

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.

No. 79355

Electronically Filed
Sep 11 2019 04:02 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Second Department 4
County Washoe Judge Connie J. Steinheimer
District Ct. Case No. CV13-02663

2. **Attorneys filing this docketing statement:**

Attorney Micah S. Echols, Esq.; Kathleen A. Wilde, Esq.; and Tom W. Stewart, Esq.

Telephone 702-382-0711

Firm Marquis Aurbach Coffing

Address 10001 Park Run Drive, Las Vegas, NV 89145

Clients Defendants/Appellants, Superpumper, Inc. ("Superpumper"); Edward Bayuk ("Ed Bayuk"), individually and as Trustee of the Edward Bayuk Living Trust ("Bayuk Trust"); Salvatore Morabito ("Sam Morabito"); and Snowshoe Petroleum, Inc. ("Snowshoe") (collectively, "Defendants")

Attorney Frank Gilmore, Esq.

Telephone 775-329-3151

Firm Robison, Sullivan & Brust

Address 71 Washington Street, Reno, Nevada 89503

Clients Defendants/Appellants, Salvatore Morabito; Superpumper, Inc.; and Snowshoe Petroleum, Inc.

Attorney Jeffrey Hartman, Esq.

Telephone 775-324-2800

Firm Hartman & Hartman

Address 510 W. Plumb Lane, Ste. B, Reno, Nevada 89509

Clients Defendants/Appellants, Edward Bayuk, individually and as Trustee of the Edward Bayuk Living Trust

3. **Attorneys representing respondents:**

Attorney Gerald M. Gordon, Esq.; Erica Pike Turner, Esq.; Teresa M. Pilatowicz, Esq.; and Stephen A. Davis, Esq.

Telephone 725-777-3000

Firm Garman Turner Gordon LLP

Address 650 White Drive, Ste. 100, Las Vegas, Nevada 89119

Client Plaintiff/Respondent, William A. Leonard, Trustee for the Bankruptcy Estate of Paul Anthony Morabito ("Plaintiff")

4. **Nature of disposition below (check all that apply):**

☒ Judgment after bench trial

☐ Dismissal

- Findings of Fact, Conclusions of Law, and Judgment, which was filed on March 29, 2019 (**Exhibit 9**)

☐ Judgment after jury verdict

☐ Lack of Jurisdiction

☐ Summary judgment

☐ Failure to state a claim

☐ Default judgment

☐ Failure to prosecute

☐ Grant/Denial of NRCP 60(b) relief

☐ Other (specify)

☐ Grant/Denial of injunction

☐ Divorce decree:

☐ Grant/Denial of declaratory relief

☐ Original

☐ Modification

☐ Review of agency determination

☒ Other disposition (specify)

- Order Denying Defendants' Motion to Dismiss, which was filed on July 17, 2014 (**Exhibit 6**)
- Order Regarding Discovery Commissioner's Recommendation for Order, which was filed on December 17, 2017 (**Exhibit 7**)
- Oral Order Denying Defendants' Motion in Limine made on October 29, 2018 (**Exhibit 8**)
- Oral Order Holding Plaintiff's Motion in Limine in Abeyance (**Exhibit 8**)
- Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment, which was filed on July 10, 2019 (**Exhibit 4**)
- Order Granting in Part and Denying in Part Motion to Retax Costs, which was filed on July 10 (**Exhibit 10**)
- Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68, which was filed on July 10, 2019 (**Exhibit 11**)

5. **Does this appeal raise issues concerning any of the following:** N/A.

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Consolidated Nev. Corp. v. JH, Inc., Case No. 54412, dismissal orders filed on November 22, 2011, December 1, 2011, and December 7, 2011.

American Realty Investors, Inc. v. Dist. Ct., Case No. 57743, order dismissing petition filed January 11, 2012.

Consolidated Nevada Corp. v. JH, Inc., Consolidated Case Nos. 57943/57944/59138, dismissal order filed November 22, 2011.

Consolidated Nevada Corp. v. Dist. Ct., Case No. 59083, order denying petition August 31, 2011.

Morabito v. Dist. Ct., Case No. 65319, order denying petition May 13, 2014.

7. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

Consolidated Nevada Corp., et al. v. JH. et al., CV07-02764, settled and dismissed December 1, 2011.

In re: Consolidated Nevada Corp., BK-N-13-51236-GWZ, order granting summary judgment and judgment filed on December 17, 2014 and order for relief filed on December 17, 2014. Pending.

In re: Consolidated Nevada Corp., Bankruptcy Appellate Case No. NV-17-1210, affirmed December 21, 2017.

In re: Consolidated Nevada Corp., Ninth Circuit Case No. 18-60002, affirmed August 8, 2019.

In re: Paul A. Morabito, BK-N-13-51237-GWZ and all related matters, order granting summary judgment and judgment filed on December 17, 2014 and order for relief filed on December 17, 2014. Pending.

In re: Paul A. Morabito, Bankruptcy Appellate Case No. NV-14-1593, affirmed June 6, 2016.

In re: Paul A. Morabito, Bankruptcy Appellate Case No. NV-17-1211, affirmed December 21, 2017.

In re: Paul A. Morabito, Bankruptcy Appellate Case No. NV-17-1304, affirmed October 30, 2018.

In re: Paul A. Morabito, Ninth Circuit Case No. 16-60055, voluntarily dismissed November 4, 2016.

In re: Paul A. Morabito, Ninth Circuit Case No. 18-60064, affirmed August 8, 2019.

In re: Paul A. Morabito, District Court Case No. 3:18-cv-00221-MMD, affirmed January 22, 2019.

Leonard v. Superpumper Inc., Maricopa County, AZ Case No. CV2019-007691, pending.

Leonard v. Bayuk, Orange County, CA Case No. 30-2019-01068591-CU-EN-CJC, pending litigation.

8. Nature of the action. Briefly describe the nature of the action and the result below:

This is an action to recover alleged fraudulent conveyances. The action was commenced by JH, Inc.; Jerry Herbst; and Berry-Hinckley Industries, Inc. on December 17, 2013. On June 20, 2013, JH, Inc.; Jerry Herbst; and Berry-Hinckley Industries, Inc. filed a petition for an involuntary bankruptcy against Paul Morabito in the United States Bankruptcy Court for the District of Nevada, Case No. BK-N 13-51237. William A. Leonard was appointed as the Chapter 7 Trustee in the involuntary bankruptcy. On May 15, 2015, the District Court entered an order substituting William A. Leonard as the Plaintiff (“Plaintiff”) in the place of JH, Inc.; Jerry Herbst; and Berry-Hinckley Industries, Inc. pursuant to NRCP 17(a). **(Exhibit 5).**

On March 29, 2019 the District Court entered judgment against each of the Defendants as follows:

Against Ed Bayuk and the Bayuk Trust, as follows: (1) Avoiding the transfer of the El Camino Property and the Los Olivos Property, and awarding Plaintiff damages in the amount of \$884,999.95, with offset for amounts collected on account of the El Camino Property and the Los Olivos Property; (2) Avoiding the transfer of Baruk LLC and awarding Plaintiff damages in the amount of \$1,654,550 with offset for amounts collected on account of Baruk LLC; (3) Avoiding the transfer of \$420,250 and awarding Plaintiff damages in the amount of \$420,250 with offset for amounts collected on account of the \$420,250; and (4) Avoiding the Superpumper Transfer and awarding Plaintiff damages in the amount of \$4,949,000 with offset for amounts collected on account of the Superpumper Transfer. (**Exhibit 9**).

Against Sam Morabito as follows: (1) Avoiding the transfer of \$355,000 and awarding Plaintiff damages in the amount of \$355,000 with offset for amounts collected on account on account of the \$355,000; and (2) Avoiding the Superpumper Transfer and awarding Plaintiff damages in the amount of \$4,949,000 with offset for amounts collected on account of the Superpumper Transfer. (**Exhibit 9**).

Against Snowshoe, avoiding the Superpumper Transfer and awarding Plaintiff damages in the amount of \$9,898,000 with offset for amounts collected on account of the Superpumper Transfer. (**Exhibit 9**). In post-trial proceedings, the District Court denied a motion for new trial, and awarded Plaintiff attorney fees and costs. (**Exhibits 4, 10 & 11**).

On August 5, 2019, Defendants filed an appeal from (1) the Findings of Fact, Conclusions of Law, and Judgment, which was filed on March 29, 2019 and is attached as **Exhibit 9** (2) the Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment, which was filed on July 10, 2019 and is attached as **Exhibit 4** (3) the Order Granting in Part and Denying in Part Motion to Retax Costs, which was filed on July 10, 2019 and is attached as **Exhibit 10** and (4) the Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68, which was filed on July 10, 2019 and is attached as **Exhibit 11**

On August 5, 2019, Ed Bayuk and the Bayuk Trust separately appealed from (1) the Order Denying Defendants' Motion to Dismiss, which was filed on July 17, 2014 and is attached as **Exhibit 6** (2) the Order Regarding Discovery Commissioner's Recommendation for Order, which was filed on December 17,

2017 and is attached as **Exhibit 7** (3) the oral order made on October 29, 2018 on the first day of trial, denying Defendants' motion in limine, for which the minutes were filed on November 11, 2018 and are attached as **Exhibit 8** (4) the oral order made on October 29, 2018 on the first day of trial, holding Plaintiff's motion in limine in abeyance, for which the minutes were filed on November 11, 2018 and are attached as **Exhibit 8** (5) the Findings of Fact, Conclusions of Law, and Judgment, which was filed on March 29, 2019 and is attached as **Exhibit 9** (6) the Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment, which was filed on July 10, 2019 and is attached as **Exhibit 4** (7) the Order Granting in Part and Denying in Part Motion to Retax Costs, which was filed on July 10, 2019 and is attached as **Exhibit 10** and (8) the Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCF 68, which was filed on July 10, 2019 and is attached as **Exhibit 11**

Both notices of appeal were docketed in the instant case, and this docketing statement addresses both appeals. Defendants intend to proceed together and file a single opening brief and appendix.

9. **Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

(1) Whether the District Court lacked subject matter jurisdiction over the entire District Court case, due to the Bankruptcy Trustee's failure to obtain the proper authorization from the Bankruptcy Court;

(2) Whether the District Court lacked subject matter jurisdiction over the Bayuk Trust since no *in rem* action was filed against it;

(3) Whether the District Court erred by refusing to apply the plain language of the specific limitations period in NRS 166.170(1); and

(4) Whether the District Court's erred by refusing to recognize the validity of spendthrift trusts under NRS Chapter 166, by adding extra-statutory conditions that are in direct conflict with *Klabacka v Nelson*, 394 P.3d 940 (Nev. 2017).

(5) Whether a transfer between two spendthrift trusts is protected from fraudulent transfer claims.

10. **Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceeding presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

Appellants are not aware of any pending proceedings in this Court raising the same or similar issues.

11. **Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. **Other issues.** Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☒ An issue of public policy

☒ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: *See* response to Question 9.

13. **Assignment to the Supreme Court of Appeals or retention in the Supreme Court.** Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This case originated in business court and should be retained by the Supreme Court according to NRAP 17(a)(9). Additionally, this appeal raises several issues of first impression, as outlined in response to Question 9.

14. **Trial.** If this action proceeded to trial, how many days did the trial last?
9 days.

Was it a bench or jury trial? Bench.

15. **Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

N/A.

TIMELINESS OF NOTICE OF APPEAL

16. **Date of entry of written judgment or order appealed from**

(1) the Order Denying Defendants' Motion to Dismiss was filed on July 17, 2014 and is attached as **Exhibit 6**;

(2) the Order Regarding Discovery Commissioner's Recommendation for Order was filed on December 17, 2017 and is attached as **Exhibit 7**;

(3) the minutes of the oral order made on October 29, 2018 on the first day of trial, denying Defendants' motion in limine, were filed on November 11, 2018 and are attached as **Exhibit 8**;

(4) the minutes of the oral order made on October 29, 2018 on the first day of trial, holding Plaintiff's motion in limine in abeyance, were filed on November 11, 2018 and are attached as **Exhibit 8**;

(5) the Findings of Fact, Conclusions of Law, and Judgment was filed on March 29, 2019 and is attached as **Exhibit 9**;

(6) the Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment was filed on July 10, 2019 and is attached as **Exhibit 4**;

(7) the Order Granting in Part and Denying in Part Motion to Retax Costs was filed on July 10, 2019 and is attached as **Exhibit 10**; and

(8) the Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68 was filed on July 10, 2019 and is attached as **Exhibit 11**.

Date written notice of entry of judgment or order was served

- (1) the Order Denying Defendants' Motion to Dismiss was noticed on July 17, 2014 and is attached as **Exhibit 6**;
- (2) the Order Regarding Discovery Commissioner's Recommendation for Order was noticed on December 17, 2017 and is attached as **Exhibit 7**;
- (3) there is no notice of entry for the minutes of the oral order made on October 29, 2018 on the first day of trial, denying Defendants' motion in limine, attached as **Exhibit 8**;
- (4) there is no notice of entry for the minutes of the oral order made on October 29, 2018 on the first day of trial, holding Plaintiff's motion in limine in abeyance, attached as **Exhibit 8**;
- (5) the Findings of Fact, Conclusions of Law, and Judgment was noticed on March 29, 2019 and is attached as **Exhibit 9**;
- (6) the Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment was noticed on July 17, 2019 and is attached as **Exhibit 4**;
- (7) the Order Granting in Part and Denying in Part Motion to Retax Costs was noticed on July 17, 2019 and is attached as **Exhibit 10**; and
- (8) the Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCp 68 was noticed on July 17, 2019 and is attached as **Exhibit 11**.

Was service by:

☐ Delivery

☒ Mail/electronic/fax

17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing

☒ NRCP 52(b) Date of filing

[Defendants'] Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60 was filed on April 25, 2019 (**Exhibit 2**) and [Bayuk's] Motion for New Trial and/or to Alter or Amend Judgment was filed on April 26, 2019 (**Exhibit 3**)

☒ NRCP 59 Date of filing

[Defendants'] Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60 was filed on April 25, 2019 (**Exhibit 2**) and [Bayuk's] Motion for New Trial and/or to Alter or Amend Judgment was filed on April 26, 2019 (**Exhibit 3**)

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ___, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion: July 10, 2019.

(c) Date written notice of entry of order resolving tolling motion was served: July 16, 2019.

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. Date notice of appeal filed: August 5, 2019.

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

All Defendants filed an appeal on August 5, 2019. Ed Bayuk and the Bayuk Trust separately filed an appeal on August 5, 2019. Both appeals were docketed together and will be treated as a single appeal by all Defendants.

19. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a).

SUBSTANTIVE APPEALABILITY

20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☒ NRAP 3A(b)(1)

☐ NRS 38.205

☒ NRAP 3A(b)(2)

☐ NRS 233B.150

☐ NRAP 3A(b)(3)

☐ NRS 703.376

☒ Other (specify)

NRAP 3A(b)(8) and *Consol. Generator-Nevada, Inc. v. Cummins Engine Company, Inc.*, 114 Nev. 1304, 971 P.2d 1251 (1998)

(b) Explain how each authority provides a basis for appeal from the judgment or order:

NRAP 3A(b)(1) provides for an appeal from a final judgment.

NRAP 3A(b)(2) provides for an appeal from an order granting or denying a motion for new trial.

NRAP 3A(b)(8) provides for an appeal from an special order filed after judgment, such as an order on fees and costs.

In *Consol. Generator-Nevada, Inc. v. Cummins Engine Company, Inc.*, 114 Nev. 1304, 971 P.2d 1251 (1998), this Court held that interlocutory orders are reviewable on appeal from the final judgment.

21. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Original Plaintiffs: JH, Inc.; Jerry Herbst; and Berry Hinckley Industries

Substituted Plaintiff: William A. Leonard, Trustee for the Bankruptcy Estate of Paul Anthony Morabito

Defendants: Paul Morabito, individually and as Trustee of the Arcadia Living Trust; Superpumper, Inc.; Edward Bayuk, individually and as Trustee of the Edward William Bayuk Trust; Salvatore Morabito; and Snowshoe Petroleum, Inc.

- (b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

All of the original Plaintiffs were removed and substituted by William A. Leonard in the May 15, 2015 stipulation and order to substitute a party pursuant to NRCP 17(a), as amended on June 16, 2015. (**Exhibit 5**). Defendant, Paul Morabito, individually and as Trustee of the Arcadia Living Trust was removed by that same stipulation and order. *Id.*

- 22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims or third-party claims, and the date of formal disposition of each claim.**

In the first amended complaint, Plaintiff alleged a claim for fraudulent transfers against all Defendants. (**Exhibit 1**). This claim was disposed of in the March 29, 2019 Findings of Fact, Conclusions of Law, and Judgment. (**Exhibit 9**).

- 23. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

☒ Yes

☐ No

- 24. If you answered "No" to question 24, complete the following:**

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

25. If you answered “No” to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

N/A.

26. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

Exhibit	Document Description
1	First Amended Complaint (filed 05/15/15)
2	[Defendants’] Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60 (filed 04/25/19)
3	[Bayuk’s] Motion for New Trial and/or to Alter or Amend Judgment without Exhibits (filed 04/26/19)
4	Notice of Entry with Order Denying Motions for New Trial and/or to Alter or Amend Judgment (filed 07/16/19)
5	Amended Stipulation and Order to Substitute a Party Pursuant to NRCP 17(a) (filed 06/16/15)
6	Notice of Entry with Order Denying Motion to Dismiss (filed 07/17/14)

Exhibit	Document Description
7	Order Regarding Discovery Commissioner's Recommendation (filed 12/07/17)
8	October 18, 2018 Minutes of Trial, Day 1
9	Notice of Entry with Findings of Fact, Conclusions of Law, and Judgment (filed 03/29/19)
10	Notice of Entry with Order Granting in Part and Denying in Part Motion to Retax Costs (filed 07/16/19)
11	Notice of Entry with Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 07/16/19)

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Superpumper, Inc.; Edward Bayuk,
individually and as Trustee of the
Edward Bayuk Living Trust; Salvatore
Morabito; and Snowshoe Petroleum,
Inc.

Name of appellant

Micah S. Echols, Esq.; Kathleen A.
Wilde, Esq.; and Tom W. Stewart, Esq.

Name of counsel of record

September 11, 2019

Date

/s/ Micah S. Echols

Signature of counsel of record

Clark County, Nevada

State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 11th day of September, 2019, I served a copy of this completed docketing statement upon all counsel of record:

☒ By electronic service in accordance with this Court's Master Service List

Gabrielle Hamm, Esq.
Michael Lehnert, Esq.
Frank Gilmore, Esq.
Jeffrey Hartman, Esq.
Erika Pike Turner, Esq.
Stephen A. Davis, Esq.
Debbie Leonard, Esq.

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es):

Gerald M. Gordon, Esq.
Teresa M. Pilatowicz, Esq.
Garman Turner Gordon LLP
650 White Drive, Ste. 100
Las Vegas, Nevada 89119

*Attorneys for Respondent, William A. Leonard, Trustee for the Bankruptcy Estate
of Paul Anthony Morabito*

Dated this 11th day of September, 2019.

/s/ Leah Dell

Signature

Exhibit 1

1090
GORDON SILVER
JOHN P. DESMOND
Nevada Bar No. 5618
Email: jdesmond@gordonsilver.com
BRIAN R. IRVINE
Nevada Bar No. 7758
Email: birvine@gordonsilver.com
100 West Liberty Street
Suite 940
Reno, Nevada 89501
Tel: (775) 343-7500
Fax: (775) 786-0131

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.

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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
BRIAN R. IRVINE
Nevada Bar No. 7758
Email: 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
24
25
26
27
28

Exhibit 2

2120
FRANK C. GILMORE, ESQ. - NSB #10052

fgilmore@rbsllaw.com

Robison, Sharp, Sullivan & Brust

71 Washington Street

Reno, Nevada 89503

Telephone: (775) 329-3151

Facsimile: (775) 329-7169

Attorneys for Defendants Salvatore Morabito,
Snowshoe Petroleum, Inc.,
Superpumper, Inc.

IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

CASE NO.: CV13-02663

DEPT. NO.: 4

Plaintiffs,

vs.

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

Defendants. /

**MOTION FOR NEW TRIAL AND/OR TO ALTER OR AMEND JUDGMENT PURSUANT
TO NRCP 52, 59, AND 60**

Defendants SUPERPUMPER, INC., SALVATORE MORABITO, and SNOWSHOE
PETROLEUM, INC. (collectively, "Defendants") moves for a new trial, pursuant to Rule 59(a) of
the Nevada Rules of Civil Procedures, and/or to Alter or Amend the Judgment pursuant to Rules
52, 59, and 60, and seek reversal of the judgment entered against them. This motion is made and
based upon pleadings and other papers on file, the evidence and argument presented at trial, the
following Memorandum of Points and Authorities, as well as the arguments and evidence presented
at any hearing convened to consider these motions. Defendants also join the Motion for New Trial
filed by Edward Bayuk, and incorporate those arguments and exhibits into this Motion as though

1 set forth fully herein.

2 DATED this 25th day of April, 2019.

3 ROBISON, SHARP, SULLIVAN & BRUST
4 71 Washington Street
5 Reno, Nevada 89503

6 /s/ Frank C. Gilmore
7 FRANK C. GILMORE, ESQ.
8 Attorneys for Defendants Salvatore
9 Morabito, Snowshoe Petroleum, Inc., Superpumper,
10 Inc.

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. INTRODUCTION**

13 Defendants Salvatore Morabito and Snowshoe, Inc., did not obtain a fair trial due to legal
14 error compounded by abuse of discretion. Defendants seek a new trial, or alternatively, amendment
15 or alteration of the Judgment. The specific errors that entitle Defendants to a new trial and/or
16 amended Judgment include:

17 A. The Court abused its discretion in denying Defendants' Motion in Limine regarding
18 Plaintiff's failure to properly disclose its damages. This Court awarded money judgments in favor
19 of Plaintiff and against Sam Morabito and Snowshoe based on the presentation of damages
20 evidence by Plaintiff which was not adequately nor properly disclosed in Plaintiff's pre-trial
21 disclosures.

22 B. The Court abused its discretion in excluding Defendants' non-retained expert Jan
23 Friederich from offering testimony as to his personal knowledge of Superpumper's operations. Jan
24 Friederich was a percipient witness to the inner-workings of Superpumper, and had personal
25 knowledge, combined with independent expertise, to offer opinion testimony as to industry-specific
26 factors that showed McGovern's valuation was flawed.

27 C. The Court abused its discretion in admitting hearsay emails into evidence. The
28 Court admitted, against Defendants' objections, dozens of hearsay emails into evidence for which
no appropriate exception was available.

D. The Court abused its discretion in excluding Plaintiff's expert report of Craig

1 Greene. The Court incorrectly sustained Plaintiff's hearsay objection to the admission of the expert
2 report of Craig Greene, which was prepared and filed by Plaintiff's counsel in the original
3 *Morabito v. Herbst* action, which was not hearsay and should have been a judicial admission that
4 estopped Plaintiff's insolvency argument.

5 E. The Court abused its discretion in admitting, against Defendants' objection, email
6 exhibits which lacked foundation. The Court incorrectly admitted emails into evidence which
7 lacked the proper foundation because no witness was available to lay the necessary foundation for
8 admission.

9 F. The Court erred in allowing inadmissible character evidence. This Court permitted
10 Timothy Herbst and William Leonard to offer testimony evidence of character in order to prove
11 that Paul Morabito committed fraud in violation of NRS 48.045.

12 These errors deprived Defendants of their right to a fair trial under NRCP 59(a). A new
13 trial is warranted to permit admission of evidence in conformity with Nevada law.

14 **II. LAW**

15 In actions tried without a jury, the district court is required to make specific findings of fact,
16 which must be sufficient to indicate the factual basis for the court's ultimate conclusions. See *Bing*
17 *Constr. v. Vasey-Scott Eng'r*, 100 Nev. 72,674 P.2d 1107-08 (1984); See also *Robison v. Robison*,
18 100 New. 668, 691 P.2d 451 (1984). A motion to amend the trial court's findings invests the Court
19 with discretion to review and amend its findings where they do not hold up to that standard. Such a
20 motion is appropriate to remedy plain error and avoid manifest injustice. See NRCP 52(b); see also
21 *Kroeger Properties & Dev., Inc. v. Silver State Title Co.*, 102 Nev. 112, 715 P.2d 1328 (1986).

22 Similarly, a motion to alter or amend a judgment pursuant to NRCP 52 is the appropriate
23 vehicle by which a party can seek review the Court's findings and question the sufficiency of the
24 factual bases on which the court's ultimate conclusion rests. See *Bing Constr.*, 100 Nev. at 73,674
25 P.2d at 1108NRCP 52(a). Rule 52(b) specifically provides that:

26 When findings of fact are made in actions tried without a jury, the
27 sufficiency of the evidence supporting the findings may later be
28 questioned whether or not in the district court the party raising the
questions objected to the findings[or] moved to amend them.

1 The Nevada Supreme Court has held that "[a] motion to alter or amend a judgment
2 "provides an opportunity, within a severely limited time, to seek correction at the trial level of an
3 erroneous order or judgment, thereby initially avoiding the time and expense of appeal." *Chiara v.*
4 *Belaustegui*, 86 Nev. 856, 859, 477 P.2d 857 (1970); NRCP 52(b). Rule 52(b) provides the basis for
5 this Court to re-examine its findings and conclusions. Careful review of the Court's Ruling
6 Transcript and the resulting Judgment demonstrates here that the Court committed legal error and
7 abuse of discretion which substantially prejudiced the Defendants and prevented them from
8 obtaining a fair trial. Accordingly, Defendants move this Court for a new trial.

9 NRCP 59(a)(1) provides for a new trial where:

10 (A) irregularity in the proceedings of the court, jury, master, or adverse party or in
11 any order of the court or master, or any abuse of discretion by which either party
was prevented from having a fair trial; and

12 (G) error in law occurring at the trial and objected to by the party making the
13 motion.

14 Pursuant to NRCP 59(a), "[o]n motion for a new trial in an action tried without a jury, the
15 court may open the judgment if one has been entered, take additional testimony, amend findings of
16 fact and conclusions of law or make new findings and conclusions, and direct the entry of a new
17 judgment." NRCP 59 (emphasis added).

18 III. ARGUMENT

19 A. The Court Abused Its Discretion in Denying Defendants' Motion in Limine 20 Regarding Plaintiff's Failure to Properly Disclose its Damages.

21 On September 12, 2018, Defendants filed their Motions in Limine, seeking to exclude
22 Plaintiff's evidence of damages due to Plaintiff's repeated failure to comply with NRCP 16.1 in
23 providing "a computation of any category of damages claimed by the disclosing party, making
24 available for inspection and copying as under Rule 34 the documents or other evidentiary matter,
25 not privileged or protected from disclosure, on which such computation is based, including
26 materials bearing on the nature and extent of injuries suffered."

27 On October 29, 2018, the Court denied the Motion, in part, because the issue "could have
28 been raised sooner rather than in a Motion in Limine." (Trial Trans. 10/29/19, p.21-22). The Court

1 then admitted all evidence of damages presented by the Plaintiff, which resulted in money damages
2 agaisnt Sam in the amount of \$355,000 related to the Raffles asset, and \$4,949,000 related to
3 Superpumper. The Court entered a money judgment against Bayuk in the amount of \$884,999.95
4 related to the Panorama and Laguna Beach Properties, \$1,654,550 related to the Baruk Properties
5 exchange, \$420,250 related to the Raffles asset, and \$4,949,000 associated with Superpumper.
6 (Judgment, p. 62).

7 The computation of Plaintiff's requested damages -- which was presented at trial and in
8 Plaintiff's proposed Finding of Fact -- should have been included in the mandatory pretrial
9 discovery, pursuant to Rule 16.1, but was not. Plaintiff's last version of the 16.1 Amended
10 Disclosures provided only:

11 Plaintiff is entitled to recover assets transferred or the value thereof
12 pursuant to Nev. Rev. Stat. §§ 112.210 and 112.220, which Plaintiff
believes to be no less than \$8,500,000.

13 (See Exhibit 1 to Motion in Limine). This disclosure was insufficient under the Rules, and the
14 Court erred by admitting Plaintiff's evidence of damages which were not included in the pretrial
15 disclosures.

16 The Rules provide that a party must disclose "[a] computation of any category of damages"
17 it seeks to recover, NRCP 16.1(a)(1)(C). NRCP 37(c)(1) provides that "[a] party that without
18 substantial justification fails to disclose information required by Rule 16.1 ... is not, unless such
19 failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness
20 or information not so disclosed."

21 Because Plaintiff failed to properly disclose its computation of damages, Defendants faced
22 trial by ambush. They did not know precisely what assets Plaintiff was alleging were transferred;
23 they did not know exactly what values Plaintiff intended to prove as to each asset; Defendants did
24 not know if Plaintiff was seeking the current value of the assets or the value at the time of the
25 alleged transfer. "[T]he purpose of providing a computation of damages is not necessarily to
26 pinpoint an exact dollar figure but to 'enable the defendants to understand the contours of their
27 potential exposure and make informed decisions regarding settlement and discovery'" *Pizarro-*
28 *Ortega v. Cervantes-Lopez*, 396 P.3d 783, 787 (Nev. 2017)(citing *Calvert v. Ellis*, No. 2:13-cv-

00464-APG-NJK, 2015 WL 631284, at *1–2 (D. Nev. Feb. 12, 2015)).

In *Pizarro-Ortega v. Cervantes-Lopez*, 396 P.3d 783, 787 (Nev. 2017), the court clarified “that when a party has failed to abide by NRCP 16.1's disclosure requirements, NRCP 37(c)(1) provides the appropriate analytical framework for district courts to employ in determining the consequence of that failure. Under NRCP 37(c)(1), a party is prohibited from ‘us[ing] as evidence at trial ... any witness or information not so disclosed’ unless the party can show there was ‘substantial justification’ for the failure to disclose or ‘unless such failure is harmless.’” *Id.* at 787.

This Court admitted Plaintiff’s damages evidence notwithstanding the fact that the computation had not been previously provided. This was error. “A party seeking damages has the burden of providing the court with an evidentiary basis upon which it may properly determine the amount of damages.” *Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000). If the computation of damages has not been produced in discovery, then the Rules require that the evidence supporting any damages claim should have been excluded.

1. *The Court’s Conclusion that the Motion in Limine Should Not Be Granted Because It “Could Have Been Raised Sooner” Was Error.*

A Motion in Limine is the appropriate request to limit the admission of evidence. See *Renown Health v. Holland & Hart, LLP*, No. 72039, 2019 WL 1530161, at *3 (Nev. Apr. 5, 2019); WDCR 5(2) provides that the appropriate timing of a Motion in Limine is to be concurrent with the Trial Statement, which is to be filed no later than five (5) days before the commencement of the trial. However, in this case, during the Court’s September 11, 2018, pre-trial conference, it was acknowledged that the parties were operating under an out-dated Pre-Trial Order, and so the Court ordered that motions in limine be submitted to the Court no later than October 12, 2018. (See Minutes, 10/19/18). Defendants timely filed and submitted their Motions in Limine seeking to have Plaintiff’s damages evidence excluded pursuant to NRCP 37. Accordingly, it was error for the Court to deny the Motions in Limine on the basis that it “could have been raised sooner.”

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1 **B. The Court Abused Its Discretion in Excluding the Bulk of Defendants' Non-**
2 **Retained Expert Jan Friederich's Testimony as to His Personal Knowledge of**
3 **Superpumper's Operations; This Error Resulted in the Court Accepting**
4 **McGovern's Faulty Fair Market Value Construct, which Substantial Evidence**
5 **Did Not Support.**

6 A primary dispute in the case was the valuation of the equity of Superpumper, Inc. Plaintiff
7 contended that Bayuk and Sam did not pay reasonably equivalent value, because, according to
8 Plaintiff, the shareholder loans carried on the books of Superpumper should have been included in
9 the "fair market value" appraisal of the equity. This single issue presented a \$6mm valuation
10 disparity at trial. The Court accepted Plaintiff's argument that the shareholder loans should be
11 included in the value of the equity without substantial evidence to support it.

12 No witness testified that under the fair market value standard of value, a rational
13 hypothetical buyer interested in buying gas stations would buy shareholder receivables from the gas
14 station seller's shareholders at face value. Indeed, the premise of this argument is patently absurd
15 on its face; even Plaintiff's expert James McGovern was forced to concede that rational gas station
16 buyers would not be interested in paying face value for the seller's shareholder notes because gas
17 station buyers would only want to buy gas station assets. The Court's conclusion to the contrary
18 was error.

19 "[T]he majority of cases addressing the issue have held that *fair market value* is the
20 appropriate starting point for determining liability in a fraudulent transfer case." *In re JTS Corp.*,
21 No. C 05-4709 JF, 2006 WL 2844581, at *6 (N.D. Cal. Sept. 29, 2006) (emphasis added); *Joseph*
22 *v. Madray (In re Brun)*, 360 B.R. 669, 674 (Bankr. C.D. Cal. 2007); see also, *Riske v. The David*
23 *Austin Seitz Irrevocable Tr. (In re Seitz)*, 400 B.R. 707, 722 (Bankr. E.D. Mo. 2008) (noting that,
24 typically, "courts equate 'value' with the fair market value of the subject property at the time of the
25 transfer.").

26 Fair market value has been defined as "the price at which property would change hands
27 between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell
28 and both and having reasonable knowledge of relevant facts." *United States v. Cartwright*, 411
29 U.S. 546, 551, 93 S.Ct. 1713, 36 L.Ed.2d 528 (1973). The "willing buyer and seller are
30 *hypothetical persons* rather than specific individuals or entities, and their characteristics are not

1 necessarily shared by the actual seller or particular buyer.” *Caracci v. Comm’r*, 456 F.3d 444, 456
2 (5th Cir.2006).

3 McGovern admitted under cross-examination that fair market value was the appropriate
4 standard of value for the Superpumper equity valuation, and he acknowledged the definition of fair
5 market value is consistent with the cases cited above. Trial Transcript, 11/1/2019 pp. 142, 182-
6 184. McGovern opined under cross-examination that a rational hypothetical buyer interested in
7 buying gas stations would be interested in paying face value for a shareholder note carried on the
8 books of the company. *Id.* at 183-184. However, then McGovern admitted that a rational gas
9 station buyer would not be interested in acquiring non-performing receivables; rather, he opined
10 that, “I think it is likely if somebody wanted to just buy the gas station, they would just buy the gas
11 station.” *Id.* at p. 184. This testimony should have ended the conversation. No rational buyer
12 seeking to acquire gas stations – which was the sole purpose of Superpumper’s business endeavors
13 -- would acquire, *at face value no less*, the bulk of the *seller’s* shareholder notes which were not
14 even evidenced by written notes at the time of the evaluation.

15 Indeed, even a rational *receivables buyer* would not purchase the Superpumper shareholder
16 notes at face value without significant diligence proving that they were (a) actually collectable, and
17 (b) the obligor had the means to repay them.

18 The Court excluded the bulk of Jan Friederich’s intended testimony on this issue on the
19 basis that he had not been properly disclosed and the scope of his proposed opinions went beyond
20 the scope of his expertise. (Trial Transcript, 11/5/2019 pp. 24-29). This was error. Friederich was
21 disclosed to address four discreet factual issues associated with Superpumper’s financial
22 performance and conditions that, according to the opinions of Mr. Friederich, Plaintiff’s expert
23 James McGovern missed or incorrectly stated. He was offered to testify, among other things, on
24 his experience as to what types of assets a potential buyer in the gas station/convenience store
25 market would actually be willing to pay for. Friederich had substantial experience in buying and
26 selling gas stations and convenience stores. (*Id.* at pp.10-11). Friederich had personal experience
27 in operating Superpumper and other gas stations and convenience stores previously. The Court
28 excluded Friederich’s testimony on that issue on the basis that Friederich “did not have any

1 expertise to support that opinion.” *Id.* at p. 25. This was error.

2 Friederich’s testimony was intended to elucidate McGovern’s concession that a rational
3 potential gas station buyer would be interested in buying gas stations and not in financing
4 shareholder receivables. Friederich was well qualified to offer such opinions, having had personal
5 experience doing so. Excluding Friederich deprived Defendants of the opportunity for a fair trial
6 because the Defendants would have established that McGovern’s inclusion of the shareholder notes
7 in the value of the equity of Superpumper was a ridiculous proposition that simply could not be
8 logically supported.

9 Further, the Court concluded that it gave Friederich’s testimony “no weight,” because an
10 entity affiliated with Mr. Friederich acquired the Superpumper assets in 2016, and “he stood to
11 benefit from a lower valuation” of Superpumper’s equity. (Judgment, p.17:12). Substantial
12 evidence did not support this finding. There was no evidence presented that Friederich stood to
13 gain from a low valuation. Friederich’s testimony centered around his personal involvement as
14 supervisor and director of operations of Superpumper in 2009, and the value of Superpumper’s
15 equity in September 2010. (Trial Transcript, 11/5/2019 pp. 15). Giving no weight to Friederich’s
16 testimony as a result of events that occurred six years after the time in question was clearly an
17 abuse of discretion.

18 **C. The Court Abused its Discretion in Admitting Hearsay Emails Into Evidence.**

19 Throughout the trial, Plaintiff offered email exhibits into evidence which were drafted by
20 witnesses who were not available for trial and who were not deposed as to the content of the
21 emails. Indeed, the Court admitted 25 emails drafted by Paul Morabito which were produced after
22 discovery had closed and after Morabito’s deposition.¹

23 For example, the Court admitted Exhibit 29 against Defendant’s hearsay objection. Exhibit
24 29 is Plaintiff’s favorite “home court advantage” email that the Court cited at paragraphs 25 and 43
25 of the Judgment to support the finding of actual fraud. Defendants objected that the substance of
26 the email was hearsay because it was drafted by an out-of-court declarant and was offered for the
27

28 ¹ See Exhibits 26, 30, 31, 33, 35, 69, 70, 76, 77, 79, 130, 132, 133, 139, 142, 143, 144, 147, 150,
152, 153, 160, 162.

1 truth of the matters asserted. (Trial Transcript, 11/1/2019, pp. 47-48). Plaintiff contended that the
2 email was not hearsay because it was a “present sense impression.” *Id.* The Court overruled the
3 objection and admitted the exhibit. This was error. NRS 51.085 explains the hearsay exception
4 for “present sense impressions.” The exception requires “a statement describing or explaining an
5 event or condition made while the declarant was perceiving the event or condition, or immediately
6 thereafter.” The content of the email contained no present sense impressions. The September 20,
7 2010, email included commentary on past events – not current or immediately thereafter -- like the
8 exoneration of Bayuk and Sam, which occurred on September 13, 2010, the week earlier. There
9 was no appropriate hearsay exception to admit the document.

10 Further, the Court relied on Exhibit 144 to support the critical (but erroneous) conclusions
11 that (a) Paul Morabito continued to control Superpumper after the merger (Judgment ¶¶37, 72), and
12 (b) the Superpumper merger was used as a ploy to diminish Superpumper’s book value (Judgment,
13 ¶28(C)). However, Exhibit 144 is an email hearsay document, authored by two witnesses who
14 were not available for trial and neither of whom testified to the document in a deposition. The
15 Court admitted the document under Plaintiff’s theory of the “business record exception” to hearsay.
16 (Trial Transcript, 10/29/2018, pp. 216-219).

17 Nevada has no “business record exception” to hearsay. Rather, Nevada has NRS 52.260,
18 which permits the admission of a record made in the course of a regularly conducted activity.
19 However, to be admissible, the record must be supported by an affidavit of the custodian of record
20 who must “verify in the affidavit that the record was made: (a) At or near the time of the act, event,
21 condition, opinion or diagnosis concerning which the information was recorded, by or from
22 information transmitted by a person with knowledge of the act or event; and (b) In the course of the
23 regularly conducted activity.” NRS 52.260(2). Plaintiff claimed to be the “owner” of the file and
24 testified that he owns the files, in an attempt to establish the requirements of the statute. Plaintiff
25 did not, and could not, establish (a) that Gary Kraus’s email in Exhibit 144 consisted of statements
26 that occurred at or near the time of an “act, event, condition, opinion, or diagnosis” nor that the
27 communication was made in the course of regularly conducted activity. Only Gary Kraus or a
28 representative of his office could give such an affidavit. Accordingly, Exhibit 144 was erroneously

1 admitted under the non-existent “business records exception,” and Defendants were deprived of
2 their right to a fair trial as a result.

3 **D. The Court Erred in Excluding the Expert Report of Craig Greene; The Report**
4 **Should Have Been Admitted as a Judicial Admission that Paul Morabito Was**
Not Rendered Insolvent as a Result of the Transfers.

5 This Court found that Paul Morabito was rendered insolvent due to the asset transfers
6 because he “effectively transferred all or substantially all of his assets.” (Judgment, ¶86, p. 31).
7 The Court concluded that “Within days after Judge Adams announced the Oral Ruling, Paul
8 Morabito divested himself of almost all, if not all, of his assets.” (Judgment, ¶46, p. 48). This
9 finding and conclusion of insolvency was directly contradicted by the expert report of Craig
10 Greene, which was delivered at the request of the Herbst Parties on May 12, 2011, eight months
11 after the Oral Ruling. The Report was filed in the *Morabito v. Herbst* case, CV07-02764, and was
12 presented to Judge Adams for the explicit purpose of showing Paul Morabito’s 9-figure net worth.
13 This Greene Report was a primary factor in the punitive damage award entered against Paul by
14 Judge Adams. (Exhibit 280).

15 Defendants offered the admission of the Greene Report, and the Court sustained an
16 objection to its admission on the basis of “the hearsay quality of an expert report.” (Trial
17 Transcript, 10/30/18, p. 92). The Court then concluded that “An expert report is not an adopted
18 admission.” (*Id.* at p. 93). This was error.

19 The Herbst Parties filed this action in 2013, before being substituted out by Mr. Leonard. In
20 the original 2013 complaint, the Herbst Parties alleged that “Paul Morabito was insolvent or was
21 rendered insolvent by the transfers.” (Complaint, ¶46).

22 During Timothy Herbst’s cross-examination, Defendants elicited testimony from Mr.
23 Herbst in which he acknowledged that he had hired Craig Greene to examine Paul Morabito’s
24 net worth. (Trial Transcript, 10/30/18, p. 89). Mr. Herbst then admitted, contrary to the
25 allegations contained in the Complaint in this case, that Mr. Greene concluded that Paul Morabito’s
26 post-transfer net worth was “Somewhere around 90 million dollars.” (Trial Transcript, 10/30/18, p.
27 91). Herbst admitted that the Herbst Parties had done post-judgment discovery and were aware of
28 the transfers. *Id.* To further illuminate the prior inconsistent statement by the Herbst Parties that

1 Paul Morabito was insolvent after the transfers, Defendants offered the Greene Report. The Court
2 sustained the objection on the basis that an expert report is a hearsay statement, and an expert
3 report is not an adoptive admission. (Trial Transcript, 10/30/18, p. 93).

4 The Greene Report should have been admitted. First, the Report was filed in CV07- 02764,
5 and the Court was authorized to take judicial notice of it, just as the Court did with the Judge Zive
6 filings in the United States Bankruptcy Court. (Trial Transcript, 11/2/18, p. 98).

7 Second, the Report was being offered against the Herbst Parties and contained statements in
8 which the Herbst Parties not only authorized Greene to make in his capacity as their expert (NRS
9 51.035(3)(c)), but also expressly adopted by filing the Report in CV07- 02764, and utilized it as a
10 basis for finding punitive damages against Paul Morabito (NRS 51.035(3)(b)). Indeed, the Herbst
11 Parties filed a Stipulation on May 25, 2011, in which the Greene Report was attached as an exhibit,
12 and presented as the Herbst Parties “respective position on the net worth of [Paul Morabito] [as]
13 outlined in these reports.” (See Exhibit 278, the docket for Case No. CV07- 02764, Stipulation
14 filed May 25, 2011, p. 3.). The Herbst Parties expressly “manifested adoption” and belief in the
15 truth of the Report, and it should have been admitted because it was being offered against the
16 Herbst Parties and the Herbst Parties clearly manifested adoption of the Report.

17 Third, the Greene Report, having been filed and relied upon by Judge Adams, had strong
18 assurances of accuracy, and, Mr. Greene not being available for trial, should have qualified for the
19 catch-all exception to hearsay. NRS 51.315.

20 Fourth, Defendants were also offering the Report not for the truth of the matter asserted, but
21 to establish that the Herbst Parties had presented an irreconcilable and inconsistent position related
22 to Paul’s insolvency, for the purposes of estoppel and judicial admission. “Judicial admissions are
23 defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that
24 party’s knowledge.” *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev.
25 331, 343, 255 P.3d 268, 276 (2011). The Herbst Parties presented the Greene Report to Judge
26 Adams as their position on Paul Morabito’s net worth as of May 2011. That presentation qualifies
27 as a judicial admission that binds the Herbsts and parties in privity therewith, including Plaintiff.
28 Plaintiff should not have been able to take a contrary position to the judicially binding admission

1 they made to Judge Adams in 2011.

2 The Court excluded the Greene Report and in doing so, deprived Defendants of the
3 opportunity to establish that the Herbst Parties, and by extension the Plaintiff, were estopped by
4 judicial admission from contending that Paul Morabito was rendered insolvent as a result of the
5 transfers. Defendants were deprived of their right to a fair trial.

6 **E. The Court Erred in Admitting, Against Defendants' Objection, Email Exhibits**
7 **Which Lacked Foundation.**

8 Plaintiff offered dozens of emails into evidence which were drafted by witnesses who were
9 not available for trial. These exhibits included various and wide-ranging emails, which contained
10 opinions of value, proposed business transactions, and other matters. Defendants objected to the
11 admission of these exhibits because they lacked foundation, could not be authenticated, and were
12 prejudicial. The Court overruled the objections. (Trial Transcript, 11/2/18, p.108).

13 Dennis Vacco was deposed three times and Paul Morabito was deposed once. The
14 objectionable documents at issue were produced by Plaintiff well after the respective author's
15 deposition.² Plaintiff's counsel conceded that the Paul Morabito emails contained in Exhibits 76,
16 77, and 79 were produced after Paul Morabito's deposition (Trial Transcript, 10/29/2019, pp. 172).
17 Therefore, the documents were not shown to the witnesses at their depositions, and they could not,
18 and did not, provide *any* testimony about them.

19 Because the documents were not available at the depositions, no foundation whatsoever has
20 been established, including authenticity. See *Mishler v. McNally*, 102 Nev. 625, 628, 730 P.2d
21 432, 435 (1986) (finding inadmissible for lack of foundation as to authenticity and identity a memo
22 prepared by an unavailable witness regarding the defendant's reputation where the document was
23 "an unsigned typewritten photocopy").

24 The emails in question contain statements concerning opinions of value, business
25 information, future intentions, observations or opinions, but no foundation has been or can be
26 established regarding the sources of the information, how it was compiled, why it was compiled, or
27

28 ² See emails drafted by Paul Morabito which were produced after his deposition: Exhibits 26, 30,
31, 33, 35, 69, 70, 76, 77, 79, 130, 132, 133, 139, 142, 143, 144, 147, 150, 152, 153, 160, 162.

1 how it is to be interpreted. See, e.g., Exhibits 25, 26, 29, 30, 42, 45, 46, 61, 76, 77, 79, 80. Thus,
2 no foundation could properly be laid. See *Mishler*, 102 Nev. at 628, 730 P.2d at 435 (concluding
3 that even a “recital of authorship on the face of [a] writing was insufficient proof of authenticity to
4 secure its admission for unlimited purposes” when the author was unavailable to testify). In the
5 complete absence of the circumstances surrounding the creation of the documents there is no
6 foundation, and it was unfairly prejudicial to admit these documents without adequate foundation
7 and the ability to cross-examine a live witness as to the context and background of the emails. See
8 *id.* (deeming opinions of an unavailable witness inadmissible when the declarant was not available
9 to testify about the basis of his opinion).

10 Moreover, many of these exhibitis included statements or opinions of value. See Exhibits
11 76, 77, 79, relied on by the Court in the Judgment, ¶27 p. 11). There was no foundation laid as to
12 the declarant’s expertise or competence to make these conclusions, nor was there any evidence of
13 the methodology of the appraisals that took place. See, e.g., *Frias v. Valle*, 101 Nev. 219, 221, 698
14 P.2d 875, 876 (1985) (concluding that a report called a thermogram was inadmissible because there
15 was no evidence demonstrating “how or when the thermograms were taken, how they could be
16 identified,” and “[n]o one with personal knowledge testified as to how, when and in what manner
17 the thermograms were taken”). NRS 50.275 requires that opinions as to “scientific, technical or
18 other specialized knowledge” must be offered by a qualified expert. There was no foundation that
19 the declarant, in most instances, Paul Morabito, had such expertise.

20 Further, because the documents were not available at the depositions, Defendants had no
21 opportunity to cross examine Mr. Morabito or Mr. Vacco about them, and they were both
22 unavailable for trial. It was unfairly prejudicial to allow a one-sided interpretation of documents
23 with no opportunity for Defendants to cross-examine the author to further explain them, and it was
24 unfairly prejudicial to admit these documents with no foundation, and then permit the Plaintiff to
25 mischaracterize them. Moreover, the trial showed that it clearly confused the facts of this case to
26 admit documents that purported to show the value of property without having the ability to show
27 weaknesses in the documents or the credibility of the author delivering the opinions. See *Mishler*,
28 102 Nev. at 629, 730 P.2d at 435 (holding that it would confuse the jury and prejudice the opposing

1 party to admit opinions of an unavailable witness for the truth of the matter asserted where the
2 opinion was admitted for unlimited purposes); *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 485, 851
3 P.2d 459, 463 (1993) (“where evidence is marginally relevant and could inject collateral issues
4 which would divert the jury from the real issues in the case, exclusion is proper.”) (internal
5 quotation marks omitted).

6 Finally, a federal court confronting almost this identical issue excluded hearsay statements
7 like the ones in question here. *See Adams v. United States*, No. CIV. 03-0049-E-BLW, 2009 WL
8 2207690 (D. Idaho July 15, 2009). In *Adams*, the witness testified in his deposition that he had
9 reviewed “inspection reports” prior to giving his deposition. *Id.* at *1. However, those inspection
10 reports, like the documents in this case, were neither identified nor marked as an exhibit during the
11 deposition. At trial, the party who took the deposition tried to introduce the four inspection reports
12 through the deponent who, like Mr. Morabito and Mr. Vacco, was unavailable. *Id.* The court first
13 determined that there was no foundation to admit the documents because the exhibits were not
14 shown to the deponent or opposing counsel during the deposition, even though the party claimed
15 the deponent authored the reports. *Id.* Next, the court explained that even if the exhibits could
16 overcome the issues concerning foundation, the exhibits may be barred as hearsay. *Id.* Finally, the
17 court determined that “another party’s inability to cross-examine a witness about a particular
18 document is not only potentially unfair, but also may very well contribute to jury confusion
19 under FRE 403³ without the benefit of a complete exchange of contextual questions, independent of
20 the exhibits’ separate admission.” *Id.*

21 Although only persuasive authority, *Adams* has an almost identical fact pattern to this case,
22 and Defendants contend that this reasoning established abuse of discretion that resulted in
23 Defendants being deprived of a fair trial. The admission of these exhibits was more prejudicial
24 than probative. *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002)
25 (“Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority,
26 because the Nevada Rules of Civil Procedure are based in large part upon their federal

27 _____
28 ³FRE 403 is the federal version of NRS 48.035, which provides that “[a]lthough relevant, evidence
is not admissible if its probative value is substantially outweighed by the danger of unfair
prejudice, of confusion of the issues or of misleading the jury.”

1 counterparts.”) (internal quotation marks omitted).

2 **F. The Court Abused its Discretion in Allowing the Character Evidence Offered**
3 **By Timothy Herbst and William Leonard.**

4 Plaintiff offered Timothy Herbst and William Leonard as *de facto* character witnesses to
5 smear the character of Paul Morabito. In permitting the character assassination, the Court was
6 unduly influenced by the irrelevant and inadmissible personal opinions of Paul Morabito’s enemies,
7 and thereby depriving Defendants of a fair trial.

8 The parties had stipulated to myriad facts, including the existence of a transaction between
9 the Herbst Parties and Paul Morabito that led to litigation between them. (Stipulated Facts, October
10 28, 2019, ¶1). Despite that Stipulation, Plaintiff endeavored to elicit testimony from Timothy
11 Herbst to the effect that he believed he had been defrauded by Paul Morabito. (Trial Transcript,
12 10/29/18, p.56). When Defendants’ counsel objected, Plaintiff’s counsel admitted that she was
13 seeking to introduce character evidence under NRS 48.045 to prove motive and intent. *Id.* at p. 57.
14 The Court, in addressing Defendants’ objection, explained that:

15 It is my understanding Mr. Morabito was at one point a party to this case
16 before everyone stipulated to his removal from the case, so your argument
17 implied he's being precluded from participating, and I don't think that was
18 really the circumstances. Now beyond that, his character and his
motivation could be relevant to show what your client's motivations were.
It is not definitive proof of your client's motivation, but it could be part of
the circumstances of evidence, so I am going to allow some inquiry.

19 *Id.* at pp.57-58. This ruling was error for two reasons.

20 First, whether or not Paul Morabito used to be a party to the case is irrelevant for the
21 purposes of the admission of character evidence. The undisputed fact was that Paul Morabito was
22 not a party at the time of trial, had not been a party since 2015, was a California resident and could
23 not be compelled to attend the trial. Accordingly, he qualified as a non-party and an unavailable
24 witness for purposes of the Rules (including hearsay and admissions of party opponents).

25 Second, the Court’s finding that Paul Morabito’s motivation in dealing with the Herbst
26 Parties in 2007 could be relevant to establish Defendants’ motivations, and therefore character
27 evidence as to Paul was admissible, is an abuse of discretion. This Court concluded that
28 “Defendants’ intent is not relevant to the analysis of whether the transfers were made with actual

1 intent to hinder, delay, or defraud, or were constructively fraudulent.” (Judgment, ¶15, p. 36).
2 Accordingly, admitting character evidence of Paul Morabito in order to establish Defendants
3 motivations was error.

4 Third, the Court admitted evidence of character offered by William Leonard. It was
5 undisputed that William Leonard had no involvement with this case, or the CV07-02764 case until
6 approximately after the Involuntary Petitions were filed in June 2013. No evidence was presented
7 in which Leonard established personal knowledge as to any fact relevant to the claims and defenses
8 in this case, which all related to the 2010-2011 asset transfers. When Plaintiff offered his
9 testimony as to his personal beliefs and opinions related to the facts of this case, the Court
10 overruled Defendants’ objection on the basis of relevance. (Trial Transcript, 11/2/18, p. 93). This
11 was an abuse of discretion.

12 NRS 48.025 provides that irrelevant evidence is inadmissible. Relevant evidence is
13 “evidence having any tendency to make the existence of any fact that is of consequence to the
14 determination of the action more or less probable than it would be without the evidence.”
15 Leonard’s personal opinions as to Paul Morabito’s character, his behavior in the bankruptcy action,
16 and all the other things Leonard was so keen to testify to were all irrelevant. Worse yet, Leonard
17 was not competent to testify as to any relevant fact because he lacked personal knowledge as to any
18 of the events that led to the transfers that were the subject of the case. NRS 50.025 provides that
19 “A witness may not testify to a matter unless: Evidence is introduced sufficient to support a finding
20 that the witness has personal knowledge of the matter; or (b) The witness states his or her opinion
21 or inference as an expert.” Leonard’s opinions as to Paul Morabito’s character were not presented
22 as expert opinions that would satisfy NRS 50.285.

23 Plaintiff offered Leonard’s opinion as to the contents of an order from Judge Zive. *Id.* at p.
24 98. The Court overruled Defendants’ objection, and permitted Leonard to characterize his
25 assessment of a written order. *Id.* This violated the best evidence rule, NRS 52.235, which
26 requires that writings be proven by the original or a copy, and not by testimony where an exception
27 applies. “[W]here the witness has knowledge only of the contents of [a writing], testimony may be
28 excluded under [the best evidence rule].” *Stephans v. State*, 127 Nev. 712, 719, 262 P.3d 727, 733

1 (2011).

2 Plaintiff's counsel offered the testimony of Leonard to give opinions as to Paul Morabito's
3 character by asking, "Have you seen indicia of the debtor hiding information from you?" *Id.* at
4 101. The Court overruled the objection on relevance and on the basis that the prejudice is
5 substantially outweighed probative weight of the testimony. *Id.* This was error. Whether Leonard
6 had an opinion as to whether Paul Morabito was "hiding information" was irrelevant to any fact in
7 dispute in this case. Indeed, Plaintiff all but conceded that the question was being asked to attempt
8 to show Paul Morabito's propensity to do (or not do) a certain act based on Leonard's opinion of
9 Morabito's character. *Id.* at p. 102. Plaintiff's counsel argued:

10 It is a pattern of behavior that shows the intent and motive of Paul
11 Morabito to avoid his obligations to the Herbsts. And this evidence is
12 **probative of this continued conduct for the purpose of avoiding**
disclosure, a badge of fraud, as well as making misrepresentations,
another badge of fraud.

13 *Id.* (emphasis added). This is thinly veiled attempt to admit character evidence in order to show
14 Morabito's propensity to act, in clear and blatant violation of NRS 48.045, which explains that
15 "Evidence of a person's character or a trait of his or her character is not admissible for the purpose
16 of proving that the person acted in conformity therewith on a particular occasion." In other words,
17 Plaintiff offered character evidence to establish that Paul Morabito's alleged conduct in avoiding
18 requests of the Plaintiff/trustee in 2015-2018 was probative of Morabito's intent to defraud the
19 Herbsts in 2010 by way of the transfers. Leonard then proceeded to testify as to his opinions on
20 Paul Morabito's character. He said:

21 I was very frustrated having to deal with Mr. Morabito. Every question I
22 asked was answered in a roundabout circuitous manner that had no indicia
23 of truth to it. I would ask him questions about income, and I'd here stories
24 about somebody owed me some money. I don't know where it came from,
and people just keep giving me money. That is not how we conduct our
hearings in 341 in bankruptcy. I questioned everything he said. I still
question everything he said.

25 *Id.* at p. 103. The Court overruled an objection that permitted Leonard to offer his opinion that
26 Morabito had committed bank fraud, tax fraud, bankruptcy fraud, and he testified that he forwarded
27 a recommendation to the department of justice that Morabito be prosecuted. *Id.* at p. 105. This
28 testimony was irrelevant and an improper admission of character evidence; yet, the Court allowed it

1 and was swayed by his testimony. Admitting Leonard's character attacks on Paul Morabito was an
2 abuse of discretion and prevented Defendants from obtaining a fair trial.

3 **IV. CONCLUSION**

4 For the reasons set forth above, the Defendants respectfully request this Court grant the
5 motion for a new trial or amend the judgment to conform to the evidence.

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

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

10 DATED this 25th day of April, 2019.

11 ROBISON, SHARP, SULLIVAN & BRUST
12 71 Washington Street
13 Reno, Nevada 89503

14 /s/ Frank C. Gilmore
15 FRANK C. GILMORE, ESQ.
16 Attorneys for Attorneys for Defendants Salvatore
17 Morabito, Snowshoe Petroleum, Inc., Superpumper,
18 Inc.
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Robison, Sharp, Sullivan & Brust, and that on this date I caused to be served a true copy of the **Motion for New Trial** all parties to this action by the method(s) indicated below:

✓ by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

Edward Bayuk
668 North Coast Hwy, #517
Laguna Beach, CA 92651

✓ by using the Court's CM/ECF Electronic Notification System addressed to:

Gerald Gordon, Esq.
Email: ggordon@Gtg.legal
Mark M. Weisenmiller, Esq.
Email: mweisenmiller@Gtg.legal
Teresa M. Pilatowicz, Esq.
Email: tpilatowicz@Gtg.legal
Erika Pike Turner, Esq.
Email: eturner@gtg.legal

by email addressed to:

Gerald Gordon, Esq.
Email: ggordon@Gtg.legal
Mark M. Weisenmiller, Esq.
Email: mweisenmiller@Gtg.legal
Teresa M. Pilatowicz, Esq.
Email: tpilatowicz@Gtg.legal
Erika Pike Turner, Esq.
Email: eturner@gtg.legal

DATED: This 25th day of April, 2019.



Exhibit 3

2120
Jeffrey L. Hartman, Esq. (SBN 1607)
Hartman & Hartman
510 W. Plumb Ln., Suite B
Reno, Nevada 89509
Tel: (775) 324-2800 / Fax: (775) 324-1818
Attorneys for Edward Bayuk

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

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

CASE NO.: CV13-02663

DEPT. NO.: 4

Plaintiffs,

vs.

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

Defendants. /

MOTION FOR NEW TRIAL AND/OR TO ALTER OR AMEND JUDGMENT

Defendant EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST ("Bayuk") moves for a new trial, pursuant to Rule 59(a) of the Nevada Rules of Civil Procedures, and/or to Alter or Amend the Judgment pursuant to Rules 52, 59, and 60, and seek reversal of the judgment entered against him. This motion is made and based upon pleadings and other papers on file, the evidence and argument presented at trial, the following Memorandum of Points and Authorities, the Declaration of Frank C. Gilmore, Esq., as well as the arguments and evidence presented at any hearing convened to consider this motion.

Bayuk further joins the Motion for New Trial filed by Defendants Salvatore Morabito,

Snowshoe Petroleum, Inc., and Superpumper, Inc., filed concurrently herewith and incorporates each of the arguments herein each of the arguments presented in the Memorandum of Points and Authorities.

DATED this 25th day of April, 2019.

Hartman & Hartman
510 W. Plumb Ln., Suite B
Reno, Nevada 89509
Tel: (775) 324-2800 / Fax: (775) 324-1818
/s/ Jeffrey Hartman
JEFFREY HARTMAN, ESQ.
Attorneys for Edward Bayuk, individually, and as
Trustee of the Edward William Bayuk Living Trust

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Edward Bayuk, individually, and as Trustee of the Edward William Bayuk Living Trust, did not obtain a fair trial due to legal error, compounded by abuse of discretion. Bayuk seeks a new trial, or alternatively, amendment or alteration of the Findings of Fact, Conclusions of Law and Judgment (“Judgment”). The specific errors that entitle Bayuk to a new trial and/or amended Judgment include:

A. The Court abused its discretion in denying Defendants’ request to continue the supplemental evidentiary hearing. After the Court granted Plaintiff’s Motion to Reopen Evidence, the Court abused its discretion in denying Defendants’ Motion to Continue the Hearing due to Edward Bayuk’s serious medical condition, thereby depriving Defendants of the opportunity for a fair trial. The abuse of discretion was extremely prejudicial in that it provided the basis for the Court’s conclusion that Paul Morabito was in control of Snowshoe after the merger.

B. The Court erred in concluding that Defendants owed the Herbst Parties a Duty to disclose the existence of the transfers. The Court committed legal error in concluding that Defendants’ owed a duty to notify the Herbst Parties of the transfers. Substantial evidence did not support the finding that the transfers were concealed pursuant to NRS 112.180(2).

C. Substantial Evidence Did Not Support the Court’s Findings that Darryl Noble Focused on the Cost Approach to the Valuation of the Panorama Property. Darryl Noble’s

1 appraisal of the Panorama Property did not rely on the cost approach; his conclusion was based on
2 the market approach and was supported by substantial evidence.

3 D. The Court Erred in rejecting Darryl Noble's appraised value of the Panorama
4 Property because the Judgment contained no findings that the appraised value "shocked the
5 conscience" or could not be supportable. In order for the Court to reject the Noble appraisal of the
6 Panorama Property, the Court must find that the valuation "shocks the conscience." The Court
7 made no such findings and therefore erred in rejecting the appraisal.

8 E. Substantial evidence did not support the Court's conclusion that Bayuk knowingly
9 offered false testimony. The Court's conclusion that Bayuk offered false testimony as to
10 Snowshoe's payment of attorneys' fees was not supported by any evidence establishing that Bayuk
11 had any knowledge that Snowshoe had paid any fees on Paul Morabito's behalf.

12 These errors deprived Bayuk of his right to a fair trial under NRCP 59(a). A new trial is
13 warranted to permit admission of evidence in conformity with Nevada law.

14 **II. LAW**

15 In actions tried without a jury, the district court is required to make specific findings of fact,
16 which must be sufficient to indicate the factual basis for the court's ultimate conclusions. See *Bing*
17 *Constr. v. Vasey-Scott Eng'r*, 100 Nev. 72,674 P.2d 1107-08 (1984); See also *Robison v. Robison*,
18 100 New. 668, 691 P.2d 451 (1984). A motion to amend the trial court's findings invests the Court
19 with discretion to review and amend its findings where they do not hold up to that standard. Such a
20 motion is appropriate to remedy plain error and avoid manifest injustice. See NRCP 52(b); see also
21 *Kroeger Properties & Dev., Inc. v. Silver State Title Co.*, 102 Nev. 112, 715 P.2d 1328 (1986).

22 Similarly, a motion to alter or amend a judgment pursuant to NRCP 52 is the appropriate
23 vehicle by which a party can seek review of the Court's findings and question the sufficiency of the
24 factual bases on which the Court's ultimate conclusion rests. See *Bing Constr.*, 100 Nev. at 73,674
25 P.2d at 1108; NRCP 52(a). Rule 52(b) specifically provides that:

26 When findings of fact are made in actions tried without a jury, the
27 sufficiency of the evidence supporting the findings may later be
28 questioned whether or not in the district court the party raising the
questions objected to the findings[or] moved to amend them.

1 The Nevada Supreme Court has held that "[a] motion to alter or amend a judgment
2 "provides an opportunity, within a severely limited time, to seek correction at the trial level of an
3 erroneous order or judgment, thereby initially avoiding the time and expense of appeal." *Chiara v.*
4 *Belaustegui*, 86 Nev. 856, 859, 477 P.2d 857 (1970); NRCP 52(b). Rule 52(b) provides the basis for
5 this Court to re-examine its findings and conclusions. Careful review of the Trial Transcript and the
6 resulting Findings of Fact, Conclusions of Law, and Judgment ("Judgment") demonstrates here that
7 the Court committed legal error and abuse of discretion which substantially prejudiced the
8 Defendants and prevented them from obtaining a fair trial. Accordingly, Defendants move this
9 Court for a new trial.

10 NRCP 59(a)(1) provides for a new trial where:

11 (A) irregularity in the proceedings of the court, jury, master, or adverse
12 party or in any order of the court or master, or any abuse of discretion by
13 which either party was prevented from having a fair trial; and

14 (G) error in law occurring at the trial and objected to by the party making
the motion.

15 Pursuant to NRCP 59(a), "[o]n motion for a new trial in an action tried without a jury, the
16 court may open the judgment if one has been entered, take additional testimony, amend findings of
17 fact and conclusions of law or make new findings and conclusions, and direct the entry of a new
18 judgment."

19 **III. ARGUMENT**

20 **A. The Court Abused its Discretion in Denying Defendants' Request to Continue** 21 **the Supplemental Evidentiary Hearing.**

22 After the close of evidence, Plaintiff filed a Motion to Reopen Evidence on January 30,
23 2019. On February 7, 2019, after notice and arguments heard by the parties, the Court granted
24 Plaintiff's motion to reopened evidence under NRCP 59(a) and admitted additional trial exhibits
25 305, 306, 307, 308, and 309 on February 8, 2019. (Judgment, pp.1-2). On February 8, 2019, the
26 Court set the March 1, 2019, hearing date for Defendants' rebuttal to the newly admitted evidence.

27 On February 19, 2019, Defendants sought to continue the March 1, hearing date on the
28 basis that Bayuk had undergone serious surgery and was unable to travel. On February 26, 2019,

1 the Court denied the Motion to Continue, but provided Bayuk the option of appearing via video
2 feed.

3 Then, on February 26, 2019, after the Court denied the Motion to Continue, Plaintiff
4 provided Defendants with additional documents they indicated were intended to be used at the
5 March 1, 2019, hearing which had not been included in the Motion to Reopen Evidence. See
6 **EXHIBIT 1**. In response, Defendants' counsel objected to the attempt to offer the exhibits, two of
7 which were statements of Defendants' counsel unrelated to the instant case, and explained that
8 Defendants' counsel may be called as a witness in the hearing. (See Declaration of Frank C.
9 Gilmore, ¶8, attached hereto as **EXHIBIT 2**). After counsel argued over the issue of calling
10 Defendants' counsel as a witness in a trial in which he was the Defendants' advocate, Defendants'
11 counsel sought emergency relief from the Court. (**EXHIBIT 3**). The Court explained that it did
12 not have time to address the issue prior to the hearing, which was three days away. *Id.* Without
13 Bayuk's ability to be present in the courtroom, and without any guidance as to whether the
14 Defendants were facing the distinct possibility that Plaintiff would call Defendants' counsel in sur-
15 rebuttal to testify against Defendants, they reluctantly declined to participate in the March 1, 2019,
16 hearing, and notified Defendant's counsel in an email who then passed that email on to Plaintiff's
17 counsel. (**EXHIBIT 2**, Gilmore Decl., ¶10) (**EXHIBIT 4**).

18 The Court gave particular treatment in the Judgment to the exhibits that were admitted
19 pursuant to the Motion to Reopen Evidence, to which Defendants were not given a genuine and fair
20 opportunity to rebut. See Judgment, ¶¶67-70 (Exhibits 305, 306, 308, 309). The Court referred to
21 the exhibits for the proposition that (a) Bayuk gave knowingly false testimony regarding
22 Snowshoe's payment of legal bills (Judgment ¶69), and (b) that the bills evidenced Paul Morabito's
23 control of Snowshoe long after the sale and merger (Judgment ¶¶36, 70). Equity and fairness
24 required that Bayuk be given a chance to appear in Court, with conflict counsel, if need be, and
25 explain the context and appropriate inferences from the newly admitted evidence. The Court's
26 refusal to continue the hearing and to address the critical issue of Plaintiff's threat to call
27 Defendants' counsel as a witness against Defendants no more than 3 days before the trial prevented
28 Bayuk from obtaining a fair trial.

1 Defendants' Motion to Continue the hearing sought a continuance of only 38 days. In light
2 of the fact that this case was filed in 2013, and trial had been continued multiple times – including
3 once due to Plaintiff's counsel's unreadiness – a 38-day delay to accommodate Bayuk, and the
4 delicate issues surrounding the potential that his lawyer would be called in the trial to testify
5 against him, was not unreasonable. The Court abused its discretion in refusing to grant Defendants
6 the continuation, and Bayuk suffered extreme prejudice. A new trial or amendment of the
7 Judgment is warranted to remedy the injustice.

8 **B. The Court Committed Legal Error in Concluding that Defendants Owed the**
9 **Herbst Parties a Duty to Disclose the Existence of the Transfers.**

10 In the Judgment, the Court concluded that “the transfers were concealed” pursuant to NRS
11 112.180(2)(c) and (g). (Judgment, §II.D.2.c). This was legal error because the Court concluded
12 that Defendants owed duties to notify the Herbst Parties of the transfers. Further, substantial
13 evidence did not support the conclusion that the transfers were concealed.

14 **1. *NRS 112.180 Does Not Contain a Duty of the Debtor to Notify the Creditor***
15 ***of Asset Transfers.***

16 The Judgment reflects the Court's conclusion that the asset transfers were concealed, and
17 the Judgment reflects the Court's reliance on that finding to support the larger conclusion that the
18 “badges of fraud” supported a finding of actual fraud. (Judgment, §II.D.2.c). However, the
19 Court's conclusions were based solely on the fact that neither the Defendants nor the Debtor
20 “informed” the Herbst Parties of the transfers. (Judgment, ¶¶41-43). The Court's identification of
21 a duty to notify the creditor under NRS 112.180 has no support in the law. There is not a single
22 case that Defendants could locate where the badge of “concealment” was met when the debtor
23 failed to affirmatively notify the creditor of a transaction absent a clear duty that arose due to the
24 parties' prior existing relationship (through contract or fiduciary duties).

25 **2. *Substantial Evidence Did Not Support the Finding that the Transfers Were***
26 ***Concealed.***

27 Substantial evidence did not support the Court's conclusion that the transfers were
28 concealed or removed. To the contrary, each of the real property transfers that Plaintiff complains

1 were concealed were each transferred by way of recorded deed. (Trial Transcript, 10/30/2018, pp.
2 165-66). Both Washoe County and Orange County, California, provide for electronic searching of
3 real property records from any computer in the world with access to the internet. Recording a deed
4 is the last thing a transferor would do if he wished to conceal a transfer. Indeed, when it comes to
5 real property, recording a deed is, as a matter of law, notice to the world of the transfer. *Dick v.*
6 *Balch*, 33 U.S. 30, 32, 8 L. Ed. 856 (1834)(recording a deed “is considered in law, as notice to all
7 the world”).

8 Further, the failure to disclose the Compass Loan, the Superpumper Agreement, and the
9 Matrix Valuation cannot be properly classified as “concealing” the transfer. Although NRS
10 112.180 does not define the term “conceal,” the Nevada Supreme Court has defined the term in
11 other contexts, and in each of them, the term requires an affirmative act associated with the attempt
12 to prevent from disclosure, contrary to the manner in which the Court applied it at Plaintiff’s
13 urging. In *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 254–55, 277 P.3d 458, 464 (2012),
14 the Court explained that:

15 use of the term “concealed” carries with it a specific connotation. While
16 different legal authorities define concealment in slightly varying ways,
17 these definitions generally include two specific elements: (1) an
18 intentional act by one party that (2) prevents or hinders another party from
19 learning something. See, e.g., BLACK’S LAW DICTIONARY 327 (9th ed.
20 2009) (defining concealment as “an act by which one prevents or hinders ”
21 another party from realizing something (emphases added)); Restatement
22 (Second) of Contracts § 160 (1981) (defining concealment as “an
23 affirmative act intended or known to be likely to keep another from
learning of a fact” (emphases added)). Thus, by using the term
“concealed” in subsection 3, it is evident that the Legislature intended for
subsection 3’s tolling provision to apply only in situations when these two
elements are present. *State v. State, Employees Assoc.*, 102 Nev. 287, 289,
720 P.2d 697, 699 (1986)(“When a statute uses words which have a
definite and plain meaning, the words will retain that meaning unless it
clearly appears that such meaning was not so intended.”).

24 Plaintiff did not produce any evidence, and the Court did not make any findings, that
25 Defendants or the Debtor affirmatively acted in some way so as to prevent the Herbst Parties from
26 discovering the transfers. Thus, substantial evidence does not support the conclusion that the
27 transfers were concealed.

28 Lastly, it was established at trial that the paramount reason the Herbst Parties failed to

1 identify the recorded deed transfers and the other exchanges was because they sat on their rights as
2 creditors for more than a year after the judgment was entered in 2010. (Trial Transcript,
3 10/29/2018, pp.84-87)(Exhibit 278). Moreover, Plaintiff's witness Timothy Herbst admitted under
4 cross-examination that the Herbst Parties attempted no collection efforts that he was aware of
5 within one year of the entry of the judgment. *Id.* Herbst admitted that his lawyers were aware of
6 the transfers in early 2011 and did nothing to protect their rights against the alleged "removal and
7 concealment" of assets. *Id.* at p.87. Thus, not only did the Herbst come to learn of the transfers
8 only weeks after they occurred, they did nothing to assert their rights, did nothing to mitigate their
9 damages, and did not attempt to commence collection efforts or enforcement of their judgment. *Id.*

10 **C. The Court Erred by Failing to Apply the Proper Application of "Reasonably**
11 **Equivalent Value."; Substantial Evidence Did Not Support the Court's**
12 **Conclusion of Value of the Panorama Property;**

13 The Court rejected Defendants' valuation of the Panorama Property, and accepted the
14 appraisal of William Kimmel. (Judgment, ¶¶48-53). The Court committed legal error by failing to
15 support the valuation conclusion with findings that Defendants' valuation "shocked the
16 conscience." The Court then compounded that legal error by abusing its discretion by accepting
17 Kimmel's appraisal despite clear failings in his report and testimony.

18 ***1. In Applying "Reasonable Equivalency" Under NRS 112.180 and 112.220,***
19 ***the Court Must Conclude the Defendants' Valuation "Shocked The***
20 ***Conscience."***

21 Nevada law is clear that the test to determine whether a debtor received reasonably fair
22 consideration for a transfer is "whether the disparity between the true value of the property
23 transferred and the price paid is so great as to shock the conscience and strike the understanding at
24 once with the conviction that such transfer could never have been made in good faith." *Matusik v.*
25 *Large*, 85 Nev. 202, 208, 452 P.2d 457, 460 (1969) (emphasis added).

26 The Court never made such a finding. Rather, the Court compared the valuation evidence
27 presented by Defendants to the valuation evidence presented by Plaintiff and arbitrarily selected
28 Plaintiff's valuation proposal. This was legal error. As set forth in *Matusik*, the objective in
determining whether Paul Morabito obtained reasonably equivalent value is not whether the Court
ultimately believes that the creditor's value conclusion was higher than the transferors, but whether

1 the disparity between the values was so great that the inescapable conclusion was that the transfer
2 was not done in good faith. “This equivalence need not be precise. By its terms and application,
3 the concept of ‘reasonably equivalent value’ does not demand a precise dollar-for-dollar
4 exchange.” *In re Pringle*, 495 B.R. 447, 464 (B.A.P. 9th Cir. 2013)(applying bankruptcy law on
5 fraudulent transfers); see also *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 559 (1994). (“[S]ome
6 disparity between the value of the collateral and the value of debt does not necessarily lead to a
7 finding of lack of reasonably equivalent value”).

8 The Court never made any findings that the value Bayuk exchanged for his interest in the
9 Panorama Property “shocked the conscience.” Accordingly, the Court’s conclusion that
10 Defendants’ value conclusion was not “reasonably equivalent value” was error.

11 **2. Substantial Evidence Did Not Support the Court’s Valuation Conclusion**
12 **of the Panorama Property.**

13 The Court found that Defendant’s appraiser Darryl Noble, “relied heavily on the cost
14 approach, focusing on the cost of the home and its significant improvements.” (Judgment, ¶48).
15 No evidence in the record supports this finding. Indeed, this finding is directly contradicted by the
16 only evidence on the subject, Exhibit 276. In his report, Noble performed a cost approach analysis,
17 but that analysis did not factor in his ultimate conclusion of value. Exhibit 276, p. 21. His report
18 concluded:

19 Based on this market value study, it is indicated to the appraisers
20 that the subject property containing a 6,331±_ square foot luxury single
21 family residence, as of the date of inspection, September 21, 2010, has a:
"As-Is" Market Value Indicated to Subject Property as of September 21,
2010 is: \$4,300,000.

22 *Id.* His sales comparison approach resulted in an appraisal of \$4.3 million, which was identical to
23 his ultimate conclusion of value. Accordingly, no substantial evidence supported the Court’s
24 findings that Noble’s cost-approach was flawed (Judgment, ¶48, 50).

25 **3. The Court Abused its Discretion By Accepting Kimmel’s Appraisal Which**
26 **Relied on Irrelevant and Inappropriate Post-Date-of-Valuation-Factors.**

27 Kimmel’s appraisal of the Panorama Property occurred more than five years after the
28 transfer of Bayuk’s interest in the property to Paul Morabito. Kimmel’s appraisal was therefore

1 retroactive more than five years to the date of valuation, which was October 1, 2010. The Court
2 accepted each of Kimmel's conclusions of value and opinions, despite the fact that Kimmel's report
3 violated well-established standards applicable to retro-active appraisals. Further, the Court abused
4 its discretion in considering the sales price of the Panorama Property that occurred more than two-
5 years after the date of valuation, where it was established that the sale was compulsory and not
6 voluntary. (Judgment, ¶51, p. 22) (the Court's finding is supported by "the subsequent sale of the
7 Panorama Property for \$2,584,000 to a third-party purchaser in December 2012.")

8 Under cross-examination, Kimmel admitted that he could not identify any "authorities,
9 guidelines, opinions, appendices" which guided the standards of his retroactive appraisal. (Trial
10 Transcript, 11/2/18, p.37-38). Kimmel admitted he had not read and was not familiar with the
11 treatise on residential real estate appraising by the authors Fishman, Pratt and Morrison. *Id.* at 38.
12 However, Kimmel agreed with the proposition posited by Fishman, Pratt and Morrison that "Since
13 valuation is as of a particular point in time, practitioners are required to reach their conclusion
14 based on information that is known or knowable (or reasonably foreseeable) at the valuation date."
15 *Id.* Kimmel further agreed that "Subsequent events that were foreseeable at the valuation date may
16 be considered in valuation. However, if an event was completely unforeseen at the time of
17 valuation, it is generally not considered." *Id.* at 40.

18 Despite his agreement with the general principles of retroactive appraisals, Kimmel then
19 admitted that he violated nearly every one of them in the methods he utilized to achieve his opinion
20 of value:

- 21 1. Kimmel considered the condition of the Property as described to him more
22 than 2 years after the date of valuation. *Id.* at 40.

23 "Q: And your opinion is informed by a conversation that you had
24 with Skip Avansino in 2015 or '16, right?

25 A: Correct"

- 26 2. Kimmel considered the sales data of real property events that occurred after
27 the date of valuation, that Bayuk would not have had when he accepted the
28 value of his interest in the Property. *Id.*

1 “Q: In fact, in your appraisal, you relied on post valuation
2 information, didn't you?

3 A. Two of my sales were after the date of value, correct.”

4 3. Kimmel admitted that he never viewed the property in 2010, and he was
5 never given access to the Property in 2012 when he did his appraisal. *Id.* at
6 p. 13. Kimmel had no ability to determine the relative quality of the
7 Property, so he simply determined that the comparable properties were more
8 favorable to the Panorama Property because according to his third-party
9 witness, “This indicates that the home was not in good condition at the time
10 it was purchased.” Exhibit 53, p. 57.

11 The Court abused its discretion in adopting the opinions and conclusions of Kimmel
12 because Kimmel’s report and opinions were not in keeping with the standards applicable to
13 retroactive appraisals, relied heavily on biased and irrelevant opinions of a third-party as to the
14 condition of the property more than 4 years after the valuation date, and utilized sales data that was
15 not available at the date of valuation.

16 **E. Substantial Evidence Did Not Support the Court’s Conclusion that Bayuk**
17 **Offered Knowingly False Testimony.**

18 This Court concluded that Bayuk offered false testimony related to the alleged payment of
19 Paul Morabito’s attorneys’ fees by Snowshoe Petroleum. (Judgment, ¶69, p. 27). Substantial
20 evidence did not support this finding. At trial, Bayuk testified:

21 Q: So you have Superpumper, pardon me, Snowshoe Petroleum. You don’t
22 know whether they have paid Paul Morabito’s attorney's fees?

23 A: No, they have not.

24 (Trial Transcript. 10/29/18, p. 189)

25 Q: Now subsequent to Paul Morabito selling his interest to you and Sam and
26 really Snowshoe Petroleum, he had input on Snowshoe's financials for the
time period subsequent to the sale, correct?

27 A: You are referring to Paul?

28 Q: Paul?

1 A: Input on what?

2 Q: On the Snowshoe financials?

3 A: I said earlier Sam was in Arizona running the business, and we had
4 accounting people there doing the accounting stuff. Paul was looking for
5 opportunities for himself, and if he thought a big opportunity was coming
6 along he would say, hey, would you be interested in participating? But
7 Sam was very focused on running the business in Arizona, Superpumper,
8 and so Paul would give his opinions and his advice. Like I said earlier, the
e-mail on 137 between Dennis and Paul I know nothing about it. I don't
even know – It makes no sense, the e-mail. So Paul, you know, he did
things. He wrote things. And sometimes it made no sense, but did he -- did
he say he was the owner of Snowshoe Petroleum or the owner of
Superpumper? No. Did he get money out of Snowshoe Petroleum or
Superpumper? No. So did he look for all kinds of opportunities? Yes.

9 (*Id.*, p. 206).

10 It was never established that Bayuk was ever aware of any fee payments made to Paul
11 Morabito's law firm by Snowshoe. Without some showing that Bayuk was aware of checks
12 Snowshoe was writing, there is no evidence that Bayuk knowingly gave false testimony. Indeed,
13 his testimony established that Sam was running the company and that the company had accounting
14 people that handled the money. It was never sufficiently established that Edward was ever aware
15 of any fee payments by Snowshoe, and concluding that Bayuk gave knowingly false testimony was
16 not supported by the evidence.

17 Second, Plaintiff was aware, prior to the Judgment, that Snowshoe did not send checks to
18 Paul Morabito's lawyers with the intention of paying Paul's personal legal bills. As established in
19 the February 19, 2019 attachment to the email sent by Plaintiff's counsel in anticipation of the
20 March 1, 2019, supplemental hearing (**EXHIBIT 1**), a full explanation had been given clarifying
21 Plaintiff's confusion as to the Robison Sharp Sullivan and Brust ("Robison") payment ledger that
22 Plaintiff had obtained (Exhibit 308).

23 Bayuk's counsel, David Shemano, explained to Plaintiff that:

- 24 1. Snowshoe Petroleum is a RSSB client.
- 25 2. At some point in 2015, Snowshoe and Robison entered in an agreement in
26 which Snowshoe paid a fixed monthly amount (plus expenses) to Robison in
27 exchange for services that benefitted Snowshoe. Snowshoe believed that
28 certain work Robison was performing in its capacity as counsel for

1 Morabito, such as the investigation and prosecution of fraud on the court
2 claims against the Herbsts, would benefit Snowshoe and, therefore, wanted
3 to make sure that work beneficial to Snowshoe continued.

- 4 3. While Snowshoe understands that Robison internally allocated a portion of
5 the monthly payments to Morabito's account, Snowshoe never sent any
6 check to Robison for the benefit of Morabito – all checks were sent to
7 benefit Snowshoe. Any allocation of a check by Robison to Morabito's
8 account is an internal Robison matter. Snowshoe takes no current position on
9 whether Robison's internal allocation was proper or not, although it is the
10 position of Snowshoe that all payments were made for the benefit of
11 Snowshoe and not Morabito.

12 (See EXHIBIT 1).

13
14 E. **The Court Abused Its Discretion In Admitting Hearsay Exhibits Which The**
15 **Court Relied On To Conclude That The Baruk Properties Exchange Was A**
Sham Sale.

16 The Court relied on Exhibit 145 to support the conclusion that the transfer of the Baruk
17 properties was a sham. (Judgment ¶76). Exhibit 145 was a hearsay email with no foundation that
18 should not have been admitted. Exhibit 145 was an email from Dennis Vacco to Edward Bayuk.
19 Plaintiff offered the email first as a “statement against interest from his counsel to him.” (Trial
20 Transcript, 10/30/2018, p. 46). The Court overruled the objection and admitted the document. *Id.*
21 at p.47. The Court appeared to admit the Exhibit on three grounds, first that Defendants’
22 foundation argument was wrong, second that the statement – made by Mr. Vacco -- was against
23 Bayuk’s interest and therefore an exception to hearsay (*Id.*), and third that the exhibit should be
24 admitted as an admission of a party opponent. *Id.* at p.48. Each ruling was erroneous.

25 First, the foundation objection should have been sustained. A federal court confronting
26 almost this identical issue excluded hearsay statements like the ones in question here. *See Adams v.*
27 *United States*, No. CIV. 03-0049-E-BLW, 2009 WL 2207690 (D. Idaho July 15, 2009). In *Adams*,
28 the witness testified in his deposition that he had reviewed “inspection reports” prior to giving his

1 deposition. *Id.* at *1. However, those inspection reports, like the documents in this case, were
2 neither identified nor marked as an exhibit during the deposition. At trial, the party who took the
3 deposition tried to introduce the four inspection reports through the deponent who, like Mr.
4 Morabito and Mr. Vacco, was unavailable. *Id.* The court first determined that there was no
5 foundation to admit the documents because the exhibits were not shown to the deponent or
6 opposing counsel during the deposition, even though the party claimed the deponent authored the
7 reports. *Id.* Next, the court explained that even if the exhibits could overcome the issues
8 concerning foundation, the exhibits may be barred as hearsay. *Id.* Finally, the court determined
9 that “another party’s inability to cross-examine a witness about a particular document is not only
10 potentially unfair, but also may very well contribute to jury confusion under FRE 403¹ without the
11 benefit of a complete exchange of contextual questions, independent of the exhibits’ separate
12 admission.” *Id.*

13 Second, the Court erroneously applied the “statement against interest” exception to hearsay
14 under NRS 51.345. The exception applies only where “A statement which at the time of its
15 making: (a) Was so far contrary to the pecuniary or proprietary **interest of the declarant.**” NRS
16 51.345 (emphasis added). In other words, a statement can only be against interest when the
17 statement was made by the declarant. In Exhibit 144, the declarant was Dennis Vacco, not Edward
18 Bayuk. The Court admitted the Exhibit as a statement against Bayuk’s interest. This was clear
19 error. Moreover, even if the email was against Vacco and Bayuk’s interest (which it is not), the
20 statute provides that, “[t]his section does not make admissible a statement or confession offered
21 against the accused made by a codefendant or other person implicating both himself or herself and
22 the accused.” NRS 51.345(2).

23 Third, the Court erroneously concluded that a statement by Vacco – as Bayuk’s attorney –
24 was not hearsay as an admission of a party opponent, because Vacco is Bayuk’s agent:

25 MR. GILMORE: Might I have a ruling on the hearsay objection?

26 THE COURT: Overruled.

27 ¹FRE 403 is the federal version of NRS 48.035, which provides that “[a]lthough relevant, evidence
28 is not admissible if its probative value is substantially outweighed by the danger of unfair
prejudice, of confusion of the issues or of misleading the jury.”

1 MR. GILMORE: Okay. It is a statement made by a party opponent that is adverse to
2 the position they are taking in this case. I am confused at the ruling.
3 This is a statement by Mr. Vacco who is not a party.
4 MS. TURNER: He's an agent.
5 THE COURT: He's an agent.
6 MR. GILMORE: He's not speaking to a third party. He's speaking to Mr. Bayuk.
7 THE COURT: Doesn't that make it even more important for Mr. Bayuk to say hold
8 on in a return e-mail perhaps, that you probably might have where he
9 told Mr. Vacco no, this is wrong?
10 MR. GILMORE: All I am arguing is the APO objection.
11 THE COURT: I ruled on it. You're wrong. It is admitted.

12 (Trial Transcript, 10/30/2018, p. 48).

13 This ruling is clearly erroneous for several reasons. First, it is clear that the only
14 participants to the communication were Vacco (as the declarant), his assistant Stefanie Canastro,
15 and Vacco's clients, Morabito and Bayuk. NRS 51.035 provides the definition (and exclusions) of
16 hearsay. A statement is not hearsay if, "[t]he statement is offered against a party and is: (a) The
17 party's own statement, in either the party's individual or a representative capacity; (b) A statement
18 of which the party has manifested adoption or belief in its truth; (c) A statement by a person
19 authorized by the party to make a statement concerning the subject; (d) A statement by the party's
20 agent or servant concerning a matter within the scope of the party's agency or employment, made
21 before the termination of the relationship; or (e) A statement by a coconspirator of a party during
22 the course and in furtherance of the conspiracy." None of these apply.

23 There was no evidence that Bayuk "manifested adoption" of Vacco's statement. The
24 burden to establish manifestation is on the party that offers the evidence. *Bourjaily v. United*
25 *States*, 483 U.S. 171, 171 (1987)(interpreting FRE 801(d)). Plaintiff supplied no argument or
26 evidence the Bayuk adopted Vacco's statement. Just because Vacco was Bayuk's counsel does not
27 necessarily follow that everything Vacco says qualifies as an adoptive statement under NRS
28 51.035(2)(b) or (c). Indeed, courts applying this rule have found just the opposite. "Although an

1 attorney does not have authority to make an out-of-court admission for his client in all instances, he
2 does have authority to make admissions which are directly related to the management of litigation.”
3 *Hanson v. Waller*, 888 F.2d 806, 814 (11th Cir. 1989). These admissions are, by their nature, made
4 to third persons on the client’s behalf, and not admissions made to the client by the attorney.

5 Nor does it make sense that Bayuk would adopt Vacco’s statement, *because Vacco was*
6 *speaking directly to Bayuk*. There are no Nevada cases interpreting the breadth of the statute to
7 include statements made directly to the principal by the agent, but California’s version of the same
8 provision of the evidence code requires that “the statement was made by a person authorized by the
9 party to make a statement or statements *for him* concerning the subject matter of the statement.”
10 Cal. Evid. Code § 1222 (West). If a statement is to be made *for* the principal, it cannot be a
11 statement made *to* him.

12 Further, the implication from the Court’s evidentiary ruling that Bayuk was under some
13 duty to respond to Vacco and establish the fact that he did not “adopt” his counsel’s statements to
14 him has no support in Nevada jurisprudence. There are myriad reasons why a client may not wish
15 to expressly disclaim a statement by his lawyer, the first of which is the common sense approach
16 that when only the lawyer and the client are speaking, there is no reason why the client would be
17 inclined to manifest a position on the statement either way. A client speaking directly with his
18 lawyer could have no basis to reject a position – or manifest adoption of it – when there is no
19 danger that a third party might accept the admission on behalf of the client. “Silence, in the
20 absence of a duty to speak, is not an admission.” *Jackson v. United States*, 250 F.2d 897, 900 (5th
21 Cir. 1958) (applying FRE 801).

22 **IV. CONCLUSION**

23 For the reasons set forth above, the Defendants respectfully request this Court grant the
24 Motion for New Trial, or, in the alternative, enter its amended Judgment conforming to the
25 substantial evidence.

26 **AFFIRMATION** 27 **Pursuant to NRS 239B.030**

28 The undersigned does hereby affirm that this document does not contain the social security

1 number of any person.

2 DATED this 25th day of April, 2019.

3 Hartman & Hartman
4 510 W. Plumb Ln., Suite B
5 Reno, Nevada 89509
6 Tel: (775) 324-2800 / Fax: (775) 324-1818
7 /s/ Jeffrey Hartman
8 JEFFREY HARTMAN, ESQ.
9 Attorneys for Edward Bayuk, individually, and as
10 Trustee of the Edward William Bayuk Living Trust
11
12
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HARTMAN & HARTMAN, and that on this date I caused to be served a true copy of the **Motion for New Trial** all parties to this action by the method(s) indicated below:

_____ by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

 X by using the Court's CM/ECF Electronic Notification System addressed to:

Gerald Gordon, Esq.
Email: ggordon@Gtg.legal
Mark M. Weisenmiller, Esq.
Email: mweisenmiller@Gtg.legal
Teresa M. Pilatowicz, Esq.
Email: tpilatowicz@Gtg.legal
Erika Pike Turner, Esq.
Email: eturner@gtg.legal

Frank C. Gilmore, Esq.
fgilmore@rssblaw.com

DATED: This 26th day of April, 2019.

/s/ Angie Gerbig
ANGIE GERBIG

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LIST OF EXHIBITS

<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>	<u>NO. OF PAGES</u>
1	Email dated February 27, 2019, with attachments	91
2	Declaration of Frank C. Gilmore	2
3	February 27, 2019 email from Marcy Trabert	2
4	February 27, 2019 email	1

Exhibit 4

2535
GARMAN TURNER GORDON LLP
ERIKA PIKE TURNER, ESQ.
Nevada Bar No. 6454
E-mail: eturner@gtg.legal
TERESA M. PILATOWICZ, ESQ.
Nevada Bar No. 9605
E-mail: tpilatowicz@gtg.legal
GABRIELLE A. HAMM
Nevada Bar No. 11588
E-mail: ghamm@gtg.legal
650 White Drive, Ste. 100
Las Vegas, Nevada 89119
Telephone 725-777-3000
Counsel to 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.: 4

NOTICE OF ENTRY OF
ORDER DENYING DEENDANTS'
MOTIONS FOR NEW TRIAL AND/OR TO
ALTER OR AMEND JUDGMENT

Notice is hereby given that on July 10, 2019, this Honorable Court entered its *Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment*, a copy of

...

...

1 which is attached hereto as **Exhibit 1**.

2 Dated this 15th day of July, 2019.

GARMAN TURNER GORDON LLP

3
4 /s/ Teresa M. Pilatowicz, Esq.

ERIKA PIKE TURNER, ESQ.

TERESA M. PILATOWICZ, ESQ.

GABRIELLE A. HAMM, ESQ.

650 White Drive, Ste. 100

Las Vegas, Nevada 89119

Telephone 725-777-3000

Special Counsel to Plaintiff,

William A. Leonard, Trustee

10 **AFFIRMATION**

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

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

14 Dated this 15th day of July, 2019.

15 GARMAN TURNER GORDON LLP

16
17 /s/ Teresa M. Pilatowicz, Esq.

ERIKA PIKE TURNER, ESQ.

TERESA M. PILATOWICZ, ESQ.

GABRIELLE A. HAMM, ESQ.

650 White Drive, Ste. 100

Las Vegas, Nevada 89119

Telephone 725-777-3000

Counsel to Plaintiff

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of GARMAN TURNER GORDON LLP, and that on this
3 date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **NOTICE OF**
4 **ENTRY OF ORDER DENYING DEENDANTS' MOTIONS FOR NEW TRIAL AND/OR**
5 **TO ALTER OR AMEND JUDGMENT** on the parties as set forth below:

6 _____ Placing an original or true copy thereof in a sealed envelope placed for collection
7 and mailing in the United States Mail, Las Vegas, Nevada, postage prepaid,
8 following ordinary business practices addressed as follows:

9 _____ Certified Mail, Return Receipt Requested

10 _____ Via Facsimile (Fax)

11 _____ Via E-Mail

12 _____ Placing an original or true copy thereof in a sealed envelope and causing the same
to be personally Hand Delivered

13 _____ Federal Express (or other overnight delivery)

14 X By using the Court's CM/ECF Electronic Notification System addressed to:

15 Frank C. Gilmore, Esq.
16 E-mail: fgilmore@rssblaw.com

Jeffrey Hartman, Esq.
E-mail: jlh@bankruptcyreno.com

17
18
19 I declare under penalty of perjury that the foregoing is true and correct.
20 DATED this 15th day of July, 2019.

21
22 /s/ Dekova Huckaby
23 An Employee of GARMAN TURNER
24 GORDON LLP
25
26
27
28

Exhibit 1

2700

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,

CASE NO.: CV13-02663

DEPT. NO. 4

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.

**ORDER DENYING DEFENDANTS' MOTIONS FOR NEW TRIAL AND/OR TO
ALTER OR AMEND JUDGMENT**

Defendants Superpumper, Inc. ("Superpumper"), Salvatore Morabito ("Morabito"), and Snowshoe Petroleum, Inc. ("Snowshoe") filed a *Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 50* on April 25, 2019 (the "Snowshoe Motion"), and Defendant Edward Bayuk, individually and as Trustee of the Edward William Bayuk Living Trust ("Bayuk," and collectively with Superpumper, Morabito, and Snowshoe, "Defendants") filed a *Motion for New Trial and/or to Alter or Amend Judgment* filed on April 26, 2019 (the "Bayuk Motion" and together with the Snowshoe Motion, the "Motions"). Plaintiff William A. Leonard, chapter 7 trustee for the bankruptcy estate of Paul A. Morabito ("Plaintiff") filed *Plaintiff's Opposition to Defendants' Motions for New Trial and/or to Alter or Amend Judgment* (the "Opposition") on May 7, 2019, and Superpumper, Snowshoe, and Morabito filed *Defendants' Reply in Support of Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60* (the "Snowshoe Reply") on May 14, 2019. The Snowshoe Motion was submitted for decision on May 14, 2019. Bayuk did not file a reply in support of the Bayuk Motion, and Plaintiff submitted the Bayuk Motion for decision on May 21, 2019.

1 The Court has reviewed and considered the arguments made in the Motions, the
2 Opposition, and the Snowshoe Reply, the papers and pleadings on file with the Court in this action,
3 the testimony and exhibits admitted during the trial, and the Court's Findings of Fact, Conclusions
4 of Law, and Judgment, entered on March 29, 2019 (the "Judgment"). The Court, persuaded by
5 the argument and authorities in Plaintiff's Opposition, along with the pleadings and papers on file,
6 the trial record, and the findings and conclusions set forth in the Judgment, finds as follows:

7 1. Defendants' Motions identify no clerical mistakes, oversights, newly-discovered
8 evidence, or any other grounds for relief from the Judgment under Rule 60 of the Nevada Rules of
9 Civil Procedure ("NRCP"). See NRCP 60(a) and (b).

10 2. Defendants' Motions do not set forth grounds for relief under NRCP 52. The Court
11 made specific findings of fact substantiated by the actual trial record and separately stated its
12 conclusions of law, and the Court's findings and conclusions were set forth in a memorandum in
13 the Judgment. See NRCP 52(a)(1). Defendants failed to set forth any basis for the Court to make
14 additional findings or amend its findings. See NRCP 52(b).

15 3. Relief from a judgment or order under NRCP 59 is an extraordinary remedy
16 available only upon a finding that an error occurred which materially affected the substantial rights
17 of the movant. See NRCP 59(a)(1); see also Khoury v. Seastrand, 132 Nev. Adv. Op. 52, 377 P.3d
18 81, 94 (2016); Gunderson v. D.R. Horton, Inc., 130 Nev. 67, 74, 319 P.3d 606, 611 (2014). Here,
19 there was no irregularity that denied Defendants a fair trial, nor an error in law over Defendants'
20 objection that would justify a new trial or altering or amending the Judgment. Further, in light of
21 the volume of evidence supporting the Court's findings regarding the multiple badges of fraud and
22 Defendants' lack of good faith, Defendants cannot demonstrate that any error, if one occurred, was
23 one that affected the outcome of the trial or materially affected their substantial rights.

24 Based on the foregoing, and good cause appearing,

25 IT IS HEREBY ORDERED that Defendants' Motions for New Trial and/or to Alter or
26 Amend Judgment are DENIED.

27 Dated this 9 day of July, 2019.

28 Connie J. Steinheimer
DISTRICT JUDGE

Exhibit 5

1 **3980**

2 GARMAN TURNER GORDON LLP

3 GERALD M. GORDON, ESQ.

4 Nevada Bar No. 229

5 E-mail: ggordon@gtg.legal

6 ERIKA PIKE TURNER, ESQ.

7 Nevada Bar No. 6454

8 E-mail: eturner@gtg.legal

9 TERESA M. PILATOWICZ, ESQ.

10 Nevada Bar No. 9605

11 E-mail: tpilatowicz@gtg.legal

12 650 White Drive, Ste. 100

13 Las Vegas, Nevada 89119

14 Telephone 725-777-3000

15 *Proposed Attorneys to Trustee*

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

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

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

CASE NO.: CV13-02663

DEPT. NO.: 1

22 Plaintiff,

23 vs.

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

Defendants.

**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:¹

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

17 ROBISON BELAUSTEGUI SHARP & LOW

18 /s/ Teresa M. Pilatowicz
19 GERALD E. GORDON, ESQ.
20 ERIKA PIKE TURNER, ESQ.
21 TERESA M. PILATOWICZ, ESQ.
22 650 White Drive, Ste. 100
23 Las Vegas, Nevada 89119
24 Telephone 725-777-3000


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 ¹ 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**

2 GARMAN TURNER GORDON LLP

3 GERALD M. GORDON, ESQ.

4 Nevada Bar No. 229

5 E-mail: ggordon@gtg.legal

6 ERIKA PIKE TURNER, ESQ.

7 Nevada Bar No. 6454

8 E-mail: eturner@gtg.legal

9 TERESA M. PILATOWICZ, ESQ.

10 Nevada Bar No. 9605

11 E-mail: tpilatowicz@gtg.legal

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,

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 15th 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 16th 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.

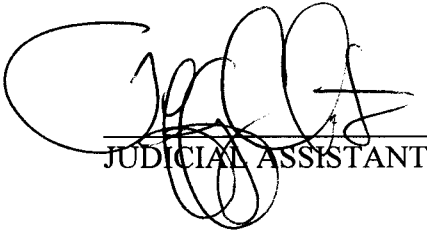
VIA MAIL

Gerald Gordan, Esq.

Teresa Pilotowicz, Esq.

650 White Drive, Ste. 100

Las Vegas, NV 89119



JUDICIAL ASSISTANT

Exhibit 6

1 **2540**
GORDON SILVER
2 GERALD M. GORDON, ESQ.
Nevada Bar No. 229
3 Email: ggordon@gordonsilver.com
JOHN P. DESMOND
4 Nevada Bar No. 5618
Email: jdesmond@gordonsilver.com
5 BRIAN R. IRVINE
Nevada Bar No. 7758
6 Email: birvine@gordonsilver.com
100 West Liberty Street
7 Suite 940
Reno, Nevada 89501
8 Tel: (775) 343-7500
Fax: (775) 786-0131

9 *Attorneys for Plaintiffs*

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

12 JH, INC., a Nevada corporation; JERRY
13 HERBST, an individual; and BERRY-
14 HINCKLEY INDUSTRIES, a Nevada
corporation,

15 Plaintiffs,

16 vs.

17 PAUL MORABITO, individually and as
Trustee of the ARCADIA LIVING TRUST;
18 SUPERPUMPER, INC., an Arizona
corporation; EDWARD BAYUK,
19 individually and as Trustee of the EDWARD
WILLIAM BAYUK LIVING TRUST; and
20 SNOWSHOE PETROLEUM, INC., a New
York corporation,

21 Defendants.
22
23

CASE NO.: CV13-02663

DEPT. NO.: 6

24 **NOTICE OF ENTRY OF ORDER**

25 PLEASE TAKE NOTICE that an Order denying Defendant Snowshoe Petroleum, Inc.'s
26 Motion to Dismiss Complaint for Lack of Personal Jurisdiction, was entered on the 17th day of
27
28

1 July, 2014, in the above-captioned matter. A copy of the written order is attached hereto as
2 "Exhibit 1".

3 **AFFIRMATION**

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

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

7 DATED this 17th day of July, 2014.

8 GORDON SILVER

9
10 By: /s/ Brian R. Irvine
11 GERALD M. GORDON, ESQ.
12 Nevada Bar No. 229
13 Email: ggordon@gordonsilver.com
14 JOHN P. DESMOND
15 Nevada Bar No. 5618
16 Email: jdesmond@gordonsilver.com
17 BRIAN R. IRVINE
18 Nevada Bar No. 7758
19 Email: birvine@gordonsilver.com
20 100 West Liberty Street
21 Suite 940
22 Reno, Nevada 89501
23 Tel: (775) 343-7500
24 Fax: (775) 786-0131

25 *Attorneys for Plaintiffs*

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 **NOTICE OF ENTRY OF**
4 **ORDER** on the parties as set forth below:

5 XXX 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
ordinary business practices

7 _____ Certified Mail, Return Receipt Requested

8 _____ Via Facsimile (Fax)

9 _____ Via E-Mail

10 _____ Placing an original or true copy thereof in a sealed envelope and causing the same
11 to be personally Hand Delivered

12 _____ Federal Express (or other overnight delivery)

13 addressed as follows:

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

18 DATED this 17th day of July, 2014.

19
20 /s/ Cindy S. Grinstead
An Employee of GORDON SILVER

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EXHIBIT TABLE

Exhibit	Description	Pages ¹
1	Order, July 17, 2014	10

¹ Exhibit page counts are exclusive of exhibit slip sheets.

EXHIBIT 1

EXHIBIT 1

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

JH, INC., a Nevada corporation; JERRY
HERBST, an individual; and BERRY
HINCKLEY INDUSTRIES, a Nevada
corporation,

Plaintiffs,

Case No. CV13-02663

Dept. No. 1

vs.

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

Defendants.

ORDER

On May 12, 2014, Defendant Snowshoe Petroleum, Inc. ("Snowshoe"), by and through
counsel, Barry L. Breslow, Esq., and Frank C. Gilmore, Esq., filed *Defendant Snowshoe Petroleum,
Inc.'s Motion to Dismiss Complaint for Lack of Personal Jurisdiction (NRC P 12(b)(2))*. On May
29, 2014, Plaintiffs JH, Inc. ("JH"), Jerry Herbst ("Mr. Herbst"), and Berry Hinckley Industries
("Berry Hinckley") (collectively, "Plaintiffs"), by and through counsel, Gerald M. Gordon, Esq.,

1 John P. Desmond, Esq., and Brian R. Irvine, Esq., filed an *Opposition to Motion to Dismiss*.¹ On
2 June 6, 2014, Snowshoe replied and submitted the matter for decision.²

3 In 2007, JH and Consolidated Nevada Corporation³ (“CNC”) purchased Berry Hinkley
4 stock under an Amended and Restated Stock Purchase Agreement (“the Purchase Agreement”).
5 (Compl. ¶ 14.) Defendant Paul Morabito (“Mr. Morabito”) personally guaranteed CNC’s
6 obligations under the Purchase Agreement. *Id.* A dispute arose between Plaintiffs, Mr. Morabito,
7 and CNC concerning the Purchase Agreement. (Compl. ¶ 15.) As a result, in December 2007, Mr.
8 Morabito and CNC brought an action against Plaintiffs in the Second Judicial District Court, Case
9 No. CV-02764, which was assigned to the Honorable Brent Adams (“the Department 6 Action”).
10 (Compl. ¶ 16.) In the Department 6 Action, Plaintiffs filed a number of counterclaims against Mr.
11 Morabito and CNC, including fraud, misrepresentation, and breach of contract. (Compl. ¶ 17.) On
12 September 13, 2010, the Court entered oral judgment in favor of Plaintiffs on a number of fraud-
13 based claims, followed by findings of fact and conclusions of law entered a month later. (Compl.
14 ¶¶ 18-19.) On August 23, 2011, the Court entered a judgment awarding Plaintiffs damages in the
15 amount of \$149,444,777.80 (“the Judgment”). (Compl. ¶ 20.)

16 While Mr. Morabito and CNC’s appeal of the Judgment was pending before the Nevada
17 Supreme Court, the parties entered into a Settlement Agreement and Mutual Release (“the
18 Settlement Agreement”) on November 30, 2011. (Compl. ¶ 21.) The Settlement Agreement
19 provided the parties would agree to vacate the appeal, as well as the Judgment, in exchange for
20 executing an \$85 million confession of judgment (“the Confessed Judgment”). *Id.* In the
21 Settlement Agreement, Mr. Morabito and CNC agreed timely pay their financial obligations, and to
22 submit themselves to the jurisdiction of the Second Judicial District Court for any dispute relating
23 to the Settlement Agreement. *Id.* Plaintiffs allege Mr. Morabito and CNC did not intend to comply

24
25 ¹ On May 30, 2014, Plaintiffs filed an *Errata to Opposition to Motion to Dismiss*, noting Exhibit 12 was inadvertently
omitted from the original filing.

26 ² On June 29, 2014, Defendant Superpumper, Inc., also filed a *Motion to Dismiss Complaint for Lack of Personal*
27 *Jurisdiction*, which has not been fully briefed or submitted yet.

28 ³ At the time of the Purchase Agreement, CNC’s predecessor-in-interest was “P.A. Morabito & Co.” (Compl. ¶ 9.)

1 with the terms of the Settlement Agreement, and induced Plaintiffs into executing the Settlement
2 Agreement in order to delay and avoid execution and collection of the Judgment so that they would
3 have more time to transfer and dissipate assets. (Compl. ¶ 23.)

4 Shortly after executing the Settlement Agreement, Mr. Morabito and CNC allegedly failed
5 to comply with several of its terms and defaulted. (Compl. ¶ 24.) Following the default, the parties
6 executed a Forbearance Agreement on March 1, 2013. (Compl. ¶¶ 25-26.) The Forbearance
7 Agreement provided that in the event of its default, or of default under the Settlement Agreement
8 (other than the acknowledged continuing defaults), Plaintiffs were entitled to immediately exercise
9 and enforce their rights and remedies under the Settlement Agreement. (Compl. ¶ 29.) Plaintiffs
10 allege Mr. Morabito and CNC did not intend to comply with the terms of the Forbearance
11 Agreement, and induced Plaintiffs into executing the Forbearance Agreement in order to delay and
12 avoid execution and collection of the Judgment so that they would have more time to transfer and
13 dissipate assets. (Compl. ¶ 30.)

14 Plaintiffs allege Mr. Morabito and CNC failed to comply with the terms of the Forbearance
15 Agreement, and on June 18, 2013, Plaintiffs filed the Confessed Judgment with the Second Judicial
16 District Court, resulting in Mr. Morabito and CNC being jointly and severally indebted to Plaintiffs
17 in the amount of \$85 million. (Compl. ¶¶ 31-32.) Plaintiffs allege Defendants engaged in a series
18 of fraudulent transfers to related parties, including Snowshoe, in an effort to prevent collection of
19 the Judgment or Confessed Judgment, and to protect Mr. Morabito from having any of his assets
20 seized. (Compl. ¶ 34.)

21 Plaintiffs have filed six claims against Defendants: (1) for fraudulent transfers under NRS
22 Chapter 112 against all Defendants; (2) for breach of contract against Mr. Morabito; (3) for breach
23 of the implied covenant of good faith and fair dealing against Mr. Morabito; (4) for fraudulent
24 inducement/misrepresentation against Mr. Morabito; (5) for civil conspiracy against all Defendants;
25 and (6) for aiding and abetting fraudulent misrepresentation against Bayuk, Salvatore Morabito,
26 Snowshoe, and Superpumper. (Compl. ¶¶ 36-85.) Plaintiffs request compensatory and punitive
27 damages, reasonable attorney fees and costs, garnishments against Defendants who received the
28 fraudulent assets, avoidance of the transfer of obligation to the extent necessary to satisfy Plaintiffs'

1 claim, and attachment or other provisional remedy against the asset transferred or other property of
2 Defendants.

3 The following alleged facts are relevant to the resolution of this *Motion to Dismiss*: Mr.
4 Morabito was a director and shareholder of Consolidated Western Corporation (“CWC”), a Nevada
5 Corporation. (Opp’n Ex. 3.) Mr. Morabito’s brother, Salvatore Morabito, was vice-president of
6 CWC. *Id.* Mr. Morabito owned 80% of CWC. (Compl. ¶ 35.) Salvatore Morabito owned 10% of
7 CWC, and Edward Bayuk, Mr. Morabito’s domestic partner, also owned 10%.⁴ *Id.*

8 On September 29, 2010, CWC merged into Superpumper, Inc. (“Superpumper”), an Arizona
9 corporation. *Id.* Mr. Morabito also owned 80% of the shares in Superpumper. *Id.* Superpumper’s
10 principal place of business is Maricopa County, Arizona. (Compl. ¶ 6.)

11 The next day, Mr. Morabito sold his 80% interest in Superpumper to Snowshoe for
12 approximately \$2.5 million, despite the fact that the shares had allegedly been valued at more than
13 \$5.5 million in 2009. *Id.* Snowshoe is a New York corporation, and Salvatore Morabito is the chief
14 executive officer; Bayuk is a shareholder and director. (Opp’n Ex. 8.) According to Salvatore
15 Morabito, Snowshoe’s principal office is located in Buffalo, New York, it has never had any
16 contacts with the State of Nevada, and the transfer of Mr. Morabito’s interest in Superpumper to
17 Snowshoe was facilitated in New York, with New York counsel, and under the application of New
18 York law. (Decl. of Salvatore Morabito ¶ 5, ¶ 9, ¶ 12.) However, Plaintiffs contend Snowshoe
19 Petroleum was incorporated the day before the sale for the sole purpose of receiving the transfer
20 from Mr. Morabito. *Id.* Plaintiffs allege this transfer and others were done in an effort to avoid
21 collection on the Judgment and Confession of Judgment. (Compl. ¶ 35.) Plaintiffs aver the Second
22 Judicial District Court has jurisdiction over the matter because Defendants reside or are located in
23 Washoe County, the activities complained of occurred in Washoe County, the alleged fraudulent
24

25
26 ⁴ Mr. Morabito, Salvatore Morabito, and Bayuk all allegedly resided in Nevada at some point, though the exact dates of
27 their residencies is unclear. (Compl. ¶ 4, ¶ 7, ¶ 9; Opp’n Ex. 11, Ex. 13.)

28 Mr. Herbst, who owns JH, is a Nevada resident. (Compl. ¶ 2.) JH is a Nevada corporation with its principal place of
business in Washoe County. (Compl. ¶ 1.) JH also owns Berry Hinckley, which is a Nevada corporation with its
principal place of business in Washoe County. (Compl. ¶ 1, ¶ 3.)

1 transfers originated from Washoe County, and/or Defendants expressly agreed to submit themselves
2 to the Second Judicial District Court's jurisdiction. (Compl. ¶ 11.)

3 In its *Motion to Dismiss*, Snowshoe argues the Court lacks personal jurisdiction over it
4 under Nevada's long-arm statute because Plaintiff fails to allege Snowshoe had any contacts with
5 Nevada, and the alleged conspiracy has no connection to Nevada. (Mtn. 2:12-17.) Snowshoe
6 contends it never participated in any transactions that "originated" in Washoe County, and has not
7 had any contact with Nevada that justifies the exercise of personal jurisdiction over it. (Mtn. 2:27-
8 3:1.) Snowshoe avers: (1) it was incorporated by Salvatore Morabito, a dual Canadian/American
9 citizen and current resident of the State of Arizona; (2) its attorneys in Buffalo, New York, prepared
10 the articles and other filings and provided advice to Salvatore Morabito from New York; (3) its
11 principal office is located in Buffalo, New York, and has been since the date of its incorporation;
12 (4) it has never transacted business in Nevada, or sold products, nor offered services in Nevada; and
13 (5) it has not had any employees who worked in Nevada. (Mtn. 3:3-10.) While Snowshoe owns an
14 interest in Defendant Superpumper, Superpumper is an Arizona corporation with no assets or
15 business in Nevada. (Mtn. 3:10-12.)

16 Snowshoe argues that while Mr. Morabito previously owned an interest in Superpumper,
17 that interest was sold to Snowshoe in September 2010, and the transfer of interest was facilitated in
18 New York, with New York counsel, under the application of New York law. (Mtn. 3:13-16.) At
19 the time the transfer occurred, Salvatore Morabito was a resident of the State of California. (Mtn.
20 3:17-18.) Therefore, Snowshoe argues Nevada lacks general jurisdiction over Snowshoe because
21 Plaintiffs have not alleged it has a systematic and continuous presence in the state. (Mtn. 5:11-6:3.)
22 Further, Snowshoe argues Nevada does not have specific jurisdiction over it due to its alleged
23 conspiracy with one-time Nevada residents because a number of courts rejected the theory of
24 conspiracy jurisdiction; even if the Court adopted that theory, a bare allegation of conspiracy
25 between the defendant and a person within the personal jurisdiction of the court is insufficient to
26 establish personal jurisdiction over the defendant. (Mtn. 6:4-7:4.) Further, Snowshoe has not
27 purposely directed any contact towards Nevada. (Mtn. 7:9-8:1.)
28

1 Plaintiffs respond they are asserting that specific, not general, jurisdiction applies in this
2 case, and that Snowshoe was formed with the specific purpose to accept a fraudulent transfer of a
3 significant Nevada asset from a Nevada judgment debtor, without payment of adequate value.
4 (Opp'n 7:15-16.) Plaintiffs argue it is clear these actions were undertaken at Mr. Morabito and his
5 co-conspirators' direction with the intent to stop or hinder Plaintiffs from collecting their Nevada
6 judgment, given then timing and the effort undertaken to move the asset from Nevada to an entity
7 formed in New York, and from Mr. Morabito to related to third parties. (Opp'n 7:16-20.) Plaintiffs
8 note Snowshoe was formed only two weeks after the Honorable Brent Adams orally entered a
9 multi-million dollar judgment against Mr. Morabito, and Snowshow was formed by Mr. Morabito's
10 New York counsel, Dennis Vacco, Esq., who has also represented Bayuk and Salvatore Morabito,
11 and was admitted pro hac vice in the Department 6 Action; Snowshoe was formed at the direction
12 of Mr. Morabito's brother, Salvatore Morabito, who also serves as CEO, and Bayuk, Mr.
13 Morabito's domestic partner, was a shareholder and director of Snowshoe when it was formed and
14 when it purchased Mr. Morabito's interest in Superpumper. (Opp'n 7:21-28.) Further, Mr.
15 Morabito, Bayuk, and Salvatore Morabito all admitted they were residents of Nevada sometime
16 during 2010, and Snowshoe received an asset that had been owned and controlled by Mr.
17 Morabito—over \$5.5 million in shares in CWC, a Nevada corporation—for less than fair market
18 value. (Opp'n 8:1-4.) Plaintiffs aver their claim arises directly out of this action. (Opp'n 8:13-20.)
19 Plaintiffs clarify that a conspiracy theory is not the basis of their assertion of personal jurisdiction;
20 instead, Plaintiffs argue Snowshoe has availed itself to the jurisdiction of Nevada court because it
21 was the ultimate recipient of a Nevada asset from a Nevada judgment creditor, and it knowingly
22 took the asset for less than fair market value. (Opp'n 8:21-25.)

23 Where personal jurisdiction is decided without a full evidentiary hearing, the "plaintiff need
24 only make a *prima facie* showing of jurisdiction." *Firouzabadi v. First Judicial Dist. Court*, 110
25 Nev. 1348, 1352, 885 P.2d 616, 618-19 (1994). "If the plaintiff makes a *prima facie* case of
26 jurisdiction prior to trial, the plaintiff must still prove personal jurisdiction at trial by a
27 preponderance of the evidence." *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 693, 857
28 P.2d 740, 744 (1993). This showing must be made by "introducing competent evidence of essential

1 facts,” which can include affidavits, depositions, and other discovery materials. *Id.* at 692-93, 587
2 P.2d at 743-44. The Court “accepts all properly supported proffers of evidence by the plaintiff as
3 true” and resolves factual disputes in the plaintiff’s favor. *Id.* at 693, 857 P.2d at 744.

4 “To obtain jurisdiction over a non-resident defendant, a plaintiff must show: (1) that the
5 requirements of the state’s long-arm statute have been satisfied, and (2) that due process is not
6 offended by the exercise of jurisdiction.” *Id.* at 687, 698, 857 P.2d at 747; *see also* NRS 14.065(1).
7 Due process requires that “minimum contacts” exist “between the defendant and the forum state
8 ‘such that the maintenance of the suit does not offend traditional notions of fair play and substantial
9 justice. *Consipio Holding, BV v. Carlberg*, 128 Nev. ___, ___, 282 P.3d 751, 754 (2012) (quoting
10 *Trump*, 109 Nev. at 698, 857 P.2d at 747). The defendant should “reasonably anticipate being
11 haled into court” in the forum state due to its conduct and connection there. *Id.* at ___, 282 P.3d at
12 754 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). However,
13 “[t]he unilateral activity of those who claim some relationship with a non-resident defendant cannot
14 satisfy the requirement of contact with the forum state.” *MGM Grand, Inc. v. Eighth Judicial Dist.*
15 *Court*, 107 Nev. 65, 69, 807 P.2d 201, 203 (1991).

16 The Court applies a three part-inquiry to determine whether specific personal jurisdiction
17 exists, which consists of: (1) whether the defendant purposely availed itself to the privilege of
18 conducting business in the state, or purposefully directed its actions towards the state, (2) whether
19 the cause of action arises out of the defendant’s forum-related activities, and (3) whether the
20 exercise of jurisdiction over the defendant is reasonable. *See Consipio*, 128 Nev. at ___, 282 P.3d
21 at 755.

22 Pursuant to the Nevada Uniform Fraudulent Transfer Act (“NUFTA”), a creditor may void a
23 transfer against the initial transferee of the asset, or any subsequent transferee that did not take in
24 good faith for value. NRS 112.220(2). Relief under NUFTA requires proof that the debtor made
25 the alleged fraudulent transfer with (a) “actual intent to hinder, delay or defraud any creditor,” or
26 (b) the debtor, who was insolvent at the time or became so as a result of the transfer, did not receive
27 “reasonably equivalent value in exchange.” NRS 112.180(1); NRS 112.190. In determining actual
28 intent, NRS 112.180(2) lists eleven “badges of fraud” that may be considered, among other factors.

1 See *In re Nat'l Audit Defense Network*, 367 B.R. 207, 219-20 (Bank. D. Nev. 2007) ("Intent
2 required for actual fraudulent transfers is established by circumstantial evidence . . . courts have
3 developed 'badges of fraud'—that is, recurring actions that historically have been associated with
4 actual intent to hinder, delay or defraud creditors."). A judgment may be entered against the first
5 transferee of the asset, or "[a]ny subsequent transferee other than a transferee who took in good
6 faith for value or from any subsequent transferee." NRS 112.220(2)(b). Other relief may include
7 "[a]n injunction against further disposition by the debtor or transferee, or both, of the asset
8 transferred or of other property." NRS 112.210(1)(c)(1).

9 Acceptance of an alleged fraudulent transfer of Nevada assets may sustain a prima facie
10 showing of specific personal jurisdiction. See *Casentini v. Ninth Judicial Dist. Court*, 110 Nev.
11 721, 727, 887 P.2d 535, 539-40 (1994) (finding personal jurisdiction over a California resident who
12 was the primary or sole shareholder of a Nevada corporation, declared a Nevada address on the
13 corporate income tax form as his address, and engaged in allegedly fraudulent stock transfers
14 involving the Nevada corporation with his son, who was a Nevada resident). Further, intentional
15 conduct occurring outside the forum state, but designed to cause harm in the forum state, may be a
16 basis for finding minimum contacts. *Calder v. Jones*, 465 U.S. 783, 787-90 (1984) (holding that
17 defendants must "reasonably anticipated being haled into court [in the forum state]" because "their
18 intentional, and allegedly tortious, actions were expressly aimed at" the forum state, even though
19 they occurred outside the forum state, and "they knew that the brunt of th[e] injury would be felt" in
20 the forum state.").

21 Here, resolving factual disputes in the Plaintiffs' favor, the former Nevada assets, Mr.
22 Morabito's shares of CWC, are held by Snowshoe, an out-of-state corporation owned and operated
23 by sophisticated businessmen and purported Nevada residents as the result of alleged fraudulent
24 transfers between corporations owned and operated by those same businessmen. These transfers
25 were allegedly a means of shielding the former Nevada assets from execution to satisfy a judgment
26 from a Nevada court. The Court must give deference to Plaintiffs' allegations. Plaintiffs allege
27 Snowshoe knew it was engaging in business transactions for the purpose of defrauding Nevada
28 residents of a judgment won in a Nevada state court; these allegations of Defendants' knowledge


1 and actual involvement in the alleged fraudulent business transactions support a finding that
2 Snowshoe purposefully availed itself to Nevada jurisdiction. Snowshoe's contacts with Nevada
3 were not the result of a unilateral act of a third party, nor were they random or fortuitous; they are
4 allegedly the direct and intended consequence of the transfers in September 2010. Therefore, the
5 Court finds Snowshoe purposefully availed itself to the conduct of business in Nevada, and/or
6 purposefully directed its actions towards Nevada, and Plaintiffs' alleged injury arises out of this
7 alleged conduct.

8 The Court finds Defendants have failed to present a compelling case that exercise of
9 personal jurisdiction would be unreasonable under the global circumstances of this case. *See*
10 *Trump*, 109 Nev. at 700, 857 P.2d at 749-50 (noting that even when a defendant has sufficient
11 contacts with the forum state to establish specific jurisdiction, the defendant may still defeat
12 jurisdiction by making a compelling case that other factors render the exercise of jurisdiction
13 unreasonable).

14 The Court has considered the arguments of the parties and the record in its entirety.
15 Accordingly, and good cause appearing, Snowshoe Petroleum, Inc.'s *Motion to Dismiss Complaint*
16 *for Lack of Personal Jurisdiction (NRCP 12(b)(2))* is DENIED.

17 IT IS SO ORDERED.

18 DATED this 17th day of July, 2014.

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21 JANET J. BERRY
22 District Judge
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Gerald M. Gordon, Esq.
John P. Desmond, Esq.
Brian R. Irvine, Esq.
Barry L. Breslow, Esq.
Frank C. Gilmore, Esq.


Christine Kuhl

Exhibit 7

3370

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

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

Case No. CV13-02663

Plaintiff,

Department No.: B4

v.

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

Defendants.

ORDER REGARDING DISCOVERY COMMISSIONER'S RECOMMENDATION FOR
ORDER DATED AUGUST 17, 2017

Presently before the Court is an objection to a *Recommendation for Order* (hereinafter the "*Recommendation*") issued by Discovery Commissioner Wesley Ayres (hereinafter the "Commissioner") on August 17, 2017. The relevant procedural history is as follows. On July 18, 2017, Defendants Superpumper, Inc., Edward Bayuk, individually and as Trustee of the Edward Williams Bayuk Living Trust, Salvatore Morabito, and Snowshoe Petroleum, Inc., (hereinafter collectively, "Defendants") filed a *Motion to Quash Subpoena, or in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP*. Plaintiff William A. Leonard, Trustee for the Bankruptcy Estate of Paul Anthony Morabito (hereinafter "Plaintiff") filed an *Opposition to Motion to Quash Subpoena, or in the Alternative for a Protective*

1 *Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP and a Countermotion*
2 *for Sanctions to Compel Resetting of 30(b)(6) Deposition of Hodgson Russ LLP* on July 24, 2017.

3 On August 2, 2017, Defendants filed a reply in support of their motion, and opposed the
4 countermotion for sanctions. On August 9, 2017, Plaintiff filed a reply in support of the
5 countermotion for sanctions. The Commissioner held a telephonic hearing on August 10, 2017 on
6 the matters and issued a *Recommendation* on August 17, 2017. On August 28, 2017, Defendants
7 filed *Objection to Recommendation for Order*. On September 5, 2017, Plaintiff filed an *Opposition*
8 *to Objection to Recommendation for Order*. On September 15, 2017, Defendants filed a reply
9 and submitted the matter to the Court for consideration.

10 In the *Recommendation*, the Commissioner denied the *Motion to Quash* and granted in part
11 the countermotion for sanctions. The Commissioner ordered: i) Plaintiff is entitled to proceed with
12 the NRCP 36(b)(6) deposition of Hodgson Russ LLP (hereinafter "HR") on the topics set forth in
13 the subpoena previously served; ii) the deposition must proceed in accordance with all applicable
14 court decisions addressing Plaintiff's right to seek information that otherwise would be protected
15 from disclosure by an evidentiary privilege; iii) Plaintiff is entitled to recover from Defendants the
16 reasonable attorney's fees and costs of the court reporter incurred in the July deposition of HR
17 (after an itemized statement of expenses is provided); iv) Plaintiff may recover from Defendants
18 all reasonable travel costs associated with the rescheduled HR deposition (after an itemized
19 statement of expenses is provided); and v) Defendants are to pay Plaintiff the sum of \$3,000 for
20 the reasonable expenses incurred in this discovery dispute.

21 Defendants' objection to the *Recommendation* is twofold. First, Defendants assert the
22 Commissioner overlooked the importance of the parties' meet and confer agreements related to
23 the dispute. Defendants contend the Commissioner erroneously concluded the parties did not
24 make an agreement under the DCR 16. Defendants are of the position the parties agreed to conduct
25 a brief deposition of HR so long as the scope of the deposition was limited to information contained
26 in what the parties refer to as the "Vacco Documents." Defendants contend the agreement is
27 reflected in an email sent to Defendants on January 24, 2017, which complied with DCR 16. Based
28 on this belief there was an agreement to limit the scope of the deposition, Defendants, in good

1 faith, suspended the HR deposition after Plaintiff began asking information beyond the scope. At
2 the very least, Defendants urge the Court to recognize that Defendants and Plaintiff met and
3 conferred in response to the dispute months before the deposition, followed appropriate procedure
4 for a discovery dispute, and therefore sanctions are inappropriate.

5 Second Defendants contend the award of \$3,000 in sanctions is arbitrary. Due process
6 requires the sanctions for discovery abuses to be just and relate to the claims which were at issue
7 in the discovery order which is violated. There is no information about what expenses Plaintiff
8 incurred in carrying out this dispute. The amount is arbitrary and unjust without further
9 information relating to the alleged discovery abuse. Defendants argue the \$3,000 sanction did not
10 relate to the deposition suspension; instead it was for expenses incurred during a good faith
11 discovery dispute.

12 Plaintiff contends a seriously erroneous standard applies to the initial review of a
13 recommendation issued by the Commissioner as he is akin to a special master. Further, Nevada
14 applies an abuse of discretion standard to discovery sanctions. Plaintiff argues Defendants'
15 objection contains the same arguments advanced in the *Motion to Quash*. The Commissioner
16 heard a lengthy dispute on August 10, 2017. The *Recommendation* was thereafter entered, and it
17 specifically addressed the arguments as to any alleged agreement to limit the scope of the
18 deposition.

19 Additionally, Plaintiffs contend, the \$3,000 award was not arbitrary or unreasonable and is
20 far below the fees actually incurred. The Young v. Johnny Ribeiro Bldg., 106 Nev. 88, 787 P.2d
21 777, (1990) factors which require a review of whether or not sanctions relate to the claims at issue
22 only apply to dispositive sanctions, not merely monetary sanctions. The Commissioner identified
23 the primary reasons for the imposition of sanctions. The award of sanctions was abundantly
24 appropriate in light of Defendants' egregious actions in unilaterally suspending Plaintiffs' noticed
25 depositions over seven months after it was noticed, after the parties had travelled across the
26 country, and after the deposition had already commenced. The Commissioner, who is tasked with
27 addressing these types of discovery disputes, is keenly aware of what a reasonable sanction for
28 this type of abusive litigation practice amounts to, and he ultimately determined \$3,000 was

1 sufficient. In reality, Plaintiff actually incurred significantly more in expenses, which amounts
2 continue to increase as a result of the objection.

3 The district court has wide discretion in controlling pretrial discovery. See MGM Grand,
4 Inc. v. District Court, 107 Nev. 65, 70 (1991) (citations omitted). “After the discovery
5 commissioner’s report and recommendations are signed and objected to, the district court has the
6 option of affirming and adopting the recommendations without a hearing, or setting a date and
7 time for a hearing upon the objections filed.” Bahena v. Goodyear Tire & Rubber Co., 126 Nev.
8 243, 250, 235 P.3d 592, 597, n.5 (Nev. 2010); see also 16.1(d)(3)(“[u]pon receipt of a discovery
9 commissioner's report and any objections thereto, the court may affirm, reverse, or modify the
10 commissioner's ruling, set the matter for a hearing, or remand the matter to the
11 commissioner for further action, if necessary”).

12 The Second Judicial District Court has approved the automatic referral to the discovery
13 master all discovery proceedings pursuant to NRCP 16, 16. 1, and 16.2. WDCR 24(1). The local
14 rule provides, “[a] party shall have 10 days from service of written findings of fact and
15 recommendations [of the discovery master] within which to file an objection. When an objection
16 has been filed, the district judge shall have discretion to determine the manner in which the master's
17 recommendation will be reviewed.” WDCR 24(6).

18 The Court first considers the argument the Commissioner overlooked the importance of
19 the parties meet and confer agreement whereby the parties agreed to limit the scope of the HR
20 deposition. Initially, the Court finds the Commissioner thoroughly considered the issues
21 surrounding the alleged limited scope of the HR deposition. The Commissioner found Defendants
22 (via two court approved stipulations) permitted HR’s NRCP 30(b)(6) deposition after the
23 discovery deadline. The Commissioner considered Defendants argument the scope of the HR
24 deposition should be limited to only those emails which were agreed to in January when counsel
25 met and conferred. The Commissioner considered DCR 16, and determined Defendants did not
26 provide the Court with a written agreement signed by Plaintiff’s counsel, in which Plaintiff agreed
27 to limit the scope of the HR deposition. The Commissioner relied on the fact the stipulations and
28 Court orders were sated without any limitation on the deposition of HR. The Commissioner

1 expressly considered whether the Jan 24, 2017 email from Plaintiff's counsel to Defendants'
2 counsel showed an agreement to limit the scope of the deposition to emails attached therein.
3 However, the Commissioner could not agree because i) the email does not purport to set forth any
4 limitation, and ii) Plaintiff's counsel has stated these documents were sent to Defendants' counsel
5 in response to his request to see the specific documents produced by Mr. Vacco in December 2016
6 that led to the issuance of the HR subpoena. The Commissioner found this is "precisely the
7 situation DCR 16 was intended to address – a dispute between parties, or their counsel, about
8 whether an agreement was reached or about the terms of an unwritten agreement." The
9 Commissioner noted DCR 16 avoids the court having to make a determination of which side's
10 explanation is correct because it places the onus of executing a clear agreement on the party who
11 wishes to enforce that agreement.

12 The Court has reviewed the January 24, 2017 email, which provides:

13 Frank,

14 Attached please find the e-mails that I intend to discuss at the deposition of
15 Hodgson Russ. I intended to provide Hodgson Russ with the notice of waiver of
privilege tomorrow.

16 If you have any questions, please let me know.

17 Teresa M. Pilatowicz

18 [Objection to Recommendation, Ex. 1]. DCR 16 provides:

19 No agreement or stipulation between the parties in a cause or their attorneys, in
20 respect to proceedings therein, will be regarded unless the same shall, by consent,
21 be entered in the minutes in the form of an order, or unless the same shall be in
writing subscribed by the party against whom the same shall be alleged, or by his
attorney.

22 For the reasons articulated by the Discovery Commissioner and referenced herein, as well
23 as for the other findings in the *Recommendation*, the Court agrees with the Commissioners'
24 conclusion there was no express agreement to limit the scope of the deposition and therefore
25 Defendants did not have a justification to suspend the deposition. The January email does not
26 expressly limit the scope of the deposition. To the extent that the email was a reflection of other
27 verbal discussions to limit the scope of the deposition, the Court agrees DCR 16 requires a writing
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1 to reflect such agreement. See Humana, Inc. v. Nguyen, 102 Nev. 507, 509, 728 P.2d 816, 817
2 (1986).

3 Second, the Court considers whether the sanction of \$3,000 for reasonable expenses is
4 arbitrary. Sanctions may be awarded for discovery violations in certain situations. For instance,
5 NRCP 37(b)(2) permits the award of reasonable expenses “[i]f a party or an officer, director, or
6 managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf
7 of a party fails to obey an order to provide or permit discovery, including an order made under
8 subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rules 16,
9 16.1, and 16.2. Additionally, NRCP 30(d)(2) permits sanctions “...including the reasonable
10 expenses and attorney's fees incurred by any party--on a person who impedes, delays, or frustrates
11 the fair examination of the deponent.”

12 With regard to Plaintiff's request for sanctions, the Commissioner found Defendants did
13 not have a legitimate basis for suspending the HR deposition. The Commissioner found at a
14 minimum, if Defendants believed Plaintiff was not entitled to ask questions upon documents other
15 than the emails disclosed to their counsel on January 24, 2017, Defendants should have permitted
16 Plaintiff's counsel to question HR designees about those emails. The Recommendation stated:

17 [W]hile the Court appreciates Defendants' belief that their counsel had an
18 agreement to limit the HR deposition to those emails, it cannot find that suspension
19 for the deposition was permissible on that basis absent evidence sufficient to
support a finding that such agreement actually existed.

20 [Recommendation, at 9].

21 The Commissioner therefore found Plaintiff was entitled to an award of sanctions for all
22 additional expense incurred by Plaintiff as a result of Defendants' suspension of the disposition.
23 Specifically, the Commissioner determined Plaintiff may recover the reasonable attorney's fees
24 and the costs of the court reporter incurred for the July HR deposition, the reasonable travel costs
25 associated with the rescheduled HR deposition, and the reasonable expenses incurred in connection
26 with this discovery dispute, which the Commissioner determined to be \$3,000.

27 The Court finds the Commissioner did not abuse his discretion in awarding sanctions, as
28 there is ample reason in the record to support such a determination. However, the Court finds the

1 \$3,000 award is not based on facts determined after a hearing as to the appropriate amount of the
2 sanctions. Therefore, the Court finds the amount of the sanction must be reviewed and a new
3 recommendation issued by the Commissioner after a hearing. The Court will therefore affirm the
4 Commissioner's Recommendation except as to the amount of the sanction to be paid by
5 Defendants.

6 Upon review of the file and good cause appearing,

7 IT IS HEREBY ORDERED that the Discovery Commissioner's Recommendation for
8 Order dated August 17, 2017 is CONFIRMED, APPROVED AND ADOPTED, in all respects
9 except as to the amount of sanction. The matter of the amount of the sanction is remanded to the
10 Discovery Commissioner for a hearing and renewed recommendation after the hearing.

11 DATED this 7 day of December, 2017.

12
13 Connie J. Steinheimer
14 DISTRICT JUDGE
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CERTIFICATE OF SERVICE

CASE NO. CV13-02663

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 7 day December 2017, I filed the **ORDER REGARDING DISCOVERY COMMISSIONER'S RECOMMENDATION FOR ORDER DATED AUGUST 17, 2017** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

X **Personal delivery to the following:**

Commissioner Wesley Ayres
Discovery Commissioner
Second Judicial District Court

X **Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User Agreement.**

TERESA PILATOWICZ, ESQ. for WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO
FRANK GILMORE, ESQ. for EDWARD WILLIAM BAYUK LIVING TRUST et al
MARK WEISENMILLER, ESQ.

 Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada: [NONE]

 Placed a true copy in a sealed envelope for service via:

 Reno/Carson Messenger Service – [NONE]

 Federal Express or other overnight delivery service [NONE]

DATED this 7 day of December, 2017.



Exhibit 8

CASE NO. CV13-02663

**TITLE: WILLIAM A. LEONARD, Trustee for the Bankruptcy
Estate of Paul Anthony Morabito VS. SUPERPUMPER, INC.,
EDWARD BAYUK, EDWARD WILLIAM BAYUK LIVING TRUST,
SALVATORE MORABITO and SNOWSHOE PETROLEUM, INC.**

DATE, JUDGE
OFFICERS OF

PAGE ONE

COURT PRESENT

APPEARANCES-HEARING

CONT'D TO

10/29/18

NON-JURY TRIAL – DAY ONE

HONORABLE
CONNIE
STEINHEIMER
DEPT. NO.4
M. Stone
(Clerk)
J. Schonlau
(Reporter)

Plaintiff William A. Leonard, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, present with counsel, Teresa Pilatowicz, Esq., Erika Turner, Esq., and Gabrielle Hamm, Esq. Defendant Edward Bayuk present, individually and as representative for Edward William Bayuk Living Trust, Superpumper, Inc., and Snowshoe Petroleum, Inc., and Defendant Salvatore Morabito present, individually and as representative for Superpumper, Inc., and Snowshoe Petroleum, Inc., with counsel, Frank Gilmore, Esq.

9:12 a.m. Court convened.

Appearances made for the record, including Chris Kemper, Esq., counsel for the Herbst Family present in the gallery.

Court noted that respective counsel have provided the Court with a set of stipulated findings of fact in this case. Court directed respective counsel to identify the remaining facts in their originally provided Findings of Fact, Conclusions of Law that remain at dispute after the noon recessed.

Defendant's Motion in Limine by counsel Gilmore; presented argument; objection and argument by counsel Pilatowicz; reply argument by counsel Gilmore. **COURT ENTERED ORDER** denying Motion with leave to renew if testimony supports renewal of such Motion.

Plaintiff's Motion in Limine to Exclude Testimony of Jan Friederich by counsel Pilatowicz; presented argument; objection and argument by counsel Gilmore; reply argument by counsel Pilatowicz. **COURT ENTERED ORDER** holding ruling in abeyance pending testimony of Mr. Friederich. Testimony may not go beyond the testimony presented in his deposition. Should the Plaintiff believe his testimony is going beyond, an objection must be raised. Court further directed respective counsel to provide Mr. Friederich's deposition to the Court for review and utilization during testimony.

Counsel Turner presented opening statement
Counsel Gilmore presented opening statement.

EXHIBITS 1 – 299 previously marked.

EXHIBITS 1 – 3, 8, 20, 25, 28, 38, 39, 42 – 58, 60 – 67, 71 – 73, 80 – 87, 90 – 92, 103 – 106, 108 – 123 125 – 127, 131, 137, 155 – 158, 163, 164, 174, 179 – 194, 196 – 198, 223, 224, 229, 241, 244, 258, 263 and 278 ordered admitted into evidence based on stipulation of respective counsel.

Respective counsel advised the Court that redactions to Exhibits 42, 72, 126,

CASE NO. CV13-02663

**TITLE: WILLIAM A. LEONARD, Trustee for the Bankruptcy
Estate of Paul Anthony Morabito VS. SUPERPUMPER, INC.,
EDWARD BAYUK, EDWARD WILLIAM BAYUK LIVING TRUST,
SALVATORE MORABITO and SNOWSHOE PETROLEUM, INC.**

**DATE, JUDGE
OFFICERS OF
COURT PRESENT**

PAGE TWO

APPEARANCES-HEARING

CONT'D TO

10/29/18

NON-JURY TRIAL – DAY ONE

J. Schonlau
(Reporter)

156 and 185 – 189 have been provided to the Clerk.
Respective counsel further stipulated that all testimony will be elicited from each witness at one time so that certain witnesses will not have to be called multiple times.
10:35 p.m. Court recessed.
10:53 p.m. Court reconvened with respective counsel and parties present.

***Deposition of Jan Friederich taken March 29, 2016 opened and published.

Rule of Exclusion invoked by counsel Gilmore.

Timothy Herbst called by counsel Pilatowicz, sworn and testified.

EXHIBIT 5 offered by counsel Pilatowicz; objection by counsel Gilmore; ordered admitted into evidence with caveat should it be deemed irrelevant based on additional testimony.

Witness Herbst further direct examined.

EXHIBIT 6 offered by counsel Pilatowicz; objection by counsel Gilmore; objection overruled and ordered admitted into evidence.

Witness Herbst further direct examined.

EXHIBIT 7 offered by counsel Pilatowicz; limited objection by counsel Gilmore; objection sustained with stipulation of counsel that an involuntary bankruptcy petition was filed by Herbst.

Witness Herbst further direct examined.

EXHIBITS 21, 22 and 23 offered by counsel Pilatowicz; objection by counsel Gilmore; objection overruled and ordered admitted into evidence based on the documents being Orders entered by the Bankruptcy Court and judicial notice can be taken.

Witness Herbst further direct examined.

CASE NO. CV13-02663

**TITLE: WILLIAM A. LEONARD, Trustee for the Bankruptcy
Estate of Paul Anthony Morabito VS. SUPERPUMPER, INC.,
EDWARD BAYUK, EDWARD WILLIAM BAYUK LIVING TRUST,
SALVATORE MORABITO and SNOWSHOE PETROLEUM, INC.**

**DATE, JUDGE
OFFICERS OF
COURT PRESENT**

PAGE THREE

APPEARANCES-HEARING

CONT'D TO

10/29/18 **NON-JURY TRIAL – DAY ONE**

J. Schonlau
(Reporter)

Witness Herbst further direct examined; cross-examined.

EXHIBIT 280 offered by counsel Gilmore; no objection by counsel Pilatowicz;
ordered admitted into evidence.

Witness Herbst further cross-examined.

EXHIBIT 279 offered by counsel Gilmore; objection by counsel Pilatowicz;
objection sustained.

Witness Herbst further cross-examined; redirect examined; recross-examined;
excused.

12:01 p.m. Court recessed until 1:15 p.m.

1:18 p.m. Court reconvened with respective counsel and parties present.

Edward Bayuk called by counsel Turner, sworn and testified.

EXHIBIT 35 offered by counsel Turner; no objection by counsel Gilmore;
ordered admitted into evidence.

Witness Bayuk further examined by counsel Turner.

EXHIBIT 88 offered by counsel Turner; objection by counsel Gilmore; objection
overruled and ordered admitted into evidence.

Witness Bayuk further examined by counsel Turner.

3:04 p.m. Court recessed.

3:25 p.m. Court reconvened with respective counsel and parties present.

EXHIBIT 77 offered by counsel Turner; objection by counsel Gilmore; objection
overruled and ordered admitted into evidence.

Witness Bayuk, heretofore sworn, resumed stand and was further examined by

CASE NO. CV13-02663

**TITLE: WILLIAM A. LEONARD, Trustee for the Bankruptcy
Estate of Paul Anthony Morabito VS. SUPERPUMPER, INC.,
EDWARD BAYUK, EDWARD WILLIAM BAYUK LIVING TRUST,
SALVATORE MORABITO and SNOWSHOE PETROLEUM, INC.**

**DATE, JUDGE
OFFICERS OF
COURT PRESENT**

PAGE FOUR

APPEARANCES-HEARING

CONT'D TO

10/29/18

J. Schonlau
(Reporter)

NON-JURY TRIAL – DAY ONE

counsel Turner.

EXHIBIT 79 offered by counsel Turner; objection by counsel Gilmore; objection overruled and ordered admitted into evidence with the caveat that William Leonard establishes its authenticity during his testimony.

Witness Bayuk further examined by counsel Turner.

EXHIBIT 128 offered by counsel Turner; no objection by counsel Gilmore; ordered admitted into evidence.

Witness Bayuk further examined by counsel Turner.

EXHIBIT 136 offered by counsel Turner; objection by counsel Gilmore; objection overruled and ordered admitted into evidence not for the truth of the matter asserted by as to the state of mind at the time.

Witness Bayuk further examined by counsel Turner.

EXHIBIT 144 offered by counsel Turner; objection by counsel Gilmore; objection sustained.

Witness Bayuk further examined by counsel Turner.

EXHIBIT 144 re-offered by counsel Turner; objection by counsel Gilmore; objection overruled and ordered admitted into evidence with the caveat that William Leonard establishes its authenticity during his testimony.

Witness Bayuk further examined by counsel Turner.

Discussion ensued regarding the Court's request of counsel regarding the Stipulated Findings of Facts. **COURT** directed counsel to highlight in color the stipulated portions of each one of their Findings of Facts and Conclusions of Law.

5:25 p.m. Court recessed until 9:45 a.m. on October 30, 2018.

**10/30/18
9:45 a.m.
Ongoing
Non-Jury
Trial – Day
Two**

Exhibit 9

2535
GARMAN TURNER GORDON LLP
ERIKA PIKE TURNER, ESQ.
Nevada Bar No. 6454
E-mail: eturner@gtg.legal
TERESA M. PILATOWICZ, ESQ.
Nevada Bar No. 9605
E-mail: tpilatowicz@gtg.legal
GABRIELLE A. HAMM
Nevada Bar No. 11588
E-mail: gamm@gtg.legal
650 White Drive, Ste. 100
Las Vegas, Nevada 89119
Telephone 725-777-3000
*Special Counsel to Plaintiff,
William A. Leonard, Trustee*

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.: 4

NOTICE OF ENTRY OF
FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND JUDGMENT

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Dated this 29th day of March, 2019.

/s/ Teresa M. Pilatowicz, Esq.
ERIKA PIKE TURNER, ESQ.
TERESA M. PILATOWICZ, ESQ.
GABRIELLE A. HAMM, ESQ.
650 White Drive, Ste. 100
Las Vegas, Nevada 89119
Telephone 725-777-3000
*Special Counsel to Plaintiff,
William A. Leonard, Trustee*

15
16
17
18
19

Dated this 29th day of March, 2019.

/s/ Teresa M. Pilatowicz, Esq.
ERIKA PIKE TURNER, ESQ.
TERESA M. PILATOWICZ, ESQ.
GABRIELLE A. HAMM, ESQ.
 650 White Drive, Ste. 100
 Las Vegas, Nevada 89119
 Telephone 725-777-3000
Special Counsel to Plaintiff,
William A. Leonard, Trustee

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John Murtha, Esq.
Woodburn & Wedge
6100 Neil Road, Suite 500
Reno, NV 89511

Jeffrey L. Hartman, Esq.
HARTMAN & HARTMAN
510 West Plumb Lane, Suite B
Reno, NV 89509

Trey A. Monsour, Esq.
Polsinelli, PC
1000 Louisiana St., Suite 6400
Houston, TX 77002

US HF Cellular Communications LLC
c/o Timothy A. Lukas, Esq.
HOLLAND & HART, LLP
5441 Kietzke Lane, 2nd Floor
Reno, NV 89511

VIRSENET LLC
c/o Registered Agent: A Registered Agent, Inc.
8 The Green, Suite A
Dover, DE 19901

Global HF Net, LLC
c/o Registered Agent: Corporation Service Company
251 Little Falls Drive
Wilmington, DQ 19808

Terlingua, LLC
c/o Registered Agent: A Registered Agent, Inc.
8 The Green, Suite A
Dover, DE 19901

Lippes Matthias Wexler Friedman, LLP
Attn: Dennis Vacco
665 Main Street, Suite 300
Buffalo, NY 14203

Ray Whiteman
3202 Shortridge Lane
Bowie, MD 20721

1 Joseph Jacobs
2 c/o Wexford Capital LP
3 411 West Putnam Ave.
4 Greenwich, CT 06830
5
6 JJ/CD Capital, LLC
7 c/o Wexford Capital LP
8 411 West Putnam Ave.
9 Greenwich, CT 06830
10
11 Meadow Farms Trust
12 c/o Edward Bayuk
13 8581 Santa Monica Blvd. #708
14 West Hollywood, CA 90069
15
16 Edward William Bayuk Living Trust dated August 13, 2009
17 c/o Edward William Bayuk, Trustee
18 668 North Coast Highway #517
19 Laguna Beach, CA 92651
20
21 Edward William Bayuk Living Trust
22 c/o Edward William Bayuk, Trustee
23 668 North Coast Highway #517
24 Laguna Beach, CA 92651
25
26 Jan Friederich
27 9705 Pebble Beach Dr., NE
28 Albuquerque, NM 87111
29
30 Andrew Wegner
31 c/o Eric J. Schindler, Esq.
32 KROESCHE SCHINDLER, LLP
33 2603 Main Street, Suite 200
34 Irvine, CA 92614
35
36 Bob Burke & Company Ltd.
37 c/o Registered Agent: Robert B. Burke
38 1100 S. Flower St., Suite 3300
39 Los Angeles, CA 90015
40
41 Robert B. Burke, Trustee
42 Burke Living Trust
43 1140 Alta Loma Road
44 West Hollywood, CA 90069
45
46 Jon Richmond
47 301 N. Canon Dr.
48 Beverly hills, CA 90210

1 Jon Richmond, COO
2 US HF Cellular Communications LLC
3 c/o Timothy A. Lukas, Esq.
4 HOLLAND & HART, LLP
5 5441 Kietzke Lane, 2nd Floor
6 Reno, NV 89511

7 Jackson Hole Trust Company
8 185 West Broadway, Suite #101
9 Jackson, WY 83001

10 Jackson Hole Trust Company
11 P.O. Box 1150
12 Jackson, WY 83001

13 Supermesa Fuel & Merc, LLC
14 14631 N. Scottsdale Road
15 Scottsdale, AZ 85254

16 Supermesa Fuel & Merc, LLC
17 8225 Washington Street NE, Suite A
18 Albuquerque, NM 87113

19 Galpin Motors, Inc.
20 Attn: Alan Skobin, Esq.
21 15505 Roscoe Blvd.
22 North Hills, CA 91343-6503

23 Jack Suddarth
24 Equity Wave Lending
25 2355 Main St., Suite 230
26 Irvine, CA 92614

27 Famille Holdings, L.P.
28 27675 Chapala
Mission Viejo, CA 92692

Patrick Harkin
Camano Group, Inc.
900 E. Washington St., Suite 100
Colton, CA 92324

25

26

27

28

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

2 DATED this 29th day of March, 2019.

3
4 /s/ Kelli Wightman

5 An Employee of GARMAN TURNER
6 GORDON LLP
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Exhibit 10

1 **2535**
2 GARMAN TURNER GORDON LLP
3 ERIKA PIKE TURNER, ESQ.
4 Nevada Bar No. 6454
5 E-mail: eturner@gtg.legal
6 TERESA M. PILATOWICZ, ESQ.
7 Nevada Bar No. 9605
8 E-mail: tpilatowicz@gtg.legal
9 GABRIELLE A. HAMM
10 Nevada Bar No. 11588
11 E-mail: ghamm@gtg.legal
12 650 White Drive, Ste. 100
13 Las Vegas, Nevada 89119
14 Telephone 725-777-3000
15 *Counsel to Plaintiff*

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.: 4

NOTICE OF ENTRY OF
ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO RETAX
COSTS

29 Notice is hereby given that on July 10, 2019, this Honorable Court entered its *Order*
30 *Granting in Part and Denying in Part Motion to Retax Costs,*

31 ...

32 ...

1 a copy of which is attached hereto as **Exhibit 1**.

2 Dated this 15th day of July, 2019.

GARMAN TURNER GORDON LLP

3
4 /s/ Teresa M. Pilatowicz, Esq.

5 ERIKA PIKE TURNER, ESQ.

6 TERESA M. PILATOWICZ, ESQ.

GABRIELLE A. HAMM, ESQ.

650 White Drive, Ste. 100

Las Vegas, Nevada 89119

Telephone 725-777-3000

Special Counsel to Plaintiff,

William A. Leonard, Trustee

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

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

17 Dated this 15th day of July, 2019.

18 GARMAN TURNER GORDON LLP

19
20 /s/ Teresa M. Pilatowicz, Esq.

21 ERIKA PIKE TURNER, ESQ.

22 TERESA M. PILATOWICZ, ESQ.

GABRIELLE A. HAMM, ESQ.

650 White Drive, Ste. 100

Las Vegas, Nevada 89119

Telephone 725-777-3000

Counsel to Plaintiff

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CERTIFICATE OF SERVICE

I certify that I am an employee of GARMAN TURNER GORDON LLP, and that on this date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART MOTION TO RETAX COSTS** on the parties as set forth below:

_____ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, Las Vegas, Nevada, postage prepaid, following ordinary business practices addressed as follows:

_____ Certified Mail, Return Receipt Requested

_____ Via Facsimile (Fax)

_____ Via E-Mail

_____ Placing an original or true copy thereof in a sealed envelope and causing the same to be personally Hand Delivered

_____ Federal Express (or other overnight delivery)

 X By using the Court's CM/ECF Electronic Notification System addressed to:

Frank C. Gilmore, Esq.
E-mail: fgilmore@rssblaw.com

Jeffrey Hartman, Esq.
E-mail: jlh@bankruptcyreno.com

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

DATED this 15th day of July, 2019.

/s/ Dekova Huckaby
An Employee of GARMAN TURNER
GORDON LLP

Exhibit 1

3025

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.: 4

**ORDER GRANTING IN PART AND DENYING IN PART MOTION
TO RETAX COSTS**

Defendants Salvatore Morabito, Superpumper, Inc., and Snowshoe Petroleum, Inc. (collectively, the "Defendants") filed their *Motion to Retax Costs* ("Motion to Retax") on April 15, 2019. Plaintiff William A. Leonard, chapter 7 trustee for the bankruptcy estate of Paul A. Morabito and judgment creditor in the above-entitled action (the "Plaintiff") filed his *Opposition to Motion to Retax Costs* (the "Opposition") on April 18, 2019. Defendants filed their *Reply in Support of Motion to Retax Costs* (the "Reply") on April 22, 2018. The Motion to Retax was submitted for decision on May 1, 2019.

The Court has reviewed and considered the arguments made in the Motion, the Opposition, and the Reply, the papers and pleadings on file with the Court in this action, the testimony and

1 exhibits admitted during the trial, and the Court's Findings of Fact, Conclusions of Law, and
2 Judgment, entered on March 29, 2019 (the "Judgment"). The Court, persuaded by the argument
3 and authorities in Plaintiff's Opposition, along with the pleadings and papers on file, the trial
4 record, and the findings and conclusions set forth in the Judgment, finds as follows:

5 1. Plaintiff filed his Memorandum of Costs and Disbursements (the "Memorandum")
6 on April 11, 2019.

7 2. The four-day delay in filing the Memorandum is for good cause based on the
8 Plaintiff's confusion regarding the application of NRCP Rule 68 and NRS 18.110.

9 3. The four-day delay in filing the Memorandum has not caused any prejudice to the
10 Defendants.

11 4. The following reductions in the costs requested in the Memorandum are
12 appropriate:

13 a. The costs of experts should be reduced from \$77,201.80 to \$75,505.90;

14 b. The costs of photocopies should be reduced from \$17,961.67 to \$17,772.17;

15 c. The costs for use of Odyssey in the amount of \$200 are reduced to \$0.00.

16 5. The remaining costs incurred for Plaintiff's experts were reasonably incurred and
17 are reasonable under the circumstances of this case as modified from the Memorandum.

18 6. The remaining charges for photocopying were reasonably incurred and are
19 reasonable under the circumstances of this case as modified from the Memorandum.

20 7. Plaintiff had no obligation to only retain local counsel and the costs associated with
21 Plaintiff's chosen counsels' representation were reasonable and necessary.

22 8. There was no objection to the remaining costs in the Memorandum and they were
23 authorized, reasonable, and actually incurred.

24 Based upon review of the entire file, the foregoing, and good cause appearing:

25 IT IS HEREBY ORDERED that the Motion to Retax is granted in part and denied in part.

26 IT IS HEREBY FURTHER ORDERED that the five-day deadline to file the Memorandum
27 is extended up to and including April 11, 2019 and the Memorandum is therefore timely.
28

1 IT IS HEREBY FURTHER ORDERED that the costs listed in the Memorandum, as
2 modified herein, in the amount of \$152,856.84 are reasonable costs incurred in this matter pursuant
3 to NRS § 18.110 and are awarded in Plaintiff's favor and against Defendants and Edward Bayuk,
4 individually and as trustee of the Edward William Bayuk Living Trust.

5 IT IS HEREBY FURTHER ORDERED that this award of costs shall be added to the
6 amount of the Judgment.

7 Dated this 9 day of July, 2019.

8 Connie J. Steinheimer
9 DISTRICT JUDGE
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Exhibit 11

2535
GARMAN TURNER GORDON LLP
ERIKA PIKE TURNER, ESQ.
Nevada Bar No. 6454
E-mail: eturner@gtg.legal
TERESA M. PILATOWICZ, ESQ.
Nevada Bar No. 9605
E-mail: tpilatowicz@gtg.legal
GABRIELLE A. HAMM
Nevada Bar No. 11588
E-mail: ghamm@gtg.legal
650 White Drive, Ste. 100
Las Vegas, Nevada 89119
Telephone 725-777-3000
Counsel to 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.: 4

NOTICE OF ENTRY OF
ORDER GRANTING PLAINTIFF'S
APPLICATION FOR AN AWARD OF
ATTORNEYS' FEES AND COSTS
PURSUANT TO NRCP 68

Notice is hereby given that on July 10, 2019, this Honorable Court entered its *Order
Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP*

...

...

68, a copy of which is attached hereto as **Exhibit 1**.

Dated this 15th day of July, 2019.

GARMAN TURNER GORDON LLP

/s/ Teresa M. Pilatowicz, Esq.
ERIKA PIKE TURNER, ESQ.
TERESA M. PILATOWICZ, ESQ.
GABRIELLE A. HAMM, ESQ.
650 White Drive, Ste. 100
Las Vegas, Nevada 89119
Telephone 725-777-3000
Counsel to Plaintiff

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 July, 2019.

GARMAN TURNER GORDON LLP

/s/ Teresa M. Pilatowicz, Esq.
ERIKA PIKE TURNER, ESQ.
TERESA M. PILATOWICZ, ESQ.
GABRIELLE A. HAMM, ESQ.
650 White Drive, Ste. 100
Las Vegas, Nevada 89119
Telephone 725-777-3000
Counsel to Plaintiff

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3 **CERTIFICATE OF SERVICE**

4 I certify that I am an employee of GARMAN TURNER GORDON LLP, and that on this
5 date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **NOTICE OF**
6 **ENTRY OF ORDER GRANTING PLAINTIFF'S APPLICATION FOR AN AWARD OF**
7 **ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 68** on the parties as set forth
8 below:

9 ☐ Placing an original or true copy thereof in a sealed envelope placed for collection
10 and mailing in the United States Mail, Las Vegas, Nevada, postage prepaid,
11 following ordinary business practices addressed as follows:

12 ☐ Certified Mail, Return Receipt Requested

13 ☐ Via Facsimile (Fax)

14 ☐ Via E-Mail

15 ☐ Placing an original or true copy thereof in a sealed envelope and causing the same
16 to be personally Hand Delivered

17 ☐ Federal Express (or other overnight delivery)

18 ☒ By using the Court's CM/ECF Electronic Notification System addressed to:

19
20 Frank C. Gilmore, Esq.
21 E-mail: fgilmore@rssblaw.com

Jeffrey Hartman, Esq.
E-mail: jlh@bankruptcyreno.com

22 I declare under penalty of perjury that the foregoing is true and correct.
23
24 DATED this 15th day of July, 2019.

25 /s/ Dekova Huckaby
26 An Employee of GARMAN TURNER
27 GORDON LLP

28 4818-3455-8364, v. 2

Exhibit 1

2777

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,

CASE NO.: CV13-02663

DEPT. NO.: 4

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.

**ORDER GRANTING PLAINTIFF'S APPLICATION FOR AN AWARD
OF ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 68**

Plaintiff William A. Leonard, chapter 7 trustee for the bankruptcy estate of Paul A. Morabito and judgment creditor in the above-entitled action (the "Plaintiff") filed an *Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68* (the "Application") on April 12, 2019. Superpumper, Inc., Salvatore Morabito, and Snowshoe Petroleum, Inc. (collectively, the "Responding Defendants") filed an *Opposition to the Application for Attorneys' Fees and Costs* (the "Opposition") on April 25, 2019. Plaintiff filed a *Reply in Support of the Application for Attorneys' Fees and Costs pursuant to NRCP 68* (the "Reply") on April 30, 2019. Edward Bayuk, individually and as trustee of the Edward William Bayuk Living Trust ("Bayuk," and together with the Responding Defendants, the "Defendants") did not oppose the Application. The Application was submitted for decision on May 1, 2019.

The Court has reviewed and considered the arguments made in the Application, the Opposition, and the Reply, the papers and pleadings on file with the Court in this action, including

1 the Memorandum of Costs filed by Trustee on April 11, 2019, the *Motion to Retax* (the "Motion
2 to Retax") filed on May 1, 2019, the testimony and exhibits admitted during the trial, and the
3 Court's Findings of Fact, Conclusions of Law, and Judgment, entered on March 29, 2019 (the
4 "Judgment"). The Court, persuaded by the argument and authorities in Plaintiff's Application,
5 along with the pleadings and papers on file, the trial record, and the findings and conclusions set
6 forth in the Judgment, finds as follows:

7 1. Plaintiff served a valid apportioned offer of judgment in the amount of \$3,000,000
8 on Defendants on May 31, 2016 (the "Offer of Judgment").

9 2. Defendants rejected the Offer of Judgment.

10 3. Plaintiff obtained a verdict in an amount greater than the Offer of Judgment after a
11 trial on the merits.

12 4. Plaintiff's Offer of Judgment must be enforced under NRS 68(f) and consistent
13 with the factors delineated in *Beattie vs. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983):

14 a. Plaintiff's Offer of Judgment was a good faith offer premised on sound factual
15 and legal bases.

16 b. Plaintiff's Offer of Judgment was reasonable and in good faith in timing and
17 amount.

18 c. Defendants' rejection of the Offer of Judgment was unreasonable.

19 5. Plaintiff's attorney's fees are fair and reasonable and enforceable under the
20 standards set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33
21 (1969):

22 a. The work required in connection with the case was difficult and time consuming
23 and performed by skilled counsel.

24 b. The character of the work, time, and skill required justifies the fees requested.

25 c. The attorneys were successful in obtaining a favorable result for the Plaintiff

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