

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

* * * *

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
IV of IV**

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on behalf of, Flamingo-Pecos Surgery
Center, LLC*

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- AA000008
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

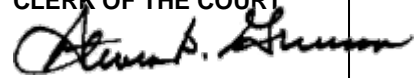
CHRONOLOGICAL ORDER

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10/10/2017	Notice of Entry of Order Regarding Defendants Motions to Dismiss	II	AA000388-AA000394
10/10/2017	Second Amended Complaint	III	AA000395-AA000658

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
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and Pankaj Bhatnagar MD incorrectly named

Pankaj Bhatanagar MD

DISTRICT COURT

CLARK COUNTY, NEVADA

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;

Plaintiff,

v.

WILLIAM SMITH MD, PANKAJ
BHATANAGAR MD, MARJORIE BELSKY
MD, SHELDON FREEDMAN MD,
MATHEW NG MD, DANIEL BURKHEAD
MDDOE 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
MOTION TO DISMISS SECOND
AMENDED COMPLAINT**

Hearing Date: November 29, 2017

Hearing Time: 9:00 a.m.

Defendants Dr. Matthew Ng and Dr. Pankaj Bhatnagar (collectively, the "Defendants"),
by and through their attorneys of record at HOLLAND & HART LLP, hereby move this Court
to dismiss all claims for relief against the Defendants. Specifically, the Defendants move to
dismiss Plaintiff's negligence based claims and breach of fiduciary duty. This motion is made

pursuant to NRCp 12(b)(5) and EDCR 2.20, the Memorandum of Points and Authorities, the pleadings and papers on file herein, and any oral argument this Court may allow.

DATED this 23rd day of October, 2017

HOLLAND & HART LLP

By/s/ Susan M. Schwartz

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*Attorneys For Defendants Matthew Ng MD
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NOTICE OF MOTION

TO: ALL INTERESTED PARTIES

PLEASE TAKE NOTICE that DR. PANKAJ BHATNAGAR AND DR. MATTHEW NG'S MOTION TO DISMISS will come for hearing before Department XV of the above-entitled Court on the 29th day of November, 2017 at 9:00 a.m.

DATED this 23rd day of October, 2017

HOLLAND & HART LLP

By/s/ Susan M. Schwartz

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS**

I.

INTRODUCTION

Defendants Dr. Pankaj Bhatnagar and Dr. Matthew Ng (collectively "Defendants"), former officers of Flamingo-Pecos Surgery Center, LLC ("FPSC"), are also victims of the despicable conduct caused by Robert Barnes, FPSC's former officer manager, who embezzled monies from FPSC. Plaintiff Mark J. Gardberg, Esq., as Receiver for FPSC ("Plaintiff" or "Gardberg"), seeks to shift liability to the Defendants for the intentional wrongful conduct of FPSC's former officer manager.

Here, Plaintiff has alleged claims based on negligence, breach of fiduciary duties, breaches of the operating agreement, waste, breaches of NRS Chapter 86, and for imposition of a constructive trust.

The negligence claims must be dismissed under the economic loss doctrine because negligence claims must result in physical injury to FPSC's person or property. Money is not considered property. Economic injury cannot serve as a basis for a negligence claim. The Nevada Supreme Court previously held that "[b]ecause [Plaintiff's] claimed damages are purely economic in nature, the district court erred in failing to dismiss [Plaintiff's] negligence claim pursuant to the economic loss doctrine."

Furthermore, even if Plaintiff could allege physical injury to person or property (which he cannot), Plaintiff's claims for negligent hiring/supervision/retention must be dismissed because these claims impose liability only on an employer (as opposed to the employee). The Second Amended Complaint ("SAC") does not allege the Defendants were the employer of Mr. Barnes, but instead acknowledges Mr. Barnes was Plaintiff's "Office Manager" (*see* SAC, ¶¶ 14, 16, 66, 69, 76-77, 168, 172, 176, 182) and that Mr. Barnes' employment was with FPSC (*id.* at ¶¶ 165, 168, 172, 173 "Flamingo's employment of Barnes") (See also *id.* at ¶ 176 "Barnes continued employment as Flamingo's Office Manager").

In addition, Plaintiff's claims for breach of fiduciary duties of care and loyalty must also be dismissed as a matter of law because the SAC does contain allegations that overcome the

powerful statutory protections afforded to business decisions made by Nevada officers and directors. First, the SAC does not plead allegations specific to Defendants that overcome the basic and express statutory presumption that that “Directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation.” NRS 78.138(3). Second, the SAC does not plead allegations specific to either Dr. Ng or Dr. Bhatnagar as having engaged in “intentional misconduct, fraud or a knowing violation of law” (*see* NRS 78.138(7)) or acted with gross negligence in order to overcome the business judgment rule. Rather, Plaintiff draws legal conclusions and makes assumptions about all defendants, failing to make any allegations specific to Drs. Ng and Bhatnagar.

Finally, Plaintiff lacks standing to bring claims under NRS Chapter 86. The Plaintiff has not alleged how he has a private right of action for any relief sought under NRS 86. As such, Plaintiff has no standing to assert claims under NRS 86.

Accordingly, Plaintiff’s claims based in negligence, breaches of fiduciary duties, and violations of NRS Chapter 86 must be dismissed as a matter of law.

II.

SUMMARY OF PLAINTIFF’S ALLEGATIONS¹

A. The Receiver.

FPSC had a lease for its ambulatory surgery center with Patriot-Reading Associates, LLC (“Patriot”). SAC, ¶ 2. On March 23, 2014, Patriot sued FPSC for breach of contract (*Patriot-Reading Associates LLC v. Flamingo-Pecos Surgery Center LLC* , case no. A-16-733627). *Id.* at ¶ 5. Default was entered against FPSC, and default judgment was then entered in favor of Patriot. *Id.* at ¶¶ 7-8. On August 10, 2016, Patriot moved for and was granted an appointment of receiver over FPSC. (the “Receivership Order”). *Id.* at ¶ 11. In the September 13, 2016 order, Timothy R. Mulliner was appointed as receiver (“Mulliner”). *Id.*

¹ To be clear, Defendants vehemently dispute the numerous false allegations asserted in the SAC. For purposes of considering the instant motion, however, the factual allegations are presented as alleged.

1 The Receivership Order granted the receiver authority to take possession of and manage
2 FPSC property, determine whether to make payments and whether to liquidate FPSC property,
3 pursue claims which FPSC may have, and pursue claims related to FPSC's "former
4 employee/office manager Robert W. Barnes." SAC, ¶ 14. The receiver was also authorized to
5 take any action deemed necessary to collect FPSC's accounts and debts owed to it. *Id.* at 15.

6 On or about July 21, 2017, Mark J. Gardberg replaced Mulliner as the receiver.²

7 **B. Allegations Against All Defendants.**

8 Plaintiff alleges that Dr. Pankaj Bhatnagar³ and Dr. Matthew Ng⁴ were both managers,
9 directors and/or officers of the FPSC. SAC, ¶¶ 4, 26, 29. FPSC was an LLC operating an
10 ambulatory surgery center with 27 practicing surgeons located in southwest Las Vegas, Clark
11 County, Nevada. *Id.* at ¶ 2, 24, 44. Robert J. Barnes ("Barnes") was FPSC's office manager
12 (*Id.* ¶¶ 14, 16, 66, 69, 76-77, 168, 172, 176, 182) and he has since been sentenced to prison for
13 his actions, detailed below. *Id.* at ¶ 49.

14 Plaintiff alleges that all defendants hired Barnes on October 5, 2006 for the position of
15 FPSC's office manager. *Id.* at ¶ 66. Plaintiff concedes that Barnes' employer was the FPSC.
16 SAC, ¶¶ 14, 16, 66, 69, 76-77, 168, 172, 176, 182. Barnes' functions and responsibilities
17 extended to FPSC's full financial workings, accounts and books. *Id.* at ¶ 69. Plaintiff alleges
18 that all defendants hired Barnes as FPSC's Office Manager. *Id.* at ¶ 70. Plaintiff alleges that all
19 defendants failed to supervise, oversee and/or monitor Barnes for many years during Barnes'
20 crime spree, allowing a criminal to effectuate and conduct his embezzlement and theft from
21 FPSC. *Id.*

22 Plaintiff further alleges that all defendants failed – for an unreasonably lengthy period of
23 time – to remove Barnes from his position as Office Manager, and to block Barnes' access to
24 FPSC's funds and assets. SAC, ¶ 120. Plaintiff alleges that all "Defendants individually and
25 collectively damaged Flamingo through a series of actions and inactions occurring over the

26 _____
27 ² From here on, any references to the "Receiver" refer to Gardberg as the receiver.

28 ³ Plaintiff's SAC incorrectly spelled Dr. Bhatanagar.

⁴ Plaintiff's SAC incorrectly spelled Dr. Matthew Ng.

1 course of several years,” related to the injury to FPSC caused by Barnes. *Id.* at ¶¶ 37, 39.
2 Specifically, Plaintiff alleges all defendants acted, or failed to act, with “gross negligence,
3 willful misconduct, and reckless/intentional disregard” regarding Barnes’ actions, as well as
4 their duties to FPSC. *Id.* at ¶¶ 39-40, 45.

5 Barnes admitted in subsequent criminal proceedings (brought by the U.S. Government
6 against Barnes) that Barnes embezzled at least \$1.3 million during the course of his crime spree
7 over many years. SAC, ¶ 98. Upon discovery of Barnes’ embezzlement and theft, all
8 defendants failed to (a) demand that Barnes return FPSC’s funds and assets; (b) pursue Barnes;
9 and (c) file a civil complaint against Barnes, with such failures resulting in substantial damages
10 against FPSC. *Id.* at ¶ 121.

11 Plaintiff, therefore, went on to allege that all defendants are liable for

- 12 • Grossly negligent hiring, supervision, and retention of Barnes, ***First – Third***
13 Causes of Action;
- 14 • Breaches of fiduciary duties of care and loyalty to FPSC, ***Fourth*** and ***Fifth***
15 (incorrectly labeled Fourth again) Causes of Action;
- 16 • Breach of the operating agreement, ***Sixth*** (incorrectly labeled Fifth) Cause of
17 Action;
- 18 • Waste, ***Seventh*** (incorrectly labeled Sixth) Cause of Action;
- 19 • Breaches of NRS Chapter 86, ***Eighth*** (incorrectly labeled Seventh) Cause of
20 Action; and
- 21 • Imposition of a constructive trust, ***Ninth*** (incorrectly labeled Eighth) Cause of
22 Action.

23 Plaintiff claimed that all defendants’ stories are inconsistent regarding Barnes’ actions and the
24 actions of FPSC, yet that all defendants “slept on their basic obligations for many years,
25 [constituting] grossly, willfully and intentionally negligent conduct . . . and, a breach of” all
26 defendants’ fiduciary duties to FPSC. SAC, ¶ 119. Essentially, Plaintiff alleged all defendants
27 “were willfully blind to Barnes’ criminality for several years, and that [all defendants] failed
28 upon discovery to immediately stop Barnes and protect [FPSC].” *Id.* at ¶ 118.

III.

LEGAL ANALYSIS

A. Legal Standard Under Rule 12(b)(5)

Rule 12(b)(5) of the Nevada Rules of Civil Procedure (“NRCP”) specifically provides that the defense of failure to state a claim upon which relief can be granted may be made by motion. *Gull v. Hoals t*, 77 Nev. 54, 59, 359 P.2d 383, 385 (1961); NRCP 12(b)(5). In *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008), the Nevada Supreme Court stated that when ruling on a motion to dismiss, the Court must “recognize all factual allegations in [the plaintiff’s] complaint as true and draw all inferences in its favor.” However, only “fair” inferences arising from the pleading must be accepted by the court. *Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997). In addition, the court need not accept as true conclusory allegations or legal characterizations of counsel. *See Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) (interpreting substantively identical FED. R. CIV. P. 12(b)(6)). Dismissal for failure to state a claim “can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *E.g., Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

B. Plaintiff’s Negligence Based Claims Must Be Dismissed Because They Are Barred Under the Economic Loss Doctrine.

Absent injury to person or property, a plaintiff may not recover in negligence for economic loss. Here, Plaintiff’s SAC includes claims for Grossly Negligent Hiring Against All Defendants (First Cause of Action), Grossly Negligent Supervision Against All Defendants (Second Cause of Action) and Grossly Negligent Retention Against All Defendants (Third Cause of Action). All of these three claims are based in negligence but yet Plaintiff’s alleged damages are pure monetary losses. Specifically, Plaintiff alleges that Barnes “embezzled at least \$1.3 million over many years,” up to \$3.5 million. SAC, ¶¶ 98, 156.

Plaintiff’s negligence based claims must be dismissed under Rule 12(b)(5) because the SAC does not allege that Plaintiff suffered any physical injury to its person or property. The

1 Nevada Supreme Court has held that “[t]he well established common law rule is that absent []
2 any injury to person or property, a plaintiff may not recover in negligence for economic loss.”
3 *Local Joint Executive B.d. of Las Vegas, Culinary Workers Union, Local No. 226 v. Stern*, 98
4 Nev. 409, 411, 651 P.2d 637, 638 (1982)(citing *Robins Dry Dock & Repair Co., v. Flint*, 275
5 U.S. 303, 48 S.Ct 14 (1927). The starting point in Nevada for the Economic Loss Doctrine is
6 *Stern*, which expressly applied the doctrine for the first time and set forth in its underlying
7 rationale.

8 Since *Stern*, the Nevada Supreme Court has many times reaffirmed the Economic Loss
9 Doctrine. For example, in *Arco Prods. Co. v. May*, 113 Nev. 1295, 948 P.2d 263 (1997), a
10 franchisee of an AM/PM Mini Market sued its franchisor for a defective cash register, which
11 often failed to scan purchases made by customers. The franchisee sued under theories of
12 negligence and strict liability. The Court granted a motion to dismiss with regard to the strict
13 products liability claim, but a jury awarded damages on the negligence claim. The Nevada
14 Supreme Court reaffirmed its position that the doctrine applies equally to claims of negligence
15 and strict liability. The Court then reversed the negligence verdict due to the fact that the
16 claimed damages were “purely economic in nature.” *Arco*, 113 Nev. at 1298. The Nevada
17 Supreme Court held that “[b]ecause [Plaintiff’s] claimed damages are purely economic in
18 nature, the district court erred in failing to dismiss [Plaintiff’s] negligence claim pursuant to the
19 economic loss doctrine.” *Id.* The Nevada Supreme Court specifically reaffirmed the well-
20 founded common law rule that “absent... injury to person or property, a plaintiff may not
21 recover in negligence for economic loss.” *Arco*, 113 Nev. at 1299.

22 Moreover, the Nevada Supreme Court addressed a similar case to the one at issue. See
23 *Jordan v. State of Nevada on Relation to the Dept. of Motor Vehicles*, 121 Nev. 44, 110 P.3d 30
24 (2005). In *Jordan*, the Court noted that even assuming a motel owner had a duty to inform
25 Plaintiff that a motel guest was a scam artist, the economic loss rule precluded the Plaintiff from
26 bringing a negligence claim against the motel owner. The Nevada Supreme Court held that a
27 plaintiff “failed to sufficiently state any cause of action for negligence” because he “did not
28 allege that he was physically harmed or injured in any way other than through [a scam artist’s]

1 appropriation of a sum of money.” *Jordan*⁵, 121 Nev. at 51.

2 Plaintiff’s SAC seeks damages for economic loss only, and binding Nevada Supreme
3 Court authority directs adjudication as a matter of law. Plaintiff’s negligence based claims are
4 an attempt “to pound a square peg in a round hole” for purposes of manufacturing legal liability
5 where none exists. For these reasons, all of Plaintiff’s negligence based claims must be
6 dismissed which include the following: (1) Grossly Negligent Hiring Against All Defendants
7 (First Cause of Action); (2) Grossly Negligent Supervision Against All Defendants (Second
8 Cause of Action); and (3) Grossly Negligent Retention Against All Defendants (Third Cause of
9 Action).

10 **C. Plaintiff’s Claims for Grossly Negligent Hiring/Supervision/Retention Must Be**
11 **Dismissed Because These Claims Impose Liability on an Employer (As Opposed to**
12 **the Employee)**

13 Moreover, even if the Plaintiff could show physical injury to person or property (which
14 Plaintiff does not and cannot allege), the tort of grossly negligent hiring (First Cause of Action),
15 grossly negligent supervision (Second Cause of Action) and grossly negligent retention (Third
16 Cause of Action) are claims against an employer (as opposed to the employee). In this case,
17 Plaintiff’s SAC acknowledges that Mr. Barnes, the person who embezzled monies from FPSC,
18 was its office manager (SAC, ¶¶ 14, 16, 66, 69, 76-77, 168, 172, 176, 182), and that Mr.
19 Barnes’ employment was with FPSC (*id.* at ¶¶ 16 “office manager for Flamingo, Robert J.
20 Barnes;” *see also id.* at ¶ 69 “Barnes’ functions and responsibilities as Flamingo’s office
21 manager;” ¶¶ 76-77 “Barnes’ performance as Flamingo’s office manager;” ¶ 172 “Barnes
22 during his employment as Flamingo’s office manager;” ¶ 176 “Barnes’ continued employment
23 as Flamingo’s office manager). In other words, Plaintiff acknowledges that Mr. Barnes’
24 employment was with FPSC, and not the individual physician Defendants. The torts of
25 negligent hiring/supervision/retention are all claims against an “employer” who in this case is
26 FPSC, who Plaintiff represents.

27 _____
28 ⁵ This case was abrogated by *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224 (2008) on unrelated grounds.

- 1 ● “The tort of **negligent hiring and supervision creates employer liability** when
2 the employer exacerbates the normal risks to be borne by the business through
3 the employer’s own negligence.” (emphasis added) *Wright v. Watkins and*
4 *Shepard Trucking, Inc.*, 968 F. Supp. 2d 1092, 1095 (2013).
- 5 ● The Nevada Supreme Court recognized that “**negligent hiring** liability is
6 imposed ‘when the **employer** knew or should have known that the employee was
7 violent or aggressive and might engage in injurious conduct.’” (emphasis added)
8 *Hall v. SFF* , 112 Nev. 1384, 1392, 930 P.2d 94, 99 (1996) (*citing Yunker v.*
9 *Honeywell, Inc.*, 496 N.W.2d 419, 422 (Minn. Ct. App. 1993)).
- 10 ● “The tort of **negligent training and supervision imposes direct liability on the**
11 **employer** if (1) the **employer knew** that the employee acted in a negligent
12 manner, (2) the **employer failed** to train or supervise the employee adequately,
13 and (3) the employer's negligence proximately caused the plaintiffs injuries.”
14 (emphasis added). *Helle v. Core Home Health Services of Nevada* , 2008 WL
15 6101984 at * 3 (Nov 20, 2008, Nev.)
- 16 ● “To prove **negligent supervision/retention**, a plaintiff must establish that the
17 ‘**employer** knew or should have known its employee behaved in a dangerous or
18 otherwise incompetent manner, and that the employer, armed with that actual or
19 constructive knowledge, failed to adequately supervise the employee.” (emphasis
20 added) *ETT, Inc. v. Delgada*, 2010 WL 3246334 at * 7 (April 29, 2010, Nev.)

21 Moreover, even if the Plaintiff had alleged injury to person or property (which Plaintiff
22 has not alleged), the torts of negligent hiring/supervision/retention are all claims against an
23 “employer.” In this case, the employer was FPSC (as opposed to the individual defendants,
24 including Dr. Bhatnagar and Dr. Ng). Because there is no allegation that Dr. Bhatnagar and Dr.
25 Ng were the employers of Barnes, the claims for grossly negligent hiring/supervision/retention
26 must be dismissed as against the Defendants.

27 **D. Plaintiff’s Breach of Fiduciary Duty Claims Fail as a Matter of Law.**

28 Plaintiff’s claim for breaches of the fiduciary duties of care and loyalty (Fourth and Fifth

(misabeled in the SAC as fourth and fourth) Causes of Action) must be dismissed against Defendants because these claims are governed by an express statutory scheme, known as the business judgment rule, that protects officers and directors by strictly limiting the circumstances in which they can be held personally liable for their business decisions. First, NRS 78.138(3)⁶ establishes a presumption that “Directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation.” Second, NRS 78.138(7) provides that in order to state a damages claim against officers and directors, a plaintiff must allege that the defendants breached their fiduciary duties and that they engaged in “intentional misconduct, fraud or a knowing violation of law.” 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.

(emphasis added). Therefore, the business judgment rule applies to protect Defendants unless Plaintiff pleads *and* proves that the alleged acts or omissions involved breaches of fiduciary duty *and* intentional misconduct, fraud, a knowing violation of law (*id.*), for an alleged breach of the duty of loyalty, or in the case of an alleged breach of the duty of care, “gross negligence of uninformed directors and officers.” *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640, 137 P.3d 1171, 1184 (2006).

⁶ Though NRS 78 is the Nevada Corporations code and the Plaintiff is a limited liability company, Nevada Courts have consistently applied the law of corporations to LLC’s for purposes of the business judgment rule. *Guy v. Casal Institute of Nevada, LLC*, 2015 WL 56048, at *2 (Jan 5, 2015, D. Nev.) (*citing Montgomery v. eTreppe Technologies, LLC*, 548 F.Supp.2d 1175, 1179 (D. Nev. 2008) (**recognizing that federal and state courts have consistently applied the law of corporations to LLCs for piercing the corporate veil, the ‘alter ego’ doctrine, the ‘business judgment rule,’ and derivative actions.**)” (emphasis added).

1 In addition, in an effort to spruce up his complaint, Plaintiff dresses up his allegations
2 and claims with legal buzzwords like “intentional” and “knowing.” Indeed, by using these
3 terms without any attempt at precision, Plaintiff makes inferences and draws conclusions not
4 only to support, but to create his claim of breaches of duty of loyalty to FPSC. Nonetheless, the
5 allegations do not support such conclusory statements made merely for the purposes of trying to
6 defeat a motion to dismiss. *See In re Amerco Derivative Litigation*, 252 P.3d 681, 706 (2011)
7 (“conclusory allegations are not considered as expressly pleaded facts or factual inferences”)
8 (internal quotation omitted); *see also Davenport v. GMAC Mortg.*, 2013 WL 5437119 at *3
9 (Nev. Sept. 25, 2013) (“[W]e have never held that this type of conclusory legal allegation must
10 be accepted as true.”).

11 **1. Duty of Care.**

12 Here, as to the duty of care, alleges that “Defendants completely neglected this duty,
13 [and] . . . Defendants’ failures allowed Barnes’ theft continue unabated.” SAC, ¶ 181. The
14 Plaintiff also alleges that Defendants failed to:

- 15 a. oversee, supervise, monitor and discipline Flamingo’s office
16 manager, who was embezzling and stealing from Flamingo;
- 17 b. supervise, care for, monitor or even review Flamingo’s books,
18 accounts, and finances while Barnes was Flamingo’s office
19 manager;
- 20 c. expeditiously remove Barnes from the position of Flamingo’s
21 office manager upon the discovery of Barnes’ embezzlement and
22 theft;
- 23 d. audit, investigate and/or determine the extent of Barnes’
24 embezzlement and theft to protect Flamingo’s interests;
- 25 e. pursue Barnes on behalf of Flamingo to recover Flamingo’s
26 assets, funding and interests from Barnes;
- 27 f. pursue third-parties, including banks holding Flamingo’s funds,
28 to recover Flamingo’s assets and funds;
- g. pursue and collect on millions of dollars in receivables owed to
Flamingo;
- h. take appropriate, reasonable and necessary steps to protect
Flamingo’s interests vis-à-vis Barnes and certain Defendants; and
- i. protect and pursue, or even register, Flamingo’s interests in
Barnes’ restitution action – resulting in the rightful victim
(Flamingo) receiving no award, and Defendants receiving
personal, ill-gotten awards.

27 *Id.* at ¶ 182. Plaintiff does not plead gross negligence here, nor that the Defendants were
28 uninformed. Actually, Plaintiff cannot decide whether Defendants were uninformed or not. In

fact, Plaintiff at times alleges Defendants had knowledge. *See, e.g.*, SAC, ¶ 46 (alleging knowledge of Barnes' actions), ¶ 54 (alleging knowledge of FPSC's insolvency and claim to restitution). Accordingly, how could any action or inaction have been uninformed?

Further, Plaintiff fails to assert any allegations regarding whether Defendants specifically sought advice or held any discussions about how to proceed, at any point. Plaintiff's averments pertain to all defendants generally, and in fact, fail to make any allegations specific to Drs. Ng and Bhatnagar.⁷ Therefore, Defendants are protected by the business judgment rule regarding the fiduciary duty of care because Plaintiff has not alleged how there has been any intentional misconduct by Defendants notwithstanding its use of conclusory and unsupported "buzzwords."

Further, inasmuch as Plaintiff's negligent hiring/supervision/retention claims must be properly directed at FPSC, as the employer (discussed in II.C., *supra*), any such allegations as the basis for the breach of duty of care must also be dismissed as a matter of law, because they cannot arise against the Defendants individually, as discussed above. *See* SAC, ¶ 182(a)-(c). Also, in as much as Plaintiff's negligent hiring/supervision/retention claims are based in negligence, the allegations of the breach of duty of care premised thereon must be dismissed under the economic loss theory, as discussed in II.B., *supra*.

2. Duty of Loyalty.

Similarly, Defendants are protected by the business judgment rule regarding the fiduciary duty of loyalty. Plaintiff fails to allege Defendants knew they were violating the law, only alleging that Defendants are included on the Restitution List (SAC, ¶¶ 56, 160). Plaintiff has failed to make *any* allegations whatsoever that Defendants were the beneficiaries of Barnes' required restitution; that is, Plaintiff failed to allege that Defendants *received* even a single dime in restitution.

It is well-established that legal conclusions or opinions couched as facts do not preclude dismissal. *See, e.g., In re Amerco Derivative Litigation*, 252 P.3d at 706 ("While '[p]laintiffs

⁷ In accordance with the SAC, none of the exhibits attached thereto make any accusations specific to either Dr. Ng or Dr. Bhatnagar.

are entitled to all reasonable factual inferences that logically flow from the particularized facts alleged, ... conclusory allegations are not considered as expressly pleaded facts or factual inferences.”) (citations omitted); *see also Davenport*, 2013 WL 5437119 at *3 (“Although the factual allegations contained in a complaint must be accepted as true, we have never held that this type of conclusory legal allegation must be accepted as true.”). The overuse of these legal buzzwords does not mean that Defendants acted in such a manner—it only dresses up Plaintiff’s SAC. As the Supreme Court instructed in *Ashcroft v. Iqbal*: the rules do “not unlock the doors . . . for a plaintiff armed with nothing more than conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). Such conclusions and assumptions cannot lie, and dismissal of this claim is warranted.

E. Plaintiff’s Lacks Standing to Bring Claims Under NRS Chapter 86.

Limited liability companies are organized and operate under NRS Chapter 86. *See* NRS 86.141. Generally, the only private cause of action permitted under NRS 86 is for a derivative action; NRS 86.483 – NRS 86.487 contain specific requirements for bringing a derivative action. However, “[i]n a derivative action, the plaintiff must be a member at the time of the transaction of which the plaintiff complains.” NRS 86.485 (emphasis added). *Cf.* NRCP 23.1 (“In a derivative action brought by one or more **shareholders or members** to enforce a right of a corporation or of an unincorporated association”) (emphasis added).⁸

The Complaint does not allege that Plaintiff is or ever was a member of FPSC. Instead, he is the Receiver for FPSC. SAC, ¶ 24. Since Plaintiff is not a member, was not a member at the time of the alleged harms he cannot file a derivative claim. *See* NRS 86.485; *Parametric Sound Corp. v. Eighth Judicial Dist. Court in & for County of Clark*, 401 P.3d 1100, 1105

⁸ While Defendants maintain Plaintiff lacks standing to bring a derivative suit because he is not a member of FPSC, NRCP 23.1 nonetheless requires a *verified* complaint alleging “that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff’s share or membership thereafter devolved on the plaintiff by operation of law.” NRCP 23.1. Plaintiff has not verified his SAC. Simply put, he is unable to do so by virtue of the fact that he is not now nor has ever been a member of FPSC.

In addition, NRCP 23.1 requires a plaintiff to have made a demand on the directors, unless such demand would be futile. NRCP 23.1. *See also* NRS 86.483; NRS 41.520; *Parametric Sound Corp.*, 401 P.3d at 1105. Plaintiff fails to allege he has made such a demand or the futility of such a demand. Again, he is unable to do so because he is not now nor has ever been a member of FPSC.

1 (Nev. 2017) (quoting *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 19, 62 P.3d 720, 732 (2003)
2 (“A derivative claim is one brought by a **shareholder** on behalf of the corporation to recover for
3 harm done to the corporation”) (emphasis added). The Plaintiff has not alleged how he has
4 standing to seek any relief under NRS 86.

5 In addition, although NRS 86.343 provides for liability of a “member who **receives** a
6 distribution in violation of this section” (NRS 86.343(6)-(7) (emphasis added)), Plaintiff has not
7 alleged that Defendants **received** such distributions. Plaintiff’s only possible related allegation
8 is that all “Defendants also violated, *inter alia*, the Nevada law against distributions of LLC
9 funds where the LLC is insolvent (NRS 86.343).” SAC, ¶ 60. However, as discussed in
10 Section II.D., *supra*, legal conclusions stated as fact should not be accepted as true. Therefore,
11 NRS 86.343 is inapplicable here.

12 Further, though “a judgment creditor of a member” is granted a right of action under
13 Chapter 86 (NRS 86.401), Plaintiff does not claim to be a judgment creditor of any member of
14 FPSC, nor does he allege having a “charging order . . . by which a judgment creditor of a
15 member can seek satisfaction.” *Weddell v. H2O, Inc.*, 128 Nev. Adv. Op. 9, 271 P.3d 743, 749
16 (2012) (internal citation omitted). Nonetheless, charging orders only provide a right to the
17 member’s economic interest in the LLC. *See Becker v. Becker*, 131 Nev. Adv. Op. 85, 362 P.3d
18 641, 644 (2015). Thus, NRS 86.401 also does not apply in this matter.

19 In sum, this is not a derivative suit, nor is Plaintiff afforded any right of action under
20 Chapter 86 to raise these claims. Accordingly, the NRS Chapter 86 claims must be dismissed.

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IV.

CONCLUSION

Accordingly, the following claims asserted by the Plaintiff, as specific to Drs. Ng and Bhatnagar, must be dismissed as a matter of law:

- (1) Grossly Negligent Hiring Against All Defendants (First Cause of Action);
- (2) Grossly Negligent Supervision Against All Defendants (Second Cause of Action);
- (3) Grossly Negligent Retention Against All Defendants (Third Cause of Action);
- (4) Defendants' Breach of Fiduciary Duty of Care to FPSC (Fourth Cause of Action);
- (5) Defendants' Breach of Fiduciary Duty of Loyalty to FPSC (Fifth Cause of Action (incorrectly labeled Fourth)); and
- (6) Defendants' Breaches of NRS Chapter 86 (Eighth Cause of Action (incorrectly labeled Seventh)).

DATED this 23rd day of October, 2017

HOLLAND & HART LLP

By/s/ Susan M. Schwartz

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of October, 2017, I served a true and correct copy of the foregoing **DEFENDANTS DR. MATTHEW NG AND DR. PANKAJ BHATNAGAR'S MOTION TO DISMISS SECOND AMENDED COMPLAINT** 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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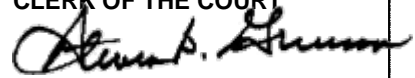
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DISTRICT COURT
CLARK COUNTY, NEVADA

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,

Plaintiff,

vs.

WILLIAM SMITH MD; PANKAJ
BHATANAGAR MD; MAJORIE BELSKY
MD; SHELDON FREEDMAN MD;
MATHEW NG MD; DANIEL BURKHEAD
MD; 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 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**

Hearing Date: 11/29/17
Hearing Time: 9:00 A.M.

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 Supplement to Motion
to Dismiss Complaint, First Amended Complaint, and Second Amended Complaint pursuant to
Nev.R.Civ.P. 12(b)(5) and Nev.R.Civ.P. 12(b)(6).

AA000676

1 This Supplement is based on papers and pleadings on file herein, the following points and
2 authorities, and upon oral argument of counsel at the time of the hearing of the motion.

3 Dated this 29 day of October, 2017.

4 COOK & KELESIS, LTD.

5

6

7

By :

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1 **POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 Defendant Freedman filed a Motion to Dismiss the original Complaint on June 27, 2017.
5 Since that time, Plaintiff Flaming-Pecos Surgery Center has twice amended the Complaint and the
6 Supreme Court has issued a decision addressing individual liability in the context of limited liability
7 companies. The Supreme Court case, as will be discussed hereinbelow, clearly demonstrates that
8 this Complaint must be dismissed. Moreover, the First and Second Amendments to the Complaint
9 do not remedy the need for dismissal. On the contrary, these changes only magnify its necessity.

10 By way of example, while the Plaintiff has changed the name of the Plaintiff to reflect a
11 Receivership, in so doing and incorporating and referencing the Receivership Order, it is clear that
12 the Receivership Order does not give authority to the Receiver to move forward in this case. Further,
13 the ability to proceed against Moving Defendant still fails pursuant to NRS 86 as well as the
14 Operating Agreement. Finally, the statute of limitation requirements have clearly not been met in
15 the case *sub judice*. The new information filed by the Receiver only magnifies this need for
16 dismissal.

17 **II.**

18 **THE INDIVIDUAL MEMBERS OF THE LLC ARE NOT LIABLE IN THIS ACTION**

19 **A. NRS Chapter 86**

20 NRS Chapter 86 prevents culpability for these members. Further, the Operating Agreement
21 itself prevents such a lawsuit. Both issues are dispositive to this case. Additionally, this is a
22 derivative suit without a derivative demand and therefore the Receiver does not have standing to
23 pursue the same. Moreover, the Supreme Court's recent ruling addressing liability of limited
24 liability members under *Gardner v. Henderson Water Park LLC*, 133 Nev. Adv. Op 54 399 P.3d 350
25 (August 3, 2017) makes it plainly clear dismissal is warranted. As *Gardner* was not addressed in
26 the prior Motion, it is addressed first below.

1 **B. Supreme Court Has Recently Precluded The Type of Lawsuit That Plaintiff is Pursuing**

2 In *Gardner supra* the Supreme Court relied upon various cases to support its position that
3 NRS Chapter 86 protects individuals from liability related to their acts as members. The court also,
4 not surprisingly, advised that this protection would not shield a member of a limited liability
5 company for personal acts of negligence committed, i.e., using an LLC as a shield against personal
6 culpability. However, our Supreme court clearly indicated that “personal liability for negligence will
7 not stand when the plaintiff fails to allege that the members acts ‘are either done outside one’s
8 capacity as a member. . . .or which while done in one’s capacity as a member . . . also violates some
9 personal duty owed by the individual to the injured party.’” *Gardner* 133 Nev. Adv. Op. 54, at pg
10 4-5 citing as a parenthetical *Petch v. Humble*, 939 So.2d 499, 504 (La. Ct. App. 2006). Therefore,
11 the Nevada Supreme Court held that it would be impermissible to “seek to hold a member-LLC
12 liable for alleged negligence of the [entity’s business] solely by virtue of the member-LLC’s being
13 managing members of the [entity].” *Id.* at 5. Freedman asks for the same ruling here.

14 Specifically, in *Gardner*, plaintiffs sought to have members of a water park found
15 individually liable for severe injuries to plaintiff. This included allegations that the water park
16 members allowed improper or inadequate staffing and “breached certain duties that only arise based
17 on the members - LLC’s roles as member.”¹ The court noted that members of an LLC enjoy the
18 benefit of limited liability which refers to their acts as a member not being personally liable for the
19 LLC solely by virtue of being a member. Again, Dr. Freedman requests the same protection as
20 directed in *Gardner*.

21 The court cited and upheld the Chapter 86 argument that is substantively similar to facts
22 submitted in this case. The court did note that Chapter 86 does not shield members from culpability
23 for their own personal negligence as independent claims to impose direct liability based on the LLC
24 members tortious conduct. The limitation on this is that the plaintiff would have to allege conduct
25 by those members that is “separate and apart from the challenged conduct of the water park-i.e., the
26 *Gardners* do not specify how any individual act or omission by the member-LLCs contributed to

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28 ¹ *Gardner supra* at 350-351.

1 L.G.'s injuries." *Gardner* at 4. In so holding the court again noted that if that member were acting
2 in their individual capacity, liability could have been properly alleged. However, in *Gardner* because
3 the plaintiff could not establish a personal duty owed to the injured party, rather than simply allege
4 the member breached certain duties "that only arise based on the member-LLC's roles as members",
5 the same was insufficient to establish liability.

6 The same is true in the case *sub judice*. There has been no suggestion that Movant has done
7 anything in his individual capacity outside of his obligation as a member of the LLC. Similarly,
8 there is no suggestion Dr. Freedman owes a personal duty to the third party vender seeking to collect
9 a debt of the LLC. Thus, Plaintiff is unable to pursue a claim under either exception noted in
10 *Gardner*.

11 In fact, it should be pointed out that while there are some specific alleged statements
12 contained in the collective series of Complaints, the same are not statements made by Freedman.
13 They are statements by Tadlock and others in the bankruptcy proceedings. Moreover, the statements
14 were exclusively made in their capacity as LLC members, not in their individual capacity.

15 Accordingly, there is nothing alleged in the Complaint which would allow individual
16 culpability for Freedman for any acts done solely in his capacity as a member (noting that no acts
17 by Freedman are even specifically alleged). Therefore, the decision in *Gardner* supports the
18 arguments previously submitted to this Court outlining while there is no liability for Defendant
19 Freedman in the case *sub judice*. In fact, Plaintiff has not even alleged Dr. Freedman did anything
20 even in his capacity as a member.²

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22 ² Further, no version of the Complaint addresses the issue that the hiring and firing
23 of Branes was subject to a majority vote and no allegation Dr. Freedman even voted to hire him.
24 Secondly, there is no allegation Dr. Freedman was ever in a position to review the accountants
25 work or if qualified to know a false accounting report. Yet, they argue in their opposition on
26 page 9 that "gross negligence raises to the level of conscious disregard" They certainly have not
27 pled any fact of that as to Dr. Freedman. Further, there is no allegation Dr. Freedman ever
28 supervised Barnes, or whether Dr. Freedman ever voted to fire him. The Receiver amended to
allege gross negligence but the allegations in a complaint may not simply recite the elements of
the cause action, but must contain sufficient allegations of underlying facts to give fair notice and
to enable the opposing party to defend itself effectively. See e.g., *Starr v. Baca*, 652 F.3d. 1202
(9 th Circ. 2011). Thus, Plaintiff has not alleged even specific acts as manager never mind

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C. The Receiver is Acting as a Fiction to Usurp NRS 86

Patriot could not have directly sued these members because NRS 86 prevents it. Thus, they are trying to circle around the law by having a receiver appointed. This action is an attempted end run around NRS Chapter 86.

An employee of the Surgery Center embezzled and defrauded the entity for over a million dollars. He was ultimately terminated, went to prison and was ordered to pay restitution. That appears to be the underlying basis for a Delaware creditor of the Surgery Center to hold individual members liable. However, this theory flies in the face of NRS § 86.

NRS 86.371 advises that “unless otherwise provided in the articles of organization or an agreement signed by the member or manager to be charged, no member or manager of any limited-liability company formed under the laws of the State is individually liable for the debts or liabilities of the company.”

Further, NRS 86.381 states that a “Member of company is not proper party in proceeding by or against company; exception. A member of a limited liability company is not a proper party to proceedings by or against the company, except where the object is to enforce the member’s right against or liability to the company.” This is not a member seeking to enforce his right.

NRS 86.391 states that a member is liable to a limited liability company only for the “difference between the member’s contribution to capital as actually made and as stated in the articles of organization or operating agreement as having been made” and “[f]or 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 operation.” Finally, NRS 86.391(3) advises that liabilities of a member can only be waived by consent of all members. There is no allegation relevant to this exception.

outside of his membership position with a duty to the vender.

1 Significantly, the Nevada legislature added an alter ego exception to Nevada's private
2 corporation statute in 2001. NRS 78.747(1) (added by ch. 601, § 1, 2001 Nev. Stat. 3170). However,
3 the alter ego doctrine is not included in Nevada's LLC statute. NRS 86.001 et seq. This omission
4 creates a negative inference that the Nevada legislature did not intend for it to apply to LLCs of
5 subject matters from statutory provisions are presumed to have been intentional.”); *Galloway v.*
6 *Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) (“The maxim ‘EXPRESSIO UNIUS EST
7 EXCLUSIO ALTERIUS’, the expression of one thing is the exclusion of another, has been
8 repeatedly confirmed in this State.”). Indeed, if the Nevada legislature had wanted the doctrine to
9 apply to LLCs, it would have followed other states whose LLC statutes explicitly state that the alter
10 ego doctrine applies to LLCs. See, e.g., Cal. Corp. Code § 17703.04(b) (LLC is subject to liability
11 under the common law governing alter ego liability); Colo. Rev. Stat. § 7-80-107(1) (applying the
12 case law which interprets the circumstances under which the corporate veil of a corporation may be
13 pierced under Colorado law to LLCs); Tex. Code Ann. § 101.002 (applying corporate alter ego
14 statute to LLCs); Was. Rev. Code § 25.15.060 (LLC members are liable for any act, debt, obligation,
15 or liability of the LLC to the extent that shareholders of a Washington business corporation would
16 be).

17 Instead, in Nevada, no such amendment was proffered as to limited liability companies. It
18 should be noted that NRS Chapter 86 was discussed at these meetings but the only action was an
19 increase in the filing fee (See NRS 86.262, 2001 amendment).
20 Accordingly, a third party creditor, the Delaware LLC, Patriot, is trying to get paid from the LLC by
21 suing its members. The limitations of NRS § 86 prevent any such recovery. Accordingly, this matter
22 must be dismissed from the Complaint.

23 **D. The Operating Agreement**

24 The Surgery Center is governed by its Operating Agreement.³ The Operating Agreement
25 specifically advises in Section 3.4 that “no member in his or her capacity as a member, shall have
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27 ³ See Operating Agreement, bates stamped FREEDMAN0001-FREEDMAN0078
28 attached to the original Motion as Exhibit “B” and incorporated herein by this reference.

1 any liability to restore any negative balance in his or her Capital Account or to contribute to, or in
2 respect of, the liabilities or the obligations of the Company, or to restore any amounts distributed
3 from the Company, except as may be required specifically under this Agreement, the Act or other
4 applicable law. Except to the extent otherwise provided by law, in no event shall any Member, in
5 this or her capacity as a Member, be personally liable for any liabilities or obligations of the
6 Company."⁴ As was outlined hereinabove, there is no other circumstances that would provide for
7 any liability asserted by the Plaintiff here. Accordingly, this Complaint fails on the entities own
8 behalf as a result of the Surgery Center's Operating Agreement.

9 Moreover, in the event that the Court were to ignore NRS § 86 and Section 3.4 of the
10 Operating Agreement, the result under the indemnification paragraph 7.8 requires the LLC to
11 indemnify its members for this litigation and for any damages from this litigation. Specifically,
12 under the indemnification, the entity would have to pay costs and damages on behalf of the directors.
13 (See 7.8). Thus, even ignoring 3.4 and NRS § 86, this would be at best an exercise of futility in that
14 the entity (by and through the Receivers), would pay for the individual members defense in this case
15 and then pay any judgment back to itself.

16 E. Standing

17 These Defendants are LLC members. Plaintiff is a creditor of the entity. NRS 86.371 says
18 this action cannot be pursued. Plaintiff has no standing to bring this suit. "It is a well-established
19 rule that a litigant may assert only his own legal rights and interests and cannot rest a claim to relief
20 on the legal rights or interests of third parties." *Coal. of Clergy, Lawyers, & Professors v. Bush*, 310
21 F.3d 1153, 1163 (9th Cir. 2002). "Standing is a legal right to set judicial machinery in motion." See
22 *Heller v. Legislature of Nev.*, 120 Nev. 456, 93 P.3d 746, 749 (2004). The question of standing is
23 similar to the issue of real party in interest because it also focuses on the party seeking adjudication
24 rather than on the issues sought to be adjudicated. *Szilagyi v. Testa*, 99 Nev. 834, 673 P.2d 495
25 (1983). NRCP 17(a) provides that "[e]very action shall be prosecuted in the name of the real party
26 in interest." A real party in interest "is one who possesses the right to enforce the claim and has a

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28 ⁴ Emphasis added.

1 significant interest in the litigation.” *Szilagyi*, 99 Nev. 834, 838, 673 P.2d 495, 498 (1983). The
2 inquiry into whether a party is a real party in interest overlaps with the question of standing. *Id.* If
3 a party does not own the claims, it has no standing to bring the action or seek the relief. *Livingston*
4 *v. State Farm Mut. Auto. Ins. Co.*, 774 So.2d 716, 718 (Fla. 2d DCA 2000).

5 In the case *sub judice*, because a Receiver has been appointed, the Receiver became the real
6 party in interest to pursue this case, if in fact the Receivership appointment Order provides for the
7 same. See e.g., *First State Bank of Northern California v. Bank of America, M.T. & S.A.*, 618 F.3d
8 603 (1980). Therefore, if the Receiver has authority under its Order granting Plaintiff’s appointment
9 of Receiver in the Patriot-Reading case, then this action would appropriately be pursued on behalf
10 of the Receiver as the real party in interest as opposed to the entity itself. However, as will be
11 discussed in Section IV hereinbelow, the Receiver is not authorized to pursue this matter on its own,
12 never mind as a derivative action. It further appears from the docketing statement that no motion
13 to authorize this action was even brought before the Court in A-733677.

14 Paragraph 7 of the Receivership Order allows the Receiver to “[b]ring and prosecute all
15 proper actions for the collection of debts owed to Flamingo, and for the protection and recovery of
16 the Receivership Property.” However, in reading the plain language of this it would appear to be for
17 the collection of actual debts owed to the Surgery Center from third parties as opposed to an action
18 against its own members. There does not appear to be any specific order approving this particular
19 litigation in that underlying manner nor anything specific in the Receiverships Order to even
20 demonstrate there is proper standing to move forward with this suit.

21 Accordingly, Defendants would submit that there is no proper standing for this Complaint.
22 Particularly as this is a derivative case.

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

2 **1. The has been no attempt to satisfy the pleading requirements**

3 This matter is clearly derivative in nature as it seeks to collect on behalf of the LLC for
4 alleged breaches of fiduciary duty to the entity.⁵ This Complaint should be dismissed because the
5 Receiver is unable to satisfy any of the statutory requirements regarding the initiation of a derivative
6 action. First, NRS 86.487 requires that a derivative action must set forth with particularity “(1) the
7 effort of the plaintiff to secure initiation of the action by a manager or a member; or (2) the reasons
8 for the plaintiff not making the effort to secure initiation of the action by a manager or a member.”
9 This standard is consistent with the standard in Nevada for a corporation. Additionally, this is the
10 same heightened pleading burden adopted in the Delaware Chancery Rule 23.1.

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III.

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LIMITATIONS PERIOD

13 This Court has been briefed in the previous paperwork on the appropriate statute of
14 limitations. Those arguments are incorporated into the pending Motion to Dismiss. However, it
15 should be noted that the Receiver’s own September 11, 2017, Report in the Receivership case takes
16 the position as follows:

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All four causes of action against FFPSC’s fiduciaries allege the
negligent (Claims 1 through 3) or intentional (Claim 4) breach of
their duties to FSPC and are subject to a three year statute of
limitation period. See N.R.S. § 11,190(3)(d); (further citations
omitted).⁶

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⁵ 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).

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⁶ See Exhibit “C” pg. 10 ll. 17-20.

1 Plaintiff does not dispute the fact that the three (3) year statute of limitations before the filing
2 of the Complaint. However, the Receiver suggests that “Nevada’s ‘discover rule’ (sic) applies to
3 these claims such that the limitations period did not begin tolling until the Receivership discovered
4 or should have discovered the basis to assert them.”⁷

5 However, the Receiver’s reliance on the discovery rule is misplaced. The discovery rule does
6 not apply here because the Receiver is suing on behalf of the entity and thus, stands in the shoes of
7 the entity.⁸

8 In ¶ 3 of the Receivership Order in which Plaintiff asserts they are pursuing this case on
9 advises that the Receiver may pursue “Flamingo’s claims and causes of action”⁹ Plaintiffs own
10 Complaints not only concedes, but is based on the companies near contemporaneous knowledge of
11 Flamingo. Thus, the Receiver has no basis to suggest that the discovery rule would toll the statute
12 of limitations until the appointment of the receivership as is suggested in this Receivership Report.
13 This claim is brought on behalf of the company pursuant to the Receivership Order. Accordingly,
14 it is Flamingo’s knowledge that begins the running of the statute of limitation.

15 Further, the burden of demonstrating compliance with the statute of limitations is on Plaintiff
16 who must show the court the point at which they knew or should have known of the alleged fraud.
17 *Platsis v. E.F. Hutton & Co., Inc.*, 829 F.2d 13 (Mich., 1987). “It is his [plaintiffs] burden to prove
18 by a preponderance of the evidence that he did not discover and through the exercise of reasonable
19 diligence could not have discovered that misrepresentations or omissions were made until some time

21 ⁷ See Exhibit “C” pg. 8 ll. 23 through pg. 9 ll. 2 (citations omitted).

22 ⁸ In any application of the discovery rule, a party steps into the shoes of the person
23 or on behalf of whom they are suing. This has applied even in circumstances of survivorship
24 actions. *See e.g., 25 A.C.G.S. Death § 166 Discovery Rule, see also Department of Labor and*
25 *Industries v. Estate of MacMillan*, 117 Wash. 2d 222, 814 P.2d 194 (1991). Moreover, it is
26 obviously also the case in receivership actions. *See e.g., The Unpublished Decision of Schettler v*
27 *RalRon Capital Corporation*, 275 P.3d 933, 938, 128 Nev. Adv. Op. 20 (2012) (noting that the
FDIC acting as a receiver stands in the shoes of its predecessor and takes all defenses and is
subject to all claims as the prior receiver.

28 ⁹ See Exhibit “A” pg. 3 ¶ 3 ll. 4.

1 within the [limitations period] preceding the commencement of the action." *Id.* (Emphasis added).

2 Paragraphs 39-47 of the Second Amended Complaint specifically detail Plaintiffs allegations
3 as to how they did not exercise reasonable diligence in discovering the theft. Plaintiffs argument,
4 in fact, is based on this failure to act reasonably. Plaintiff cannot on the one hand argue Flamingo's
5 managers did not act reasonably in discovering Barnes theft while also seeking to extend the statute
6 of limitations through the discovery rule.

7 Accordingly, it is clear in the case *sub judice* that the statute of limitation has expired. First,
8 the Receivership Report states that the theft occurred from 2010 to 2013. Specifically, the report
9 summarizes the claims as advising that between 2010 and continuing through 2013 Barnes
10 embezzled at least 1.3 million dollars.¹⁰ Notably, this Receivership Report specifically cites to the
11 Complaint for these dates identifying ¶ 19 of the Complaint. However, the Second Amended
12 Complaint, obviously seeing the writing on the wall with regard to the statute of limitations
13 arguments, did not include any dates. Nonetheless, as is mentioned in the authorities hereinabove,
14 that obligation has now shifted to the Plaintiffs. Further, in ¶ 46 of the Second amended Complaint,
15 Plaintiff alleges that Barnes remained at Flamingo Pecos "for up to a year after discovery [of his
16 theft]".¹¹

17 Therefore, it is the position of the Receivership in their own Complaint that the theft by
18 Barnes was discovered in 2012. It is also the admission of the Receiver that the statute of limitations
19 is 3 years. Accordingly, if this Complaint was not filed by 2015, it is time barred.

20 It is clear that the Receiver knows this was a 3 year statute of limitations and that the
21 "directors and officers" knew a year before Barnes' termination in 2013. The continued prosecution
22 of this case constitutes a total disregard of the facts - the Receiver knows this case was filed well
23 after the statute of limitations ran. Clearly, this explains the Receiver's reluctance to report to its
24 Court of origin these problems. Even more clear, is that this case should be dismissed.

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27 ¹⁰ See Exhibit "C" pg. 8 ll. 6-8.

28 ¹¹ See Complaint ¶ 46 pg. 9 ll. 5.

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IV.

NO STANDING

A. Introduction

Clearly, in the case *sub judice* the Receiver has exceeded his authority to present this case. There are a variety of violations and failures pursuant to the Receivership Order and subsequent actions that prevents the Receiver from moving forward in this matter.

B. Director and Officer Limitation

The Receiver proffers in the Second Amended Complaint, that he is entitled to move against “Flamingo’s directors and officers”.¹² The allegations against Defendant Freedman (as well as the other Defendants) is expanded to “manager, director and/or officer of Flamingo”¹³ However, the Receiver must clearly be aware that he is exceeding his authority in moving forward in this matter as the Receivership Order is limited to “directors and officer”. Specifically, the Receivership Order allows the Receiver to proceed against directors and officers, not managers. The Receiver has no authority under the Receivership Order to attempt to proceed against “managers.”

Further, as can be seen in Exhibit “B”¹⁴ Defendant Sheldon Freedman, is not nor has he ever been a director or officer of Flamingo-Pecos Surgery Center, LLC. Certainly, the Receiver, whom pursuant to ¶ 1 on pgs. 2 and ¶ 3 pgs. 3 ll. 19 of the Receivership Order, was to take immediate possession of the Receivership property and evaluate the same, must know that Freedman is not an officer or director for the Flamingo-Pecos Surgery Center. Accordingly, this lawsuit is beyond the scope of Plaintiffs authority in this matter and Plaintiff knew it or should have known the same.

¹² See Receivership Order pgs. 3 ¶ 3 ll. 5 attached hereto as Exhibit “A” and incorporated herein by this reference.

¹³ See ¶ 28 ll. 24 of the Second Amended Complaint. (emphasis added).

¹⁴ See Nevada Secretary of State search attached hereto as Exhibit “B” and incorporated herein by this reference.

1 **C. Receivership Approvals Not Requested Or Complied With**

2 The Receivership Order in the case *sub judice* advises that on the first business day of each
3 month the Receiver is to file with the original appointing Court reports designed to “keep the Court
4 apprised of the material items/issues regarding Flamingo, the Receivership Property, and/or the
5 Receivership Estate”.¹⁵ Further, “the Receiver is hereby vested with all the general powers of
6 receivers in cases of this kind, subject to the direction of this Court, and is to render to the Court
7 reports of the proceedings and accounting with respect to all acts and things done by the Receiver
8 and all monies received and expended by the Receiver or Receiver’s agents.”¹⁶ Additionally, the
9 Receivership was to file monthly financial reports indicating the full financial status of the
10 Receivership.¹⁷ The record reveals that the Receivership went from April 2017 until September 2017
11 without filing any reports. Moreover, the reports filed from December 2016, February 2017, and
12 March 2017, do not mentioned the retention of a law firm to prosecute this action, the existence of
13 the action or account for the costs incurred in filing this action or any of the fees related thereto.

14 Instead, the Receiver moved forward with this lawsuit without seeking approval from the
15 Court as required in the Receivership Order. This includes failing to provide any information as to
16 these pending lawsuits in any of those reports (until a September 27, 2017 report which has just been
17 filed, which will be discussed in detail hereinbelow). The reports that were filed did not include, and
18 still have not included any of the financial obligations incurred by counsel in this case.

19 The Receivership Order requires that the Receiver keep the court informed. Instead, the
20 Receiver has incurred debt on the Receivership, including not only filing fees, and their own
21 attorneys fees but has also incurred potential additional debt in what are now significant attorneys
22 fees that should be found against the Receivership in this matter, yet the Receiver did not inform the
23 Court of any of those risks or expenses and did not receive authority to go forward in this matter.

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26 ¹⁵ See Exhibit “A” pg. 7 ¶ D ll. 13-14.

27 ¹⁶ See Exhibit “A” pg. 9, ¶ L ll. 17-21.

28 ¹⁷ See Exhibit “A” pg. 6, ¶¶ 15-16 ll. 22-23 and pg. 7 ¶ D ll. 9-14.

1 Accordingly, without compliance with the Receivership Order, this is a rouge matter which
2 must be dismissed.

3 **D. New Receivership Report Misleads The Receivership Court**

4 The Receiver's contradictory language in this case and the Receivership case demonstrate
5 that the Receivership is not being up front with either Court in an effort to divert attention from their
6 failures in both cases. By way of example, in the case *sub judice*, Plaintiffs filed a Motion to Extend
7 Time for service on certain individual Defendants. However, it does not appear that those individual
8 Defendants were served with the Motions. Accordingly, these Motions cannot properly go forward
9 as to these individuals in the manner noticed because pursuant to NRCP 4(i) they should have been
10 noticed of this request for extension so that they have an opportunity to defend themselves.

11 More to the point in this case, this Motion to Extend Time includes the declaration of
12 Timothy Mulliner who advises that he "deferred service of the summons and complaint and focused
13 my efforts on issues that I hoped would bring further resources into the estate quickly." and that he
14 "determined that I could limit expenses and preserved resources by doing the legal work in this
15 action myself."¹⁸ Thus, it is his position that in an effort to save money and bring in additional funds
16 to the Estate Mulliner mistakenly waited too long before he acquired service in the case *sub judice*.

17 However, in Mulliner's Report in the Receivership case, he specifically advises that "[t]he
18 Receivership did not serve FPSC's former directors and officers immediately upon the filing the
19 complaint for strategic reasons not detailed in this report."¹⁹

20 In both filings the Receiver indicates that he believes the amounts of the parties sought to
21 "evade" service. However, even a cursory review of the Affidavit of Due Diligence reveals that the
22 only attempts to serve Dr. Smith at his "home" occurred on June 6, 2017, (noting no answer), and
23 June 7, 2017, (noting that his minor daughter through the glass indicated that the father wouldn't be
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25 ¹⁸ See Mulliner's Declaration ¶¶ 5-6 ll. 20-26.

26 ¹⁹ See Receiver's Report of September 11, 2017, filed by Timothy Mulliner (without
27 exhibits) in the A-733627-B matter pg. 11 ll. 2-4 attached hereto as Exhibit "C" and incorporated
28 herein by this reference.

1 home for 10 days and wouldn't open the door). She did state that her father was out of town for 10
2 days. It should be noted however, that counsel for Freedman personally knows William Smith and
3 if asked would attest that his knowledge is that the daughter's mother and Dr. Smith are not married
4 and that Dr. Smith's primary address is not on Greensboro Lane.²⁰ The following Affidavit of Due
5 Diligence notes that on June 9, 2017, (2 days after the process server was told Dr. Smith was out of
6 town for 10 days) the process server sought to serve Dr. Smith at his office and he was not in (of
7 course as the process server was aware, Dr. Smith was out of town). There is no indication of any
8 effort to serve Dr. Smith during the time still within the 120 days after the process server was
9 advised that Dr. Smith would return to town. Thus, the facts are that the Receiver waited months
10 to attempt service, when the Receiver finally sought to serve Dr. Smith, he tried only from June 6,
11 2017, through June 9, 2017, after admittedly being advised on June 7, 2017 that Smith would be out
12 of town for 10 days.

13 The Receiver's position with regard to the extension of process is addressed herein not to
14 demonstrate that the extension should not be granted against the unserved Defendants as Defendant
15 Freedman does not have standing for the same. However, it is important to note that the Receiver's
16 position in the Receivership Report was that it was a strategical decision to wait on service and
17 thereafter the "evasion" by the unserved Defendants that let the time slip past the permitted service.
18 Notably, being out of town without knowledge of attempted service is not evading and Plaintiff
19 proffers no evidence of "evading." On the contrary, they admit that they were told Smith was out
20 of town, and that a child told them that. They provide no evidence that this was untrue. The only
21 evidence they present is that a child was smart enough to not open the door for a stranger.

22 Conversely, in an effort to acquire some basis of good faith for an extension, (although the
23 same technically fails where the ruling does not establish good faith),²¹ it should be noted the
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25 ²⁰ See Affidavit of Marc P. Cook attached hereto as Exhibit "D" and incorporated
26 herein by this reference.

27 ²¹ Significantly, the Motion before this Court continues to suggest that it was a
28 calendaring mistake/oversight that resulted in the Motion to Extend being untimely. NRCP Rule
4(i) advises that good cause must exist. It is clearly the law of Nevada that a calendaring mistake

1 difference in factual position laid out in this Court as opposed to the Court in which the Receiver was
2 appointed. The Receiver should have advised its Court of origin of this issue and should have sought
3 authority prior to filing the Complaint in March, and filed updates, which presumably would have
4 and should have included relevant information about service in the April, May and June, Status
5 Reports. However, the Plaintiffs failure to comply with the Receivership Order clearly negates their
6 ability to go forward in this case.

7 **V.**

8 **ALL CAUSES OF ACTION VIOLATE THE ECONOMIC LOSS DOCTRINE**

9 Plaintiffs causes of action include a claim for negligent hiring, negligent supervision, and
10 negligent retention. These claims are clearly based on the tort theory of negligence yet seek
11 economic damages without alleging personal injury or property damage. “The economic loss
12 doctrine marks the fundamental boundary between contract law, which is designed to enforce the
13 expectancy interest of the parties, and tort law, which imposes a duty of reasonable care and thereby
14 [generally] encourages citizens to avoid causing physical harm to others.” *Terracon Consultants,*
15 *Western, Inc. v. Mandalay Resort Group*, 125 Nev. 66, 72, 206 P.3e 81, 86 (2009) citing *Calloway*
16 *v. City of Reno*, 116 Nev. 250, 256, 993 P.2d 1259, 1263 (2000). Accordingly, the economic loss
17 doctrines application to negligence claims applies in the sense that “unless there is personal injury
18 or property damage, a plaintiff may not recover in negligence for economic losses.” *Terracon*
19 *Consultants, Western, Inc.* 125 Nev. at 73, 206 P.3d at 87 (further citations omitted).

20 Accordingly, there is no basis for Plaintiffs to proceed on these negligence claims on behalf
21 of a third party Delaware vendor for economic loss.

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27 is not good cause for untimely service of process. *Dougan v. Gustaveson*, 108 Nev. 517, 520,
28 835 P.2d 795, 797 (1992), abrogated on other grounds by *Arnold v. Kip*, 123 Nev. 410, 168 P.3d
1050 (2007).

1 VI.

2 MOTION FOR ATTORNEYS FEES

3 As this is a Supplement, the attorneys fees argument previously submitted will not be
4 repeated herein. However, it is significant to note that the more work that is done in this case the
5 more obvious it is that these claims should not have been submitted. First, Dr. Freedman is being
6 sued even though he is not an officer or director of the entity. This clearly exceeds the Receiver's
7 power. Second, the Receiver did not get approval and did not apprise or comply with the
8 Receivership Order in pursuing this matter. On the contrary, it appears that the Receivership Reports
9 are inadequate or tell a different story the Plaintiff is trying to put forward in the case *sub judice*.
10 This is disingenuous at best and should not be tolerated by this Court.

11 Further, Plaintiff's own admissions that the information in which they seek to pursue their
12 claim on against Dr. Freedman was known in 2012. Accordingly, Plaintiff also admits that there is
13 a 3 year statute of limitations, and that this Complaint was not filed until subsequent to that statute
14 of limitations. This case absolutely should not have been pursued against this Defendant. Finally,
15 this case pursues claims against members of the LLC in violation of the Operating Agreement,
16 Chapter 86 and now, a new Nevada case that is consistent with Chapter 86. Yet even after the Court
17 pointed out this new decision to the Plaintiff, instead of dismissing Dr. Freedman, they have
18 continued to pursue this action incurring even more fees.

19 The *Beattie* factors have been addressed in the previous Motion. This Defendant would
20 additionally submit that the award of attorneys fees against Mark J. Gardberg, Esq. in his capacity
21 as Receiver for, and acting on behalf of Flamingo-Pecos Surgery Center, LLC , are far more than
22 anticipated based on the two (2) Amendments and additional briefing. Accordingly, thus far in the
23 case *sub judice* Dr. Freedman, through October 20, 2017, has been billed in the amount of
24 \$30,085.67. These fees are all the result of a Complaint that should have never been filed in the case
25 *sub judice*. Accordingly, the same should be dismissed and Dr. Freedman awarded attorneys fees.

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VI.

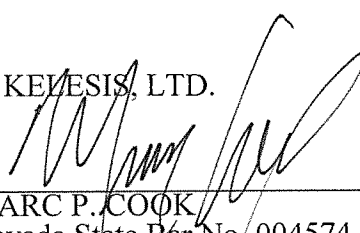
CONCLUSION

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

Dated this 24 day of October, 2017.

COOK & KELESIS, LTD.

By :



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Nevada State Bar No. 004574
GEORGE P. KELESIS
Nevada State Bar No. 000069
517 S. 9th Street
Las Vegas, Nevada 89101
Attorneys for Defendant Sheldon J. Freedman

1 **CERTIFICATE OF SERVICE**

2 The undersigned hereby certifies that on the 24th day of October, 2017, in accordance with
3 NRCF 5(b), NEFCRRR Administrative Order 14-2 and NEFCR 9(e), the undersigned provided the
4 clerk with a service list of parties to be served with the above and foregoing **DEFENDANT**
5 **SHELDON J. FREEDMAN'S SUPPLEMENT TO MOTION TO DISMISS COMPLAINT,**
6 **FIRST AMENDED COMPLAINT AND SECOND AMENDED COMPLAINT PURSUANT**
7 **TO N.R.C.P. 12(b)(5) and 12(b)(6) AND FOR ATTORNEYS FEES PURSUANT TO NRS**
8 **18.020** as follows:

9
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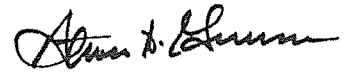
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EXHIBIT “A”

EXHIBIT “A”



CLERK OF THE COURT

ORDER

IQBAL LAW PLLC

Mohamed A. Iqbal, Jr. (NSB #10623)

Christopher Mathews (NSB #10674)

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101 Convention Center Dr., Suite 1175

Las Vegas, Nevada 89109

1-(702) 750-2950 (Tel)

1-(702) 825-2841 (V-Fax)

Attorneys for Plaintiff Patriot-Reading Associates LLC

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Patriot-Reading Associates LLC, a Delaware
limited liability company,

Plaintiff,

vs.

Flamingo-Pecos Surgery Center LLC, a Nevada
limited liability company,

Defendant.

Case No.: A-16-733627-B

Dept. No.: XXVII

**ORDER GRANTING PLAINTIFF
PATRIOT-READING ASSOCIATES
LLC'S PETITION FOR APPOINTMENT
OF A RECEIVER**

Date: August 10, 2016

Time: 9:30 am

HAVING CONSIDERED the Petition for Appointment of a Receiver (the "Petition") filed by Plaintiff Patriot-Reading Associates LLC ("Patriot") on July 3, 2016; and

HAVING FURTHER CONSIDERED that:

- (a) Defendant Flamingo-Pecos Surgery Center LLC ("Flamingo") was served with a Summons and the Complaint in this case no. A-16-733627 (this "Matter") on March 23, 2016;
- (b) Default was entered against Flamingo on April 28, 2016;
- (c) A default judgment was entered on May 20, 2016 against Flamingo and in favor of Patriot, in the amount \$706,631.17 (the "Judgment"); and
- (d) Flamingo has not appeared in this Matter despite service of process and multiple notices.

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2 **THE COURT FINDS** that Flamingo has made no attempt to preserve its assets, pursue
3 such claims and causes of action as may be warranted, or pay any of its lawful debts, including
4 the Judgment; and

5 **THE COURT FURTHER FINDS** there is a material risk that Flamingo's assets will be
6 dissipated and/or lose further value; and

7 **THE COURT FURTHER FINDS** that, pursuant to NRS 32.010, appointment of a
8 receiver is necessary to carry into effect and aid the execution of the Judgment of this Court
9 previously entered in favor of Patriot and against Flamingo.

10 Good cause being thereby shown,

11 **IT IS HEREBY ORDERED** that Patriot's Petition is **GRANTED**. Timothy R.
12 Mulliner, Esq. is hereby appointed receiver (the "Receiver") for Flamingo, to take possession of
13 Flamingo and its assets, including all accounts, books, records, contract rights, restitution rights,
14 claims and causes of action, and such other further assets to which Flamingo might be entitled
15 (collectively, the "Receivership Property"); and

16 **IT IS FURTHER ORDERED** that the Receiver shall serve without posting a bond; and

17 **IT IS FURTHER ORDERED** that a status hearing on the receivership is set for
18 October 26 __, 2016, at 9:30 a.m.; and

19 **IT IS FURTHER ORDERED** that:

20 A. Upon accepting the duties of receiver hereunder, the Receiver shall:

21 1) Take immediate possession of the Receivership Property (including, without
22 limitation, any accounts held in Flamingo's name), to hold and manage the Receivership
23 Property to preserve it from loss, removal, material injury, destruction, substantial waste,
24 and loss of income;

25 2) Determine, subject to the terms of this Order, which if any of Flamingo's
26 accounts payable should be paid, in full or in part, so that there might be an orderly
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liquidation of the Receivership Property and payment of claims of and debts against Flamingo, including the Judgment;

3) Pursue Flamingo's claims and causes of actions against third parties, including but not limited to Flamingo's directors and officers; and

4) Pursue Flamingo's claims against personal property seized as part of criminal forfeiture proceedings against Flamingo's former employee/office manager Robert W. Barnes. For the avoidance of doubt, the Receiver shall not be obligated to bring any such claims or actions as contemplated by this Section A and/or the other Sections of this Order, and the Receiver in his discretion may determine the extent to which, if at all, any such claims or actions may be beneficial to the effectuation of the terms of this Order.

B. The Receiver shall be authorized and empowered to:

1) Gain access to and take possession of the Receivership Property and all income/proceeds from the Receivership Property, whether in the possession, custody or control of Flamingo or in the possession, custody or control of agents, servants or employees of Flamingo;

2) Bar from access anyone claiming any of Flamingo's accounts and/or the records relating thereto, if the Receiver deems it necessary to effect his duties hereunder;

3) Gain access to, and take possession of, all of the books and records (including all electronic records and the hardware containing the same) concerning the Receivership Property that the Receiver deems necessary for the proper administration, management or control of the Receivership Property and the estate created thereby (the "Receivership Estate"). All books and records relating to the Receivership Property, in electronic form or otherwise, in the possession, custody or control of agents, servants, or employees of Flamingo, shall be delivered to the Receiver within five (5) business days of entry of this Order. All other books and records, held by third parties, relating to the Receivership Property, shall be made available to the Receiver as the Receiver deems reasonably

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2 necessary to give effect to this Order. The Receiver shall keep all of Flamingo's books
3 and records relating to the Receivership Property confidential, unless ordered by this
4 Court or another court of competent jurisdiction, to disclose such books and records;

5 4) Enter Flamingo's premises, wherever located, for the purpose of preserving,
6 protecting, managing and/or controlling the Receivership Property;

7 5) Take any and all steps the Receiver deems necessary to receive and collect
8 any of Flamingo's accounts, and, in connection therewith, issue demands and institute,
9 continue, or otherwise resolve all proper legal actions on behalf of and to preserve the
10 Receivership Property and the Receivership Estate;

11 6) Prepare and execute all documents and to perform all acts, in the name of
12 Flamingo, which are necessary or incidental to collecting upon, preserving, protecting,
13 maintaining, managing and/or controlling Flamingo's accounts and the other
14 Receivership Property;

15 7) Bring and prosecute all proper actions for the collection of debts owed to
16 Flamingo, and for the protection and recovery of the Receivership Property;

17 8) Engage the services of counsel, when and as the Receiver deems necessary;
18 and to pay for such services from the Receivership Property and funds collected on behalf
19 of the Receivership Estate;

20 9) Care for, preserve, protect, manage, and maintain the Receivership Property,
21 and to incur the expenses necessary in such care, preservation, protection, management
22 and conduct. Monies coming into the possession of the Receiver pursuant hereto (and
23 not expended for any of the purposes herein authorized) shall be held by the Receiver in
24 an interest-bearing account, subject to such order as this Court may hereinafter issue as to
25 its disposition; and the Receiver or any party to this action may, from time to time, and
26 on due notice to all parties entitled thereto, apply to this Court for an order providing
27 instructions to the Receiver regarding such monies;

10) Purchase materials, supplies and services and to pay therefor at ordinary and usual rates and prices; enter into contracts for, *inter alia*, the maintenance of the Receivership Property; and incur such risks and obligations as may be ordinarily incurred by owners, managers and operators of similar property and enterprises. No such risk or obligation so incurred shall be the personal risk or obligation of the Receiver but shall be a risk or obligation to the Receivership Estate;

11) Retain, employ and hire accountants, attorneys, property management companies, or environmental consultants, as the Receiver deems necessary to assist in the discharge of the Receiver's duties under this Order;

12) Serve upon Patriot and counsel of record for the parties which have appeared in this Matter written notice of any persons proposed to be retained, employed, or hired pursuant to Paragraph 11 above, and a brief description of the proposed services to be provided by such persons. Any party so noticed wishing to object must deliver to the Receiver a written objection specifying the grounds for such objection within five (5) business days from service of the notice. If no such written objection is timely delivered, the Receiver may retain, employ or hire such proposed person to which no objection was made;

13) Serve upon the parties which have appeared in this Matter written notice of the amount to be paid to each person or entity hired pursuant to Paragraph 11 above, and the services rendered or expenses incurred. Any party so noticed wishing to object must deliver to the Receiver a written objection specifying the grounds for such objection within ten (10) calendar days from service of the notice. If no such written objection is timely delivered, the Receiver may deduct from the Receiver's account all fees and expenses to which no objection was made. If objections have been timely made, the Receiver may at his election file with the Court a motion, upon notice to the parties which have appeared in this Matter, to retain such person or to pay such fees or expenses

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objected to. Any notice required under Paragraphs 12 and 13 shall be in writing and at the addresses the parties have previously provided to each other by any of the following means: (i) personal service; (ii) overnight courier or messenger; (iii) registered or certified, first class U.S. mail, return receipt requested; or (iv) electronic mail. Any such notice, demand or request sent pursuant to either subsection (i) or (ii) above, shall be deemed received upon personal delivery to the address specified or to the addressee, upon delivery by the courier or messenger to the specified address. Any notice, demand or request sent pursuant to subsection (iii) above, shall be deemed received two (2) business days following deposit into the U.S. mail properly addressed to the party to be notified. Any notice, demand or request sent pursuant to subsection (iv) above, shall be deemed received the same day the electronic mail is sent to the proper address of the party to be notified. Flamingo shall notify the Receiver immediately upon the Receiver's taking possession of the Receivership Property whether there are any claims against Receivership Property, other than the Judgment and any other claims made by Patriot, the identity of any claimant and the nature of the claim;

14) Receive and collect debts, accounts, profits, and income of the Receivership Property and the Receivership Estate during the pendency of this Matter and pay the typical and ordinary operating expenses of the Receivership Property and the Receivership Estate incurred before and after the entry of this Order from the gross receipts derived from all aspects of those operations (the "Income");

15) Marshal and account for the Receivership Property;

16) Identify all of Flamingo's debts and liabilities, secured and unsecured;

C. The Receiver shall prepare and file with the Court an initial report (the "Initial Report") on or before October 11, 2016. The Initial Report shall contain the following information:

1) An inventory of the Receivership Property;

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2) A listing of all known secured and unsecured claims against Flamingo, the Receivership Property and/or the Receivership Estate;

3) An accounting of Flamingo's bank accounts; and

4) Copies of all invoices paid regarding the Receivership Property and/or the Receivership Estate during said calendar month (with the understanding that all such invoices shall be paid only as provided herein).

A copy of the Initial Report shall be served upon the parties which have appeared in this Matter.

D. On the first business day of each month thereafter, the Receiver shall file with this Court (and serve upon the parties appearing in this Matter) a monthly financial report, showing activity for that month including without limitation calculation of the Receiver's fees and payments to any third parties. The Receiver shall also file such additional reports with the Court as the Receiver reasonably deems necessary to keep the Court apprised of the material items/issues regarding Flamingo, the Receivership Property, and/or the Receivership Estate;

E. In connection with the reports referenced in Sections C and D above, the Receiver shall also prepare and file with the Court statements reflecting the Receiver's fees and administrative costs/expenses incurred for such period in the operation and administration of the Receivership, and shall serve the same upon the parties which have appeared in this Matter. In the event no such party files an objection to any statement of the Receiver's fees and administrative costs/expenses within ten (10) calendar days of the Receiver's service upon the parties, and pursuant to Court approval in the form of a minute order or filed order, the Receiver may pay from the Receivership Property and/or the Receivership Estate the amount of said statements; provided, however, that the fees associated with such first statement not be paid until reviewed by the Court at the initial status hearing on this Matter. In the event an objection to any statement is filed with the Court (which objection shall state the reason such party contests the fees/expenses which the Receiver seeks to have paid) any party or the Receiver may submit a

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2 request for a hearing to have the Court rule on such objection and determine the payment of such
3 portion of the periodic statement in issue;

4 F. Subject to any objection and Court approval as set forth in Sections C, D and E
5 above, the Receiver shall be fully reimbursed for amounts the Receiver expends in the
6 preservation and maintenance of the Receivership Property and the Receivership Estate, and
7 shall be reasonably compensated for his services to the Court in the following manner: the
8 Receiver shall be paid \$300.00 per hour for time expended in connection with his receivership
9 duties hereunder, plus "out-of-pocket" expenses incurred by Receiver, with \$100.00 per hour of
10 the \$300.00 per hour fee constituting deferred payment to be paid upon the successful
11 administration/retrieval of the Receivership Property and/or the Receivership Estate. For the
12 avoidance of doubt, all of the Receiver's expenses, including accountant and/or attorneys' fees
13 (or other professional services of any kind whatsoever that the Receiver reasonably deems
14 necessary in the performance of his duties under the Order) are to be paid out of the Receivership
15 Property and/or the Receivership Estate;

16 G. In order to fulfill his duties, the Receiver shall have unlimited access to the
17 Receivership Property, including access to all books and records kept by Flamingo and its
18 employees, officers, and directors, and Flamingo and its employees, officers, and directors shall
19 relinquish to the Receiver possession of all such books and records, including those kept in
20 electronic form, expeditiously and within ten (10) calendar days of receipt of any reasonable
21 written request from the Receiver;

22 H. Within five (5) business days of the entry of this Order, Flamingo shall deliver to the
23 Receiver any and all cash, issues, profits, revenues or income derived from the Receivership
24 Property which are now in the possession, custody and/or control of Flamingo or its employees,
25 officers or directors as of the entry of this Order. Flamingo and its employees, officers,
26 accountants, attorneys and directors shall further account to the Receiver for all monies
27 representing proceeds, issues, income, and profits of the Receivership Property commencing as

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2 of December 1, 2011, to the present date, within twenty (20) calendar days of the entry of this
3 Order;

4 I. Flamingo and its employees, officers, and directors shall not interfere in any manner
5 with the Receiver's collection or management of the Receivership Property and/or Receivership
6 Estate in furtherance of this Order, including but not limited to the satisfaction of the Judgment;

7 J. Upon the final and full collection of Flamingo's accounts, or as otherwise ordered by
8 the Court in connection with an order terminating the receivership or otherwise, the Receiver
9 shall render a final accounting which shall be filed with the Court, with copies served upon the
10 parties which have appeared in this Matter, and upon approval thereof by the Court, the Receiver
11 shall be discharged from his duties as a receiver;

12 K. The Receiver is empowered to establish one or more bank accounts or maintain the
13 existing bank accounts on which the Receiver is the sole signatory, for the deposit of monies
14 received in connection with the administration of the Receivership Property and/or the
15 Receivership Estate, at any financial institution the Receiver deems appropriate; provided,
16 however, all sums must be fully insured by an agency of the United States Government;

17 L. In addition to all the powers set forth herein, the Receiver is hereby vested with all
18 the general powers of receivers in cases of this kind, subject to the direction of this Court, and is
19 to render to the Court reports of the proceedings and accounting with respect to all acts and
20 things done by the Receiver and all monies received and expended by the Receiver or Receiver's
21 agents;

22 M. The Receiver and the parties which have appeared in this Matter may, from time to
23 time and upon notice to all other parties petition this Court for instructions in furtherance of this
24 Order;

25 N. Flamingo shall provide the Receiver, within five (5) calendar days of the entry of this
26 Order, with all tax identification numbers relating to Flamingo and the Receivership Property.

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2 Said tax identification number(s) are hereby assigned to the Receiver to the extent permitted by
3 law to allow the Receiver to perform his duties described herein;

4 O. Flamingo, and its agents, servants, directors, offices, affiliates, employees, attorneys,
5 representatives and all other persons and entities who are successors-in-interest to or who are
6 acting in concert or participating with Flamingo are hereby ordered to refrain from engaging in
7 conduct which is inconsistent with the terms hereof or which would interfere from the actions of
8 the Receiver hereunder, including, but not limited to:

9 1) Assigning, transferring, encumbering, diverting or otherwise disposing of,
10 directly or indirectly, any monies or properties receivable from any source whatsoever
11 without the prior express written approval of the Receiver;

12 2) Interfering with the Receiver's access to or control of the Receivership
13 Property;

14 3) Loaning or gifting any monies for the benefit of any person or entity without
15 the prior express written approval of the Receiver;

16 4) Interfering in any way with the discharge of the Receiver's duties under this
17 Order; and

18 5) Acting in any way that will impair the preservation of the Receivership Estate
19 or Patriot's interest in the Receivership Estate.

20 P. Upon receipt by the Receiver of notice from Patriot that Flamingo has paid monies
21 owed to Patriot, the Receiver shall turn over possession, custody and control of the Receivership
22 Property to either Patriot, Flamingo or to the successful purchaser of the Receivership Property
23 (whichever is appropriate), pursuant to an order of this Court. The Receiver shall then be
24 divested of the possession, custody, and control of the Receivership Property and, if consistent
25 with existing law, the Receiver shall have no further liability as to the Receivership Property.
26 Discharge of the Receiver shall require Court order after a properly noticed petition and hearing
27 approving the Receiver's final report and account;

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2 Q. No person or entity shall file suit against the Receiver, Receivership Property, or the
3 Receivership Estate, or take other enforcement action or remedies against the Receiver,
4 Receivership Property, or the Receivership Estate, without an order of this Court permitting a
5 suit or action to proceed; provided, however, that no prior court order is required to file a motion
6 in this action to enforce the provisions of this Order or any other order of this Court in this
7 action;

8 R. The Receivership Estate, the Receiver, and his employees, agents, attorneys and all
9 professionals and management companies retained by the Receiver shall have no liability for any
10 obligations, or debts incurred by the parties which have appeared in this Matter. The Receiver
11 and his employees, agents, attorneys, and all professionals and management companies retained
12 by the Receiver shall have no personal liability except for acts of fraud and gross negligence, and
13 they shall have no claim asserted against them relating to the Receiver's duties under this Order,
14 without prior authority from this Court. In any event, no suit shall be maintained against the
15 Receiver unless the Receiver has acted outside the scope of his authority and/or committed fraud
16 or gross negligence in the administration of his duties. The Receiver is acting solely in his
17 capacity as a Receiver, and the debts of the Receiver are solely the debts of the Receivership
18 Estate;

19 S. The Receiver's liability for any action taken in the course of his duties shall be
20 limited to the Receivership Estate. The Receivership Estate shall indemnify and hold harmless
21 the Receiver, and any affiliate, member, officer or agent of the Receiver from any claims,
22 liability, loss, cost or expense (including reasonable attorneys' fees and costs) arising out of this
23 Receivership, unless the Receiver has acted outside the scope of his authority and/or committed
24 fraud or gross negligence in the administration of his duties;

25 T. Except as set forth below in Section V, the Receiver shall not pay any of Flamingo's
26 accounts payable or other expenses of the Receivership Estate or make any distributions of any
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2 kind, in excess of \$5,000, unless and until the Receiver shall obtain an order of this Court
3 directing that it do so, which may be heard on an expedited basis;

4 U. The Receiver shall not be performing the Receiver's functions under this Order as a
5 licensed attorney (notwithstanding his status as a licensed attorney in good standing with the
6 State Bar of Nevada), given that the Receiver shall not engage in the practice of law in
7 performing the services hereunder;

8 V. The Receiver shall apply all Income and assets of the Receivership Estate as collected
9 by the Receiver: (a) the reasonable and necessary costs and expenses of the Receiver and the
10 Receivership Estate, and any working capital provided by Patriot, as directed by this Court or the
11 terms of this Order; (b) to the extent funds are available, to the indebtedness owed to Patriot
12 resulting from the Judgment; and (c) with Court approval, to valid creditor claims, pro-rata
13 subject to any lien or statutory or other priority;

LAW 14 W. The Receiver shall have no duty or obligation to pay any expenses, bills or debts
15 incurred prior to the Receiver taking possession and control of the Receivership Property, except
16 as explicitly listed in Section V above. In no event shall the Receiver be obligated to advance his
17 own funds for the payment of expenses for the Receivership Estate. The filing of the Petition by
18 Patriot does not render Patriot liable for the costs and expenses of the Receiver, nor is Patriot
19 required to advance funds to the Receiver to meet the working capital needs of Flamingo, the
20 Receivership Property and/or the Receivership Estate; nor shall anything in this Order be
21 construed as obligating the Receiver to advance his own funds to pay costs and expenses of the
22 receivership which have been approved by this Court; notwithstanding the foregoing, Patriot
23 may submit funds to the Receiver for the purposes of working capital, such that the Receiver
24 may be able to carry out and effectuate the terms of this Order, with such working capital to be
25 repaid to Patriot pursuant to Section V above;

26 X. The Receiver is granted a limited power of attorney to access all of Flamingo's bank
27 accounts;

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2 Y. The Receiver is authorized to employ Todd E. Kennedy, Esq. of Black & LoBello as
3 his counsel for this matter without further order of the Court. Mr. Kennedy is entitled to
4 reasonable compensation, including reimbursement of all reasonable administrative costs and
5 expenses, and shall be compensated for his own work and for the reasonable and necessary work
6 of attorneys and staff assisting him, at the ordinary and reasonable rates for attorneys and staff
7 for matters of this kind; and

8 Z. Should the Receiver determine, in his discretion and upon due investigation of
9 Flamingo's records, accounting and books, and of the actions and omissions of Flamingo's
10 directors, officers, and employees, that the Receivership Estate is insolvent and Flamingo's debts
11 (including the Judgment) cannot reasonably be satisfied through this receivership, the Receiver
12 may move for a discharge of the Receiver and seek an order from the Court after a properly
13 noticed petition and hearing approving the Receiver's final report and account.

14 DATED this 8 day of August, 2016:

15 
DISTRICT JUDGE NANCY ALLF
16 DC

17 Respectfully submitted by:

18 IQBAL LAW PLLC


19 By: 
20 Mohamed A. Iqbal, Jr. (NSB #10623)
21 Christopher Mathews (NSB #10674)
22 101 Convention Center Drive, Suite 1175
23 Las Vegas, Nevada 89109
24 Attorneys for Plaintiff Patriot-Reading
25 Associates LLC
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EXHIBIT “B”

EXHIBIT “B”

FLAMINGO-PECOS SURGERY CENTER, LLC

Business Entity Information			
Status:	Revoked	File Date:	1/9/2002
Type:	Domestic Limited-Liability Company	Entity Number:	LLC240-2002
Qualifying State:	NV	List of Officers Due:	1/31/2015
Managed By:	Managers	Expiration Date:	1/9/2502
NV Business ID:	NV20021004335	Business License Exp:	1/31/2015

Additional Information	
Central Index Key:	

Registered Agent Information
Registered Agent resigned

Financial Information			
No Par Share Count:	0	Capital Amount:	\$ 0
No stock records found for this company			

<div> <div></div> <div>Officers</div> <div><input checked="" type="checkbox"/> Include Inactive Officers</div> </div>			
Manager - ELLY SIMPSON			
Address 1:	10195 W. TWAIN AVE	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89147-6727	Country:	USA
Status:	Resigned	Email:	
Manager - WILLIAM D SMITH MD			
Address 1:	2110 E FLAMINGO RD STE 109	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89119	Country:	USA
Status:	Historical	Email:	
Manager - WILLIAM D SMITH MD			
Address 1:	10195 W. TWAIN AVE	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89147-6727	Country:	USA
Status:	Active	Email:	
Manager - CHARLES TADLOCK MD			
Address 1:	2110 E FLAMINGO RD STE 109	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89119	Country:	USA

Status:	Historical	Email:	
Manager - CHARLES TADLOCK MD			
Address 1:	10195 W. TWAIN AVE	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89147-6727	Country:	USA
Status:	Active	Email:	

Actions\Amendments			
Action Type:	Articles of Organization		
Document Number:	LLC240-2002-001	# of Pages:	2
File Date:	1/9/2002	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	LLC240-2002-004	# of Pages:	2
File Date:	11/26/2002	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	LLC240-2002-003	# of Pages:	1
File Date:	1/16/2004	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	LLC240-2002-002	# of Pages:	1
File Date:	1/17/2005	Effective Date:	
List of Officers for 2005 to 2006			
Action Type:	Annual List		
Document Number:	20060060240-00	# of Pages:	1
File Date:	1/30/2006	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20070035531-16	# of Pages:	1
File Date:	1/16/2007	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20080173775-90	# of Pages:	1
File Date:	3/10/2008	Effective Date:	
08/09			
Action Type:	Registered Agent Change		
Document Number:	20090103452-46	# of Pages:	1
File Date:	2/2/2009	Effective Date:	
2009-2010			
Action Type:	Annual List		

Document Number:	20090103453-57	# of Pages:	1
File Date:	2/2/2009	Effective Date:	
2009-2010			
Action Type:	Annual List		
Document Number:	20100010732-96	# of Pages:	1
File Date:	1/8/2010	Effective Date:	
(No notes for this action)			
Action Type:	Registered Agent Change		
Document Number:	20100213597-40	# of Pages:	1
File Date:	4/2/2010	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20110117689-36	# of Pages:	1
File Date:	2/16/2011	Effective Date:	
(No notes for this action)			
Action Type:	Merge In		
Document Number:	20110754933-05	# of Pages:	6
File Date:	10/20/2011	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20120061226-72	# of Pages:	1
File Date:	1/27/2012	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20130138695-98	# of Pages:	1
File Date:	2/28/2013	Effective Date:	
(No notes for this action)			
Action Type:	Amended List		
Document Number:	20130647725-57	# of Pages:	1
File Date:	10/2/2013	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20140100816-93	# of Pages:	1
File Date:	2/10/2014	Effective Date:	
(No notes for this action)			
Action Type:	Commercial Registered Agent Resignation		
Document Number:	20150276898-08	# of Pages:	3
File Date:	6/18/2015	Effective Date:	
(No notes for this action)			
Action Type:	Resignation of Officers		
Document Number:	20160215742-70	# of Pages:	1

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EXHIBIT “C”

EXHIBIT “C”



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10
11 *(Former) Receiver for Flamingo-Pecos*
12 *Surgery Center LLC*
13
14
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16
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19

DISTRICT COURT
CLARK COUNTY, NEVADA

11 PATRIOT-READING ASSOCIATES,
12 LLC, a Delaware limited liability
13 company,

Plaintiff,

-vs-

15 FLAMINGO-PECOS SURGERY
16 CENTER LLC, a Nevada limited
17 liability company,

Defendant.

Case No. A-16-733627-B

Dept. No. XXVII

RECEIVER'S COMPREHENSIVE STATUS REPORT

20 Timothy R. Mulliner, as (former) Court-appointed receiver ("Receiver") for
21 Flamingo-Pecos Surgery Center, LLC ("FPSC"), submits the following status report
22 concerning efforts made to date in furtherance of the duties imposed by the Court's
23 Order Granting Plaintiff Patriot-Reading Associates LLC's Petition for
24 Appointment of Receiver ("Receivership Order" or the "Order") entered herein on
25 September 12, 2016, as follows:

26 ///

27 ///

28 ///

MULLINER LAW GROUP CHTD
101 CONVENTION CENTER DRIVE, SUITE 650
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AA000717

1 I. Investigation of Receivership Assets

2 Section A.1. of the Receivership Order authorized and instructed Receiver to:

3 Take immediate possession of the Receivership Property
4 (including, without limitation, any accounts held in
5 Flamingo's name), to hold and manage the Receivership
Property to preserve it from loss, removal, material
injury, destruction, substantial waste, and loss of income;

6 Receiver's initial efforts upon being appointed sought to determine whether
7 and to what extent FPSC continues to possess assets despite having ceased
8 operations in October 2014 and thereafter failing to obtain a plan of reorganization
9 through Bankruptcy Proceedings dismissed approximately one year later, in
10 September 2015.¹ In the absence of financial information for any period following
11 the Bankruptcy Proceedings (December 2014-September 2015), or the cooperation of
12 FPSC representatives to provide background concerning later events,² Receiver's
13 asset investigation relied primarily on information obtained from Bankruptcy
14 filings, court records in subsequent litigation filed by FPSC's creditors, and other
15 information discovered through online resources and public records.

16 A. Disposition of Known Assets

17 FPSC's December 31, 2014 Bankruptcy Petition identified approximately \$3
18 million in assets comprised of (1) negligible cash account balances (+/- \$22,000); (2)
19 accounts receivable (+/- \$2,200,000); and "Machinery, Fixtures [and] Equipment"
20 (collectively, "Equipment") (+/- \$700,000), none of which remains available to the

21
22 ¹ FPSC filed its petition for bankruptcy ("Bankruptcy Petition" or "Petition") on December 31,
23 2014 in Case No. BK-S-14-18480-ABL ("Bankruptcy Proceedings" or "Bankruptcy") seeking a plan of
24 reorganization under Chapter 11. However, when FPSC failed to realize the capital infusion
25 required to resume operations, the Bankruptcy was converted to a Chapter 7 on June 16, 2015. The
Bankruptcy was dismissed entirely approximately five months later, on September 11, 2015, upon
motion of the Trustee and her determination that the Petition "was an attempt by the Debtor to
avoid the ongoing litigation with its main secured creditors[.]"

26 ² As discussed in more detail in Section A.3., *supra*, FPSC's former principles effectively
27 abandoned the company after its Bankruptcy Petition was converted to a Chapter 7, failed to file
28 annual disclosures necessary to maintain good standing with the Nevada Secretary of State since
January 2015, and officially resigned their positions as officers and directors in February 2016.

(continued...)

1 Receivership as a viable asset today.

2 Cash Accounts and Deposits. FPSC reported a combined balance of just
3 \$2,190.90 in operating and payroll accounts. While its Bankruptcy Schedules
4 also identified rental deposits totaling \$19,531.45, the lessors in possession of
5 those funds were owed more than \$200,000 in past due rent alone at the time of
6 the Petition. Not surprisingly, none of these funds remain available to the
7 Receivership today.³

8 Accounts Receivable. The majority of FPSC's purported \$3 million in
9 assets were in the form of Accounts Receivable totaling \$2,195,139.30. Even at
10 the time of FPSC's Petition, collection efforts on these delinquent accounts would
11 have yielded a small fraction of the amount owed, as (1) most of them reflected
12 balances unpaid by Medicaid; (2) all accounts had been delinquent for at least
13 six months (prior to the Petition) up to several years; and (3) collection efforts in
14 the normal course of FPSC's business had already failed to produce payment. In
15 fact, FPSC continued to employ a small collections department even after
16 operations had otherwise ceased, suggesting that the remaining accounts were
17 the least collectable of all.⁴

18 For these reasons, and because collection efforts may even be time-barred at
19 this juncture, Receiver does not consider FPSC's Accounts Receivable viable assets of
20 the Receivership today.

21 Equipment (machinery, and fixtures). The remaining assets identified in
22 FPSC's Petition, Equipment valued at \$708,745.07, are similarly unavailable to the

23
24 ³ As previously reported, Receiver was unable to locate any deposit accounts held in FPSC's
25 name at the time of his appointment, but subsequently opened the operating account at Bank of
Nevada which was initially funded on or about November 2, 2016 and is the subject of Receiver's
monthly reports.

26 ⁴ Moreover, filings in the Bankruptcy proceedings suggest that records necessary to pursue
27 collection of the FPSC's Accounts Receivable were being withheld by creditor(s) attempting to secure
their own payment.

1 Receivership after being sold to satisfy obligations to FPSC's secured creditors. For
2 example, litigation brought by FPSC's largest secured creditor, J.P. Morgan Chase
3 Bank, N.A. ("Chase"), appears to have resulted in the sale of "all medical assets"
4 belonging to FPSC as of April 2016 at public auction.⁵ Based on Receiver's review of
5 court filings in that litigation, proceeds of the April 2016 auction were likely
6 insufficient to satisfy even FPSC's indebtedness to Chase, much less its indebtedness
7 to other secured creditors.⁶

8 Accordingly, and because health care providers such as FPSC tend to lease,
9 rather than own, much of the equipment used in day-to-day operations, Receiver does
10 not to believe the "Machinery, Fixtures [and] Equipment" referenced in FPSC's
11 Bankruptcy Schedules are available to the Receivership today.⁷

12 B. Investigation of Other Possible Assets

13 Because court filings in FPSC's Bankruptcy represented the best source of
14 information concerning the company's finances in the absence of internal books and
15 records, Receiver reviewed and relied on those records heavily. However, Receiver's
16 broader attempt to identify potential assets of the Receivership relied on many

17 ⁵ While auction notices and other materials obtained online do not specifically reference Chase,
18 this is the same auction referenced in Patriot-Reading's Petition for the Appointment of a Receiver
filed herein on July 3, 2016. *Id.*, at pp. 3:1-21, 7:5-7, 10:25-11:2, Ex. 4.

19 ⁶According to allegations in Chase's lawsuit (filed May 7, 2014), the Equipment secured two
20 loans totaling more than \$1.3 million. Details of the settlement resolving that litigation are
21 unknown, however Chase's voluntary dismissal without prejudice in February 2016 was likely
conditioned upon the sale of its collateral at the April 2016 auction (presumably with FPSC's
principles, as guarantors, remaining liable for any deficiency).

22 ⁷ Receiver recognizes the possibility that some of the property listed in FPSC's Bankruptcy
23 Petition was not included in the collateral securing the loans by Chase and/or was not sold at the
24 April 2016 auction. However, based on UCC Financing Statements ("UCC-1") reflecting the security
25 interests of other creditors in (broadly defined) property "owned or acquired" by FPSC, Receiver
26 concluded that FPSC does not continue to own or possess any of the machinery, fixtures or
27 equipment identified in Bankruptcy filings. For example, FPSC's Petition acknowledges
28 indebtedness totaling \$166,808.77 to just one creditor with a UCC-1 of record, Cardinal Health. At a
minimum, it is Receiver's opinion that further direct investigation into this property does not
warrant incurring additional fees and expenses unless and until some event(s) in the future suggests
otherwise.

1 other sources, including records of state and local agencies (for example, secretary of
2 state and fictitious name filings, mark and trade name registrations, etc.), health
3 care regulators and accrediting organizations (for example, to identify transferable
4 licenses as a medical facility and/or of certifications or memberships having
5 discernable value), and Westlaw® public records databases (for example, to identify
6 other possible sources of revenue or locations used to conduct business). Despite
7 these efforts, Receiver was largely unable to identify any assets available to the
8 Receivership other than FPSC's choses of actions against third parties discussed in
9 Sections III and IV, *supra*.

10 II. Investigation of Receivership Liabilities

11 Section A.2. of the Receivership Order authorized and instructed Receiver to:

12 Determine, subject to the terms of this Order, which if
13 any of Flamingo's accounts payable should be paid, in full
14 or in part, so that there might be an orderly liquidation of
the Receivership Property and payment of claims of and
debts against Flamingo, including the Judgment;

15 Relying primarily on information obtained from filings in the Bankruptcy
16 Proceedings, Receiver conducted a thorough initial investigation of FPSC's
17 liabilities to determine the following:

18 1. Having ceased operations in October 2014, FPSC has no
19 recurring liabilities or operational costs;

20 2. None of FPSC's current liabilities threaten the assets or the
21 Receivership or the viability of the Receivership itself, or otherwise require
22 priority payment (subject, potentially, to paragraph 8 below);

23 3. None of FPSC's liabilities is the subject of ongoing litigation
24 other than the enforcement of Patriot-Reading's judgment in these
25 proceedings;

26 ///

27 ///

28 ///

1 4. All known prior litigation against FPSC has concluded and/or
2 does not implicate the assets of the Receivership, as follows,

- 3 a. Case No. A688930, Westland Enterprises LLC (Plaintiff) -
4 Closed February 9, 2015 after Notice of Bankruptcy filed
5 January 6, 2015
6 b. Case No. A698938, Michael G. Valpiani (Plaintiff) - Stipulated
7 dismissal entered March 2, 2015
8 c. Case No. A700424, JP Morgan Chase Bank NA (Plaintiff) -
9 Stipulated dismissal entered February 16, 2016
10 d. Case No. A709268, George S. Gluck (Plaintiff) - Closed May 2,
11 2016; no activity since Complaint filed November 3, 2014
12 e. Case No. YC069383 (California Superior Court, L.A. County,
13 SW District) Karl Storz Endoscopy-America, Inc. (Plaintiff) -
14 Voluntary Dismissal entered October 26, 2015
15 f. Case No. A616308, Quirk Law Firm, LLP (Plaintiff)
16 Case No. A657298, Law Offices of Brian D. Nettles (Plaintiff)
17 Case No. A663823, Gazda & Tadayon, LLC (Plaintiff)
18 Case No. A674176, Rebeca Medrano (Plaintiff)
19 Case No. A690515, Glen Lerner Injury Attorneys (Plaintiff)
20 Case No. A696615, Benson & Bingham LLC (Plaintiff)
21 Case No. A700435, Qualey Law Group Inc. (Plaintiff)
22 Case No. A701857, Howard Law Firm PC (Plaintiff)
23 Case No. A706790, Law Office of Eric R. Blank PC (Plaintiff)
24 Case No. A707569, Eglet Wall Christiansen Eglet (Plaintiff)
25 Case No. A708977, Kunin & Carman (Plaintiff)
26 Case No. A710770, Law Office of Karen H. Ross (Plaintiff)
27 - Interpleader/lien actions not affecting the Receivership

18 5. No creditors other than Patriot-Reading have obtained a
19 judgment against FPSC.

20 6. A total of seventy-four (74) creditors filed claims in the
21 Bankruptcy Proceedings, however only two creditors, Patriot-Reading and
22 Chase, pursued recovery of those claims after FPSC's Bankruptcy was
23 dismissed.⁸

24 7. Pursuant to an amended claim filed by the Internal Revenue
25

26 ⁸ As noted in Section I, *infra*, Chase appears to have recovered its indebtedness from proceeds of
27 the sale of FPSC's equipment at public auction in April 2016. While Chase's dismissal of FPSC was
28 entered without prejudice in February 2016, Chase has not pursued further recovery against FPSC
according to records available to Receiver.

1 Service on March 5, 2015, FPSC owed no back-taxes as of December 31,
2 2014.

3 8. However, the State of Nevada Department of Taxation filed a
4 claim against FPSC's Bankruptcy Estate in the amount of \$467.19.

5 9. At this stage of the Receivership, further attempts to
6 determine which creditors (other than Patriot-Reading), if any, may be
7 entitled to participate in the ultimate distribution of its assets is not
8 warranted.

9 10. Unless and until the Court instructs otherwise, for now,
10 Receiver reports only that Patriot-Reading and the Nevada Department of
11 Taxations should be included in such a distribution.

12 III. FPSC's Choses of Action Against Third Parties

13 Section A.3. of the Receivership Order authorized and instructed Receiver to:

14 Pursue Flamingo's claims and causes of actions against
15 third parties, including but not limited to Flamingo's
directors and officers⁹

16 The Receivership is currently prosecuting lawsuits filed against (1) FPSC's
17 former directors and officers for breach of fiduciary and other duties; and (2) former
18 employee Robert Barnes for his embezzlement from the company while still in
19 operation.

20 A. Litigation Against Robert W. Barnes

21 The Receivership sued FPSC's former Office Administrator and Operating
22

23 ⁹ It should be noted that the Order made Receiver's pursuit of any such causes of action
permissive, rather than mandatory, as stated below:

24 For the avoidance of doubt, the Receiver shall not be obligated to
25 bring any such claims or actions as contemplated by this Section A
26 and/or the other Sections of this Order, and the Receiver in his
27 discretion may determine the extent to which, if at all, any such
claims or actions may be beneficial to the effectuation of the terms of
this Order.

1 Manager Robert W. Barnes (“Barnes”) on May 2, 2017, seeking to recover the
2 approximately \$1.3 million he embezzled from the company from 2010 through
3 2013.¹⁰

4 Summary of Claims. Tracking Barnes’ admissions from the plea agreement
5 in his criminal prosecution, each of the Receivership’s claims are based on the
6 following core allegations:¹¹

- 7 a. Between approximately 2010 and continuing through 2013,
8 [Barnes] embezzled at least \$1.3 million dollars from SCSN
without authority to do so.
- 9 b. Defendant Robert W. Barnes improperly used multiple SCSN
10 credit cards for personal purchases, including travel, jewelry,
concerts and dining.
- 11 c. For example, Barnes obtained approximately \$515,000 in casino
12 cash advances using SCSN credit cards, which he used for
personal gambling.
- 13 d. In February 2013, Barnes used an SCSN credit card to purchase
14 a diamond and platinum ring for \$38,000.
- 15 e. During one five-month period in 2013, Barnes charged \$45,000
16 on one SCSN credit card for concert tickets, hotels and expenses
at Disneyland, expensive meals, and other personal
entertainment and expenses.

17 Statutes of Limitation. A three-year statute of limitations applies to both
18 claims asserted in this lawsuit, conversion and breach of fiduciary duties. *See* N.R.S.
19 § 11.190(3)(c) (three-year limitation period for unlawful “taking [of] personal
20 property” applies to conversion); Stalk v. Mushkin, 125 Nev. 21, 30, 199 P.3d 838, 844
21 (2009) (“claims for breach of fiduciary duty based on fiduciary relationships other than attorney-
22 client are akin to fraud claims, subject to the [three-year] limitation period set forth under NRS
23 11.190(3)(d)”). However, Nevada’s “discover rule” applies to these claims such that the

24
25 ¹⁰ Barnes is believed to have embezzled more than \$1.3 million while employed by FPSC,
26 however the Receivership’s Complaint adopted that estimate of damages based on Barnes’
27 admissions in criminal proceedings to eliminate the need to prove-up additional damages. Due to
Barnes’ incarceration, Receiver does not anticipate being able to collect even the lower estimate of
damages.

28 ¹¹ *See* Complaint in Case No. A754867, at ¶ 19, p. 4:12-26.

1 limitations period did not begin tolling until the Receivership discovered or should have discovered
2 the basis to assert them. *See Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437, 440
3 (1998) (“Today, we conclude that the statute of limitations for conversion is discovery based.”);
4 *In re Amerco Derivative Litig.*, 127 Nev. 196, 228, 252 P.3d 681, 703 (2011) (“The statute of
5 limitations for a claim for breach of fiduciary duty does not begin to run until the aggrieved party
6 knew, or reasonably should have known, of the facts giving rise to the breach.”) (internal
7 quotations omitted).

8 In light of Barnes’ concealment of his embezzlement (and the failure of FPSC’s former
9 directors and officers to discover the same, discussed below), the three-year limitations period
10 applicable to the Receivership’s claims started running, at the earliest, upon Receiver’s
11 appointment on September 12, 2016. The Receivership asserted those claims less than eight
12 months later, on May 2, 2017, well within the limitations period.

13 **Status of Litigation.** Barnes was served with the Complaint and Summons on June 6,
14 2017, requiring that he respond to the same by no later than June 26, 2017.

15 **Next Steps.** Barnes having failed to answer or otherwise respond to the Complaint,
16 Receiver’s next steps will pursue entry of his default and a default judgment against him in the
17 amount of \$1.3 million.

18 B. Litigation Against FPSC’s Former Director and Officers

19 The Receivership filed its Complaint against former directors and officers
20 William Smith, MD; Pankaj Bhatanagar, MD; Marjorie Belsky, MD; Sheldon
21 Freedman, MD; Mathew Ng, MD and Daniel Burkhead, MD on February 10, 2017 to
22 recover damages resulting from acts and omissions related to Barnes’ embezzlement
23 from FPSC.

24 **Summary of Claims.** The Receivership’s Complaint asserts causes of action
25 for (1) Negligent Hiring, (2) Negligent Supervision, (3) Negligent Retention and (4)
26 Breach of Fiduciary Duties based on acts and omissions of FPSC’s former principles
27
28

generally described as follows:¹²

24. Individually and collectively, Defendants failed to conduct the necessary due diligence regarding Barnes and negligently hired Barnes as Plaintiff's Office Manager – effectively putting a criminal in a position to embezzle and steal from Plaintiff.
25. Individually and collectively, Defendants failed to supervise, oversee and/or monitor Barnes for many years during Barnes' crime spree, allowing a criminal to effectuate and conduct his embezzlement and theft from Plaintiff and resulting in substantial damages to and against Plaintiff.
26. Individually and collectively, Defendants negligently supervised, retained, oversaw and/or monitored Barnes for many years during Barnes' crime spree, resulting in substantial damages to and against Plaintiff.
27. 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.
31. ... Defendants individually and collectively failed - for an unreasonably lengthy period of time - to remove Barnes from his position as Office Manager, and to block Barnes' access to Plaintiffs funds and assets, thereby: (a) allowing Barnes to continue his crime spree for some time; (b) failing to limit Plaintiffs potential losses; and (c) exacerbating Plaintiffs actual losses.

Statutes of Limitation. All four causes of action against FPSC's fiduciaries allege the negligent (Claims 1 through 3) or intentional (Claim 4) breach of their duties to FPSC and are subject to a three-year statute of limitations period. *See* N.R.S. § 11.190(3)(d); Stalk, 125 Nev. at 30 ("claims for breach of fiduciary duty based on fiduciary relationships other than attorney-client are akin to fraud claims"). Because the Receivership could have only discovered breaches of those duties by FPSC's former principles, at the earliest, upon Receiver's appointment in September 2016, the Complaint filed in February 2017 was timely. *See In re Amerco Derivative Litig.*, 127 Nev. at 228 ("The statute of limitations for a claim for breach of fiduciary duty does not begin to run until the aggrieved party knew, or reasonably should have known, of the facts giving rise

¹² *See* Complaint in Case No. A750926, at pp. 4:14-5:3, 5:14-18.

1 to the breach.”) (internal quotations omitted).

2 Status of Litigation. The Receivership did not serve FPSC’s former directors
3 and officers immediately upon filing the Complaint for strategic reasons not
4 detailed in this report. However, within the initial 120-day period allowed, four of
5 the six defendants were successfully served and have filed motions to dismiss the
6 Complaint set for hearing on July 27, 2017.¹³ The two remaining defendants, Drs.
7 Smith and Belsky, have thus far been successfully evaded service of process,
8 however Receiver anticipates securing leave of court to make additional attempts
9 and/or effecting service by publication based on multiple affidavits of due diligence
10 demonstrating defendants’ intentional evasion.¹⁴

11 Next Steps. Receiver’s next steps in this litigation will include (1) serving
12 Drs. Smith and Belsky, personally or by publication, as appropriate based on future
13 service attempts; (2) briefing each of the pending motions to dismiss; and (3) holding
14 an early case conference before starting discovery and otherwise proceeding to
15 prosecute the litigation.

16 IV. Receivership’s Claim to Forfeited Assets

17 Section A.4. of the Order instructed Receiver to:

18 Pursue Flamingo's claims against personal property
19 seized as part of criminal forfeiture proceedings against
20 Flamingo's former employee/office manager Robert W.
21 Barnes.

22 Pursuant to Barnes’ Plea Agreement in criminal proceedings (Case No. 2:16-

23 ¹³ Three motions to dismiss have been filed. Jointly represented, Drs. Ng and Bhatnagar jointly
24 moved to dismiss the Complaint on June 23, 2017, while Dr. Burkhead moved for the same relief on
25 June 26, 2017 and later joined Dr. Freedman’s motion filed on June 27, 2017,

26 Since the time Receiver initially prepared this report, Dr. Freedman filed a joinder to each of his
27 co-defendants’ motions to dismiss and the hearing of all motions (and joinders thereto) was
28 continued to September 26, 2017.

29 ¹⁴ While Receiver previously believed a motion had already been filed seeking an enlargement of
the time to serve Drs. Smith and Belsky, he discovered that the same still needs to be filed shortly
before submitting this report.

(continued...)

1 cr-00090-APG-GWF, the “Criminal Case”) brought by the U.S. Attorney’s Office for
2 the District of Nevada (“USAO”), (in addition to acknowledging his guilt for
3 embezzling \$1.3 million from FPSC) Barnes “knowingly and voluntarily agree[d to]
4 the civil judicial forfeiture or the criminal forfeiture of” approximately forty (40) items
5 of specified property (the “Forfeited Assets”).¹⁵ While the process to do so was well
6 underway (or, possibly, closed as discussed below) by the time of his appointment,
7 Receiver formally asserted the Receivership’s claim to the Forfeited Assets in a
8 “Petition for Remission” filed January 28, 2017.¹⁶

9 Summary of Action. Receiver’s initial efforts to claim the Forfeited Property
10 consisted of his review of filings in the Criminal Case, phone calls to the responsible
11 attorney(s) at the USAO and research to understand rather complex (and mostly
12 obscure) areas of asset forfeiture law.¹⁷ Based on this research and communications
13 with the AG’s office, Receiver determined that a Petition for Remission filed after
14 Barnes’ criminal sentencing was the most appropriate available method to assert the
15 Receivership’s claim to the Forfeited Assets. Accordingly, the Receiver submitted the
16 Receivership’s Petition for Remission, attached hereto as Exhibit 1, on January 27,
17 2017.

18 When Receiver later discovered that an Amended Judgment purporting to
19 award restitution to FPSC’s former principles and not the Receivership had been
20

21 ¹⁵ The Plea Agreement includes a list of forty-five (45) Forfeited Assets, however the USAO
22 subsequently agreed to return six (6) of the items listed to Barnes. The resulting list of Forfeited
Assets is attached as Exhibit _ to the Receivership Petition for Remission. See Exhibit _.

23 ¹⁶ FPSC’s former principles were served with notice of the “Preliminary Order of Forfeiture”
24 issued in the Criminal Case in June 2016 and, Receiver contends, had an obligation to assert a claim
25 to the Forfeited Property on FPSC’s behalf within the time permitted, by August 18, 2016 at the very
26 latest. Instead, those principles asserted claims on their own behalf. Their flagrant breach of
fiduciary duties in this regard is likely to become the subject of future litigation if the Receivership is
ultimately prejudiced, i.e. the Forfeited Assets are distributed to the principles rather than FPSC
vis-à-vis the Receivership.

27 ¹⁷ References to “asset forfeiture” in this respect and elsewhere in this report generally includes
28 the processes known as, and law applicable to, “Restoration”, “Remission”, “Recovery” and
“Restitution.”

1 entered on March 28, 2017, Receiver sent the attached correspondence to the lead
2 attorney in the Criminal Case and the USAO's asset forfeiture unit., See Exhibits 2
3 and 3. Receiver has since been informed (after many phone calls with the USAO staff
4 members, paralegals and attorney Nicholas Dickenson) that decisions on petitions for
5 remission simply have not yet been made yet. As of the filing of this report, Receiver
6 has not received notice of such a decision and the fate of the Receivership's Petition
7 for Remission is yet to be determined

8 Respectfully submitted,

9 MULLINER LAW GROUP

10
11 By: /s/ Timothy R. Mulliner
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19 *(Former) Receiver for Flamingo-Pecos*
20 *Surgery Center LLC*
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CERTIFICATE OF SERVICE:

Pursuant to N.R.C.P. 5(b), I hereby certify that on the 8th day of September, 2017, I caused a true and correct copy of the foregoing Receiver's Comprehensive Status Report to be served upon all parties and interested persons in the manner indicated:

- ☐ BY MAIL: I caused said document(s) to be deposited with the U.S. postal service on this date with postage fully prepaid thereon to:
- ☐ BY FEDERAL EXPRESS: I caused said document(s) to be delivered on the same day to a courier or driver authorized by Federal Express to receive documents, in an envelope or package designated by Federal Express to:
- ☒ BY ELECTRONIC SERVICE: I served said document(s), together with all exhibits thereto, via the Court's electronic filing and service system commonly known as Wiznet to the email addresses then on file with the Court's system.

MULLINER LAW GROUP CHTD

/s/ Timothy R. Mulliner
An employee of Mulliner Law Group Chtd

EXHIBIT “D”

EXHIBIT “D”

AFFIDAVIT OF MARC P. COOK

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

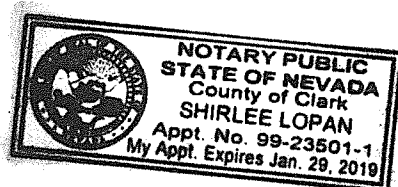
MARC P. COOK, hereby swears under penalty of perjury:

1. I am a partner in the law firm of Cook & Kelesis, Ltd., and an attorney, duly licensed to practice in the State of Nevada and am counsel for Defendant Freedman in the above-captioned action.
 2. I have read this Affidavit and know the contents thereof and the same is true based my personal knowledge, information and belief and as to those matters based on belief, I believe them to be true.
 3. Affiant personally knows Dr. William Smith and to my knowledge the daughter indicted in the Affidavit of Due Diligence is the daughter of Dr. Smith but she and her mother (whom is not married to Dr. Smith) reside at the residence on Greensboro Lane.
 4. Affiant would stat that Dr. Smith's primary address is not on Greensboro Lane.
- FURTHER AFFIANT SAYETH NAUGHT.

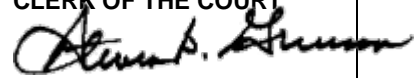
MARC P. COOK, ESQ.

SUBSCRIBED AND SWORN to before me
this 24th day of October, 2017.

NOTARY PUBLIC in and for said State of
Nevada County of Clark



AA000732



MDSM

ROBERT E. SCHUMACHER, ESQ

Nevada State Bar No. 7504

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Attorney For: Defendant

DANIEL L. BURKHEAD, M.D., LTD.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MARK J. GARDBERG, ESQ., in his capacity as	)	CASE NO. A-17-750926-B
Receiver for, and acting on behalf of,	)	DEPT. NO.: XV
FLAMINGO-PECOS SURGERY CENTER, LLC a)	
Nevada limited liability company;	)	DEFENDANT DANIEL
	)	BURKHEAD M.D.'S MOTION TO
Plaintiff.	)	DISMISS SECOND AMENDED
	)	COMPLAINT
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.)	

**DEFENDANT DANIEL BURKHEAD M.D.'S MOTION TO DISMISS SECOND
AMENDED COMPLAINT**

Defendant, DANIEL L. BURKHEAD, M.D., ("Dr. Burkhead") by and through his attorney of record, Robert E. Schumacher, Esq., of the law firm of GORDON REES SCULLY MANSUKHANI, LLP, hereby submits this Motion to Dismiss Second Amended Complaint ("Motion") filed by Plaintiff FLAMINGO-PECOS SURGERY CENTER, LLC ("Plaintiff").

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

5 Dated: October 25, 2017

**GORDON REES SCULLY
MANSUKHANI, LLP**

6 By:

7 /s/ Robert E. Schumacher

8 ROBERT E. SCHUMACHER, ESQ

9 Nevada State Bar No. 7504

10 300 South Fourth Street

11 Suite 1550

12 Las Vegas, Nevada 89101

13 *Attorney for Defendant*

14 **DANIEL L. BURKHEAD, M.D.**

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Dated: October 25, 2017

By: **GORDON REES SCULLY
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Plaintiff was a local ambulatory surgery center (“ASC”) set up as a Nevada limited liability company. Second Amended Complaint (“SAC”), ¶ 24. The ASC’s Operating Agreement provides that the company would be run by and through an annually elected Board of Managers. Numerous local physicians invested in the ASC and became owners, some serving from time to time (on a volunteer basis) on the company’s Board of Managers. Dr. Burkhead served on the Board of Managers. However, he resigned from the Board of Managers prior to the occurrence of many of the significant events alleged in Plaintiff’s Complaint. Since that time, Plaintiff’s status as a Nevada business entity has been revoked.

Plaintiff alleges that Defendants negligently hired, supervised and trained a former employee, Robert Barnes (“Barnes”), who served as the company’s office manager. Plaintiff terminated Mr. Barnes after it discovered millions of dollars of revenue could not be accounted for. Ultimately, Mr. Barnes was charged criminally with and convicted of embezzling millions of dollars from Plaintiff. Plaintiff’s negligence claims are barred by the applicable statute of limitations, the economic loss doctrine, and due to the fact that they implicate employer liability. For these reasons, Plaintiff’s negligence claims should be dismissed as against Dr. Burkhead. Alternatively, this Court should stay this action until Plaintiff rectifies its corporate status, which is currently revoked by the Nevada Secretary of State.

II. STATEMENTS OF FACTS

Dr. Burkhead was a member of Plaintiff Flamingo Pecos Surgery Center, which is currently a defunct and insolvent business entity. SAC, ¶¶ 1, 30, 42. Plaintiff’s corporate status is currently listed as “revoked” by the Nevada Secretary of State. *See Exhibit 1*. As explained below, Plaintiff does not have standing to pursue this action while its corporate status is revoked. As such, this case should be stayed for a brief, reasonable amount of time to give Plaintiff the opportunity to cure its revoked corporate status. Until Plaintiff’s revoked status is cured,

1 Plaintiff cannot pursue its claims. If Plaintiff fails to rectify its corporate standing this suit
2 should be dismissed for lack of standing.

3 Plaintiff's claims against Dr. Burkhead also lack merit because he resigned from the ASC
4 prior to many of the acts for which Plaintiff complains. Further, Plaintiff has alleged that Barnes
5 was negligently hired, retained, and supervised by Defendants. However, Plaintiff filed this
6 action well after the statute of limitations for these claims expired. Additionally, Dr. Burkhead
7 was not Barnes' employer. Accordingly, he cannot be held liable under Plaintiff's claims for
8 relief. Finally, because Plaintiff fails to allege any injury to person or property damage, its
9 claims are barred under the economic loss doctrine.

10 **III. DISCUSSION**

11 **A. Legal Standard**

12 **1. Motion to Dismiss**

13 Dismissal under NRCP 12(b)(5) is proper "where the allegations in the counterclaims,
14 taken at face value, and construed favorably in the counterclaimant's behalf, fail to state a
15 cognizable claim for relief." *Morris v. Bank of Am. Nev.*, 110 Nev. 1274, 886 P.2d 454 (1994)
16 (citations omitted). Moreover, pleading of conclusions must be "sufficiently definite to give fair
17 notice of the nature and basis or grounds of the claim and a general indication of the type of
18 litigation involved." *Taylor v. State of Nevada*, 73 Nev. 151, 152, 153, 311 P.2d 733, 734
19 (1957).

20 Further, "[t]he court may take into account matters of public record, orders, items present
21 in the record of the case, and any exhibits attached to the complaint when ruling on a motion to
22 dismiss for failure to state a claim upon which relief can be granted." *Breliant v. Preferred*
23 *Equities Corp.*, 109 Nev. 842, 847, 848 P.2d 1258, 1261 (Nev. 1993). Notwithstanding all
24 favorable inferences, Plaintiff cannot establish any set of facts that would entitle it to relief
25 against Dr. Burkhead Trail based on the causes of action that are the subject of this motion.
26 *Blackjack Bonding v. City of Las Vegas Municipal Court*, 116 Nev. 1213, 1217, 14 P.3d 1275,
27 1278 (2000) (affirming dismissal).

B. This Court Should Dismiss the Claims Against Dr. Burkhead

1. The Statute of Limitations has Expired for Plaintiff's Negligence Claims

Plaintiff alleges three negligence based causes of action in its Second Amended Complaint ("SAC"). These causes of action are negligent hiring, supervision, and retention relating to Barnes' employment as the office manager of the ASC. The statute of limitations for negligence is two years. NRS 11.190(e). Plaintiff filed its original Complaint on February 10, 2017. In the SAC, Plaintiff states Barnes' was hired on October 5, 2006. SAC, ¶ 66. As such, the two year statute of limitations had long since expired for a claim of negligent hiring by the time of the filing of the Complaint in 2017.

Plaintiff alleges that Barnes' embezzlement was discovered in 2012, but he was not fired until 2013. SAC, ¶ 112. According to Plaintiff's own allegations, the statute of limitation began accruing for the negligent retention and supervision claims in 2012 or at the latest in 2013. The Complaint was not filed until February 10, 2017, long after the statute of limitations for those claims expired. Dr. Burkhead requests that all negligence based causes of action be dismissed since the applicable statute of limitations for these claims expired before this action was initiated.

2. The Torts of Negligent Hiring/Retention/Supervision Implicate Employer Liability

Plaintiff improperly alleges causes of action for negligent hiring, supervision, and retention against Dr. Burkhead and all of the other Defendants. Plaintiff, not Dr. Burkhead or the other Defendants, employed Barnes as Plaintiff's office manager. Only an employer, which was Plaintiff itself, can be liable for negligent hiring, supervision and retention. Since Dr. Burkhead was not Barnes' employer, he cannot be held liable under Plaintiffs' causes of action. *See Wright v. Watkins and Shepard Trucking, Inc.*, 968 F.Supp.2d 1092, 1095 (2013) (stating the tort of negligent hiring "creates **employer** liability") (emphasis added).

Only an employer can be liable for Plaintiffs' claims. Plaintiff did not and cannot allege that Dr. Burkhead acted as Barnes' employer. Plaintiffs' claims against Dr. Burkhead must be dismissed.

Additionally, negligent hiring is based on the failure of an employer to conduct a reasonable background check or hires an employee that the employer knew, or should have

known, that the employee had dangerous propensities that could result in harm to others. *See Hall v. SSF, Inc.*, 112 Nev. 1384, 1392, 930 P.2d 94, 98 (1996). There are zero factual allegations in the Second Amended Complaint that Dr. Burkhead or the other Defendants failed to conduct a reasonable background check or knew before he was hired that Barnes was a risk to embezzle money from Plaintiff. *See e.g.*, SAC, ¶¶ 66-70. Plaintiff's sole allegation is a bald conclusory allegation that Defendants failed to conduct necessary due diligence. *See* SAC ¶ 70. Because this is a conclusory statement with no actual facts, the Court does not need to treat it as true and may disregard it when deciding this Motion. Plaintiff did not and cannot plead the necessary elements of a negligent hiring claim. Plaintiff's negligent hiring claim fails as a matter of law and must be dismissed.

3. The Economic Loss Doctrine Bars Plaintiff's Negligence Claims

Even assuming that Plaintiff could meet the elements for its negligence claims against Dr. Burkhead, those claims are precluded by the economic loss doctrine. Well established Nevada law hold that the economic loss doctrine precludes a plaintiff from recovering under theories of negligence for purely economic loss. *Local Joint Executive Board v. Stern*, 98 Nev. 409, 651 P.2d 637, 638 (1983) ("The primary purpose of the rule is to shield a defendant from unlimited liability for all of the economic consequences of a negligence act, particularly in a commercial or professional setting...."); *Terracon Consultants Western Inc. v. Mandalay Resort Group*, 125 Nev. 66, 73, 206 P.3d 81, 86 (Nev. 2009) (responding to certified question from the United States District Court for the District of Nevada on whether economic loss doctrine bars negligence claims where loss is solely economic); *Calloway v. City of Reno*, 116 Nev. 250, 256, 993 P.2d 1259, 1263 (2000), overruled on other grounds by *Olson v. Richard*, 89 P.3d 31, 31-33 (Nev. 2004) (holding district court properly applied the economic loss doctrine to preclude negligence claims where only damages were economic). Purely economic loss occurs when there is no damage or injury to a person or property, and only monetary losses are sustained.

As part of its causes of action for negligent hiring, retention, and supervision, Plaintiff seeks only recovery of economic losses allegedly sustained by Plaintiff as a result of Barnes' embezzlement. Plaintiff failed to allege any injury to a person or property that occurred as a

1 result of the alleged negligence. This is precisely the type of claim that is barred under the
2 economic loss doctrine. Plaintiff cannot recover for purely economic loss under a theory of
3 negligence. In order to sustain a cause of action for negligence, Plaintiff must allege injury to
4 person or property. Plaintiff's SAC completely omits any such allegations. For these reasons,
5 Plaintiff's negligence based causes of action must be dismissed.

6 4. Dr. Burkhead Cannot be Liable for Actions Taken After His Resignation

7 Dr. Burkhead resigned as a member of the ASC. Many of the actions for which Plaintiff
8 complains took place after his resignation. Plaintiff alleges that the members actions are not
9 protected by the business judgment rule.¹ However, Dr. Burkhead's resignation insulates him
10 from liability for any decisions made by the members after his resignation became effective. Dr.
11 Burkhead cannot be liable for the actions of the members when he was not a member at the time
12 such actions were taken. None of the events alleged in the SAC which occurred after Dr.
13 Burkhead's resignation can be attributed to him.

14 Specifically, Plaintiff alleges that Defendant is liable for waste for failing to pursue
15 accounts receivable that could have been used to satisfy company debts and breach of NRS 86.
16 However, such inaction was not attributable to Dr. Burkhead, as he had already resigned before
17 the ASC members failed to pursue such accounts. Further, Defendant had already resigned
18 before the alleged breaches of NRS 86. For these reasons, the SAC should be dismissed against
19 Dr. Burkhead.

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

22 Plaintiff's Charter with the Nevada Secretary of State is currently listed as revoked. *See*
23 **Exhibit 1.**² When the revoked corporate status is brought to the attention of the court by a
24 motion, a reasonable period of time should be allowed to the entity to bring its status back to
25 current. *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578 (2010). Although a court
26 should stay the action for a brief period of time to allow the entity to be reinstated by the

27 ¹ Plaintiff's allegation about the business judgment rule is not a factual allegation. *See e.g.* SAC, ¶¶ 41, 43. It is a
legal conclusion. Accordingly, the Court should not treat that allegation as true for purposes of this Motion.

28 ² The Court may properly take judicial notice of Exhibit 1 as it is a copy of a print out from the Nevada Secretary of
State's electronic database and is not susceptible to dispute. *Breliant*, 109 Nev. at 847.

1 Secretary of State, if the entity does not cure the revoked status the Court can dismiss the case.
2 *Id.*

3 If the Court is not inclined to dismiss this case on the grounds asserted above, Defendant
4 requests that this Court stay the case for a brief period of time in order to give Plaintiff an
5 opportunity to cure its revoked status. If Plaintiff fails to cure the revoked status within thirty
6 days, then this Court should dismiss the SAC for lack of standing Because Plaintiff has already
7 had multiple opportunities to cure the defects in its claims against Dr. Burkhead, the dismissal
8 should be with prejudice.

9 **IV. CONCLUSION**

10 Based on the foregoing, Dr. Burkhead respectfully requests that this Court dismiss all
11 claims against him. Alternatively, this Court should stay this action for a reasonable time to
12 allow Plaintiff an opportunity to reinstate its charter with the Nevada Secretary of State. If
13 Plaintiff fails to do so within a reasonable period of time then this action should be dismissed.

14 Dated: October 25, 2017

**GORDON REES SCULLY
MANSUKHANI, LLP**

16 By:

/s/ Robert E. Schumacher

17 ROBERT E. SCHUMACHER, ESQ

18 Nevada State Bar No. 7504

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Attorney for Defendant

DANIEL L. BURKHEAD, M.D.

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b) and Administrative Order 14-2, effective June 1, 2014, and
3 N.E.F.C.R. Rule 9, I certify that I am an employee of GORDON REES SCULLY
4 MANSUKHANI LLP and that on this 25th day of October, 2017, I did cause a true correct copy
5 of **DEFENDANT DANIEL BURKHEAD M.D.'S MOTION TO DISMISS SECOND**
6 **AMENDED COMPLAINT** to be served via the Court's electronic filing service on all parties
7 listed below (unless indicated otherwise):

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EXHIBIT 1

EXHIBIT 1

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Business Entity Information			
Status:	Revoked	File Date:	1/9/2002
Type:	Domestic Limited-Liability Company	Entity Number:	LLC240-2002
Qualifying State:	NV	List of Officers Due:	1/31/2015
Managed By:	Managers	Expiration Date:	1/9/2502
NV Business ID:	NV20021004335	Business License Exp:	1/31/2015

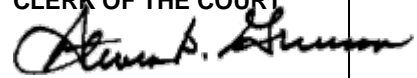
Additional Information	
Central Index Key:	

Registered Agent Information	
Registered Agent resigned	

Financial Information			
No Par Share Count:	0	Capital Amount:	\$ 0
No stock records found for this company			

<div><div></div></div> Officers		<input type="checkbox"/> Include Inactive Officers	
Manager - WILLIAM D SMITH MD			
Address 1:	10195 W. TWAIN AVE	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89147-6727	Country:	USA
Status:	Active	Email:	
Manager - CHARLES TADLOCK MD			
Address 1:	10195 W. TWAIN AVE	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89147-6727	Country:	USA
Status:	Active	Email:	

Actions\Amendments
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Bhatnagar MD incorrectly named Pankaj
Bhatanagar MD, and Marjorie Belsky 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

**MARJORIE BELSKY MD'S
OPPOSITION TO MOTION TO
EXTEND TIME**

AND

COUNTER-MOTION TO DISMISS

Defendant Marjorie Belsky MD ("Dr. Belsky" or "Defendant"), by and through her
counsel of record, Holland & Hart LLP, hereby opposes Flamingo-Pecos Surgery Center,
LLC's Motion to Extend Time to Serve Certain Defendants, and moves for dismissal of all
claims asserted against it by Plaintiff Flamingo-Pecos Surgery Center, LLC (as in the Complaint

1 and First Amended Complaint) and Mark J. Gardberg, Esq., in his capacity as Receiver for, and
2 acting on behalf of, Flamingo-Pecos Surgery Center, LLC, a Nevada limited liability company
3 (in the Second Amended Complaint) (together the “Plaintiff”) in the above-entitled action. This
4 case was filed in February 2017, yet Plaintiff has never served Dr. Belsky with the Summons
5 and Complaint. For this reason, Flamingo-Pecos Surgery Center, LLC’s Motion to Extend must
6 be denied, and Plaintiff’s claims against Dr. Belsky must be dismissed.

7 This Opposition and Counter-Motion is made pursuant to Nevada Rule of Civil
8 Procedure (“NRCP”) 12(b)(4) and EDCR 2.20,¹ and is based on the attached Memorandum of
9 Points and Authorities, the Declaration of Jessica Weiss, attached hereto as **Exhibit “A,”** the
10 papers and pleadings on file in this matter, and any oral argument this Court may allow.

11 DATED this 25th day of October, 2017

12 HOLLAND & HART LLP

13
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22 *Attorneys For Defendants Matthew Ng MD,*
23 *Pankaj Bhatnagar MD, and Marjorie Belsky MD*

24 ///

25 ///

26
27 ¹ Dr. Belsky retained Holland & Hart, LLP effective October 20, 2017, and was therefore previously unaware of
28 Flamingo-Pecos Surgery Center, LLC’s Motion to Extend Time to Serve Certain Defendants. Accordingly, Dr.
Belsky now files her Opposition thereto, and Counter-Motion to Dismiss.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION
TO MOTION TO EXTEND TIME AND COUNTER-MOTION TO DISMISS BY
MARJORIE BELSKY MD.**

I.

INTRODUCTION

Flamingo-Pecos Surgery Center, LLC (“FPSC”) commenced this action on February 10, 2017 with the filing of the Complaint. This action, now on the Second Amended Complaint (“SAC”) with Mark J. Gardberg, Esq. (“Gardberg”), in his capacity as Receiver² for, and acting on behalf of, Flamingo-Pecos Surgery Center, LLC, as the Plaintiff,³ has been pending for over eight (8) months, and neither FPSC nor Gardberg has ever served the Complaint, First Amended Complaint (“FAC”), or SAC on Dr. Belsky. Indeed, on September 28, 2017, Gardberg filed a Motion to Extend Time to Serve Certain Defendants (the “Motion to Extend”),⁴ itself an acknowledgement that Dr. Belsky was never served. *See generally* Motion to Extend. Because the Summons and Complaint were never served on Dr. Belsky, and no good cause exists for failing to timely file the Motion to Extend, the Motion to Extend must be denied and all of FPSC’s and Gardberg’s claims against Dr. Belsky must be dismissed.

II.

RELEVANT FACTS AND PROCEDURAL HISTORY

Mulliner was appointed as the original Receiver (“Original Receiver”) for FPSC on September 12, 2016. *See* Declaration of Timothy Mulliner, Esq. (“Mulliner Decl.”), ¶ 2, attached to the Motion to Extend. On February 10, 2017, FPSC, through Mulliner, filed the Complaint in this matter. *See* Complaint. FPSC asserts various claims against all defendants, including Dr. Belsky. *Id.* According to the docket, Drs. Bhatnagar, Freedman, Ng, and Burkhead were served with the Summons and Complaint, and subsequently filed various Motions to Dismiss. *See* Docket. However, Dr. Belsky and another defendant were never

² According to the Motion to Extend, the original Receiver was Timothy R. Mulliner, Esq. (“Mulliner”). Gardberg replaced Mulliner as Receiver on July 20, 2017. *See* Mulliner Decl., ¶ 16.

³ While the SAC now lists Gardberg, in his capacity as Receiver, as the Plaintiff, the Motion to Extend still names FPSC as the Plaintiff. These two filings are in discord, and it is unclear how FPSC is able to bring the Motion to Extend in light of the fact that there is a Receiver in place.

⁴ Dr. Belsky also requests that the Court treat the instant Opposition as a Counter-Motion to Dismiss.

1 served. *See* Docket. *See generally* Motion to Extend.

2 On July 20, 2017, Gardberg replaced Mulliner as the Receiver (“New Receiver”) for
3 FPSC. Mulliner Decl., ¶ 16.

4 According to the docket, on September 18, 2017, FPSC, through Gardberg, filed the
5 First Amended Complaint (“FAC”). *See* Docket. A hearing was held on September 26, 2017,
6 wherein leave was granted to file a Second Amended Complaint (*see id.*), which was
7 subsequently filed on October 10, 2017.⁵ *See id.* In between, on September 28, 2017, FPSC,
8 through Gardberg, brought a Motion to Extend Time, seeking to extend the time to serve Dr.
9 Belsky.⁶ *See* Motion to Extend.

10 According to the Motion to Extend, Mulliner had focused on FPSC’s assets and claims,
11 not service of the Complaint. Motion to Extend, p. 2:19-23; Mulliner Decl., ¶ 5 (“I deferred
12 service of the summons and complaint”). Yet, Mulliner chose to manage and litigate the matter
13 himself. Motion to Extend, p. 2:23-25; Mulliner Decl., ¶ 6. While the Motion to Extend asserts
14 Mulliner was “[m]indful of the time limits in NRCP 4(i)” (*id.* at 2:25; Mulliner Decl., ¶ 7 (“I
15 recognize that Rule 4(i) imposed a June 12, 2017 deadline for service in this lawsuit and acted
16 accordingly.”)), no attempts at service were made prior to June 6, 2017, **only six (6) days prior**
17 **to the 120-day deadline** imposed by NRCP 4(i). *See* Exhibits 1-A and 1-C to Motion to
18 Extend (respectively “Exhibit 1-A” and “Exhibit 1-C”). In fact, Mulliner waited until late May
19 to even attempt to find addresses for all the defendants. Mulliner Decl., ¶ 7. A subsequent
20 effort at service was made on June 7, 2017, **5 days prior to the 120-day deadline** of June 12,
21 2017. *See id.* The June 6 attempt was made at Dr. Belsky’s residence (*see* Exhibit 1-C), and
22 the June 7 attempt was made at her office. *Id.* However, Dr. Belsky was unavailable because
23 she was on vacation. *Id.* *See also* Declaration of Jessica Weiss (“Weiss Declaration”), a true
24 and correct copy of which is attached hereto as **Exhibit “A”** at ¶5. Ms. Weiss, as authorized by
25 Dr. Belsky, offered to accept service of the Summons and Complaint for Dr. Belsky, but the

26 ⁵ It should be noted that the SAC was filed by Gardberg, in his capacity as Receiver for FPSC. The same cannot be
27 said for the Motion to Extend, as it was filed by FPSC. Accordingly, it is unclear whether FPSC is the proper party
to bring the Motion to Extend.

28 ⁶ The Motion to Extend also seeks to extend time to serve William Smith MD, another defendant in this matter.

1 process server declined. *Id.* at ¶¶ 6, 22.

2 Thereafter, efforts at service were made on June 19 and 20, 2017, **after** the deadline
3 imposed by NRCP 4(i). Exhibit 1-C. The June 20 attempt at service was again made at Dr.
4 Belsky's place of work.⁷ Exhibit A at ¶ 7; Exhibit 1-C. This time, Dr. Belsky was seeing
5 patients and was unavailable to accept service. Exhibit A at ¶¶ 10-12. Ms. Weiss again offered
6 to accept service on Dr. Belsky's behalf, but the process server declined, saying that only Dr.
7 Belsky could accept service of the documents which were marked "HOT." *Id.* at ¶¶ 8, 13. The
8 process server then chose to wait for Dr. Belsky, but then after waiting for less than an hour,
9 decided to leave when Dr. Belsky did not emerge to meet with him. *Id.* at ¶¶ 14-15, 17. Prior
10 to the process server leaving, Ms. Weiss provided him with information for Dr. Belsky's
11 attorney at Bailey Kennedy, stating he could try to attempt service there. *Id.* at 16. Mulliner
12 made no effort to contact Bailey Kennedy at that time. *See generally* Motion to Extend;
13 Mulliner Decl.

14 Mulliner also claims to have made an attempt to file an *Ex Parte* Motion to Extend Time
15 (the "*Ex Parte* Motion") on June 12, 2017—the deadline for service—via the Court's efileing
16 system.⁸ Mulliner Decl., ¶ 13. Mulliner never received confirmation of filing of the *Ex Parte*
17 Motion, indicating that it was not filed. Mulliner Decl., ¶ 15. Because Mulliner neglected to
18 follow-up and check to see whether it had been filed, he "did not realize [the *Ex Parte* Motion
19 was not filed] until much later." *Id.* Instead, Mulliner blamed his assistant for the failed filing.
20 *Id.* at ¶¶ 14-15. He further claimed that as a sole practitioner, he is very busy, and struggles to
21 keep up due to other matters. *Id.* at ¶ 16. In fact, Mulliner admits he "was not supervising and
22 monitoring . . . as closely as [he] should have." *Id.* Consequently, his ability to perform as the
23

24 ⁷ While the Motion to Extend alleges that the process server attempted to serve Dr. Belsky at her office on both June
25 19 and 20, 2017 (Motion to Extend, p. 4:17-18), Mulliner's Declaration and the process server's affidavits indicate
26 that the only attempts at service at Dr. Belsky's office were on June 7 and 20, 2017. Mulliner Decl., ¶ 17; Exhibits
27 1-A and 1-C.

28 ⁸ Mulliner's alleged *Ex Parte* Motion to Extend Time was not attached as an exhibit to FPSC's Motion to Extend
Time, nor is there a declaration from Vince Baladamenti, Mulliner's assistant (Motion to Extend, ¶13) indicating he
attempted to file the *Ex Parte* Motion. *See generally* Motion to Extend Time.

Original Receiver was impacted because he was so overwhelmed by his practice and personal life. Mulliner Decl., ¶ 16. He was subsequently replaced by Gardberg on July 20, 2017. *Id.* Gardberg did nothing regarding Dr. Belsky’s lack of service until the Motion to Extend was filed on September 28, 2017. *See* Motion to Extend. Gardberg was not even aware Dr. Belsky had not been served until he was notified by Mulliner on September 7, 2017, nearly two (2) months after he became the New Receiver. Motion to Extend, p. 12:17-18.

As of this filing, Dr. Belsky has not been served. *See generally* Motion to Extend; Docket.

III.

LEGAL ARGUMENT

A. Legal Standard.

NRCP 12(b)(4) provides that a party may move to dismiss the complaint based on “insufficiency of service of process.” NRCP 12(b)(4). “The burden is on the Plaintiff to show that the service of process . . . meet(s) the requirements of Rule 4.” *Norkunas v. NC Hotel Associates, Ltd.*, 851 F. Supp.2d 958, 960 (M.D.N.C. 2011) (analyzing the analogous Fed. R. Civ. P. 4). NRCP 4(i) mandates that service of the complaint and summons must be made within 120 days, or the action shall be dismissed without prejudice, unless a plaintiff “files a motion to enlarge the time for service and shows good cause why such service was not made within that period.” NRCP 4(i). Good cause must also be shown for failing “to file a timely motion seeking enlargement of time.” *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 596–97, 245 P.3d 1198, 1201 (2010).

B. The Motion to Extend Time to Serve Should Be Denied.

A district court must “first evaluate whether good cause exists for a party’s failure to file a timely motion seeking enlargement of time. **Failure to demonstrate such good cause ends the district court’s inquiry.**” *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 597, 245 P.3d 1198, 1201 (2010) (emphasis added). This initial inquiry supports the purpose of NRCP 4(i) “to encourage litigants to promptly prosecute matters by properly serving the opposing party in a timely manner.” *Id.* at 596, 245 P.3d 1201.

1 ***1. No good cause exists for failing to timely file a Motion to Extend Time.***

2 FPSC is mistaken with the applicable standard here, instead arguing that “good cause
3 exists **for the motion being filed at this time.**” Motion to Extend, p. 8:5-6 (heading III.B.)
4 (emphasis added). Even if good cause did exist to enlarge time, that is insufficient to grant an
5 extension. *See id.* at 598, 245 P.3d 1202 (“Even if we concluded that good cause to enlarge
6 time existed, which we do not, Saavedra–Sandoval's request would still fail because she did not
7 address, and the district court did not consider, why she did not file a motion to enlarge time
8 within the 120–day period. NRCP 4(i) requires a party to first show good cause for filing an
9 untimely motion. While good cause for failing to file a timely motion and good cause for
10 granting an enlargement of time may be the same in some instances, failure to address the issue
11 of cause for filing an untimely motion ends the district court's inquiry.”)

12 Therefore, a court must assess “whether good cause existed **for failing to move to**
13 **extend the service period before its expiration.**” *St. John v. Mirage Casino-Hotel* , 66835,
14 2015 WL 9485176, at *2 (Nev. App. Dec. 16, 2015) (citing *Saavedra–Sandoval*, 126 Nev. at
15 597, 245 P.3d at 1201) (emphasis added).

16 In evaluating whether there is good cause for failing to timely file a motion to extend
17 time for service, “a court should consider [factors] that would impede the plaintiff's attempts at
18 service and, in turn, could result in the filing of an untimely motion to enlarge the time to serve
19 the defendant with process: ‘(2) the defendant's efforts at evading service or concealment of
20 improper service until after the 120–day period has elapsed, (3) the plaintiff's diligence in
21 attempting to serve the defendant, ... and (9) the defendant's knowledge of the existence of the
22 lawsuit.’” *Saavedra–Sandoval*, 126 Nev. at 597, 245 P.3d 1201 (quoting *Scrimmer v. Eighth*
23 *Judicial Dist. Court*, 116 Nev. 507, 519, 998 P.2d 1190, 1196 (2000)).

24 Of importance here, a receiver is an officer of the court:

25 A receiver appointed by the court is a person who by such
26 appointment **becomes an officer of the court** to receive, collect,
27 care for, administer, and dispose of the property or the fruits of the
28 property of another or others brought under the orders of court by
the institution of a proper action or actions.

1 A receiver appointed by the court is an arm or hand of the
2 court, and as said above, **an officer of the court** and a
3 representative of the court.

4 . . . **The receiver is but the court's officer.**

5 *Jones v. Free*, 83 Nev. 31, 36–37, 422 P.2d 551, 554 (1967) (quoting 1 Clark on Receivers §
6 11(a) (pp. 13-14, 3d Ed.)) (internal quotation marks omitted) (emphasis added). Therefore, not
7 only did Mulliner have duties and responsibilities as an attorney, he was an officer of the court,
8 acting on the court’s behalf as “an arm or hand of the court.” As such, he did not act diligently,
9 whether as an attorney, or more importantly as the Original Receiver. Mulliner completely
10 failed in his duties as the Original Receiver, and Gardberg should not be given another bite at
11 the apple with the SAC because Mulliner was sleeping on the job. Nor should Gardberg be
12 rewarded for his own failure to notice—for nearly two (2) months—that Dr. Belsky had not
13 been served and that the *Ex Parte* Motion was not filed. Motion to Extend, p. 12:17-18.

14 First, Mulliner did not exercise diligence in attempting to serve Dr. Belsky. Mulliner
15 chose how to prioritize his duties, and he determined that service was at the bottom of the list,
16 “deferr[ing] service of the summons and complaint.” Mulliner Decl., ¶ 5. *See also* Motion to
17 Extend, p. 2:19-23. In fact, Mulliner waited until **late May** to even **begin searching** for the
18 defendants’ addresses for service. Mulliner Decl., ¶ 7. Tellingly, Mulliner offers no reason for
19 this delay other than **failing to view service as a priority**. Mulliner Decl., ¶ 5. *See also*
20 Motion to Extend, p. 2:19-23. This resulted in the first attempt at service on Dr. Belsky not
21 occurring until June 6, 2017, a mere six (6) days prior to the 120-day deadline for service. *See*
22 Exhibits 1-A and 1-C. As both an attorney and officer of the court (as the Original Receiver), it
23 was incumbent on Mulliner to act appropriately and responsibly in carrying out the duties of the
24 Receiver. By only leaving himself six (6) days to serve Dr. Belsky, he failed miserably. No
25 one told Mulliner to wait until late May to begin searching for Dr. Belsky’s address, or until
26 June 6 to begin to try to effect service—these are fatal errors resulting from his choices and
27 decisions as the Original Receiver.

28 In addition, Mulliner lacked diligence when he accepted the process server’s half-
hearted attempts to serve Dr. Belsky. On June 7, 2017, when Dr. Belsky was away on vacation,

her assistant, Jessica Weiss, offered to accept service as authorized by Dr. Belsky, but the process server refused and left. Exhibit A at ¶¶ 5, 6, 20, 22; Exhibits 1-A and 1-C. When the process server returned, on June 20, 2017 (after the 120-day deadline), Dr. Belsky was busy seeing patients and unable to come out to accept service. *Id.* at ¶¶ 11-12; Exhibit 1-C. Ms. Weiss again offered to accept service for Dr. Belsky, but the process server declined, instead choosing to wait for Dr. Belsky. *Id.* at ¶ 14; Exhibit 1-C. After waiting for less than an hour, the process server left, but not before Ms. Weiss provided him with information for Dr. Belsky's attorney at Bailey Kennedy. *Id.* at ¶¶ 15-17; Exhibit 1-C. These are the only two attempts at service at Dr. Belsky's office, and one of the attempts was after the 120-day deadline. In fact, only two other attempts were made at serving Dr. Belsky, both at her home, with one coming before the 120-day deadline, and one after. Exhibits 1-A and 1-C.

Interestingly, while Ms. Weiss provided contact information for Dr. Belsky's attorney to the process server on June 20, Mulliner does not allege to have contacted Bailey Kennedy at that time. *See generally* Mulliner Decl.; Motion to Extend. Therefore, he does not know whether Dr. Belsky's attorney was authorized to accept service at that time. Clearly, Mulliner's poor judgment as the Original Receiver left him no time should issues occur serving Dr. Belsky, and then only gave limited effort to additional attempts at service. Dr. Belsky should not have to pay for Mulliner's poor timing and lack of judgment.

Next, Mulliner waited until the last possible moment to file the *Ex Parte* Motion: June 12, 2017 (Mulliner Decl., ¶ 13), which was the end of the 120-day period in which to serve Dr. Belsky. His poor choices again left him no room for any issues to arise, which once again occurred. Not surprisingly, Mulliner tries to blame the filing problem on everyone but himself: on the court's e-filing system, on his assistant, and on the fact that he's a busy sole practitioner. *Id.* at ¶¶ 14-16. Yet, Mulliner was the one who waited until the eleventh hour to file the *Ex Parte* Motion, after having waited nearly as long to attempt to serve Dr. Belsky.

However, Mulliner concedes that he was the one that dropped the ball by not verifying that the *Ex Parte* Motion was, in fact, filed with the Court. *Id.* at ¶¶ 14-15. He was "very busy, [struggling] to keep up due to other matters." *Id.* Perhaps Mulliner should not have taken on

1 the role of a court officer, of a receiver, if he was too busy to handle the duties that come with
2 the position. Yet, he did, and he pressed on, leaving nearly everything until the last minute
3 because of other commitments to his practice, as well as “personal issues.” Mulliner Decl., ¶
4 16. Mulliner concedes he “was not supervising and monitoring . . . as closely as [he] should
5 have,” yet now Gardberg asks this Court to accept this concession as good cause for failing to
6 timely file the *Ex Parte* Motion. This request is absurd, because had Gardberg not been
7 appointed to replace Mulliner, Mulliner would likely **still** be operating under the incorrect
8 **assumption** that the *Ex Parte* Motion had been filed.

9 Ignoring the fact that the *Ex Parte* Motion was never granted (since it was not filed),
10 Mulliner operated as if the [faulty] filing alone was sufficient for him to continue to attempt to
11 serve Dr. Belsky. *See* Exhibit 1-C (noting attempts at service on June 19 and 20, 2017, **after**
12 the June 12, 2017 deadline imposed by NRCP 4(i)). His actions make no sense as an attorney,
13 much less as an officer of the court. Mulliner exercised no diligence as the Original Receiver in
14 carrying out his duty in serving Dr. Belsky. FPSC now asks the Court to hold Dr. Belsky
15 accountable for Mulliner’s failures and shortcomings as its Original Receiver. This is
16 completely lacking in good cause.

17 Mulliner’s delaying attempts at service until six (6) days before the deadline, and stating
18 he “regret[s] and take[s] responsibility for failing to adequately monitor and supervise my staff”
19 (Mulliner Decl., ¶ 19) are insufficient for a finding of good cause. He states that once he
20 discovered the filing error, he disclosed it to Gardberg and the Court on **September 7, 2017**,
21 **nearly three (3) months after the deadline.** *Id.* This is not exercising diligence; this is a
22 complete lack thereof.

23 In addition, Gardberg lacked diligence because he failed to notice Dr. Belsky had not
24 been served. He also failed to notice that the *Ex Parte* Motion had not been filed until he was
25 informed by Mulliner. Again, Dr. Belsky should not be held responsible for the failures of both
26 Receivers.

27 As the Nevada Court of Appeals cautioned, when a plaintiff’s conduct is what prevents
28 compliance with the requirements of NRCP 4(i), good cause does not exist. *See St. John*, No.

66835, 2015 WL 9485176, at * 2. “Indeed, if a party could demonstrate good cause based on purported impediments created by the party's own actions or inaction, NRCP 4(i)'s requirements would have no real meaning as there would be few, if any, circumstances where good cause for failure to comply with these requirements could not be found.” *Id.*

In addition, Dr. Belsky’s alleged knowledge of the lawsuit plays no role here. The fact is that Mulliner waited until June 6, 2017 to begin to attempt to serve her. *See* Exhibits 1-A and 1-C. During attempted service at her residence, no one answered the door. *Id.*; Mulliner Decl., ¶ 10. As both Mulliner and the process servers noted, Dr. Belsky was out of the country when service was attempted prior to the deadline. *Id.*; Mulliner Decl., ¶ 10. How was she evading service when she was unable to accept it in the first place? Was Dr. Belsky supposed to postpone her plans until she was served? It is a plaintiff’s responsibility to effect service, and not a defendant’s responsibility to sit around and wait for it.

Finally, even had Mulliner served Dr. Belsky on June 19 or 20, 2017, as had been attempted, service still would have been improper because (1) it was beyond the 120-day limit imposed by NRCP 4(i), and (2) no order had been issued granting an extension of time in which Mulliner could serve Dr. Belsky. For this and the reasons stated above, notwithstanding FPSC’s failure to state the appropriate standard, no good cause exists for Mulliner’s failure to timely file the *Ex Parte* Motion.

2. No good cause exists for failing to serve Dr. Belsky.

“[O]nly upon a showing of good cause to file an untimely motion to enlarge time for service should the district court then apply *Scrimmer's* good-cause factors for the delay in service.” *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 597, 245 P.3d 1198, 1201 (2010). Again, FPSC misunderstands the standard to apply here, stating that “good cause exists to extend time to serve the remaining defendants.” Motion to Extend, p. 9:22-23 (heading II.C.). Instead, a plaintiff must demonstrate why good cause exists for a plaintiff’s failure to serve a defendant. *Saavedra-Sandoval*, 126 Nev. at 597, 245 P.3d at 1201.

While Dr. Belsky maintains that FPSC has not shown good cause for not timely filing a Motion to Extend Time, in the event that the Court finds otherwise, neither does good cause

1 exist for the delay in service. Granting an extension of time in this situation clear: “Dismissal is
2 **mandatory** unless there is a **legitimate** excuse for failing to serve within the 120 days.”
3 *Scrimmer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 512-13, 998 P.2d 1190, 1193 (2000)
4 (emphasis added). District courts have discretion to determine good cause. *Id.* at 513, 1193-94.

5 Here, upon review of the *Scrimmer* factors,⁹ there exists no “legitimate excuse” for failing
6 to timely serve Dr. Belsky. For example, for the first and second factors, there were no
7 difficulties or evasiveness¹⁰ in locating Dr. Belsky; she was to be out of the country when
8 service was attempted. The third factor requires a plaintiff’s diligence in attempting service.
9 Any arguments regarding Mulliner’s purported diligence have already been debunked herein.
10 Not only are Mulliner’s delays inexcusable, Gardberg failed to exercise diligence as well, since
11 he failed for nearly two (2) months to discovery that Dr. Belsky had not been served and that
12 the *Ex Parte* Motion had not been filed.. Motion to Extend, p. 12:17-18.

13 As to the fourth factor, Mulliner’s difficulties were of his own making, and the Nevada
14 Court of Appeals provides guidance that this should not be considered for good cause. *See St.*
15 *John*, No. 66835, 2015 WL 9485176, at * 2. Also, while the Nevada Supreme Court affirmed
16 that a breakup of a law firm and change in office staff constituted good cause for failing to
17 timely serve, that is not the case here. *Scrimmer*, 116 Nev. at 511, 998, 517-518, 998 P.2d at
18 1192-93, 1197. Here, Mulliner first says his assistant failed, then admits that he, himself,
19 dropped the ball in monitoring this matter because he was too busy. Mulliner Decl., ¶ 14-16.
20 And while Dr. Belsky sympathizes with Mulliner’s health issues (*id.* at ¶ 16), the fact remains
21 that Mulliner did, in fact, wait until the last minute to serve her, and blamed the delay on his

22 ⁹ The *Scrimmer* factors include: “(1) difficulties in locating the defendant, (2) the defendant's efforts at evading
23 service or concealment of improper service until after the 120-day period has lapsed, (3) the plaintiff's diligence in
24 attempting to serve the defendant, (4) difficulties encountered by counsel, (5) the running of the applicable statute of
25 limitations, (6) the parties' good faith attempts to settle the litigation during the 120-day period, (7) the lapse of time
26 between the end of the 120-day period and the actual service of process on the defendant, (8) the prejudice to the
defendant caused by the plaintiff's delay in serving process, (9) the defendant's knowledge of the existence of the
lawsuit, and (10) any extensions of time for service granted by the district court.” *Scrimmer v. Eighth Judicial Dist.*
Court, 116 Nev. 507, 516, 998 P.2d 1190, 1195-96 (2000).

27 ¹⁰ Mulliner asserts that Dr. Belsky attempted to evade service because she denied permission for Joseph A.
Liebman, Esq. to accept service on her behalf, as noted in an email from Mr. Liebman to Mulliner. Mulliner Decl.,
28 ¶ 11. However, this email has not been produced as an exhibit to the Motion to Extend, and therefore any claims by
Mulliner regarding the alleged email are hearsay.

own prioritization of other issues above service (not that his health caused the delay in his attempts at service). *Id.* at ¶ 10.

The seventh factor also weighs in favor of Dr. Belsky. Dr. Belsky has not been served yet, and 108 days passed from the expiration of the 120-day service period to the filing of the Motion to Extend. Currently, over 130 days have elapsed without service. This ties into the eighth factor, prejudice to the defendant. In *Dallman v. Merrell*, service was effected 108 days late, and the Nevada Supreme Court affirmed that such a delay was a consideration in finding the defendant there was prejudiced. *Dallman v. Merrell*, 106 Nev. 9292, 803 P.2d 232 (1990). This also weighs in favor of Dr. Belsky.

For the foregoing reasons, no good cause exists for failing to serve Dr. Belsky, and FPSC's Motion to Extend should be denied.

C. FPSC's Complaint Should Be Dismissed for Lack of Service.

A motion to dismiss is the proper method by which to challenge "a complaint when service of process has not been effected with 120 days, as required by NRCP 4(i)." *Lacey v. Wen-Neva, Inc.*, 109 Nev. 341, 347, 849 P.2d 260, 263 (1993), *overruled on other grounds by Scrimmer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 998 P.2d 1190 (2000). If service of the complaint and summons are not made within 120 days, and no good cause is shown for failing to timely file the motion to enlarge time for service, the action **shall** be dismissed without prejudice. NRCP 4(i).

FPSC filed its Complaint on February 10, 2017, and amended it twice since. Yet Dr. Belsky still has not been served, more than 250 days later. *See* Complaint. While FPSC moved this Court for an extension of the time to serve Dr. Belsky, it was 108 days outside of the 120-day deadline to serve, and no good cause has been demonstrated for the failure to timely file, as demonstrated herein.

To summarize, Mulliner and Gardberg failed to exercise due diligence through:

- Mulliner's decision that service on Dr. Belsky was not a priority;
- Mulliner waiting until late May to begin searching for an address for Dr. Belsky;

- Mulliner first attempting service on Dr. Belsky only six (6) days before the 120-day deadline of June 12, 2017;
- Mulliner only making two (2) attempts at service prior to the 120-day deadline;
- Mulliner only making four (4) attempts total at service on Dr. Belsky (two before the 120-day deadline, and two after);
- Mulliner's failure to allow Ms. Weiss to accept service, since she was authorized to accept service for Dr. Belsky;
- Mulliner's failure to follow up with Dr. Belsky's attorney after being provided with information from Ms. Weiss;
- Mulliner attempting to file the *Ex Parte* Motion on the final day of the 120-day deadline;
- Mulliner's failure to notice for almost three (3) months that he had not received a confirmation for the *Ex Parte* Motion;
- Mulliner being **too busy** to notice for almost three (3) months that no order had issued on the *Ex Parte* Motion, check with his staff, or follow up in any manner regarding service on Dr. Belsky;
- Gardberg failing to notice for six (6) weeks that Dr. Belsky had not been served; and
- Gardberg failing to notice for six (6) weeks that the *Ex Parte* Motion had not been filed.

Not only did the Receivers fail to exercise due diligence, Dr. Belsky did not evade service. She was either on vacation, not at home, or seeing patients. None of these demonstrate evasiveness, as FPSC would have the Court believe. Accordingly, as demonstrated herein, no good cause existed for failing to file the *Ex Parte* Motion or for timely serving Dr. Belsky and dismissal is warranted. *See Guido v. Catholic Charities of S. Nevada*, 128 Nev. 900, 381 P.3d 617 (2012) (affirming the district court granting a motion to dismiss, because "[e]ven assuming that appellant demonstrated good cause for his failure to timely serve respondents with the

1 summons and complaint, he did not establish good cause for his failure to file a timely motion
2 for an extension of time to serve process, and thus, he was not entitled to such an extension”).

3 Thus, all claims by FPSC against Dr. Belsky must be dismissed pursuant to NRC
4 12(b)(4) for insufficiency of service of process because FPSC never served Dr. Belsky with a
5 Summons or the Complaint as required by NRC 4.

6 IV.

7 CONCLUSION

8 For the foregoing reasons, Dr. Marjorie Belsky respectfully requests that this Court deny
9 FPSC’s Motion to Extend Time to Serve Certain Defendants as it pertains to her, and grant her
10 Counter-Motion to Dismiss all FPSC’s claims against her.

11 DATED this 25th day of October, 2017

12 HOLLAND & HART LLP

13
14 By /s/ Susan Schwartz

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22 *Attorneys For Defendants Matthew Ng MD,*
23 *Pankaj Bhatnagar MD, and Marjorie Belsky MD*

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October, 2017, I served a true and correct copy of the foregoing **MARJORIE BELSKY MD'S OPPOSITION TO MOTION TO EXTEND TIME AND COUNTER-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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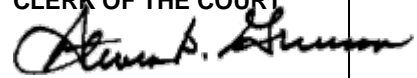
☐ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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

☐ Facsimile: by faxing a copy to the following numbers referenced below:

/s/ Marie Twist

An Employee of Holland & Hart LLP



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Bhatnagar MD incorrectly named Pankaj
Bhatanagar MD, and Marjorie Belsky 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

**ERRATA TO MARJORIE BELSKY
MD'S OPPOSITION TO MOTION TO
EXTEND TIME**

AND

COUNTER-MOTION TO DISMISS

///

///

///

///

1 On October 25, 2017, Defendant Marjorie Belsky MD (“Dr. Belsky” or “Defendant”),
2 filed an Opposition to Flamingo-Pecos Surgery Center, LLC’s Motion to Extend Time to Serve
3 Certain Defendants, and Counter-Motion to Dismiss (“Opposition”). Defendant inadvertently
4 left “Exhibit A” out of the Opposition. The complete file stamped Opposition and Counter-
5 Motion, plus the inadvertently omitted “Exhibit A,” is attached to this errata.

6 DATED this 26th day of October, 2017

7 HOLLAND & HART LLP

8
9 By /s/ Susan Schwartz

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18 *Pankaj Bhatnagar MD, and Marjorie Belsky MD*

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of October, 2017, I served a true and correct copy of the foregoing **ERRATA TO MARJORIE BELSKY MD'S OPPOSITION TO MOTION TO EXTEND TIME AND COUNTER-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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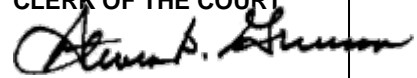
☐ Email: by electronically delivering a copy via email to the following e-mail address:

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/s/ Marie Twist

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Page 3 of 3



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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

**MARJORIE BELSKY MD'S
OPPOSITION TO MOTION TO
EXTEND TIME**

AND

COUNTER-MOTION TO DISMISS

Defendant Marjorie Belsky MD ("Dr. Belsky" or "Defendant"), by and through her
counsel of record, Holland & Hart LLP, hereby opposes Flamingo-Pecos Surgery Center,
LLC's Motion to Extend Time to Serve Certain Defendants, and moves for dismissal of all
claims asserted against it by Plaintiff Flamingo-Pecos Surgery Center, LLC (as in the Complaint

1 and First Amended Complaint) and Mark J. Gardberg, Esq., in his capacity as Receiver for, and
2 acting on behalf of, Flamingo-Pecos Surgery Center, LLC, a Nevada limited liability company
3 (in the Second Amended Complaint) (together the “Plaintiff”) in the above-entitled action. This
4 case was filed in February 2017, yet Plaintiff has never served Dr. Belsky with the Summons
5 and Complaint. For this reason, Flamingo-Pecos Surgery Center, LLC’s Motion to Extend must
6 be denied, and Plaintiff’s claims against Dr. Belsky must be dismissed.

7 This Opposition and Counter-Motion is made pursuant to Nevada Rule of Civil
8 Procedure (“NRCPP”) 12(b)(4) and EDCR 2.20,¹ and is based on the attached Memorandum of
9 Points and Authorities, the Declaration of Jessica Weiss, attached hereto as **Exhibit “A,”** the
10 papers and pleadings on file in this matter, and any oral argument this Court may allow.

11 DATED this 25th day of October, 2017

12 HOLLAND & HART LLP

13
14 By /s/ Susan Schwartz

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27 ¹ Dr. Belsky retained Holland & Hart, LLP effective October 20, 2017, and was therefore previously unaware of
28 Flamingo-Pecos Surgery Center, LLC’s Motion to Extend Time to Serve Certain Defendants. Accordingly, Dr.
Belsky now files her Opposition thereto, and Counter-Motion to Dismiss.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION
TO MOTION TO EXTEND TIME AND COUNTER-MOTION TO DISMISS BY
MARJORIE BELSKY MD.**

I.

INTRODUCTION

Flamingo-Pecos Surgery Center, LLC (“FPSC”) commenced this action on February 10, 2017 with the filing of the Complaint. This action, now on the Second Amended Complaint (“SAC”) with Mark J. Gardberg, Esq. (“Gardberg”), in his capacity as Receiver² for, and acting on behalf of, Flamingo-Pecos Surgery Center, LLC, as the Plaintiff,³ has been pending for over eight (8) months, and neither FPSC nor Gardberg has ever served the Complaint, First Amended Complaint (“FAC”), or SAC on Dr. Belsky. Indeed, on September 28, 2017, Gardberg filed a Motion to Extend Time to Serve Certain Defendants (the “Motion to Extend”),⁴ itself an acknowledgement that Dr. Belsky was never served. *See generally* Motion to Extend. Because the Summons and Complaint were never served on Dr. Belsky, and no good cause exists for failing to timely file the Motion to Extend, the Motion to Extend must be denied and all of FPSC’s and Gardberg’s claims against Dr. Belsky must be dismissed.

II.

RELEVANT FACTS AND PROCEDURAL HISTORY

Mulliner was appointed as the original Receiver (“Original Receiver”) for FPSC on September 12, 2016. *See* Declaration of Timothy Mulliner, Esq. (“Mulliner Decl.”), ¶ 2, attached to the Motion to Extend. On February 10, 2017, FPSC, through Mulliner, filed the Complaint in this matter. *See* Complaint. FPSC asserts various claims against all defendants, including Dr. Belsky. *Id.* According to the docket, Drs. Bhatnagar, Freedman, Ng, and Burkhead were served with the Summons and Complaint, and subsequently filed various Motions to Dismiss. *See* Docket. However, Dr. Belsky and another defendant were never

² According to the Motion to Extend, the original Receiver was Timothy R. Mulliner, Esq. (“Mulliner”). Gardberg replaced Mulliner as Receiver on July 20, 2017. *See* Mulliner Decl., ¶ 16.

³ While the SAC now lists Gardberg, in his capacity as Receiver, as the Plaintiff, the Motion to Extend still names FPSC as the Plaintiff. These two filings are in discord, and it is unclear how FPSC is able to bring the Motion to Extend in light of the fact that there is a Receiver in place.

⁴ Dr. Belsky also requests that the Court treat the instant Opposition as a Counter-Motion to Dismiss.

1 served. *See* Docket. *See generally* Motion to Extend.

2 On July 20, 2017, Gardberg replaced Mulliner as the Receiver (“New Receiver”) for
3 FPSC. Mulliner Decl., ¶ 16.

4 According to the docket, on September 18, 2017, FPSC, through Gardberg, filed the
5 First Amended Complaint (“FAC”). *See* Docket. A hearing was held on September 26, 2017,
6 wherein leave was granted to file a Second Amended Complaint (*see id.*), which was
7 subsequently filed on October 10, 2017.⁵ *See id.* In between, on September 28, 2017, FPSC,
8 through Gardberg, brought a Motion to Extend Time, seeking to extend the time to serve Dr.
9 Belsky.⁶ *See* Motion to Extend.

10 According to the Motion to Extend, Mulliner had focused on FPSC’s assets and claims,
11 not service of the Complaint. Motion to Extend, p. 2:19-23; Mulliner Decl., ¶ 5 (“I deferred
12 service of the summons and complaint”). Yet, Mulliner chose to manage and litigate the matter
13 himself. Motion to Extend, p. 2:23-25; Mulliner Decl., ¶ 6. While the Motion to Extend asserts
14 Mulliner was “[m]indful of the time limits in NRCP 4(i)” (*id.* at 2:25; Mulliner Decl., ¶ 7 (“I
15 recognize that Rule 4(i) imposed a June 12, 2017 deadline for service in this lawsuit and acted
16 accordingly.”)), no attempts at service were made prior to June 6, 2017, **only six (6) days prior**
17 **to the 120-day deadline** imposed by NRCP 4(i). *See* Exhibits 1-A and 1-C to Motion to
18 Extend (respectively “Exhibit 1-A” and “Exhibit 1-C”). In fact, Mulliner waited until late May
19 to even attempt to find addresses for all the defendants. Mulliner Decl., ¶ 7. A subsequent
20 effort at service was made on June 7, 2017, **5 days prior to the 120-day deadline** of June 12,
21 2017. *See id.* The June 6 attempt was made at Dr. Belsky’s residence (*see* Exhibit 1-C), and
22 the June 7 attempt was made at her office. *Id.* However, Dr. Belsky was unavailable because
23 she was on vacation. *Id.* *See also* Declaration of Jessica Weiss (“Weiss Declaration”), a true
24 and correct copy of which is attached hereto as **Exhibit “A”** at ¶5. Ms. Weiss, as authorized by
25 Dr. Belsky, offered to accept service of the Summons and Complaint for Dr. Belsky, but the

26 ⁵ It should be noted that the SAC was filed by Gardberg, in his capacity as Receiver for FPSC. The same cannot be
27 said for the Motion to Extend, as it was filed by FPSC. Accordingly, it is unclear whether FPSC is the proper party
to bring the Motion to Extend.

28 ⁶ The Motion to Extend also seeks to extend time to serve William Smith MD, another defendant in this matter.

1 process server declined. *Id.* at ¶¶ 6, 22.

2 Thereafter, efforts at service were made on June 19 and 20, 2017, **after** the deadline
3 imposed by NRCP 4(i). Exhibit 1-C. The June 20 attempt at service was again made at Dr.
4 Belsky's place of work.⁷ Exhibit A at ¶ 7; Exhibit 1-C. This time, Dr. Belsky was seeing
5 patients and was unavailable to accept service. Exhibit A at ¶¶ 10-12. Ms. Weiss again offered
6 to accept service on Dr. Belsky's behalf, but the process server declined, saying that only Dr.
7 Belsky could accept service of the documents which were marked "HOT." *Id.* at ¶¶ 8, 13. The
8 process server then chose to wait for Dr. Belsky, but then after waiting for less than an hour,
9 decided to leave when Dr. Belsky did not emerge to meet with him. *Id.* at ¶¶ 14-15, 17. Prior
10 to the process server leaving, Ms. Weiss provided him with information for Dr. Belsky's
11 attorney at Bailey Kennedy, stating he could try to attempt service there. *Id.* at 16. Mulliner
12 made no effort to contact Bailey Kennedy at that time. *See generally* Motion to Extend;
13 Mulliner Decl.

14 Mulliner also claims to have made an attempt to file an *Ex Parte* Motion to Extend Time
15 (the "*Ex Parte* Motion") on June 12, 2017—the deadline for service—via the Court's efileing
16 system.⁸ Mulliner Decl., ¶ 13. Mulliner never received confirmation of filing of the *Ex Parte*
17 Motion, indicating that it was not filed. Mulliner Decl., ¶ 15. Because Mulliner neglected to
18 follow-up and check to see whether it had been filed, he "did not realize [the *Ex Parte* Motion
19 was not filed] until much later." *Id.* Instead, Mulliner blamed his assistant for the failed filing.
20 *Id.* at ¶¶ 14-15. He further claimed that as a sole practitioner, he is very busy, and struggles to
21 keep up due to other matters. *Id.* at ¶ 16. In fact, Mulliner admits he "was not supervising and
22 monitoring . . . as closely as [he] should have." *Id.* Consequently, his ability to perform as the
23

24 ⁷ While the Motion to Extend alleges that the process server attempted to serve Dr. Belsky at her office on both June
25 19 and 20, 2017 (Motion to Extend, p. 4:17-18), Mulliner's Declaration and the process server's affidavits indicate
26 that the only attempts at service at Dr. Belsky's office were on June 7 and 20, 2017. Mulliner Decl., ¶ 17; Exhibits
27 1-A and 1-C.

28 ⁸ Mulliner's alleged *Ex Parte* Motion to Extend Time was not attached as an exhibit to FPSC's Motion to Extend
Time, nor is there a declaration from Vince Baladamenti, Mulliner's assistant (Motion to Extend, ¶13) indicating he
attempted to file the *Ex Parte* Motion. *See generally* Motion to Extend Time.

Original Receiver was impacted because he was so overwhelmed by his practice and personal life. Mulliner Decl., ¶ 16. He was subsequently replaced by Gardberg on July 20, 2017. *Id.* Gardberg did nothing regarding Dr. Belsky’s lack of service until the Motion to Extend was filed on September 28, 2017. *See* Motion to Extend. Gardberg was not even aware Dr. Belsky had not been served until he was notified by Mulliner on September 7, 2017, nearly two (2) months after he became the New Receiver. Motion to Extend, p. 12:17-18.

As of this filing, Dr. Belsky has not been served. *See generally* Motion to Extend; Docket.

III.

LEGAL ARGUMENT

A. Legal Standard.

NRCP 12(b)(4) provides that a party may move to dismiss the complaint based on “insufficiency of service of process.” NRCP 12(b)(4). “The burden is on the Plaintiff to show that the service of process . . . meet(s) the requirements of Rule 4.” *Norkunas v. NC Hotel Associates, Ltd.*, 851 F. Supp.2d 958, 960 (M.D.N.C. 2011) (analyzing the analogous Fed. R. Civ. P. 4). NRCP 4(i) mandates that service of the complaint and summons must be made within 120 days, or the action shall be dismissed without prejudice, unless a plaintiff “files a motion to enlarge the time for service and shows good cause why such service was not made within that period.” NRCP 4(i). Good cause must also be shown for failing “to file a timely motion seeking enlargement of time.” *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 596–97, 245 P.3d 1198, 1201 (2010).

B. The Motion to Extend Time to Serve Should Be Denied.

A district court must “first evaluate whether good cause exists for a party’s failure to file a timely motion seeking enlargement of time. **Failure to demonstrate such good cause ends the district court’s inquiry.**” *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 597, 245 P.3d 1198, 1201 (2010) (emphasis added). This initial inquiry supports the purpose of NRCP 4(i) “to encourage litigants to promptly prosecute matters by properly serving the opposing party in a timely manner.” *Id.* at 596, 245 P.3d 1201.

1 ***1. No good cause exists for failing to timely file a Motion to Extend Time.***

2 FPSC is mistaken with the applicable standard here, instead arguing that “good cause
3 exists **for the motion being filed at this time.**” Motion to Extend, p. 8:5-6 (heading III.B.)
4 (emphasis added). Even if good cause did exist to enlarge time, that is insufficient to grant an
5 extension. *See id.* at 598, 245 P.3d 1202 (“Even if we concluded that good cause to enlarge
6 time existed, which we do not, Saavedra–Sandoval's request would still fail because she did not
7 address, and the district court did not consider, why she did not file a motion to enlarge time
8 within the 120–day period. NRCP 4(i) requires a party to first show good cause for filing an
9 untimely motion. While good cause for failing to file a timely motion and good cause for
10 granting an enlargement of time may be the same in some instances, failure to address the issue
11 of cause for filing an untimely motion ends the district court's inquiry.”)

12 Therefore, a court must assess “whether good cause existed **for failing to move to**
13 **extend the service period before its expiration.**” *St. John v. Mirage Casino-Hotel* , 66835,
14 2015 WL 9485176, at *2 (Nev. App. Dec. 16, 2015) (citing *Saavedra–Sandoval*, 126 Nev. at
15 597, 245 P.3d at 1201) (emphasis added).

16 In evaluating whether there is good cause for failing to timely file a motion to extend
17 time for service, “a court should consider [factors] that would impede the plaintiff's attempts at
18 service and, in turn, could result in the filing of an untimely motion to enlarge the time to serve
19 the defendant with process: ‘(2) the defendant's efforts at evading service or concealment of
20 improper service until after the 120–day period has elapsed, (3) the plaintiff's diligence in
21 attempting to serve the defendant, ... and (9) the defendant's knowledge of the existence of the
22 lawsuit.’” *Saavedra–Sandoval*, 126 Nev. at 597, 245 P.3d 1201 (quoting *Scrimmer v. Eighth*
23 *Judicial Dist. Court*, 116 Nev. 507, 519, 998 P.2d 1190, 1196 (2000)).

24 Of importance here, a receiver is an officer of the court:

25 A receiver appointed by the court is a person who by such
26 appointment **becomes an officer of the court** to receive, collect,
27 care for, administer, and dispose of the property or the fruits of the
28 property of another or others brought under the orders of court by
the institution of a proper action or actions.

1 A receiver appointed by the court is an arm or hand of the
2 court, and as said above, **an officer of the court** and a
3 representative of the court.

4 . . . **The receiver is but the court's officer.**

5 *Jones v. Free*, 83 Nev. 31, 36–37, 422 P.2d 551, 554 (1967) (quoting 1 Clark on Receivers §
6 11(a) (pp. 13-14, 3d Ed.)) (internal quotation marks omitted) (emphasis added). Therefore, not
7 only did Mulliner have duties and responsibilities as an attorney, he was an officer of the court,
8 acting on the court’s behalf as “an arm or hand of the court.” As such, he did not act diligently,
9 whether as an attorney, or more importantly as the Original Receiver. Mulliner completely
10 failed in his duties as the Original Receiver, and Gardberg should not be given another bite at
11 the apple with the SAC because Mulliner was sleeping on the job. Nor should Gardberg be
12 rewarded for his own failure to notice—for nearly two (2) months—that Dr. Belsky had not
13 been served and that the *Ex Parte* Motion was not filed. Motion to Extend, p. 12:17-18.

14 First, Mulliner did not exercise diligence in attempting to serve Dr. Belsky. Mulliner
15 chose how to prioritize his duties, and he determined that service was at the bottom of the list,
16 “deferr[ing] service of the summons and complaint.” Mulliner Decl., ¶ 5. *See also* Motion to
17 Extend, p. 2:19-23. In fact, Mulliner waited until **late May** to even **begin searching** for the
18 defendants’ addresses for service. Mulliner Decl., ¶ 7. Tellingly, Mulliner offers no reason for
19 this delay other than **failing to view service as a priority**. Mulliner Decl., ¶ 5. *See also*
20 Motion to Extend, p. 2:19-23. This resulted in the first attempt at service on Dr. Belsky not
21 occurring until June 6, 2017, a mere six (6) days prior to the 120-day deadline for service. *See*
22 Exhibits 1-A and 1-C. As both an attorney and officer of the court (as the Original Receiver), it
23 was incumbent on Mulliner to act appropriately and responsibly in carrying out the duties of the
24 Receiver. By only leaving himself six (6) days to serve Dr. Belsky, he failed miserably. No
25 one told Mulliner to wait until late May to begin searching for Dr. Belsky’s address, or until
26 June 6 to begin to try to effect service—these are fatal errors resulting from his choices and
27 decisions as the Original Receiver.

28 In addition, Mulliner lacked diligence when he accepted the process server’s half-
hearted attempts to serve Dr. Belsky. On June 7, 2017, when Dr. Belsky was away on vacation,

her assistant, Jessica Weiss, offered to accept service as authorized by Dr. Belsky, but the process server refused and left. Exhibit A at ¶¶ 5, 6, 20, 22; Exhibits 1-A and 1-C. When the process server returned, on June 20, 2017 (after the 120-day deadline), Dr. Belsky was busy seeing patients and unable to come out to accept service. *Id.* at ¶¶ 11-12; Exhibit 1-C. Ms. Weiss again offered to accept service for Dr. Belsky, but the process server declined, instead choosing to wait for Dr. Belsky. *Id.* at ¶ 14; Exhibit 1-C. After waiting for less than an hour, the process server left, but not before Ms. Weiss provided him with information for Dr. Belsky's attorney at Bailey Kennedy. *Id.* at ¶¶ 15-17; Exhibit 1-C. These are the only two attempts at service at Dr. Belsky's office, and one of the attempts was after the 120-day deadline. In fact, only two other attempts were made at serving Dr. Belsky, both at her home, with one coming before the 120-day deadline, and one after. Exhibits 1-A and 1-C.

Interestingly, while Ms. Weiss provided contact information for Dr. Belsky's attorney to the process server on June 20, Mulliner does not allege to have contacted Bailey Kennedy at that time. *See generally* Mulliner Decl.; Motion to Extend. Therefore, he does not know whether Dr. Belsky's attorney was authorized to accept service at that time. Clearly, Mulliner's poor judgment as the Original Receiver left him no time should issues occur serving Dr. Belsky, and then only gave limited effort to additional attempts at service. Dr. Belsky should not have to pay for Mulliner's poor timing and lack of judgment.

Next, Mulliner waited until the last possible moment to file the *Ex Parte* Motion: June 12, 2017 (Mulliner Decl., ¶ 13), which was the end of the 120-day period in which to serve Dr. Belsky. His poor choices again left him no room for any issues to arise, which once again occurred. Not surprisingly, Mulliner tries to blame the filing problem on everyone but himself: on the court's e-filing system, on his assistant, and on the fact that he's a busy sole practitioner. *Id.* at ¶¶ 14-16. Yet, Mulliner was the one who waited until the eleventh hour to file the *Ex Parte* Motion, after having waited nearly as long to attempt to serve Dr. Belsky.

However, Mulliner concedes that he was the one that dropped the ball by not verifying that the *Ex Parte* Motion was, in fact, filed with the Court. *Id.* at ¶¶ 14-15. He was "very busy, [struggling] to keep up due to other matters." *Id.* Perhaps Mulliner should not have taken on

1 the role of a court officer, of a receiver, if he was too busy to handle the duties that come with
2 the position. Yet, he did, and he pressed on, leaving nearly everything until the last minute
3 because of other commitments to his practice, as well as “personal issues.” Mulliner Decl., ¶
4 16. Mulliner concedes he “was not supervising and monitoring . . . as closely as [he] should
5 have,” yet now Gardberg asks this Court to accept this concession as good cause for failing to
6 timely file the *Ex Parte* Motion. This request is absurd, because had Gardberg not been
7 appointed to replace Mulliner, Mulliner would likely **still** be operating under the incorrect
8 **assumption** that the *Ex Parte* Motion had been filed.

9 Ignoring the fact that the *Ex Parte* Motion was never granted (since it was not filed),
10 Mulliner operated as if the [faulty] filing alone was sufficient for him to continue to attempt to
11 serve Dr. Belsky. *See* Exhibit 1-C (noting attempts at service on June 19 and 20, 2017, **after**
12 the June 12, 2017 deadline imposed by NRCP 4(i)). His actions make no sense as an attorney,
13 much less as an officer of the court. Mulliner exercised no diligence as the Original Receiver in
14 carrying out his duty in serving Dr. Belsky. FPSC now asks the Court to hold Dr. Belsky
15 accountable for Mulliner’s failures and shortcomings as its Original Receiver. This is
16 completely lacking in good cause.

17 Mulliner’s delaying attempts at service until six (6) days before the deadline, and stating
18 he “regret[s] and take[s] responsibility for failing to adequately monitor and supervise my staff”
19 (Mulliner Decl., ¶ 19) are insufficient for a finding of good cause. He states that once he
20 discovered the filing error, he disclosed it to Gardberg and the Court on **September 7, 2017**,
21 **nearly three (3) months after the deadline.** *Id.* This is not exercising diligence; this is a
22 complete lack thereof.

23 In addition, Gardberg lacked diligence because he failed to notice Dr. Belsky had not
24 been served. He also failed to notice that the *Ex Parte* Motion had not been filed until he was
25 informed by Mulliner. Again, Dr. Belsky should not be held responsible for the failures of both
26 Receivers.

27 As the Nevada Court of Appeals cautioned, when a plaintiff’s conduct is what prevents
28 compliance with the requirements of NRCP 4(i), good cause does not exist. *See St. John*, No.

66835, 2015 WL 9485176, at * 2. “Indeed, if a party could demonstrate good cause based on purported impediments created by the party's own actions or inaction, NRCP 4(i)'s requirements would have no real meaning as there would be few, if any, circumstances where good cause for failure to comply with these requirements could not be found.” *Id.*

In addition, Dr. Belsky’s alleged knowledge of the lawsuit plays no role here. The fact is that Mulliner waited until June 6, 2017 to begin to attempt to serve her. *See* Exhibits 1-A and 1-C. During attempted service at her residence, no one answered the door. *Id.*; Mulliner Decl., ¶ 10. As both Mulliner and the process servers noted, Dr. Belsky was out of the country when service was attempted prior to the deadline. *Id.*; Mulliner Decl., ¶ 10. How was she evading service when she was unable to accept it in the first place? Was Dr. Belsky supposed to postpone her plans until she was served? It is a plaintiff’s responsibility to effect service, and not a defendant’s responsibility to sit around and wait for it.

Finally, even had Mulliner served Dr. Belsky on June 19 or 20, 2017, as had been attempted, service still would have been improper because (1) it was beyond the 120-day limit imposed by NRCP 4(i), and (2) no order had been issued granting an extension of time in which Mulliner could serve Dr. Belsky. For this and the reasons stated above, notwithstanding FPSC’s failure to state the appropriate standard, no good cause exists for Mulliner’s failure to timely file the *Ex Parte* Motion.

2. No good cause exists for failing to serve Dr. Belsky.

“[O]nly upon a showing of good cause to file an untimely motion to enlarge time for service should the district court then apply *Scrimmer's* good-cause factors for the delay in service.” *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 597, 245 P.3d 1198, 1201 (2010). Again, FPSC misunderstands the standard to apply here, stating that “good cause exists to extend time to serve the remaining defendants.” Motion to Extend, p. 9:22-23 (heading II.C.). Instead, a plaintiff must demonstrate why good cause exists for a plaintiff’s failure to serve a defendant. *Saavedra-Sandoval*, 126 Nev. at 597, 245 P.3d at 1201.

While Dr. Belsky maintains that FPSC has not shown good cause for not timely filing a Motion to Extend Time, in the event that the Court finds otherwise, neither does good cause

1 exist for the delay in service. Granting an extension of time in this situation clear: “Dismissal is
2 **mandatory** unless there is a **legitimate** excuse for failing to serve within the 120 days.”
3 *Scrimmer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 512-13, 998 P.2d 1190, 1193 (2000)
4 (emphasis added). District courts have discretion to determine good cause. *Id.* at 513, 1193-94.

5 Here, upon review of the *Scrimmer* factors,⁹ there exists no “legitimate excuse” for failing
6 to timely serve Dr. Belsky. For example, for the first and second factors, there were no
7 difficulties or evasiveness¹⁰ in locating Dr. Belsky; she was to be out of the country when
8 service was attempted. The third factor requires a plaintiff’s diligence in attempting service.
9 Any arguments regarding Mulliner’s purported diligence have already been debunked herein.
10 Not only are Mulliner’s delays inexcusable, Gardberg failed to exercise diligence as well, since
11 he failed for nearly two (2) months to discovery that Dr. Belsky had not been served and that
12 the *Ex Parte* Motion had not been filed.. Motion to Extend, p. 12:17-18.

13 As to the fourth factor, Mulliner’s difficulties were of his own making, and the Nevada
14 Court of Appeals provides guidance that this should not be considered for good cause. *See St.*
15 *John*, No. 66835, 2015 WL 9485176, at * 2. Also, while the Nevada Supreme Court affirmed
16 that a breakup of a law firm and change in office staff constituted good cause for failing to
17 timely serve, that is not the case here. *Scrimmer*, 116 Nev. at 511, 998, 517-518, 998 P.2d at
18 1192-93, 1197. Here, Mulliner first says his assistant failed, then admits that he, himself,
19 dropped the ball in monitoring this matter because he was too busy. Mulliner Decl., ¶ 14-16.
20 And while Dr. Belsky sympathizes with Mulliner’s health issues (*id.* at ¶ 16), the fact remains
21 that Mulliner did, in fact, wait until the last minute to serve her, and blamed the delay on his

22 ⁹ The *Scrimmer* factors include: “(1) difficulties in locating the defendant, (2) the defendant's efforts at evading
23 service or concealment of improper service until after the 120-day period has lapsed, (3) the plaintiff's diligence in
24 attempting to serve the defendant, (4) difficulties encountered by counsel, (5) the running of the applicable statute of
25 limitations, (6) the parties' good faith attempts to settle the litigation during the 120-day period, (7) the lapse of time
26 between the end of the 120-day period and the actual service of process on the defendant, (8) the prejudice to the
defendant caused by the plaintiff's delay in serving process, (9) the defendant's knowledge of the existence of the
lawsuit, and (10) any extensions of time for service granted by the district court.” *Scrimmer v. Eighth Judicial Dist.*
Court, 116 Nev. 507, 516, 998 P.2d 1190, 1195-96 (2000).

27 ¹⁰ Mulliner asserts that Dr. Belsky attempted to evade service because she denied permission for Joseph A.
Liebman, Esq. to accept service on her behalf, as noted in an email from Mr. Liebman to Mulliner. Mulliner Decl.,
28 ¶ 11. However, this email has not been produced as an exhibit to the Motion to Extend, and therefore any claims by
Mulliner regarding the alleged email are hearsay.

own prioritization of other issues above service (not that his health caused the delay in his attempts at service). *Id.* at ¶ 10.

The seventh factor also weighs in favor of Dr. Belsky. Dr. Belsky has not been served yet, and 108 days passed from the expiration of the 120-day service period to the filing of the Motion to Extend. Currently, over 130 days have elapsed without service. This ties into the eighth factor, prejudice to the defendant. In *Dallman v. Merrell*, service was effected 108 days late, and the Nevada Supreme Court affirmed that such a delay was a consideration in finding the defendant there was prejudiced. *Dallman v. Merrell*, 106 Nev. 9292, 803 P.2d 232 (1990). This also weighs in favor of Dr. Belsky.

For the foregoing reasons, no good cause exists for failing to serve Dr. Belsky, and FPSC's Motion to Extend should be denied.

C. FPSC's Complaint Should Be Dismissed for Lack of Service.

A motion to dismiss is the proper method by which to challenge "a complaint when service of process has not been effected with 120 days, as required by NRCP 4(i)." *Lacey v. Wen-Neva, Inc.*, 109 Nev. 341, 347, 849 P.2d 260, 263 (1993), *overruled on other grounds by Scrimmer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 998 P.2d 1190 (2000). If service of the complaint and summons are not made within 120 days, and no good cause is shown for failing to timely file the motion to enlarge time for service, the action **shall** be dismissed without prejudice. NRCP 4(i).

FPSC filed its Complaint on February 10, 2017, and amended it twice since. Yet Dr. Belsky still has not been served, more than 250 days later. *See* Complaint. While FPSC moved this Court for an extension of the time to serve Dr. Belsky, it was 108 days outside of the 120-day deadline to serve, and no good cause has been demonstrated for the failure to timely file, as demonstrated herein.

To summarize, Mulliner and Gardberg failed to exercise due diligence through:

- Mulliner's decision that service on Dr. Belsky was not a priority;
- Mulliner waiting until late May to begin searching for an address for Dr. Belsky;

- Mulliner first attempting service on Dr. Belsky only six (6) days before the 120-day deadline of June 12, 2017;
- Mulliner only making two (2) attempts at service prior to the 120-day deadline;
- Mulliner only making four (4) attempts total at service on Dr. Belsky (two before the 120-day deadline, and two after);
- Mulliner's failure to allow Ms. Weiss to accept service, since she was authorized to accept service for Dr. Belsky;
- Mulliner's failure to follow up with Dr. Belsky's attorney after being provided with information from Ms. Weiss;
- Mulliner attempting to file the *Ex Parte* Motion on the final day of the 120-day deadline;
- Mulliner's failure to notice for almost three (3) months that he had not received a confirmation for the *Ex Parte* Motion;
- Mulliner being **too busy** to notice for almost three (3) months that no order had issued on the *Ex Parte* Motion, check with his staff, or follow up in any manner regarding service on Dr. Belsky;
- Gardberg failing to notice for six (6) weeks that Dr. Belsky had not been served; and
- Gardberg failing to notice for six (6) weeks that the *Ex Parte* Motion had not been filed.

Not only did the Receivers fail to exercise due diligence, Dr. Belsky did not evade service. She was either on vacation, not at home, or seeing patients. None of these demonstrate evasiveness, as FPSC would have the Court believe. Accordingly, as demonstrated herein, no good cause existed for failing to file the *Ex Parte* Motion or for timely serving Dr. Belsky and dismissal is warranted. *See Guido v. Catholic Charities of S. Nevada*, 128 Nev. 900, 381 P.3d 617 (2012) (affirming the district court granting a motion to dismiss, because "[e]ven assuming that appellant demonstrated good cause for his failure to timely serve respondents with the

1 summons and complaint, he did not establish good cause for his failure to file a timely motion
2 for an extension of time to serve process, and thus, he was not entitled to such an extension”).

3 Thus, all claims by FPSC against Dr. Belsky must be dismissed pursuant to NRC
4 12(b)(4) for insufficiency of service of process because FPSC never served Dr. Belsky with a
5 Summons or the Complaint as required by NRC 4.

6 IV.

7 **CONCLUSION**

8 For the foregoing reasons, Dr. Marjorie Belsky respectfully requests that this Court deny
9 FPSC’s Motion to Extend Time to Serve Certain Defendants as it pertains to her, and grant her
10 Counter-Motion to Dismiss all FPSC’s claims against her.

11 DATED this 25th day of October, 2017

12 HOLLAND & HART LLP

13
14 By /s/ Susan Schwartz

15 Bryce K. Kunimoto, Esq.
16 Nevada Bar No. 7781

bkunimoto@hollandhart.com

17 Robert J. Cassity, Esq.

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21 Phone: (702) 222-2542

Fax: (702) 669-4650

22 *Attorneys For Defendants Matthew Ng MD,*
23 *Pankaj Bhatnagar MD, and Marjorie Belsky MD*

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October, 2017, I served a true and correct copy of the foregoing **MARJORIE BELSKY MD'S OPPOSITION TO MOTION TO EXTEND TIME AND COUNTER-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:

☐ Facsimile: by faxing a copy to the following numbers referenced below:

/s/ Marie Twist

An Employee of Holland & Hart LLP

Exhibit A

AA000780

1 **DECL**

2 Bryce K. Kunimoto, Esq.
3 Nevada Bar No. 7781
4 bkunimoto@hollandhart.com
5 Robert J. Cassity, Esq.
6 Nevada Bar No. 9779
7 bcassity@hollandhart.com
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16 *Attorneys For Defendants Matthew Ng MD*
17 *incorrectly named Mathew Ng MD,*
18 *Pankaj Bhatnagar MD incorrectly named*
19 *Pankaj Bhatanagar MD, and Marjorie*
20 *Belsky MD*

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

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

16 Plaintiff,

17 v.

18 WILLIAM SMITH MD, an individual;
19 PANKAJ BHATANAGAR MD, an
20 individual; MARJORIE BELSKY MD, an
21 individual; SHELDON FREEDMAN MD, an
22 individual; MATHEW NG MD, an
23 individual; DANIEL BURKHEAD MD, an
24 individual; DOE MANAGERS,
25 DIRECTORS AND OFFICERS 1-25, ROE
26 BUSINESS ENTITIES 1-25;

27 Defendants.

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

**DECLARATION OF JESSICA WEISS IN
SUPPORT OF MARJORIE BELSKY
MD'S MOTION TO DISMISS**

26 I, Jessica Weiss, declare as follows:

27 1. I make this Declaration in support of Dr. Marjorie Belsky's Motion to Dismiss
28 (the "Motion") in the above-entitled action. I am over the age of eighteen years and am

1 competent to make this declaration. I have personal knowledge of the matters set forth in this
2 declaration, except as to those matters stated upon information and belief, and I believe those
3 matters to be true. Based on the foregoing, if called upon as a witness, I could and would
4 competently testify as to all of the matters stated herein.

5 2. I am currently Dr. Belsky's Assistant at Integrated Pain Specialists (the
6 "office"), and have been employed there by Dr. Belsky for two (2) years. I am familiar with
7 her policies and procedures in the office.

8 3. Dr. Belsky was on vacation during approximately the first two weeks of June
9 2017, coinciding with a family event.

10 4. In June 2017, at least two attempts at service on Dr. Belsky were made at her
11 office.

12 5. One attempt at service occurred while Dr. Belsky was on vacation and therefore
13 not in the office (the "First Attempt").

14 6. For the First Attempt, the process server refused to leave the summons and
15 complaint with me, stating that Dr. Belsky had to be served personally. The process server left
16 the office at that point.

17 7. Another attempt at service was made a few days after Dr. Belsky returned from
18 vacation in mid-June 2017 (the "Second Attempt").

19 8. During the Second Attempt, the process server had documents stamped "HOT."

20 9. I do not know what "HOT" indicated.

21 10. Dr. Belsky was in with patients during the Second Attempt, and remained with
22 her patients.

23 11. Dr. Belsky does not leave her patients to accept service.

24 12. I informed the process server that Dr. Belsky was unavailable because she was
25 with patients.

26 13. The process server would not let me sign for the documents, because, he said,
27 Dr. Belsky had to sign for them.

1 14. The process server chose to wait for Dr. Belsky to come out to receive the
2 documents.

3 15. The process server waited for no more than one hour for Dr. Belsky, but she
4 continued with her patients and did not emerge.

5 16. After a few moments I gave the process server information regarding Dr.
6 Belsky's attorney at Bailey Kennedy, and told him he could try to bring the documents there.

7 17. The process server then left the office.

8 18. I did notice that the documents the process server had for the Second Attempt
9 had a date that was earlier than the day service was being attempted. I believed this meant that
10 a deadline had passed.

11 19. I do not know what documents were in the process server's possession, either
12 for the First or Second Attempts.

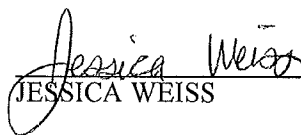
13 20. Dr. Belsky had previously authorized me to accept service on her behalf.

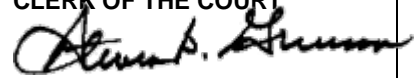
14 21. I have previously accepted service for Dr. Belsky.

15 22. I told the process servers for both the First and Second Attempts that I am
16 authorized to accept service for Dr. Belsky.

17 I declare under penalty of perjury that the foregoing is true and correct.

18 EXECUTED this 24 day of October, 2017.

19
20
21 
22 JESSICA WEISS
23
24
25
26
27
28



OPPS

Todd E. Kennedy (NSB# 6014)
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*Attorneys for Mark J. Gardberg, Esq., in his capacity as Receiver for,
and acting on behalf of, Flamingo-Pecos Surgery Center LLC*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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;

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

**PLAINTIFF'S OMNIBUS
SUPPLEMENTAL OPPOSITION TO
DEFENDANTS' VARIOUS MOTIONS TO
DISMISS AND ASSOCIATED JOINDERS**

Date: November 29, 2017

Time: 9:00 AM

I. RELEVANT PROCEDURAL HISTORY & SUMMARY

Plaintiff Mark J. Gardberg, Esq., in his capacity as Receiver for, and acting on behalf of, Flamingo-Pecos Surgery Center, LLC ("Plaintiff" or "Flamingo"), through Todd E. Kennedy of the law firm of Black & LoBello, hereby submits this Omnibus Supplemental Opposition ("Omnibus Opp.")¹ to:

¹ In order to avoid redundant/repetitive filings, Plaintiff first respectfully requests that this Court take judicial notice of its own docket and the papers and pleadings on file thereon.

To that end, this Omnibus Opp. relies on and incorporates by reference as if set forth herein Plaintiff's: (i) Opposition to Dr. Matthew Ng and Dr. Pankaj Bhatnagar's Motion to Dismiss ("Ng Opp.") and the Declaration of Todd E. Kennedy ("Kennedy Decl.") (and all four of the Exhibits thereto) filed with the Ng Opposition on Thursday, July 13, 2017; (ii) Opposition to Defendant Daniel Burkhead M.D.'s Motion to Dismiss Complaint filed on July 14, 2017 ("Burkhead Opp."); and (iii) Opposition to Defendant Sheldon J. Freedman's Motion to Dismiss pursuant to NRCF 12(b)(5) and 12(b)(6) and for Attorneys [sic] Fees Pursuant to NRS 18.020 filed on July 17, 2017 ("Freedman Opp.").

- 1 (i) *Defendants Dr. Matthew Ng and Dr. Pankaj Bhatnagar's Motion to Dismiss Second*
2 *Amended Complaint* [the "SAC"], filed on October 23, 2017 (the "Ng MTD")²;
- 3 (ii) *Defendant Sheldon J. Freedman's Supplement to Motion to Dismiss Complaint and*
4 *[SAC] Pursuant to NRC 12(b)(5) and 12(b)(6) and for Attorneys [sic] Fees Pursuant to*
5 *NRS 18.020*, filed on October 24, 2017 (the "Freedman MTD")³; and
- 6 (iii) *Defendant Danial Burkhead M.D.'s Motion to Dismiss [SAC]*, filed on October 25, 2017
7 (the "Burkhead MTD")⁴ ((i), (ii), and (iii)), along with associated joinders filed by the
8 various defendants, collectively, the "Supplemental MTDs")

9 ² The Ng MTD filed on October 24th regurgitates:

- 10 (i) the ***economic loss doctrine*** argument (defeated in, among other oppositions, the Ng Opp.,
11 pp. 10-14, Section IV(A)); indeed, every original MTD and every single Defendant fails
12 by ignoring the doctrine's numerous exceptions – which are triggered in this action);
- 13 (ii) the unsupported assertion that ***Plaintiff's negligence claims do not apply to***
14 ***"Employees"*** (this is a strawman argument defeated in the Ng Opp., pp. 14-16, Section
15 IV(B); Plaintiff's SAC alleges each Defendant to be a "Manager", "Director", and/or
16 "Officer," and such reasonable allegations must be taken as true); and
- 17 (iii) the wholly unsupported argument that ***Plaintiff has failed to plead intentional***
18 ***misconduct specific to Drs. Ng and Bhatnagar*** (Ng MTD, p. 4, ll. 5-8; defeated in the
19 Ng Opp., pp. 12-13, Section IV(A)(2), and addressed herein, *infra*, at Section II). The
20 SAC contains dozens of separate factual allegations of intentional and/or willful
21 misconduct by Defendants.

22 The Ng MTD has an erroneous assertion that Plaintiff lacks standing to bring a claim under NRS
23 Chapter 86, which is defeated in this Omnibus Opp., *infra*, at Section IV, for ignoring the plain
24 language of the Receivership Order, NRS Chapter 86, and the Operating Agreement.

25 ³ The Freedman MTD filed on October 24th regurgitates:

- 26 (i) the ***NRS Chapter 86 Standing*** arguments (defeated in the July Freedman Opp., pp. 12-
27 13, Section IV(A), p. 17, Section IV(D), and in this Omnibus Opp., *infra*, at Section IV,
28 for ignoring the plain language of the Receivership Order, NRS Chapter 86, and the
Operating Agreement);
- (ii) the ***Operating Agreement and indemnification*** arguments (defeated in the Freedman
Opp., pp. 13-15, Section IV(B), as Defendants fail to recognize the express carve-out of
the Operating Agreement that allows for direct individual liability of Defendants, and
imposes duties of good faith and care and loyalty upon Defendants);
- (iii) the ***statute of limitations*** argument (defeated in the Freedman Opp., pp. 15-17, Section
IV(C), and here, *infra*, at Section V, as Plaintiff was dominated by the very defendants
who would never bring claims against themselves, thus there was no way the entity could
realistically bring an action prior to an independent receiver taking over);
- (iv) the ***economic loss doctrine*** (*see* Footnote 2(i), *supra*); and
- (v) the ***motion for attorney's fees*** (defeated in the Freedman Opp., pp. 22-23, Section IV(F),
as the facts alleged in the SAC provide an overwhelming basis for the litigation of this
action; for example, Defendants let millions in receivables belonging to Plaintiff go to
waste, usurped hundreds of thousands in awards for their own personal benefit which
should have accrued to Flamingo).

1 This Court's consideration of Defendants' three separate original motions to dismiss at the
2 September 26, 2017 hearing, and the resultant order, allowed Plaintiff the option to file the SAC
3 by October 10th (which Plaintiff did), and Defendants to file the Supplemental MTDs.
4 However, the Supplemental MTDs *regurgitate the same* failed arguments from the original
5 motions to dismiss and posit *new assertions* which are *invalid on their face* – and thus should be
6 denied in their entirety.

7 **II. DEFENDANTS' ASSERTION THAT PLAINTIFF HAS FAILED TO PLEAD INTENTIONAL**
8 **MISCONDUCT IGNORES MASSIVE CHUNKS OF THE SAC; THERE'S ALSO A CLEAR**
9 **DISPARITY BETWEEN THE SAC'S EVIDENCE AND DEFENDANTS' UNSUPPORTED**
10 **RHETORIC OF COUNSEL**

11 The Ng Motion argues that Plaintiff has failed to plead intentional misconduct specific to
12 Drs. Ng and Bhatnagar (Ng MTD, p. 4, ll. 5-8). This argument cannot survive even a cursory
13 glance at the SAC, which has *over forty* separate allegations of intentional acts and/or willful
14 misconduct against Defendants, which include Drs. Ng and Bhatnagar. Just one paragraph of the
15 SAC, paragraph 45, reflects many separate, intentional actions of Defendants:

16 Individually and collectively, Defendants, with . . . *willful misconduct*, and
17 *reckless/intentional disregard*, and in breach of their respective fiduciary duties
18 to Flamingo:

19 a. hired an embezzler, Barnes, into an unsupervised position with the power
20 to destroy Flamingo and shut down all of Flamingo's business at three locations;

21 ⁴ The Burkhead MTD filed on October 25th regurgitates the same failed arguments as the
22 original motion to dismiss:

- 23 (i) the *statute of limitations* argument (*see* Footnote 3(iii), *supra*);
24 (ii) the *economic loss doctrine* (*see* Footnote 2(i), *supra*);
25 (iii) the same "*employee/employer liability*" argument defeated in the Ng Opp., pp. 14-16,
26 Section IV(B)(*see* Footnote 2(ii), *supra*); and
27 (iv) the claim that Flamingo lacks standing *because of its revoked charter* – which manages
28 to misread the relevant statute and flatly contradict Nevada law (as detailed in the
Burkhead Opp., pp. 11-12, Section 4(B)).

The Burkhead MTD has an erroneous assertion that Defendant Burkhead is not liable for actions
after his resignation – but it's unsupported by evidence and void of the most basic details (as
discussed in this Omnibus Opp., *infra*, at Section II).

1 b. chose not to put a system in place to monitor said embezzler, enabling him
2 to engage in criminal conduct with complete impunity for “at least three to five
3 years”;

4 c. failed to monitor and supervise that embezzler, who left **obvious and**
5 **brazen** warning signs (including, for example, middle-of-the-night withdrawals of
6 \$25,000 and \$30,000 from Flamingo’s corporate card to feed a gambling problem,
7 forging documents, and tying Flamingo to “economically unfeasible
8 agreements”); and

9 d. failed to terminate, seek recourse from, or pursue that embezzler or
10 **complicit banking institutions**, even after learning he stole millions from
11 Flamingo while Defendants – who owed duties to Flamingo – **did nothing**.
12 (Emphasis added).

13 Contrary to Defendants’ assertions, the SAC is brimming with allegations of intentional and
14 willful misconduct, and under the standards for judging motions to amend, each such allegation
15 must be construed in the non-moving party’s favor. Here, the SAC handily defeats Defendants’
16 unsupported assertions, and it is a recurring theme. The Supplemental MTDs are often supported
17 by nothing more than bald representations of counsel, whereas the SAC is built paragraph by
18 paragraph with testimony given under oath, and documents and evidence this Court can and does
19 take judicial notice of. For example, the Burkhead MTD has an erroneous assertion that
20 Defendant Burkhead is not liable for actions after his resignation – but it’s unsupported by
21 evidence and void of the most basic details – such as a date for Dr. Burkhead’s resignation.
22 From both the law and the evidence, the Supplemental MTDs fail – and should be denied.

23 **III. DEFENDANTS’ READING OF *GARDNER V. HENDERSON WATER PARK, LTD. LIAB. CO.*, 399**
24 **P. 3D 350 (NEV. 2017) IGNORES DEFENDANTS’ SEPARATE INDIVIDUAL DUTIES TO**
25 **PLAINTIFF, WHICH MAKE IT INAPPLICABLE TO THIS ACTION**

26 Defendant Freedman cites the *Gardner* case to argue that Defendants cannot be sued by
27 Plaintiff here. Defendant Freedman misreads this seminal case and is wrong. The Nevada
28 Supreme Court held in *Gardner* that no member can be libel for a negligence-based tort of an
LLC simply for being a member - absent either personal negligent conduct outside the scope of
their capacity in the LLC or unless they **owed some personal duty to the injured party**. In
Gardner, no such duty was found. Here, Defendants have multiple separate and personal duties
to the injured party – Flamingo – by virtue of Defendants’ fiduciary duties and the Operating

1 Agreement. *Gardner* is inapplicable to the facts of the SAC, and this prong of Defendants'
2 MTDs fails.

3 **IV. DEFENDANTS' NOTION THAT NRS CHAPTER 86 DEPRIVES THE RECEIVER OF STANDING**
4 **TO BRING THIS ACTION IGNORES THE PLAIN LANGUAGE OF THE COURT'S**
5 **RECEIVERSHIP ORDER AND OF NRS CHAPTER 86, ESPECIALLY WHERE, AS HERE, ITS**
6 **LANGUAGE ALLOWING FOR INDIVIDUAL LIABILITY IS TRIGGERED BY AN OPERATING**
7 **AGREEMENT**

8 A. Defendants Ignore the Plain Language of the Receivership Order – *Which Defeats*
9 Defendants' Standing Argument *Itself*

10 Defendants' assertion that the Receiver lacks the standing to bring this action is directly
11 contradicted by the plain language of the Order Granting Patriot-Reading Associates LLC's
12 Petition for the Appointment of Receiver (the "Receivership Order"), which held that the
13 Receiver *shall*:

- 14 (1) Take immediate possession of the Receivership Property (including, without
15 limitation, any accounts held in Flamingo's name), to hold and manage the
16 Receivership Property to preserve it from loss, removal, material injury,
17 destruction, substantial waste, and loss of income;
18 (2) Determine, subject to the terms of this Order, which if any of Flamingo's
19 accounts payable should be paid, in full or in part, so that there might be an
20 orderly liquidation of the Receivership Property and payment of claims of and
21 debts against Flamingo, including the Judgment;
22 (3) *Pursue Flamingo's claims and causes of actions against third parties,*
23 *including but not limited to Flamingo's directors and officers;* and
24 (4) Pursue Flamingo's claims against personal property seized as part of criminal
25 forfeiture proceedings against Flamingo's former employee/office manager
26 Robert W. Barnes. For the avoidance of doubt, the Receiver shall not be obligated
27 to bring any such claims or actions as contemplated by this Section A and/or the
28 other Sections of this Order, and the Receiver in his discretion may determine the
extent to which, if at all, any such claims or actions may be beneficial to the
effectuation of the terms of this Order. Section A of the Receivership Order, pp.
2-3 of 14, ll. 20-26:2-11 (Emphasis added).

23 **Sub-section (3) is end of the inquiry** – the Court granted the Receiver explicit authority to sue,
24 among others, Flamingo's directors and officers. And it is far too late for Defendants to now take
25 issue with the appointment of the Receiver, the scope of the Receiver's authorization, and/or the
26

1 Receivership Order itself.⁵ Flamingo – under the control of Defendants – failed to appear despite
2 service of process, failed to oppose Patriot’s default proceedings or application for the
3 appointment of a receiver, failed to move for reconsideration of Patriot’s receivership
4 appointment, and failed to appeal the Receivership Order. *See generally* SAC, at ¶¶ 5-7. The
5 Receiver has unchallenged and unquestioned authority pursuant to an order of the Court, and
6 Defendants’ standing argument fails in the face of that Order’s plain language and explicit grant
7 of standing to the Receiver.

8 **B. Defendants’ Lack of Standing and ‘Improper Derivative Action’ Arguments Also**
9 **Contradict the Explicit Language of NRS Chapter 86, which is triggered by the terms**
10 **of the Operating Agreement Here and Allows for Defendants to be Sued**

11 NRS Chapter 86 contemplates actions by an LLC against members and, given the
12 Operating Agreement here, Defendants can clearly be sued by the Flamingo the limited liability
13 company:

14 NRS 86.371 Liability of member or manager for debts or liabilities of
15 company. ***Unless otherwise provided in the articles of organization or an***
16 ***agreement signed by the member or manager to be charged***, no member or
manager of any limited-liability company formed under the laws of this State is
individually liable for the debts or liabilities of the company. (Emphasis added).

17 NRS 86.381 Member of company is not proper party in proceeding by or
18 against company; exception. A member of a limited-liability company is not a
proper party to proceedings by or against the company, ***except where the object is***

19 ⁵ ***On April 28, 2016:*** In a breach of contract action brought by Patriot-Reading Associates
20 LLC (“Patriot”)(case no. A-16-733627, *Patriot-Reading Associates LLC v. Flamingo-Pecos*
21 *Surgery Center LLC*), default is entered against Flamingo which – under the control of
22 Defendants (SAC, at ¶¶ 5-7) – fails to appear and defend the action; Defendants do nothing to
protect Flamingo’s interests, despite their obligations as directors, officers and members of
Flamingo;

23 ***On May 20, 2016:*** A default judgment was entered against Flamingo and in favor of
24 Patriot, in the amount \$706,631.17 (the “Judgment”)(SAC, at ¶ 8); Defendants do nothing, and
Flamingo failed to appear at all in the breach of contract action despite service of process and
multiple notices; and

25 ***During an August 10, 2016 Hearing and regarding an order entered on September 13,***
26 ***2016:*** The Court granted Patriot’s Petition for the Appointment of Receiver following a hearing,
27 and issued an Order Granting Patriot-Reading Associates LLC’s Petition for the Appointment of
Receiver (the “Receivership Order”), which was entered on or about September 13, 2016.
Timothy R. Mulliner was appointed as the initial receiver; Flamingo and Defendants – who
control Flamingo – do nothing.

1 *to enforce the member's right against or liability to the company.* (Emphasis
2 added).

3 Additionally, while not applicable here, NRS 86.391 contemplates the direct liability of a
4 member to the company under specific circumstances. These provisions show that, at a
5 minimum, Defendants' notions of Chapter 84 and member liability are flawed and incomplete.
6 Taken in conjunction with the Operating Agreement and triggered by the plain terms of that
7 Agreement, Chapter 86 operates to completely defeat Defendants' standing argument: Section
8 7.1 imposes a duty of good faith obligation, and a duty of care and a duty of loyalty, upon certain
9 Defendants, and Section 7.8 allows for Defendants to be personally sued under the gross
10 negligence and willful misconduct exceptions.

11 For example, Section 7.1 states, in part: "Each member of the Board *shall devote such*
12 *time to the affairs of the Company as is reasonably necessary for performance by such*
13 *member of the Board of his or her duties*, provided such member of the Board shall not be
14 required to devote full time to such affairs." (Emphasis added). Here, Defendants devoted *no*
15 *time* – over several years – as Barnes bled Plaintiff dry.

16 These sections of the Operating Agreement trigger the carve-out of NRS 86.371 and
17 allow Flamingo, the limited liability company, to sue Defendants, its own members, officers,
18 directors, and managers. Defendants' assertions that Plaintiff is bringing an improper derivative
19 action (Freedman MTD, p. 10, Section F(1)) are even more flawed – Plaintiff is the company
20 itself, to which Defendants have duties and obligations as directors, officers, and members –
21 Plaintiff is not a shareholder or another member of the company.

22 **V. DEFENDANTS' STATUTE OF LIMITATIONS ARGUMENT IGNORES THE ELEPHANT IN THE**
23 **ROOM – THE FLAMINGO ENTITY WAS NOT INDEPENDENT AND WAS NOT CAPABLE**

24 The statute of limitations argument is even more futile and nonsensical. Defendants argue
25 that *now*:

- 26 <> *after* hiring the looter as an office manager and giving him *carte blanche* over
27 Plaintiff's finances;
- 28 <> *after* allowing Plaintiff to be looted for several years to the tune of millions of
dollars;

- ◇ **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 taking tens of thousands in withdrawals from the corporate card at night, from within Vegas casinos);
- ◇ **after** doing nothing for years 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;
- ◇ **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. Plaintiff was dominated by the very

1 defendants who would never bring claims against themselves, thus there was no way the entity
2 could realistically bring an action prior to an independent receiver taking over – and Defendants
3 should be responsible for the delay, with their actions constituting the basis for equitable tolling.
4 *See, e.g., State of NV Dept. of Taxation v. Masco Builder Cabinet Group*, 265 P.3d 666, 669-670
5 (2011)(“Given that the Tax Department actively participated in and contributed to Masco’s delay
6 in filing its formal refund claim, the interests of justice require the statute of limitations to be
7 tolled.”). Here, Defendants were solely responsible for and actively participated in Plaintiff’s
8 delay in filing this action, and the interests of justice and common sense require that the statute
9 of limitations arguments be rejected.

10 **VI. INDEED, DEFENDANTS FAIL TO ACKNOWLEDGE OR UNDERSTAND THE VERY BASIS OF**
11 **THIS ACTION – DEFENDANTS’ CONDUCT, *NOT* BARNES’ CONDUCT**

12 Defendants’ Supplemental MTDs continue to focus on criminal office manager Robert
13 Barnes’ actions (e.g., “[Plaintiff] seeks to shift liability to the Defendants for the intentional
14 wrongful conduct of [Barnes]”),⁶ when, as clearly set forth in the SAC, the basis of this litigation
15 is Defendants’ own and separate culpability and intentional actions. There is no need to shift
16 liability because Defendants themselves are liable to the Plaintiff here, the entity for which
17 Defendants served as directors, officers, and managers. Indeed, the SAC clearly alleges (and its
18 allegations at this stage must be taken as true)⁷ that this case is driven by what Defendants did
19 and Defendants’ own independent failures and intentional acts, not those of Barnes:

20 The injury to Flamingo and the damages sought arise from Defendants’ **own**
21 misconduct and breaches—Defendants’ **own** failures in hiring and supervising
22 Barnes, Defendants’ **own** failures to audit, review, or even check Flamingo’s
23 finances and accounts, Defendants’ **own** failures to pursue or recover embezzled
amounts, Defendants’ **own** failures to pursue, preserve and collect Flamingo’s
receivables, and Defendants’ **own** failures to assert Flamingo’s interests and right

24 ⁶ The Ng MTD, at p. 3, ll. 8-10. See also e.g.

25 ⁷ When deciding a motion to dismiss for failure to state a claim, the court “must construe
26 the pleadings liberally and accept all factual allegations in the complaint as true,” drawing every
27 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).

1 to restitution when Barnes' criminal matter was adjudicated. SAC, at ¶ 40
(emphasis added).

2 To point to just a few of several egregious examples of Defendants' independent liability to
3 Plaintiff:

4 *Well after Barnes was gone from Flamingo*, it was Defendants, not Barnes, who failed
5 to pursue or preserve millions in receivables – for work Flamingo had already completed and
6 was entitled to – and it was Defendants, not Barnes, who failed to stop their utter waste. SAC, at
7 ¶ 60(b).

8 *Well after Barnes was gone from Flamingo*, it was Defendants, not Barnes, who ignored
9 and grossly failed to protect Flamingo's interests with respect to the Restitution List, and
10 intentionally usurped those interests in favor of their own, by allowing the substitution of their
11 own personal self-interest over Flamingo's. SAC, at ¶ 57(b).

12 *And, after Barnes' criminality was discovered*, it was Defendants who individually and
13 collectively failed to, among other things: (a) demand that Barnes return Flamingo's funds and
14 assets; (b) pursue Barnes; and (c) file a civil complaint against Barnes, with such failures
15 resulting in substantial damages against Flamingo. SAC, at ¶ 121.

16 Taken as a whole, the evidence in the SAC is overwhelming, and shows that Defendants
17 are proper parties to this action – not Barnes or anyone else; accordingly, the SAC must survive
18 Defendants' multiple flawed attempts at dismissal.

19 **VII. CONCLUSION**

20 For all the reasons and bases detailed above, Plaintiff respectfully requests that
21 Defendants' Supplemental MTDs be denied in their entirety.

22 Respectfully Submitted,

23 /s/ Todd E. Kennedy

24 By: _____

Todd E. Kennedy (NSB# 6014)

25 BLACK & LOBELLO

26 *Attorneys for Mark J. Gardberg, Esq., in his*
27 *capacity as Receiver for,*
and acting on behalf of, Flamingo-Pecos Surgery
Center LLC

1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that I am an employee of BLACK & LOBELLO, and that on this
3 7th day of November, 2017 I caused to be served a true and correct copy of the foregoing
4 **OMNIBUS SUPPLEMENTAL OPPOSITION TO DEFENDANTS' SUPPLEMENTS TO**
5 **MOTIONS TO DISMISS** in the following manner:

6 (ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-
7 referenced document was electronically filed on the date hereof and served through the Notice of
8 Electronic Filing automatically generated by the Court's facilities to those parties listed on the
9 Court's Master Service List.

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28 PLAINTIFF'S OMNIBUS SUPPLEMENTAL OPPOSITION TO DEFENDANTS' VARIOUS
MOTIONS TO DISMISS AND ASSOCIATED JOINDERS

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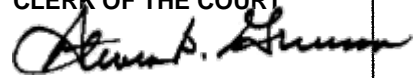
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6
7
8 /s/ Todd E. Kennedy
9 An employee of BLACK & LOBELLO
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8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

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

12 Plaintiff,
13 vs.

14 WILLIAM SMITH MD, an individual;
15 PANKAJ BHATANAGAR MD, an
16 individual; MAJORIE BELSKY MD, an
17 individual; SHELDON FREEDMAN MD,
18 an individual; MATHEW NG MD, an
19 individual; DANIEL BURKHEAD MD, an
20 individual; and DOE MANAGERS,
21 DIRECTORS, AND OFFICERS 1-25, ROE
22 BUSINESS ENTITIES 1-25;

23 Defendant.

CASE NO. A-17-750926-B
DEPT. NO. XV

**DEFENDANT SHELDON J.
FREEDMAN'S REPLY TO
PLAINTIFFS OMNIBUS
SUPPLEMENTAL OPPOSITION TO
DEFENDANTS VARIOUS MOTIONS
TO DISMISS AND ASSOCIATED
JOINDERS**

Hearing Date:
Hearing Time:

24 COMES NOW, Defendant Sheldon J. Freedman, by and through his attorney of record, Marc
25 P. Cook, Esq., of the law firm of Cook & Kelesis, Ltd., files the following Reply to Omnibus
26 Supplemental Opposition to Defendants' Various Motions to Dismiss and Associated Joinders.
27
28

AA000796

1 This Reply is made and based on papers and pleadings on file herein, the following points
2 and authorities, and upon oral argument of counsel at the time of the hearing of the motion.

3 Dated this 20 day of November, 2017.

4 COOK & KELESIS, LTD.

5
6
7 By : 

8 MARC P. COOK

9 Nevada State Bar No. 004574

10 GEORGE P. KELESIS

11 Nevada State Bar No. 000069

12 517 S. 9th Street

13 Las Vegas, Nevada 89101

14 Attorneys for Defendant, Sheldon J. Freedman

1 POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION

4 The reasons warranting dismissal of the Plaintiff's lawsuit against Defendant Freedman are
5 numerous. The law in this area is clear. In fact, Plaintiff's Opposition is persuasive *only if* this
6 Court ignores the Order Appointing Receivership, the entity Operating Agreement, NRS Chapter 87,
7 NRS Chapter 11, *and accepts the Plaintiff's misreading of Gardner v. Henderson Water Park*. In
8 fact, if the Court considers only one of the foregoing documents and/or authorities accurately, it must
9 dismiss this case.

10 It cannot be ignored that Plaintiff takes mutually exclusive positions in the Opposition in an
11 attempt to defeat dismissal. However, each position is fatal to the subsequent alternative dismissal
12 argument. By way of example, on pgs. 4 of its Opposition while claiming that an exception to
13 *Gardner* applies, Plaintiff argues that a personal duty is owed to the injured party. Thus, Plaintiff
14 argues that the Flamingo is the injured party, and the Receiver is acting as one in the same as
15 Flamingo.¹ Conversely, when addressing the statute of limitations argument, Plaintiff argues it is
16 entitled to equitable tolling because the current Plaintiff is separate from "the very defendants who
17 would never bring claims against themselves."² In analyzing this argument, if Plaintiff is believed
18 as to *Gardner*, dismissal as to the statute of limitations is appropriate. If the Court is convinced as
19 to the Plaintiffs statute of limitations argument, no exception to *Gardner* can be found. Therefore,
20 dismissal is still appropriate.³

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25 ¹ See Opposition pgs. 4 ll. 20-26.

26 ² See Opposition pgs. 8 ll. 24 through pgs. 9 ll. 9.

27 ³ Additionally, for other reasons discussed below, neither argument works for
28 Plaintiff and both issues mandate dismissal.

1 It is also apparent Plaintiff's Opposition misconstrues the procedural status of this matter.
2 Specifically, on page 3, it claims the supplements "regurgitate the same failed arguments from the
3 original Motion to Dismiss"⁴ Defendant's Motion did not fail and has not been denied. On the
4 contrary, at the hearing the Court suggested that Plaintiff again amend its Complaint and ordered
5 further briefing. In the current amended form, many of the issues that concern the Court are still
6 present. Thus, this Motion to Dismiss must be granted.

7 II.

8 GARDNER

9 A. Gardner Restricts Liability Against LLC Members

10 Gardner warrants dismissal of this action. The Supreme Court specifically and most recently
11 advised that if pursuing a tort claim against an LLC member, there must be one of two things, neither
12 of which is present here. Specifically, the Court found that "personal liability for negligence will
13 not stand when the plaintiff fails to allege that the member's acts 'are either done outside one's
14 capacity as a member or [second] which while done in one's capacity as a member also
15 violates some personal duty owed by the individual to the injured party.'" *Gardner* 133 Nev. Adv.
16 Op. 54 at page 4-5 citing as a parenthetical *Petch v. Humble*, 939 So. 2d 499, 504 (LA. Ct. App.
17 2006). Without this it is impermissible to "seek to hold a member - LLC liable for alleged
18 negligence of the [entity's business] solely by virtue of the member - LLC being managing member
19 of [entity]." *Id.* at 5.

20 B. The Allegations Arise Based On Defendant's Membership

21 Significantly, the entirety of Plaintiff's allegations flies in the face of this language of
22 *Gardner*. There is no exception that would allow Plaintiff to reach individual members or even
23 officers. First there are no allegations against Freedman that are "separate and apart" from
24 Freedman's "role[s] as a member." On the contrary, Plaintiff specifically alleges that the entire basis
25 for the breach "arise based on the members - LLC's roles as a member." ¶ 8 of the Amended
26 Complaint advises that "**at all times described herein**, Defendant Freedman was a manager, director
27

28 ⁴ See Opposition pgs. 3 ll. 4-5.

1 and/or officer of Plaintiff and owed certain duties to Plaintiff.”⁵ Plaintiff cannot, on the one hand
2 advise that the allegations against Freedman are outside the scope of his duties as a member while
3 simultaneously advising in the Complaint that that is the sole basis of liability. In *Gardner* the court
4 noted that the allegations against the members were that they “breached certain duties that arise only
5 based on the members - LLC’s roles as member.” *Gardner supra* at 350-351. Thus, no liability
6 could be found. The same is true here.

7 ***C. There Is No Separate Duty***

8 Alternatively, Plaintiff would need to allege an independent duty. Plaintiff cannot claim any
9 other source of duty to Plaintiff for two (2) reasons.

10 First, Plaintiff is solely seeking collections for a third party vendor.⁶ Specifically, ¶ P on pgs.
11 10 of the Receivership Order states:

12 Paragraph P on pg. 10 of the Receivership Order specifically advises
13 that “the Receiver shall turn over possession, custody and control of
14 the Receivership Property to either Patriot, Flamingo or to the
15 successful purchaser of the Receivership Property” Thus, it is
16 clear that the Receiver is acting at the behest of Patriot to act as its
17 vendor collector.

18 Plaintiff has not and cannot state any basis to substantiate in any manner legally or factually
19 that Freedman had any duty to any third party vendors. However, the money is clearly designed to
20 go directly to Patriot, a third party vendor. There is no independent debt Freedman owed to Patriot.
21 There is no duty Freedman owed to Patriot. Thus, *Gardner* is not met.

22 Second, the Operating Agreement, attached as Exhibit “B” to Freedman’s original Motion
23 to Dismiss⁷ precludes any finding of culpability of an individual member. Specifically, Section 3.4
24 of the Operating Agreement indicates “no member in his or her capacity as a member, shall have any
25 liability to restore any negative balance in his or her Capital Account or to contribute to, or in respect
26

25 ⁵ Emphasis added.

26 ⁶ See original Receivership case.

27 ⁷ See Exhibit “B” to the original Motion to Dismiss bates stamped Freedman0001-
28 0078.

1 of, the liabilities or the obligations of the Company, or to restore any amounts distributed from the
2 Company, except as may be required specifically under this Agreement, the Act or other applicable
3 law. Except to the extent otherwise provided by law, in no event shall any Member, in his or her
4 capacity as a Member, be personally liable for any liabilities or obligations of the Company.⁸
5 Further, Section 7.3 of the Operating Agreement states that any decision by the Board of Managers
6 of the entity “shall be exercised by the Board of Managers as a body, and no member of the Board
7 of Managers, acting alone, shall have the authority to act on behalf of the Board of Managers.”⁹
8 Section 7.4 of the Operating Agreement directs that, even the Board cannot, without 66% of unit
9 approval “amend or terminate any arrangement or agreement with any Company administrator,
10 management company, consulting company or other senior executive of the Company”¹⁰
11 Additionally, Section 7.8 of the Operating Agreement does not conflict with 3.4. 3.4 precludes
12 liability. 7.8 establishes when a member is entitled to be indemnified by the entity. Plaintiff is trying
13 to suggest this paragraph is the opposite of 3.4 but if that was the case, 3.4 would have been deleted.

14 The logical interpretation of these two (2) clauses, when considered together is that 3.4
15 precludes liability but 7.8 sets the parameters for indemnification. Any question on this issue could
16 be resolved simply by noting that the heading of 3.4.3 “Liability of Members” and the heading of
17 7.8 “Indemnification.” No duty lies therein. Thus, *Gardner* requires dismissal.

18 There is no duty owed to Patriot and the specific exclusions of duty in 3.4 of the Operating
19 Agreement control the Agreement.

20 Finally, as previously demonstrated with the entity filings, Freedman is not even an officer
21 of Flamingo.

22

23

24 ⁸ emphasis added.

25 ⁹ See Exhibit “B” to the original Motion to Dismiss bates stamped Freedman0029-
26 0030.

27 ¹⁰ See Exhibit “B” to the original Motion to Dismiss Section 7.4(g) bates stamped
28 Freedman0031.

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III.

THE RECEIVER IS ACTING AS A FICTION TO USURP NRS 86

Plaintiff cites to the Receivership Order as a manner in which to sue “Flamingo’s directors and officers”. However, Chapter 86 of the Nevada Revised Statutes governs this issue. Certainly, it is not the original Receivership Court’s intent to grant the Receivership authority that would allow the Receiver to circumvent the intent of the Nevada Revised Statutes. In fact, such an order would exceed the Court’s jurisdiction. Thus, Plaintiff cannot use the language of being able to file causes of action against “Flamingos directors and officers” as a way to usurp Chapter 86. Pages 6 and 7 of the Supplement detail how NRS Chapter 86 precludes this action. Other than citing to the Receivership’s Order in the underlying case, which is not and cannot be a basis to avoid the statutory requirements, Plaintiff proffers nothing to dispute this argument. Finally, Plaintiff fails to respond to Flamingo’s own secretary of state paperwork¹¹ demonstrating Freedman is not an officer or director.

IV.

OPERATING AGREEMENT

Plaintiffs suggest in their Omnibus Opposition that because NRS 86.371 allows members to provide contrary information in their articles that would assign individual liability, that this language creates a mechanism to in fact find liability here.

As discussed hereinabove however, the Operating Agreement precludes liability. Thus, NRS 86.371 does not help Plaintiff. However, Plaintiff tries to use Section 7.1 that advises that the Board “shall devote such time to the affairs of the Company as is reasonably necessary” that there was somehow a failure to do so which led to liability. In fact, it is Plaintiff’s position that Defendant “devoted no time-over several years-as Barnes bled Plaintiff dry.”¹²

¹¹ See Exhibit “B” to Freedman’s October 24, 2017, Supplement to Motion to Dismiss First and Second Amended Complaints.

¹² See Opposition pgs. 7 ll 13-14.

1 First, Freedman was not an officer or director. Second, the Complaint does not contain these
2 allegations. Specifically, it does not advise at any point in time that 7.1 was violated, or reference
3 Section 7.1 at all nor does Plaintiff allege that “no time” was devoted by members to any particular
4 purpose. Third, Section 3.4 of the Operating Agreement still advises that “no member in his or her
5 capacity as a member, shall have any liability to restore any negative balance”¹³ Thus, even
6 if best efforts are not met, there is no liability to the company beyond the members initial investment.

7 Plaintiff desperately argues that Section 7.8 allows Defendant to be personally sued under
8 the gross negligence and willful misconduct exceptions. This statement is not true. The Operating
9 Agreement does not provide for any level of liability for any level of action. 7.8 merely advises the
10 board member would have to defend himself without indemnification from the entity. It does not
11 say such a cause of action may stand or should not be dismissed. Any question on this issue could
12 be resolved simply by noting that the heading of 3.4.3 “Liability of Members” and the heading
13 “Indemnification.” The only section discussing the liability is 3.4 which precludes the same.

14 V

15 STANDING

16 Plaintiff tries to create standing by arguing that the Receivership Order allows the Receiver
17 to pursue “directors and officers”. Obviously, this Order can not be read in violation of NRS
18 Chapter 86 or the Operating Agreement. To the extent that this argument violates the Operating
19 Agreement and NRS Chapter 86 the same has already been discussed hereinabove. Paragraph 7 of
20 the Receivership Order allows the Receiver to “[b]ring in and prosecute all proper actions for the
21 collection of debts owed to Flamingo, and for the protection and recovery of the Receivership
22 Property.” As was discussed hereinabove, the Operating Agreement Section 3.4 makes it clear that
23 the members have no culpability for any debts owed to Flamingo. Thus, pursuant to NRS Chapter
24 86, no liability can be found. Moreover, it is Barnes that stole from Flamingo and not these
25 Defendants.

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28 ¹³ See Exhibit “B” Section 3.4 as previously cited in full hereinabove.

1 Plaintiff also fails to respond to the fact that while there is language in the Receivership
2 Order that would allow them to sue “Flamingo’s directors and officers”, the Exhibits regarding
3 officers and directors of the Receivership entity clearly reveal that this Moving Defendant is not one
4 of them. Further, the Receivership Order that Plaintiff so heavily relies on does not reference “suing
5 the members”, thus, Plaintiff has no standing to sue Defendant Freedman.

6 **VI.**

7 **DERIVATIVE ACTION**

8 While Plaintiff references the derivative action in the heading and part of his Opposition to
9 the Motion to Dismiss, there is no substance anywhere suggesting why the derivative requirements
10 do not have to be followed or how they were followed. Thus, NRS 86.487 is not complied with and
11 therefore this Complaint must again fail.

12 **VII.**

13 **LIMITATIONS PERIOD**

14 **A. No Allegations Of Misconduct**

15 The Court does not credit conclusory allegation, even if uncontroverted. *Panda Brandywine*
16 *Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 869 (5th Circ. 2001). A “complaint must contain
17 sufficient factual material accepted as true, to state claim to relief that is plausible on its face.” *Iqbal*
18 *566 U. S. at 678* (citing *Twombly*, 550 U.S. at 570). The “factual allegations must be enough to raise
19 a right to relief above the speculative level . . . on the assumption that the allegations in the
20 complaint are true (even if doubtful in fact).” *See Twombly* 550 U.S. at 555; *see also Cuvillier v.*
21 *Taylor*, 503 F.3d 397, 501 (5th Circ. 2007).

22 In the case *sub judice*, Plaintiff responds to the statute of limitations argument with a series
23 of bullet points, some of which are included in the Complaint and some of which are not. Several
24 others in the laundry list do not allege any improper conduct, i.e., placing Plaintiff company into
25 bankruptcy.¹⁴ Still others do not directly relate to any cause of action. However, what must not be
26 overlooked at this time is that there are no factual allegations that Freedman knew or participated

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28 ¹⁴ See Opposition pgs. 8 ll. 16.

1 in any of these bullet points. Thus, none of these statements are a basis to be applied to Dr.
2 Freedman to hold him into this case in any manner.

3 **B. The Receiver Is The Entity Which Is Its Members**

4 Plaintiffs argument attempts to separate the knowledge of the members in their capacity as
5 “officers and directors” from the knowledge of the entity. This ignores the very Complaint which
6 they filed. Specifically, the Second Amended Complaint in ¶ 24 advises that the Receiver is “acting
7 on behalf of, Flamingo-Pecos Surgery Center, LLC, a Nevada limited liability company”
8 Further, the Receivership Order, as Plaintiffs note on page 4 lines 8-23 of their Opposition, notes that
9 the Receiver is pursuing these claims on behalf of Flamingo. Thus, the Receiver stands in the shoes
10 of the Flamingo.

11 Further, as will be discussed hereinbelow, an entity is bound by the actions of its members.
12 Consequently, wherein Plaintiff admits in their Complaint knowledge by its members and board in
13 excess of three (3) years before filing the Complaint, and further Plaintiff acknowledges that the
14 statute of limitations is only three (3) years, Plaintiff has not complied with the statute of limitations.

15 In an effort to avoid the consequences of its own admissions and the inability to address this
16 rather obvious failure of its own pleadings, Plaintiff attempts to seek protection from the discovery
17 rule. This argument is transparent. Plaintiff Flamingo is suing its “officers and directors” advising
18 that they had knowledge of a situation that Flamingo did not. However, Plaintiff Flamingo is
19 impugned with the knowledge of its “officers and directors”. Plaintiff cannot argue its board had
20 knowledge but it did not. Neither aspect of this legal analysis, i.e., that the Receiver stands in the
21 place of the entity, or that an entities members knowledge is impugned on the entity is any area of
22 legal controversy.

23 Specifically, Nevada Courts have always held that a Receiver steps into the shoes as to the
24 party in which they had become a receiver for. *See e.g., Anes v. Crown Partnership, Inc.*, 113 Nev.
25 195, 199, 932 P.2d 1067, 1069, (1997); *Main Gate Auto Wrecking LLC v. First National Bank of*
26 *Nevada*, 128 Nev. 915, 381 P.3d 36 (the FDIC “steps into the shoes” and obtains all the rights of a
27 failed bank when it becomes receiver.) (citations omitted) (2012); *Schettler v. RalRon Capital Corp.*,
28 128 Nev. Adv. Opin. 20, 275 P.3d 933, 938 (2012). In fact, ¶ 24 of the Second amended Complaint

1 alleges this status. As a consequence thereof, it is factually impossible for Plaintiff, the entity, to
2 argue it is not on notice of its agents actions wherein the actors were agents for the entity itself.
3 Plaintiffs citation as to the discovery rule is of no moment.

4 It is similarly uncontroverted that when an agent of the company knows information it is
5 impugned upon the company *see e.g., In Re Americo Derivative Litigation*, 127 Nev. 196, 215, 252
6 P.3d 681, 695-96 (2011). In fact, when there are multiple owners and managers who each engage
7 in allegedly improper acts, no exception applies. *Id.* Plaintiff's suggestions that because all of the
8 "officers and directors" who made up the entity participated in the conduct that the company now
9 complains of, the company has not discovered their action and gets a pass for some undetermined
10 amount of time. This is absolutely contrary to the law as it exists. See, e.g., *Seigworth v. State*, 91
11 Nev. 536, 539 P.2d 464 (1975) (a general agent may bind his principal in most circumstances);
12 *Simmons Self-Storage v. Rib Roof Inc.*, 331 P3d 850, 956, 130 Nev. Adv. Op. 57 (2014) (an agent
13 may bind a principle if it has actual or apparent authority).

14 In fact, not only is this knowledge binding, but Plaintiff's effort to argue the contrary, i.e.,
15 that the named Defendants did not have authority to act to take action on behalf of the company is
16 an argument that would undermine the substance of their argument and they would have no basis to
17 state a claim for relief factually.¹⁵ On the contrary, the substance of their very causes of action
18 presume that the named Defendants had authority to act on behalf of the corporation.
19 Notwithstanding the essential nature of this aspect of their argument, they reversed the same under
20 the statute of limitations suggesting somehow that these individuals could not act on behalf of the
21 company. First, this is legally wrong. Additionally, it is nonsensical.

22 By way of example, Plaintiff's analysis would allow the members of an LLC to participate
23 in a fraud with a third party. After participating in a fraud and getting their own ill gotten gains at
24 the expense of the entity, the entity could then sue the third party regardless of the statute of
25 limitations advising that the entity just discovered the fraud of its members even though they are one
26

27 ¹⁵ i.e., if Plaintiffs did not have authority to bind the company they could not have
28 stopped Barnes even with knowledge of his wrongdoings.

1 in the same. There is no manner in which this purported analysis makes any level of legal sense.
2 The contrary is clearly true and therefore the statute of limitations, based on Plaintiff's own
3 allegations has clearly expired.

4 Further, the case cited by Plaintiff, *State of Nevada Department of Taxation v. Masco Builder*
5 *Cabinet Group*, 265 P.3d 666, 127 Nev. 730 (2011) has absolutely no application to Plaintiff's
6 analysis. In *State Department of Taxation*, the tax payor was not a member of the Nevada Tax
7 Commission. On the contrary, he was an entity who sought to challenge the finding of the Tax
8 Commission. The Tax Commission's auditor signed a waiver tolling the statute of limitations which
9 the Tax Commission then fought. 127 Nev. at 738-739. The *State Department of Taxation* case is
10 not only factually inapplicable, but it has nothing to do with the discovery rule. In fact, the phrase
11 "discovery rule" does not appear anywhere in this case. Similarly, this case does not at all discuss
12 whether a member is acting as an agent for the entity. In fact, the word "agent" also does not appear
13 in this case. It is not surprising that there is no case law to support Plaintiff's position here as it is
14 mutually exclusive to the law.

15 Plaintiff believes it is standing in the shoes of the Flamingo. Thus, it is bound to its
16 detriment to do so. This means Flamingo had knowledge when its agents had knowledge. As a
17 consequence thereof, as pled in the Complaint, the statute of limitations has long expired.

18 VIII.

19 RECEIVER'S CONDUCT

20 Plaintiff did not discuss the multiple failures to act appropriately in the case *sub judice*.
21 However, it is clear that the Receiver is acting solely for the benefit of a third party vendor. In fact,
22 the Receivership Order states as follows:

23 the Receiver shall turn over possession, custody and control of the
24 Receivership Property to either Patriot, Flamingo or to the successful
purchaser of the Receivership Property".

25 Moreover, it is clear that the Receiver has exceeded the scope of this Order, has pursued
26 improper actions and has failed to comply with Section Z of the Receivership Order which states as
27 follows:
28

1 Should the Receiver determine, in his discretion and upon due
2 investigation of Flamingo's records, accounting and books, and of the
3 actions and omissions of Flamingo's directors, officers, and
4 employees, that the Receivership Estate is insolvent and Flamingo's
5 debts (including the Judgment) cannot reasonably be satisfied through
this receivership, the Receiver may move for a discharge of the
Receiver and seek an order from the Court after a properly noticed
petition and hearing approving the Receiver's final report and
account.

6 In the case *sub judice*, if the Receiver was inclined to comply with his duties, he would have
7 noted that there are no assets to get from the jailed Barnes and no legal basis to get assets from the
8 Defendants in this case *sub judice*. When the Receiver ultimately makes that conclusion, it will
9 make the same reasonable finding that the appropriate members of Flamingo, including their
10 bankruptcy counsel concluded in the case *sub judice*, which is that there is no money to get from
11 Barnes and the members lost money themselves on what could have been a potentially profitable
12 business. However, chasing more money through litigation would not be of benefit to any party.
13 Once the Receiver realizes the same, he will file a long overdue report with the Court and withdraw
14 this lawsuit.

15 **IX.**

16 **CONCLUSION**

17 Therefore, it is respectfully requested that this Motion as to Dr. Freedman be granted and all
18 matters against him be dismissed.

19 Dated this 20 day of November, 2017.

20 COOK & KELESIS, LTD.

21 By :

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23 Nevada State Bar No. 004574

24 GEORGE P. KELESIS

25 Nevada State Bar No. 000069

26 517 S. 9th Street

27 Las Vegas, Nevada 89101

28 *Attorneys for Defendant Sheldon J. Freedman*

1 **CERTIFICATE OF SERVICE**

2 The undersigned hereby certifies that on the 20th day of November, 2017, in accordance
3 with NRCP 5(b), NEFCRRR Administrative Order 14-2 and NEFCR 9(e), the undersigned provided
4 the clerk with a service list of parties to be served with the above and foregoing **DEFENDANT**
5 **SHELDON J. FREEDMAN'S REPLY TO PLAINTIFFS OMNIBUS SUPPLEMENTAL**
6 **OPPOSITION TO DEFENDANTS VARIOUS MOTIONS TO DISMISS AND ASSOCIATED**
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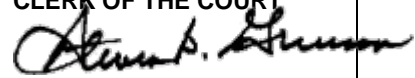
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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;

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 IN
SUPPORT OF MOTION TO
DISMISS SECOND AMENDED
COMPLAINT**

**DEFENDANT DANIEL BURKHEAD, M.D.'S REPLY IN SUPPORT OF MOTION TO
DISMISS SECOND AMENDED COMPLAINT**

Defendant, DANIEL L. BURKHEAD, M.D. ("Dr. Burkhead"), 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 in Support of his Motion to Dismiss Plaintiff's
Second Amended Complaint ("Reply").

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

5 Dated: November 21, 2017

**GORDON REES SCULLY
MANSUKHANI, LLP**

By:

/s/ Robert E. Schumacher

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Attorney for Defendant,

DANIEL L. BURKHEAD, M.D.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On October 10, 2017, Plaintiff filed its Second Amended Complaint (“SAC”) alleging multiple causes of action allegedly arising from Defendant’s tenure as a member of Plaintiff. Notably, Plaintiff’s negligence based claims must be dismissed since the applicable statute of limitations expired prior to the filing of Plaintiff’s complaint. Plaintiff argues that equitable tolling should apply to save its claims. However, the doctrine of equitable tolling is inapplicable to Plaintiff’s action. Finally, the economic loss doctrine bars Plaintiff’s claims. Accordingly, Defendant BURKHEAD’s Motion to Dismiss Plaintiff’s Second Amended Complaint should be granted.

II. DISCUSSION

A. This Court Should Dismiss the Claims Against Dr. Burkhead

1. The Statute of Limitations is Not Subject to Equitable Tolling

Plaintiff alleges three negligence based causes of action in its Second Amended Complaint relating to Robert Barnes’ employment as office manager of Plaintiff: (1) negligent hiring; (2) negligent supervision; and (3) negligent retention. SAC, ¶ 66. The statute of limitations for negligence is two years. NRS 11.190(e). Plaintiff filed its original Complaint on February 10, 2017. Plaintiff alleges Barnes’ was hired on October 5, 2006. SAC, ¶ 66. Plaintiff alleges Barnes’ embezzlement was discovered in 2012, but he was not fired until 2013. SAC, ¶ 112.

According to Plaintiff’s own allegations, the statute of limitation for the negligent retention and supervision claims began running in 2012--or at the latest in 2013. The Complaint was not filed until February 10, 2017, years after the statute of limitations for those claims expired. Dr. Burkhead requests that all Plaintiff’s negligence based causes of action be dismissed since the applicable statute of limitations expired before Plaintiff’s action was initiated.

Plaintiff argues the two year statute of limitations enumerated in NRS 11.190(e) should be equitably tolled in an effort to save its claims from dismissal. Plaintiff’s reliance on equitable

1 tolling is misguided. Plaintiff cites *State of NV Dept. of Taxation v. Masco Builder Cabinet*
2 *Group*, 265 P.3d 666, 669-670 (2011) to support the argument that equitable tolling should be
3 applied by the Court thereby circumventing the two year statute of limitations in NRS 11.190(e).
4 The *Masco* Court relied heavily on *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 826 673 P.2d
5 490, 492 (1983), for the proposition that a statute of limitations may be equitably tolled in
6 situations where procedural technicalities would bar claims. *Masco Builder Cabinet Group*, 265
7 P.3d at 671. Plaintiff misconstrues the ruling in *Copeland*.

8 The *Copeland* ruling applied to “Nevada anti discrimination statutes [which] have
9 laudable goals and will be construed broadly... [the court decided to] adopt the doctrine of
10 equitable tolling in this context; procedural technicalities that would bar claims of discrimination
11 will be looked upon with disfavor.” *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 826 673 P.2d
12 490, 492 (1983). (emphasis added). Clearly, this was a limited holding that applied to
13 discrimination cases, which is not at issue in this matter. Further, *Masco* and *Copeland* are both
14 cases where the claims at issue were first pending before an administrative agency. Those
15 Courts adopted equitable tolling due to the fact that a procedural technicality would bar the
16 claims at issue. Here, a procedural technicality does not bar the claims, rather, Plaintiff’s failure
17 to file this action within the limitations period is the sole reason that the applicable statute of
18 limitations period expired.

19 *Copeland* established certain factors to be considered when determining whether the
20 doctrine of equitable tolling should apply:

21 the diligence of the claimant; the claimant’s knowledge of the relevant facts; the
22 claimant’s reliance on authoritative statements by the administrative agency that misled
23 the claimant about the nature of the claimant’s rights; any deception or false assurances
24 on the part of the employer against who the claim is made; the prejudice to the employer
that would actually result from delay during the time that the limitations period is tolled;
and any other equitable considerations appropriate in the particular case.

25 *Id.*

26 Consideration of these factors herein weighs against tolling the four year statute of
27 limitations. Plaintiff was not diligent in prosecuting these claims and failed to file them within
28 the limitations period. Moreover, unlike *Copeland*, Plaintiff’s claims were never pending before

1 an administrative agency and therefor Plaintiff could not have been misled in any way regarding
2 the applicable statute of limitations. Plaintiff was well aware of the relevant facts since Barnes'
3 left the company. A careful reading of the remaining factors shows they were intended to apply
4 only to actions that were at some point required to be filed with an administrative agency and are
5 thus inapplicable in the instant case.

6 Therefore, Defendant requests that all causes of action based on theories of negligence be
7 dismissed. The doctrine of equitable tolling is inapplicable and these claims are barred by NRS
8 11.190(e). Applying equitable tolling outside of the context of cases that were required to be
9 pursued initially before an administrative agency would lead to absurd results and defeat the
10 underlying public policy behind statutes of limitation.

11 2. The Torts of Negligent Hiring/Retention/Supervision Implicate Employer Liability

12 Plaintiff improperly alleges causes of action for negligent hiring, supervision, and
13 retention against Dr. Burkhead and all of the other Defendants who were members of Plaintiff.
14 Plaintiff, not Dr. Burkhead or the other Defendants, employed Barnes as Plaintiff's office
15 manager. SAC, ¶ 66. Only an employer, which was Plaintiff itself, can be liable for negligent
16 hiring, supervision and retention. Since Dr. Burkhead was not Barnes' employer, he cannot be
17 held liable under Plaintiffs' causes of action. *See Wright v. Watkins and Shepard Trucking, Inc.*,
18 968 F.Supp.2d 1092, 1095 (2013) (stating the tort of negligent hiring "creates **employer**
19 liability") (emphasis added). Plaintiff did not and cannot allege that Dr. Burkhead acted as
20 Barnes' employer. See SAC. Plaintiffs' claims against Dr. Burkhead must be dismissed.

21 Additionally, negligent hiring is based on the failure of an employer to conduct a
22 reasonable background check or hiring an employee the employer knew, or should have known,
23 had dangerous propensities that could result in harm to others. *See Hall v. SSF, Inc.*, 112 Nev.
24 1384, 1392, 930 P.2d 94, 98 (1996). There are no factual allegations in the Second Amended
25 Complaint that Dr. Burkhead or the other Defendants failed to conduct a reasonable background
26 check or knew before he was hired that Barnes was a risk to embezzle money from Plaintiff. *See*
27 *e.g.*, SAC, ¶¶ 66-70. Plaintiff's sole allegation is a bald conclusory allegation that Defendants
28 failed to conduct necessary due diligence. *See* SAC ¶ 70. Because this is a conclusory statement

1 with no actual facts, the Court does not need to treat it as true and may disregard it when
2 deciding this Motion. Plaintiff did not and cannot plead the necessary elements of a negligent
3 hiring claim. Plaintiff's negligent hiring claim fails as a matter of law and must be dismissed.

4 3. The Economic Loss Doctrine Bars Plaintiff's Negligence Claims Since No Exception
5 Applies

6 As a preliminary note, Plaintiff does not oppose Defendant's economic loss doctrine
7 arguments in its Omnibus Opposition. For this reason, Defendant's Motion should be granted.
8 See EDCR 2.2(e). The Omnibus Opposition states that the economic loss doctrine is
9 inapplicable in a footnote due to certain exceptions without any further elaboration. See
10 Omnibus Opposition, footnote 2(i). This footnote mentions a previous opposition filed by
11 Plaintiff, but fails to incorporate that previous oppositions arguments by reference. If this Court
12 chooses to allow these unincorporated arguments, then they are defeated on the substantive
13 grounds discussed below.

14 Even assuming that Plaintiff could meet the elements for its negligence claims against Dr.
15 Burkhead and that those claims are not barred by the applicable statute of limitations, the
16 economic loss doctrine would be applicable. Well established Nevada law hold that the
17 economic loss doctrine precludes a plaintiff from recovering under theories of negligence for
18 purely economic loss. *Local Joint Executive Board v. Stern*, 98 Nev. 409, 651 P.2d 637, 638
19 (1983) ("The primary purpose of the rule is to shield a defendant from unlimited liability for all
20 of the economic consequences of a negligence act, particularly in a commercial or professional
21 setting...."); *Terracon Consultants Western Inc. v. Mandalay Resort Group*, 125 Nev. 66, 73,
22 206 P.3d 81, 86 (Nev. 2009) (responding to certified question from the United States District
23 Court for the District of Nevada on whether economic loss doctrine bars negligence claims
24 where loss is solely economic); *Calloway v. City of Reno*, 116 Nev. 250, 256, 993 P.2d 1259,
25 1263 (2000), overruled on other grounds by *Olson v. Richard*, 89 P.3d 31, 31-33 (Nev. 2004)
26 (holding district court properly applied the economic loss doctrine to preclude negligence claims
27 where only damages were economic). Purely economic loss occurs when there is no damage or
28 injury to a person or property, and only monetary losses are sustained. *Id.*

1 As part of its causes of action for negligent hiring, retention, and supervision, Plaintiff
2 seeks only recovery of economic losses allegedly sustained by Plaintiff as a result of Barnes’
3 embezzlement. Plaintiff failed to allege any injury to a person or property that occurred as a
4 result of the alleged negligence. This is precisely the type of claim that is barred under the
5 economic loss doctrine. Plaintiff cannot recover for purely economic loss under a theory of
6 negligence. In order to sustain a cause of action for negligence, Plaintiff must allege injury to
7 person or property. Plaintiff’s SAC completely omits any such allegations. For these reasons,
8 Plaintiff’s negligence based causes of action must be dismissed.

9 Defendant surmises that Plaintiff attempts to incorporate by reference arguments made in
10 its Opposition to NG and Banghatar Motion to Dismiss filed July 14, 2017 (“NG Opposition”) in
11 the Omnibus Opposition. Omnibus Opposition, footnote 2(i). Plaintiff claims that many
12 exceptions to the economic loss doctrine are applicable, but clearly no such exception applies.
13 See NG Opposition.

14 First, Plaintiff claims that there are “exceptions to the ELD in certain categories of
15 negligence cases ‘against attorneys, accountants, real estate professionals, and insurance
16 brokers’” and “even third parties may be successful with negligent supervision and management
17 claims against directors and officers in cases involving purely economic loss.” NG Opposition,
18 p.10:26-11:2. The former proposition is clearly inapplicable since Defendant is a doctor and was
19 not acting in any of those capacities at any time during the events in question. The latter
20 proposition is supported only by foreign authority that is not binding on this Court and
21 essentially has no bearing on this case at all. A careful reading of *Sergeants* shows that the
22 economic loss doctrine is not even considered in that case and thus it should not be read to create
23 any so-called “exception” to it. See *Sergeants Benevolent Ass’s Annuity Fund v. Renck*, 796
24 N.Y.S.2d 77 (N.Y. App. Div. 2005).

25 The next exception to the economic loss doctrine that Plaintiff claims is applicable is
26 where “a duty is imposed by law rather than contract.” NG Opposition p.11:24-25. This
27 exception is also clearly inapplicable since Plaintiff claims that Defendant breached his fiduciary
28 duty to Plaintiff, but this duty arises in contract not in law. NRS 86 does not prescribe any

1 fiduciary duty to members of a limited liability company by operation of law. See NRS 86. The
2 fiduciary duty of Defendant to Plaintiff arises via the Operating Agreement that its members
3 were signatories under. This fiduciary relationship does not exist by operation of law, thus this
4 exception to the economic loss doctrine is inapplicable.

5 Plaintiff also claims that an exception to the economic loss doctrine exists for intentional
6 torts, which allows the recovery of purely economic losses. While this is an accurate statement
7 of law, this exception is inapplicable since Plaintiff does not allege any intentional torts against
8 Defendant. See SAC. Plaintiff states that Defendant engaged in intentional conduct, but an
9 allegation of intentional conduct does not make negligence an intentional tort. It is self-evident
10 that intentional torts are limited torts such as assault, battery, false imprisonment, intentional
11 infliction of emotional distress, trespass to land, trespass to chattels, and conversion where the
12 intent of the defendant must be shown. None of these are intentional torts are alleged in the SAC
13 and negligence clearly is not an intentional tort. Thus, this exception to the economic loss
14 doctrine is not applicable to this matter.

15 Since no exception to referenced by Plaintiff is actually applicable to the instant case, the
16 economic loss doctrine acts as a complete bar to Plaintiff's claims. As such, all negligence based
17 causes of action should be dismissed.

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1 **III. CONCLUSION**

2 Based on the foregoing, Dr. Burkhead respectfully requests that this Court dismiss all
3 claims against him. Alternatively, this Court should stay this action for a reasonable time to
4 allow Plaintiff an opportunity to reinstate its charter with the Nevada Secretary of State. If
5 Plaintiff fails to do so within a reasonable period of time then this action should be dismissed.

6 Dated: November 21, 2017

**GORDON REES SCULLY
MANSUKHANI, LLP**

By:

/s/ Robert E. Schumacher

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***Attorney for Defendant,
DANIEL L. BURKHEAD, M.D.***

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b) and Administrative Order 14-2, effective June 1, 2014, and
3 N.E.F.C.R. Rule 9, I certify that I am an employee of GORDON REES SCULLY
4 MANSUKHANI LLP and that on this 21st day of November, 2017, I did cause a true correct
5 copy of **DEFENDANT DANIEL BURKHEAD M.D.'S REPLY IN SUPPORT OF**
6 **MOTION TO DISMISS SECOND AMENDED COMPLAINT** to be served via the Court's
7 electronic filing service on all parties listed below (unless indicated otherwise):

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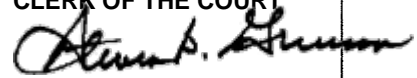
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and Pankaj Bhatnagar MD incorrectly named
Pankaj Bhatanagar MD*

DISTRICT COURT

CLARK COUNTY, NEVADA

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;

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

**PANKAJ BHATNAGAR, MD AND
MATTHEW NG, MD'S REPLY IN
SUPPORT OF THEIR MOTION TO
DISMISS SECOND AMENDED
COMPLAINT**

Hearing Date: November 29, 2017

Hearing Time: 9:00 a.m.

Defendants Matthew Ng, MD ("Ng") and Pankaj Bhatnagar, MD ("Bhatnagar"), by and
through their attorneys of record at Holland & Hart LLP, hereby submit this reply memorandum
in support of their Motion to Dismiss (the "Motion") Second Amended Complaint. This Reply

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

3 DATED this 21st day of November, 2017

4 HOLLAND & HART LLP

5
6 By 

7 Bryce K. Kunimoto, Esq.

8 Robert J. Cassity, Esq.

9 Susan M. Schwartz, Esq.

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15 *Attorneys For Defendants Matthew Ng MD*
16 *and Pankaj Bhatnagar MD*

17 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REPLY IN**
18 **SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT**

19 **I.**

20 **INTRODUCTION**

21 Plaintiff attempts to paint Defendants Drs. Ng and Bhatnagar (collectively
22 “Defendants”) as self-absorbed and self-centered members of Flamingo-Pecos Surgery Center,
23 LLC (“FPSC”) looking out only for themselves, instead of as additional victims of the
24 despicable conduct of Robert Barnes (“Barnes”), the former FPSC office manager who
25 embezzled from it. Plaintiff, in his Omnibus Supplemental Opposition to Defendants’ Various
26 Motions to Dismiss and Associated Joinders (the “Supplemental Opposition”), attempts to shift
27 liability for Barnes’ actions to Defendants. However, as a matter of law, the claims brought
28 against Defendants cannot stand.

29 In his Supplemental Opposition, Plaintiff inappropriately attempts to incorporate past
30 filings that are now *moot*. These are based on the original Complaint, which is now moot and
31 without legal effect because Plaintiff is on the *Second* Amended Complaint. Because the

1 original Complaint is moot, the outcome is the same for any past filings based thereon.
2 Accordingly, they should be disregarded.

3 As to Plaintiff's claims in the *Second* Amended Complaint, the claims of grossly
4 negligent hiring, supervision, and retention must be dismissed because such claims can only be
5 against an employer. Defendants were not Barnes' employer; FPSC was. Plaintiff
6 acknowledges FPSC as Barnes' employer numerous times, and does not allege Defendants were
7 his employer. Thus, there exist no valid claims here.

8 In addition, the Economic Loss Doctrine bars Plaintiff's negligence claims because there
9 is no physical injury alleged. Without a physical injury, purely economic loss cannot serve as
10 the basis for negligence claims. Accordingly, the negligence claims cannot stand.

11 Next, the claims for breaches of duty of care and duty of loyalty must also be dismissed.
12 No particularity is alleged with regard to specific acts or omissions of the Defendants. Also,
13 there is a presumption that Defendants are afforded protection under the business judgment rule,
14 overriding these claims. Further, without more, slapping conclusory labels on allegations does
15 not require the Court to accept such allegations as true. Plaintiff's assertions of Defendants
16 acting intentionally or willfully does not warrant the Court's acceptance of such statements
17 because they are simply unsupported bare assertions.

18 Finally, Plaintiff lacks standing to bring the NRS Chapter 86 claims. Plaintiff is not now
19 nor has ever been a member of FPSC, and accordingly lacks standing to bring derivative claims.
20 Nor has Plaintiff ever been a judgment creditor of Defendants in order to bring judgment
21 creditor's claims. The Receivership Order changes none of this. Therefore the NRS Chapter 86
22 claims likewise must be dismissed.

23 ///

24 ///

25 ///

26 ///

27 ///

II.

ARGUMENT

A. As A Threshold Matter, Plaintiff Improperly Attempts To Incorporate A Now Moot and Legally Ineffective Objection Referencing the Legally Ineffective and Moot Original Complaint and Motion To Dismiss.

It is well established in Nevada that an amended pleading supersedes the original (and any other prior pleadings), rendering any prior pleadings without “legal effect.” *McFadden v. Ellsworth Mill & Mining Co.*, 8 Nev. 57, 60 (1872) (“The amended complaint supersedes the original, and destroys its legal effect.”). *See also Bonaventura v. Ross*, 64370, 2014 WL 1101588, at *1 (Nev. Mar. 18, 2014) (“an amended complaint supersedes the original complaint”); *Randono v. Ballow*, 100 Nev. 142, 143, 676 P.2d 807, 808 (1984) (“The amended complaint in this case was a distinct pleading which superseded the original complaint.”). Here, Plaintiff is on the Second Amended Complaint (the “SAC”) in this matter. Accordingly, the original Complaint and First Amended Complaint (the “FAC”) are now moot.

Nonetheless, Plaintiff, in his Supplemental Opposition, asks the “Court to take judicial notice of its own docket and the papers and pleadings on file thereon,” by incorporating by reference Plaintiff’s “Opposition to Dr. Matthew Ng and Dr. Pankaj Bhatnagar’s Motion to Dismiss (‘Ng Opp.’) and the Declaration of Todd E. Kennedy (‘Kennedy Decl.’) (and all four of the Exhibits thereto) filed with the Ng Opposition on Thursday, July 13, 2017.”¹ Supplemental Opposition, p.1, n.1. Without the original Complaint, it follows that the Ng Opposition, and any exhibits thereto likewise do not have any legal effect. The same would go for Defendants’ original motion to dismiss, filed on July 23, 2017, and their reply filed on August 25, 2017.

Defendants did not ask the Court to take judicial notice of their previous motion or reply; instead they restated and reincorporated their arguments, as applicable, into the Motion and instant Reply. Plaintiff’s request, aside from asking the Court and all parties to rely on mooted filings, also requires the Court and all parties to hunt for needles in a haystack in order

¹ Similarly, Plaintiff asks the Court to take judicial notice and incorporate by reference the Burkhead Opposition filed on July 14, 2017, and the Freedman Opposition filed on July 17, 2017. Supplemental Opposition, p.1, n.1. These are also moot and without legal effect, due to the subsequent filings of the FAC and SAC.

1 to determine what citations and quotations to the original Complaint may or may not apply to
2 the Motion and SAC. In essence, what Plaintiff has done—other than sending the Court on a
3 wild goose chase and wasting its time—is give the Court complete discretion as to how best
4 spend its time in evaluating the Supplemental Opposition, including deciding what Plaintiff may
5 or may not have meant in the Ng Opposition, *should it choose to*.

6 Accordingly, because, as noted by the Nevada Supreme Court over 140 years ago, the
7 original Complaint has no legal effect, Defendants ask that it is disregarded here, along with any
8 and all pleadings, responses, and references thereto. Plaintiff should not be rewarded because
9 he could not be bothered to reargue what was previously argued, as Defendants have done.²

10 **B. Plaintiff's Claims For for Grossly Negligent Hiring (First Cause of Action), Grossly**
11 **Negligent Supervision (Second Cause of Action) And Grossly Negligent Retention**
12 **(Third Cause of Action) Must Be Dismissed Because These Claims Impose Liability**
Only Against An Employer, And Plaintiff's Complaint States That FPSC Was
Barnes' Employer, Not Defendants Drs. Ng and Bhatnagar.

13 Notwithstanding Plaintiff directing the Court to mooted filings, Plaintiff's three
14 negligence based claims must be dismissed because the Nevada Supreme Court has made it
15 clear that negligent hiring, negligent supervision and negligent retention are claims that can be
16 brought only against an employer.³ Plaintiff does not dispute that there exists binding Nevada
17 Supreme Court precedent on this very issue. On the contrary, Plaintiff's SAC acknowledges
18 that the only employer of Mr. Barnes, the individual who embezzled funds, was FPSC itself:

- 19 • Mr. Barnes was Plaintiff's "Office Manager." SAC, ¶¶ 14, 16, 66, 69, 76-
20 77, 168, 172, 176, 182. *See also* Supplemental Opposition, p. 5 (quoting
21 the Receivership Order, ¶ 4 ("Flamingo's former employee/office manager
Robert W. Barnes")).

22
23 ² Instead of incorporating previous arguments (as applicable) by reference, Defendants restate
and reargue herein, as they also did in the Motion.

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

- Mr. Barnes' employment was with FPSC: "Flamingo's employment of Barnes." SAC, ¶¶ 165, 168, 172, 173. *See also* Supplemental Opposition, p. 5 (quoting the Receivership Order, ¶ 4 ("Flamingo's former employee/office manager Robert W. Barnes")).

Plaintiff, by referring the Court to his now moot July 13, 2017 Ng Opposition, attempts to distract the Court away from these binding Nevada Supreme Court cases and instead argues that the Defendants Drs. Ng and Bhatnagar were "a 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 SAC acknowledges, in no uncertain terms, was FPSC itself.

In sum, Plaintiff relies on the July 13, 2017 Ng Opposition to make his argument here.⁴ Never mind that the July 13, 2017 Ng Opposition is now moot, as discussed *supra*, it is also misleading and wrong. Further, Plaintiff makes no new contentions in the Supplemental Opposition to rebut Defendants' arguments raised in the Motion. Simply put, Plaintiff has failed to raise valid claims.

C. While Plaintiff Has Identified Some Limited *Inapplicable* Exceptions To The Economic Loss Doctrine, There Is No Basis For This Court To Expand The List of Exceptions Enumerated By The Nevada Supreme Court.⁵

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 Ng Opposition, are extremely limited to those

⁴ In fact, Plaintiff claims to have "defeated" Defendants' arguments in the July 13, 2017 Ng Opposition. *See* Supplemental Opposition, p.2, n.2. *Cf. id.* at p.2, n.3 (referencing the Freedman Opposition); *id.* at p.3, n.4 (referencing the Burkhead Opposition). Yet, at no time has this Court issued a ruling or order on the Ng Opposition (or the Freedman or Burkhead Oppositions) in Plaintiff's favor. Clearly this tactic is meant to be misleading and a distraction.

⁵ Once again, Plaintiff attempts to incorporate the July 13, 2017 Ng Opposition, choosing not to actually argue against Defendants' Motion in the Supplemental Opposition. *See* Section II.A., *supra*, and n.4, *supra*. In the event that the Court incorporates the Ng Opposition, Defendants reargue and restate their response here.

1 “negligence cases against ‘attorneys, accountants, real estate professionals and insurance
2 brokers.’” Ng Opposition, p. 8, Ins. 21-23. The Plaintiff is asking this Court to expand the
3 exceptions of the Economic Loss Doctrine to include claims against directors, officers and
4 managers arising from the theft of monies caused by another employee. The Nevada Supreme
5 Court has not recognized such an exception to the Economic Loss Doctrine and neither should
6 this Court.

7 Quite tellingly, neither the Ng Opposition nor Supplemental Opposition disputes that the
8 Nevada Supreme Court had addressed a case similar to this one, when it found that under the
9 economic loss doctrine, an owner of a motel cannot be held liable for negligence which resulted
10 in economic losses caused by a third party scam artist. See *Jordan v. State of Nevada on*
11 *Relation to the Dept. of Motor Vehicles*, 121 Nev. 44, 110 P.3d 30 (2005).⁶ In *Jordan*, the
12 Plaintiff had alleged that the Defendant motel owner had knowledge that another motel guest
13 was a scam artist, the motel owner was profiting from these scams and the motel owner did
14 nothing to remove the scam artist from the motel property. *Jordan*, 121 Nev. at 55. In *Jordan*,
15 the Court noted that even assuming that the Defendant motel owner had a duty to take actions to
16 prevent the scam artist from causing injury to Plaintiff, the economic loss rule precluded the
17 Plaintiff from bringing a negligence claim against the motel owner. The Nevada Supreme Court
18 held that a plaintiff “failed to sufficiently state any cause of action for negligence” because he
19 “did not allege that he was physically harmed or injured in any way other than through [a scam
20 artist’s] appropriation of a sum of money.” *Jordan*, 121 Nev. at 51.

21 While the Ng Opposition and Supplemental Opposition *conveniently* fail to address the
22 *Jordan* case, the Plaintiff engages in misdirection (in the Ng Opposition) by misleading this
23 Court to the holding of a non-binding case from the 9th Circuit as purported support that this
24 Court should make an exception to the applicability of the economic loss doctrine. The
25 Economic Loss Doctrine has two components, and can either bar (1) claims based on
26 negligence for purely monetary harm or, (2) it can “bar recovery for other tort claims where the

27 ⁶ This case was abrogated by *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224 (2008)
28 on unrelated grounds.

1 plaintiff's only complaint is that the defendant failed to perform what was promised in the
2 contract⁷." See *Giles*, 494 F.3d at 879. It was in the context of the second category (where the
3 Court was addressing whether Plaintiff could allege a fraud and conversion claim under the
4 ELD which is a wholly separate issue from the negligence claims at issues) that the Court held
5 that the "ELD does not bar claims 'where the defendant had a duty imposed by law rather than
6 by contract and where the defendant's intentional breach of that duty caused purely monetary
7 harm to the plaintiff.'" (citing *Giles v. General Motors Acceptance Corp.*, 494 F.3d 865, 879
8 (9th Cir. 2007)). Ng Opposition, p. 9, Ins. 1-4. In other words, in *Giles*, the issue was whether
9 the Economic Loss Doctrine barred recovery for the intentional tort of fraud and conversion and
10 the Court specifically held "We therefor held that the economic loss doctrine does not bar
11 Appellant's fraud claim" and "We threefold hold the economic loss doctrine does not bar
12 Appellant's conversion claim." See *Giles*, 494 F.3d at 880. In other words, Plaintiff's reliance
13 on the *Giles* case was misplaced and the language was taken out of context because the *Giles*
14 case focused on whether the economic loss doctrine barred claims for fraud or conversion...
15 neither of which are asserted in Plaintiff's Complaint!!

16 Once again, Plaintiff relies on the July 13, 2017 Ng Opposition to make his argument
17 here,⁸ which as discussed above, is misleading and wrong. Having made no new contentions in
18 the Supplemental Opposition to rebut Defendants' arguments raised in the Motion, Plaintiff
19 again failed to raise valid claims.

20 **D. Plaintiff's Claims for Breach of Fiduciary Duty (Fourth and Fifth Causes of**
21 **Action) Must Be Dismissed Because Defendants Are Protected By The**
22 **Presumptions Afforded By The Business Judgment Rule.**

23 While in the Ng Opposition, Plaintiff cited to numerous non-Nevada cases (especially
24 cases from Delaware) imposing liability for breach of fiduciary duty, none of these Delaware
25 cases address Nevada's business judgment rule statute which specifically precludes liability
26 unless the director or officer has engaged in "intentional misconduct, fraud or a knowing

27 ⁷ The second category that has no bearing on this case.

28 ⁸ See n.4, *supra*.

1 violation of the law.” See NRS 78.138(7)

2 While Plaintiff incorporates, in the SAC, bankruptcy transcripts and a Final Order of
3 Forfeiture signed by the Honorable Andrew P. Gordon, United States District Court Judge (*see*
4 *generally* Exhibits to SAC), none of these documents show that Defendants Drs. Ng or
5 Bhatnagar, *specifically*, engaged in “intentional misconduct, fraud or a knowing violation of the
6 law” as required by NRS 78.138(7)⁹. In addition, under NRS 78.138(7), there must first be a
7 breach of duty, and **that breach** must have involved “intentional misconduct, fraud or a
8 knowing violation of the law,” and Plaintiff fails to (1) allege how specific duties were breached
9 by the individual Defendants, and (2) specifically and adequately allege the intentional or
10 fraudulent acts by the individual Defendants. To wit, none of the transcripts even reference Drs.
11 Ng or Bhatnagar individually.

12 The SAC also argues that because the Order of Restitution is an improper distribution
13 and is a fraud transfer of corporate assets. *See* SAC, ¶¶ 56-57, 59, 159-163. This argument is
14 ridiculous because Plaintiff has not identified any documents to even suggest that any monies
15 have been received pursuant to the Court Order of Restitution, and if Plaintiff has any
16 disagreement with the Federal Court Order, the appropriate relief is to petition the Federal
17 District Court to amend the same.

18 Moreover, neither the Ng Opposition nor the Supplemental Opposition dispute that even
19 if Plaintiff could assert that Defendants engaged in “intentional misconduct, fraud or a knowing

20 ⁹ The liability imposed upon directors and officers is set forth in NRS 78.138(7) which, *inter*
21 *alia*, states as follows:

22 7. Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200,
23 452.270, 668.045 and 694A.030, or unless the articles of incorporation or an
24 amendment thereto, in each case filed on or after October 1, 2003, provide for
25 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:

26 (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**

27 (b) **The breach of those duties involved intentional misconduct, fraud or a**
knowing violation of law.
28

violation of the law,” the Nevada Supreme Court requires, pursuant to NRS 78.138(7), the claim must be pled “with particularity” pursuant to Rule of Civil Procedure 9(b). *In re Amerco Derivative Litig.*, 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 Drs. Ng and Bhatnagar, *specifically*, acted with “intentional misconduct, fraud or a knowing violation of law” which is necessary to overcome Nevada’s statutory business judgment rule presumption. No allegations whatsoever are made specific to either Dr. Ng or Dr. Bhatnagar.

In fact, as to the Duty of Care, Plaintiff cannot decide whether Defendants had knowledge or not. At times, Plaintiff alleges Defendants had knowledge (SAC, ¶ 46 (alleging knowledge of Barnes’ actions), ¶ 54 (alleging knowledge of FPSC’s insolvency and claim to restitution), while simultaneously claiming a violation of the Duty of Care, which requires directors must be uninformed. Plaintiff cannot have it both ways.

In addition, as to the Duty of Loyalty, as noted above, Plaintiff makes no allegations that the Defendants were the beneficiaries of Barnes’ restitution—Plaintiff failed to allege that Defendants received *anything* in restitution. Instead, Plaintiff slaps conclusory labels on statements, drawing legal conclusions couched as facts. Such statements **do not** preclude dismissal, because they should not be taken as true. *See, e.g., In re Amerco Derivative Litig.*, 127 Nev. at 232, 252 P.3d at 706 (“conclusory allegations are not considered as expressly pleaded facts or factual inferences”) (internal quotation omitted); *Davenport v. GMAC Mortg.*, 56697, 2013 WL 5437119, at *3 (Nev. Sept. 25, 2013) (conclusory legal allegations should not be accepted as true). Therefore, Plaintiff’s conclusory labels should be ignored, Defendants are protected by the business judgment rule, and dismissal is appropriate.

E. Plaintiff’s Lack Of Standing Under NRS Chapter 86 (Eight Cause of Action) Is Not Changed By The Receivership Order.

The Receivership Order does not usurp Nevada law, giving Plaintiff free reign to manipulate or invent claims against the Defendants. Instead, the Receivership Order grants the Receiver the ability to “[p]ursue Flamingo’s claims and causes of action.” Supplemental

1 Opposition, p. 5:17. This requires the existence of a **valid** claim or cause of action; Plaintiff
2 does not get to create nonexistent claims or bring invalid causes of action against Defendants.

3 Plaintiff states that this “is the end of the inquiry.” *Id.* at p. 5:23. To the extent that
4 **valid** claims may be pursued, this statement makes sense. However, Plaintiff cannot, as he did
5 in the SAC, bring nonexistent claims and invalid causes of action against Defendants, as
6 discussed herein and in the Motion. Plaintiff was not a member of FPSC at the time of the
7 alleged harms, and therefore cannot file a derivative claim. *See* NRS 86.485; *Parametric Sound*
8 *Corp. v. Eighth Judicial Dist. Court in & for County of Clark*, 401 P.3d 1100, 1105 (Nev. 2017)
9 (internal quotation omitted). Also, Plaintiff failed to allege he is a judgment creditor with
10 proper standing, because he cannot do so. *See Weddell v. H2O, Inc.*, 128 Nev. Adv. Op. 9, 271
11 P.3d 743, 749 (2012) (internal citation omitted); *Becker v. Becker*, 131 Nev. Adv. Op. 85, 362
12 P.3d 641, 644 (2015). Without properly alleging how he has standing to seek relief under NRS
13 86 (which he cannot do), and without anything other than legal conclusions couched as fact,
14 Plaintiff lacks standing. This is not changed by the Receivership Order.

15 ///

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19 ///

III.

CONCLUSION

Accordingly, and for the reasons stated herein and in Drs. Ng and Bhatnagar's Motion to Dismiss the Second Amended Complaint, the following claims must be dismissed as a matter of law:

- (1) Grossly Negligent Hiring Against All Defendants (First Cause of Action);
- (2) Grossly Negligent Supervision Against All Defendants (Second Cause of Action);
- (3) Grossly Negligent Retention Against All Defendants (Third Cause of Action);
- (4) Defendants' Breach of Fiduciary Duty of Care to FPSC (Fourth Cause of Action);
- (5) Defendants' Breach of Fiduciary Duty of Loyalty to FPSC (Fifth Cause of Action (incorrectly labeled Fourth)); and
- (6) Defendants' Breaches of NRS Chapter 86 (Eighth Cause of Action (incorrectly labeled Seventh)).

DATED this 21st day of November, 2017

HOLLAND & HART LLP

By 

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and Pankaj Bhatnagar MD*

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November, 2017, I served a true and correct copy of the foregoing **PANKAJ BHATNAGAR, MD AND MATTHEW NG, MD'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS SECOND AMENDED COMPLAINT** 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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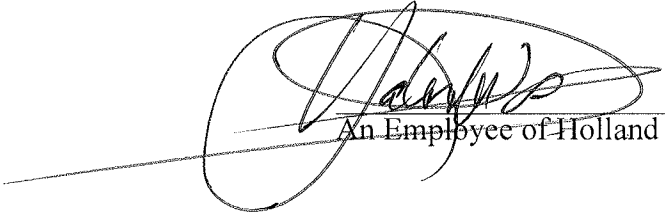
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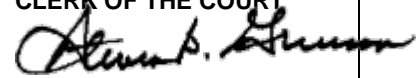
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13 **EIGHTH JUDICIAL DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 MARK J. GARDBERG, ESQ., in his capacity as) CASE NO. A-17-750926-B
16 Receiver for, and acting on behalf of,) DEPT. NO.: XV
17 FLAMINGO-PECOS SURGERY CENTER, LLC a)
18 Nevada limited liability company;)

19 Plaintiff.)

20 **ANSWER TO SECOND AMENDED**
21 **COMPLAINT**

22 vs.)

23 William Smith MD, an individual; Pankaj)
24 Bhatanagar MD, an individual; Marjorie Belsky MD,)
25 an individual; Sheldon Freedman MD, an individual;)
26 Mathew Ng MD, and individual; Daniel Burkhead)
27 M.D., an individual; and DOE MANAGERS,)
28 DIRECTORS AND OFFICERS 1-25, ROE)
BUSINESS ENTITIES 1-25;)

Defendants.)

ANSWER TO SECOND AMENDED COMPLAINT

Defendant, DANIEL L. BURKHEAD, M.D., (“DEFENDANT”) by and through his attorney of record, Robert E. Schumacher, Esq., of the law firm of GORDON REES SCULLY MANSUKHANI, LLP, hereby answers the Second Amended Complaint (“SAC”) filed by Plaintiff FLAMINGO-PECOS SURGERY CENTER LLC (“Plaintiff”) as follows:

PROCEDURAL HISTORY

A. The Appointment of the Receiver by the Court in Case No. A-16-733627

1. DEFENDANT, answering Paragraphs 1 of the SAC, admits the allegations contained therein.

2. DEFENDANT, answering Paragraphs 2 of the SAC, denies the allegations contained therein.

3. DEFENDANT, answering Paragraphs 3 of the SAC, denies the allegations contained therein.

4. DEFENDANT, answering Paragraphs 4 of the SAC, denies the allegations contained therein.

5. DEFENDANT, answering Paragraphs 5 of the SAC, denies the allegations contained therein.

6. DEFENDANT, answering Paragraphs 6 of the SAC, denies the allegations contained therein.

7. DEFENDANT, answering Paragraphs 7 of the SAC, denies the allegations contained therein.

8. DEFENDANT, answering Paragraphs 8 of the SAC, denies the allegations contained therein.

9. DEFENDANT, answering Paragraphs 9 of the SAC, denies the allegations contained therein.

10. DEFENDANT, answering Paragraphs 10 of the SAC, denies the allegations contained therein.

11. DEFENDANT, answering Paragraphs 11 of the SAC, denies the allegations contained therein.

12. DEFENDANT, answering Paragraphs 12 of the SAC, denies the allegations contained therein.

13. DEFENDANT, answering Paragraph 13 of the SAC, denies the allegations

1 contained therein.

2 14. DEFENDANT, answering Paragraphs 14 of the SAC, denies the allegations
3 contained therein.

4 15. DEFENDANT, answering Paragraphs 15 of the SAC, denies the allegations
5 contained therein.

6 16. DEFENDANT, answering Paragraphs 16 of the SAC, denies the allegations
7 contained therein.

8 17. DEFENDANT, answering Paragraphs 17 of the SAC, denies the allegations
9 contained therein.

10 18. DEFENDANT, answering Paragraphs 18 of the SAC, denies the allegations
11 contained therein.

12 **B. The Proceedings in the Instant Action**

13 19. DEFENDANT, answering Paragraph 19 of the SAC, admits the allegations
14 contained therein.

15 20. DEFENDANT, answering Paragraph 20 of the SAC, admits the allegations
16 contained therein.

17 21. DEFENDANT, answering Paragraph 21 of the SAC, admits the allegations
18 contained therein.

19 22. DEFENDANT, answering Paragraph 22 of the SAC, admits the allegations
20 contained therein.

21 23. DEFENDANT, answering Paragraph 23 of the SAC, admits the allegations
22 contained therein.

23 **THE PARTIES**

24 24. DEFENDANT, answering Paragraph 24 of the SAC, denies the allegations
25 contained therein.

26 25. DEFENDANT, answering Paragraph 25 of the SAC, denies the allegations
27 contained therein.

28

1 26. DEFENDANT, answering Paragraph 26 of the SAC, denies the allegations
2 contained therein.

3 27. DEFENDANT, answering Paragraph 27 of the SAC, denies the allegations
4 contained therein.

5 28. DEFENDANT, answering Paragraph 28 of the SAC, denies the allegations
6 contained therein.

7 29. DEFENDANT, answering Paragraph 29 of the SAC, denies the allegations
8 contained therein.

9 30. DEFENDANT, answering Paragraph 30 of the SAC, admits that he is an
10 individual who resides and/or does business in Clark County, Nevada but denies that at all
11 relevant times he was a manager, director and/or officer of Plaintiff and owed certain duties to
12 Plaintiff.

13 31. DEFENDANT, answering Paragraph 31 of the SAC, denies the allegations
14 contained therein.

15 32. DEFENDANT, answering Paragraph 32 of the SAC, denies the allegations
16 contained therein.

17 33. DEFENDANT, answering Paragraph 33 of the SAC, denies the allegations
18 contained therein.

19 34. DEFENDANT, answering Paragraph 34 of the SAC, denies the allegations
20 contained therein.

21 **JURISDICTION AND VENUE**

22 35. DEFENDANT, answering Paragraph 35 of the SAC, denies the allegations
23 contained therein.

24 36. DEFENDANT, answering Paragraph 36 of the SAC, denies the allegations
25 contained therein.

26 **SUMMARY OF ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

27 37. DEFENDANT, answering Paragraph 37 of the SAC, denies the allegations
28

1 contained therein.

2 38. DEFENDANT, answering Paragraph 38 of the SAC, denies the allegations
3 contained therein.

4 39. DEFENDANT, answering Paragraph 39 of the SAC, denies the allegations
5 contained therein.

6 40. DEFENDANT, answering Paragraph 40 of the SAC, denies the allegations
7 contained therein.

8 41. DEFENDANT, answering Paragraph 41 of the SAC, denies the allegations
9 contained therein.

10 42. DEFENDANT, answering Paragraph 42 of the SAC, denies the allegations
11 contained therein.

12 43. DEFENDANT, answering Paragraph 43 of the SAC, denies the allegations
13 contained therein.

14 44. DEFENDANT, answering Paragraph 44 of the SAC, denies the allegations
15 contained therein.

16 45. DEFENDANT, answering Paragraph 45 of the SAC, denies the allegations
17 contained therein.

18 46. DEFENDANT, answering Paragraph 46 of the SAC, denies the allegations
19 contained therein.

20 47. DEFENDANT, answering Paragraph 47 of the SAC, denies the allegations
21 contained therein.

22 48. DEFENDANT, answering Paragraph 48 of the SAC, denies the allegations
23 contained therein.

24 49. DEFENDANT, answering Paragraph 49 of the SAC, denies the allegations
25 contained therein.

26 50. DEFENDANT, answering Paragraph 50 of the SAC, denies the allegations
27 contained therein.

28

1 51. DEFENDANT, answering Paragraph 51 of the SAC, denies the allegations
2 contained therein.

3 52. DEFENDANT, answering Paragraph 52 of the SAC, denies the allegations
4 contained therein.

5 53. DEFENDANT, answering Paragraph 53 of the SAC, denies the allegations
6 contained therein.

7 54. DEFENDANT, answering Paragraph 54 of the SAC, denies the allegations
8 contained therein.

9 55. DEFENDANT, answering Paragraph 55 of the SAC, denies the allegations
10 contained therein.

11 56. DEFENDANT, answering Paragraph 56 of the SAC, denies the allegations
12 contained therein.

13 57. DEFENDANT, answering Paragraph 57 of the SAC, denies the allegations
14 contained therein.

15 58. DEFENDANT, answering Paragraph 58 of the SAC, denies the allegations
16 contained therein.

17 59. DEFENDANT, answering Paragraph 59 of the SAC, denies the allegations
18 contained therein.

19 60. DEFENDANT, answering Paragraph 60 of the SAC, denies the allegations
20 contained therein.

21 61. DEFENDANT, answering Paragraph 61 of the SAC, denies the allegations
22 contained therein.

23 62. DEFENDANT, answering Paragraph 62 of the SAC, denies the allegations
24 contained therein.

25 63. DEFENDANT, answering Paragraph 63 of the SAC, denies the allegations
26 contained therein.

27 64. DEFENDANT, answering Paragraph 64 of the SAC, denies the allegations
28

1 contained therein.

2 65. DEFENDANT, answering Paragraph 65 of the SAC, denies the allegations
3 contained therein.

4 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION: BARNES' HIRING AND**
5 **THE UNSUPERVISED YEARS OF CRIME – DESPITE OBVIOUS WARNING SIGNS**

6 66. DEFENDANT, answering Paragraph 66 of the SAC, denies the allegations
7 contained therein.

8 67. DEFENDANT, answering Paragraph 67 of the SAC, denies the allegations
9 contained therein.

10 68. DEFENDANT, answering Paragraph 68 of the SAC, denies the allegations
11 contained therein.

12 69. DEFENDANT, answering Paragraph 69 of the SAC, denies the allegations
13 contained therein.

14 70. DEFENDANT, answering Paragraph 70 of the SAC, denies the allegations
15 contained therein.

16 71. DEFENDANT, answering Paragraph 71 of the SAC, denies the allegations
17 contained therein.

18 72. DEFENDANT, answering Paragraph 72 of the SAC, denies the allegations
19 contained therein.

20 73. DEFENDANT, answering Paragraph 73 of the SAC, denies the allegations
21 contained therein.

22 74. DEFENDANT, answering Paragraph 74 of the SAC, denies the allegations
23 contained therein.

24 75. DEFENDANT, answering Paragraph 75 of the SAC, denies the allegations
25 contained therein.

26 76. DEFENDANT, answering Paragraph 76 of the SAC, denies the allegations
27 contained therein.

28 77. DEFENDANT, answering Paragraph 77 of the SAC, denies the allegations

1 contained therein.

2 78. DEFENDANT, answering Paragraph 78 of the SAC, denies the allegations
3 contained therein.

4 79. DEFENDANT, answering Paragraph 79 of the SAC, denies the allegations
5 contained therein.

6 80. DEFENDANT, answering Paragraph 80 of the SAC, denies the allegations
7 contained therein.

8 81. DEFENDANT, answering Paragraph 81 of the SAC, denies the allegations
9 contained therein.

10 82. DEFENDANT, answering Paragraph 82 of the SAC, denies the allegations
11 contained therein.

12 83. DEFENDANT, answering Paragraph 83 of the SAC, denies the allegations
13 contained therein.

14 84. DEFENDANT, answering Paragraph 84 of the SAC, denies the allegations
15 contained therein.

16 85. DEFENDANT, answering Paragraph 85 of the SAC, denies the allegations
17 contained therein.

18 86. DEFENDANT, answering Paragraph 86 of the SAC, denies the allegations
19 contained therein.

20 87. DEFENDANT, answering Paragraph 87 of the SAC, denies the allegations
21 contained therein.

22 88. DEFENDANT, answering Paragraph 88 of the SAC, denies the allegations
23 contained therein.

24 89. DEFENDANT, answering Paragraph 89 of the SAC, denies the allegations
25 contained therein.

26 90. DEFENDANT, answering Paragraph 90 of the SAC, denies the allegations
27 contained therein.

28

1 91. DEFENDANT, answering Paragraph 91 of the SAC, denies the allegations
2 contained therein.

3 92. DEFENDANT, answering Paragraph 92 of the SAC, denies the allegations
4 contained therein.

5 93. DEFENDANT, answering Paragraph 93 of the SAC, denies the allegations
6 contained therein.

7 94. DEFENDANT, answering Paragraph 94 of the SAC, denies the allegations
8 contained therein.

9 95. DEFENDANT, answering Paragraph 95 of the SAC, denies the allegations
10 contained therein.

11 96. DEFENDANT, answering Paragraph 96 of the SAC, denies the allegations
12 contained therein.

13 97. DEFENDANT, answering Paragraph 97 of the SAC, denies the allegations
14 contained therein.

15 98. DEFENDANT, answering Paragraph 98 of the SAC, denies the allegations
16 contained therein.

17 99. DEFENDANT, answering Paragraph 99 of the SAC, denies the allegations
18 contained therein.

19 100. DEFENDANT, answering Paragraph 100 of the SAC, denies the allegations
20 contained therein.

21 101. DEFENDANT, answering Paragraph 101 of the SAC, denies the allegations
22 contained therein.

23 102. DEFENDANT, answering Paragraph 102 of the SAC, denies the allegations
24 contained therein.

25 103. DEFENDANT, answering Paragraph 103 of the SAC, denies the allegations
26 contained therein.

27 104. DEFENDANT, answering Paragraph 104 of the SAC, denies the allegations
28

1 contained therein.

2 105. DEFENDANT, answering Paragraph 105 of the SAC, denies the allegations
3 contained therein.

4 106. DEFENDANT, answering Paragraph 106 of the SAC, denies the allegations
5 contained therein.

6 107. DEFENDANT, answering Paragraph 107 of the SAC, denies the allegations
7 contained therein.

8 108. DEFENDANT, answering Paragraph 108 of the SAC, denies the allegations
9 contained therein.

10 109. DEFENDANT, answering Paragraph 109 of the SAC, denies the allegations
11 contained therein.

12 110. DEFENDANT, answering Paragraph 110 of the SAC, denies the allegations
13 contained therein.

14 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION: BARNES' NON-**
15 **TERMINATION AND LINGERING RETENTION – AND DEFENDANTS'**
16 **INACTIVITY AND INTENTIONAL MISCONDUCT – FOLLOWING DISCOVERY OF**
BARNES' CRIMINALITY

17 111. DEFENDANT, answering Paragraph 111 of the SAC, denies the allegations
18 contained therein.

19 112. DEFENDANT, answering Paragraph 112 of the SAC, denies the allegations
20 contained therein.

21 113. DEFENDANT, answering Paragraph 113 of the SAC, denies the allegations
22 contained therein.

23 114. DEFENDANT, answering Paragraph 114 of the SAC, denies the allegations
24 contained therein.

25 115. DEFENDANT, answering Paragraph 115 of the SAC, denies the allegations
26 contained therein.

27 116. DEFENDANT, answering Paragraph 116 of the SAC, denies the allegations
28 contained therein.

1 117. DEFENDANT, answering Paragraph 117 of the SAC, denies the allegations
2 contained therein.

3 118. DEFENDANT, answering Paragraph 118 of the SAC, denies the allegations
4 contained therein.

5 119. DEFENDANT, answering Paragraph 119 of the SAC, denies the allegations
6 contained therein.

7 120. DEFENDANT, answering Paragraph 120 of the SAC, denies the allegations
8 contained therein.

9 121. DEFENDANT, answering Paragraph 121 of the SAC, denies the allegations
10 contained therein.

11 122. DEFENDANT, answering Paragraph 122 of the SAC, denies the allegations
12 contained therein.

13 123. DEFENDANT, answering Paragraph 123 of the SAC, denies the allegations
14 contained therein.

15 124. DEFENDANT, answering Paragraph 124 of the SAC, denies the allegations
16 contained therein.

17 125. DEFENDANT, answering Paragraph 125 of the SAC, denies the allegations
18 contained therein.

19 126. DEFENDANT, answering Paragraph 126 of the SAC, denies the allegations
20 contained therein.

21 127. DEFENDANT, answering Paragraph 127 of the SAC, denies the allegations
22 contained therein.

23 128. DEFENDANT, answering Paragraph 128 of the SAC, denies the allegations
24 contained therein.

25 129. DEFENDANT, answering Paragraph 129 of the SAC, denies the allegations
26 contained therein.

27 130. DEFENDANT, answering Paragraph 130 of the SAC, denies the allegations
28

1 contained therein.

2 131. DEFENDANT, answering Paragraph 131 of the SAC, denies the allegations
3 contained therein.

4 132. DEFENDANT, answering Paragraph 132 of the SAC, denies the allegations
5 contained therein.

6 133. DEFENDANT, answering Paragraph 133 of the SAC, denies the allegations
7 contained therein.

8 134. DEFENDANT, answering Paragraph 134 of the SAC, denies the allegations
9 contained therein.

10 135. DEFENDANT, answering Paragraph 135 of the SAC, denies the allegations
11 contained therein.

12 136. DEFENDANT, answering Paragraph 136 of the SAC, denies the allegations
13 contained therein.

14 137. DEFENDANT, answering Paragraph 137 of the SAC, denies the allegations
15 contained therein.

16 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION: DEFENDANTS' GROSS**
17 **NEGLIGENCE, INTENTIONAL MISCONDUCT AND BREACHES OF FIDUCIARY**
18 **DUTY IN FAILING TO PURSUE MILLIONS OF DOLLARS IN RECEIVABLES**
OWED TO FLAMINGO- RESULTING IN COMPLETE WASTE

19 138. DEFENDANT, answering Paragraph 138 of the SAC, denies the allegations
20 contained therein.

21 139. DEFENDANT, answering Paragraph 139 of the SAC, denies the allegations
22 contained therein.

23 140. DEFENDANT, answering Paragraph 140 of the SAC, denies the allegations
24 contained therein.

25 141. DEFENDANT, answering Paragraph 141 of the SAC, denies the allegations
26 contained therein.

27 142. DEFENDANT, answering Paragraph 142 of the SAC, denies the allegations
28 contained therein.

1 143. DEFENDANT, answering Paragraph 143 of the SAC, denies the allegations
2 contained therein.

3 144. DEFENDANT, answering Paragraph 144 of the SAC, denies the allegations
4 contained therein.

5 145. DEFENDANT, answering Paragraph 145 of the SAC, denies the allegations
6 contained therein.

7 146. DEFENDANT, answering Paragraph 146 of the SAC, denies the allegations
8 contained therein.

9 147. DEFENDANT, answering Paragraph 147 of the SAC, denies the allegations
10 contained therein.

11 148. DEFENDANT, answering Paragraph 148 of the SAC, denies the allegations
12 contained therein.

13 149. DEFENDANT, answering Paragraph 149 of the SAC, denies the allegations
14 contained therein.

15 150. DEFENDANT, answering Paragraph 150 of the SAC, denies the allegations
16 contained therein.

17 151. DEFENDANT, answering Paragraph 151 of the SAC, denies the allegations
18 contained therein.

19 152. DEFENDANT, answering Paragraph 152 of the SAC, denies the allegations
20 contained therein.

21 153. DEFENDANT, answering Paragraph 153 of the SAC, denies the allegations
22 contained therein.

23 154. DEFENDANT, answering Paragraph 154 of the SAC, denies the allegations
24 contained therein.

25 155. DEFENDANT, answering Paragraph 155 of the SAC, denies the allegations
26 contained therein.

27
28

**ALLEGATIONS COMMON TO ALL CAUSES OF ACTION: DEFENDANTS'
INTENTIONAL FAILURE TO PROTECT FLAMINGO'S INTERESTS AND
DEFENDANTS' PERSONAL ENRICHMENT THROUGH BREACHES OF THEIR
FIDUCIARY DUTIES**

156. DEFENDANT, answering Paragraph 156 of the SAC, denies the allegations contained therein.

157. DEFENDANT, answering Paragraph 157 of the SAC, denies the allegations contained therein.

158. DEFENDANT, answering Paragraph 158 of the SAC, denies the allegations contained therein.

159. DEFENDANT, answering Paragraph 159 of the SAC, denies the allegations contained therein.

160. DEFENDANT, answering Paragraph 160 of the SAC, denies the allegations contained therein.

161. DEFENDANT, answering Paragraph 161 of the SAC, denies the allegations contained therein.

162. DEFENDANT, answering Paragraph 162 of the SAC, denies the allegations contained therein.

163. DEFENDANT, answering Paragraph 163 of the SAC, denies the allegations contained therein.

**FIRST CAUSE OF ACTION
(Grossly Negligent Hiring against All Defendants)**

164. DEFENDANT, answering Paragraph 164 through 170 of the SAC, states that no response is required since this cause of action was dismissed by the Court.

**SECOND CAUSE OF ACTION
(Negligent Supervision against all Defendants)**

165. DEFENDANT, answering Paragraph 171 through 174 of the SAC, states that no response is required since this cause of action was dismissed by the Court.

THIRD CAUSE OF ACTION
(Grossly Negligent Retention against all Defendants)

166. DEFENDANT, answering Paragraph 175 through 178 of the SAC, states that no response is required since this cause of action was dismissed by the Court.

FOURTH CAUSE OF ACTION
(Defendants' Breach of Fiduciary Duty of Care to Plaintiff)

167. DEFENDANT, answering Paragraph 179 of the SAC, incorporates by reference his responses in Paragraphs 1 through 166 above.

168. DEFENDANT, answering Paragraph 180 of the SAC, denies the allegations contained therein.

169. DEFENDANT, answering Paragraph 181 of the SAC, denies the allegations contained therein.

170. DEFENDANT, answering Paragraph 182 of the SAC, denies the allegations contained therein.

171. DEFENDANT, answering Paragraph 183 of the SAC, denies the allegations contained therein.

172. DEFENDANT, answering Paragraph 184 of the SAC, denies the allegations contained therein.

FIFTH CAUSE OF ACTION
(Defendants' Breaches of Defendants' fiduciary Duty of Loyalty to Plaintiff)

173. DEFENDANT, answering Paragraph 185 of the SAC, incorporates by reference his responses in Paragraphs 1 through 172 above.

174. DEFENDANT, answering Paragraph 186 of the SAC, denies the allegations contained therein.

175. DEFENDANT, answering Paragraph 187 of the SAC, denies the allegations contained therein.

176. DEFENDANT, answering Paragraph 188 of the SAC, denies the allegations contained therein.

177. DEFENDANT, answering Paragraph 189 of the SAC, denies the allegations contained therein.

SIXTH CAUSE OF ACTION
(Defendants' Breach of the Operating Agreement)

178. DEFENDANT, answering Paragraph 190 of the SAC, incorporates by reference his responses in Paragraphs 1 through 177 above.

179. DEFENDANT, answering Paragraph 191 of the SAC, denies the allegations contained therein.

180. DEFENDANT, answering Paragraph 192 of the SAC, denies the allegations contained therein.

181. DEFENDANT, answering Paragraph 193 of the SAC, denies the allegations contained therein.

182. DEFENDANT, answering Paragraph 194 of the SAC, denies the allegations contained therein.

183. DEFENDANT, answering Paragraph 195 of the SAC, denies the allegations contained therein.

SEVENTH CAUSE OF ACTION
(Waste - Against All Defendants)

184. DEFENDANT, answering Paragraph 196 of the SAC, incorporates by reference his responses in Paragraphs 1 through 183 above.

185. DEFENDANT, answering Paragraph 197 of the SAC, denies the allegations contained therein.

186. DEFENDANT, answering Paragraph 198 of the SAC, denies the allegations contained therein.

187. DEFENDANT, answering Paragraph 199 of the SAC, denies the allegations contained therein.

188. DEFENDANT, answering Paragraph 200 of the SAC, denies the allegations contained therein.

EIGHTH CAUSE OF ACTION
(Defendants' Breaches of NRS Chapter 86)

189. DEFENDANT, answering Paragraph 201 through 209 of the SAC, states that no response is required since this cause of action was dismissed by the Court.

AFFIRMATIVE DEFENSES

DEFENDANT denies the allegations of Plaintiff's SAC, and each cause of action, and each paragraph in each cause of action, and each and every part thereof, including a denial that Plaintiff was damaged in the sum or sums alleged, or to be alleged, or any other sums whatsoever.

FIRST AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes and thereon alleges that Plaintiff's SAC fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

DEFENDANT denies that by reason of any act or omission, fault, conduct or liability on the part of DEFENDANT, whether negligent, careless, unlawful or whether as alleged, or otherwise, Plaintiff was injured or damaged in any of the amounts alleged, or in any other manner or amount whatsoever; DEFENDANT further denies that answering it was negligent, careless, reckless, wanton, acted unlawfully or is liable, whether in the manner alleged or otherwise.

THIRD AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that the Plaintiff's SAC, and each and every cause of action stated therein, fails to state facts sufficient to constitute a cause of action, or any cause of action, as against DEFENDANT.

FOURTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, it is not legally responsible for the acts and/or omissions of those other Defendants named by Plaintiff as fictitious Defendants.

FIFTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that if Plaintiff suffered or sustained any loss, injury, damage or detriment, the same is directly and proximately caused and contributed to, in whole or in part, by the breach of warranty, conduct, acts, omissions, activities, carelessness, recklessness, negligence, and/or intentional misconduct of Plaintiff, thereby completely or partially barring its recovery herein.

SIXTH AFFIRMATIVE DEFENSE

DEFENDANT deny the allegations of Plaintiff's SAC, and each cause of action, and each paragraph in each cause of action, and each and every part thereof, including a denial that Plaintiff was damaged in the sum or sums alleged, or to be alleged, or any other sums whatsoever.

SEVENTH AFFIRMATIVE DEFENSE

If DEFENDANT is found responsible in damages to Plaintiff or some other party, whether as alleged or otherwise, then DEFENDANT is informed and believes, and thereon alleges, that the liability will be predicated upon the active conduct of Plaintiff, whether by negligence, breach of warranty, strict liability in tort or otherwise, which unlawful conduct proximately caused the alleged incident and that Plaintiff's action against DEFENDANT is barred by that active and affirmative conduct.

EIGHTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that at no time prior to the filing of this action did Plaintiff, or any agent, representative or employee thereof, notify DEFENDANT of any breach of any contract or duty to Plaintiff; therefore, Plaintiff is barred from any right of recovery from DEFENDANT.

NINTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that Plaintiff's SAC, and each and every cause of action contained therein is barred by the applicable Statutes of Repose.

TENTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that as to each alleged cause of action, Plaintiff has failed, refused and neglected to take reasonable steps to mitigate its alleged damages, if any, thus barring or diminishing Plaintiff's recovery herein.

ELEVENTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that Plaintiff's SAC, and each and every cause of action contained therein, is barred by the applicable Statutes of Limitation.

TWELFTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that Plaintiff unreasonably delayed both the filing of the SAC and notification DEFENDANTS of the causes of action alleged against him, all of which has unduly and severely prejudiced him in defense of the action, thereby barring or diminishing Plaintiff's recovery herein under the Doctrine of Waiver, Estoppel, and/or Laches.

THIRTEENTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that Plaintiff lacks standing to bring the instant claim against DEFENDANT.

FOURTEENTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that the claims of Plaintiff are reduced, modified and/or barred by the Doctrine of Unclean Hands.

FIFTEENTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that Plaintiff has failed to join all necessary and indispensable parties to this lawsuit.

SIXTEENTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that the injuries and damages of which Plaintiff complains were proximately caused by, or contributed to by, the acts of other third-party defendants, cross-defendants, persons, and/or other entities, and that said

1 acts were an intervening and superseding cause of the injuries and damages, if any, of which
2 Plaintiff complains, thus barring Plaintiff from any recovery against DEFENDANT.

3 **SEVENTEENTH AFFIRMATIVE DEFENSE**

4 DEFENDANT is informed and believes, and thereon alleges, that Plaintiff is barred
5 from the recovery it seeks by the legal doctrines of Res Judicata and Issue Preclusion having
6 already sought recovery for the damages alleged herein in prior litigation.

7 **EIGHTEENTH AFFIRMATIVE DEFENSE**

8 It has been necessary for DEFENDANT to retain the services of an attorney to defend
9 this action, and DEFENDANT is entitled to a reasonable sum as and for attorney's fees.

10 **NINETEENTH AFFIRMATIVE DEFENSE**

11 DEFENDANT hereby incorporate by reference those affirmative defenses enumerated in
12 Rule 8 of the Nevada Rules of Civil Procedure as if fully set forth herein. In the event further
13 investigation or discovery reveals the applicability of any such defenses, DEFENDANT reserve
14 the right to seek leave of court to amend their Answer to specifically assert any such defense.
15 Such defenses are herein incorporated by reference for the specific purpose of not waiving any
16 such defense.

17 **TWENTIETH AFFIRMATIVE DEFENSE**

18 Pursuant to N.R.C.P. 11, as amended, all possible affirmative defenses may not have
19 been alleged herein insofar as sufficient facts were not available for DEFENDANT after
20 reasonable inquiry, and therefore, DEFENDANT reserve the right to amend its Answer to
21 alleged additional affirmative defenses, if subsequent investigation so warrants.

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1 **WHEREFORE**, DEFENDANT prays for judgment against Plaintiff as follows:

- 2 1. That Plaintiff take nothing by way of this action;
- 3 2. For the prejudgment interest or costs incurred herein;
- 4 3. For cost of suit and attorney's fees and costs; and
- 5 4. For such other and further relief as the Court deems just and proper.

6 Dated: December 6th, 2017

7 **GORDON REES SCULLY**
8 **MANSUKHANI, LLP**

9 By: /s/ Robert E. Schumacher

10 ROBERT E. SCHUMACHER, ESQ
11 Nevada State Bar No. 7504
12 300 South 4th Street, Suite 1550
13 Las Vegas, Nevada 89101
14 ***Attorney for Defendant***
15 ***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 6th day of December, 2017, I did cause a true correct copy of **ANSWER TO SECOND AMENDED COMPLAINT** to be served via the Court's electronic filing service on all parties listed below (unless indicated otherwise)

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Attorneys for Defendants
MATTHEW NG MD and
PANKAJ BHATNAGAR MD

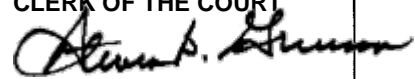
/s/ Andrea Montero

An Employee of Gordon Rees Scully
Mansukhani, LLP

Gordon Rees Scully Mansukhani, LLP
300 South 4th Street, Suite 1550
Las Vegas, NV 89101

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Attorneys for Defendants

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
CONSOLIDATED MOTIONS TO
DISMISS**

Hearing Date: November 29, 2017
Hearing Time: 9:00 AM

The above-captioned action having come on for hearing on the 29th day of November,
2017 on the following motions:

Defendant Sheldon J. Freeman, M.D.'s 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;

Defendants Dr. Matthew Ng and Dr. Pankaj Bhatnagar's Motion to Dimiss
Second Amended Complaint;

and,

Defendant Daniel L. Burkhead, M.D.'s Motion to Dismiss Second Amended
Complaint;

and the related joinders thereto; Todd E. Kennedy appearing for Plaintiff; Bryce Kurimoto
appearing for Defendants Bhatnagar, and Ng; Marc P. Cook appearing for Sheldon

AA000856

DEC 05 2017

1 Freedman, M.D.; and Dylan E. Houston appearing for Daniel Burkhead, M.D., the court having
2 considered the papers on file therein and having heard arguments of counsel, and good cause
3 appearing therefor:

4 **IT IS ORDERED, ADJUDGED AND DECREED** that the motions to dismiss are
5 granted in part and denied in part as set forth more fully below.

6 Specifically, the Motions to Dismiss are granted without prejudice as to Causes of Action
7 I - Grossly Negligent Hiring, II - Grossly Negligent Supervision, and III - Grossly Negligent
8 Retention, all of which relate to non-employer liability for actions against an employee and the
9 economic loss doctrine, merit dismissal, even pursuant to the Motion to Dismiss standards.

10 Similarly, Cause of Action VII - Breaches of NRS Chapter 86, is not an appropriate
11 Cause of Action under Chapter 86 and, therefore, is also dismissed without prejudice.

12 Defendants' motions are denied as to the remaining causes of action in Plaintiff's Second
13 Amended Complaint as the claims as pled, state causes of action, without prejudice subject to
14 future motion work.

15 The Motion to Dismiss based on the revoked limited liability company is also denied
16 without prejudice.

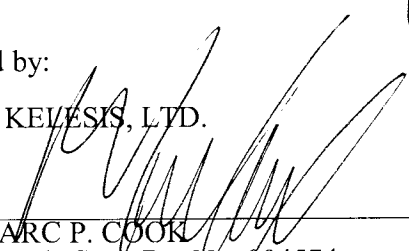
17 DATED and DONE this 10th day of December, 2017.

18
19 
20 DISTRICT JUDGE

21 Submitted by:

22 COOK & KELESIS, LTD.

23 By :

24 
25 MARC P. COOK
Nevada State Bar No. 004574
26 GEORGE P. KELESIS
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Attorneys for Defendant Sheldon J. Freedman
28

1 Approved as to form and content by:

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3
4 By 

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9 Las Vegas, Nevada 89135
10 *Counsel for Receiver*

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and Pankaj Bhatnagar, M.D.*

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19 *Attorneys for Defendant Daniel L. Burkhead, M.D.*

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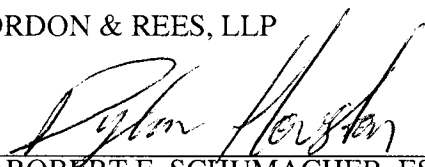
BLACK AND LOBELLO PLLC

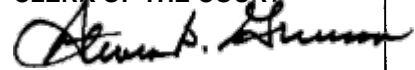
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*Attorneys for Defendants Matthew Ng., M.D.
and Pankaj Bhatnagar, M.D.*

GORDON & REES, LLP

By 
ROBERT E. SCHUMACHER, ESQ.
Nevada Bar No. 7504
Dylan E. Houston
Nevada Bar No. 013697
300 South Fourth Street
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Attorneys for Defendant Daniel L. Burkhead, M.D.



MARC P. COOK
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GEORGE P. KELESIS
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Facsimile: 702-737-7712
Email: mcook@bckltd.com
Attorneys for Defendant Sheldon Freedman

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 CONSOLIDATED
MOTIONS TO DISMISS**

Hearing Date: November 29, 2017
Hearing Time: 9:00 A.M.

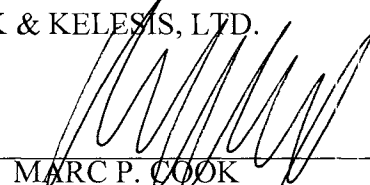
PLEASE TAKE NOTICE that on the 6th day of December, 2017, an Order Regarding
Defendants' Motions to Dismiss was entered in the above-captioned matter.

A copy of said Order is attached hereto.

Dated this 8 day of December, 2017.

COOK & KELESIS, LTD.

By :



MARC P. COOK
Nevada State Bar No. 004574
GEORGE P. KELESIS
Nevada State Bar No. 000069
517 S. 9th Street
Las Vegas, Nevada 89101
Attorneys for Defendant, Sheldon J. Freedman

AA000861

1 **CERTIFICATE OF SERVICE**

2 The undersigned hereby certifies that on the 8¹⁴ day of December, 2017, in accordance
3 with NRCP 5(b), NEFCRRR Administrative Order 14-2 and NEFCR 9(e), the undersigned provided
4 the clerk with a service list of parties to be served with the above and foregoing **NOTICE OF**
5 **ENTRY OF ORDER REGARDING CONSOLIDATED MOTIONS TO DISMISS** as follows:

6 Timothy R. Mulliner, Esq.
7 MULLINER LAW GROUP CHRD.
8 101 Convention Center Drive
9 Suite 650
Las Vegas, NV 89109
tmulliner@mullinerlaw.com

10 Todd E. Kennedy
11 BLACK AND LOBELLO PLLC
12 10777 West Twain Avenue
Suite 300
Las Vegas, Nevada 89135
tkennedy@blacklobellolaw.com

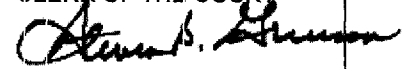
13 Bryce K. Kunimoto
14 bkunimoto@hollandhart.com
15 Robert J. Cassity
16 rcassity@hollandhart.com
17 Erica C. Smit
18 ecsmit@hollandhart.com
HOLLAND & HART, LLP
9555 Hillwood Drive
2nd Floor
Las Vegas, Nevada 89134

19 Robert E. Schumacher, Esq.
20 Rschumacher@gordonrees.com
21 Dylan E. Houston
22 dhouston@gordonrees.com
23 GORDON & REESE, LLP
24 300 South Fourth Street
25 Suite 1550
26 Las Vegas, Nevada 89101

27 
28 An employee of COOK & KELESIS, LTD.

ORIGINAL

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Steven D. Grierson
CLERK OF THE COURT



MARC P. COOK
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Email: mcook@bckltd.com
Attorneys for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

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

CASE NO. A-17-750926-B
DEPT. NO. XV

Plaintiff,

vs.

**ORDER REGARDING
CONSOLIDATED MOTIONS TO
DISMISS**

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;

Hearing Date: November 29, 2017
Hearing Time: 9:00 AM

Defendant.

The above-captioned action having come on for hearing on the 29th day of November,
2017 on the following motions:

Defendant Sheldon J. Freeman, M.D.'s 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;

Defendants Dr. Matthew Ng and Dr. Pankaj Bhatnagar's Motion to Dismiss
Second Amended Complaint;

and,

Defendant Daniel L. Burkhead, M.D.'s Motion to Dismiss Second Amended
Complaint;

and the related joinders thereto; Todd E. Kennedy appearing for Plaintiff; Bryce Kurimoto

appearing for Defendants Bhatnagar, and Ng; Marc P. Cook appearing for Sheldon

1 Freedman, M.D.; and Dylan E. Houston appearing for Daniel Burkhead, M.D., the court having
2 considered the papers on file therein and having heard arguments of counsel, and good cause
3 appearing therefor:

4 **IT IS ORDERED, ADJUDGED AND DECREED** that the motions to dismiss are
5 granted in part and denied in part as set forth more fully below.

6 Specifically, the Motions to Dismiss are granted without prejudice as to Causes of Action
7 I - Grossly Negligent Hiring, II - Grossly Negligent Supervision, and III - Grossly Negligent
8 Retention, all of which relate to non-employer liability for actions against an employee and the
9 economic loss doctrine, merit dismissal, even pursuant to the Motion to Dismiss standards.

10 Similarly, Cause of Action VII - Breaches of NRS Chapter 86, is not an appropriate
11 Cause of Action under Chapter 86 and, therefore, is also dismissed without prejudice.

12 Defendants' motions are denied as to the remaining causes of action in Plaintiff's Second
13 Amended Complaint as the claims as pled, state causes of action, without prejudice subject to
14 future motion work.

15 The Motion to Dismiss based on the revoked limited liability company is also denied
16 without prejudice.

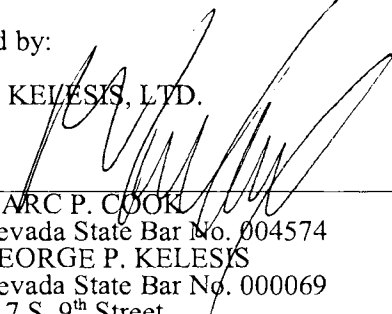
17 DATED and DONE this 10th day of December, 2011.

18
19 
20 DISTRICT JUDGE

21 Submitted by:

22 COOK & KELESIS, LTD.

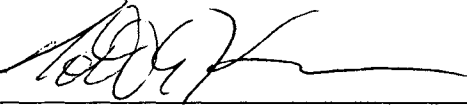
23 By :

24 
25 MARC P. COOK
Nevada State Bar No. 004574
26 GEORGE P. KELESIS
Nevada State Bar No. 000069
27 517 S. 9th Street
Las Vegas, Nevada 89101
Attorneys for Defendant Sheldon J. Freedman
28

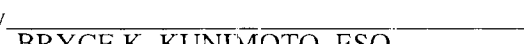
1 Approved as to form and content by:

2 BLACK AND LOBELLO PLLC

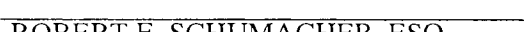
HOLLAND & HART, LLP

3
4 By 

5 TODD E. KENNEDY
6 Nevada Bar No. 006014
7 10777 West Twain Avenue
8 Suite 300
9 Las Vegas, Nevada 89135
10 *Counsel for Receiver*

By 
BRYCE K. KUNIMOTO, ESQ.
Nevada Bar No. 7781
9555 Hillwood Drive
2nd Floor
Las Vegas, Nevada 89134
*Attorneys for Defendants Matthew Ng., M.D.
and Pankaj Bhatnagar, M.D.*

8 GORDON & REES, LLP

9
10
11 By 
12 ROBERT E. SCHUMACHER, ESQ.
13 Nevada Bar No. 7504
14 Dylan E. Houston
15 Nevada Bar No. 013697
16 300 South Fourth Street
17 Suite 1550
18 Las Vegas, Nevada 89101
19 *Attorneys for Defendant Daniel L. Burkhead, M.D.*

1 Approved as to form and content by:


2 BLACK AND LOBELLO PLLC

HOLLAND & HART, LLP

3
4 By

TODD E. KENNEDY
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Las Vegas, Nevada 89135
Counsel for Receiver

By


BRYCE K. KUNIMOTO, ESQ.
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2nd Floor
Las Vegas, Nevada 89134
*Attorneys for Defendants Matthew Ng., M.D.
and Pankaj Bhatnagar, M.D.*

8 GORDON & REES, LLP

9
10 By

ROBERT E. SCHUMACHER, ESQ.
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Suite 1550
Las Vegas, Nevada 89101
Attorneys for Defendant Daniel L. Burkhead, M.D.

1 Approved as to form and content by:

2 BLACK AND LOBELLO PLLC

HOLLAND & HART, LLP

3

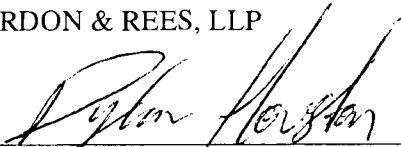
4 By TODD E. KENNEDY
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6 10777 West Twain Avenue
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8 Las Vegas, Nevada 89135
9 *Counsel for Receiver*

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2nd Floor
Las Vegas, Nevada 89134
*Attorneys for Defendants Matthew Ng., M.D.
and Pankaj Bhatnagar, M.D.*

8

9 GORDON & REES, LLP

9

10 By 
11 ROBERT E. SCHUMACHER, ESQ.
12 Nevada Bar No. 7504
13 Dylan E. Houston
14 Nevada Bar No. 013697
15 300 South Fourth Street
16 Suite 1550
17 Las Vegas, Nevada 89101
18 *Attorneys for Defendant Daniel L. Burkhead, M.D.*

15

16

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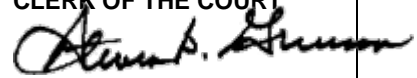
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28



ERR

ROBERT E. SCHUMACHER, ESQ

Nevada State Bar No. 7504

GORDON REES SCULLY MANSUKHANI, LLP

300 South Fourth Street, Suite 1550

Las Vegas, Nevada 89101

Telephone: (702) 577-9300

Direct Line: (702) 577-9319

Facsimile: (702) 255-2858

Email: rschumacher@grsm.com

Attorney for Defendant,

DANIEL L. BURKHEAD, M.D.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MARK J. GARDBERG, ESQ., in his capacity as	)	CASE NO. A-17-750926-B
Receiver for, and acting on behalf of,	)	DEPT. NO.: XV
FLAMINGO-PECOS SURGERY CENTER, LLC a)	
Nevada limited liability company;	)	ERRATA TO ANSWER TO
	)	SECOND AMENDED COMPLAINT
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.)	

ERRATA TO ANSWER TO SECOND AMENDED COMPLAINT

Defendant, DANIEL L. BURKHEAD, M.D. ("Dr. Burkhead"), by and through his attorney of record, Robert E. Schumacher, Esq., of the law firm of GORDON REES SCULLY MANSUKHANI, LLP, hereby submits this Errata to his Answer to Second Amended Complaint. ("Answer") filed on December 5, 2017.

1 Following the submission of the Answer, it was brought to my attention that we did not
2 provide our answer to the Ninth Cause of Action allegations. Dr. Burkhead hereby files this
3 Errata to resubmit a full and copy complete of the Corrected Answer to Second Amended
4 Complaint attached hereto as **Exhibit “1”**.

5 Dated: December 8, 2017

**GORDON REES SCULLY
MANSUKHANI, LLP**

By:

/s/ Robert E. Schumacher

ROBERT E. SCHUMACHER, ESQ

Nevada State Bar No. 7504

300 South Fourth Street

Suite 1550

Las Vegas, Nevada 89101

Attorney for Defendant,

DANIEL L. BURKHEAD, M.D.

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b) and Administrative Order 14-2, effective June 1, 2014, and
3 N.E.F.C.R. Rule 9, I certify that I am an employee of GORDON REES SCULLY
4 MANSUKHANI LLP and that on this 8th day of December, 2017, I did cause a true correct copy
5 of **ERRATA TO ANSWER SECOND AMENDED COMPLAINT** to be served via the
6 Court's electronic filing service on all parties listed below (unless indicated otherwise):

7 Timothy E. Kennedy, Esq.
8 **BLACK & LOBELLO**
9 10777 West Twain Avenue, Suite 300
10 Las Vegas, Nevada 89135
11 *Attorney for Plaintiff*

12 Marc P. Cook, Esq.
13 George P. Kelesis, Esq.
14 **COOK & KELESIS, LTD**
15 517 S. 9th Street
16 Las Vegas, Nevada 89101
17 *Attorneys for Defendant*
18 **SHELDON J. FREEDMAN**

19 Bryce K. Kunitomo, Esq.
20 Robert J. Cassity, Esq.
21 Erica C. Smit, Esq.
22 **HOLLAND & HART LLP**
23 9555 Hillwood Drive, 2nd Floor
24 Las Vegas, Nevada 89134
25 *Attorneys for Defendants*
26 **MATTHEW NG MD and**
27 **PANKAJ BHATNAGAR MD**

28 */s/ Andrea Montero*

An Employee of Gordon Rees Scully
Mansukhani, LLP

Gordon Rees Scully Mansukhani, LLP
300 South 4th Street, Suite 1550
Las Vegas, NV 89101

EXHIBIT 1

EXHIBIT 1

1 **ANSC**
2 ROBERT E. SCHUMACHER, ESQ
3 Nevada State Bar No. 7504
4 **GORDON REES SCULLY MANSUKHANI, LLP**
5 300 South 4th Street, Suite 1550
6 Las Vegas, Nevada 89101
7 Telephone: (702) 577-9300
8 Direct Line: (702) 577-9319
9 Facsimile: (702) 255-2858
10 Email: rschumacher@grsm.com

11 *Attorney for Defendant,*
12 **DANIEL L. BURKHEAD, M.D.**

13 **EIGHTH JUDICIAL DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 MARK J. GARBERG, ESQ., in his capacity as) CASE NO. A-17-750926-B
16 Receiver for, and acting on behalf of,) DEPT. NO.: XV
17 FLAMINGO-PECOS SURGERY CENTER, LLC a)
18 Nevada limited liability company;)

19 Plaintiff.)

20 vs.)

21 William Smith MD, an individual; Pankaj)
22 Bhatanagar MD, an individual; Marjorie Belsky MD,)
23 an individual; Sheldon Freedman MD, an individual;)
24 Mathew Ng MD, and individual; Daniel Burkhead)
25 M.D., an individual; and DOE MANAGERS,)
26 DIRECTORS AND OFFICERS 1-25, ROE)
27 BUSINESS ENTITIES 1-25;)

28 Defendants.)

**ANSWER TO SECOND AMENDED
COMPLAINT**

ANSWER TO SECOND AMENDED COMPLAINT

Defendant, DANIEL L. BURKHEAD, M.D., (“DEFENDANT”) by and through his
attorney of record, Robert E. Schumacher, Esq., of the law firm of GORDON & REES SCULLY
MANSUKHANI, LLP, hereby answers the Second Amended Complaint (“SAC”) filed by
Plaintiff FLAMINGO-PECOS SURGERY CENTER LLC (“Plaintiff”) as follows:

PROCEDURAL HISTORY

A. The Appointment of the Receiver by the Court in Case No. A-16-733627

1. DEFENDANT, answering Paragraphs 1 of the SAC, admits the allegations contained therein.

2. DEFENDANT, answering Paragraphs 2 of the SAC, denies the allegations contained therein.

3. DEFENDANT, answering Paragraphs 3 of the SAC, denies the allegations contained therein.

4. DEFENDANT, answering Paragraphs 4 of the SAC, denies the allegations contained therein.

5. DEFENDANT, answering Paragraphs 5 of the SAC, denies the allegations contained therein.

6. DEFENDANT, answering Paragraphs 6 of the SAC, denies the allegations contained therein.

7. DEFENDANT, answering Paragraphs 7 of the SAC, denies the allegations contained therein.

8. DEFENDANT, answering Paragraphs 8 of the SAC, denies the allegations contained therein.

9. DEFENDANT, answering Paragraphs 9 of the SAC, denies the allegations contained therein.

10. DEFENDANT, answering Paragraphs 10 of the SAC, denies the allegations contained therein.

11. DEFENDANT, answering Paragraphs 11 of the SAC, denies the allegations contained therein.

12. DEFENDANT, answering Paragraphs 12 of the SAC, denies the allegations contained therein.

13. DEFENDANT, answering Paragraph 13 of the SAC, denies the allegations

1 contained therein.

2 14. DEFENDANT, answering Paragraphs 14 of the SAC, denies the allegations
3 contained therein.

4 15. DEFENDANT, answering Paragraphs 15 of the SAC, denies the allegations
5 contained therein.

6 16. DEFENDANT, answering Paragraphs 16 of the SAC, denies the allegations
7 contained therein.

8 17. DEFENDANT, answering Paragraphs 17 of the SAC, denies the allegations
9 contained therein.

10 18. DEFENDANT, answering Paragraphs 18 of the SAC, denies the allegations
11 contained therein.

12 **B. The Proceedings in the Instant Action**

13 19. DEFENDANT, answering Paragraph 19 of the SAC, admits the allegations
14 contained therein.

15 20. DEFENDANT, answering Paragraph 20 of the SAC, admits the allegations
16 contained therein.

17 21. DEFENDANT, answering Paragraph 21 of the SAC, admits the allegations
18 contained therein.

19 22. DEFENDANT, answering Paragraph 22 of the SAC, admits the allegations
20 contained therein.

21 23. DEFENDANT, answering Paragraph 23 of the SAC, admits the allegations
22 contained therein.

23 **THE PARTIES**

24 24. DEFENDANT, answering Paragraph 24 of the SAC, denies the allegations
25 contained therein.

26 25. DEFENDANT, answering Paragraph 25 of the SAC, denies the allegations
27 contained therein.

28

1 26. DEFENDANT, answering Paragraph 26 of the SAC, denies the allegations
2 contained therein.

3 27. DEFENDANT, answering Paragraph 27 of the SAC, denies the allegations
4 contained therein.

5 28. DEFENDANT, answering Paragraph 28 of the SAC, denies the allegations
6 contained therein.

7 29. DEFENDANT, answering Paragraph 29 of the SAC, denies the allegations
8 contained therein.

9 30. DEFENDANT, answering Paragraph 30 of the SAC, admits that he is an
10 individual who resides and/or does business in Clark County, Nevada but denies that at all
11 relevant times he was a manager, director and/or officer of Plaintiff and owed certain duties to
12 Plaintiff.

13 31. DEFENDANT, answering Paragraph 31 of the SAC, denies the allegations
14 contained therein.

15 32. DEFENDANT, answering Paragraph 32 of the SAC, denies the allegations
16 contained therein.

17 33. DEFENDANT, answering Paragraph 33 of the SAC, denies the allegations
18 contained therein.

19 34. DEFENDANT, answering Paragraph 34 of the SAC, denies the allegations
20 contained therein.

21 **JURISDICTION AND VENUE**

22 35. DEFENDANT, answering Paragraph 35 of the SAC, denies the allegations
23 contained therein.

24 36. DEFENDANT, answering Paragraph 36 of the SAC, denies the allegations
25 contained therein.

26 **SUMMARY OF ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

27 37. DEFENDANT, answering Paragraph 37 of the SAC, denies the allegations
28

1 contained therein.

2 38. DEFENDANT, answering Paragraph 38 of the SAC, denies the allegations
3 contained therein.

4 39. DEFENDANT, answering Paragraph 39 of the SAC, denies the allegations
5 contained therein.

6 40. DEFENDANT, answering Paragraph 40 of the SAC, denies the allegations
7 contained therein.

8 41. DEFENDANT, answering Paragraph 41 of the SAC, denies the allegations
9 contained therein.

10 42. DEFENDANT, answering Paragraph 42 of the SAC, denies the allegations
11 contained therein.

12 43. DEFENDANT, answering Paragraph 43 of the SAC, denies the allegations
13 contained therein.

14 44. DEFENDANT, answering Paragraph 44 of the SAC, denies the allegations
15 contained therein.

16 45. DEFENDANT, answering Paragraph 45 of the SAC, denies the allegations
17 contained therein.

18 46. DEFENDANT, answering Paragraph 46 of the SAC, denies the allegations
19 contained therein.

20 47. DEFENDANT, answering Paragraph 47 of the SAC, denies the allegations
21 contained therein.

22 48. DEFENDANT, answering Paragraph 48 of the SAC, denies the allegations
23 contained therein.

24 49. DEFENDANT, answering Paragraph 49 of the SAC, denies the allegations
25 contained therein.

26 50. DEFENDANT, answering Paragraph 50 of the SAC, denies the allegations
27 contained therein.

28

1 51. DEFENDANT, answering Paragraph 51 of the SAC, denies the allegations
2 contained therein.

3 52. DEFENDANT, answering Paragraph 52 of the SAC, denies the allegations
4 contained therein.

5 53. DEFENDANT, answering Paragraph 53 of the SAC, denies the allegations
6 contained therein.

7 54. DEFENDANT, answering Paragraph 54 of the SAC, denies the allegations
8 contained therein.

9 55. DEFENDANT, answering Paragraph 55 of the SAC, denies the allegations
10 contained therein.

11 56. DEFENDANT, answering Paragraph 56 of the SAC, denies the allegations
12 contained therein.

13 57. DEFENDANT, answering Paragraph 57 of the SAC, denies the allegations
14 contained therein.

15 58. DEFENDANT, answering Paragraph 58 of the SAC, denies the allegations
16 contained therein.

17 59. DEFENDANT, answering Paragraph 59 of the SAC, denies the allegations
18 contained therein.

19 60. DEFENDANT, answering Paragraph 60 of the SAC, denies the allegations
20 contained therein.

21 61. DEFENDANT, answering Paragraph 61 of the SAC, denies the allegations
22 contained therein.

23 62. DEFENDANT, answering Paragraph 62 of the SAC, denies the allegations
24 contained therein.

25 63. DEFENDANT, answering Paragraph 63 of the SAC, denies the allegations
26 contained therein.

27 64. DEFENDANT, answering Paragraph 64 of the SAC, denies the allegations
28

1 contained therein.

2 65. DEFENDANT, answering Paragraph 65 of the SAC, denies the allegations
3 contained therein.

4 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION: BARNES' HIRING AND**
5 **THE UNSUPERVISED YEARS OF CRIME – DESPITE OBVIOUS WARNING SIGNS**

6 66. DEFENDANT, answering Paragraph 66 of the SAC, denies the allegations
7 contained therein.

8 67. DEFENDANT, answering Paragraph 67 of the SAC, denies the allegations
9 contained therein.

10 68. DEFENDANT, answering Paragraph 68 of the SAC, denies the allegations
11 contained therein.

12 69. DEFENDANT, answering Paragraph 69 of the SAC, denies the allegations
13 contained therein.

14 70. DEFENDANT, answering Paragraph 70 of the SAC, denies the allegations
15 contained therein.

16 71. DEFENDANT, answering Paragraph 71 of the SAC, denies the allegations
17 contained therein.

18 72. DEFENDANT, answering Paragraph 72 of the SAC, denies the allegations
19 contained therein.

20 73. DEFENDANT, answering Paragraph 73 of the SAC, denies the allegations
21 contained therein.

22 74. DEFENDANT, answering Paragraph 74 of the SAC, denies the allegations
23 contained therein.

24 75. DEFENDANT, answering Paragraph 75 of the SAC, denies the allegations
25 contained therein.

26 76. DEFENDANT, answering Paragraph 76 of the SAC, denies the allegations
27 contained therein.

28 77. DEFENDANT, answering Paragraph 77 of the SAC, denies the allegations

1 contained therein.

2 78. DEFENDANT, answering Paragraph 78 of the SAC, denies the allegations
3 contained therein.

4 79. DEFENDANT, answering Paragraph 79 of the SAC, denies the allegations
5 contained therein.

6 80. DEFENDANT, answering Paragraph 80 of the SAC, denies the allegations
7 contained therein.

8 81. DEFENDANT, answering Paragraph 81 of the SAC, denies the allegations
9 contained therein.

10 82. DEFENDANT, answering Paragraph 82 of the SAC, denies the allegations
11 contained therein.

12 83. DEFENDANT, answering Paragraph 83 of the SAC, denies the allegations
13 contained therein.

14 84. DEFENDANT, answering Paragraph 84 of the SAC, denies the allegations
15 contained therein.

16 85. DEFENDANT, answering Paragraph 85 of the SAC, denies the allegations
17 contained therein.

18 86. DEFENDANT, answering Paragraph 86 of the SAC, denies the allegations
19 contained therein.

20 87. DEFENDANT, answering Paragraph 87 of the SAC, denies the allegations
21 contained therein.

22 88. DEFENDANT, answering Paragraph 88 of the SAC, denies the allegations
23 contained therein.

24 89. DEFENDANT, answering Paragraph 89 of the SAC, denies the allegations
25 contained therein.

26 90. DEFENDANT, answering Paragraph 90 of the SAC, denies the allegations
27 contained therein.

28

1 91. DEFENDANT, answering Paragraph 91 of the SAC, denies the allegations
2 contained therein.

3 92. DEFENDANT, answering Paragraph 92 of the SAC, denies the allegations
4 contained therein.

5 93. DEFENDANT, answering Paragraph 93 of the SAC, denies the allegations
6 contained therein.

7 94. DEFENDANT, answering Paragraph 94 of the SAC, denies the allegations
8 contained therein.

9 95. DEFENDANT, answering Paragraph 95 of the SAC, denies the allegations
10 contained therein.

11 96. DEFENDANT, answering Paragraph 96 of the SAC, denies the allegations
12 contained therein.

13 97. DEFENDANT, answering Paragraph 97 of the SAC, denies the allegations
14 contained therein.

15 98. DEFENDANT, answering Paragraph 98 of the SAC, denies the allegations
16 contained therein.

17 99. DEFENDANT, answering Paragraph 99 of the SAC, denies the allegations
18 contained therein.

19 100. DEFENDANT, answering Paragraph 100 of the SAC, denies the allegations
20 contained therein.

21 101. DEFENDANT, answering Paragraph 101 of the SAC, denies the allegations
22 contained therein.

23 102. DEFENDANT, answering Paragraph 102 of the SAC, denies the allegations
24 contained therein.

25 103. DEFENDANT, answering Paragraph 103 of the SAC, denies the allegations
26 contained therein.

27 104. DEFENDANT, answering Paragraph 104 of the SAC, denies the allegations
28

1 contained therein.

2 105. DEFENDANT, answering Paragraph 105 of the SAC, denies the allegations
3 contained therein.

4 106. DEFENDANT, answering Paragraph 106 of the SAC, denies the allegations
5 contained therein.

6 107. DEFENDANT, answering Paragraph 107 of the SAC, denies the allegations
7 contained therein.

8 108. DEFENDANT, answering Paragraph 108 of the SAC, denies the allegations
9 contained therein.

10 109. DEFENDANT, answering Paragraph 109 of the SAC, denies the allegations
11 contained therein.

12 110. DEFENDANT, answering Paragraph 110 of the SAC, denies the allegations
13 contained therein.

14 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION: BARNES' NON-**
15 **TERMINATION AND LINGERING RETENTION – AND DEFENDANTS'**
16 **INACTIVITY AND INTENTIONAL MISCONDUCT – FOLLOWING DISCOVERY OF**
BARNES' CRIMINALITY

17 111. DEFENDANT, answering Paragraph 111 of the SAC, denies the allegations
18 contained therein.

19 112. DEFENDANT, answering Paragraph 112 of the SAC, denies the allegations
20 contained therein.

21 113. DEFENDANT, answering Paragraph 113 of the SAC, denies the allegations
22 contained therein.

23 114. DEFENDANT, answering Paragraph 114 of the SAC, denies the allegations
24 contained therein.

25 115. DEFENDANT, answering Paragraph 115 of the SAC, denies the allegations
26 contained therein.

27 116. DEFENDANT, answering Paragraph 116 of the SAC, denies the allegations
28 contained therein.

1 117. DEFENDANT, answering Paragraph 117 of the SAC, denies the allegations
2 contained therein.

3 118. DEFENDANT, answering Paragraph 118 of the SAC, denies the allegations
4 contained therein.

5 119. DEFENDANT, answering Paragraph 119 of the SAC, denies the allegations
6 contained therein.

7 120. DEFENDANT, answering Paragraph 120 of the SAC, denies the allegations
8 contained therein.

9 121. DEFENDANT, answering Paragraph 121 of the SAC, denies the allegations
10 contained therein.

11 122. DEFENDANT, answering Paragraph 122 of the SAC, denies the allegations
12 contained therein.

13 123. DEFENDANT, answering Paragraph 123 of the SAC, denies the allegations
14 contained therein.

15 124. DEFENDANT, answering Paragraph 124 of the SAC, denies the allegations
16 contained therein.

17 125. DEFENDANT, answering Paragraph 125 of the SAC, denies the allegations
18 contained therein.

19 126. DEFENDANT, answering Paragraph 126 of the SAC, denies the allegations
20 contained therein.

21 127. DEFENDANT, answering Paragraph 127 of the SAC, denies the allegations
22 contained therein.

23 128. DEFENDANT, answering Paragraph 128 of the SAC, denies the allegations
24 contained therein.

25 129. DEFENDANT, answering Paragraph 129 of the SAC, denies the allegations
26 contained therein.

27 130. DEFENDANT, answering Paragraph 130 of the SAC, denies the allegations
28

1 contained therein.

2 131. DEFENDANT, answering Paragraph 131 of the SAC, denies the allegations
3 contained therein.

4 132. DEFENDANT, answering Paragraph 132 of the SAC, denies the allegations
5 contained therein.

6 133. DEFENDANT, answering Paragraph 133 of the SAC, denies the allegations
7 contained therein.

8 134. DEFENDANT, answering Paragraph 134 of the SAC, denies the allegations
9 contained therein.

10 135. DEFENDANT, answering Paragraph 135 of the SAC, denies the allegations
11 contained therein.

12 136. DEFENDANT, answering Paragraph 136 of the SAC, denies the allegations
13 contained therein.

14 137. DEFENDANT, answering Paragraph 137 of the SAC, denies the allegations
15 contained therein.

16 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION: DEFENDANTS' GROSS**
17 **NEGLIGENCE, INTENTIONAL MISCONDUCT AND BREACHES OF FIDUCIARY**
18 **DUTY IN FAILING TO PURSUE MILLIONS OF DOLLARS IN RECEIVABLES**
OWED TO FLAMINGO- RESULTING IN COMPLETE WASTE

19 138. DEFENDANT, answering Paragraph 138 of the SAC, denies the allegations
20 contained therein.

21 139. DEFENDANT, answering Paragraph 139 of the SAC, denies the allegations
22 contained therein.

23 140. DEFENDANT, answering Paragraph 140 of the SAC, denies the allegations
24 contained therein.

25 141. DEFENDANT, answering Paragraph 141 of the SAC, denies the allegations
26 contained therein.

27 142. DEFENDANT, answering Paragraph 142 of the SAC, denies the allegations
28 contained therein.

1 143. DEFENDANT, answering Paragraph 143 of the SAC, denies the allegations
2 contained therein.

3 144. DEFENDANT, answering Paragraph 144 of the SAC, denies the allegations
4 contained therein.

5 145. DEFENDANT, answering Paragraph 145 of the SAC, denies the allegations
6 contained therein.

7 146. DEFENDANT, answering Paragraph 146 of the SAC, denies the allegations
8 contained therein.

9 147. DEFENDANT, answering Paragraph 147 of the SAC, denies the allegations
10 contained therein.

11 148. DEFENDANT, answering Paragraph 148 of the SAC, denies the allegations
12 contained therein.

13 149. DEFENDANT, answering Paragraph 149 of the SAC, denies the allegations
14 contained therein.

15 150. DEFENDANT, answering Paragraph 150 of the SAC, denies the allegations
16 contained therein.

17 151. DEFENDANT, answering Paragraph 151 of the SAC, denies the allegations
18 contained therein.

19 152. DEFENDANT, answering Paragraph 152 of the SAC, denies the allegations
20 contained therein.

21 153. DEFENDANT, answering Paragraph 153 of the SAC, denies the allegations
22 contained therein.

23 154. DEFENDANT, answering Paragraph 154 of the SAC, denies the allegations
24 contained therein.

25 155. DEFENDANT, answering Paragraph 155 of the SAC, denies the allegations
26 contained therein.

27
28

**ALLEGATIONS COMMON TO ALL CAUSES OF ACTION: DEFENDANTS'
INTENTIONAL FAILURE TO PROTECT FLAMINGO'S INTERESTS AND
DEFENDANTS' PERSONAL ENRICHMENT THROUGH BREACHES OF THEIR
FIDUCIARY DUTIES**

156. DEFENDANT, answering Paragraph 156 of the SAC, denies the allegations contained therein.

157. DEFENDANT, answering Paragraph 157 of the SAC, denies the allegations contained therein.

158. DEFENDANT, answering Paragraph 158 of the SAC, denies the allegations contained therein.

159. DEFENDANT, answering Paragraph 159 of the SAC, denies the allegations contained therein.

160. DEFENDANT, answering Paragraph 160 of the SAC, denies the allegations contained therein.

161. DEFENDANT, answering Paragraph 161 of the SAC, denies the allegations contained therein.

162. DEFENDANT, answering Paragraph 162 of the SAC, denies the allegations contained therein.

163. DEFENDANT, answering Paragraph 163 of the SAC, denies the allegations contained therein.

FIRST CAUSE OF ACTION
(Grossly Negligent Hiring against All Defendants)

164. DEFENDANT, answering Paragraph 164 through 170 of the SAC, states that no response is required since this cause of action was dismissed by the Court.

SECOND CAUSE OF ACTION
(Negligent Supervision against all Defendants)

165. DEFENDANT, answering Paragraph 171 through 174 of the SAC, states that no response is required since this cause of action was dismissed by the Court.

THIRD CAUSE OF ACTION
(Grossly Negligent Retention against all Defendants)

166. DEFENDANT, answering Paragraph 175 through 178 of the SAC, states that no response is required since this cause of action was dismissed by the Court.

FOURTH CAUSE OF ACTION
(Defendants' Breach of Fiduciary Duty of Care to Plaintiff)

167. DEFENDANT, answering Paragraph 179 of the SAC, incorporates by reference his responses in Paragraphs 1 through 166 above.

168. DEFENDANT, answering Paragraph 180 of the SAC, denies the allegations contained therein.

169. DEFENDANT, answering Paragraph 181 of the SAC, denies the allegations contained therein.

170. DEFENDANT, answering Paragraph 182 of the SAC, denies the allegations contained therein.

171. DEFENDANT, answering Paragraph 183 of the SAC, denies the allegations contained therein.

172. DEFENDANT, answering Paragraph 184 of the SAC, denies the allegations contained therein.

FIFTH CAUSE OF ACTION
(Defendants' Breaches of Defendants' fiduciary Duty of Loyalty to Plaintiff)

173. DEFENDANT, answering Paragraph 185 of the SAC, incorporates by reference his responses in Paragraphs 1 through 172 above.

174. DEFENDANT, answering Paragraph 186 of the SAC, denies the allegations contained therein.

175. DEFENDANT, answering Paragraph 187 of the SAC, denies the allegations contained therein.

176. DEFENDANT, answering Paragraph 188 of the SAC, denies the allegations contained therein.

177. DEFENDANT, answering Paragraph 189 of the SAC, denies the allegations contained therein.

SIXTH CAUSE OF ACTION
(Defendants' Breach of the Operating Agreement)

178. DEFENDANT, answering Paragraph 190 of the SAC, incorporates by reference his responses in Paragraphs 1 through 177 above.

179. DEFENDANT, answering Paragraph 191 of the SAC, denies the allegations contained therein.

180. DEFENDANT, answering Paragraph 192 of the SAC, denies the allegations contained therein.

181. DEFENDANT, answering Paragraph 193 of the SAC, denies the allegations contained therein.

182. DEFENDANT, answering Paragraph 194 of the SAC, denies the allegations contained therein.

183. DEFENDANT, answering Paragraph 195 of the SAC, denies the allegations contained therein.

SEVENTH CAUSE OF ACTION
(Waste - Against All Defendants)

184. DEFENDANT, answering Paragraph 196 of the SAC, incorporates by reference his responses in Paragraphs 1 through 183 above.

185. DEFENDANT, answering Paragraph 197 of the SAC, denies the allegations contained therein.

186. DEFENDANT, answering Paragraph 198 of the SAC, denies the allegations contained therein.

187. DEFENDANT, answering Paragraph 199 of the SAC, denies the allegations contained therein.

188. DEFENDANT, answering Paragraph 200 of the SAC, denies the allegations contained therein.

EIGHTH CAUSE OF ACTION
(Defendants' Breaches of NRS Chapter 86)

189. DEFENDANT, answering Paragraph 201 through 204 of the SAC, states that no response is required since this cause of action was dismissed by the Court.

NINTH CAUSE OF ACTION
(Imposition of a Constructive Trust Against All Defendants)

190. DEFENDANT, answering Paragraph 205 of the SAC, denies the allegations contained therein.

191. DEFENDANT, answering Paragraph 206 of the SAC, denies the allegations contained therein.

192. DEFENDANT, answering Paragraph 207 of the SAC, denies the allegations contained therein.

193. DEFENDANT, answering Paragraph 208 of the SAC, denies the allegations contained therein.

194. DEFENDANT, answering Paragraph 209 of the SAC, denies the allegations contained therein.

AFFIRMATIVE DEFENSES

DEFENDANT denies the allegations of Plaintiff's SAC, and each cause of action, and each paragraph in each cause of action, and each and every part thereof, including a denial that Plaintiff was damaged in the sum or sums alleged, or to be alleged, or any other sums whatsoever.

FIRST AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes and thereon alleges that Plaintiff's SAC fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

DEFENDANT denies that by reason of any act or omission, fault, conduct or liability on the part of DEFENDANT, whether negligent, careless, unlawful or whether as alleged, or otherwise, Plaintiff was injured or damaged in any of the amounts alleged, or in any other

manner or amount whatsoever; DEFENDANT further denies that answering it was negligent, careless, reckless, wanton, acted unlawfully or is liable, whether in the manner alleged or otherwise.

THIRD AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that the Plaintiff's SAC, and each and every cause of action stated therein, fails to state facts sufficient to constitute a cause of action, or any cause of action, as against DEFENDANT.

FOURTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, it is not legally responsible for the acts and/or omissions of those other Defendants named by Plaintiff as fictitious Defendants.

FIFTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that if Plaintiff suffered or sustained any loss, injury, damage or detriment, the same is directly and proximately caused and contributed to, in whole or in part, by the breach of warranty, conduct, acts, omissions, activities, carelessness, recklessness, negligence, and/or intentional misconduct of Plaintiff, thereby completely or partially barring its recovery herein.

SIXTH AFFIRMATIVE DEFENSE

DEFENDANT deny the allegations of Plaintiff's SAC, and each cause of action, and each paragraph in each cause of action, and each and every part thereof, including a denial that Plaintiff was damaged in the sum or sums alleged, or to be alleged, or any other sums whatsoever.

SEVENTH AFFIRMATIVE DEFENSE

If DEFENDANT is found responsible in damages to Plaintiff or some other party, whether as alleged or otherwise, then DEFENDANT is informed and believes, and thereon alleges, that the liability will be predicated upon the active conduct of Plaintiff, whether by negligence, breach of warranty, strict liability in tort or otherwise, which unlawful conduct

proximately caused the alleged incident and that Plaintiff's action against DEFENDANT is barred by that active and affirmative conduct.

EIGHTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that at no time prior to the filing of this action did Plaintiff, or any agent, representative or employee thereof, notify DEFENDANT of any breach of any contract or duty to Plaintiff; therefore, Plaintiff is barred from any right of recovery from DEFENDANT.

NINTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that Plaintiff's SAC, and each and every cause of action contained therein is barred by the applicable Statutes of Repose.

TENTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that as to each alleged cause of action, Plaintiff has failed, refused and neglected to take reasonable steps to mitigate its alleged damages, if any, thus barring or diminishing Plaintiff's recovery herein.

ELEVENTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that Plaintiff's SAC, and each and every cause of action contained therein, is barred by the applicable Statutes of Limitation.

TWELFTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that Plaintiff unreasonably delayed both the filing of the SAC and notification DEFENDANTS of the causes of action alleged against him, all of which has unduly and severely prejudiced him in defense of the action, thereby barring or diminishing Plaintiff's recovery herein under the Doctrine of Waiver, Estoppel, and/or Laches.

THIRTEENTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that Plaintiff lacks standing to bring the instant claim against DEFENDANT.

FOURTEENTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that the claims of Plaintiff are reduced, modified and/or barred by the Doctrine of Unclean Hands.

FIFTEENTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that Plaintiff has failed to join all necessary and indispensable parties to this lawsuit.

SIXTEENTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that the injuries and damages of which Plaintiff complains were proximately caused by, or contributed to by, the acts of other third-party defendants, cross-defendants, persons, and/or other entities, and that said acts were an intervening and superseding cause of the injuries and damages, if any, of which Plaintiff complains, thus barring Plaintiff from any recovery against DEFENDANT.

SEVENTEENTH AFFIRMATIVE DEFENSE

DEFENDANT is informed and believes, and thereon alleges, that Plaintiff is barred from the recovery it seeks by the legal doctrines of Res Judicata and Issue Preclusion having already sought recovery for the damages alleged herein in prior litigation.

EIGHTEENTH AFFIRMATIVE DEFENSE

It has been necessary for DEFENDANT to retain the services of an attorney to defend this action, and DEFENDANT is entitled to a reasonable sum as and for attorney's fees.

NINETEENTH AFFIRMATIVE DEFENSE

DEFENDANT hereby incorporate by reference those affirmative defenses enumerated in Rule 8 of the Nevada Rules of Civil Procedure as if fully set forth herein. In the event further investigation or discovery reveals the applicability of any such defenses, DEFENDANT reserve the right to seek leave of court to amend their Answer to specifically assert any such defense. Such defenses are herein incorporated by reference for the specific purpose of not waiving any such defense.

TWENTIETH AFFIRMATIVE DEFENSE

Pursuant to N.R.C.P. 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available for DEFENDANT after reasonable inquiry, and therefore, DEFENDANT reserve the right to amend its Answer to alleged additional affirmative defenses, if subsequent investigation so warrants.

WHEREFORE, DEFENDANT prays for judgment against Plaintiff as follows:

1. That Plaintiff take nothing by way of this action;
2. For the prejudgment interest or costs incurred herein;
3. For cost of suit and attorney's fees and costs; and
4. For such other and further relief as the Court deems just and proper.

Dated: December 8th, 2017

**GORDON REES SCULLY
MANSUKHANI, LLP**

By:

/s/ Robert E. Schumacher

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Nevada State Bar No. 7504
300 South 4th Street, Suite 1550
Las Vegas, Nevada 89101

Attorney for Defendant
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 8th day of December, 2017, I did cause a true correct copy of **ANSWER TO SECOND AMENDED COMPLAINT** to be served via the Court's electronic filing service on all parties listed below (unless indicated otherwise)

Timothy E. Kennedy, Esq.
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Attorney for Plaintiff

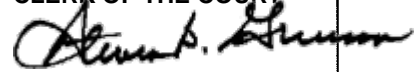
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MATTHEW NG MD and
PANKAJ BHATNAGAR MD

/s/ Andrea Montero

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16 *Attorneys For Defendants Matthew Ng MD*
17 *incorrectly named Mathew Ng MD*
18 *and Pankaj Bhatnagar MD incorrectly named*
19 *Pankaj Bhatanagar MD*

20 **DISTRICT COURT**

21 **CLARK COUNTY, NEVADA**

22 MARK J. GARDBERG, ESQ., in his capacity
23 as Receiver for, and acting on behalf of,
24 FLAMINGO-PECOS SURGERY CENTER,
25 LLC, a Nevada limited liability company;

26 Plaintiff,

27 v.

28 WILLIAM SMITH MD, an individual;
29 PANKAJ BHATANAGAR MD, an
30 individual; MARJORIE BELSKY MD, an
31 individual; SHELDON FREEDMAN MD, an
32 individual; MATHEW NG MD, an
33 individual; DANIEL BURKHEAD MD, an
34 individual; DOE MANAGERS,
35 DIRECTORS AND OFFICERS 1-25, ROE
36 BUSINESS ENTITIES 1-25;

37 Defendants.

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

**PANKAJ BHATNAGAR, MD AND
MATTHEW NG, MD'S ANSWER TO
SECOND AMENDED COMPLAINT**

38 Defendants Pankaj Bhatnagar, MD ("Bhatnagar") and Matthew Ng, MD ("Ng")
39 (together "Defendants"), by and through their counsel of the law firm of Holland & Hart LLP,
40 hereby admits, denies, and alleges as follows in response to the Second Amended Complaint
41 (the "SAC") on file herein:

PROCEDURAL HISTORY

A. The Appointment of the Receiver by the Court in Case No. A-16-733627

1. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 1 and, therefore, deny the same.

2. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 2 and, therefore, deny the same.

3. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 3 and, therefore, deny the same.

4. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 4 and, therefore, deny the same.

5. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 5 and, therefore, deny the same.

6. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 6 and, therefore, deny the same.

7. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 7 and, therefore, deny the same.

8. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 8 and, therefore, deny the same.

9. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 9 and, therefore, deny the same.

10. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 10 and, therefore, deny the same.

11. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 11 and, therefore, deny the same.

12. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 12 and, therefore, deny the same.

1 13. Paragraph 13 calls for a legal conclusion to which no response is required. To
2 the extent a response is required, Defendants deny such allegation solely for purposes of this
3 Answer.

4 14. Paragraph 14 calls for a legal conclusion to which no response is required. To
5 the extent a response is required, Defendants deny such allegation solely for purposes of this
6 Answer.

7 15. Paragraph 15 calls for a legal conclusion to which no response is required. To
8 the extent a response is required, Defendants deny such allegation solely for purposes of this
9 Answer.

10 16. Defendants are without information sufficient to form a response to the
11 allegations contained in Paragraph 16 and, therefore, deny the same.

12 17. Defendants admit the allegations contained in Paragraph 17.

13 18. Paragraph 18 calls for a legal conclusion to which no response is required. To
14 the extent a response is required, Defendants deny such allegation solely for purposes of this
15 Answer.

16 **B. The Proceedings in this Instant Action**

17 19. Paragraph 19 calls for a legal conclusion to which no response is required. To
18 the extent a response is required, Defendants deny such allegation solely for purposes of this
19 Answer.

20 20. Paragraph 20 calls for a legal conclusion to which no response is required. To
21 the extent a response is required, Defendants deny such allegation solely for purposes of this
22 Answer.

23 21. Paragraph 21 calls for a legal conclusion to which no response is required. To
24 the extent a response is required, Defendants deny such allegation solely for purposes of this
25 Answer.

26 22. Paragraph 22 calls for a legal conclusion to which no response is required. To
27 the extent a response is required, Defendants deny such allegation solely for purposes of this
28 Answer.

23. Paragraph 23 calls for a legal conclusion to which no response is required. To the extent a response is required, Defendants deny such allegation solely for purposes of this Answer.

THE PARTIES

24. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 24 and, therefore, deny the same.

25. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 25 and, therefore, deny the same.

26. Defendants admit Dr. Bhatnagar resides and/or does business in Clark County, Nevada. As to the second sentence of Paragraph 26, the terms “at all times described herein” and “certain duties” are unclear and vague, and Defendants therefore deny the same.

27. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 27 and, therefore, deny the same.

28. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 28 and, therefore, deny the same.

29. Defendants admit Dr. Ng resides and/or does business in Clark County, Nevada. As to the second sentence of Paragraph 29, the terms “at all times described herein” and “certain duties” are unclear and vague, and Defendants therefore deny the same.

30. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 30 and, therefore, deny the same.

31. Paragraph 31 calls for a legal conclusion to which no response is required. To the extent a response is required, Defendants deny such allegation solely for purposes of this Answer.

32. Paragraph 32 calls for a legal conclusion to which no response is required. To the extent a response is required, Defendants deny such allegation solely for purposes of this Answer.

1 47. Defendants are without information sufficient to form a response to the
2 allegations contained in Paragraph 47 and, therefore, deny the same.

3 48. Defendants are without information sufficient to form a response to the
4 allegations contained in Paragraph 48 and, therefore, deny the same.

5 49. Defendants are without information sufficient to form a response to the
6 allegations contained in Paragraph 49 and, therefore, deny the same.

7 50. Defendants deny the allegations contained in Paragraph 50.

8 51. Defendants are without information sufficient to form a response to the
9 allegations contained in Paragraph 51 and, therefore, deny the same.

10 52. Defendants are without information sufficient to form a response to the
11 allegations contained in Paragraph 52 and, therefore, deny the same.

12 53. Defendants are without information sufficient to form a response to the
13 allegations contained in Paragraph 53 and, therefore, deny the same.

14 54. Defendants are without information sufficient to form a response to the
15 allegations contained in Paragraph 54 and, therefore, deny the same.

16 55. Defendants are without information sufficient to form a response to the
17 allegations contained in Paragraph 55 and, therefore, deny the same.

18 56. Defendants are without information sufficient to form a response to the
19 allegations contained in Paragraph 56 and, therefore, deny the same.

20 57. Defendants deny the allegations contained in Paragraph 57.

21 58. Defendants deny the allegations contained in Paragraph 58.

22 59. Defendants deny the allegations contained in Paragraph 59.

23 60. Paragraph 60 calls for a legal conclusion to which no response is required. To
24 the extent a response is required, Defendants deny such allegation solely for purposes of this
25 Answer.

26 61. Defendants deny the allegations contained in Paragraph 61.

27 62. Defendants deny the allegations contained in Paragraph 62.

28 63. Defendants deny the allegations contained in Paragraph 63.

64. Defendants deny the allegations contained in Paragraph 64.

65. Paragraph 65 calls for a legal conclusion to which no response is required. To the extent a response is required, Defendants deny such allegation solely for purposes of this Answer.

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION: BARNES' HIRING AND THE UNSUPERVISED YEARS OF CRIME – DESPITE OBVIOUS WARNING SIGNS

66. Defendants deny the allegations contained in Paragraph 66.

67. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 67 and, therefore, deny the same.

68. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 68 and, therefore, deny the same.

69. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 69 and, therefore, deny the same.

70. Defendants deny the allegations contained in Paragraph 70.

71. Defendants deny the allegations contained in Paragraph 71.

72. Defendants deny the allegations contained in Paragraph 72.

73. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 73 and, therefore, deny the same.

74. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 74 and, therefore, deny the same.

75. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 75 and, therefore, deny the same.

76. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 76 and, therefore, deny the same.

77. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 77 and, therefore, deny the same.

78. Defendants deny the allegations contained in Paragraph 78.

1 79. Defendants are without information sufficient to form a response to the
2 allegations contained in Paragraph 79 and, therefore, deny the same.

3 80. Defendants are without information sufficient to form a response to the
4 allegations contained in Paragraph 80 and, therefore, deny the same.

5 81. Defendants are without information sufficient to form a response to the
6 allegations contained in Paragraph 81 and, therefore, deny the same.

7 82. Defendants are without information sufficient to form a response to the
8 allegations contained in Paragraph 82 and, therefore, deny the same.

9 83. Defendants are without information sufficient to form a response to the
10 allegations contained in Paragraph 83 and, therefore, deny the same.

11 84. Defendants are without information sufficient to form a response to the
12 allegations contained in Paragraph 84 and, therefore, deny the same.

13 85. Defendants are without information sufficient to form a response to the
14 allegations contained in Paragraph 85 and, therefore, deny the same.

15 86. Defendants are without information sufficient to form a response to the
16 allegations contained in Paragraph 86 and, therefore, deny the same.

17 87. Defendants are without information sufficient to form a response to the
18 allegations contained in Paragraph 87 and, therefore, deny the same.

19 88. Defendants are without information sufficient to form a response to the
20 allegations contained in Paragraph 88 and, therefore, deny the same.

21 89. Defendants are without information sufficient to form a response to the
22 allegations contained in Paragraph 89 and, therefore, deny the same.

23 90. Defendants are without information sufficient to form a response to the
24 allegations contained in Paragraph 90 and, therefore, deny the same.

25 91. Defendants are without information sufficient to form a response to the
26 allegations contained in Paragraph 91 and, therefore, deny the same.

27 92. Defendants are without information sufficient to form a response to the
28 allegations contained in Paragraph 92 and, therefore, deny the same.

1 93. Defendants are without information sufficient to form a response to the
2 allegations contained in Paragraph 93 and, therefore, deny the same.

3 94. Defendants are without information sufficient to form a response to the
4 allegations contained in Paragraph 94 and, therefore, deny the same.

5 95. Defendants are without information sufficient to form a response to the
6 allegations contained in Paragraph 95 and, therefore, deny the same.

7 96. Defendants are without information sufficient to form a response to the
8 allegations contained in Paragraph 96 and, therefore, deny the same.

9 97. Defendants are without information sufficient to form a response to the
10 allegations contained in Paragraph 97 and, therefore, deny the same.

11 98. Defendants are without information sufficient to form a response to the
12 allegations contained in Paragraph 98 and, therefore, deny the same.

13 99. Defendants are without information sufficient to form a response to the
14 allegations contained in Paragraph 99 and, therefore, deny the same.

15 100. Defendants are without information sufficient to form a response to the
16 allegations contained in Paragraph 100 and, therefore, deny the same.

17 101. Defendants are without information sufficient to form a response to the
18 allegations contained in Paragraph 101 and, therefore, deny the same.

19 102. Defendants are without information sufficient to form a response to the
20 allegations contained in Paragraph 102 and, therefore, deny the same.

21 103. Defendants are without information sufficient to form a response to the
22 allegations contained in Paragraph 103 and, therefore, deny the same.

23 104. Defendants are without information sufficient to form a response to the
24 allegations contained in Paragraph 104 and, therefore, deny the same.

25 105. Defendants are without information sufficient to form a response to the
26 allegations contained in Paragraph 105 and, therefore, deny the same.

27 106. Defendants are without information sufficient to form a response to the
28 allegations contained in Paragraph 106 and, therefore, deny the same.

1 107. Defendants are without information sufficient to form a response to the
2 allegations contained in Paragraph 107 and, therefore, deny the same.

3 108. Defendants are without information sufficient to form a response to the
4 allegations contained in Paragraph 108 and, therefore, deny the same.

5 109. Defendants deny the allegations contained in Paragraph 109.

6 110. Defendants are without information sufficient to form a response to the
7 allegations contained in Paragraph 110 and, therefore, deny the same.

8
9 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION: BARNES' NON-**
10 **TERMINATION AND LINGERING RETENTION – AND DEFENDANTS'**
11 **INACTIVITY AND INTENTIONAL MISCONDUCT – FOLLOWING DISCOVERY OF**
12 **BARNES' CRIMINALITY**

11 111. Defendants are without information sufficient to form a response to the
12 allegations contained in Paragraph 111 and, therefore, deny the same.

13 112. Defendants are without information sufficient to form a response to the
14 allegations contained in Paragraph 112 and, therefore, deny the same.

15 113. Defendants are without information sufficient to form a response to the
16 allegations contained in Paragraph 113 and, therefore, deny the same.

17 114. Defendants are without information sufficient to form a response to the
18 allegations contained in Paragraph 114 and, therefore, deny the same.

19 115. Defendants are without information sufficient to form a response to the
20 allegations contained in Paragraph 115 and, therefore, deny the same.

21 116. Defendants are without information sufficient to form a response to the
22 allegations contained in Paragraph 116 and, therefore, deny the same.

23 117. Defendants are without information sufficient to form a response to the
24 allegations contained in Paragraph 117 and, therefore, deny the same.

25 118. Defendants are without information sufficient to form a response to the
26 allegations contained in Paragraph 118 and, therefore, deny the same.

27 119. Defendants deny the allegations contained in Paragraph 119.
28

120. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 120 and, therefore, deny the same.

121. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 121 and, therefore, deny the same.

122. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 122 and, therefore, deny the same.

123. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 123 and, therefore, deny the same.

124. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 124 and, therefore, deny the same.

125. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 125 and, therefore, deny the same.

126. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 126 and, therefore, deny the same.

127. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 127 and, therefore, deny the same.

128. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 128 and, therefore, deny the same.

129. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 129 and, therefore, deny the same.

130. Defendants deny the allegations contained in Paragraph 130.

131. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 131 and, therefore, deny the same.

132. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 132 and, therefore, deny the same.

133. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 133 and, therefore, deny the same.

1 134. Defendants are without information sufficient to form a response to the
2 allegations contained in Paragraph 134 and, therefore, deny the same.

3 135. Defendants are without information sufficient to form a response to the
4 allegations contained in Paragraph 135 and, therefore, deny the same 35.

5 136. Defendants are without information sufficient to form a response to the
6 allegations contained in Paragraph 136 and, therefore, deny the same.

7 137. Defendants deny the allegations contained in Paragraph 137.

8
9 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION: DEFENDANTS' GROSS**
10 **NEGLIGENCE, INTENTIONAL MISCONDUCT AND BREACHES OF FIDUCIARY**
11 **DUTY IN FAILING TO PURSUE MILLIONS OF DOLLARS IN RECEIVABLES**
12 **OWED TO FLAMINGO – RESULTED IN COMPLETE WASTE**

13 138. Defendants are without information sufficient to form a response to the
14 allegations contained in Paragraph 138 and, therefore, deny the same.

15 139. Defendants deny the allegations contained in Paragraph 139.

16 140. Defendants are without information sufficient to form a response to the
17 allegations contained in Paragraph 140 and, therefore, deny the same.

18 141. Defendants are without information sufficient to form a response to the
19 allegations contained in Paragraph 141 and, therefore, deny the same.

20 142. Defendants are without information sufficient to form a response to the
21 allegations contained in Paragraph 142 and, therefore, deny the same.

22 143. Defendants are without information sufficient to form a response to the
23 allegations contained in Paragraph 143 and, therefore, deny the same.

24 144. Defendants are without information sufficient to form a response to the
25 allegations contained in Paragraph 144 and, therefore, deny the same.

26 145. Defendants are without information sufficient to form a response to the
27 allegations contained in Paragraph 145 and, therefore, deny the same.

28 146. Defendants are without information sufficient to form a response to the
allegations contained in Paragraph 146 and, therefore, deny the same.

147. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 147 and, therefore, deny the same.

148. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 148 and, therefore, deny the same.

149. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 149 and, therefore, deny the same.

150. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 150 and, therefore, deny the same.

151. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 151 and, therefore, deny the same.

152. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 152 and, therefore, deny the same.

153. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 153 and, therefore, deny the same.

154. Defendants deny the allegations contained in Paragraph 154.

155. Defendants deny the allegations contained in Paragraph 155.

**ALLEGATIONS COMMON TO ALL CAUSES OF ACTION: DEFENDANTS'
INTENTIONAL FAILURE TO PROTECT FLAMINGO'S INTERESTS AND
DEFENDANTS' PERSONAL ENRICHMENT THROUGH BREACHES OF THEIR
FIDUCIARY DUTIES**

156. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 156 and, therefore, deny the same.

157. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 157 and, therefore, deny the same.

158. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 158 and, therefore, deny the same.

159. Defendants deny the allegations contained in Paragraph 159.

160. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 160 and, therefore, deny the same.

161. Defendants are without information sufficient to form a response to the allegations contained in Paragraph 161 and, therefore, deny the same.

162. Defendants deny the allegations contained in Paragraph 162.

163. Defendants deny the allegations contained in Paragraph 163.

FIRST CAUSE OF ACTION
(GROSSLY NEGLIGENT HIRING AGAINST ALL DEFENDANTS)

164. In answering Paragraph 164, Defendants repeat and reallege the answers to Paragraphs 1 through 163, inclusive, as fully set forth herein.

165. Because the First Cause of Action was dismissed by the Court, Defendants state that no response is required for Paragraphs 165 – 170.

SECOND CAUSE OF ACTION
(GROSSLY NEGLIGENT SUPERVISION AGAINST ALL DEFENDANTS)

166. In answering Paragraph 171, Defendants repeat and reallege the answers to Paragraphs 1 through 170, inclusive, as fully set forth herein.

167. Because the Second Cause of Action was dismissed by the Court, Defendants state that no response is required for Paragraphs 172 – 174.

THIRD CAUSE OF ACTION
(GROSSLY NEGLIGENT RETENTION AGAINST ALL DEFENDANTS)

168. In answering Paragraph 175, Defendants repeat and reallege the answers to Paragraphs 1 through 174, inclusive, as fully set forth herein.

169. Because the Third Cause of Action was dismissed by the Court, Defendants state that no response is required for Paragraphs 176 – 178.

FOURTH CAUSE OF ACTION
(DEFENDANTS' BREACHES OF DEFENDANTS' FIDUCIARY DUTY OF CARE TO FLAMINGO)

170. In answering Paragraph 179, Defendants repeat and reallege the answers to Paragraphs 1 through 178, inclusive, as fully set forth herein.

171. Paragraph 180 calls for a legal conclusion to which no response is required. To the extent a response is required, Defendants deny such allegation solely for purposes of this Answer.

172. Defendants deny the allegations contained in Paragraph 181.

173. Defendants deny the allegations contained in Paragraph 182.

174. Defendants deny the allegations contained in Paragraph 183.

175. Defendants deny the allegations contained in Paragraph 184.

FIFTH (misabeled Fourth) CAUSE OF ACTION
(DEFENDANTS' BREACHES OF DEFENDANTS' FIDUCIARY DUTY OF LOYALTY TO FLAMINGO)

176. In answering Paragraph 185, Defendants repeat and reallege the answers to Paragraphs 1 through 184, inclusive, as fully set forth herein.

177. Paragraph 186 calls for a legal conclusion to which no response is required. To the extent a response is required, Defendants deny such allegation solely for purposes of this Answer.

178. Defendants deny the allegations contained in Paragraph 187.

179. Defendants deny the allegations contained in Paragraph 188.

180. Defendants deny the allegations contained in Paragraph 189.

SIXTH (misabeled Fifth) CAUSE OF ACTION
(DEFENDANTS' BREACHES OF THE OPERATING AGREEMENT)

181. In answering Paragraph 190, Defendants repeat and reallege the answers to Paragraphs 1 through 189, inclusive, as fully set forth herein.

182. Paragraph 191 calls for a legal conclusion to which no response is required. To the extent a response is required, Defendants deny such allegation solely for purposes of this Answer.

183. Defendants deny the allegations contained in Paragraph 192.

184. Defendants deny the allegations contained in Paragraph 193.

185. Defendants deny the allegations contained in Paragraph 194.

186. Defendants deny the allegations contained in Paragraph 195.

SEVENTH (misabeled Sixth) CAUSE OF ACTION
(WASTE, AGAINST ALL DEFENDANTS)

187. In answering Paragraph 196, Defendants repeat and reallege the answers to Paragraphs 1 through 195, inclusive, as fully set forth herein.

188. Defendants deny the allegations contained in Paragraph 197.

189. Defendants deny the allegations contained in Paragraph 198.

190. Defendants deny the allegations contained in Paragraph 199.

191. Defendants deny the allegations contained in Paragraph 200.

EIGHTH (misabeled Seventh) CAUSE OF ACTION
(DEFENDANTS' BREACHES OF NRS 86)

192. In answering Paragraph 201, Defendants repeat and reallege the answers to Paragraphs 1 through 200, inclusive, as fully set forth herein.

193. Because the Eighth Cause of Action was dismissed by the Court, Defendants state that no response is required for Paragraphs 202 – 204.

NINTH (misabeled Eighth) CAUSE OF ACTION
(IMPOSITION OF A CONSTRUCTIVE TRUST AGAINST ALL DEFENDANTS)

194. In answering Paragraph 205, Defendants repeat and reallege the answers to Paragraphs 1 through 204, inclusive, as fully set forth herein.

195. Paragraph 206 calls for a legal conclusion to which no response is required. To the extent a response is required, Defendants deny such allegation solely for purposes of this Answer.

196. Defendants deny the allegations contained in Paragraph 207.

197. Defendants deny the allegations contained in Paragraph 208.

198. Defendants deny the allegations contained in Paragraph 209.

GENERAL DENIAL

Defendants denies each and every allegation of the Plaintiff's Complaint not specifically addressed herein, if any.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Plaintiff failed to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The Plaintiff has failed to mitigate his damages, if any, thereby reducing Plaintiff's recovery to reflect the amount by which Plaintiff's alleged damages could have been mitigated by the exercise of reasonable diligence.

THIRD AFFIRMATIVE DEFENSE

The Plaintiff's claims are barred by the doctrines of waiver, ratification, and estoppel.

FOURTH AFFIRMATIVE DEFENSE

The Plaintiff's damages, if any, were not proximately or legally caused by any of the actions of Defendants.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff was comparatively and/or contributorily negligent, assumed risk, and bears proportionate responsibility, if any.

SIXTH AFFIRMATIVE DEFENSE

There is no basis under the subject agreement, law, or equity for some or all of the damages sought by Plaintiff.

SEVENTH AFFIRMATIVE DEFENSE

Any and all damages sustained by Plaintiff are the result of Plaintiff's own conduct.

EIGHTH AFFIRMATIVE DEFENSE

Any and all damages sustained by Plaintiff are the result of acts and/or omissions of others, including other defendants, third parties, and fictitious defendants.

NINTH AFFIRMATIVE DEFENSE

Plaintiff is barred from its contract claims as a result of its own breach of due obligations under the subject agreement.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's conduct prevented or frustrated performance by Defendants.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff has not come before this Court with clean hands.

TWELFTH AFFIRMATIVE DEFENSE

The Plaintiff failed to state facts sufficient to constitute any cause of action against Defendants.

THIRTEENTH AFFIRMATIVE DEFENSE

Defendants are not legally responsible for the acts and/or omissions of others, including defendants in this matter, fictitious defendants, third parties, and other entities.

FOURTEENTH AFFIRMATIVE DEFENSE

Any loss, injury, or damages sustained by Plaintiff was directly and proximately caused by and contributed to by Plaintiff's conduct, acts, and/or omissions.

FIFTEENTH AFFIRMATIVE DEFENSE

The Plaintiff's claims are barred by the applicable Statutes of Limitations.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiff lacks standing to bring the instant causes of action against Defendants.

SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiff failed to join all necessary and indispensable parties to this lawsuit.

EIGHTEENTH AFFIRMATIVE DEFENSE

Any and all of Plaintiff's injuries and damages were proximately caused by or contributed to by the acts and/or omissions of third parties.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovery under the doctrine of *res judicata*, both claim and issue preclusion.

TWENTIETH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovery under the theory of laches.

TWENTY FIRST AFFIRMATIVE DEFENSE

Plaintiff is barred from recovery because any damages incurred, if any, were caused by its own actions and inactions.

TWENTY SECOND AFFIRMATIVE DEFENSE

It is necessary for Defendants to retain the services of an attorney to defend this matter and a reasonable sum should be allowed to Defendants as and for attorneys' fees, together with its costs incurred in this action.

TWENTY THIRD AFFIRMATIVE DEFENSE

Plaintiff is barred from recovery because of a superseding cause which includes, but is not limited to, the criminal acts of its own employee.

TWENTY FORTH AFFIRMATIVE DEFENSE

Pursuant to NRCP 8 and 11, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of this Answer, and therefore, Defendants reserve the right to amend this Answer to allege additional affirmative defenses if subsequent investigation so warrants.


WHEREFORE, Defendants pray for relief against Plaintiff as follows:

1. That Plaintiff take nothing by way of this action;
2. That Plaintiff's claims be forever barred;
3. For an award of Defendants' reasonable attorneys' fees and costs incurred herein in defense of the Complaint, including prejudgment interest and costs; and
4. For such other and further relief as the Court deems just and proper.

DATED this 12th day of December, 2017

HOLLAND & HART LLP

By


Bryce K. Kunimoto, Esq.
Robert J. Cassity, Esq.
Susan M. Schwartz, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 222-2542
Fax: (702) 669-4650

*Attorneys For Defendants Matthew Ng MD
and Pankaj Bhatnagar MD*

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December, 2017, I served a true and correct copy of the foregoing **PANKAJ BHATNAGAR, MD AND MATTHEW NG, MD'S ANSWER TO SECOND AMENDED COMPLAINT** 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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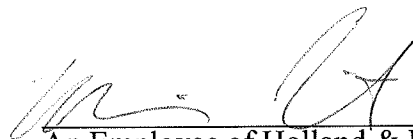
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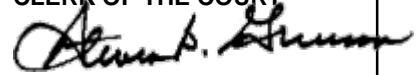
☐ **U.S. Mail:** by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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

☐ **Facsimile:** by faxing a copy to the following numbers referenced below:



An Employee of Holland & Hart LLP



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Attorneys for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

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,

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

**DEFENDANT SHELDON J.
FREEDMAN'S MOTION FOR STAY**

Hearing Date: 01/17/18
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 Motion for Stay of the
District Court's Order of December 6, 2017.

AA000914

1 This Motion is based on papers and pleadings on file herein, the following points and
2 authorities, and upon oral argument of counsel at the time of the hearing of the motion.

3 Dated this 18 day of December, 2017.

4 COOK & KELESIS, LTD.

5
6 By :

MARC P. COOK

Nevada State Bar No. 004574

GEORGE P. KELESIS

Nevada State Bar No. 000069

517 S. 9th Street

Las Vegas, Nevada 89101

Attorneys for Defendant, Sheldon J. Freedman

11
12 **NOTICE OF MOTION**

13 TO: THE PARTIES HERETO, and

14 TO: THEIR RESPECTIVE COUNSEL.

15 **PLEASE TAKE NOTICE** that the undersigned will bring the foregoing **DEFENDANT**
16 **SHELDON J. FREEDMAN'S MOTION FOR STAY**, on for hearing before the above-entitled
17 court on the 17 day of January, ²⁰¹⁸~~2017~~, at the hour of 9:00 a.m., in Department XV,
18 or as soon thereafter as counsel may be heard.

19 Dated this 15 day of December, 2017.

20 COOK & KELESIS, LTD.

21
22 By :

MARC P. COOK

Nevada State Bar No. 004574

GEORGE P. KELESIS

Nevada State Bar No. 000069

517 S. 9th Street

Las Vegas, Nevada 89101

Attorneys for Defendant Sheldon J. Freedman

1 **POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 Respectfully, as will be demonstrated herein below, it is the moving party's assertion that the
5 Court committed substantial error when it failed to dismiss Defendant, Sheldon Freedman, MD,
6 Pankaj Bhatanagar, M.D., Mathew NG, M.D. and Daniel Burkhead, M.D., in response to the parties
7 motions to dismiss as reflected in the order of December 6, 2017.

8 Accordingly, movants request that this court stay all proceedings in this matter while
9 Defendants file a Writ with the Nevada Supreme Court seeking relief from this court's decision. The
10 stay is appropriate at this junction because if the Defendants are successful with the Writ, delay
11 would be minimal, could potentially avoid a waste of time, money, efforts expended on discovery
12 which would ultimately be unnecessary as well as the upheaval of the surgeons' patient schedules.

13 Defendants assure the Court that they are in the process of seeking expedited review of the
14 issues to be raised in the Writ. Even if the Supreme Court rejects review, delay will be minimal.
15 Therefore, if the Writ is granted substantial cost savings would occur in the form of reduced
16 litigation expenses. Since the Writ issues are confined to the application of the recently decided
17 Supreme Court case and uncontroverted statutes of limitations law, the review is based purely on
18 legal issues and is likely to be completed judiciously.

19 For the reasons above, the Defendants believe the Writ would be successful.

20 **II.**

21 **FACTUAL BACKGROUND**

22 **A. The Receiver.**

23 Flamingo Pecos Surgery Center ("FPCS") had a lease for its ambulatory surgery center with
24 Patriot-Reading Associates, LLC ("Patriot"). SAC, ¶ 2. On March 23, 2014, Patriot sued FPSC for
25 breach of contract (*Patriot-Reading Associates LLC v. Flamingo-Pecos Surgery Center LLC*, Case
26 No. A-16-733627). *Id.* at ¶ 5. Default was entered against FPSC, and default judgment was then
27 entered in favor of Patriot. *Id.* at ¶¶ 7-8. On August 10, 2016, Patriot moved for and was granted an
28 appointment of receiver over FPSC. (the "Receivership Order"). *Id.* at ¶ 11. In the September 13,

1 2016 order, Timothy R. Mulliner was appointed as receiver ("Mulliner"). *Id.*

2 The Receivership Order granted the receiver authority to take possession of and manage
3 FPSC property, determine whether to make payments and whether to liquidate FPSC property,
4 pursue claims which FPSC may have, and pursue claims related to FPSC's "former employee/office
5 manager Robert W. Barnes." SAC, ¶ 14. The receiver was also authorized to take any action
6 deemed necessary to collect FPSC's accounts and debts owed to it (*id.* at 15), including actions
7 against "Flamingo's directors and officers." *Id.* at ¶ 3.¹

8 On or about July 21, 2017, Mark J. Gardberg replaced Mulliner as the receiver.

9 **B. Allegations Against All Defendants.**

10 Plaintiff alleges that Defendants were managers,² directors, and/or officers of the FPSC.
11 SAC, ¶¶ 4, 26, 29. FPSC was an LLC operating an ambulatory surgery center with 27 practicing
12 surgeons located in southwest Las Vegas, Clark County, Nevada. *Id.* at ¶¶ 2, 24, 44. Robert J.
13 Barnes ("Barnes") was FPSC's office manager (*Id.* ¶¶ 14, 16, 66, 69, 76-77, 168, 172, 176, 182) and
14 he has since been sentenced to prison for his actions. *Id.* at ¶ 49.

15 Plaintiff alleges that the defendants hired Barnes on October 5, 2006 for the position of
16 FPSC's office manager. *Id.* at ¶ 66. Plaintiff concedes that Barnes' employer was the FPSC. SAC,
17 ¶¶ 14, 16, 66, 69, 76-77, 168, 172, 176, 182. Barnes' functions and responsibilities extended to
18 FPSC's full financial workings, accounts, and books. *Id.* at ¶ 69. Plaintiff alleges that all defendants
19 failed to supervise, oversee and/or monitor Barnes for many years during Barnes' crime spree,
20 allowing a criminal to effectuate and conduct his embezzlement and theft from FPSC. *Id.*

21 Plaintiff further alleges that all defendants had authority to act on behalf of the entity and
22 failed - for an unreasonably lengthy period of time - to remove Barnes from his position as Office
23 Manager, and to block Barnes' access to FPSC's funds and assets. SAC, ¶ 120. Plaintiff alleges that
24 all "Defendants individually and collectively damaged Flamingo through a series of actions and
25

26 ¹ From here on, any references to the "receiver" refer to Gardberg as the receiver.

27 ² Notably, the Receivership Order permits actions against "directors and officers" and
28 does not reference managers under that section. *Id.* at ¶ 3.

1 inactions occurring over the course of several years," related to the injury to FPSC caused by Barnes.
2 *Id.* at ¶¶ 37, 39. Specifically, Plaintiff alleges all defendants acted, or failed to act, with "gross
3 negligence, willful misconduct, and reckless/intentional disregard" regarding Barnes' actions, as well
4 as their duties to FPSC. *Id.* at ¶¶ 39-40, 45.

5 Barnes admitted in subsequent criminal proceedings (brought by the U.S. Government
6 against Barnes) that Barnes embezzled at least \$1.3 million during the course of his crime spree over
7 many years. SAC, ¶ 98. Receiver further alleges that upon discovery of Barnes' embezzlement and
8 theft, all defendants had the authority to act on behalf of the entity but failed to (a) demand that
9 Barnes return FPSC's funds and assets; (b) pursue Barnes; and (c) file a civil complaint against
10 Barnes, with such failures resulting in substantial damages against FPSC. *Id.* at 121.

11 Plaintiff, therefore, went on to allege that all defendants are liable for:

- 12 • Grossly negligent hiring, supervision, and retention of Barnes, First - Third Causes
13 of Action;
- 14 • Breaches of fiduciary duties of care and loyalty to FPSC, Fourth and Fifth
15 (incorrectly labeled Fourth again) Causes of Action;
- 16 • breach of the operating agreement, Sixth (incorrectly labeled Fifth) Cause of Action;
- 17 • Waste, Seventh (incorrectly labeled Sixth) Cause of Action;
- 18 • Breaches of NRS Chapter 86, Eighth (incorrectly labeled Seventh) Cause of Action;
- 19 and.
- 20 • Imposition of a constructive trust, Ninth (incorrectly labeled Eighth) Cause of Action.

21 Plaintiff claimed that all defendants' stories are inconsistent regarding Barnes' actions and
22 the actions of FPSC, yet that all defendants "slept on their basic obligations for many years,
23 [constituting] grossly, willfully and intentionally negligent conduct . . . and, a breach of" all
24 defendants' fiduciary duties to FPSC. SAC, ¶ 119. Essentially, Plaintiff alleged all defendants "were
25 willfully blind to Barnes' criminality for several years, and that [all defendants] failed upon discovery
26 to immediately stop Barnes and protect [FPSC]." *Id.* at ¶ 118. Accordingly, the Receiver has
27 brought suit alleging the Defendants had the authority to act on behalf of the company and the
28

1 Receiver has the ability to sue these members. In fact, the Receiver is pursuing this claim on behalf
2 of the entity itself.³

3 III.

4 LEGAL STANDARD

5 A. Motion to Stay Standard

6 "The power to stay proceedings is incidental to the power inherent in every court to control
7 the disposition of the causes on its docket with economy of time and effort for itself, for counsel,
8 and for litigants." *See Landis v. North Am. Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153
9 (1936); *Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1972); *Mediterranean Enterprises,*
10 *Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983). An action may be "stayed" pending
11 the disposition of an appeal. *See Milcohn Gaming Corp. v. McCrear*, 120 Nev. 248, 89 P.3d 36
12 (2004). In determining whether to exercise its authority, the Court should consider (1) whether
13 the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether
14 the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will
15 substantially injure the other parties interested in the proceeding; and (4) where the public interest
16 lies. *See Hilton v. Braunsell*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987).
17 Alternatively, the court may grant a stay if the party seeking the stay demonstrates that serious
18 questions are raised and the balance of hardships tips sharply in his favor. That is, "serious
19 questions going to the merits" and the balance of hardships that tips sharply towards the movant
20 in support of issuance of a stay, so long as the movant also shows that there is a likelihood of
21 irreparable injury and that the stay is in the public interest. *See Alliance for the Wild Rockies v.*
22 *Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011); *Winter v. Natural Resources Defense Council*,
23 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008).

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28 ³ Receivership Order at Page 3, Lines 4-5.

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IV

ISSUES ON WRIT

1. Does a third party creditor, by virtue of having a Receiver appointed for a defunct entity, in a default action, have a basis to sue individual LLC members for its vendor debt as though the Receiver is a member itself?
2. If a receiver is appointed on behalf of a third party vendor in a default action, has an order which provides that the receiver may pay directly to the third party vendor any proceeds it receives through the receivership, can it be said that the receiver is acting as a member or entity under NRS Chapter 86.
3. If a receiver appointed for purposes of collection for a third-party vendor, sues the receivership LLC's members, is this a separate duty owed to the receivership entity under *Gardner, supra*.
4. If the receiver is held to the "standing in the shoes of the entity for which it is a receivership, is it bound by the agency knowledge of its board and, therefore, imputed with that knowledge for purposes of the statute of limitations.

V

LIKELIHOOD OF SUCCESS ON WRIT

While the Court carefully considered these motions, and decided the motion to dismiss without prejudice, no amount of discovery in the case subjudice will remedy one of the essential issues brought forth in the motion to dismiss, which is the limited issue that will be taken up on the Writ. Specifically, the receiver is either a separate entity from the Limited Liability Company and cannot proceed under the recently decided *Gardner, supra*, cases and NRS Chapter 86, or alternatively, the Receiver is the same as the entity and thus bound by the knowledge of its decision making members and, therefore, the self admitted statute of limitations period expired⁴. Discovery will not change the fact that either the Receiver is acting on behalf of the entity or on

⁴Alternatively, if non-decision makers that do not bind the entity are the only member who knew of the allegations of theft, they were in no position to stop the same, there is no substance to the cause of action.

1 behalf of the Vendor. If the Receiver is acting on behalf of the entity, as a matter of law, this
2 matter must be dismissed pursuant to the statute of limitations. If the Receiver is acting on
3 behalf of the vendor, then this matter must be dismissed pursuant to *Gardner* and *NRS Chapter*
4 *86*. While this was evidently an issue of careful consideration by this Court, the Supreme Court
5 has recently decided *Gardner* on two (2) separate occasions in 2017. The first of which
6 substantially limits liability of LLC members in a manner which does not permit liability for an
7 outside third party under very limited circumstances, none of which apply here. However, the
8 court was ultimately persuaded at least in part by the Receiver's argument that the Receiver is the
9 entity and, therefore, the second exception of *Gardner* applies.

10 As the Supreme Court has addressed *Gardner* twice, it is likely that the Supreme Court's
11 decision in this matter would be consistently limiting on this Writ, and this matter would be
12 subject to dismissal. If not, then the limited parameters in which the Supreme Court has
13 permitted actions under *Gardner* against members of an LLC, would go into effect and result in a
14 statute of limitations dismissal. However, as the Supreme Court has issued two (2) decisions on
15 limited liability members in a very short period of time, the likelihood of their decision-making
16 is not subject to any significant debate. It is clear that they would follow *Gardner* and the effect
17 of following *Gardner* is dismissal at the current stage without the necessity of discovery.

18 Specifically, the question is not if the case should be dismissed but, based on mutually
19 exclusive positions taken by the Receiver, should their case be dismissed based on a failure under
20 *Gardner, supra* and *NRS Chapter 86*, for Plaintiff's inability to sue the individual members of a
21 limited liability company or, alternatively, based on the statute of limitations.⁵

22 The Plaintiff is a Receiver appointed in a default action by a third party creditor. The
23 Receiver is pursuing individual members of the now defunct and non-operational surgery center
24 limited liability company, seeking funds to pay back this third party vendor of the surgery center.
25 Moreover, the specific language of the Receivership Order permits the Receiver to provide its

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27 ⁵ Defendant would note that there is an underlying basis to be dismissed under both,
28 however, for the limited purpose of this Writ, that issue need not be discussed in detail.

1 collectibles directly to this third party vendor.⁶

2 The Receiver has brought this action against these individual members alleging that their
3 CEO's scamming of millions from the Respondent members and the company resulting in the
4 downfall of the company, occurred somehow through negligence of its members. The Receiver
5 alleges that the members had knowledge of the CEO stealing from them and had the power to
6 stop this theft and/or fire the culprit who was committing the theft, but neglected to do so. The
7 Receiver admits that this action is filed more than three (3) years after the officers and directors
8 had knowledge of the negligent conduct complained of, but suggests the discovery rule provides
9 them some type of exception.

10 Herein lies the difficulties for the Receiver. The law creates a problematic situation for
11 which the only solution is denied by the circumstances inherent in the law, a Catch-22 when the
12 situation presents two equally undesirable alternatives.

13 First, if the Receiver is a third party vendor, this action is precluded based on *Gardner*,
14 *supra* and Chapter 86. The Points and Authorities providing this dismissal are clearly and solely
15 legal issues demonstrating the necessity of dismissal under either one or both. If the court would
16 somehow find that the Receiver was truly the entity pursuing its members in a manner permitted
17 under Chapter 86 and *Gardner*,⁷ and the entity pursuing its members⁸ then the entity is
18 impugned with the knowledge of its members and therefore, there is no basis to toll discovery for
19 the statute of limitations.

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22 ⁶ See Receivership Order at Page 10, "the Receiver shall turn over possession, custody
23 and control of the Receivership to either Patriots [Patriots is the third-party vendor], Flamingo or
24 to the successful purchaser of the receivership property. . .".

25 ⁷ Notably, alter ego is not alleged. In fact, the allegations are the opposite of an alter-ego
26 case. Receiver does not claim the doctors ran the company as their own. In fact, they plead the
27 reverse, i.d., that the doctors let the thieving CEO run the company for himself without
28 supervision from the doctors.

28 ⁸ As an additional basis as to why the Operating Agreement would otherwise preclude
this, but the same is not necessary for this aspect of the Writ.

Moreover, if the Receiver is the entity, and the entity is impugned with the knowledge of its agents who have the ability to make decisions on this issue, the Receiver is precluded from arguing to the contrary because if the Defendants did not have the authority to stop the thief, then the substance of the allegations against these Defendants falls apart, i.e., they could not negligently, or in bad faith, fail to stop the thief if the Receiver's argument is that they do not have authority to do so. Thus, either the Receiver is the entity bound by the actions of its members and this matter must be dismissed as it has not been filed within the appropriate statute of limitations or, instead, it is not the entity and therefore is not bound by the members but is an outside vendor seeking to sue the members of an LLC in a manner that has just been specifically precluded in *Gardner, supra*. Under either scenario, the Receiver's case must be dismissed.

There is no discovery necessary to determine either of these issues. This is entirely a legal decision to which it is appropriate to be determined in this Writ rather than having years of litigation and discovery as well as schedules of practicing physicians being turned upside down on such a clear legal issue.

VII

**DEFENDANTS WILL LIKELY BE RREPARABLY HARMED
UNLESS THE STAY IS ISSUED AND PLAINTIFF
WILL NOT BE SUBSTANTIALLY HARMED
BY VIRTUE OF THE STAY**

As was stated herein above, Defendants will seek expedited relief by way of the Writ, as well as an expedited briefing schedule. If the stay is not issued, it is clear that the discovery and its associated expenses, together with scheduling difficulties for the Defendant surgeons, would be undertaken with other matters and issues which are unnecessary and would otherwise cause significant judicial expense, expense to the doctors' practice, impede the schedules of not only the doctors but of their patients.

Significant discovery is anticipated by all parties in this action. However, up to this time, the Receiver has shown no exigency in moving forward in this matter, having not sought to serve these moving Defendants until near the expiration of the service time (and as to other non-appearing defendants, pass the service time). Thus, the lack of urgency by the Receiver in this

1 matter demonstrates that they will not be substantially harmed by virtue of the stay. Conversely,
2 the moving Defendants would be irreparably harmed, unnecessarily, if this Writ is undertaken by
3 the Supreme Court. Further, if the Supreme Court declines this Writ, this stay would be
4 relatively short lived.

5 VIII

6 STAY PENDING OUTCOME OF THE WRIT 7 WOULD SERVE THE PUBLIC INTEREST

8 In determining whether a stay is appropriate, this Court should consider the public
9 interest. The Stay requested contravenes no public interest. Rather, it is in the public interest to
10 have the Nevada Supreme Court address this issue and clarify the same. Receiverships in this
11 manner appear to be growing in this jurisdiction. Similarly, the number of limited liability
12 companies being formed increases. As we have seen in *Gardner*, supra, and in *Klabacka v.*
13 *Nelson*, 133 Nev. Adv. Op. 24 (2017), Nevada has intentionally favored business and trust
14 statutes which, when properly used, will protect entities and trusts as well as members and
15 beneficiaries as provided by this State (as well as doing business in this State). This protection
16 was intentionally implemented by the legislature to create a business friendly environment.
17 Failing to protect these statutes will similarly be detrimental to the state's economy.

18 It serves the public's interest if the court applies its lawful protections appropriately and
19 properly. It is particularly true in such an ever growing area of entities and trusts provided to
20 protect individual's assets and separate certain businesses from others. Accordingly, this Stay
21 should be appropriately granted as it would serve the public interest.

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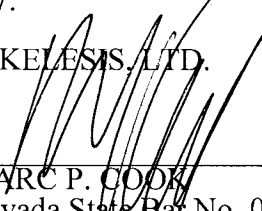
VII
CONCLUSION

Therefore, it is respectfully requested that Movants Motion for Stay be granted.

Dated this 15 day of December, 2017.

COOK & KELESIS, LTD.

By :



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1 **CERTIFICATE OF SERVICE**

2 The undersigned hereby certifies that on the 15th day of December, 2017, in
3 accordance with NRCP 5(b), NEFCRRR Administrative Order 14-2 and NEFCR 9(e), the
4 undersigned provided the clerk with a service list of parties to be served with the above and
5 foregoing **DEFENDANT SHELDON J. FREEDMAN'S MOTION FOR STAY**, as follows:

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