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Elizabeth A. Brown  
Clerk of Supreme Court

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

Appellants,

vs.

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

Respondent.

Case No.: 79355

**RESPONDENT'S OPPOSITION  
TO APPELLANTS'  
EMERGENCY MOTION FOR  
STAY RELIEF**

## **I. INTRODUCTION**

Respondent, William A. Leonard, in his capacity as Trustee for the Bankruptcy Estate of Paul Anthony Morabito, by and through his counsel, files his opposition to Appellants' Emergency Motion for Stay Relief (the "Motion").

First, as a threshold matter, Appellants did not file their Motion in compliance with the requirement to first exhaust their request for stay relief with the District Court. Thus, the Motion is properly denied under NRAP 8(a)(1).

Nor did Appellants file the Motion at the "earliest possible opportunity." This Court should not permit Appellants to manufacture exigency where this none. Judgment in this case was entered on March 29, 2019. Execution on the Judgment has been ongoing since the expiration of the NRCP 62(a) automatic stay. Inclusive, there was a hearing on July 22, 2019 in the District Court- over a month prior to the Motion- regarding Appellants' claim objection. The deadline of 5:00 p.m. on Friday, August 30, is arbitrary and is not grounded in any factual basis. Thus, the Motion is also properly denied under NRAP 27(e)(1).

Regardless of these fatal procedural defects, the Motion is also properly denied on the merits. Appellants are unlikely to succeed on their appeal of the Judgment entered against them. The instant appeal follows over a decade of litigation stemming from an \$85 million judgment entered by the Honorable Brent Adams in favor of Jerry Herbst, JH Inc., and Berry Hinckley Industries (the

“Herbst Parties”) against Paul Morabito (“Morabito”), and Morabito’s fraudulent transfer of his assets to the Appellants in order to avoid payment to the Herbst Parties. The District Court’s conclusions following a lengthy trial are grounded in findings of both actual and constructive fraud by these Appellants under Nevada’s Uniform Fraudulent Transfer Act (“UFTA”).

In their further attempt to avoid any consequences for their fraudulent actions that provide the basis for the Judgment, Appellants now attempt to raise a host of new issues that were never previously raised until after the conclusion of trial, and are thus waived. In addition, the new issues are spurious. For instance, there was no evidence presented whatsoever in favor of any statute of limitations defense at trial. Indeed, the “Edward William Bayuk Trust” (the “Bayuk Trust”) never disclosed any evidence whatsoever of its status as a purported irrevocable trust until post-Judgment proceedings. Prior, the Bayuk Trust actually presented evidence to the contrary, including at trial. Moreover, Appellants are misstating the applicable law regarding their subject matter jurisdiction arguments.

Finally, it is Respondent who faces imminent and permanent harm if the stay is granted as requested; given Appellants’ past fraudulent transfers for little or no consideration, and the extensive history of litigation and incumbent fraud that Appellants omit in their Motion, there is demonstrated danger that Appellants will use any opportunity, inclusive of the requested stay, to further transfer their assets

subject to execution. Thus, to avoid inevitable harm to Respondent with any stay, this Court should condition any stay on the posting of a supersedeas bond sufficient to avoid further damage pursuant to NRAP 8(a)(2)(E).

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

The events that led to this Motion started in 2007. Motion at Exh. 1 (the Judgment), p. 1 ¶ 1. After three years of litigation, in September 2010, Judge Adams determined that Morabito fraudulently induced the Herbst Parties, and awarded damages against Morabito in the amount of \$149,444,777.80. Id. at p. 2, ¶ 3. Subsequently, the Herbst Parties and Morabito agreed to settle the matter in 2011 where Morabito confessed to judgment for \$85 million. Id. at p. 2, ¶ 4.

Collection on the confessed judgment was frustrated because Morabito transferred assets out of his name. Id. at p. 3, ¶ 5. Ultimately, in 2013, the Herbst Parties filed an involuntary bankruptcy against Morabito. Id. at p. 4 ¶ 7. Shortly thereafter, the instant case was commenced to unwind fraudulent transfers made by Morabito to Superpumper (an Arizona corporation where Morabito had a controlling ownership interest), Bayuk (Morabito's boyfriend and longtime business partner), in both his individual capacity and in his capacity as the trustee of the Bayuk Trust, Sam Morabito ("Sam," Morabito's brother), and Snowshoe (a company formed to purchase Superpumper's parent company and owned equally by Bayuk and Sam). Id. at pp. 5-6, ¶¶ 12-16, id. at p. 8, ¶ 18. Eighteen (18) months

later, at the end of 2014, the bankruptcy court determined that Morabito was a chapter 7 debtor. Id. at p. 4, ¶ 8.

It was established by the evidence adduced at a lengthy trial before the Honorable Connie Steinheimer that within weeks of Judge Adams' September 2010 ruling against Morabito, Morabito transferred the following assets:

- \$6 million in cash; Id. at p. 41, ¶ 25;
- various real properties, worth \$3,916,250; Id. at p. 48, ¶ 46, id. p. 50, ¶ 50(a);
- a 50% ownership interest in Baruk LLC, worth \$1,654,550; Id. at p. 48, ¶ 46; id. p. 50, ¶ 50(a);
- a 80% equity interest in Superpumper's parent, worth \$10,440,000; Id. at p. 48, ¶ 46; id. p. 50, ¶ 50(a);
- furniture and personal property; Id. at p. 48, ¶ 46.

These transfers effectively made Morabito judgment-proof. Id. at p. 31, ¶ 86. As the District Court noted: "By the time of Judge Adams' FF&CL [in September 2010], let alone entry of the Final Judgment on August 23, 2011, Paul Morabito's attachable assets were gone." Id. at p. 48, ¶ 45.

As a result of Morabito's fraudulent transfers, the District Court determined that those transfers were avoidable under UFTA, and that all fraudulently-transferred assets should be returned to Morabito's bankruptcy estate. Id. at pp. 59-

62, ¶¶ 73-82. There has been no voluntary payment of any amount due and owing on the Judgment by any of Appellants. Further, Respondent has been forced to expend significant fees and costs to address Appellants' myriad objections to its efforts to execute on the Judgment.<sup>1</sup> As there is no merit to any of Appellants' objections, as determined by every court that has considered them, the Motion is an escalated effort to stop the Judgment collection.

### **III. LEGAL ARGUMENT**

#### **A. Appellants failed to file the Motion at the earliest possible time.**

It is axiomatic that “[i]f an emergency motion is not filed at the earliest possible time, the court may summarily deny the motion.” NRAP 27(e)(1). That is exactly what occurred here—Appellants waited until the last possible moment when they had months following their Notice of Appeal, or alternatively weeks following the last hearing on July 22 in the District Court, to prepare their Motion, only to spring it on Respondent and this Court in an attempt to get the Court to stay execution on Judgment.

Additionally, Appellants failed to properly move the District Court for a stay on the execution of judgment pending appeal. Appellants' counsel orally moved the District Court to stay the denial of their exemption. See Exh. F at pp. 57-58.

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<sup>1</sup> See Declaration of Stephen A. Davis, attached hereto as **Exhibit A** (describing approximately \$250,000 in fees/costs to enforce the Judgment, not including fees/costs incurred in California).

Because Appellants failed to move for a stay in the District Court in the first instance, the Motion should be denied. NRAP 8(a)(1); Nelson v. Heer, 121 Nev. 832, 836, 122 P.3d 1252, 1254 (2005).

Relatedly, there are no facts in the Motion that would lend this Court to grant a temporary stay pending full briefing. It appears that Appellants determined this artificially-contrived deadline in order to goad this Court into granting a temporary stay pending the holiday weekend. The Court should see through this unseemly tactic.

**B. The NRAP 8(c) factors weigh in favor of Respondent.**

NRAP 8(c) sets forth four factors that this Court will consider when determining whether to stay judgment pending appeal. Those factors are:

- (1) “whether the object of the appeal will be defeated if the stay . . . is denied;”
- (2) “whether the appellant . . . will suffer irreparable or serious injury if the stay . . . is denied;”
- (3) “whether the respondent . . . will suffer irreparable or serious injury if the stay . . . is granted; and”
- (4) “whether appellant . . . is likely to prevail on the merits of the appeal . . . .”

NRAP 8(c).

**1. Appellants are unlikely to prevail on appeal.**

Appellants make four arguments in their Motion on why they are likely to prevail on appeal. Each argument fails.

First, Appellants argue that Respondent was time-barred from making a claim against the Bayuk Trust. Motion at pp. 13-14 (citing NRS 166.170). What Appellants omit, however, is that they first disclosed that the Bayuk Trust was spendthrift trust when they filed their Claim of Exemption on June 28, 2019- well after the trial and entry of Judgment. *See* Motion at Exh. 5 (Order), p. 2, ll. 18-19. Under NRS 166.170(1)(a)(2), then, Respondent's claim was brought timely because Respondent did not discover the existence of the Trust until *after the case was filed*. *Id.* at p. 3, ll. 4-15. And, given the contradictory nature of the evidence produced by the Bayuk Trust both in discovery and at trial, Respondent could not have reasonably discovered the existence of the purported irrevocable nature of the Bayuk Trust sooner—as the District Court so found. *See id.*, at pp. 2-3, ¶ 3, 6.

Moreover, Appellants now assert that NRS 166.170 is a subject matter jurisdiction issue that this Court may consider in the first instance. Motion at pp. 13-14. Again, Appellants are wrong—NRS 166.170 is merely an affirmative defense, not a subject matter jurisdiction issue, and it is an affirmative defense issue that was never brought by the Bayuk Trust prior to the Judgment being entered following trial.<sup>2</sup> The statute does not prevent a court from hearing the matter; it merely prevents a person from bringing a claim outside the relevant time period, similar to NRS 11.190—Nevada's statute of limitations. Compare NRS

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<sup>2</sup> The Answer to the Amended Complaint is attached hereto as **Exhibit B**.



166.170 with NRS 11.190. Because Appellants did not raise this affirmative defense in District Court, it is waived. NRCP 8(c)(1) (requiring affirmative statement of any avoidance or affirmative defense in the answer); Clark County Sch. Dist. v. Richardson Constr., Inc., 123 Nev. 382, 393, 168 P.3d 508, 513 (2007) (determining that allegations must be pleaded as affirmative defenses under the catch all provision under NRCP 8(c) if they raise “new facts and arguments that, if true, will defeat the plaintiff’s...claim, even if all allegations in the complaint are true”); see also Douglas Disposal, Inc. v. Wee Haul, LLC, 123 Nev. 552, 557-58, 170 P.3d 508, 513 (2007); NRCP 8(c)(1)(R) (statute of limitations as affirmative defense).

Second, Appellants argue that the District Court lacked subject matter jurisdiction over the case because Respondent was required to bring the action in bankruptcy court in an adversary proceeding. Motion at pp. 10-12. Appellants have repeatedly raised this argument post-judgment, *but never pre-judgment*, and it has now already been rejected by at least two courts including the United States Bankruptcy Court for the District of Nevada (the “Bankruptcy Court”) and the Superior Court of Arizona in Maricopa County.<sup>3</sup> At its core, the argument is a misinterpretation of various bankruptcy concepts.

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<sup>3</sup> The Orders of the Bankruptcy Court and Arizona Court are attached hereto as **Exhibits C** and **D**, respectively, judicial notice of which is hereby requested.

First, the concept of jurisdiction. 28 U.S.C. § 1334 governs the Bankruptcy Court's jurisdiction. Under this section, United States district courts<sup>4</sup> have original and exclusive jurisdiction over only the actual filing of a bankruptcy petition. See Williams v. Shell Oil Co., 169 B.R. 684, 688 (S.D. Cal. 1994) (citing In re Wood, 825 F.2d 90, 92 (5th Cir.1987)). However, as to all civil proceedings arising under title 11, or arising in or related to cases under title 11, district courts have original ***but not exclusive jurisdiction***. 28 U.S.C. § 1334(a). Fraudulent transfer actions can be, but are not necessarily, civil proceedings related to a bankruptcy case. Therefore, at best, the Bankruptcy Court may have had original, ***but not exclusive***, jurisdiction.

Jurisdiction is a different concept when considering core vs. non-core matters in a bankruptcy proceeding governed by 28 U.S.C. § 157. The core vs. non-core distinction is critical in that it governs which matters, if any, a bankruptcy court has any jurisdiction to enter final orders. See Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1940 (2015). Specifically, if a matter is core, “bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection

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<sup>4</sup> Under 28 U.S.C. 157(a), each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district. In Nevada, the district court has referred cases under title 11 to the Bankruptcy Court pursuant to Local Rule 1001(b).

(a) of this section, and may enter appropriate orders and judgment.” 28 U.S.C. 157(b)(1) (emphasis added). If a matter is not a core proceeding, however, a bankruptcy judge may hear it providing the case is related to a case under title 11. 28 U.S.C. 157(c)(1). Thus, whether a matter is core, or conversely non-core, has no bearing on whether the bankruptcy court has exclusive jurisdiction. Instead, the core/non-core distinction governs the ability of the bankruptcy court to enter final orders absent consent of the parties. Nonetheless, Appellants improperly attempt to conflate these two concepts of jurisdiction and core in a veiled attempt to convince this Court that core matters mean that the Bankruptcy Court had exclusive jurisdiction over the State Court Case. Appellants are incorrect.

Appellants next move to the concept of an adversary proceeding and, relying on Fed. R. Bank. P. 7001, and Bear v. Cobe (In re Golden Plan), 829 F.2d 705, 711-712 (9th Cir. 1886), contend that a fraudulent conveyance action can only be brought as an adversary proceeding in Bankruptcy Court. Appellants are wrong. Rule 7001 provides that certain actions are to be governed by FRCP 3 through 71; and, in essence, requires that certain matters be afforded the due process protections associated with litigation (ie, a complaint, service, discovery, etc.). There is nothing in the rule that requires that the matters be brought in bankruptcy court. As made clear in Golden Plan, the effect of the Rule is that “[m]otion practice cannot be used to circumvent the requirement of an adversary

proceeding.” See Motion at p. 12 (citing Golden Plan, 829 F.2d at 711-712). For example, in Golden Plan, the parties sought to avoid liens through a provision in a plan. Because this does not have the same protections of a litigation case, the court held that was improper.

The procedural history of this case lends additional context as to why the District Court properly had, and executed, concurrent jurisdiction. The Herbst Parties filed an involuntary proceeding against Morabito in June 2013. Morabito opposed the involuntary proceeding and Judge Zive suspended the proceedings for the purpose of the Herbst Parties filing the proceeding in state court. Ultimately, in December 2014, an Order for Relief was entered against Morabito and he was adjudicated a debtor. At that point, all parties—Appellants, Morabito, and Respondent—stipulated that the Respondent would substitute into the state court as the real party in interest. Motion, at Exh. 4. There was simply nothing improper as to the State District Court’s jurisdiction, either before or after the entry of the order for relief in the bankruptcy, and the State District Court has subject matter jurisdiction to hear the fraudulent transfer claims. Furthermore, because Appellants stipulated that Respondent could substitute into the State District Court as the real party in interest, Appellants are now barred (or estopped) from asserting that Respondent failed to obtain the requisite authority necessary to substitute in for the Herbst Parties. See Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.,

124 Nev. 1102, 1118, 197 P.3d 1032, 1043 (2008) (both trial and appellate courts are required to enforce stipulations). The Stipulation is attached as **Exhibit E**.

Third, Appellants argue that the District Court further lacked subject matter jurisdiction because there was no *in rem* action filed against the Trust, as required by NRS 164.010 and NRS 166.120(2). Motion at pp. 12-13. But, NRS 164.010 is inapplicable when a judgment creditor brings suit, as evidenced by the statute's clear and plain language:

1. Upon petition of any person appointed as a trustee . . . ,  
or upon petition of a settlor or beneficiary of the trust, the district  
court . . . shall assume jurisdiction in rem . . . .

Thus, for NRS 164.010 to apply, the suit must be initiated by a settlor, trustee, or beneficiary. NRS 166.120(2) is in accord—that statutory provision applies when a beneficiary sues to enforce his or her rights. Judgment creditors are a wholly different matter, and the statutes constituting Appellants' legal authority is simply not applicable here.

Fourth, Appellants argue that the District Court erred when it determined that the Trust was not a valid spendthrift trust. Motion at pp. 14-15. The District Court determined that the Trust did not meet the statutory requirements for a spendthrift trust under NRS 166.015 because there was no credible evidence introduced that any of the Trust's property was situated in Nevada, nor that there was a trustee in Nevada. Motion at Exh. 5 p. 3 ¶ 5. Now, seeking a second bite at

the apple, Appellants proffer (for the very first time) that a trustee does live in Nevada. Motion at pp. 14-15.

However, that fact was not in front of the District Court.<sup>5</sup> And because that fact was not properly presented to the District Court, Appellants have waived that issue. Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (points not raised in the district court are waived on appeal); Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (points not cogently argued are not considered by this court); Mason v. Cuisenaire, 122 Nev. 43, 48, 128 P.3d 446, 449 (2006) (explaining that a party may not raise an argument on appeal that was not raised in the district court). Furthermore, the District Court has not had the opportunity to weigh the facts—is Mr. Gibbons still a trustee? Is he still in Nevada?—means that this Court must ignore Appellants' newly-proffered facts, which are not a part of the record, which Respondent has not had the opportunity to inquire into, and which have not been verified.

## **2. Respondent will suffer irreparable injury if the stay is granted.**

While the entire record is not currently before this Court, Respondent will represent that he, and the bankruptcy estate, will suffer irreparable injury if the stay is granted. Specifically, there is no evidence Appellants have assets beyond those

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<sup>5</sup> The Claim Objection that includes the Declaration of Governor Gibbons is attached hereto as **Exhibit E**.

which have been fraudulently conveyed by Morabito. There are no cash accounts, or promissory notes, or other assets that will satisfy judgment. It is the property interests, detailed above, which constitute the majority of assets in Appellants' possession, and the primary asset is the equity interest in Superpumper. Given that there are no other assets to secure judgment, and given Appellants' prior actions (which they do not challenge) that fraudulently transferred assets, Respondent will face irreparable harm should this Court grant a stay, Appellants transfer assets yet again, and Respondent is unable to collect upon those assets. When the full record is considered (which, again, is not before this Court on this Motion by Appellants' design), it is apparent that Morabito is concerned only with preserving his assets and frustrating Respondent's collection efforts.

### **3. The object of appeal will be defeated if the stay is granted.**

As detailed above, it is believed that Appellants have no assets beyond what has been fraudulently transferred to them. Thus, should this Court determine that a stay is warranted (and it is not), then given Appellants' prior actions as a precursor to come, Appellants will liquidate assets or transfer them, thus further frustrating Respondent's attempt to collect those assets for the bankruptcy estate. Because there are no additional assets other than the real properties and business interests, should Appellants transfer those assets yet again, the object of this appeal will be defeated.

**C. If this Court is inclined to grant a stay, it should require Appellants post a bond of no less than the amount of the Amended Judgment, together with anticipated fees and costs.**

Should the Court be inclined to grant a stay, then it should set the bond sufficient to cover the damages Respondent will suffer. See NRAP 8(a)(2)(E).

“The purpose of a supersedeas bond is to protect the prevailing party from loss resulting from a stay of execution of the judgment.” McCulloch v. Jeakins, 99 Nev. 122, 123, 659 P.2d 302, 303 (1983), dismissed, 100 Nev. 816, 808 P.2d 18 (1984), holding modified by Nelson v. Heer, 121 Nev. 832, 122 P.3d 1252 (2005). Indeed, a supersedeas bond’s purpose is not only “to preserve the status quo for the sake of the appellant, but also to secure the [respondent] from loss resulting from a stay of execution, as well as to compensate it for the deprivation of the immediate benefits of its judgment.” Tri County Wholesale Distributors, Inc. v. Labatt USA Operating Co., LLC, 311 F.R.D. 166, 176 (S.D. Ohio 2015) The Court must approve the bond’s amount before any stay becomes effective. See McCulloch, 99 Nev. at 123, 659 P.2d at 303.

The order awards Respondent \$9,898,000 in damages. Motion at Exh. 1, p. 62. Appellants argue that no bond should be required. Motion at p. 10. But Appellants omit two salient factors in their analysis. First, Appellants have had a long history of receiving fraudulent transfers with knowledge those transfers were fraudulent. Given their history established in the Judgment, Appellants are nothing



more than appendages for Morabito. Second, Appellants have not analyzed the factors for a reduced bond amount as articulated in Nelson v. Heer, which are:

- (1) the complexity of the collection process;
- (2) the amount of time required to obtain a judgment after it is affirmed on appeal;
- (3) the degree of confidence that the district court has in the availability of funds to pay the judgment;
- (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and
- (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.

Id. at 836, 122 P.3d at 1254 (quoting Dillon v. City of Chicago, 866 F.2d 902, 904-05 (7th Cir. 1988)).

All five factors weigh against reducing or eliminating a supersedeas bond. This litigation has been ongoing for over 10 years. There has been a confessed judgment since 2013. Appellants and Morabito have continually frustrated the collections process by participating in fraudulent transfers. Indeed, Respondent's counsel has expended millions in attorneys' fees and costs trying to litigate this matter to collect those assets, and close to \$250,000.00 just since the Judgment was entered. Furthermore, Appellants do not have the capability, other than through their real property and business equity interests, to otherwise satisfy the judgment. In sum, there is no reason why the bond should be reduced or waived.

#### IV. CONCLUSION

Appellants made the tactical decision to sit on this Motion until the last moment to force this Court's hand. For that reason alone, this Court should deny the Motion. But even if this Court reaches the merits, the Motion still fails.

Appellants have no likelihood of success on the merits, especially considering their years of fraud and fraudulent conveyance. Indeed, reviewing their Motion and previous objections to exemptions in front of other courts, it is apparent that the Appellants are simply stalling for time—and for what nefarious reason, unknown—to accomplish their goals. Because the Motion fails to comply with NRAP 27(e), and because the NRAP 8 factors fall squarely on Respondent's side, this Court should deny the Motion in its entirety. Alternatively, this Court should require Appellants to post a bond of not less than \$10 million.

Dated: August 30, 2019.

GARMAN TURNER GORDON LLP

BY: /s/ Stephen A. Davis

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**CERTIFICATE OF SERVICE**

This is to certify that on August 30, 2019, a true and correct copy of the foregoing **RESPONDENT'S OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR STAY RELIEF** was served on the following by United States Mail, first class, and by the Supreme Court Electronic Filing System:

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# EXHIBIT A

# EXHIBIT A

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*Counsel for Respondent*

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

Appellants,

vs.

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

Respondent.

Case No.: 79355

**DECLARATION OF STEPHEN  
A. DAVIS, ESQ., IN SUPPORT  
OF THE OPPOSITION TO  
APPELLANTS' EMERGENCY  
MOTION FOR STAY RELIEF**

**DECLARATION OF STEPHEN A. DAVIS, ESQ. IN SUPPORT OF  
RESPONDENT'S OPPOSITION TO APPELLANTS' EMERGENCY  
MOTION FOR STAY RELIEF**

I, Stephen A. Davis, Esq, declare as follows:

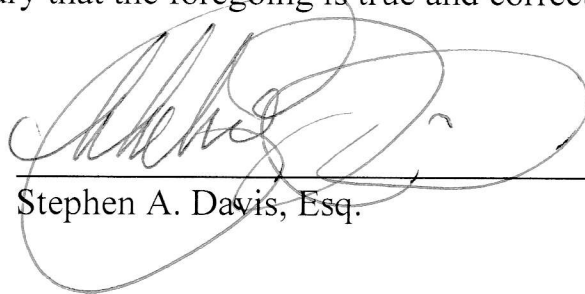
1. I am over the age of eighteen (18) years and competent to testify on the matters set forth herein. At all relevant times, I am and have been an attorney with the law firm of Garman Turner Gordon, LLP, counsel for Respondent. In such capacity, I have direct and personal knowledge of the matters set forth herein and know them to be true, except when stated on information and belief, which I believe to be true. I make this declaration in support of Respondent's Opposition to Appellants' Emergency Motion for Stay Relief (the "Opposition").

2. From the day after the judgment was entered on March 29, 2019, this law office has expended \$225,419.70 in attorneys' fees and costs to enforce the judgment.

3. These fees and costs are in addition to Respondent's California counsel, which is also attempting to enforce the judgment. I am informed and believe that California counsel has expended in excess of \$50,000.00 in fees, plus costs, to enforce the judgment.

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

Dated: August 30, 2019.

  
\_\_\_\_\_  
Stephen A. Davis, Esq.

# EXHIBIT B

# EXHIBIT B

1090  
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*Attorneys for Plaintiff*

IN THE SECOND JUDICIAL DISTRICT COURT OF  
THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: CV13-02663

DEPT. NO.: 7

**FIRST AMENDED COMPLAINT**

**[EXEMPT FROM ARBITRATION – DAMAGES IN EXCESS OF \$50,000]**

Plaintiff WILLIAM A. LEONARD hereby alleges the following:

**I.**

**THE PARTIES, JURISDICTION AND VENUE**

1. Plaintiff William A. Leonard is an individual serving as the Chapter 7 Trustee in  
the bankruptcy proceeding of Paul Morabito (hereinafter referred to as the “Debtor”), *In re*:



1 *Paul A. Morabito*, Case 13-51237 in the United States Bankruptcy Court for the District of  
2 Nevada.

3 2. Upon information and belief, Defendant Superpumper, Inc. (“Superpumper”) is  
4 and was at all times relevant hereto an Arizona corporation with its principal place of business  
5 in Maricopa County, Arizona. Superpumper was the recipient of certain fraudulent transfers  
6 originating in Washoe County, Nevada.

7 3. Upon information and belief, Defendant Edward Bayuk (“Bayuk”) is and was at  
8 all times relevant hereto a resident of both Washoe County Nevada and Los Angeles County,  
9 California and is the domestic partner of the Debtor. Bayuk is also the President of  
10 Superpumper.

11 4. Upon information and belief, Bayuk is also the Trustee of the Edward William  
12 Bayuk Living Trust. Bayuk, individually, and as Trustee of the Edward William Bayuk Living  
13 Trust, was the recipient of certain fraudulent transfers originating in Washoe County, Nevada.

14 5. Upon information and belief, Defendant Salvatore Morabito (“Salvatore  
15 Morabito”) is and was at all times relevant hereto a resident of Washoe County, Nevada and  
16 Maricopa County, Arizona and the Secretary and Vice President of Superpumper. Salvatore  
17 Morabito is the brother of the Debtor. Salvatore Morabito was the recipient of certain  
18 fraudulent transfers originating in Washoe County, Nevada.

19 6. Upon information and belief, Defendant Snowshoe Petroleum, Inc. (“Snowshoe  
20 Petroleum,” together with Superpumper, Bayuk, and Salvatore Morabito, collectively referred to  
21 as the “Defendants”) is a New York corporation. Bayuk is the President of Snowshoe  
22 Petroleum. Snowshoe Petroleum and Bayuk, individually, and as Trustee of the Edward  
23 William Bayuk Living Trust, were the recipients of certain fraudulent transfers originating in  
24 Washoe County, Nevada.

25 7. This Court has jurisdiction over this matter on the basis that the Defendants  
26 reside or are located in Washoe County, Nevada; the activities complained of herein occurred in  
27 Washoe County, Nevada; the fraudulent transfers outlined in the complaint originated from  
28

1 Washoe County, Nevada; and/or Defendants have expressly agreed to submit themselves to the  
2 jurisdiction of this Court.

3 8. Venue is proper in Washoe County, Nevada pursuant to NRS § 13.010 because  
4 the rights, obligations and activities that give rise to this action occurred in Washoe County,  
5 Nevada and Defendants have already agreed that Washoe County, Nevada is an appropriate  
6 venue.

## 7 II.

### 8 GENERAL ALLEGATIONS

9 9. Plaintiff repeats, realleges, and incorporates the allegations set forth in the  
10 proceeding paragraphs of this Complaint as if fully set forth herein.

11 10. On or about June 28, 2007, JH and P.A. Morabito & Co., Ltd. ("PAMCO"), the  
12 predecessor-in-interest to Consolidated Nevada Corporation ("CNC"), entered into an Amended  
13 and Restated Stock Purchase Agreement (the "ARSPA"), whereby JH purchased the stock of  
14 Berry-Hinckley Industries ("BHI") from PAMCO. Herbst was the guarantor of the JH  
15 obligations under the ARSPA, and the Debtor guaranteed the obligations of PAMCO.

### 16 THE STATE COURT ACTION

17 11. A dispute developed between JH, Inc., Jerry Herbst, and BHI (collectively, the  
18 "Herbst Entities") on the one hand and the Debtor and CNC on the other regarding the sale of  
19 the BHI stock to JH.

20 12. On December 3, 2007, the Debtor and CNC filed a lawsuit against the Herbst  
21 Entities, captioned Consolidated Nevada Corp., et al. v. JH, et al., (the "State Court"), Case No.  
22 CV07-02764 (together with all claims and counterclaims, the "State Court Action").

23 13. The Herbst Entities filed numerous counterclaims in the State Court Action  
24 against the Debtor and CNC, including, but not limited to, fraud in the inducement,  
25 misrepresentation, and breach of contract relating to the ARSPA.

26 14. On September 13, 2010, the State Court entered an oral judgment against the  
27 Debtor and CNC in favor of the Herbst Entities. Specifically, the State Court found that the  
28

Debtor and CNC fraudulently induced JH and Herbst to enter into the ARSPA and ruled in favor of JH and Herbst against the Debtor on other fraud-based claims.

15. On October 12, 2010, the State Court entered its findings of fact and conclusions of law which set forth the legal and factual basis for a forthcoming state court judgment, including fraud in the inducement.

16. On August 23, 2011, the State Court entered a judgment awarding the Herbst Entities total damages in the amount of \$149,444,777.80 for actual fraud, representing both compensatory and punitive damages as well as an award of attorneys' fees and costs (the "Nevada Court Judgment").

#### **THE SETTLEMENT AGREEMENT AND FORBEARANCE AGREEMENT**

17. While the Debtor and CNC's appeal of the State Court Judgment (the "Appeal") was pending before the Nevada Supreme Court, the Debtor, CNC, and the Herbst Entities entered into a Settlement Agreement and Mutual Release dated November 30, 2011 (the "Settlement Agreement"). Pursuant to the terms of the Settlement Agreement:

(a) The parties agreed to file a *Stipulation to Vacate Appeal and a Stipulation to Vacate Judgment and Findings of Fact and Conclusions of Law entered by the State Court*;

(b) The parties agreed to execute a *Confession of Judgment and Stipulation to Confess Judgment in the Amount of \$85,000,000.00* (referred to collectively as the "Confessed Judgment"), which, in the event that the Settlement Agreement was breached and not cured, Plaintiffs would be permitted to file *ex parte* and without notice in Department 6 of the Second Judicial District Court in and for the County of Washoe;

(c) The Debtor and CNC agreed to comply with the timely payment of numerous financial obligations set forth therein; and

(d) The Debtor and CNC agreed to submit themselves to the jurisdiction of the court of Washoe County, Nevada for any dispute relating to the Settlement Agreement.

1           18. Consistent with the terms of the Settlement Agreement, the State Court Action  
2 was dismissed with prejudice and the Debtor, CNC, and the Herbst Entities executed the  
3 Confessed Judgment.

4           19. Unbeknownst to the Herbst Entities, at the time the parties began negotiating and  
5 subsequently executed the Settlement Agreement, the Debtor and CNC had no intention of  
6 complying with its terms. Instead, the Debtor and CNC induced the Herbst Entities to execute  
7 the Settlement Agreement as a delay tactic to avoid execution and collection efforts on the State  
8 Court Judgment and in an effort to obtain more time to transfer and dissipate assets in  
9 furtherance of their attempts to thwart the Herbst Entities' collection of the State Court  
10 Judgment.

11           20. Shortly after execution, the Debtor and CNC defaulted under the terms of the  
12 Settlement Agreement by failing to comply with several of their financial obligations, including  
13 complying with obligations under the related Moreno settlement agreement (the "Moreno  
14 Default"), failing to pay amounts due and owing under the Hinckley Note (the "Hinckley Note  
15 Default"), and failing to make the cash payment of Four Million and No/100ths Dollars  
16 (\$4,000,000.00) due to Plaintiffs on or before March 1, 2013 (the "Cash Payment Default")  
17 (collectively, the "Continuing Defaults").

18           21. After defaulting under the terms of the Settlement Agreement, the Debtor and  
19 CNC requested that the Herbst Entities forbear from exercising their rights and remedies set  
20 forth in the Settlement Agreement, until December 1, 2013.

21           22. Accordingly, the Debtor, CNC and the Herbst Entities entered into that certain  
22 Forbearance Agreement dated March 1, 2013 (the "Forbearance Agreement").

23           23. Pursuant to the Forbearance Agreement, the Debtor and CNC made the following  
24 acknowledgments:

- 25           (i) The Continuing Defaults have occurred and are continuing; (ii)  
26 [Paul Morabito and CNC] are unable to cure the Cash Payment Default;  
27 (iii) [Paul Morabito and CNC] are unable to cure the Hinckley Note  
28 Default; (iv) pursuant to the terms of the Settlement Agreement, as a result  
of the occurrence of the Continuing Defaults, [Plaintiffs] currently have  
the right to immediately exercise any one or more of the rights and

1 remedies under the Settlement Agreement, at law or in equity, as they, in  
2 their sole discretion, deem necessary or desirable; and (v) [Paul Morabito  
3 and CNC] do not have any defenses, legal or equitable, to the Continuing  
4 Defaults, and/or any other events of Default that may exist under the  
Settlement Agreement or the exercise by [Plaintiffs] of anyone or more of  
their rights and remedies under the Settlement Agreement.

5 24. In exchange for the Herbst Entities' agreement to grant a forbearance, the Debtor  
6 and CNC agreed to (1) by no later than March 15, 2013, provide the Herbst Entities with a fully  
7 executed forbearance agreement between the Debtor, CNC, and the holders of the Hinckley  
8 Note; (2) to make certain payments of deferred principal on the payment due on March 1, 2013  
9 under the Settlement Agreement; and (3) to make certain additional payments to the Herbst  
10 Entities commencing with a payment of \$68,437 on or before May 21, 2013.

11 25. In the event of a default under the terms of the Forbearance Agreement or the  
12 Settlement Agreement, other than the Continuing Defaults, the Herbst Entities were entitled  
13 under the Forbearance Agreement to "immediately, and without expiration of any notice and cure  
14 period, exercise and enforce their rights and remedies under the Settlement Agreement or at law."

15 26. Upon information and belief, as with the Settlement Agreement, at the time the  
16 parties began negotiating and subsequently executed the Forbearance Agreement, the Debtor and  
17 CNC had no intention of complying with its terms. Instead, the Debtor and CNC induced the  
18 Herbst Entities to execute the Forbearance Agreement as a delay tactic to avoid execution and  
19 collection efforts on the State Court Judgment and in an effort to obtain more time to transfer and  
20 dissipate assets in furtherance of their attempts to thwart the Herbst Entities collection of the  
21 State Court Judgment.

22 27. The Debtor and CNC failed to comply with the terms of the Forbearance  
23 Agreement by, among other things, failing to pay the required April, May, or June payments and  
24 failing to obtain or deliver the Hinckley Forbearance Agreement.

25 28. Based on the express terms of the Settlement Agreement, on June 18, 2013, the  
26 Herbst Entities filed the Confessed Judgment with the Second Judicial District Court in and for  
27 the State of Nevada. Pursuant to the Confessed Judgment, the Debtor and CNC are jointly and  
28

severally indebted to the Herbst Entities in the amount of \$85,000,000.00, less any credits or offsets for any payments made under the Settlement Agreement.

29. Despite the oral findings of fact and conclusions of law, State Court Judgment, Settlement Agreement, Forbearance Agreement, and Confessed Judgment, the Debtor and CNC have failed to make the required payments to the Herbst Entities in satisfaction of the amounts due and owing them.

### **THE FRAUDULENT TRANSFERS**

30. Upon information and belief, Defendants and the Debtor engaged in a series of fraudulent transfers in an effort to prevent the Herbst Entities from collecting on the State Court Judgment and/or the Confessed Judgment and to protect the Debtor from having any of his assets seized. The vast majority of those transfers occurred shortly after the State Court entered its oral findings of fact and conclusions of law. The transfers were intentional and in contravention of the District Court's findings made in the State Court Judgment. The transfers, include, but are not limited to, the following:

(a) On or about September 15, 2010, a mere two days after the State Court issued its oral findings of fact and conclusions of law, the Debtor transferred \$6,000,000 out of his account with Bank of Montreal in Canada to an entity identified as Sefton Trustees in New Zealand.

(b) Upon information and belief, Sefton Trustees is an entity that specializes in offshore trusts.

(c) Although the Debtor claimed this \$6,000,000 transfer was made as a settlement relating to his obligation on a guaranty, no documentation supporting said guaranty obligation was ever provided to the Herbst Entities and the Debtor subsequently denied under oath that the transfer was made to satisfy an obligation under a guaranty.

(d) Upon information and belief, on September 21, 2010, the Debtor next transferred \$355,000 to Salvatore Morabito, the Debtor's brother, and \$420,250 to Bayuk.

(e) Upon information and belief, prior to September 28, 2010, the Debtor resided at 8355 Panorama Drive in Reno, Nevada (the "Reno Property"). The Debtor

1 owned a two-thirds interest in the Property and Bayuk owned the remaining one-third of  
2 the Reno Property.

3 (f) Upon information and belief, on October 1, 2010, the Debtor and Bayuk  
4 transferred the Reno Property to the Debtor as Trustee of the Arcadia Living Trust for  
5 \$981,341. It was later discovered that the appraised value of the Reno Property was  
6 \$4,300,000 with a corresponding mortgage of \$1,021,000.

7 (g) Upon information and belief, are Bayuk, who holds a 70% beneficial  
8 interest, and Salvatore Morabito, who holds a 30% beneficial interest.

9 (h) Upon information and belief, up until September 28, 2010, the Debtor was  
10 the 80% owner of Consolidated Western Corporation ("CWC"). Salvatore Morabito and  
11 Bayuk each also held a 10% interest in CWC. At the time, CWC held an interest in  
12 Superpumper.

13 (i) Upon information and belief, on September 28, 2010, CWC was merged  
14 into Superpumper. At the time, the Debtor's 2009 personal income tax return showed his  
15 stock basis in the company was \$5,588,661.

16 (j) On September 30, 2010, despite the Debtor's 2009 \$5,588,661 stock basis,  
17 the Debtor sold his interest in Superpumper to Snowshoe Petroleum for approximately  
18 \$2,500,000. Snowshoe Petroleum was incorporated on September 29, 2010 for the sole  
19 purpose of receiving the transfer from the Debtor.

20 (k) Upon information and belief, prior to October 1, 2010, the Arcadia Living  
21 Trust and Bayuk held a joint interest in Baruk Properties. On October 1, 2010, the  
22 Debtor transferred the Arcadia Living Trust's 50% interest in Baruk Properties to Bayuk  
23 as Trustee of the Edward William Bayuk Living Trust for a promissory note with a  
24 principal amount of \$1,617,050, which was then assigned to the principals of Woodland  
25 Heights Ltd. for a 20% interest in a joint venture.

26 (l) Upon information and belief, the appraised value of Baruk Properties at the  
27 time of the transfer was \$9,266,600 less a mortgage of \$1,440,000, for a net equity value  
28

1 of \$7,826,600, making the Debtor's 50% worth \$3,913,000, exceeding the value of the  
2 promissory note received in exchange by \$2,295,950.

3 (m) Upon information and belief, in or around September 2010, the Debtor as  
4 Trustee of the Arcadia Living Trust, and Bayuk, held joint ownership of a property  
5 located at 1254 Mary Flemming Circle in Palm Springs, California (the "Palm Springs  
6 Property").

7 (n) Upon information and belief, the Palm Springs Property was subsequently  
8 transferred to Bayuk as Trustee of the Edward William Bayuk Living Trust. No  
9 documentation has ever been provided demonstrating that this transfer was made for any  
10 form of consideration.

11 (o) Upon information and belief, the Debtor and Bayuk also transferred real  
12 property consisting of a personal residence located at 371 El Camino Del Mar, Laguna  
13 Beach, California (Parcel No. 644-032-01) (the "Laguna Beach Property") to the Debtor  
14 as Trustee for the Arcadia Living Trust, and Bayuk as trustee for Edward William Bayuk  
15 Living Trust, on or around August 20, 2009. Ownership of the California Property was  
16 subsequently transferred in whole to the Edward William Bayuk Living Trust, despite the  
17 fact that the Debtor admitted that he did not know if it was for consideration.

18 (p) Lastly, upon information and belief, at some point subsequent to the State  
19 Court's oral judgment, the Debtor executed a promissory note in favor of Bayuk in the  
20 amount of \$600,000. The Debtor has refused to produce any evidence relating to the  
21 underlying obligation to Bayuk or payments made on said obligation and Bayuk claims  
22 that the note is in good standing despite the fact that the Debtor purportedly failed to  
23 make any payments on the note to Bayuk.

24 31. Upon information and belief, these transfers were done in an effort to avoid the  
25 Herbst Entities' efforts to collect on the State Court Judgment and the subsequently executed  
26 Confession of Judgment.

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38. In January 2015, Plaintiff was elected to serve as the Chapter 7 Trustee in the bankruptcy proceedings.

### CLAIMS FOR RELIEF

**[FRAUDULENT TRANSFERS NRS § 112.140 – ALL DEFENDANTS]**

42. Upon information and belief, the transfers by the Debtor to the Defendants were made with the actual intent to hinder, delay, or defraud the Herbst Entities as a creditor of the Debtor, pursuant to NRS § 112.180.

1           43.     Before the transfers were made, the Herbst Entities had obtained an oral judgment  
2 against the Debtor on claims for fraud and fraud in the inducement.

3           44.     Upon information and belief, the transfers were made to insiders.

4           45.     Upon further information and belief, the Debtor retained possession or control of  
5 at least some of the property transferred after the transfer and continued to control the actions of  
6 Bayuk and Salvatore Morabito and continues to presently control their actions.

7           46.     Upon further information and belief, said transfers were made without the Debtor  
8 receiving reasonably equivalent value from Defendants, and left the Debtor with debts which he  
9 lacked the means to pay, including the State Court Judgment owed to Plaintiffs.

10          47.     Upon information and belief, at the time of the transfers to Defendants, the Debtor  
11 was engaged or was about to engage in a business or a transaction for which his remaining assets  
12 were unreasonably small in relation to his business or transaction.

13          48.     Upon information and belief, at the time of the transfers to the remaining  
14 Defendants, the Debtor intended to incur, or believed or reasonably should have believed that he  
15 would incur debts beyond his ability to pay as they became due.

16          49.     Upon further information and belief, at the time of the transfers to Defendants, the  
17 Debtor was insolvent or was rendered insolvent by the transfers.

18          50.     As a direct, natural, and foreseeable consequence of the Debtor and Defendants'  
19 actions, the Bankruptcy Estate has been damaged in an amount to be proven at trial.

20          51.     Plaintiff is entitled to the remedies provided in NRS § 112.210, including, but not  
21 limited to:

22                 (a)     Avoidance of the transfer or obligation to the extent necessary to satisfy  
23 Plaintiffs' claim.

24                 (b)     Garnishment against Defendants as transferor and recipients of the  
25 fraudulent obligations, in accordance with the procedure prescribed by law in obtaining  
26 such remedy.

1 (c) An attachment or other provisional remedy against the asset transferred or  
2 other property of Defendants in accordance with the procedure prescribed by law in  
3 obtaining such remedy.

4 (d) Imposition of a constructive trust over the assets fraudulently transferred.

5 (e) Any other relief the circumstances may require.

6 52. It has been necessary for Plaintiff to retain the services of counsel to prosecute  
7 this action, and Plaintiff is entitled to recover the attorneys' fees and costs incurred herein.

8 53.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff prays for relief as follows:

11 1. For an award of compensatory damages against Defendants in an amount to be  
12 proven at trial;

13 2. For an award of punitive damages against Defendants in an amount to be proven  
14 at trial;

15 3. For an award to Plaintiff of reasonable attorneys' fees and costs;

16 4. For garnishment against Defendants, the recipients of the fraudulent obligation.

17 5. For avoidance of the transfer or obligation to the extent necessary to satisfy  
18 Plaintiff's claim.

19 6. For attachment or other provisional remedy against the asset transferred or other  
20 property of Defendants in accordance with the procedure prescribed by law in obtaining such  
21 remedy.

22 7. For such other and further relief as this Court deems appropriate.

23 ///

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**AFFIRMATION**  
**Pursuant to NRS 239B.030**

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 15th day of May, 2015.

GORDON SILVER

By: /s/ John P. Desmond  
JOHN P. DESMOND  
Nevada Bar No. 5618  
Email: [jdesmond@gordonsilver.com](mailto:jdesmond@gordonsilver.com)  
BRIAN R. IRVINE  
Nevada Bar No. 7758  
Email: [birvine@gordonsilver.com](mailto:birvine@gordonsilver.com)  
100 West Liberty Street  
Suite 940  
Reno, Nevada 89501  
Tel: (775) 343-7500  
Fax: (775) 786-0131

*Attorneys for Plaintiff*

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of GORDON SILVER, and that on this date, pursuant to  
3 NRCP 5(b), I am serving a true and correct copy of the attached **FIRST AMENDED**  
4 **COMPLAINT** on the parties as set forth below:

- 5 \_\_\_\_\_ Placing an original or true copy thereof in a sealed envelope placed for collection  
6 and mailing in the United States Mail, Reno, Nevada, postage prepaid, following  
7 ordinary business practices  
8 \_\_\_\_\_ Certified Mail, Return Receipt Requested  
9 \_\_\_\_\_ Via Facsimile (Fax)  
10 \_\_\_\_\_ Via E-Mail  
11 \_\_\_\_\_ Placing an original or true copy thereof in a sealed envelope and causing the same  
12 to be personally Hand Delivered  
13 \_\_\_\_\_ Federal Express (or other overnight delivery)  
14   X   Via CM/ECF

14 addressed as follows:

15 Barry Breslow  
16 Frank Gilmore  
17 ROBISON, BELAUSTEGUI, SHARP & LOW  
18 71 Washington Street  
19 Reno, NV 89503

20 DATED this 15th day of May, 2015.

21 \_\_\_\_\_ /s/ Mina Reel  
22 An Employee of GORDON SILVER  
23  
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25  
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27  
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# EXHIBIT C

# EXHIBIT C

GARMAN TURNER GORDON LLP  
Teresa Pilatowicz, Esq.  
Arizona Bar No. 024447  
2415 E. Camelback Road, Suite 700  
Phoenix, Arizona 85007  
E-mail: tpilatowicz@gtg.legal  
Phone: (602) 612-2819  
*Attorneys for Plaintiff*

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
**IN AND FOR THE COUNTY OF MARICOPA**

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

Plaintiff,

vs.

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

Defendants.

Case No. CV2019-007691

**NOTICE OF FILING NEVADA ORDERS**

(Assigned to the Hon. Lindsay Abramson)

Plaintiff William A. Leonard, by and through his counsel, Garman Turner Gordon, LLP, hereby provides notice of the following order and findings, which were entered on the docket of the United States Bankruptcy Court for the District of Nevada in adversary proceeding no. 16-05041-gwz styled *William Leonard v. Edward Bayuk and Snowshoe Properties, LLC* (the “Adversary Proceeding”) on August 6, 2019 and August 14, 2019 respectively:

1. *Order Denying Motion of Defendants Edward Bayuk and Snowshoe Properties, LLC to Dismiss Complaint*, attached hereto as **Exhibit “A.”**
2. *Findings of Facts and Conclusions of Law*, attached hereto as **Exhibit “B.”**

Plaintiff provides that foregoing notice as a result of Defendants’ statement in their Reply filed on August 5, 2019 that, “As of August 5, 2019, there was no written judgment filed in the Adversary Proceeding and signed by Judge Zive, expressly addressing the jurisdictional issues in

1 Defendants' Motion to Vacate. Judge Zive may have orally articulated his inclination but his  
2 comments are not binding or do not have any preclusive value until reduced to a signed writing."

3 RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of August, 2019.

4 GARMAN TURNER GORDON

5 By /s/ Teresa Pilatowicz (SBN 024447)

6 TERESA M. PILATOWICZ  
7 2415 E. Camelback Road, Suite 700  
8 Phoenix, Arizona 85007

9 *Attorneys for Plaintiff*

10 ORIGINAL of the foregoing electronically  
11 filed this 19<sup>th</sup> day of August, 2019.

12 COPY of the foregoing mailed and e-mailed  
13 this 19<sup>th</sup> day of August, 2019 to:

14 Kesha A. Hodge  
15 BALL SANTIN & MCLERAN  
16 2999 North 44<sup>th</sup> Street, Suite 500  
17 Phoenix, Arizona 85018  
18 Tel: 602.840.1400  
19 Fax: 602.840.4411  
20 E-mail: [Hodge@bsmplc.com](mailto:Hodge@bsmplc.com)

21 /s/ Melissa Burkart



# Exhibit A

*Gregg W. Zive*

Honorable Gregg W. Zive  
United States Bankruptcy Judge



Entered on Docket  
August 06, 2019

SULLIVAN HILL REZ & ENGEL  
A Professional Law Corporation  
Jonathan S. Dabbieri, CA SBN 91963 (*pro hac vice*)  
Elizabeth E. Stephens, NV SBN 5788  
228 South Fourth Street, First Floor  
Las Vegas, NV 89101  
Telephone: (702) 382-6440  
Fax Number: (702) 384-9102

Attorneys for WILLIAM A. LEONARD, JR.,  
Chapter 7 Trustee for the Estate of Paul Anthony Morabito

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

In re	)	CASE NO. BK-13-51237-GWZ
	)	
PAUL A. MORABITO,	)	Chapter 7
	)	
Debtor.	)	Adversary No. 16-05041-GWZ
	)	
WILLIAM A. LEONARD, JR., Chapter 7	)	<b>ORDER DENYING MOTION OF</b>
Trustee for the Estate of Paul Anthony	)	<b>DEFENDANTS EDWARD BAYUK AND</b>
Morabito,	)	<b>SNOWSHOE PROPERTIES, LLC TO</b>
	)	<b>DISMISS COMPLAINT</b>
	)	
Plaintiff,	)	Ctrm: 1
	)	United States Bankruptcy Court
v.	)	300 Booth Street
	)	Reno, Nevada 89509
EDWARK BAYUK; SNOWSHOE	)	Judge: Hon. Gregg W. Zive
PROPERTIES, LLC, a California limited	)	
liability company; and BANK OF	)	
AMERICA,	)	
	)	
	)	
Defendants.	)	
	)	

405073-v1

- 1 -

ORDER DENYING MOTION OF DEFENDANTS EDWARD BAYUK  
AND SNOWSHOE PROPERTIES, LLC TO DISMISS COMPLAINT

1 The motion of defendants Edward Bayuk and Snowshoe Properties, LLC to dismiss  
2 plaintiff's complaint came on regularly for hearing at 1:30 p.m. on June 6, 2019 in courtroom 1 of  
3 the above-entitled court, the Honorable Gregg W. Zive, presiding. Plaintiff appeared through  
4 counsel Jonathan S. Dabbieri of Sullivan Hill Rez & Engel; defendants Edward Bayuk and  
5 Snowshoe Properties, LLC, appeared through counsel Michael Lehnrs; other appearances were as  
6 noted in the record.

7 The court having considered the papers submitted in support of and in opposition to said  
8 motion, having heard the argument of counsel, and having stated its findings of fact and conclusions  
9 of law in open court,

10 IT IS HEREBY ORDERED that the motion be, and hereby is, denied.

11 Dated: \_\_\_\_\_

12  
13  
14 Prepared and Submitted by:

15 SULLIVAN HILL REZ & ENGEL  
16 A Professional Law Corporation  
17 Elizabeth E. Stephens  
Jonathan S. Dabbieri  
18 228 South Fourth Street, First Floor, Las Vegas, NV 89101  
Attorneys for Chapter 7 Trustee, William A. Leonard, Jr.

19 Approved by:

20 Michael Lehnrs  
21 429 Marsh Avenue  
22 Reno, NV 89509  
23 Attorneys for Defendant Edward Bayuk  
24  
25  
26  
27

**RULE 9021 DECLARATION**

In accordance with LR 9021, counsel submitting this document certifies as follows (check one):

☐ The court has waived the requirement of approval under LR 9021.

☒ This is a chapter 7 or 13 case, and either with the motion, or at the hearing, I have delivered a copy of this proposed order to all counsel who appeared at the hearing, any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated below:

Michael Lehnert, Approved

☐ This is a chapter 9, 11, or 15 case, and I have delivered a copy of this proposed order to all counsel who appeared at the hearing, any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated below [list each party and whether the party has approved, disapproved, or failed to respond to the document]:

☐ I certify that I have served a copy of this order with the motion, and no parties appeared or filed written objections.

Dated this 31st day of July, 2019.

SULLIVAN HILL REZ & ENGEL  
A Professional Law Corporation

By: /s/ Jonathan S. Dabbieri  
Jonathan S. Dabbieri  
Elizabeth E. Stephens  
Attorneys for Chapter 7 Trustee,  
William A. Leonard, Jr.

###

# Exhibit B

*Gregg W. Zive*

Honorable Gregg W. Zive  
United States Bankruptcy Judge



Entered on Docket  
August 14, 2019

SULLIVAN HILL REZ & ENGEL  
A Professional Law Corporation  
Jonathan S. Dabbieri, CA SBN 91963 (*pro hac vice*)  
Elizabeth E. Stephens, NV SBN 5788  
228 South Fourth Street, First Floor  
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Attorneys for WILLIAM A. LEONARD, JR.,  
Chapter 7 Trustee for the Estate of Paul Anthony Morabito

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

In re	)	CASE NO. BK-13-51237-GWZ
	)	
PAUL A MORABITO,	)	Chapter 7
	)	
Debtor.	)	Adversary No. 16-05041-GWZ
	)	
WILLIAM A. LEONARD, JR., Chapter 7	)	<b>FINDINGS OF FACT AND</b>
Trustee for the Estate of Paul Anthony	)	<b>CONCLUSIONS OF LAW</b>
Morabito,	)	
	)	Ctrm: 1
Plaintiff,	)	United States Bankruptcy Court
	)	300 Booth Street
v.	)	Reno, Nevada 89509
	)	Judge: Hon. Gregg W. Zive
EDWARD BAYUK; SNOWSHOE	)	
PROPERTIES, LLC,	)	
a California limited liability company; and	)	
BANK OF AMERICA,	)	
	)	
Defendants.	)	
	)	

1 Plaintiff's motion for summary judgment came on regularly for hearing on June 6, 2019, the  
2 Honorable Gregg W. Zive, presiding. Plaintiff, William A. Leonard, Jr., chapter 7 trustee, appeared  
3 through counsel Jonathan S. Dabbieri of Sullivan Hill Rez & Engel; defendants Edward Bayuk and  
4 Snowshoe Properties, LLC, appeared through counsel Michael Lehnert; other appearances were as  
5 noted in the record. The court having reviewed the papers submitted in support of and in opposition  
6 to the motion, having heard the argument of counsel, being fully advised in the premises, and having  
7 orally stated on the record its findings of fact and conclusions of law pursuant to Rule 7052 of the  
8 Federal Rules of Bankruptcy Procedure, which findings of fact and conclusions of law are  
9 incorporated herein by reference, the court makes the following findings of fact and conclusions of  
10 law. If any finding of fact herein is actually a conclusion of law, it shall be deemed a conclusion of  
11 law. If any conclusion of law herein is actually a finding of fact, it shall be deemed a finding of fact.

### 12 Findings of Fact

13 1. The plaintiff in this action is William A. Leonard, Jr. as trustee of the bankruptcy  
14 estate of Paul Anthony Morabito, the chapter 7 debtor, who seeks recovery pursuant to 11 U.S.C.  
15 section 547.

16 2. The defendants are Edward Bayuk and Snowshoe Properties, LLC (Snowshoe).

17 3. The Court adopts and incorporates herein by reference each of the facts set forth in  
18 the Order Settling Certain Facts for Purposes of Trial, entered in the related adversary action,  
19 *Leonard v. Morabito et al.*, case no. 15-5046-GWZ in the United States Bankruptcy Court for the  
20 District of Nevada.

21 4. The Court adopts and incorporates herein by reference each of the facts set forth in  
22 plaintiff's Statement of Facts.

23 5. The defendants admitted all of the facts set forth in the plaintiff's Statement of Facts  
24 submitted in accordance with Local Rule 56-1 and Federal Rule of Bankruptcy Procedure 7056.  
25 Defendant did dispute the legal effect of some of the facts set forth in the Statement of Facts, but that  
26 constitutes legal memoranda, not factual evidence nor does it constitute contesting a fact set forth in  
27 the Statement of Facts.  
28

1           6.       In December 2009 Bank of America and the debtor entered into an agreement  
2 whereby Bank of America provided the debtor with a \$2 million line of credit.

3           7.       In September 2010, in state court proceedings in the Second Judicial District of the  
4 State of Nevada, case no. CV07-02764, the state court judge rendered an oral ruling finding the  
5 debtor and the corporation Consolidated Nevada Corporation liable to JH, Inc., Jerry Herbst, and  
6 Berry-Hinckley Industries for \$85,871,364.75. Immediately thereafter debtor and Mr. Bayuk  
7 engaged in a series of fraudulent and sham transactions.

8           8.       As part of the series of fraudulent and sham transactions Mr. Bayuk executed a  
9 promissory note, payable to debtor, in the principal amount of \$1,617,050, representing a sham  
10 “Equalizing Obligation” from Mr. Bayuk to debtor.

11          9.       The debtor defaulted on his line of credit with Bank of America and the bank sued  
12 him in Nevada state court. This action was resolved by a settlement agreement.

13          10.      The settlement agreement called for Snowshoe to pledge its property at 570  
14 Glenneyre, Laguna Beach, California to secure the debtor’s obligations under the settlement  
15 agreement.

16          11.      In accordance with the settlement agreement Snowshoe recorded a trust deed against  
17 the 570 Glenneyre property, securing the obligations under settlement agreement.

18          12.      On December 4, 2012 Mr. Bayuk paid Bank of America \$732,124.75 to satisfy  
19 debtor’s obligations to the bank.

20          13.      As a result, the trust deed against the Glenneyre was reconveyed to Snowshoe.

21          14.      Mr. Bayuk’s obligations under the Equalizing Obligation and the Note were illusory.

22          15.      The transactions which gave rise to the Equalizing Obligation were an attempt by the  
23 debtor to utilize Mr. Bayuk and/or entities controlled by Mr. Bayuk to transfer assets but retain  
24 control over them.

25          16.      This is demonstrated by, among other transactions: (a) Snowshoe pledging its  
26 property to guaranty the debtor’s obligations to Bank of America; (b) the debtor referring to the  
27 refund from Bank of America as “my refund.”  
28



1           17.     The debtor treated Snowshoe and all of the assets he transferred as his own property,  
2 doing whatever was convenient for him at the time.

3           18.     Because Snowshoe had pledged its property to secure debtor's obligations under the  
4 settlement agreement with the bank, it had and retained a right of indemnification from the debtor  
5 for any losses it suffered by reason of the pledge.

6           19.     Because the Equalizing Obligation was a sham, Mr. Bayuk had and retained a right of  
7 indemnification from the debtor for the payments it made to the bank.

8           20.     As a result of these transactions, on December 17, 2013 a fraudulent conveyance  
9 action was filed against the debtor and others, titled *JH, Inc., Jerry Herbst, and Berry Hinkley v.*  
10 *Paul A. Morabito; Edward Bayuk, individually and as Trustee of the Edward William Bayuk Living*  
11 *Trust; Salvatore Morabito; and Snowshoe Petroleum, Inc.*, case no. CV13-02663 in the Second  
12 Judicial District Court of the State of Nevada, in and for the County of Washoe (the state court  
13 action).

14           21.     In or near June 2015, by stipulation of the parties, (i) JH, Inc., Jerry Herbst, and Berry  
15 Hinkley were removed as plaintiffs in the action and the trustee was substituted in and (ii) the debtor  
16 was removed as a defendant in the action.

17           22.     Thereafter, the trustee filed a first amended complaint in the action.

18           23.     On March 29, 2019, in the state court action, the state court entered its Findings of  
19 Fact, Conclusions of Law, and Judgment (the state court judgment).

20           24.     The state court judgment is, under Nevada law, a final judgment which has issue  
21 preclusive effects in subsequent proceedings.

22           25.     The state court action was properly before the state court and dealt with matters  
23 within its jurisdiction.

24           26.     No act of the state court in the state court action was in derogation of any bankruptcy  
25 court order.

26           27.     This court therefore gives issue preclusive effect to the state court judgment in this  
27 action.

1 28. To the extent giving issue preclusive effect to the state court judgment is  
2 discretionary, this court exercises its discretion to give the state court judgment issue preclusive  
3 effect.

4 29. As stated above, all of the findings of fact entered in the state court action are adopted  
5 by this court, incorporated herein by reference, and given issue preclusive effect.

6 30. Plaintiff is entitled to summary judgment and an award of damages in the sum of  
7 \$732,124.75.

8 31. Plaintiff is entitled to prejudgment interest in the sum of \$18,894.95, calculated  
9 pursuant to 28 U.S.C. section 1961(a), from June 12, 2017, the date of the filing of the amended  
10 complaint, to August 6, 2019, a period of 785 days. The interest rate pursuant to 28 U.S.C. section  
11 1961(a) on June 12, 2017 was 1.20%. Prejudgment interest is calculated as follows:

12  $\$732,124.75 * .0120 = \$8,785.497$  interest per annum

13  $\$8,785.497 \div 365 = \$24.07$  interest per diem

14  $\$24.07 * 785 = \$18,894.95$

15 32. Plaintiff is further allowed post-judgment interest as allowed by law.

#### 16 **Conclusions of Law**

17 33. Summary judgment is appropriate where the moving party shows there is no genuine  
18 dispute as to any material fact and the movant is entitled to judgment as a matter of law. Federal  
19 Rule of Bankruptcy Procedure 7056(a).

20 34. The party moving for summary judgment has the initial burden of showing the  
21 absence of a genuine issue of material fact. Once that burden is met by presenting evidence which, if  
22 uncontroverted, would entitle the movant to a directed verdict at trial, the burden shifts to the  
23 responding party to set forth specific facts demonstrating there is a genuine issue for trial. If the  
24 factual context makes the respondent's claim implausible, that party must come forward with more  
25 persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial.  
26 *Rudberg v. Nevada ex rel. S. Nevada Children's Home*, 896 F. Supp. 1017, 1019-20 (D.NV 1995),  
27 citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), *Celotex Corp. V. Catrett*, 477 U.S.

1 317, 323-24 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 486-87  
2 (1986).

3 35. The trustee's prosecution of the state court action was not a violation as the automatic  
4 stay as the debtor was dismissed from the action.

5 36. The state court action was properly prosecuted in state court by the trustee, who could  
6 prosecute the claims in either state court or bankruptcy court, at his election.

7 37. Mr. Bayuk is neither the debtor and nor a party in interest. He therefore lacks  
8 standing to raise a motion based upon a violation of the automatic stay provided for by 11 USC  
9 §362. *In re Pecan Groves*, 951 F.2d 242, 245 (9th Cir. 1991). 11 USC §362(d).

10 38. Any violation of the automatic stay was cured by the dismissal of the debtor as a  
11 defendant in the state court action, as it was no longer against the debtor or property of the estate. 11  
12 USC 362(a).

13 39. Any violation of the automatic stay was cured by the trustee's filing of an amended  
14 complaint in the state court action.

15 40. Any violation of the automatic stay would only affect the state court proceedings  
16 against the debtor, the other defendants in the state court action cannot claim a remedy for a  
17 violation of the automatic stay benefiting the debtor. *James v. Washington Sav. Bank (In re Brooks)*,  
18 871 F.2d 89, 90 (9th Cir. 1989).

19 41. After the trustee filed the first amended complaint in the state court action, all of the  
20 claims asserted in the state court action were property of the bankruptcy estate, asserting a general  
21 claims for the benefit of the estate. The trustee therefore had standing to pursue the claims asserted  
22 in the state court action. *Schnelling v. Thomas (In re Agribotech, Inc.)*, 319 B.R. 216, 220-222 (D.NV  
23 2004).

24 42. As a preference action, the claims asserted in the adversary complaint are asserted on  
25 behalf of the estate and all the creditors of the estate. As a result, the trustee has standing to assert the  
26 preference claim set forth in the adversary complaint. *Schnelling v. Thomas (In re Agribotech, Inc.)*,  
27 319 B.R. 216, 220-222 (D.NV 2004).  
28

43. In the state court action defendants waived any standing objection to the trustee's standing by failing to plead it as an affirmative defense and by affirmatively endorsing the trustee's standing by stipulating he be substituted into the action as the plaintiff. *Contrail Leasing Partners v. Executive Serv. Corp.* 100 Nev. 545, 549 n. 2 (1984), citing NRCP 8(c) and NRCP 9.

44. The test used by the state court to determine defendants' non-statutory insider statute is the same test this Court is required to apply – the closeness of the relationship between the transferor and the transferee and whether the transactions between them were at arm's length. *In re Village at Lakeridge, LLC.*, 814 F.3d 993, 996 (9th Cir. 2016)

45. Based on (i) the facts found in the state court action and which are given preclusive effect here; (ii) the plaintiffs Statement of Facts, all of which have been admitted by defendants; and (iii) the Order Settling Certain Facts for Purposes of Trial, this court finds that the debtor had an extremely close relationship with each of the defendants and the transaction at issue, as well as many other transactions between them, were not at arm's length. Mr. Bayuk is therefore a non-statutory insider of the debtor. *In re Village at Lakeridge, LLC.*, 814 F.3d 993, 996 (9th Cir. 2016).

46. A preference action is within the bankruptcy court's statutory core jurisdiction and within its constitutional jurisdiction to enter final orders and judgments in a preference action because preference actions only arise as a matter of bankruptcy law and because when a judgment is entered against the recipient of a preferential transfer and paid by it, the recipient obtains a claim in the bankruptcy estate for the amount paid. Preference actions are therefore part of the restructuring of the debtor/creditor relationship. *MorrisAnderson & Asssoc. V. Redeye II, LLC (In re Swift Air)*, 2019 Lexis 852, 2019 WL 1266100 (Bankr. D. AZ 2019). *Pantazelos v. Benjamin (In re Pantazelos)*, 543 B.R. 864, 872 (Bankr. E.D.Ill 2016).

47. If this adversary action is a *Stern* claim and the district court determines that this Court did not have the power under Article III of the Constitution to enter the judgment or order appealed from, the district court may treat these findings of fact and conclusions of law as proposed findings of fact and conclusions of law. Federal Rule of Bankruptcy Procedure 8018.1. *Pantazelos v. Benjamin (In re Pantazelos)*, 543 B.R. 864, 873 (Bankr. E.D.Ill 2016), citing *Executive Benefits Insurance Agency v. Arkison*, 134 S.Ct. 2165 (2014).

1           48. In determining whether an otherwise preferential payment permits a creditor to  
2 receive more than the creditor would receive in a chapter 7 liquidation, one looks only to what the  
3 creditor would receive from the debtor's estate, without regard to what the creditor might receive  
4 from other non-debtor sources. Accordingly, no additional discovery is relevant to the issues before  
5 the Court. Additionally, the defendants have had sufficient time and opportunity to conduct any  
6 discovery they consider relevant. *Committee of Creditors Holding Unsecured Claims v. Koch Oil*  
7 *Co. (In re Powerine Oil Co.)*, 59 F.3d 969, 973 (9th Cir. 1995).

8           49. The plaintiff has established each of the criteria for establishing that the defendants  
9 are non-statutory insiders and for establishing a preferential transfer under bankruptcy code §547.

10          50. The plaintiff is entitled to and is hereby granted summary judgment.

11  
12 Dated: \_\_\_\_\_

\_\_\_\_\_  
Hon. Gregg W. Zive  
Judge of the Bankruptcy Court

**RULE 9021 DECLARATION**

In accordance with LR 9021, counsel submitting this document certifies as follows (check one):

☐ The court has waived the requirement of approval under LR 9021.

☒ This is a chapter 7 or 13 case, and either with the motion, or at the hearing, I have delivered a copy of this proposed order to all counsel who appeared at the hearing, any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated below:

Michael Lehnert, Approved.

☐ This is a chapter 9, 11, or 15 case, and I have delivered a copy of this proposed order to all counsel who appeared at the hearing, any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated below [list each party and whether the party has approved, disapproved, or failed to respond to the document]:

☐ I certify that I have served a copy of this order with the motion, and no parties appeared or filed written objections.

Dated this 7th day of August, 2019.

SULLIVAN HILL REZ & ENGEL  
A Professional Law Corporation

By: /s/ Jonathan S. Dabbieri  
Jonathan S. Dabbieri  
Elizabeth E. Stephens  
Attorneys for Chapter 7 Trustee,  
William A. Leonard, Jr.

###

# EXHIBIT D

# EXHIBIT D

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2019-007691

08/26/2019

HONORABLE LINDSAY P. ABRAMSON

CLERK OF THE COURT  
C. Inmon  
Deputy

WILLIAM A LEONARD

TERESA M. PILATOWICZ

v.

SUPERPUMPER INC, et al.

KESHA A HODGE

COMM. ABRAMSON

MINUTE ENTRY

ECB-Courtroom 812

10:30 a.m. This is the time set for an Oral Argument re: Defendant's Motion to Vacate and Set Aside Foreign Judgment. Counsel, Teresa M. Pilatowicz, is present on behalf of Plaintiff, William A. Leonard. Counsel, Kesha A. Hodge, is present on behalf Defendants. No other parties appear.

A record of the proceedings is made digitally in lieu of a court reporter.

Argument is heard.

The Court has reviewed and considered the Motion to Vacate and Set Aside Foreign Judgment filed by the Defendant, The Plaintiff's Opposition to Motion to Vacate and Set Aside Foreign Judgment as well as the Reply in Support of the Motion to Vacate and Set Aside Foreign Judgment.

The Court finds that the Defendant has not proven that the Nevada court lacked subject matter jurisdiction. For those reasons as stated on the record,



SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2019-007691

08/26/2019

**IT IS ORDERED** denying Defendants' Motion to Vacate and Set Aside Foreign Judgment.

10:59 a.m. Matter concludes.

# EXHIBIT E

# EXHIBIT E

1 **3980**

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12 650 White Drive, Ste. 100

13 Las Vegas, Nevada 89119

14 Telephone 725-777-3000

15 *Proposed Attorneys to Trustee*

16 **IN THE SECOND JUDICIAL DISTRICT COURT OF**

17 **THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE**

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

21 Plaintiff,

22 vs.

23 SUPERPUMPER, INC., an Arizona  
24 corporation; EDWARD BAYUK,  
25 individually and as Trustee of the EDWARD  
26 WILLIAM BAYUK LIVING TRUST;  
27 SALVATORE MORABITO, and individual;  
28 and SNOWSHOE PETROLEUM, INC., a  
New York corporation,

Defendants.

CASE NO.: CV13-02663

DEPT. NO.: 1

**AMENDED STIPULATION AND ORDER TO SUBSTITUTE A PARTY PURSUANT TO  
NRCP 17(a)**

Plaintiff William A. Leonard, Jr. ("Leonard"), trustee for the Bankruptcy Estate of Paul Anthony Morabito, by and through his counsel of record, Garman Turner Gordon, LLP, and Defendants Superpumper, Inc.; Edward Bayuk, individually and as Trustee of the Edward

1 William Bayuk Living Trust; Snowshoe Petroleum, Inc.; and Salvatore Morabito (collectively,  
2 "Defendants") by and through their attorneys of record, Robison, Belaustegui, Sharp & Low,  
3 hereby jointly agree and stipulation as follows:<sup>1</sup>

4 1. To remove JH, Inc., Jerry Herbst, and Berry-Hinkley Industries as plaintiff to this  
5 action;

6 2. To substitute Leonard, the trustee for the Bankruptcy Estate of Paul A. Morabito,  
7 as the plaintiff in this action under NRCP 17(a);

8 3. To remove Paul Morabito as a defendant to this action, both individually and as a  
9 Trustee of the Arcadia Living Trust;

10 4. To remove the Arcadia Living Trust as a defendant to this action.

11 **AFFIRMATION**  
12 **Pursuant to NRS 239B.030**

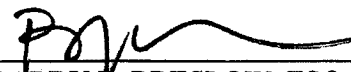
13 The undersigned does hereby affirm that the preceding document does not contain the  
14 social security number of any person.

15 DATED this 1 day of June, 2015.

16 GARMAN TURNER GORDON LLP

ROBISON BELAUSTEGUI SHARP & LOW

17  
18 /s/ Teresa M. Pilatowicz  
19 GERALD E. GORDON, ESQ.  
20 ERIKA PIKE TURNER, ESQ.  
21 TERESA M. PILATOWICZ, ESQ.  
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BARRY L. BRESLOW, ESQ.  
FRANK C. GILMORE, ESQ.  
71 Washington Street  
Reno, Nevada 89503  
Telephone 775-329-3151

25 *Proposed Attorneys for Trustee*

*Attorneys for Defendants*

26 ...

27 <sup>1</sup> Plaintiffs JH, Inc., Jerry Herbst, and Berry-Hinkley Industries and Defendants, including Paul  
28 Morabito, individually and as trustee of the Arcadia Living Trust, previously submitted a  
stipulation to substitute Leonard, which was approved. The purpose of this Amended Stipulation  
is to clarify that all Leonard is substituting if for all three previous plaintiffs, and that the Arcadia  
Living Trust is being removed as a defendant

1 **4030**

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15 *Proposed Attorneys to Trustee*

16 **IN THE SECOND JUDICIAL DISTRICT COURT OF**

17 **THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE**

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

**CASE NO.: CV13-02663**

**DEPT. NO.: 1**

21 Plaintiff,

22 vs.

23 SUPERPUMPER, INC., an Arizona  
24 corporation; EDWARD BAYUK,  
25 individually and as Trustee of the EDWARD  
26 WILLIAM BAYUK LIVING TRUST;  
27 SALVATORE MORABITO, and individual;  
28 and SNOWSHOE PETROLEUM, INC., a  
New York corporation,

Defendants.

**ORDER APPROVING AMENDED STIPULATION TO SUBSTITUTE A PARTY**  
**PURSUANT TO NRCP 17(a)**

Pursuant to the foregoing Stipulation, IT IS SO ORDERED.

Dated this 15<sup>th</sup> day of June, 2015.

  
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 16<sup>th</sup> day of June, 2015, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed the individuals listed herein and/or electronically filed the foregoing document with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following: :

VIA ECF

Barry Breslow, Esq.

Frank Gilmore, Esq.

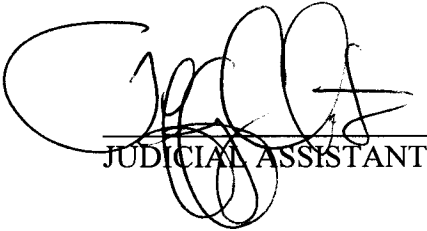
VIA MAIL

Gerald Gordan, Esq.

Teresa Pilotowicz, Esq.

650 White Drive, Ste. 100

Las Vegas, NV 89119



JUDICIAL ASSISTANT

# EXHIBIT F

# EXHIBIT F

1 +

2  
3 JUDITH ANN SCHONLAU

4 CCR #18

5 75 COURT STREET

6 RENO, NEVADA

7  
8 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

9 IN AND FOR THE COUNTY OF WASHOE

10 BEFORE THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

11 -o0o-

12 WILLIAM LEONARD, JR. TRUSTEE, )

)

13 Plaintiff, )

)

14 vs. )

CASE NO. CV13-02663

) DEPARTMENT NO. 4

15 EDWARD WILLIAM BAYUL Living )

Trust, ET AL, )

)

16 Defendants. )

17  
18 TRANSCRIPT OF PROCEEDINGS

19 HEARING

20 MONDAY, JULY 22, 2019, 2:00 P.M.

21 Reno, Nevada

22  
23 Reported By: JUDITH ANN SCHONLAU, CCR #18  
24 NEVADA-CALIFORNIA CERTIFIED; REGISTERED PROFESSIONAL REPORTER  
Computer-aided Transcription



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A P P E A R A N C E S

FOR THE PLAINTIFF:            GARMAN TURNER GORDON

BY:    ERIKA PIKE TURNER, ESQ.

         TERESA M. PILATOWICZ, ESQ.

         JERRY GORDON, ESQ.

         650 WHITE DRIVE, SUITE 100

         LAS VEGAS, NEVADA 89119

FOR THE DEFENDANTS:        MICHAEL C. LEHNERS, ESQ.

         ATTORNEY AT LAW

         429 MARSH AVENUE

         RENO, NEVADA, 89509

         HARTMAN & HARTMAN

BY:    JEFFREY L. HARTMAN, ESQ.

         510 W. PLUMB LANE, SUITE B

         RENO, NEVADA 89509

1 RENO, NEVADA; MONDAY, JULY 22, 2019; 2:00 P.M.

2 -oOo-

3 THE COURT: Thank you, please be seated. So this is  
4 the time for a hearing on an objection to claim an exemption.  
5 Counsel, are you ready to proceed?

6 MS. TURNER: Yes, Your Honor.

7 THE COURT: Have you had an opportunity to review  
8 the Reply?

9 MS. TURNER: Yes.

10 THE COURT: Go ahead.

11 MS. TURNER: So, Your Honorer, Erika Pike Turner and  
12 Teresa Pilatowicz and Jerry Gordon of Garman Turner and Gordon  
13 on behalf of the Plaintiff Trustee. And do you want to make  
14 your appearances?

15 MR. LEHNERS: Sure. Good afternoon, Judge  
16 Steinheimer. We meet again. I am Mike Lehnern. I just filed a  
17 Notice of Association. I am appearing with Jeffrey Hartman.  
18 I am representing Ed Bayuk and the Bayuk Living Trust.

19 MR. HARTMAN: Good afternoon, Your Honor, Jeff  
20 Hartman.

21 MS. TURNER: So, Your Honor, I think I can make  
22 brief arguments. I understand you are in trial but -- no?

23 THE COURT: I was last week.

24 MS. TURNER: We talked to the clerk and she

1 indicated you were in the middle of trial, but that was last  
2 week. So just starting with the Claim of Exemption and the  
3 Amendment to the Edward William Bayuk Living Trust Agreement  
4 that is attached as an exhibit. We have it Recital 3 of the  
5 Amendment to the Edward William Bayuk Living Trust Agreement  
6 provides that the Trust is to be referred to as the Edward  
7 William Bayuk Living Trust. That's it. That is how you refer  
8 to the Trust. And then we have the Declaration of Edward  
9 William Bayuk who says and clarifies the evidence that came in  
10 at trial that there is but one Trust from 1998 through the  
11 time of the 2005 Amendment to the Edward William Bayuk Living  
12 Trust to the present time, and thereafter the intention and  
13 the reality is that all assets have been in the Edward William  
14 Bayuk Living Trust. All assets that were transferred to the  
15 Edward William Bayuk Living Trust. Even though the Deeds or  
16 the testimony may indicate there was a 2008-2009 Trust, there  
17 is but one. There is the Edward William Bayuk Living Trust  
18 which is a judgment debtor which is a judgment debtor. This  
19 is a judgment debtor. We are not dealing with a claim of  
20 exemption by a beneficiary of a trust. This is where the  
21 Trust, itself, is a judgment debtor.

22 So then we go to the allegation that is if the  
23 Edward William Bayuk Living Trust is a judgment debtor as is  
24 the case here, is there protection under NRS Chapter 166 as a

1 Spendthrift Trust was intended by the 2005 Amendment. That is  
2 the allegation, and Your Honor there is no such protection  
3 here. There is no such protection here because, one, the  
4 Trust, itself, is a judgment debtor. Two, NRS 166.170 provides  
5 that assets cannot be fraudulently transferred to a  
6 Spendthrift Trust and provide the protections under the  
7 statutory scheme. And I will address that in a little more  
8 detail in just a moment.

9 But the third and most dispositive fact that is  
10 really indisputable, as a result of the Amendment that is from  
11 2005 that has been attached to the Claim of Exemption and the  
12 Declaration of Mr. Bayuk is under NRS 166.015. Your Honor, in  
13 the Findings of Fact and Conclusions of Law in this case, the  
14 Court found Paragraph 17b of the Findings of Fact, Conclusions  
15 of Law that Edward Bayuk and Paul Morabito moved to California  
16 in September 2010. By virtue of that move, the protections  
17 under NRS Chapter 166, if they ever existed, they were lost at  
18 that point in time. The Amendment to the Edward William Bayuk  
19 Living Trust that is attached as an exhibit has at Recital B,  
20 Edward Bayuk is a Reno resident. At Recital G, the only  
21 co-trustee of the Edward William Bayuk Living Trust, Paul  
22 Morabito, is a resident of Reno. Well, under NRS 166.015 in a  
23 self-settled Spendthrift Trust, any Trustee, there must be at  
24 least one who resides in the State of Nevada. Spendthrift

1 Trusts are against public policy unless abrogated by statute,  
2 and there is no protection of the assets of the Edward William  
3 Bayuk Living Trust except under NRS Chapter 166. Those were  
4 lost in September 2010 if they were ever had.

5 And, Your Honor, in the Reply, counsel for Edward  
6 Bayuk and the Edward William Bayuk Living Trust make the  
7 argument the assets are still protected by virtue of  
8 NRS Chapter 166 without regard to whether or not they are a  
9 resident, without regard to whether or not the Trust, itself  
10 is a judgment debtor here. They say but there is a Statute of  
11 Limitation under NRS Chapter 166 that required that the action  
12 be brought within six months of discovery of the Spendthrift  
13 Trust, a transfer to the Spendthrift Trust or within two years  
14 of the transfer. NRS 166.170 is the statute, and we have shown  
15 in our Opposition that it is an "or", either within two years  
16 of the transfer, or it is within six months of discovery that  
17 the Complaint was actually brought within two years of the  
18 transfer. The transfers were between September and November  
19 2010. There was a tolling agreement from November 30, 2011  
20 through June 17, 2013, and the Complaint was filed December 17  
21 2017. To the extent that there was any statute of limitation  
22 issue, it was waived because that was something that was never  
23 addressed at the time of trial. But even if it was preserved  
24 for some reason or this was a statute opposed to limitation,

1       it was certainly satisfied.

2               In addition, with the six years of discovery, I mean  
3       six months of discovery prong of that statute, again it is an  
4       "or". The first time that the Amendment from 2005 that  
5       purportedly created an irrevocable or Spendthrift Trust under  
6       new law, the first time it was produced was in conjunction  
7       with the Claim of Exemption that brings us here today.

8               There were requests, and we provided the detailed  
9       request for production of Trust Agreement during the  
10      litigation, and Mr. Bayuk chose not to produce this Amendment  
11      for some reason. There was no testimony, there was no document  
12      that was produced at any point in discovery or in trial that  
13      disclosed that Mr. Bayuk claimed or would claim this was an  
14      irrevocable or Spendthrift Trust. At the end of the day, it  
15      is Mr. Bayuk, individually, and as Trustee of the Edward  
16      William Bayuk Living Trust, it is his burden to show that the  
17      assets that are the subject of Writs are subject to exemption.  
18      He's failed to do that under NRS Chapter 166. He's failed to  
19      do that under NRS Chapter 21. And, Your Honor, the elephant  
20      in the room really with respect to both Mr. Morabito and to  
21      Mr. Bayuk is how can you have a successful claim of exemption  
22      without identifying the actual asset you're claiming the  
23      exemption for? Both gentlemen, Mr. Morabito and Mr. Bayuk are  
24      claiming a general exemption for all assets.

1 THE COURT: Do you need some water?

2 MS. TURNER: I know. I am going to try to make it  
3 through.

4 THE COURT: Okay.

5 MS. TURNER: I apologize. I am getting a little bit  
6 scratchy. But, Your Honor, there is no evidence that was  
7 presented by Mr. Bayuk, he's here today, maybe he intends to  
8 today, but there has been no evidence of a particular account  
9 that is the subject of his claim of exemption. It is not  
10 enough to say all accounts and all sums within those accounts  
11 are the subject of my Claim of Exemption. It must be an  
12 account with assets in Nevada or that is otherwise subject to  
13 Nevada law. That would be something that we can analyze a  
14 particular sum and determine whether or not there is an  
15 exemption under Nevada statutes that is available to Mr. Bayuk  
16 or Mr. Morabito. NRS 21.270 provides that the Court can  
17 require a judgment debtor to come and testify before her and  
18 describe the particular assets that they have and have failed  
19 to disclose. Not only that they are claiming an exemption for  
20 but which can be used to pay the judgment. We would ask that,  
21 if the Court thinks there is any colorable claim of exemption,  
22 we don't believe there is, there be that requirement that  
23 there be testimony presented to Your Honor subject to  
24 cross-examination over a particular asset that we can then do

1 the analysis of whether or not a particular statute for  
2 exemption applies.

3 The example that Mr. Morabito provides in the most  
4 general sense is he says there is a wage exemption that  
5 applies under Nevada law. At the same time, he says he's a  
6 citizen of Canada. He doesn't identify any asset in Nevada or  
7 account in Nevada that we could then analyze to see, one, what  
8 are the wages that could possibly be deposited there, how is  
9 it subject to Nevada exemption statutes.

10 I am happy to answer any questions, but I think our  
11 position is very clear, there is no exemption that applies  
12 under any statute.

13 THE COURT: Okay. Thank you.

14 MR. LEHNERS: Good afternoon, Your Honor. Thank you  
15 for allowing me to appear in your courtroom today. I feel  
16 somewhat like a Ph.D student would feel on giving an oral  
17 dissertation. I have been doing exemption law for probably  
18 thirty-two years. We get a lot of it in bankruptcy court.  
19 This is probably one the more complex legal issues I have  
20 seen. I have taken the liberty of making an outline to try to  
21 make it flow how the law works at least in my mind. I would  
22 like to take you through that if I may.

23 I would like to start with the Klabacka versus  
24 Nelson case. I think that case is important because it sets



1       forth the legislative history behind the Nevada self-settled  
2       Spendthrift Trust Act. And Klabacka is a somewhat lengthy  
3       opinion. It does go into the policy behind the Spendthrift  
4       Trusts. In there our Supreme Court said despite the public  
5       policy rationale used in other jurisdictions, Nevada statutes  
6       explicitly protects Spendthrift Trust assets from the personal  
7       obligations of beneficiaries. The legislative History in  
8       Nevada supports this conclusion.

9               It appears that the legislature enacted the  
10       statutory framework allowing Spendthrift Trusts to make Nevada  
11       an attractive place for wealthy individuals to invest their  
12       assets which in turn provides Nevada with the increased estate  
13       and inheritance tax revenues.

14              Now when crafting the language to allow the  
15       Spendthrift Trust statutes the legislature did contemplate the  
16       statutory framework that protected Trust assets from unknown  
17       future creditors as opposed to debts that existed at the time.  
18       The legislative history expressly mentions child support as an  
19       example of a debt that would not be free from an attachment if  
20       known at the time that the Trust was created. However, Trust  
21       assets wouldn't be protected from attachment as to debts  
22       unknown at the time the Trust was created. Presumably this  
23       protection extended to child support and spousal support  
24       obligation unknown at the time. Now this is very important

1 because we know that Nevada exemptions do not hold up to  
2 claims for child support and spousal support. And in 2013 our  
3 legislature proposed changes to Chapter 166 that would have  
4 allowed a spouse or child to collect spousal support and child  
5 support from Trust assets. It was defeated. It did not pass.  
6 As a result, the Spendthrift Trust statutes were not amended.  
7 The rigid scheme makes Nevada self-settled Spendthrift Trust  
8 framework unique. The key difference between Nevada  
9 self-settled Trusts and those of other states is Nevada has  
10 the interest of the child and child support creditors as well  
11 as involuntary tort creditors seemingly in an effort to  
12 attract trust business of those individuals seeking maximum  
13 asset protection.

14 Now with that, there has been a lot of talk about  
15 well, it is kind of like, you know, the three shell monty,  
16 where is the Trust? Mr. Bayuk did form the Trust by an  
17 Amendment in 2005. That is attached as an exhibit to his  
18 Affidavit. And we also know that the Edward Bayuk Living  
19 Trust was created originally in 1998 in Miami, Florida, and  
20 this was a revocable Trust. It was amended by the 2005 Trust  
21 Amendment that I have attached to Mr. Bayuk's Affidavit. And  
22 what it says on Page 1, Item D, this Amendment shall  
23 constitute the entire and exclusive statement of the terms of  
24 the Nevada Trust nullifying all prior and subsuming all

1 versions of the Bayuk Trust. In other words, Judge, what we  
2 have in 2005 is a novation. There was a Trust, identical  
3 name. In the 2005 Amendment a new self-settled Spendthrift  
4 Trust that is irrevocable was created. Like the Phoenix that  
5 arises out of the ashes, this is the Trust.

6 Now I hated Wills and Trusts in law school. I did  
7 everything I could to try to get out of that. But one of the  
8 things that I understand on how these trusts work, you have  
9 got a Spendthrift Trust which will hold all the assets.  
10 Mr. Bayuk signed an Affidavit saying that is what holds all  
11 the assets, the 2005 version of the Trust. But Mr. Bayuk has  
12 to pay bills. He has expenses as the Trustee. He has to  
13 defend the Trust in the litigation. The Trust has been sued,  
14 at least he was been sued as a Trustee. How do we pay these  
15 bills? The answer is simple. You form, spendthrift trusts.  
16 These are revocable Trusts. What happens is let's say because  
17 Mr. Bayuk as a Trustee gets sued, he has to pay a retainer to  
18 say Richard Hollingsworth. Where does that money come from?  
19 It comes out of the 2005 irrevocable self-settled Spendthrift  
20 Trust, and it can go into another Trust, and then that Trust  
21 goes ahead and pays the bill on behalf of the Trustee.

22 And one of the things that I noticed in opposing  
23 counsel's oral argument and written argument is, hey, how come  
24 you're keeping us in the dark on this? Well, I would like to

1 refer Your Honor to Paragraph 35 of the 2005 Amendment which  
2 is attached. And what it says is confidentially of the Trust  
3 Agreement except as otherwise provided in this Trust  
4 Agreement, the Trustee shall not disclose the contents of this  
5 Trust Agreement or the fact of its existence unless required  
6 to do so by law, regulation, legal process, etcetera,  
7 etcetera. In other words, Mr. Bayuk was doing what he was  
8 ordered to do as the Trustee.

9 And in the deposition of Paul Morabito which took  
10 place -- I am getting a little bit ahead of myself. I  
11 apologize. Mr. Morabito was deposed in 2011, March 3rd. He  
12 disclosed not only the existence of this Trust, the Edward  
13 Bayuk Trust, but also a lot of the assets that went into it.  
14 So at the very latest, as of March of 2011 they knew, and that  
15 is relevant because I am going to be discussing the Statute of  
16 Limitation requirement next. They knew. And that was either  
17 the date of the transfer, six months of when you knew. They  
18 knew at that time.

19 THE COURT: But you are arguing that, if I  
20 understand you correctly, Mr. Lehnert, that there is a Trust  
21 that has one name. We amend it and keep the exact same name.  
22 We change the circumstances of it and the requirements of it  
23 drastically, and we say we can't tell anyone that.

24 MR. LEHNERS: Correct.

1           THE COURT:   Isn't that just setting up to defraud  
2   your creditors?   How can you say in the later testimony at a  
3   deposition, he didn't say this is a Spendthrift Trust, he just  
4   used the exact same name, and the only documents proving the  
5   Trust that were disclosed were of a Living Trust that is  
6   revocable.

7           MR. LEHNERS:   Your Honor, what happened, the Living  
8   Trust ceased to exist.

9           THE COURT:   I understand your argument.   But what  
10   your argument is, is that you in fact could have a Living  
11   Trust --

12          MR. LEHNERS:   Yes.

13          THE COURT:   -- in secret, change it to a Spendthrift  
14   Trust and not tell your creditors that you have changed it to  
15   a Spendthrift Trust until after the Statute of Limitations may  
16   have run and a full-blown litigation that took five years  
17   could take place.

18          MR. LEHNERS:   Your Honor, that is a very good point  
19   and I would like to address.   As you know, I am not making an  
20   excuse, but I did come in late to the case.   And it's my  
21   understanding that this Trust, from reading it, did act as a  
22   novation. And I also know, after reading Mr. Morabito's March  
23   3, 2011 deposition, he talked about the Bayuk Trust.   Now I  
24   wasn't there in 2011, but when I read that, I scratched my

1 head. I thought why didn't those guys serve a subpoena on  
2 him. Why didn't they do a request for production for all of  
3 it? Why didn't they depose him? Why didn't they --

4 THE COURT: They did.

5 MR. LEHNERS: The specific 2005 Trust, I mean it was  
6 there. And he was also under an obligation not --

7 THE COURT: But there was discovery in the case I  
8 tried for it to be disclosed.

9 MR. LEHNERS: Well, Your Honor, I don't know how to  
10 respond to that. But let's assume for the sake of argument  
11 that the Trust was here. Does that kill the exemption? The  
12 answer is no it doesn't. And I can tell you why. In the event  
13 that I have hidden something, let's say somebody has a  
14 \$100,000 judgment against me for fraud, fraud of the worst  
15 kind. And they go to me and say Mr. Lehnerns, do you have a  
16 car? No, sir, I don't. I do not have a car. And I lie. I  
17 do have a car, and that car is worth \$15,000. If they find  
18 the car and try to attach it, can I still claim it as exempt?  
19 The answer is yes. And the reason why is the Mackey vs. Chong  
20 case. The answer is yes.

21 THE COURT: But that isn't the case here. Here the  
22 car was specifically taken and placed into a trust that you're  
23 now saying is not executable against. So you have, by fraud,  
24 taken assets and put it into -- transferred it into an asset

1       you're now claiming is not executable upon.

2               MR. LEHNERS: Your Honor, there is a provision, this  
3       actually gets to the next section of the argument I wanted to  
4       make, is Spendthrift Trusts are not exempt from fraudulent  
5       transfers. They are not. We just have a shorter limitation  
6       period for them. It is two years.

7               THE COURT: She just argued that the two-year period  
8       in fact was met because of the tolling.

9               MR. LEHNERS: No, it couldn't have been, and the  
10       reason why is that it is two years from the date of the  
11       transfer the stuff got put in the Trust, 2005, or thereafter  
12       it was and became in the Trust. All the stuff has been in the  
13       2005 Spendthrift Trust. In 2010 there were assets, I believe  
14       property, the Del Mar property, there was certain properties  
15       transferred in. And it is in Mr. Morabito's testimony, and  
16       that stuff got stuck into the Trust in 2010. But, hey, they  
17       didn't know about it allegedly. Then in March of 2011, oh,  
18       there is a Bayuk Trust? What went in it? There is a lot of  
19       copied deposition testimony that shows that stuff went in as  
20       of that time.

21               Now let's talk about the tolling Agreement. I am  
22       very glad that you brought that up, when was the tolling  
23       Agreement exercised or signed? It was signed on November 30,  
24       2011, more than six months after discovery. And one of the

1 most important arguments that I wish to make to this Court,  
2 and it is very important indeed, is how the Statute of  
3 Limitation works under 166.170. You have got two sections  
4 under that statute. You have got Subsection 1. That is our  
5 two year or six month rule; and then you have Subsection 8.  
6 Subsection 8 I found to be very interesting. Notwithstanding  
7 any other provision of law, no action of any kind, including  
8 without limitation an action to enforce a judgment entered by  
9 a court or other body having adjudicative authority may be  
10 brought at law against the trustee of the Spendthrift Trust,,  
11 as of the date an action was brought, an action by a creditor  
12 with respect to the spendthrift trust would be barred pursuant  
13 to this section.

14           So the way I duped this is statute of limitation  
15 plus. In other words, here's what this means. I cited the  
16 statutory construction principles in my brief. All of the  
17 provisions are considered together and nothing is rendered  
18 superfluous. Well, if we had a statute of limitation say  
19 pursuant to a written contract which we know is six years, if  
20 I sue on one year seven, does the court have subject matter  
21 jurisdiction? Of course it does, because affirmative defenses  
22 are exactly that, use them or lose them.

23           But here we have something else. That's why I call  
24 statute of limitation plus. Not only does it give us this two-



1 year six month statute of limitation, the legislature added to  
2 that saying no action can be brought against the trustee  
3 unless it is within the time frame. That is subject matter  
4 jurisdiction. Otherwise, why would it be there? If it says  
5 no action can be brought, then no action can be brought. Our  
6 legislature is the one entity that sets the limits of what the  
7 courts can and can't hear. For example, if I ever elected to  
8 divorce my wife which I pray I never do or she me, we couldn't  
9 file the action in small claims court. It would have to be  
10 filed in the Family Division. So here, if you are going to  
11 sue somebody or try to get an asset of the spendthrift trust  
12 you have to do it within the time period in 166.170, Sub 1.

13 THE COURT: What if you had an interlocutory appeal.  
14 Are you saying that interlocutory appeal automatically tolls  
15 the time to bring an action? Would it toll it?

16 MR. LEHNERS: Your Honor, I am not sure I understand  
17 that question.

18 THE COURT: Let's say it wasn't a voluntary waiver  
19 of time. In other words, you have got voluntarily entering  
20 into an Agreement to toll the time running. You're arguing  
21 that voluntary Agreement is abrogated by legislature you can't  
22 enter into it?

23 MR. LEHNERS: Yes. I will tell you why. Because if  
24 you accept the premise that we have a two year or six month

1 look back, then we have -- You can't bring this action, then a  
2 month or two after the passage of the six months, he goes and  
3 signs a tolling Agreement, you can't consent to subject matter  
4 jurisdiction even if he wanted to. Even if it is unfair, and  
5 inequitable to Trustee Leonard, you can't consent to it. It is  
6 impossible to do.

7 THE COURT: Isn't this language, doesn't it parrot  
8 the language in the five-year rule?

9 MR. LEHNERS: Ae you talking about 41e?

10 THE COURT: Yes.

11 MR. LEHNERS: No, Your Honor, I don't think it does,  
12 because 41e says you have to bring a matter to trial within  
13 five years or else the Court shall dismiss it. It can do  
14 whatever terms it wants. But what it also says is you can  
15 move to extend it. I know I have done that before Your Honor  
16 in one of the cases if I took the case over. I said eek, I  
17 can't get it in before five years. I filed a motion with our  
18 trial starting on one day then it is going to get continued.  
19 But here it is absolute. NRS 41e, you can file a motion to  
20 extend it before it expires. There is no such provision in  
21 166.170. So I don't believe, with all due respect, the  
22 analogy would apply. On account of the fact it says no action  
23 can be brought against the Trustee unless it is within the  
24 time period. The absolute phrasing of that language is

1 mandatory which is why I do believe it is subject matter  
2 jurisdiction.

3 Now, Your Honor, that is not the only jurisdictional  
4 argument that we have here.

5 THE COURT: Okay. I have a question though. In  
6 this case, the Trust was sued. It is a party.

7 MR. LEHNERS: It was not. That is where I was  
8 getting to. And the reason why, Your Honor, Mr. Bayuk was  
9 sued as the Trustee. That is not how you sue one of these  
10 things. And if I may skip ahead, I will quickly try to  
11 explain it unless you have questions of me first.

12 THE COURT: No, that is fine. Okay, explain to me  
13 why the Trust is not a party.

14 MR. LEHNERS: Okay. If I could just beg your  
15 indulgence. I even tabbed it. I should be able to find this.  
16 Found it. Your Honor, I would like to go talk now about  
17 NRS 166.120. What this is is it talks about the restraint on  
18 alienation and exclusive jurisdiction of the court. This  
19 basically says that Subsection 1 of 120, it says that the  
20 assets, any interest of the beneficiary under the Trust may  
21 not be assigned by operation of law or process. Shall never  
22 be assigned, alienated, diminished or impaired by any  
23 alienation, transfer or seizure so as to cut off or diminish  
24 the right of payment by the Trustee to the beneficiary may

1       only be made to and for the benefit of the beneficiary. And  
2       here is what is important: Any action -- because remember  
3       this Trust has beneficiaries. It is his stepmother who is a  
4       beneficiary of the Trust and the Humane Society as an  
5       alternative beneficiary. But it says any action to determine  
6       if the beneficiary rights are subject to execution to levy or  
7       attachment. And, Your Honor, I am reading from Subsection 2  
8       of 166.120. Must be made only in a proceeding commenced  
9       pursuant to 153 of the NRS if it is a testamentary Trust or  
10      NRS 164.010 if it is a non-testamentary Trust. The court has  
11      exclusive jurisdiction over any proceeding to this action. So  
12      Klabacka recognized this. The ultimate holding in Klabacka  
13      was one of the parties said you can't do this in Family Court.  
14      You can't come in here in Family Court and mess with the Trust  
15      You have to do an in rem action under 164.010 in probate  
16      court. And the Family Court says this isn't about trusts, it  
17      is about divorce, and we do have jurisdiction over it.  
18      Klabacka is distinguishable from that aspect. If you want to  
19      sue a Trustee, you better be a beneficiary and allege a breach  
20      of some sort of fiduciary duty. We don't have that here  
21      today. To sue Mr. Bayuk, as Trustee of the Trust does not  
22      bring in the Trust at all. Any time the execution--

23               THE COURT: That would have been a defense to if you  
24      think that the Plaintiff in the underlining action did not

1 have jurisdiction to bring the action against the Trust by  
2 suing Mr. Bayuk, you had to raise that in that litigation.  
3 You can't sit on your rights, as we know, the Supreme Court  
4 has told us and wait until a judgment is entered to raise that  
5 objection.

6 MR. LEHNERS: It has, Your Honor. And again, you  
7 make absolute perfect sense. It didn't get raised. Sat on  
8 their rights. 164.010 is jurisdictional. I mean --

9 THE COURT: Why would it be anymore jurisdictional  
10 than the Family Court? Family Court had jurisdiction over the  
11 divorce. This court had jurisdiction over the fraud.

12 MR. LEHNERS: Well, on account of the fact nobody  
13 had in rem jurisdiction over the Trust, itself. This was a  
14 divorce that had to do with both parties. You know, the  
15 execution and attachment of Trust assets I do not believe was  
16 at issue with Klabacka. I even have a crib note to make sure  
17 I don't misspeak on the record. Oh, yes. We conclude that  
18 this case was not initiated for the purpose of enforcing or  
19 determining a spendthrift beneficiary's rights under NRS  
20 164.120 sub 2, that's the statute I just mentioned, or  
21 determining the internal affairs of a a non-testamentary Trust  
22 under 164.015. But rather the case was initiated as a divorce  
23 proceeding.

24 THE COURT: So why is it any different? The action

1       wasn't brought to determine the rights of the beneficiary to  
2       the Trust assets. It was brought in fraud.

3               MR. LEHNERS: Well, Your Honor, maybe not directly,  
4       but clearly, if the assets of the spendthrift trust are  
5       gobbled up, it is going to affect the rights of the  
6       beneficiary. And Mr. Bayuk, under the Trust, has a duty to  
7       stop that. And again, the Trust is a thing, so it is an in  
8       rem action not an in personam action. You don't bring the  
9       Trust in by suing the Trustee. You bring the Trust in by  
10      filing an action to determine whether or not there has been a  
11      fraud. If there has, the Court can do something about it.  
12      But it is restricted procedurally. I understand and it is very  
13      difficult for me to argue to you. You were the trial Judge.  
14      I was not. I have never even had a jury trial. But I went  
15      through a lot of history on this, and I am somewhat of a  
16      Johnny come lately, and it is difficult for me to argue why  
17      they didn't you raise it then, Mr. Lehnrs. Well, because it  
18      is jurisdictional. The law states I get to raise it at any  
19      time, and I will raise it now because I was brought in on this  
20      case to represent Mr. Bayuk, and I have to make that argument.  
21      And I also believe in the argument. So again --

22               THE COURT: Well it doesn't exempt Mr. Bayuk.

23               MR. LEHNERS: Well, Mr. Bayuk is a judgment debtor.

24               THE COURT: Yes.

1           MR. LEHNERS: He is. And to the extent his assets  
2 are held by the Spendthrift Trust, they can't get it. He's  
3 the settlor. You cannot get the assets in the Spendthrift  
4 Trust. Now Mr. Bayuk, as a Trustee, and there is provision in  
5 the Trust that he has the right to compensate himself.  
6 Paragraph 31, the Trustee shall be reimbursed a reasonable  
7 expenses actually and properly incurred by him or her in the  
8 administration of the Trust. Even if the Trustee serves as  
9 director, officer, partner of a partnership in which the  
10 Nevada Trust has as an interest in he still gets paid. And on  
11 top of that the Trustee fees get to be paid. That is in  
12 Paragraph 95. There is provision in here where he can go hire  
13 attorneys, which he has done, to represent and defend the  
14 Trust's interests. Those are the assets that Trustee Leonard  
15 seeks to attach.

16           THE COURT: He's hired lawyers using the Trust  
17 assets to represent his personal interests.

18           MR. LEHNERS: Well, Your Honor, personal interests  
19 or the Trust's interests, I don't think they are divisible.

20           THE COURT: They have to be if the Trust is a  
21 separate entity. If they are not separate entities, the Trust  
22 isn't even in existence.

23           MR. LEHNERS: Well, Your Honor, that may be true.  
24 If Mr. Bayuk has a bank account in his name, and that is one

1 of the very important things I will get to in a minute,  
2 mentioning of the assets. Let's say for the sake of argument  
3 Mr. Bayuk has an bank account. It is his bank account, and  
4 they want to go attach it. Well, fine, they can go do that.  
5 And maybe he could claim, well what is the source of the  
6 money, Mr. Bayuk. Oh, well, it came from the Spendthrift  
7 Trust. Well maybe we can use in re Christenson which says if  
8 you trace an exempt asset to a bank account, you can exempt  
9 that. Maybe that would work. Or maybe he could say, you  
10 know, I am really working hard to try to manage this Trust. I  
11 think that is a wage and exempt under NRS 21.010 Sub 1, Sub g.  
12 So you can have twenty-five percent of it and I get the rest.  
13 That is not what we have here. Think of the Spendthrift  
14 Trust, this Trust is really a golden goose. When the golden  
15 goose lays the golden egg, wherever the egg goes, if it goes  
16 into Bayuk's personal account subject to attachment, no  
17 argument here. I am saying you can't cut the goose open and  
18 take the eggs out of it.

19 Speaking of the golden goose and eggs and all that,  
20 let's talk about the argument we didn't mention what assets  
21 that we are trying to exempt. And I really do want to address  
22 that. As Exhibit 1 to the Affidavit of Mr. Bayuk, I attached  
23 a copy of the Writs. The Writs don't tell me anything. They  
24 are addressed to the Las Vegas Constable. One of them is.



1 The other one is addressed to the Las Vegas Sheriff. Go  
2 forward and seize assets. What assets? I read the thing five  
3 times. Do you know how I found out what they were going  
4 after? I had my staff call the Constable and Sheriff's  
5 office. Then we were told that they want the surplus money, if  
6 any, in Mr. Hartman's Trust account and Holly Driggs' Trust  
7 account, and that was about it. So we had to play a guessing  
8 game. We had to call and find out what are they after? It is  
9 their job, when you issue a Writ of Execution, because I have  
10 done thousands of them. You have to say, go to U.S. Bank,  
11 anything with Mr. Smith's name on it, attach. Go get the 1965  
12 Prius located over here. Go get the interest in this account.  
13 They have to specify.

14 THE COURT: Yes, but for whose benefit do they have  
15 to specify?

16 MR. LEHNERS: Well, Your Honor for the judgment  
17 debtor's benefit. Otherwise, how can they file a claim of  
18 exemption where they fail to specify what they are going  
19 after? If they want to haul-- Opposing counsel did say we  
20 have the right to haul Mr. Bayuk in and ask him questions  
21 under NRS 21.270. What she did not add is you can only do it  
22 in the county in which the debtor resides. So they can't do  
23 that. What they have to do is figure out what asset they want,  
24 and specify where it is and attach it, or, if they want to

1       examine Mr. Bayuk as to what assets he has versus what the  
2       Spendthrift Trust has, then they get to go to Orange County,  
3       California and conduct a judgment debtor exam down there under  
4       the Foreign Judgment Act. That hasn't happened. Well they've  
5       gone to Orogen County and the have domesticated it, but there  
6       is no judgment debtor exam yet.

7               So the point is, and this goes to Salvatore  
8       Morabito's claim, we're guessing. I mean the Salvatore  
9       Morabito, I didn't know what they are trying to get. So I  
10      threw up the wild card exemption and I threw up the gee  
11      exemption because that is all I could think of.

12             The reason I filed it for Mr. Morabito, we have done  
13      this before. I have a case where we have executed on a Wells  
14      Fargo account branch in Nevada, they will look up stuff in  
15      California and we have to turn it loose. That happens more  
16      often than you think. What I didn't want to have happen is, I  
17      don't know where Mr. Morabito keeps his bank accounts, he  
18      hasn't really told me, but if any of them are locked up by  
19      executing on a branch here, it is not proper to lock them up  
20      outside the State. That is the only reason I filed  
21      Mr. Morabito's exemption.

22             In any event, getting to the Spendthrift Trust, with  
23      respect to the restraint of alienation, with respect to the  
24      mandatory procedure for filing an in rem action against the

1 Trust, with respect to the two years and the six months and  
2 their knowledge as of March 3rd, 2011, and in acknowledgment  
3 of NRS 166.170, saying you can't bring an action unless it is  
4 within the time period of Subsection 1, I would argue that  
5 there is no subject matter jurisdiction, and it can be raised  
6 at any time. I apologize for any, you know, waiver argument.  
7 I know this Court works very, very hard. You have put a lot  
8 of time into trying this case and rendering your decision. I  
9 read the competing statements of facts and conclusions of law.  
10 It was a very difficult decision, and here comes somebody  
11 trying to upset the whole apple card. Judge, I am doing it  
12 based on jurisdiction.

13 THE COURT: Okay. So let's assume your argument is  
14 their failure to disclose that, isn't that a new fraud?

15 MR. LEHNERS: Their failure to disclose the Trust?

16 THE COURT: Yes. If they truly did not have the  
17 wherewithal to file an exemption, basically didn't they commit  
18 a fraud by not telling anybody they didn't have any authority  
19 to do it or give them the information so they could look it  
20 up?

21 MR. LEHNERS: Well, I cannot concede my client  
22 committed a fraud. What I can do, I can say let's assume so  
23 for the sake of argument, well, what does that mean he  
24 committed a fraud? That means he could be sued again for that

1 fraud. They could seek punitive damages for that, or they  
2 could attempt to impose the remedy for fraud which is the  
3 constructive Trust. However, this is the second important  
4 holding of Klabacka versus Nelson. They tried to put a  
5 constructive Trust which is a remedy. It is not a Trust in  
6 itself. It is a remedy. Mackey vs. Chong goes over how it is  
7 a remedy to unjust enrichment. They refused to apply it to a  
8 Spendthrift Trust. Even assuming for sake of argument he  
9 committed a fraud, Klabacka is a controlling case. And the  
10 remedy, the constructive trust getting the assets does not  
11 apply. The reason is all set forth in the legislative  
12 history. He set this thing up in 2005 long before you ever  
13 heard of Terrible Herbst. Years have past. They are the  
14 future creditor. The legislative history, talks about that.  
15 And this Spendthrift Trust Act was written so well and so  
16 powerfully to protect Nevada residents property that they made  
17 it jurisdictional just so stuff like this can't happen.  
18 Lawyers make mistakes every day. I probably made a few today  
19 so far. I don't want to think about it. I can imagine what  
20 it is like doing a week long, two week, three week long trial.  
21 There is a lot of mistakes. Humans make mistakes. People are  
22 human. Humans make mistakes. That is why we have waiver and  
23 estoppel. But then what trumps all of that is subject matter  
24 jurisdiction.

1           THE COURT: What about their argument you lost, the  
2 jurisdictional issue is lost when the trustees both left the  
3 State of Nevada?

4           MR. LEHNERS: I will be glad to address that, Your  
5 Honor, because again, as Paul Harvey used to say, the rest of  
6 the story.

7           THE COURT: Yes, but we never heard the end of the  
8 Paul Harvey story until a long time later.

9           MR. LEHNERS: Counsel referred to NRS 166.015. It  
10 says: Unless the writing declares to the contrary, expressly,  
11 this Chapter governs the construction, operation, and  
12 enforcement in this state of all spendthrift TRUSTS if: And  
13 then it says C, the declared domicile of the creator of a  
14 Spendthrift Trust affecting the personal property is in this  
15 state. Well we have got A through D, and it is in the  
16 disjunctive so any one will fit because it says 'or' after C.  
17 A says all or part of the land, rents, issues or profits  
18 affected are in this state. The Trust owns a burial plot in  
19 Washoe County. So we fall under A.

20           THE COURT: So really, you think public policy of  
21 the legislature would support an analysis by the Court that  
22 because he has a burial plot and he's left the State, no  
23 trustee in this state, we're going to let residents of another  
24 state, because they have a burial plot, commit a fraud on the

1 residents of our state which Terrible Herbst did or the  
2 Trustee?

3 MR. LEHNERS: Your Honor, there is a difference in  
4 time. One looks to what happened when the Trust was created.  
5 NRS 166.015 says the requirements. It goes over the  
6 requirements. How do you make one of these things.

7 THE COURT: No, I understand the requirements at the  
8 time the trust is created, but for the same reason that big  
9 trusts are moving into Nevada and moving into Nevada with a  
10 Trustee located in Nevada is in order to get the protections  
11 of the Nevada Trust law. For those same reasons, they're  
12 moving in, when they move out they lose the protections of the  
13 very favorable Nevada Trust law which is very favorable, not  
14 just here, but we have lots of changes that were made in 2013.

15 MR. LEHNERS: Why does the statute say it governs  
16 the construction, operation, or enforcement in this State of  
17 all spendthrift Trusts created in or outside the State so long  
18 as part of the property affected is in the State and the  
19 declared domicile of the creator of the Spendthrift Trust  
20 affected is in this state? At that time he was. Now again  
21 exemptions, if I move to California, Judge, I give up a lot of  
22 exemptions. I can't claim my Nevada exemptions in California.  
23 I just can't. But this is not really an exemption, because  
24 the Spendthrift Trust is dual. You have got NRS 21.080, that

1 is the exemption statute. That's where you find all of them.  
2 That is the exemption statute vis-à-vis the beneficiary of the  
3 Trust. In other words, I'm the beneficiary. He's the  
4 creditor. And they are trying to get it by Spendthrift Trust.  
5 I flop out NRS 21.080 which says you can't do that.

6 Now Mr. Bayuk is not the beneficiary of the Trust.  
7 Why do we raise 21.080? Well he's bound to it because of the  
8 beneficiary of the Trust. What we really have, it is not as  
9 much an exemption, Judge, as it is an anti-alienation and  
10 here's the jurisdiction and here's the Statute of Limitations.

11 THE COURT: So a Trust is domiciled where the  
12 Trustee is. And the case law is very clear that the case law  
13 you apply to the administration or review of the Trust is  
14 based on where the Trust is domiciled. So right now this Trust  
15 is not domiciled in Nevada. It is domiciled in California  
16 because the only Trustee of the Trust lives in California.

17 MR. LEHNERS: But, Your Honor, if it is an in rem  
18 action that must be brought, you would look to where the Trust  
19 was initially created.

20 THE COURT: No. No. Not if the trust comes to  
21 Nevada. You create it in Delaware and bring it to Nevada, you  
22 get to use Nevada law. I tried those in rem actions. So the  
23 Nevada law applies no matter where it was created. As long as  
24 I brought it to Nevada, you have a Trustee living in Nevada,

1       it is a Nevada Trust. Now it doesn't matter if the dollars  
2       are located here. You can be in multi-national banks or a  
3       local bank in Indiana. If the Trustee is located in Nevada, it  
4       is a Nevada Trust.

5               MR. LEHNERS: In reading this and the legislature  
6       history behind it, I don't think the exemption -- and I didn't  
7       see anything in the case law. I read all the statutes and  
8       annotations -- I didn't see anything where you would lose it.  
9       It is not an exemption. It is anti-alienation, really. I  
10      didn't see where that was waived or lost if you cease being a  
11      Nevada resident. Even if I accept your argument as true, you  
12      are the Judge and I will --

13             THE COURT: I don't know it is true.

14             MR. LEHNERS: We still have the fact that some of  
15      the property that is owned by that Trust is here in Nevada,  
16      and that is enough to confer the domicile requirement under  
17      166.015 because remember 166.015 gives us four disjunctive  
18      methods for a Trust to be domiciled here, and there is a  
19      burial plot. I mean it doesn't say you have to have most of  
20      it, twenty-five percent, a third of it. It just says all or  
21      part. Part means part. It is a small part, but it is here and  
22      always remained here. It is a burial plot. So even if  
23      Mr. Bayuk were deemed to have waived any --

24             THE COURT: So you are saying the Spendthrift Trust



1 owns the asset of the Trustee's burial plot because he's not a  
2 beneficiary?

3 MR. LEHNERS: No, it owns a burial plot for him. He  
4 has a burial plot in Nevada. It owns it. A Trust can hold  
5 property, and other people can have rights in that property  
6 without being a beneficiary. Why not? They can own  
7 businesses. That is in the Trust Agreement. And then they  
8 will have other shareholders as well. So the point is I do not  
9 believe that is going to be waived if he goes to a different  
10 state as I would waive my automobile exemption if I went to  
11 California. I can't use Nevada's anymore. But at the same  
12 time, the Trust is here. If you are going to go after it, you  
13 have to do it within the time limit. It is jurisdiction, and  
14 the procedure is jurisdictional. It has to be an in rem  
15 action. In other words, Judge, it is easy being a Monday  
16 morning quarterback. I do it all the time with the San  
17 Francisco giants. I wasn't there. I wasn't in the trenches.  
18 And I think, you know, for the record, all attorneys did the  
19 best that they could, but in coming back and going through the  
20 record on this, I saw some things, and I do think that the  
21 jurisdiction cannot be waived, and I think it is absolute.  
22 And it's not really -- It is an irrevocable Trust. Whose  
23 stuff is it? It is belonging to the Trust for the benefit of  
24 his stepmother. He can never, ever, ever, ever revoke that.

1           THE COURT: Right. We are not talking about -- We  
2 are not talking about assets that the Trust legitimately  
3 secured. The Trust secured assets by fraud. That was the  
4 finding.

5           MR. LEHNERS: I read the finding.

6           THE COURT: That is a fraudulent transfer into a  
7 Spendthrift Trust that failed to be disclosed.

8           MR. LEHNERS: And this action was brought under  
9 Chapter 112 which is Nevada's Uniform Fraudulent Transfer Act.  
10 It should have been brought within two years or six months of  
11 discovery, at the latest September 3rd, 2011 under 164.010. It  
12 wasn't. It is jurisdictional.

13          THE COURT: I have jurisdiction whether it is 164 or  
14 112, you are not in a different court. It is not like I can't  
15 put on a hat. I have jurisdiction on every statute in the  
16 State of Nevada.

17          MR. LEHNERS: But we do have to follow what was pled  
18 in the Complaint. I didn't see 164 in the Complain and I  
19 didn't see it in the findings either. I read it.

20          THE COURT: You don't have to state the statute in  
21 order to have jurisdiction.

22          MR. LEHNERS: Well, again --

23          THE COURT: I am not saying it was in the Judgment.  
24 It wasn't. There was no argument presented in the trial. But

1 when you talk about jurisdiction, this Court has the  
2 jurisdiction whether you allege it under 164 or 112, does not  
3 make a difference.

4 MR. LEHNERS: Your Honor, that is what the issue was  
5 in the Family Court in Klabacka.

6 THE COURT: Klabacka was even before the Supreme  
7 Court determined the Family Court had co-existence  
8 jurisdiction.

9 MR. LEHNERS: I will defer to you on all issues of  
10 family law.

11 THE COURT: It used to be that was considered a  
12 separate jurisdiction and the Family Court judges didn't have  
13 jurisdiction over any general jurisdiction cases.

14 MR. LEHNERS: But the one thing I think is important  
15 to point out is the difference in personam and in rem.  
16 Mr. Bayuk, we know that he is the judgment debtor,  
17 individually on the fraudulent conveyance action and in his  
18 capacity as the Trustee. But the Trust is a thing, and an in  
19 rem action had to have been brought which wasn't. He could  
20 have brought it had it been properly pled and filed and timely  
21 filed but it wasn't.

22 THE COURT: Of course, their argument is it was not  
23 disclosed.

24 MR. LEHNERS: Well, Judge, of the things that

1       166.170.1 says, it not only says discover within six months --

2               THE COURT: Mr. Bayuk, it really isn't appropriate  
3       for you to be doing what you're doing.

4               THE DEFENDANT: Sorry.

5               MR. LEHNERS: Your Honor he's getting to the point I  
6       was going to get to. In addition between knew or should have  
7       known, we have a second part of 166.170, Sub 1 you are  
8       imparted with knowledge on the public land records. All of  
9       the transfers of these properties are in the public land  
10      records. We are talking about real property here. What he's  
11      pointing out is that a bunch of stuff was transferred in I  
12      guess between 2007 and 2010, but the Deeds would be in the  
13      public record and that imparts notice period.

14              THE COURT: But the Trust was never disclosed.

15              MR. LEHNERS: Well, Your Honor, if the Trust owns  
16      the asset it has been disclosed, because what the statute  
17      says, I would like to read it verbatim so I don't make an  
18      error.

19              THE COURT: Well wait a minute. You are saying you  
20      could disclose a revocable Living Trust and give the  
21      parameters of that revocable Living Trust, secretly create an  
22      irrevocable Spendthrift Trust using the exact same name and  
23      never disclose the content of that and therefore protect your  
24      assets?

1           MR. LEHNERS: Your Honor, that is not what I am  
2 saying at all. What, I am saying is, and let's go with  
3 exactly what the statute says. This is where a person becomes  
4 a creditor after the transfer is made which I believe is what  
5 would have here.

6           THE COURT: Why? Because it is a judgment debtor?

7           MR. LEHNERS: Well I think he became a creditor when  
8 he sued in 2007. I believe that is the earliest he could have  
9 become a creditor of Terrible Herbst.

10          THE COURT: Well, it is the bankruptcy Trustee.

11          MR. LEHNERS: Well the bankruptcy Trustee stepped in  
12 in place instead. The Herbst creditors started this with the  
13 lawsuit of 2007. Then there is a Judgment. Then there is a  
14 Confession of Judgment, and then we had the Superpumper case  
15 which is tried in your court.

16          THE COURT: We are talking about the case from Judge  
17 Adams.

18          MR. LEHNERS: Right. So my point is is that is the  
19 earliest, the farthest we could go back, and that is still two  
20 years after he did the 2005 Amendment November 2005. And  
21 here's what it does say: A person shall be deemed to have  
22 discovered the transfer at the time a public record is made of  
23 the transfer including without limitation the conveyance of  
24 real property that is recorded in the office of the County

1 Recorder where the property is located. Okay. Your point is we  
2 hid the fact, allegedly, that we did not disclose it was a  
3 Spendthrift Trust. We disclosed the name of the Trust is  
4 located on the Deed, and that is all that is required.

5 THE COURT: But you already disclosed with that name  
6 of the Trust, you disclosed the contents of it. You disclosed  
7 the content of the Trust, what existed and what it was with  
8 that name. Then you secretly, as you say, created a novation  
9 by the Amendment in 2005, and then never provided, using the  
10 exact same name, then you never provided discovery as to what  
11 that new Trust even though it says it is a Living Trust, you  
12 never gave any -- so on its name it didn't give anybody notice  
13 of this Amendment and the content of it.

14 MR. LEHNERS: Well, Your Honor, I do know that the  
15 Living Trust was created in '98. It ceased to exist in  
16 November of 2005 and now we have the self-settled Spendthrift  
17 Trust in place. We have that.

18 THE COURT: I understand that.

19 MR. LEHNERS: It doesn't help the names are the  
20 same. It does make it somewhat confusing. I will leave it to  
21 the Trust lawyers to do what Trust lawyers do. But then some  
22 spendthrift trusts were created with the same name. But what  
23 you have in 2005, he didn't owe anybody anything. He had no  
24 creditors. When a creditor comes into being in 2007, all right

1 then it is two years after the transfer or six months, and  
2 they knew about the Trust. They knew there was a Trust out  
3 there. And it was also a matter of public record the name of  
4 Trust that owned it. They knew it. What they didn't do is  
5 follow up. Had I been --

6 THE COURT: Let's assume they did. Let's assume  
7 there was litigation with regard to the content of the Trust  
8 that was not disclosed by the Trustee, and you argued a few  
9 minutes ago that he had an obligation not to disclose it.

10 MR. LEHNERS: Mr. Bayuk.

11 THE COURT: So how could you discover it?

12 MR. LEHNERS: By court order. You discover it, you  
13 produce it or you go to jail.

14 THE COURT: If you don't know their not producing it  
15 how can you get an order like that?

16 MR. LEHNER: Well because in the deposition they talk  
17 about the El Camino Del Mar property being transferred to the  
18 Bayuk Trust. Mr. Morabito testified to that.

19 THE COURT: Right.

20 MR. LEHNERS: They knew, well there is a Bayuk Trust  
21 out there.

22 THE COURT: They knew there was a Bayuk Trust?

23 MR. LEHNERS: Well they also knew the address and  
24 county of the Del Mar property. Dig out the public record,

1 look at that. Say I want a copy of the Trust Agreement that  
2 owns this property.

3 THE COURT: I am saying I assume the request for the  
4 copy of the Trust Agreement was made and discovered.

5 MR. LEHNERS: Your Honor, I can't speak to that. I  
6 don't have that in the record. I just can't speak to that.  
7 What I am telling you is if somebody says hey give me a copy  
8 of the Trust Agreement or they send something over, it is  
9 like, well, I am under an obligation not to disclose it as a  
10 Trustee. I've been a Trustee of a Trust once. Your  
11 obligation is to that beneficiary, not the creditors.

12 THE COURT: Well certainly if the request for  
13 production was responded to that I cannot give you that  
14 information, then the person would be on notice to go follow  
15 up and get a court order to produce. When you say here it is  
16 and what you get isn't the right one, how can you then claim  
17 protection?

18 MR. LEHNERS: Well what you do is you make a  
19 privilege call, you know, this exists.

20 THE COURT: I understand how you can do it. What if  
21 you say here it is and you don't give the right one?

22 MR. LEHNERS: Well, it looks like trusts can all  
23 have the same name. I can't explain exactly why.

24 THE COURT: I am not discussing anything about the



1 name. But assuming that you said you have an obligation to ask  
2 for it and you asked for it and you weren't given it, it was  
3 I'm not giving it to you because I can't. It was here you go  
4 and it was the Trust that was no longer in existence based on  
5 your argument. What is remedy then?

6 MR. LEHNERS: Your Honor, the Trust that is no  
7 longer in existence and the Trust that replaced it are the  
8 same names. It is a novation. One replaced the other.

9 THE COURT: I understand your argument. What if he  
10 didn't produce it.

11 MR. LEHNERS: Well, the discovery request should  
12 have been as follows: Here's the Deed, it says the Edward  
13 Bayuk Living Trust. I want the Trust Agreement, all  
14 amendments with respect to the Trust that owns this property.  
15 Give me that. That is what should have happened.

16 THE COURT: I am just asking you to assume that was  
17 made.

18 MR. LEHNERS: Well, if they didn't give it, then  
19 they are going to be under the contempt powers of this Court.

20 THE COURT: But not until someone figures out that  
21 they didn't give it, because they gave the wrong thing.

22 MR. LEHNERS: Well, Your Honor, what we don't have  
23 here is actually who did know what. Let's say that we accept  
24 your argument. The recordation of a public record is enough to

1 start the six month statute. It is statutory. And maybe,  
2 even if there were, for the sake of argument only, maybe if  
3 there was a little bit of misdirection, and I am not saying  
4 there was, and opposing counsel and what I have seen did an  
5 excellent job, but my point is this: In the event that there  
6 was some misdirection, the statute says you have got six  
7 months as long as something has been recorded with that Trust  
8 name and we know that there was.

9 THE COURT: Okay. Judge, thank you for hearing me  
10 today.

11 THE COURT: Oh, you're welcome. That's it?

12 MR. LEHNERS: Unless you have more questions for me.

13 THE COURT: No, no. I didn't want to interrupt you  
14 so much you didn't finish.

15 MR. LEHNERS: Before I close, I would like to confer  
16 with my client. I may need a little bit of time. Thank you,  
17 Judge.

18 THE COURT: You're welcome.

19 MR. LEHNERS: I am going to probably say a few  
20 closing remarks after I confer.

21 Judge, did you want me to make closing comments now?

22 THE COURT: Sure.

23 MR. LEHNERS: Because I do want to ask a couple of  
24 questions of my client.

1 THE COURT: Do you want to take a short recess?

2 MR. LEHNERS: If I could.

3 THE COURT: Court's in recess.

4 (Short recess taken.)

5 MR. LEHNERS: Judge, I have no further submission.

6 THE COURT: Okay. Thank you, Mr. Lehnern. Counsel.

7 MS. TURNER: Thank you Your Honor. I am going to try  
8 to unpack the argument of counsel and start with the subject  
9 matter jurisdiction argument, that this Court somehow lacks  
10 subject matter jurisdiction. A review of Chapter NRS 166 and  
11 the Klabacka case do not support counsel's argument as he has  
12 set forth. NRS 166.170 provides specifically that a creditor  
13 does have the right to bring an action against a Spendthrift  
14 Trust, if it is a Spendthrift Trust, so long as the person is  
15 a creditor, a transfer has been made to that Trust, and the  
16 action is commenced within two years after the transfer is  
17 made or six months after the person discovers or reasonably  
18 should have discovered the transfer.

19 Your Honor, for the purpose of discussing this  
20 particular point, in Klabacka, the Supreme Court said that the  
21 Family Court had subject matter jurisdiction without question.  
22 And here, when the only claim in the case was under the  
23 Fraudulent Transfer Act, and a creditor is bringing the claim  
24 challenging the transfer to Edward William Bayuk Living Trust,

1       there could be no question that under NRS 166.170 Your Honor  
2       would determine whether or not we had a valid claim against  
3       the Edward William Bayuk Living Trust.

4               Now the question then becomes was the claim brought  
5       within the two years or six months of discovery whichever is  
6       later. And I did not hear any argument that made sense on the  
7       tolling agreements, that the tolling agreements applied and  
8       there could be an extension of or a tolling of the two year  
9       statute period.

10              As Your Honor brought up, there are waivers of  
11       Statutes of Limitation and at the five year rule by  
12       stipulation. Why wouldn't a tolling Agreement also extend?  
13       But I don't even think we need to get too bogged down in that  
14       position because, one, we were not on notice of a Spendthrift  
15       Trust existing and being the transferee of the properties,  
16       whether cash or the real property until this month. When you  
17       look at the Edward William Bayuk deposition, and counsel was  
18       clever in what he cited to, but our Exhibit 4 to our objection  
19       to the Claim for Exemption contained the September 28, 2015  
20       deposition of Mr. Bayuk, and the question was posed:

21              "Q Do you know what kind of Trust it is?

22              "A It is just a living -- it is the Edward -- it is  
23       listed as Edward William Bayuk Living Trust.

24              "Q What's your understanding?

1           "A   Edward William Bayuk Living Trust.

2           "Q   So it is a Living Trust?

3           "A   Correct.

4           "Q   and what's your understanding of what a Living  
5 Trust is?"

6                   And he goes on and describes how it is to address  
7 his demise, a probate. Paul Morabito's deposition that is  
8 attached I believe to the Reply also refers to a probate  
9 purpose which would be a revocable Trust. There is never a  
10 disclosure, not in responses to requests for production, not  
11 in deposition and not in trial testimony that would ever give  
12 rise to or in the public documents themselves, the Deeds that  
13 were exhibits at trial, that referred to only the Edward  
14 William Bayuk Living Trust or Edward William Bayuk Living  
15 Trust with dates other than 2005. The 2008 and the 2009 dates  
16 don't correlate with anything. There was no information that  
17 would give rise to an inquiry is this a Spendthrift Trust that  
18 we are talking about.

19                   Then when there is an obligation to bring evidence  
20 in support of the affirmative defense, never, never, ever was  
21 there a discussion of a Statute of Limitations or other  
22 infirmity in the claims being brought against the Edward  
23 William Bayuk Living Trust because of some argument there was  
24 a spendthrift provision.

1           Your Honor at trial made a finding at Page 6  
2 paragraph 17 the Bayuk Trust, is a self-settled Trust, formed  
3 in expectation for the estate planning purposes issue. The  
4 finding was based on testimony presented at trial by Mr. Bayuk  
5 continuing on with this fraud upon his creditors and the  
6 Court, and now post judgment there is this argument, well,  
7 there is no subject matter jurisdiction. I think that is  
8 belied by the fact that, even if Mr. Bayuk purposefully  
9 withheld the information in order to withhold it and use it on  
10 appeal, there is a lack of subject matter jurisdiction, NRS  
11 Chapter 166 provides a creditor can make this claim now that  
12 it is discovered and there doesn't need to be a new fraud  
13 action. I think that if we were to say, Your Honor, there is a  
14 new Trust that was not earlier disclosed that was the  
15 transferee, we can substitute in a new party when it is  
16 discovered a new party is -- there has been a successor or  
17 different party that is truly responsible. We don't even need  
18 to do that here. The only Trust the Edward William Bayuk  
19 Living Trust was named as a judgment debtor, and here we sit  
20 addressing the Edward William Bayuk Living Trust. The correct  
21 Trust is the correct defendant and judgment debtor.

22           And, Your Honor, with respect to whether or not  
23 NRS Chapter 166 even applies, I submit to you that the  
24 arguments of counsel were not credible. That there was a

1 misleading of NRS 166.015 which requires that in order to  
2 obtain the protections of a Spendthrift Trust under NRS  
3 Chapter 166, at least one Trustee qualified under Section 2  
4 has powers that include maintaining records and preparing  
5 income tax returns for the Trust and all or part of the  
6 administration of the Trust is performed in this State. Which  
7 makes sense. That this is an abrogation of the common law and  
8 only the citizens of the State of Nevada will receive the  
9 benefits of the Spendthrift Trust set forth at NRS Chapter  
10 166. If a natural person -- if the settlor is the beneficiary  
11 of the Trust, at least one Trustee of the Spendthrift Trust  
12 must be a natural person who resides and has his or her  
13 domicile in the state.

14 Now counsel said, Your Honor, Mr. Bayuk is not a  
15 beneficiary of the Trust. When you read the Amendment to the  
16 Trust Agreement, it says very explicitly that the co-trustee,  
17 Paul Morabeto, is not a beneficiary. And then there are named  
18 beneficiaries upon Mr. Bayuk's demise. However, there can be  
19 no question that Mr. Bayuk is a beneficiary of whatever Trust  
20 it is, whether it receives the protections under Chapter 166  
21 or not, when he claims otherwise, he receives his living  
22 expenses, and all of his assets now and forever more as set  
23 forth in that Trust for his benefit. He receives no other  
24 income other than from from this Edward William Bayuk Living

1 Trust. And it is an inconsistent position, not one that is  
2 dispositive. The dispositive provision I think is at  
3 NRS 166.015c and d. It was partially referenced by  
4 Mr. Lehnert, and it certainly makes sense in light of what the  
5 public policy behind Spendthrift Trust is and how narrow this  
6 statutory framework is.

7 And, Your Honor, in the argument it was said, well,  
8 this Trust Agreement, the Amendment was not produced because  
9 of confidentiality concerns. There should have been a court  
10 order. There was a court order in this case. There was a  
11 protective order that was entered which was utilized by both  
12 sides for the production of thousands and thousands of pages  
13 of documents, and this 2005 Amendment was held back. And, Your  
14 Honor, if NRS Chapter 166 is no longer available to the Edward  
15 William Bayuk Living Trust by virtue of both co-trustees  
16 moving to California, then the Statute of Limitations for a  
17 fraudulent transfer action that is set forth in NRS Chapter 11  
18 and 112, that statute would apply and there could be no  
19 question that that three year statute was utilized here or  
20 met.

21 Again, there was no argument at the time of trial  
22 the Statute of Limitations applied or barred the claims  
23 brought by Plaintiff. And, Your Honor, at the end of the day,  
24 we still don't have any description of the the specific assets



1 that are subject of the exemption. And this general argument  
2 that all assets are subject to the exemption, I suppose they  
3 are hanging their hat on NRS Chapter 166. But when  
4 NRS Chapter 166 is no longer available, unless we have a  
5 specific asset to address, then the judgment debtor has not  
6 met their burden for a claim of exemption here today. Thank  
7 you.

8 THE COURT: What about his argument that the  
9 Trustees not residing, the business of Trust not taking place  
10 in Nevada is not required as long as a piece of the Trust is  
11 located in Nevada?

12 MS. TURNER: That is inconsistent with the provision  
13 of NRS 166.015 that talks about the domicile of the creator of  
14 the Spendthrift Trust. It is a domicile of the creator of the  
15 Spendthrift Trust that must be in the State of Nevada or at  
16 least one Trustee. Having the estate there, that is also all  
17 or part of land, rents, issues or profits affected are in this  
18 state.

19 THE COURT: That is an "and." It isn't an "or," is  
20 the argument.

21 MS TURNER: It appears he's reading it as that is  
22 enough. I have not seen any evidence presented that there is  
23 anything other than a plot, a burial plot that has been argued  
24 with no evidence that has been discussed. There is no evidence

1 of that. But, Your Honor, that would only permit the  
2 establishment of the Trust. You still have Subsection 2, if  
3 the settlor is a beneficiary of the Trust, at least one  
4 Trustee of the Spendthrift Trust must be a natural person that  
5 resides in or who is domiciled in the state. Mr. Morabito  
6 expressly is not a beneficiary, but Mr. Bayuk is during his  
7 lifetime.

8 THE COURT: Thank you.

9 THE COURT: Mr. Lehnert, you always give me such  
10 interesting arguments.

11 MR. LEHNERT: Thank you, Your Honor.

12 THE COURT: And I enjoy the mental issues that you  
13 raise. However, in this case, I think the objection to the  
14 lack of -- Well I guess I'll start with the explanation of why  
15 the request for exemption was not specific was based upon a  
16 allegation that the execution wasn't specific, and that is not  
17 sufficient to get around the need to be explicit.

18 Also, I do find that in order to get the benefits of  
19 the Spendthrift Trust, you need to have at least one of the  
20 Trustees or the beneficiary reside in the State of Nevada, and  
21 that is not the case. They are not domiciled here, so I do not  
22 find, even though I don't have any evidence of the burial  
23 plot, that would be sufficient to create the Trust protection  
24 under the statute.

1           I also find that I do have subject matter  
2 jurisdiction in this case based upon the Court's jurisdiction  
3 over the Trust in all respects whether it is alleged here or  
4 not.

5           I think any objection to it not being pled  
6 sufficiently was waived by not raising it as an affirmative  
7 defense during the trial, and so I do have subject matter  
8 jurisdiction, and it was waived by the Trust by not raising it  
9 to argue that somehow 166 should apply.

10           So with all of those things in mind, the Court does  
11 find that it is appropriate to deny your request for  
12 exemption.

13           MR. LEHNERS: Your Honor, thank you for hearing me.  
14 May I make one request --

15           THE COURT: Yes.

16           MR. LEHNERS:: -- on behalf of my client, and there  
17 is some authority for this. We have raised a lot of new  
18 ground here today.

19           THE COURT: Yes.

20           MR. LEHNERS:: And this is going to probably go up  
21 the appellate ladder. At this time, I would wish to make an  
22 oral motion for a stay pending appeal, so matters of stay  
23 while the Supreme Court can figure this out, because we have a  
24 lot of matters of first impression. I mean counsel has made

1       some very good arguments. I think I have made some good  
2       arguments, and there is some stuff out there that just isn't  
3       really addressed, and I think that is the way, you know, to  
4       eventually sort things out. I think, you know, you have done a  
5       great job listening and reading, doing all that, but we do  
6       intend to file an appeal, and I would request a stay pending  
7       appeal at this time. There is some authority it can be made  
8       by oral motion in the District Court.

9               THE COURT: Thank you. Counsel.

10              MR. LEHNERS: Thank you, Judge.

11              MR. TURNER: Well, Your Honor, on an oral motion,  
12       the Court doesn't have the benefit of the arguments in detail  
13       or briefs to consider the amount of the bond. But here, you  
14       know, the Court should look at the likelihood of success on  
15       the merits of these new arguments. And given NRS 166, NRS  
16       Chapter 21 are black and white, there is not a likelihood of  
17       success on the merits that has been shown here today or in the  
18       briefs.

19              And so then we look at the risk of loss. What we  
20       have seen time and time again with Mr. Bayuk is he has no  
21       qualms with misleading the Court, his creditors and otherwise,  
22       and we are chasing somebody who takes time and pivots in big  
23       giant leaps, and we are in further danger. This is years and  
24       years of litigation to pursue a judgment, and then the

1 fraudulent transfers. We need to be able to collect, to move  
2 forward with collection. To be halted in that process now  
3 gives a risk of loss that we can't stand. The prejudice would  
4 be too great. There is no money in an account that we could  
5 use to satisfy this Judgment or that has been shown to be in  
6 an account if for some reason we prevail on appeal, and we  
7 don't have a bond posted at least as of the amount of the  
8 Judgment plus interest that would accrue at the statutory rate  
9 or what two years plus attorney's fees and costs. You know,  
10 we are talking about a fifteen million dollar bond that I  
11 think is minimal that would be required to avoid the prejudice  
12 we would suffer if the requested stay was granted.

13 THE COURT: Okay.

14 MR. LEHNERS: Your Honor, one other question for  
15 clarification, we did have Salvatore Morabito's motion for  
16 today as well. Little shrift was given to that because he  
17 doesn't really have anything here. The only thing I would  
18 request when this Court issues an order denying it, that it  
19 direct no accounts and branches outside the State of Nevada be  
20 affected by any attachment issued by this Court.

21 THE COURT: Without pursuing those?

22 MR. LEHNERS: Exactly. Pursuant to the laws of the  
23 State in which the other accounts may be located in. In other  
24 words, in the event they attach say a Wells Fargo branch here

1 and lock up a deposit account in Iowa, we would not want that  
2 to happen. They would have to go to Iowa and domesticate the  
3 Judgment there first. That is all I am asking.

4 THE COURT: Normally I would agree that is the law.  
5 The only problem I have is entering this sort of a broad order  
6 like that, because theoretically you could have money here in  
7 Wells Fargo and think it is going to be attached through a  
8 Judgment and the money could be transferred to an account in  
9 Wells Fargo in another state.

10 MR. LEHNERS: Perhaps the best way to do it is  
11 retain jurisdiction. In the event that an execution is levied  
12 on a Nevada bank account and an Iowa bank account is seized,  
13 we could come back and with proof that money had been there  
14 prior to the execution. And that way, the Court could fashion  
15 a remedy.

16 The last thing I wish to make for the record, I did  
17 make an offer proof the Trust owns a burial plot here. I am  
18 wondering whether counsel would accept that offer of proof as  
19 evidence or if I may ask Mr. Bayuk that one simple question to  
20 get it on the record and make the record complete.

21 THE COURT: I don't know if she'll accept the  
22 statement. You might need some evidence.

23 MR. LEHNERS:: I can swear Mr. Bayuk and ask him the  
24 one question and there is the evidence.

1           THE COURT: We have a little bit of an issue there  
2 if he doesn't have any evidence of it.

3           MR. LEHNERS: Well he has personal knowledge. If he  
4 has personal knowledge the Trust owns burial plot, he's  
5 qualified.

6           THE COURT: He would be qualified if he told the  
7 truth.

8           MR. LEHNERS: Well, Your Honor, under oath, I  
9 presume he would. He could be cross-examined as to that  
10 limited issue. Your Honor, I simply want to make the record.

11          THE COURT: Counsel.

12          MS. TURNER: Your Honor, nowhere in the Claim of  
13 Exemption that was filed in this action or Reply was there any  
14 reference to a burial plot. If there had been, we would have  
15 asked for the ability to go up and get documentary evidence of  
16 it, because of exactly what Your Honor just noted. And  
17 Mr. Lehnerns was not counsel so he did not see, but unless  
18 confronted with a document, Mr. Bayuk's testimony shifts on a  
19 dime. And we would need to -- We already have an exhibit  
20 actually in evidence in the trial where there was discussion  
21 from Paul Morabito they were going to move the plots from  
22 Nevada to California. So this is not just a simple matter  
23 that we can trust oral testimony.

24          If Your Honor is inclined to take evidence, we would

1 ask that Mr. Bayuk be deposed under NRS 21.270 regarding all  
2 of his assets, whether that be a burial plot or beyond.

3 THE COURT: So what you are asking is if he's going  
4 to testify as to assets that he owns or the Living Trust owns,  
5 that it can't be limited to just -- cross-examination can't be  
6 limited to just the one thing he wants to tell us about.

7 MR. TURNER: Right.

8 MR. LEHNERS: In response to that, the evidence the  
9 Trust owns the burial plot is to confer domestication on the  
10 Trust which is one of the issues on appeal. Counsel must  
11 follow NRS 21.270 if she wants to examine Mr. Bayuk about the  
12 assets, which means she has to go to the county in which he  
13 resides. The purpose of the offer of proof and testimony is  
14 to make the record complete for purposes of domestication  
15 rather than opening up a judgment debtor exam before it's  
16 taken place in the proper procedure. I am just trying to make  
17 the record clear.

18 THE COURT: Over their objection, the fact you  
19 already rested your arguments today, I am not going to  
20 entertain anymore evidence. If you want to try to do  
21 something in the future with some documentary evidence, you  
22 can certainly do that, but not today.

23 MR. LEHNERS: Thank you, Your Honor.

24 THE COURT: So with regard to the request for a



1 stay, I think in this instance you have already told me you  
2 are going to appeal, I am not shocked by that idea, so I  
3 believe I need a written decision on the exemption, and I  
4 think the best thing to do is have that in writing and then  
5 you can make your request for a stay. But I am denying the  
6 exemption today, and I am denying the oral request for an  
7 exemption or for a stay for the reason stated by counsel.

8 I don't know how to set the bond amount you would  
9 need. Now if you wanted to stipulate it was fifteen million  
10 which is what she argued, you can do that. But absent --  
11 Right now I have no true evidence before me other than what I  
12 had in the trial.

13 MR. LEHNERS: Your Honor, I had a question for  
14 clarification. On the rules regarding the stay pending  
15 appeal, we are required to first ask the District Court. If  
16 the District Court says no, then you can ask the Appellate  
17 Court. Is this Court saying no or is this Court saying wait  
18 until I enter my written Judgment then you may file a motion  
19 to stay pending appeal?

20 THE COURT: I think you need to wait until I enter  
21 my written Judgment or decision. I am not sure the Supreme  
22 Court would even hear your appeal.

23 MR. LEHNERS: All right. I will file the motion to  
24 stay after the entry of written Judgment.

1           THE COURT: That is fine. I just think that you  
2 would be premature if you filed an appeal on my oral decision  
3 at this point.

4           MR. LEHNERS: Your Honor, I agree with you. That is  
5 how I shall proceed. Thank you.

6           MR. TURNER: Your Honor, just one housekeeping  
7 issue, I understand Your Honor denied the claim for exemption.  
8 There was also a third party claim where the Edward William  
9 Bayuk Living Trust filed what they call a third party claim.  
10 It was the same grounds. But that is also being denied?

11          THE COURT: Yes.

12          MR. TURNER: We'll include that in the order.

13          THE COURT: Okay. Yes. I would like you to include  
14 that in the order and provide the draft to Mr. Lehnerns and  
15 then present it to the Court. I know that you're executing on  
16 the Judgment. I have orally told you it is not exempt, but we  
17 should get that written decision to me as soon as you can so I  
18 can review it and enter my decision.

19          MS. TURNER: We'll get that over to Mr. Lehnerns  
20 quickly.

21          THE COURT: All right. Anything further for today?

22          MR. LEHNERS: No, Judge. Thank you for letting us be  
23 here.

24          THE COURT: Court's in recess.

1 STATE OF NEVADA, )  
2 ) ss.  
3 COUNTY OF WASHOE. )  
4

5 I, Judith Ann Schonlau, Official Reporter of the Second  
6 Judicial District Court of the State of Nevada, in and for the  
7 County of Washoe, DO HEREBY CERTIFY:

8 That as such reporter I was present in Department No. 4 of the  
9 above-entitled court on Monday, July 22, 2019 at the hour of  
10 2:00 of said day and that I then and there took verbatim  
11 stenotype notes of the proceedings had in the matter of  
12 WILLIAM A. LEONARD, JR. TRUSTEE vs. EDWARD WILLIAM BAYUK  
13 Living Trust, ET AL, Case Number CV13-02663.

14 That the foregoing transcript, consisting of pages numbered  
15 1-60 inclusive, is a full, true and correct transcription of  
16 my said stenotypy notes, so taken as aforesaid, and is a full,  
17 true and correct statement of the proceedings had and  
18 testimony given upon the trial of the above-entitled action to  
19 the best of my knowledge, skill and ability.

20 DATED: At Reno, Nevada this 25th day of July, 2019.  
21  
22

23 /s/ Judith Ann Schonlau  
24 JUDITH ANN SCHONLAU CSR #18