economic loss." "Purely economic loss" is defined as "the loss of the benefit of the user's bargain ... including ... pecuniary damage for inadequate value, the cost of repair and replacement of the defective product, or consequent loss of profits, without any claim of personal injury or damage to other property." *Calloway v. City of Reno*, 116 Nev. 250, 257, 993 P.2d 1259, 1263 - 1264 (2000). Thus, courts will not grant damages in tort, with no accompanying personal or property damage, if contract damages, i.e., "the benefit of the user's bargain" or products liability damages are available to make the plaintiff whole. In fact, "... when economic loss occurs as a result of negligence in the context of commercial activity, contract law can be invoked to enforce the quality expectations derived from the parties' agreement." *Terracon Consultants Western, Inc. v. Mandalay Resort Group*, 206 P.3d 81, 87 (2009). Put simply, there must be a commercial products transaction or a contractual relationship between the parties wherein non-tort remedies are available to Plaintiff for the economic loss doctrine to apply, lest there be no remedy at all for Plaintiff. In short, where contract or products

liability remedies are available, plaintiff cannot be granted tort remedies as well. Plaintiff's claim cannot be, "... a mere contract claim cloaked in the language of tort." *Giles v. General Motors Acceptance Corp.*, 494 F.3d 865, 880 (C.A.9,2007). It is only where contract remedies or products liability remedies are not available, the economic loss doctrine does not apply and tort remedies are available. If they were not, Plaintiff would have an injury, with no way of recovering damages.

There has been great difficulty among courts in properly applying the economic loss doctrine. It is not accurate to make general and sweeping statements such as there are exceptions to the "ELD in certain categories of negligence cases."[11] To support this statement, Plaintiff cites to two cases, *Sergeants Benevolent Ass'n Annuity Fund v. Renck*, 796 NYS2d 77, (N.Y.App.Div2005) and *Keams v. Tempe Tech. Inst., Inc,* 993 F.Supp. 714 (D.Ct.Ariz.1997) which do not in any way actually support this position.[12]

In the present case, Plaintiff attempts to avoid application of the economic loss doctrine by ignoring facts which make it apparent the doctrine applies here. The pled claims here are actually brought by a Receiver appointed at the request of a creditor of Flamingo-Pecos. The damages which could be awarded on behalf of the creditor would necessarily be the value of breached contract amounts. The claims plead although couched as tort damages, would be calculated based on contract amounts or benefit of the bargain damages. Those would be the basis for establishing the substantial damages to Plaintiff - the amounts Plaintiff was unable to pay to its creditors because they were embezzled by Barnes. Plaintiff's losses are purely economic. "The crux of the [economic loss] doctrine is ... the premise that economic interests are protected, if at all, by contract principles, rather than tort principles." *Calloway*, 116 Nev. 250, 257, 993 P.2d 1259, 1263 - 1264 (2000) 993 P.2d at 1265.

To further illustrate this point, Plaintiff's Complaint seeks compensatory damages, interest

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[11] Opposition at 18:3.

[12] *Sergeants Benev. Ass'n*, 796 NYS2d 77, (N.Y.App.Div2005) was not a case which discussed economic loss and *Keams*, 993 F.Supp. 714 (D.Ct.Ariz.1997) made no findings regarding economic loss doctrine, specifically stating, 'the Court need not reach the issue of whether Plaintiff's recovery in tort would be barred by the "economic loss rule."'

and attorney's fees.[13] Compensatory damages owed to Patriot-Reading Associates, LLC would necessarily be calculated based on the amount of any breached contract with the entity that initiated the Receivership action. Those would be the company's actual damages. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (describing compensatory damages as being "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." We conclude that the term "actual damages" is synonymous with the term "compensatory damages." *Davis v. Beling*, 278 P.3d 501, 128 Nev. Adv. Op. 28. (2012). Compensatory damages must be proven by substantial evidence. *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 235 P.3d 592 (2010). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998).

Patriot-Reading Associates, LLC is going to have access only to contract based damage figures and can necessarily limit its recovery to those amounts. While it has attempted to plead this case as one which is brought derivatively on behalf of the LLC, the Receiver has no standing to do so. The fact remains that this case, stripped of its derivative label is nothing more than a creditor attempting an end run around straightforward litigation in its own name. The sole basis for any calculation of damages is contractual and therefore the economic loss doctrine applies.

E. Freedman is entitled to Attorney's Fees for having been forced to address the obvious problems with the Complaint

Plaintiff opposes Freedman's request for attorney's fees by ignoring the obvious problems with the Complaint as pled and stating that the evidence supports its filing. What the "evidence" indicates, which is actually contained in documents never mentioned nor summarized in the pled claims, does is clearly indicate this matter was improperly brought by a Receiver who has no ability to do what he is trying here. Furthermore, even if that were no the case, the claims are improperly pled and subject to outright dismissal. These actions do not meet the bear minimum of NRCP Rule 11. Moreover, it does not meet the guidelines set forth in NRS 18.010.

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[13] See Complaint at 8.

Attorney's fees are clearly warranted here. Since the Plaintiff's Opposition required additional attorney time in preparing this Reply, Freedman now seeks $6,120.00 for having been forced to bring the instant matter to the Court's attention and seek dismissal.

II.

CONCLUSION

As is demonstrated with this Motion, Plaintiff initiated the present matter without doing little more than making a series of insufficient allegations without the benefit of performing any legal research to determine whether or not the Receiver had the standing or ability to assert the claims it pled derivatively.

First, he ignored that the Nevada Revised Statutes prevented liability in this case because they do not provide for member liability in situations where an LLC is insolvent. He also ignored longstanding statutory interpretation principals which hold that when provisions are omitted from a statute, a negative inference is created since case law presumes such omissions are intentional.

Next, the Receiver is unable to assert a deriviative claim on behalf of the LLC: (1) there was no attempt to comply with the pleading requirements for a derivative action - no facts were pled to demonstrate an effort to secure action by a member or reasons the attempt was not made; and (2) the Receiver has no standing to bring a derivative claim because he was not a member of the LLC at the time of the incident complained of.

Further, the Operating Agreement precludes the relief requested but even if it did not, the rationale for moving forward would be on the basis of causes of action which were not actually pled on behalf of the Plaintiff. The information relied upon to justify the filing of this action does not appear as allegations in the Complaint and is contained in documents which are not referenced therein.

The claims pled are barred by the applicable statute of limitations for negligence and there is no allegation in the Complaint upon which to base a delayed discovery of the facts.

Finally, the economic loss doctrine bars recovery for claims which are actually contractual in nature and where contractual remedies are available.

Therefore, it is respectfully requested that this matter be dismissed and attorneys fees

awarded.

Dated this 15 day of August, 2017.

COOK & KELESIS, LTD.

By: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16 day of August, 2017, in accordance with NRCP 5(b), NEFCRRR Administrative Order 14-2 and NEFCR 9(e), the undersigned provided the clerk with a service list of parties to be served with the above and foregoing **DEFENDANT SHELDON J. FREEDMAN'S REPLY TO OPPOSITION TO MOTION TO DISMISS PURSUANT TO N.R.C.P. 12(b)(5) and 12(b)(6) AND FOR ATTORNEYS FEES PURSUANT TO NRS 18.020** as follows:

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Attorneys For Defendants Matthew Ng MD incorrectly named Mathew Ng MD and Pankaj Bhatnagar MD incorrectly named Pankaj Bhatanagar MD

DISTRICT COURT

CLARK COUNTY, NEVADA

FLAMINGO-PECOS SURGERY CENTER, LLC, a Nevada limited liability company;

Plaintiff,

v.

WILLIAM SMITH MD, an individual; PANKAJ BHATANAGAR MD, an individual; MARJORIE BELSKY MD, an individual; SHELDON FREEDMAN MD, an individual; MATHEW NG MD, an individual; DANIEL BURKHEAD MD, an individual; DOE MANAGERS, DIRECTORS AND OFFICERS 1-25, ROE BUSINESS ENTITIES 1-25;

Defendants.

Case No. :A-17-750926-B
Dept. No. :XV

DEFENDANTS DR. MATTHEW NG AND DR. PANKAJ BHATNAGAR'S REPLY IN SUPPORT OF MOTION TO DISMISS

Hearing Date: September 26, 2017

Hearing Time: 9:00 am

Defendants Dr. Matthew Ng and Dr. Pankaj Bhatnagar (collectively, the "Defendants"), by and through their attorneys of record at HOLLAND & HART LLP, hereby submit this reply memorandum in support of Defendants Dr. Matthew Ng and Dr. Pankaj Bhatnagar's Motion to

Dismiss. This Reply is based on the attached Memorandum of Points and Authorities, the papers and pleadings on file in this action, and any oral argument this Court may allow.

DATED this 25th day of August, 2017

HOLLAND & HART LLP

By _____

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REPLY TO DEFENDANTS' DR. MATTHEW NG and DR. PANKAJ BHATNAGAR's MOTION TO DISMISS

I.

INTRODUCTION

Plaintiff's Opposition asks this Court to disregard binding Nevada Supreme Court precedent which mandates that the negligence based claims (negligent hiring, negligent supervision and negligent retention) and the breach of fiduciary duty claim be dismissed as a matter of law.

First, the three negligence based claims must be dismissed as a matter of law for the following reasons:

(1) The Plaintiff's opposition does not dispute that the Nevada Supreme Court has made it clear that negligent hiring, negligent supervision and negligent retention are claims that can be brought only against an employer. In this case, Plaintiff's

Complaint states that the only employer of Mr. Barnes, the individual who embezzled funds, was the Plaintiff Flamingo Pecos Surgery Center itself.

(2) In regard to the Economic Loss Doctrine, while the Nevada Supreme Court has enumerated certain limited exceptions in which negligence based claims can be asserted in the absence of injury to person or property, those exceptions, as acknowledged in Plaintiff's Opposition, are extremely limited to those "negligence cases against 'attorneys, accountants, real estate professionals and insurance brokers.'" Opposition, p. 8, lns. 21-23. The Plaintiff is asking this Court to expand the exceptions of the Economic Loss Doctrine to include claims against directors, officers and managers arising from the theft of monies caused by another employee. The Nevada Supreme Court has not recognized such an exception to the Economic Loss Doctrine and neither should this Court.

Second, the Nevada Legislature has made it clear that under Nevada's business judgment rule presumption, there can be no liability unless the director or officer has engaged in "intentional misconduct, fraud or a knowing violation of the law." See NRS 78.138(7). The Plaintiff's Opposition does not dispute this but instead has cited to laws of other non-Nevada jurisdictions which make no reference to Nevada's business judgment rule presumption.

Moreover, while Plaintiff improperly attaches documents outside the four corners of its Complaint to show that Defendants may have engaged in other torts that issue is not currently pending before this Court. The issue here is whether based on the Complaint, the Plaintiff can assert viable claims, as a matter of law, for (1) negligent hiring, negligent retention and negligent supervision and (2) breach of fiduciary duty. That answer is a resounding no and Plaintiff's claims based in negligence and breach of fiduciary duty must be dismissed as a matter of law.

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While Plaintiff states that it may seek to amend the Complaint (and the Defendants will vigorously oppose such an effort as being futile), as of this point, the claims for negligence and breach of fiduciary duty must be dismissed as a matter of law.

II.

LEGAL ARGUMENT

A. Plaintiff's claims for Negligent Hiring (First Cause of Action), Negligent Supervision (Second Cause of Action) and Negligent Retention (Third Cause of Action) must be dismissed because these claims impose liability only against an employer, and Plaintiff's Complaint states that it was the Plaintiff who was the employer of Mr. Barnes who committed the acts of embezzlement (as opposed to the Defendants Dr. Ng or Dr. Bhatnagar).

Plaintiff's three negligence based claims must be dismissed, as a matter of law, because the Nevada Supreme Court has made it clear that negligent hiring, negligent supervision and negligent retention are claims that can be brought only against an employer[1]. In Plaintiff's opposition, it does not dispute that there exists binding Nevada Supreme Court precedent on this very issue. In this case, Plaintiff's Complaint acknowledges that the only employer of Mr. Barnes, the individual who embezzled funds, was the Plaintiff Flamingo Pecos Surgery Center itself.

- "Plaintiff's employment of Barnes." Comp. ¶¶ 37, 43, and 44.
- "Barnes' continued employment as Plaintiff's Office Manager." Comp. ¶ 47.
- Mr. Barnes "was Plaintiff's Office Manager." Comp. ¶¶ 20, 22, 24, 48 and 53.

Instead, Plaintiff attempts to distract the Court away from these binding Nevada Supreme Court cases and instead argues that the Defendant Dr. Ng and Dr. Bhatnagar was "a

[1] Moreover, the tort of negligent hiring, supervision and retention are claims that are recognized when a third party has suffered a physical injury and for which the employer shall be held liable. *See Helle v. Core Home Health Services of Nevada*, 2008 WL 6101984 at * 3 (Nov 20, 2008, Nev.); *See Hall v. SFF*, 112 Nev. 1384, 1392, 930 P.2d 94, 99 (1996); *See ETT, Inc. v. Delgada*, 2010 WL 3246334 at * 7 (April 29, 2010, Nev.). In this case, the Plaintiff's Complaint does not allege that it suffered physical injury.

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manager, director, and/or officer of Plaintiff." However, the Plaintiff cannot cite to any Nevada Supreme Court cases, or US Supreme Court cases, where a court has ever imposed liability on an officer, manager, or director for the tort of negligent hiring, negligent supervision or negligent retention. Plaintiff is asking this Court to create new law which disregards binding Nevada Supreme Court precedent which has only imposed liability for these negligent based claims on the employer for which the Complaint acknowledges, in no uncertain terms, was the Plaintiff itself.

B. While Plaintiff has identified four limited exceptions to the Economic Loss Doctrine (negligence cases against attorneys, accountants, real estate professionals and insurance brokers), there is no basis for this Court to expand the list of exceptions enumerated by the Nevada Supreme Court.

While the Nevada Supreme Court has enumerated certain limited exceptions in which negligence based claims can be asserted in the absence of injury to person or property, those exceptions, as acknowledged in Plaintiff's Opposition, are extremely limited to those "negligence cases against 'attorneys, accountants, real estate professionals and insurance brokers.'" Opposition, p. 8, lns. 21-23. The Plaintiff is asking this Court to expand the exceptions of the Economic Loss Doctrine to include claims against directors, officers and managers arising from the theft of monies caused by another employee. The Nevada Supreme Court has not recognized such an exception to the Economic Loss Doctrine and neither should this Court.

Quite tellingly, Plaintiff's Opposition does not dispute that the Nevada Supreme Court had addressed a case similar to this one, when it found that under the economic loss doctrine, an owner of a motel cannot be held liable for negligence which resulted in economic losses caused by a third party scam artist. See *Jordan v. State of Nevada on Relation to the Dept. of Motor Vehicles*[2], 121 Nev. 44, 110 P.3d 30 (2005). In *Jordan*, the Plaintiff had alleged that the Defendant motel owner had knowledge that another motel guest was a scam artists, the motel

[2] This case was abrogated by *Buzz Steew, LLC v. City of North Las Vegas,* 124 Nev. 224 (2008) on unrelated grounds.

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owner was profiting from these scams and the motel owner did nothing to remove the scam artist from the motel property. *Jordan*, 121 Nevada at 55. In *Jordan*, the Court noted that even assuming that the Defendant motel owner had a duty to take actions to prevent the scam artiss from causing injury to Plaintiff, the economic loss rule precluded the Plaintiff from bringing a negligence claim against the motel owner. The Nevada Supreme Court held that a plaintiff "failed to sufficiently state any cause of action for negligence" because he "did not allege that he was physically harmed or injured in any way other that through [a scam artist's] appropriation of a sum of money." *Jordan,* 121 Nev. at 51.

While Plaintiff's Opposition *conveniently* fails to address the Jordan case, the Plaintiff engages in misdirection by misleading this Court to the holding of a non-binding case from the 9th Circuit as purported support that this Court should make an exception to the applicability of the economic loss doctrine. The Economic Loss Doctrine has two components and this legal doctrine can either bar (1) claims based on negligence for purely monetary harm or, (2) it can "bar recovery for other tort claims where the plaintiff's only complaint is that the defendant failed to perform what was promised in the contract[3]." *See Giles*, 494 F.3d at 879. It was in the context of the second category (where the Court was addressing whether Plaintiff could allege a fraud and conversion claim under the ELD which is a wholly separate issue from the negligence claims at issues) that the Court held that the "ELD does not bar claims 'where the defendant had a duty imposed by law rather than by contract and where the defendant's intentional breach[4] of that duty caused purely monetary harm to the plaintiff." (citing Giles v. General Motors Acceptance Corp., 494 F.3d 865, 879 (9th Cir. 2007)). Opposition, p. 9, lns. 1-4. In other words, in *Giles*, the issue was whether the Economic Loss Doctrine barred recovery for the intentional tort of fraud and conversion and the Court specifically held "We therefor held that the economic loss doctrine does not bar Appellant's fraud claim" and "We threefold hold the economic loss doctrine does not bar Appellant's conversion claim." *See Giles*, 494 F.3d at

[3] The second category that has no bearing on this case.

[4] Plaintiff's Complaint does not allege an intentional act by Defendants. Rather the Complaint says the Defendants were "asleep at the wheel" (Complaint, ¶52).

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880. In other words, Plaintiff's reliance on the Giles case was misplaced and the language was taken out of context because the Giles case focused on whether the economic loss doctrine barred claims for fraud or conversion... neither of which are asserted in Plaintiff's Complaint!!

C. Plaintiff's Claim for Breach of Fiduciary Duty (Fourth Cause of Action) must be dismissed under the business judgment rule presumption because Plaintiff's Complaint does not allege Defendant Dr. Ng and Dr. Bhatnagar engaged in "intentional misconduct, fraud or a knowing violation of law" as required under NRS 78.138(7).

While Plaintiff has cited to numerous non-Nevada cases (especially cases from Delaware) imposing liability for breach of fiduciary duty, none of these Delaware cases address Nevada's business judgment rule statute which specifically precludes liability unless the director or officer has engaged in "intentional misconduct, fraud or a knowing violation of the law." See NRS 78.138(7)

While Plaintiffs opposition improperly incorporates selected pages of bankruptcy transcripts and a Final Order of Forfeiture signed by the Honorable Andrew P. Gordon, United States District Court Judge, none of these improperly attached documents show that Defendants Dr. Ng or Dr. Bhatnagar engaged in "intentional misconduct, fraud or a knowing violation of the law" as required by NRS 78.138(7)[5]. Moreover, none of the transcripts even reference Dr. Ng or Dr. Bhatnagar. Moreover, the Opposition argues that the Federal District Court Order is a violation of NRS 86.343 because the Order of Restitution is an improper distribution and is a

[5] The liability imposed upon directors and officers is set forth in NRS 78.138(7) which, *inter alia*, states as follows:

> 7. Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200, 452.270, 668.045 and 694A.030, or unless the articles of incorporation or an amendment thereto, in each case filed on or after October 1, 2003, provide for greater individual liability, **a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages** as a result of any act or failure to act in his or her capacity as a director or officer **unless** it is proven that:
> (a) The director's or officer's act or failure to act constituted a breach of his or her fiduciary duties as a director or officer; **and**
> **(b) The breach of those duties involved intentional misconduct, fraud or a knowing violation of law.**

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fraud transfer of corporate assets. See Opposition, p. 18-19, lns. 25 – 5. This argument is ridiculous because Plaintiff has not identified any documents to even suggest that any monies have been received pursuant to the Court Order of Restitution, and if Plaintiff has any disagreement with the Federal Court Order, it's appropriate relief is to petition the Federal District Court to amend the same. Moreover, even if there was a violation of NRS 86.343 (for improper distributions of an LLC) or a fraudulent transfer of corporate assets (which Defendants vehemently dispute), then those claims should have been asserted in the Complaint (as opposed to a Breach of Fiduciary Duty claim which is a wholly separate claim which must be dismissed as a matter of law).

Moreover, Plaintiff's Opposition does not dispute that even if Plaintiff could assert that Defendants engaged in "intentional misconduct, fraud or a knowing violation of the law," the Nevada Supreme Court requires, pursuant to NRS 78.138(7), the claim must be pleaded "with particularity" pursuant to Rule of Civil Procedure 9(b). *In re AMERCO Derivative Lit.,* 127 Nev. 196, 223, 252 P.3d 681, 700 (2011). Simply put, Plaintiff's Complaint does not contain allegations (including under the heightened pleading standard) that the Defendants acted with "intentional misconduct, fraud or a knowing violation of law" which is necessary to overcome Nevada's statutory business judgment rule presumption.

Simply put, while the Plaintiff argues that the Defendants may have committed a violation under NRS 86.343 or a fraudulent transfer of corporate assets (which Defendants will oppose should Plaintiff file a formal motion for leave to amend Complaint to assert these claims), at the very least, Plaintiff's claim for breach of fiduciary duty must be dismissed as a matter of law.

III.

CONCLUSION

Accordingly, the following claims asserted by the Plaintiff must be dismissed as a matter of law:

(1) Negligent Hiring Against All Defendants (First Cause of Action);

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(2) Negligent Supervision Against All Defendants (Second Cause of Action);

(3) and Negligent Retention Against All Defendants (Third Cause of Action); and

(4) Defendants' Breach of Fiduciary Duty of Care to Plaintiff (Fourth Cause of Action).

DATED this 25th day of August, 2017

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Attorneys for Defendant Dr. Pankaj Bhatnagar and Dr. Matthew Ng.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2017, I served a true and correct copy of the foregoing **DEFENDANTS DR. MATTHEW NG AND DR. PANKAJ BHATNAGAR'S REPLY IN SUPPORT OF MOTION TO DISMISS** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

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☐ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

☐ Email: by electronically delivering a copy via email to the following e-mail address:

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DISTRICT COURT

CLARK COUNTY, NEVADA

FLAMINGO-PECOS SURGERY CENTER, LLC a Nevada limited liability company, Plaintiff, vs. WILLIAM SMITH MD, an individual; PANKAJ BHATANAGAR MD, an individual; MAJORIE BELSKY MD, an individual; SHELDON FREEDMAN MD, an individual; MATHEW NG MD, an individual; DANIEL BURKHEAD MD, an individual; and DOE MANAGERS, DIRECTORS, AND OFFICERS 1-25, ROE BUSINESS ENTITIES 1-25; Defendant.	CASE NO. A-17-750926-B DEPT. NO. XV **ORDER REGARDING DEFENDANTS MOTIONS TO DISMISS** **Hearing Date: 09/26/17** **Hearing Time: 9:00 A.M.**

This Matter, having come regularly on for hearing before the Honorable Joe Hardy, Plaintiff appearing by and through its counsel Todd E. Kennedy, Esq., of the law firm of Black and Lobello PLLC, Defendant Sheldon Freedman, M.D., appearing by and through his counsel Marc P. Cook, Esq., of the law firm of Cook & Kelesis, Ltd., Defendants Pankaj Bhatanagar, M.D., and Matthew Ng, M.D., appearing by and through their counsel Bryce K. Kunimoto, Esq., of the law firm of Holland & Hart, no appearance by Defendant Daniel Burkhead, the Court having reviewed the pleadings and papers on file herein and heard the arguments presented by the parties at the hearings scheduled for this matter, and good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

IT IS HEREBY ORDERED that the Court finds good cause for supplemental briefing regarding the issues related to the pending Motions to Dismiss;

That the good cause for the supplemental briefing includes that the First Amended Complaint does contain substantial modifications upon which the Motions to Dismiss were filed; and that additional arguments in the Replies could have been raised in the original Motions;

IT IS FURTHER ORDERED that thus, it is appropriate and proper based on the changed landscape to schedule supplemental briefing in the following manner:

1. Plaintiff shall have the option to file a Second Amended Complaint on or before October 10, 2017;
2. If a Second Amended Complaint is not filed, this supplemental briefing will proceed as to the First Amended Complaint; if a Second Amended Complaint is filed, the supplemental briefing will address the issue as presented in light of the Second Amended Complaint;
3. The Moving Defendants (Freedman, Bhatanagar, Ng, and Burkhead) shall have until October 24, 2017, to file their response to either the First or Second Amended Complaint which may be in the form of a supplement to each Defendants pending Motion to Dismiss;
4. Plaintiff shall have until November 7, 2017, to file a Supplemental Opposition to any October 24, 2017, supplement(s) to the Motions to Dismiss;
5. Defendants shall have until November 21, 2017, to file a Reply to any Opposition filed with regard to the supplemental briefing;
6. This matter will be heard on November 29, 2017, at 9:00 a.m.

IT IS SO ORDERED.

DATED this 9th day of October, 2017.

DISTRICT COURT JUDGE

Respectfully Submitted By:

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DISTRICT COURT

CLARK COUNTY, NEVADA

FLAMINGO-PECOS SURGERY CENTER, LLC a Nevada limited liability company, Plaintiff, vs. WILLIAM SMITH MD, an individual; PANKAJ BHATANAGAR MD, an individual; MAJORIE BELSKY MD, an individual; SHELDON FREEDMAN MD, an individual; MATHEW NG MD, an individual; DANIEL BURKHEAD MD, an individual; and DOE MANAGERS, DIRECTORS, AND OFFICERS 1-25, ROE BUSINESS ENTITIES 1-25; Defendant.	CASE NO. A-17-750926-B DEPT. NO. XV **NOTICE OF ENTRY OF ORDER REGARDING DEFENDANTS MOTIONS TO DISMISS** Hearing Date: 09/26/17 Hearing Time: 9:00 A.M.

PLEASE TAKE NOTICE that on the 9th day of October, 2017, an Order Regarding Defendants Motions to Dismiss was entered in the above-captioned matter.

A copy of said Order is attached hereto.

Dated this 10 day of October, 2017.

COOK & KELESIS, LTD.

By :

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Attorneys for Defendant, Sheldon J. Freedman

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of October, 2017, in accordance with NRCP 5(b), NEFCRRR Administrative Order 14-2 and NEFCR 9(e), the undersigned provided the clerk with a service list of parties to be served with the above and foregoing **NOTICE OF ENTRY OF ORDER REGARDING DEFENDANTS MOTIONS TO DISMISS** as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

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This Matter, having come regularly on for hearing before the Honorable Joe Hardy, Plaintiff appearing by and through its counsel Todd E. Kennedy, Esq., of the law firm of Black and Lobello PLLC, Defendant Sheldon Freedman, M.D., appearing by and through his counsel Marc P. Cook, Esq., of the law firm of Cook & Kelesis, Ltd., Defendants Pankaj Bhatanagar, M.D., and Matthew Ng, M.D., appearing by and through their counsel Bryce K. Kunimoto, Esq., of the law firm of Holland & Hart, no appearance by Defendant Daniel Burkhead, the Court having reviewed the pleadings and papers on file herein and heard the arguments presented by the parties at the hearings scheduled for this matter, and good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

IT IS HEREBY ORDERED that the Court finds good cause for supplemental briefing regarding the issues related to the pending Motions to Dismiss;

That the good cause for the supplemental briefing includes that the First Amended Complaint does contain substantial modifications upon which the Motions to Dismiss were filed; and that additional arguments in the Replies could have been raised in the original Motions;

IT IS FURTHER ORDERED that thus, it is appropriate and proper based on the changed landscape to schedule supplemental briefing in the following manner:

1. Plaintiff shall have the option to file a Second Amended Complaint on or before October 10, 2017;
2. If a Second Amended Complaint is not filed, this supplemental briefing will proceed as to the First Amended Complaint; if a Second Amended Complaint is filed, the supplemental briefing will address the issue as presented in light of the Second Amended Complaint;
3. The Moving Defendants (Freedman, Bhatanagar, Ng, and Burkhead) shall have until October 24, 2017, to file their response to either the First or Second Amended Complaint which may be in the form of a supplement to each Defendants pending Motion to Dismiss;
4. Plaintiff shall have until November 7, 2017, to file a Supplemental Opposition to any October 24, 2017, supplement(s) to the Motions to Dismiss;
5. Defendants shall have until November 21, 2017, to file a Reply to any Opposition filed with regard to the supplemental briefing;
6. This matter will be heard on November 29, 2017, at 9:00 a.m.

IT IS SO ORDERED.

DATED this 9th day of October, 2017.

DISTRICT COURT JUDGE

Respectfully Submitted By:

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