

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondent.

Case No. 79355

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District Court, the Honorable Connie
J. Steinheimer Presiding

APPELLANTS' APPENDIX, VOLUME 5
(Nos. 726–925)

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| Motion for Partial Summary Judgment (filed 08/17/2017) | | Vol. 11, 1754–1796 |
| Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment (filed 08/17/2017) | | Vol. 11, 1797–1825 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|--|--|------------------------|
| Exhibits to Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment | | |
| Exhibit | Document Description | |
| 1 | Declaration of Timothy P. Herbst in Support of Separate Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment | Vol. 12, 1826–1829 |
| 2 | Findings of Fact, Conclusions of Law, and Judgment in <i>Consolidated Nevada Corp., et al v. JH. et al.</i> ; Case No. CV07-02764 (filed 10/12/2010) | Vol. 12, 1830–1846 |
| 3 | Judgment in <i>Consolidated Nevada Corp., et al v. JH. et al.</i> ; Case No. CV07-02764 (filed 08/23/2011) | Vol. 12, 1847–1849 |
| 4 | Excerpted Transcript of July 12, 2017 Deposition of Garry M. Graber | Vol. 12, 1850–1852 |
| 5 | September 15, 2015 email from Yalamanchili RE: Follow Up Thoughts | Vol. 12, 1853–1854 |
| 6 | September 23, 2010 email between Garry M. Graber and P. Morabito | Vol. 12, 1855–1857 |
| 7 | September 20, 2010 email between Yalamanchili and Eileen Crotty RE: Morabito Wire | Vol. 12, 1858–1861 |
| 8 | September 20, 2010 email between Yalamanchili and Garry M. Graber RE: All Mortgage Balances as of 9/20/2010 | Vol. 12, 1862–1863 |
| 9 | September 20, 2010 email from Garry M. Graber RE: Call | Vol. 12, 1864–1867 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|------------------------------------|---|------------------------|
| 10 | September 20, 2010 email from P. Morabito to Dennis and Yalamanchili RE: Attorney client privileged communication | Vol. 12, 1868–1870 |
| 11 | September 20, 2010 email string RE: Attorney client privileged communication | Vol. 12, 1871–1875 |
| 12 | Appraisal of Real Property: 370 Los Olivos, Laguna Beach, CA, as of Sept. 24, 2010 | Vol. 12, 1876–1903 |
| 13 | Excerpted Transcript of March 21, 2016 Deposition of P. Morabito | Vol. 12, 1904–1919 |
| 14 | P. Morabito Redacted Investment and Bank Report from Sept. 1 to Sept. 30, 2010 | Vol. 12, 1920–1922 |
| 15 | Excerpted Transcript of June 25, 2015 Deposition of 341 Meeting of Creditors | Vol. 12, 1923–1927 |
| 16 | Excerpted Transcript of December 5, 2015 Deposition of P. Morabito | Vol. 12, 1928–1952 |
| 17 | Purchase and Sale Agreement between Arcadia Trust and Bayuk Trust entered effective as of Sept. 27, 2010 | Vol. 12, 1953–1961 |
| 18 | First Amendment to Purchase and Sale Agreement between Arcadia Trust and Bayuk Trust entered effective as of Sept. 28, 2010 | Vol. 12, 1962–1964 |
| 19 | Appraisal Report providing market value estimate of real property located at 8355 Panorama Drive, Reno, NV as of Dec. 7, 2011 | Vol. 12, 1965–1995 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|------------------------------------|---|------------------------|
| 20 | An Appraisal of a vacant .977± Acre Parcel of Industrial Land Located at 49 Clayton Place West of the Pyramid Highway (State Route 445) Sparks, Washoe County, Nevada and a single-family residence located at 8355 Panorama Drive Reno, Washoe County, Nevada 89511 as of October 1, 2010 a retrospective date | Vol. 13, 1996–2073 |
| 21 | APN: 040-620-09 Declaration of Value (dated 12/31/2012) | Vol. 14, 2074–2075 |
| 22 | Sellers Closing Statement for real property located at 8355 Panorama Drive, Reno, NV 89511 | Vol. 14, 2076–2077 |
| 23 | Bill of Sale for real property located at 8355 Panorama Drive, Reno, NV 89511 | Vol. 14, 2078–2082 |
| 24 | Operating Agreement of Baruk Properties LLC | Vol. 14, 2083–2093 |
| 25 | Edward Bayuk, as trustee of the Edward William Bayuk Living Trust’s Answer to Plaintiff’s First Set of Interrogatories (dated 09/14/2014) | Vol. 14, 2094–2104 |
| 26 | Summary Appraisal Report of real property located at 1461 Glenneyre Street, Laguna Beach, CA 92651, as of Sept. 25, 2010 | Vol. 14, 2105–2155 |
| 27 | Appraisal of Real Property as of Sept. 23, 2010: 1254 Mary Fleming Circle, Palm Springs, CA 92262 | Vol. 15, 2156–2185 |
| 28 | Appraisal of Real Property as of Sept. 23, 2010: 1254 Mary Fleming Circle, Palm Springs, CA 92262 | Vol. 15, 2186–2216 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|------------------------------------|---|------------------------|
| 29 | Membership Interest Transfer Agreement between Arcadia Trust and Bayuk Trust entered effective as of Oct. 1, 2010 | Vol. 15, 2217–2224 |
| 30 | PROMISSORY NOTE [Edward William Bayuk Living Trust (“Borrower”) promises to pay Arcadia Living Trust (“Lender”) the principal sum of \$1,617,050.00, plus applicable interest] (dated 10/01/2010) | Vol. 15, 2225–2228 |
| 31 | Certificate of Merger dated Oct. 4, 2010 | Vol. 15, 2229–2230 |
| 32 | Articles of Merger Document No. 20100746864-78 (recorded date 10/04/2010) | Vol. 15, 2231–2241 |
| 33 | Excerpted Transcript of September 28, 2015 Deposition of Edward William Bayuk | Vol. 15, 2242–2256 |
| 34 | Grant Deed for real property 1254 Mary Fleming Circle, Palm Springs, CA 92262; APN: 507-520-015 (recorded 11/04/2010) | Vol. 15, 2257–2258 |
| 35 | General Conveyance made as of Oct. 31, 2010 between Woodland Heights Limited (“Vendor”) and Arcadia Living Trust (“Purchaser”) | Vol. 15, 2259–2265 |
| 36 | Appraisal of Real Property as of Sept. 24, 2010: 371 El Camino Del Mar, Laguna Beach, CA 92651 | Vol. 15, 2266–2292 |
| 37 | Excerpted Transcript of December 6, 2016 Deposition of P. Morabito | Vol. 15, 2293–2295 |
| 38 | Page intentionally left blank | Vol. 15, 2296–2297 |
| 39 | Ledger of Edward Bayuk to P. Morabito | Vol. 15, 2298–2300 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|------------------------------------|--|------------------------|
| 40 | Loan Calculator: Payment Amount (Standard Loan Amortization) | Vol. 15, 2301–2304 |
| 41 | Payment Schedule of Edward Bayuk Note in Favor of P. Morabito | Vol. 15, 2305–2308 |
| 42 | November 10, 2011 email from Vacco RE: Baruk Properties, LLC/P. Morabito/Bank of America, N.A. | Vol. 15, 2309–2312 |
| 43 | May 23, 2012 email from Vacco to Steve Peek RE: Formal Settlement Proposal to resolve the Morabito matter | Vol. 15, 2313–2319 |
| 44 | Excerpted Transcript of March 12, 2015 Deposition of 341 Meeting of Creditors | Vol. 15, 2320–2326 |
| 45 | Shareholder Interest Purchase Agreement between P. Morabito and Snowshoe Petroleum, Inc. (dated 09/30/2010) | Vol. 15, 2327–2332 |
| 46 | P. Morabito Statement of Assets & Liabilities as of May 5, 2009 | Vol. 15, 2333–2334 |
| 47 | March 10, 2010 email from Naz Afshar, CPA to Darren Takemoto, CPA RE: Current Personal Financial Statement | Vol. 15, 2335–2337 |
| 48 | March 10, 2010 email from P. Morabito to Jon RE: ExxonMobil CIM for Florida and associated maps | Vol. 15, 2338–2339 |
| 49 | March 20, 2010 email from P. Morabito to Vacco RE: proceed with placing binding bid on June 22nd with ExxonMobil | Vol. 15, 2340–2341 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|------------------------------------|---|------------------------|
| 50 | P. Morabito Statement of Assets & Liabilities as of May 30, 2010 | Vol. 15, 2342–2343 |
| 51 | June 28, 2010 email from P. Morabito to George R. Garner RE: ExxonMobil Chicago Market Business Plan Review | Vol. 15, 2344–2345 |
| 52 | Plan of Merger of Consolidated Western Corp. with and into Superpumper, Inc. (dated 09/28/2010) | Vol. 15, 2346–2364 |
| 53 | Page intentionally left blank | Vol. 15, 2365–2366 |
| 54 | BBVA Compass Proposed Request on behalf of Superpumper, Inc. (dated 12/15/2010) | Vol. 15, 2367–2397 |
| 55 | Business Valuation Agreement between Matrix Capital Markets Group, Inc. and Superpumper, Inc. (dated 09/30/2010) | Vol. 15, 2398–2434 |
| 56 | Expert report of James L. McGovern, CPA/CFF, CVA (dated 01/25/2016) | Vol. 16, 2435–2509 |
| 57 | June 18, 2014 email from Sam Morabito to Michael Vanek RE: SPI Analysis | Vol. 17, 2510–2511 |
| 58 | Declaration of P. Morabito in Support of Opposition to Motion of JH, Inc., Jerry Herbst, and Berry-Hinckley Industries for Order Prohibiting Debtor from Using, Acquiring, or Disposing of or Transferring Assets Pursuant to 11 U.S.C. §§ 105 and 303(f) Pending Appointment of Trustee; Case No. BK-N-13-51237 (filed 07/01/2013) | Vol. 17, 2512–2516 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|------------------------------------|---|------------------------|
| 59 | State of California Secretary of State Limited Liability Company – Snowshoe Properties, LLC; File No. 201027310002 (filed 09/29/2010) | Vol. 17, 2517–2518 |
| 60 | PROMISSORY NOTE [Snowshoe Petroleum (“Maker”) promises to pay P. Morabito (“Holder”) the principal sum of \$1,462,213.00] (dated 11/01/2010) | Vol. 17, 2519–2529 |
| 61 | PROMISSORY NOTE [Superpumper, Inc. (“Maker”) promises to pay Compass Bank (the “Bank” and/or “Holder”) the principal sum of \$3,000,000.00] (dated 08/13/2010) | Vol. 17, 2530–2538 |
| 62 | Excerpted Transcript of October 21, 2015 Deposition of Salvatore R. Morabito | Vol. 17, 2539–2541 |
| 63 | Page intentionally left blank | Vol. 17, 2542–2543 |
| 64 | Edward Bayuk’s Answers to Plaintiff’s First Set of Interrogatories (dated 09/14/2014) | Vol. 17, 2544–2557 |
| 65 | October 12, 2012 email from Stan Bernstein to P. Morabito RE: 2011 return | Vol. 17, 2558–2559 |
| 66 | Page intentionally left blank | Vol. 17, 2560–2561 |
| 67 | Excerpted Transcript of October 20, 2015 Deposition of Dennis C. Vacco | Vol. 17, 2562–2564 |
| 68 | Snowshoe Petroleum, Inc.’s letter of intent to set out the framework of the contemplated transaction between: Snowshoe Petroleum, Inc.; David Dwelle, LP; Eclipse Investments, LP; Speedy Investments; and TAD Limited Partnership (dated 04/21/2011) | Vol. 17, 2565–2572 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|------------------------------------|--|------------------------|
| 69 | Excerpted Transcript of July 10, 2017 Deposition of Dennis C. Vacco | Vol. 17, 2573–2579 |
| 70 | April 15, 2011 email from P. Morabito to Christian Lovelace; Gregory Ivancic; Vacco RE: \$65 million loan offer from Cerberus | Vol. 17, 2580–2582 |
| 71 | Email from Vacco to P. Morabito RE: \$2 million second mortgage on the Reno house | Vol. 17, 2583–2584 |
| 72 | Email from Vacco to P. Morabito RE: Tim Haves | Vol. 17, 2585–2586 |
| 73 | Settlement Agreement, Loan Agreement Modification & Release dated as of Sept. 7, 2012, entered into by Bank of America and P. Morabito | Vol. 17, 2587–2595 |
| 74 | Page intentionally left blank | Vol. 17, 2596–2597 |
| 75 | February 10, 2012 email from Vacco to Paul Wells and Timothy Haves RE: 1461 Glenneyre Street, Laguna Beach – Sale | Vol. 17, 2598–2602 |
| 76 | May 8, 2012 email from P. Morabito to Vacco RE: Proceed with the corporate set-up with Ray, Edward and P. Morabito | Vol. 17, 2603–2604 |
| 77 | September 4, 2012 email from Vacco to Edward Bayuk RE: Second Deed of Trust documents | Vol. 17, 2605–2606 |
| 78 | September 18, 2012 email from P. Morabito to Edward Bayuk RE: Deed of Trust | Vol. 17, 2607–2611 |
| 79 | October 3, 2012 email from Vacco to P. Morabito RE: Term Sheet on both real estate deal and option | Vol. 17, 2612–2614 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|------------------------------------|--|------------------------|
| 80 | March 14, 2013 email from P. Morabito to Vacco RE: BHI Hinckley | Vol. 17, 2615–2616 |
| 81 | Page intentionally left blank | Vol. 17, 2617–2618 |
| 82 | November 11, 2011 email from Vacco to P. Morabito RE: Trevor’s commitment to sign | Vol. 17, 2619–2620 |
| 83 | November 28, 2011 email string RE: Wiring \$560,000 to Lippes Mathias | Vol. 17, 2621–2623 |
| 84 | Page intentionally left blank | Vol. 17, 2624–2625 |
| 85 | Page intentionally left blank | Vol. 17, 2626–2627 |
| 86 | Order for Relief Under Chapter 7; Case No. BK-N-13-51236 (filed 12/22/2014) | Vol. 17, 2628–2634 |
| 87 | Report of Undisputed Election (11 U.S.C § 702); Case No. BK-N-13-51237 (filed 01/23/2015) | Vol. 17, 2635–2637 |
| 88 | Amended Stipulation and Order to Substitute a Party to NRCP 17(a) (filed 06/11/2015) | Vol. 17, 2638–2642 |
| 89 | Membership Interest Purchase Agreement, entered into as of Oct. 6, 2010 between P. Morabito and Edward Bayuk | Vol. 17, 2643–2648 |
| 90 | Complaint; Case No. BK-N-13-51237 (filed 10/15/2015) | Vol. 17, 2649–2686 |
| 91 | Fifth Amendment and Restatement of the Trust Agreement for the Arcadia Living Trust (dated 09/30/2010) | Vol. 17, 2687–2726 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|---|---|------------------------|
| Objection to Recommendation for Order filed August 17, 2017 (filed 08/28/2017) | | Vol. 18, 2727–2734 |
| Exhibit to Objection to Recommendation for Order | | |
| Exhibit | Document Description | |
| 1 | Plaintiff’s counsel’s Jan. 24, 2017, email memorializing the discovery dispute agreement | Vol. 18, 2735–2736 |
| Opposition to Objection to Recommendation for Order filed August 17, 2017 (filed 09/05/2017) | | Vol. 18, 2737–2748 |
| Exhibit to Opposition to Objection to Recommendation for Order | | |
| Exhibit | Document Description | |
| A | Declaration of Teresa M. Pilatowicz, Esq., in Support of Opposition to Objection to Recommendation for Order (filed 09/05/2017) | Vol. 18, 2749–2752 |
| Reply to Opposition to Objection to Recommendation for Order filed August 17, 2017 (dated 09/15/2017) | | Vol. 18, 2753–2758 |
| Defendants’ Opposition to Plaintiff’s Motion for Partial Summary Judgment (filed 09/22/2017) | | Vol. 18, 2759–2774 |
| Defendants’ Separate Statement of Disputed Facts in Support of Opposition to Plaintiff’s Motion for Partial Summary Judgment (filed 09/22/2017) | | Vol. 18, 2775–2790 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|---|--|------------------------|
| Exhibits to Defendants' Separate Statement of Disputed Facts in Support of Opposition to Plaintiff's Motion for Partial Summary Judgment | | |
| Exhibit | Document Description | |
| 1 | Judgment in <i>Consolidated Nevada Corp., et al v. JH. et al.</i> ; Case No. CV07-02764 (filed 08/23/2011) | Vol. 18, 2791–2793 |
| 2 | Excerpted Transcript of October 20, 2015 Deposition of Dennis C. Vacco | Vol. 18, 2794–2810 |
| 3 | Order Denying Motion to Dismiss Involuntary Chapter 7 Petition and Suspending Proceedings Pursuant to 11 U.S.C §305(a)(1); Case No. BK-N-13-51237 (filed 12/17/2013) | Vol. 18, 2811–2814 |
| 4 | Excerpted Transcript of March 21, 2016 Deposition of P. Morabito | Vol. 18, 2815–2826 |
| 5 | Excerpted Transcript of September 28, 2015 Deposition of Edward William Bayuk | Vol. 18, 2827–2857 |
| 6 | Appraisal | Vol. 18, 2858–2859 |
| 7 | Budget Summary as of Jan. 7, 2016 | Vol. 18, 2860–2862 |
| 8 | Excerpted Transcript of March 24, 2016 Deposition of Dennis Banks | Vol. 18, 2863–2871 |
| 9 | Excerpted Transcript of March 22, 2016 Deposition of Michael Sewitz | Vol. 18, 2872–2879 |
| 10 | Excerpted Transcript of April 27, 2011 Deposition of Darryl Noble | Vol. 18, 2880–2883 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
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| 11 | Copies of cancelled checks from Edward Bayuk made payable to P. Morabito | Vol. 18, 2884–2892 |
| 12 | CBRE Appraisal of 14th Street Card Lock Facility (dated 02/26/2010) | Vol. 18, 2893–2906 |
| 13 | Bank of America wire transfer from P. Morabito to Salvatore Morabito in the amount of \$146,127.00; and a wire transfer from P. Morabito to Lippes for \$25.00 (date 10/01/2010) | Vol. 18, 2907–2908 |
| 14 | Excerpted Transcript of October 21, 2015 Deposition of Christian Mark Lovelace | Vol. 18, 2909–2918 |
| 15 | June 18, 2014 email from Sam Morabito to Michael Vanek RE: Analysis of the Superpumper transaction in 2010 | Vol. 18, 2919–2920 |
| 16 | Excerpted Transcript of October 21, 2015 Deposition of Salvatore R. Morabito | Vol. 18, 2921–2929 |
| 17 | PROMISSORY NOTE [Snowshoe Petroleum (“Maker”) promises to pay P. Morabito (“Holder”) the principal sum of \$1,462,213.00] (dated 11/01/2010) | Vol. 18, 2930–2932 |
| 18 | TERM NOTE [P. Morabito (“Borrower”) promises to pay Consolidated Western Corp. (“Lender”) the principal sum of \$939,000.00, plus interest] (dated 09/01/2010) | Vol. 18, 2933–2934 |
| 19 | SUCCESSOR PROMISSORY NOTE [Snowshoe Petroleum (“Maker”) promises to pay P. Morabito (“Holder”) the principal sum of \$492,937.30, plus interest] (dated 02/01/2011) | Vol. 18, 2935–2937 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|--|--|------------------------|
| 20 | Edward Bayuk's wire transfer to Lippes in the amount of \$517,547.20 (dated 09/29/2010) | Vol. 18, 2938–2940 |
| 21 | Salvatore Morabito Bank of Montreal September 2011 Wire Transfer | Vol. 18, 2941–2942 |
| 22 | Declaration of Salvatore Morabito (dated 09/21/2017) | Vol. 18, 2943–2944 |
| 23 | Edward Bayuk bank wire transfer to Superpumper, Inc., in the amount of \$659,000.00 (dated 09/30/2010) | Vol. 18, 2945–2947 |
| 24 | Edward Bayuk checking account statements between 2010 and 2011 funding the company with transfers totaling \$500,000 | Vol. 18, 2948–2953 |
| 25 | Salvatore Morabito's wire transfer statement between 2010 and 2011, funding the company with \$750,000 | Vol. 18, 2954–2957 |
| 26 | Payment Schedule of Edward Bayuk Note in Favor of P. Morabito | Vol. 18, 2958–2961 |
| 27 | September 15, 2010 email from Vacco to Yalamanchili and P. Morabito RE: Follow Up Thoughts | Vol. 18, 2962–2964 |
| Reply in Support of Motion for Partial Summary Judgment (dated 10/10/2017) | | Vol. 19, 2965–2973 |
| Order Regarding Discovery Commissioner's Recommendation for Order dated August 17, 2017 (filed 12/07/2017) | | Vol. 19, 2974–2981 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|--|---|------------------------|
| Order Denying Motion for Partial Summary Judgment (filed 12/11/2017) | | Vol. 19, 2982–2997 |
| Defendants’ Motions in Limine (filed 09/12/2018) | | Vol. 19, 2998–3006 |
| Exhibits to Defendants’ Motions in Limine | | |
| Exhibit | Document Description | |
| 1 | Plaintiff’s Second Supplement to Amended Disclosures Pursuant to NRCP 16.1(A)(1) (dated 04/28/2016) | Vol. 19, 3007–3016 |
| 2 | Excerpted Transcript of March 25, 2016 Deposition of William A. Leonard | Vol. 19, 3017–3023 |
| 3 | Plaintiff, Jerry Herbst’s Responses to Defendant Snowshoe Petroleum, Inc.’s Set of Interrogatories (dated 02/11/2015); and Plaintiff, Jerry Herbst’s Responses to Defendant, Salvatore Morabito’s Set of Interrogatories (dated 02/12/2015) | Vol. 19, 3024–3044 |
| Motion in Limine to Exclude Testimony of Jan Friederich (filed 09/20/2018) | | Vol. 19, 3045–3056 |
| Exhibits to Motion in Limine to Exclude Testimony of Jan Friederich | | |
| Exhibit | Document Description | |
| 1 | Defendants’ Rebuttal Expert Witness Disclosure (dated 02/29/2016) | Vol. 19, 3057–3071 |
| 2 | Condensed Transcript of March 29, 2016 Deposition of Jan Friederich | Vol. 19, 3072–3086 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
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| Opposition to Defendants' Motions in Limine (filed 09/28/2018) | | Vol. 19, 3087–3102 |
| Exhibits to Opposition to Defendants' Motions in Limine | | |
| Exhibit | Document Description | |
| A | Declaration of Teresa M. Pilatowicz, Esq. in Support of Opposition to Defendants' Motions in Limine (filed 09/28/2018) | Vol. 19, 3103–3107 |
| A-1 | Plaintiff's February 19, 2016, Amended Disclosures Pursuant to NRCP 16.1(A)(1) | Vol. 19, 3108–3115 |
| A-2 | Plaintiff's January 26, 2016, Expert Witnesses Disclosures (without exhibits) | Vol. 19, 3116–3122 |
| A-3 | Defendants' January 26, 2016, and February 29, 2016, Expert Witness Disclosures (without exhibits) | Vol. 19, 3123–3131 |
| A-4 | Plaintiff's August 17, 2017, Motion for Partial Summary Judgment (without exhibits) | Vol. 19, 3132–3175 |
| A-5 | Plaintiff's August 17, 2017, Statement of Undisputed Facts in Support of his Motion for Partial Summary Judgment (without exhibits) | Vol. 19, 3176–3205 |
| Defendants' Reply in Support of Motions in Limine (filed 10/08/2018) | | Vol. 20, 3206–3217 |
| Exhibit to Defendants' Reply in Support of Motions in Limine | | |
| Exhibit | Document Description | |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|---|--|------------------------|
| 1 | Chapter 7 Trustee, William A. Leonard's Responses to Defendants' First Set of Interrogatories (dated 05/28/2015) | Vol. 20, 3218–3236 |
| Defendants' Opposition to Plaintiff's Motions in Limine to Exclude the Testimony of Jan Friederich (filed 10/08/2018) | | Vol. 20, 3237–3250 |
| Exhibits to Defendants' Opposition to Plaintiff's Motions in Limine to Exclude the Testimony of Jan Friederich | | |
| Exhibit | Document Description | |
| 1 | Excerpt of Matrix Report (dated 10/13/2010) | Vol. 20, 3251–3255 |
| 2 | Defendants' Rebuttal Expert Witness Disclosure (dated 02/29/2016) | Vol. 20, 3256–3270 |
| 3 | November 9, 2009 email from P. Morabito to Daniel Fletcher; Jim Benbrook; Don Whitehead; Sam Morabito, etc. RE: Jan Friederich entered consulting agreement with Superpumper | Vol. 20, 3271–3272 |
| 4 | Excerpted Transcript of March 29, 2016 Deposition of Jan Friederich | Vol. 20, 3273–3296 |
| Defendants' Objections to Plaintiff's Pretrial Disclosures (filed 10/12/2018) | | Vol. 20, 3297–3299 |
| Objections to Defendants' Pretrial Disclosures (filed 10/12/2018) | | Vol. 20, 3300–3303 |
| Reply to Defendants' Opposition to Plaintiff's Motion in Limine to Exclude the Testimony of Jan Friederich (filed 10/12/2018) | | Vol. 20, 3304–3311 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|---|--|------------------------|
| Minutes of September 11, 2018, Pre-trial Conference (filed 10/19/2018) | | Vol. 20, 3312 |
| Stipulated Facts (filed 10/29/2018) | | Vol. 20, 3313–3321 |
| Defendants’ Points and Authorities RE: Objection to Admission of Documents in Conjunction with the Depositions of P. Morabito and Dennis Vacco (filed 10/30/2018) | | Vol. 20, 3322–3325 |
| Plaintiff’s Points and Authorities Regarding Authenticity and Hearsay Issues (filed 10/31/2018) | | Vol. 20, 3326–3334 |
| Clerk’s Trial Exhibit List (filed 02/28/2019) | | Vol. 21, 3335–3413 |
| Exhibits to Clerk’s Trial Exhibit List | | |
| Exhibit | Document Description | |
| 1 | Certified copy of the Transcript of September 13, 2010 Judge’s Ruling; Case No. CV07-02764 | Vol. 21, 3414–3438 |
| 2 | Findings of Fact, Conclusions of Law, and Judgment; Case No. CV07-02764 (filed 10/12/2010) | Vol. 21, 3439–3454 |
| 3 | Judgment; Case No. CV07-0767 (filed 08/23/2011) | Vol. 21, 3455–3456 |
| 4 | Confession of Judgment; Case No. CV07-02764 (filed 06/18/2013) | Vol. 21, 3457–3481 |
| 5 | November 30, 2011 Settlement Agreement and Mutual Release | Vol. 22, 3482–3613 |
| 6 | March 1, 2013 Forbearance Agreement | Vol. 22, 3614–3622 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|------------------------------------|---|------------------------|
| 8 | Order Denying Motion to Dismiss Involuntary Chapter 7 Petition and Suspending Proceedings, Case 13-51237. ECF No. 94, (filed 12/17/2013) | Vol. 22, 3623–3625 |
| 19 | Report of Undisputed Election– Appointment of Trustee, Case No. 13-51237, ECF No. 220 | Vol. 22, 3626–3627 |
| 20 | Stipulation and Order to Substitute a Party Pursuant to NRCF 17(a), Case No. CV13-02663, May 15, 2015 | Vol. 22, 3628–3632 |
| 21 | Non-Dischargeable Judgment Regarding Plaintiff's First and Second Causes of Action, Case No. 15-05019-GWZ, ECF No. 123, April 30, 2018 | Vol. 22, 3633–3634 |
| 22 | Memorandum & Decision; Case No. 15-05019-GWZ, ECF No. 124, April 30, 2018 | Vol. 22, 3635–3654 |
| 23 | Amended Findings of Fact, Conclusions of Law in Support of Judgment Regarding Plaintiff's First and Second Causes of Action; Case 15-05019-GWZ, ECF No. 122, April 30, 2018 | Vol. 22, 3655–3679 |
| 25 | September 15, 2010 email from Yalamanchili to Vacco and P. Morabito RE: Follow Up Thoughts | Vol. 22, 3680–3681 |
| 26 | September 18, 2010 email from P. Morabito to Vacco | Vol. 22, 3682–3683 |
| 27 | September 20, 2010 email from Vacco to P. Morabito RE: Spirit | Vol. 22, 3684–3684 |
| 28 | September 20, 2010 email between Yalamanchili and Crotty RE: Morabito -Wire | Vol. 22, 3685–3687 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|------------------------------------|---|------------------------|
| 29 | September 20, 2010 email from Yalamanchili to Graber RE: Attorney Client Privileged Communication | Vol. 22, 3688–3689 |
| 30 | September 21, 2010 email from P. Morabito to Vacco and Cross RE: Attorney Client Privileged Communication | Vol. 22, 3690–3692 |
| 31 | September 23, 2010 email chain between Graber and P. Morabito RE: Change of Primary Residence from Reno to Laguna Beach | Vol. 22, 3693–3694 |
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| 1-F | Order Granting Motion to Compel Compliance with the Subpoena to Robison Sharp Sullivan Brust; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 229 (Jan. 3, 2019) | Vol. 46, 8036–8039 |
| 1-G | Response of Robison, Sharp, Sullivan & Brust[] To Subpoena (including RSSB_000001 – RSSB_000031) (Jan. 18, 2019) | Vol. 46, 8040–8067 |
| 1-H | Excerpts of Deposition Transcript of Sam Morabito as PMK of Snowshoe Petroleum, Inc. (Oct. 1, 2015) | Vol. 46, 8068–8076 |
| Errata to: Plaintiff's Motion to Reopen Evidence (filed 01/30/2019) | | Vol. 47, 8077–8080 |
| Exhibit to Errata to: Plaintiff's Motion to Reopen Evidence | | |
| Exhibit | Document Description | |
| 1 | Plaintiff's Motion to Reopen Evidence | Vol. 47, 8081–8096 |
| Ex Parte Motion for Order Shortening Time on Plaintiff's Motion to Reopen Evidence and for Expedited Hearing (filed 01/31/2019) | | Vol. 47, 8097–8102 |
| Order Shortening Time on Plaintiff's Motion to Reopen Evidence and for Expedited Hearing (filed 02/04/2019) | | Vol. 47, 8103–8105 |
| Supplement to Plaintiff's Motion to Reopen Evidence (filed 02/04/2019) | | Vol. 47, 8106–8110 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|---|---|------------------------|
| Exhibits to Supplement to Plaintiff's Motion to Reopen Evidence | | |
| Exhibit | Document Description | |
| 1 | Supplemental Declaration of Gabrielle A. Hamm, Esq. in Support of Plaintiff's Motion to Reopen Evidence (filed 02/04/2019) | Vol. 47, 8111–8113 |
| 1-I | Declaration of Frank C. Gilmore in Support of Robison, Sharp Sullivan & Brust's Opposition to Motion for Order Holding Robison in Contempt; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 259 (Jan. 30, 2019) | Vol. 47, 8114–8128 |
| Defendants' Response to Motion to Reopen Evidence (02/06/2019) | | Vol. 47, 8129–8135 |
| Plaintiff's Reply to Defendants' Response to Motion to Reopen Evidence (filed 02/07/2019) | | Vol. 47, 8136–8143 |
| Minutes of February 7, 2019 hearing on Motion to Reopen Evidence (filed 02/28/2019) | | Vol. 47, 8144 |
| Rough Draft Transcript of February 8, 2019 hearing on Motion to Reopen Evidence | | Vol. 47, 8145–8158 |
| [Plaintiff's Proposed] Findings of Fact, Conclusions of Law, and Judgment (filed 03/06/2019) | | Vol. 47, 8159–8224 |
| [Defendants' Proposed Amended] Findings of Fact, Conclusions of Law, and Judgment (filed 03/08/2019) | | Vol. 47, 8225–8268 |
| Minutes of February 26, 2019 hearing on Motion to Continue ongoing Non-Jury Trial (Telephonic) (filed 03/11/2019) | | Vol. 47, 8269 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|--|--|------------------------|
| Findings of Fact, Conclusions of Law, and Judgment (filed 03/29/2019) | | Vol. 48, 8270–8333 |
| Notice of Entry of Findings of Fact, Conclusions of Law, and Judgment (filed 03/29/2019) | | Vol. 48, 8334–8340 |
| Memorandum of Costs and Disbursements (filed 04/11/2019) | | Vol. 48, 8341–8347 |
| Exhibit to Memorandum of Costs and Disbursements | | |
| Exhibit | Document Description | |
| 1 | Ledger of Costs | Vol. 48, 8348–8370 |
| Application for Attorneys’ Fees and Costs Pursuant to NRCP 68 (filed 04/12/2019) | | Vol. 48, 8371–8384 |
| Exhibits to Application for Attorneys’ Fees and Costs Pursuant to NRCP 68 | | |
| Exhibit | Document Description | |
| 1 | Declaration of Teresa M. Pilatowicz In Support of Plaintiff’s Application for Attorney’s Fees and Costs Pursuant to NRCP 68 (filed 04/12/2019) | Vol. 48, 8385–8390 |
| 2 | Plaintiff’s Offer of Judgment to Defendants (dated 05/31/2016) | Vol. 48, 8391–8397 |
| 3 | Defendant’s Rejection of Offer of Judgment by Plaintiff (dated 06/15/2016) | Vol. 48, 8398–8399 |
| 4 | Log of time entries from June 1, 2016 to March 28, 2019 | Vol. 48, 8400–8456 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|--|--|------------------------|
| 5 | Plaintiff's Memorandum of Costs and Disbursements (filed 04/11/2019) | Vol. 48, 8457–8487 |
| Motion to Retax Costs (filed 04/15/2019) | | Vol. 49, 8488–8495 |
| Plaintiff's Opposition to Motion to Retax Costs (filed 04/17/2019) | | Vol. 49, 8496–8507 |
| Exhibits to Plaintiff's Opposition to Motion to Retax Costs | | |
| Exhibit | Document Description | |
| 1 | Declaration of Teresa M. Pilatowicz In Support of Opposition to Motion to Retax Costs (filed 04/17/2019) | Vol. 49, 8508–8510 |
| 2 | Summary of Photocopy Charges | Vol. 49, 8511–8523 |
| 3 | James L. McGovern Curriculum Vitae | Vol. 49, 8524–8530 |
| 4 | McGovern & Greene LLP Invoices | Vol. 49, 8531–8552 |
| 5 | Buss-Shelger Associates Invoices | Vol. 49, 8553–8555 |
| Reply in Support of Motion to Retax Costs (filed 04/22/2019) | | Vol. 49, 8556–8562 |
| Opposition to Application for Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 04/25/2019) | | Vol. 49, 8563–8578 |
| Exhibit to Opposition to Application for Attorneys' Fees and Costs Pursuant to NRCP 68 | | |
| Exhibit | Document Description | |
| 1 | Plaintiff's Bill Dispute Ledger | Vol. 49, 8579–8637 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|---|---|------------------------|
| Defendants, Salvatore Morabito, Snowshoe Petroleum, Inc., and Superpumper, Inc.'s Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60 (filed 04/25/2019) | | Vol. 49, 8638–8657 |
| Defendant, Edward Bayuk's Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60 (filed 04/26/2019) | | Vol. 50, 8658–8676 |
| Exhibits to Edward Bayuk's Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60 | | |
| Exhibit | Document Description | |
| 1 | February 27, 2019 email with attachments | Vol. 50, 8677–8768 |
| 2 | Declaration of Frank C. Gilmore in Support of Edward Bayuk's Motion for New Trial (filed 04/26/2019) | Vol. 50, 8769–8771 |
| 3 | February 27, 2019 email from Marcy Trabert | Vol. 50, 8772–8775 |
| 4 | February 27, 2019 email from Frank Gilmore to eturner@Gtg.legal RE: Friday Trial | Vol. 50, 8776–8777 |
| Plaintiff's Reply in Support of Application of Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 04/30/2019) | | Vol. 50, 8778–8790 |
| Exhibit to Plaintiff's Reply in Support of Application of Attorneys' Fees and Costs Pursuant to NRCP 68 | | |
| Exhibit | Document Description | |
| 1 | Case No. BK-13-51237-GWZ, ECF Nos. 280, 282, and 321 | Vol. 50, 8791–8835 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|---|--|------------------------|
| Plaintiff's Opposition to Defendants' Motions for New Trial and/or to Alter or Amend Judgment (filed 05/07/2019) | | Vol. 51, 8836–8858 |
| Defendants, Salvatore Morabito, Snowshoe Petroleum, Inc., and Superpumper, Inc.'s Reply in Support of Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCp 52, 59, and 60 (filed 05/14/2019) | | Vol. 51, 8859–8864 |
| Declaration of Edward Bayuk Claiming Exemption from Execution (filed 06/28/2019) | | Vol. 51, 8865–8870 |
| Exhibits to Declaration of Edward Bayuk Claiming Exemption from Execution | | |
| Exhibit | Document Description | |
| 1 | Copy of June 22, 2019 Notice of Execution and two Write of Executions | Vol. 51, 8871–8896 |
| 2 | Declaration of James Arthur Gibbons Regarding his Attestation, Witness and Certification on November 12, 2005 of the Spendthrift Trust Amendment to the Edward William Bayuk Living Trust (dated 06/25/2019) | Vol. 51, 8897–8942 |
| Notice of Claim of Exemption from Execution (filed 06/28/2019) | | Vol. 51, 8943–8949 |
| Edward Bayuk's Declaration of Salvatore Morabito Claiming Exemption from Execution (filed 07/02/2019) | | Vol. 51, 8950–8954 |
| Exhibits to Declaration of Salvatore Morabito Claiming Exemption from Execution | | |
| Exhibit | Document Description | |
| 1 | Las Vegas June 22, 2019 letter | Vol. 51, 8955–8956 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|---|--|------------------------|
| 2 | Writs of execution and the notice of execution | Vol. 51, 8957–8970 |
| Minutes of June 24, 2019 telephonic hearing on Decision on Submitted Motions (filed 07/02/2019) | | Vol. 51, 8971–8972 |
| Salvatore Morabito’s Notice of Claim of Exemption from Execution (filed 07/02/2019) | | Vol. 51, 8973–8976 |
| Edward Bayuk’s Third Party Claim to Property Levied Upon NRS 31.070 (filed 07/03/2019) | | Vol. 51, 8977–8982 |
| Order Granting Plaintiff’s Application for an Award of Attorneys’ Fees and Costs Pursuant to NRCP 68 (filed 07/10/2019) | | Vol. 51, 8983–8985 |
| Order Granting in part and Denying in part Motion to Retax Costs (filed 07/10/2019) | | Vol. 51, 8986–8988 |
| Plaintiff’s Objection to (1) Claim of Exemption from Execution and (2) Third Party Claim to Property Levied Upon, and Request for Hearing Pursuant to NRS 21.112 and 31.070(5) (filed 07/11/2019) | | Vol. 52, 8989–9003 |
| Exhibits to Plaintiff’s Objection to (1) Claim of Exemption from Execution and (2) Third Party Claim to Property Levied Upon, and Request for Hearing Pursuant to NRS 21.112 and 31.070(5) | | |
| Exhibit | Document Description | |
| 1 | Declaration of Gabrielle A. Hamm, Esq. | Vol. 52, 9004–9007 |
| 2 | 11/30/2011 Tolling Agreement – Edward Bayuk | Vol. 52, 9008–9023 |
| 3 | 11/30/2011 Tolling Agreement – Edward William Bayuk Living Trust | Vol. 52, 9024–9035 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|---|---|------------------------|
| 4 | Excerpts of 9/28/2015 Deposition of Edward Bayuk | Vol. 52, 9036–9041 |
| 5 | Edward Bayuk, as Trustee of the Edward William Bayuk Living Trust’s Responses to Plaintiff’s First Set of Requests for Production, served 9/24/2015 | Vol. 52, 9042–9051 |
| 6 | 8/26/2009 Grant Deed (Los Olivos) | Vol. 52, 9052–9056 |
| 7 | 8/17/2018 Grant Deed (El Camino) | Vol. 52, 9057–9062 |
| 8 | Trial Ex. 4 (Confession of Judgment) | Vol. 52, 9063–9088 |
| 9 | Trial Ex. 45 (Purchase and Sale Agreement, dated 9/28/2010) | Vol. 52, 9089–9097 |
| 10 | Trial Ex. 46 (First Amendment to Purchase and Sale Agreement, dated 9/29/2010) | Vol. 52, 9098–9100 |
| 11 | Trial Ex. 51 (Los Olivos Grant Deed recorded 10/8/2010) | Vol. 52, 9101–9103 |
| 12 | Trial Ex. 52 (El Camino Grant Deed recorded 10/8/2010) | Vol. 52, 9104–9106 |
| 13 | Trial Ex. 61 (Membership Interest Transfer Agreement, dated 10/1/2010) | Vol. 52, 9107–9114 |
| 14 | Trial Ex. 62 (\$1,617,050.00 Promissory Note) | Vol. 52, 9115–9118 |
| 15 | Trial Ex. 65 (Mary Fleming Grant Deed recorded 11/4/2010) | Vol. 52, 9119–9121 |
| Notice of Entry of Order Denying Defendants’ Motions for New Trial and/or to Alter or Amend Judgment (filed 07/16/2019) | | Vol. 52, 9122–9124 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|--|---|------------------------|
| Exhibit to Notice of Entry of Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment | | |
| Exhibit | Document Description | |
| 1 | Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment (filed 07/10/2019) | Vol. 52, 9125–9127 |
| Notice of Entry of Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 07/16/2019) | | Vol. 52, 9128–9130 |
| Exhibit to Notice of Entry of Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68 | | |
| Exhibit | Document Description | |
| 1 | Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 07/10/2019) | Vol. 52, 9131–9134 |
| Notice of Entry of Order Granting in Part and Denying in Part Motion to Retax Costs (filed 07/16/2019) | | Vol. 52, 9135–9137 |
| Exhibit to Notice of Entry of Order Granting in Part and Denying in Part Motion to Retax Costs | | |
| Exhibit | Document Description | |
| 1 | Order Granting in Part and Denying in Part Motion to Retax Costs (filed 07/10/2019) | Vol. 52, 9138–9141 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|---|--|------------------------|
| Plaintiff's Objection to Notice of Claim of Exemption from Execution Filed by Salvatore Morabito and Request for Hearing (filed 07/16/2019) | | Vol. 52, 9142–9146 |
| Reply to Objection to Claim of Exemption and Third Party Claim to Property Levied Upon (filed 07/17/2019) | | Vol. 52, 9147–9162 |
| Exhibits to Reply to Objection to Claim of Exemption and Third Party Claim to Property Levied Upon | | |
| Exhibit | Document Description | |
| 1 | March 3, 2011 Deposition Transcript of P. Morabito | Vol. 52, 9163–9174 |
| 2 | Mr. Bayuk's September 23, 2014 responses to Plaintiff's first set of requests for production | Vol. 52, 9175–9180 |
| 3 | September 28, 2015 Deposition Transcript of Edward Bayuk | Vol. 52, 9181–9190 |
| Reply to Plaintiff's Objection to Notice of Claim of Exemption from Execution (filed 07/18/2019) | | Vol. 52, 9191–9194 |
| Declaration of Service of Till Tap, Notice of Attachment and Levy Upon Property (filed 07/29/2019) | | Vol. 52, 9195 |
| Notice of Submission of Disputed Order Denying Claim of Exemption and Third Party Claim (filed 08/01/2019) | | Vol. 52, 9196–9199 |
| Exhibits to Notice of Submission of Disputed Order Denying Claim of Exemption and Third Party Claim | | |
| Exhibit | Document Description | |
| 1 | Plaintiff's Proposed Order Denying Claim of Exemption and Third-Party Claim | Vol. 52, 9200–9204 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|---|--|------------------------|
| 2 | Bayuk and the Bayuk Trust's proposed Order Denying Claim of Exemption and Third-Party Claim | Vol. 52, 9205–9210 |
| 3 | July 30, 2019 email evidencing Bayuk, through counsel Jeffrey Hartman, Esq., requesting until noon on July 31, 2019 to provide comments. | Vol. 52, 9211–9212 |
| 4 | July 31, 2019 email from Teresa M. Pilatowicz, Esq. Bayuk failed to provide comments at noon on July 31, 2019, instead waiting until 1:43 p.m. to send a redline version with proposed changes after multiple follow ups from Plaintiff's counsel on July 31, 2019 | Vol. 52, 9213–9219 |
| 5 | A true and correct copy of the original Order and Bayuk Changes | Vol. 52, 9220–9224 |
| 6 | A true and correct copy of the redline run by Plaintiff accurately reflecting Bayuk's proposed changes | Vol. 52, 9225–9229 |
| 7 | Email evidencing that after review of the proposed revisions, Plaintiff advised Bayuk, through counsel, that Plaintiff agree to certain proposed revisions, but the majority of the changes were unacceptable as they did not reflect the Court's findings or evidence before the Court. | Vol. 52, 9230–9236 |
| Objection to Plaintiff's Proposed Order Denying Claim of Exemption and Third Party Claim (filed 08/01/2019) | | Vol. 53, 9237–9240 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|---|---|------------------------|
| Exhibits to Objection to Plaintiff's Proposed Order Denying Claim of Exemption and Third-Party Claim | | |
| Exhibit | Document Description | |
| 1 | Plaintiff's Proposed Order Denying Claim of Exemption and Third-Party Claim | Vol. 53, 9241–9245 |
| 2 | Defendant's comments on Findings of Fact | Vol. 53, 9246–9247 |
| 3 | Defendant's Proposed Order Denying Claim of Exemption and Third-Party Claim | Vol. 53, 9248–9252 |
| Minutes of July 22, 2019 hearing on Objection to Claim for Exemption (filed 08/02/2019) | | Vol. 53, 9253 |
| Order Denying Claim of Exemption (filed 08/02/2019) | | Vol. 53, 9254–9255 |
| Bayuk's Case Appeal Statement (filed 08/05/2019) | | Vol. 53, 9256–9260 |
| Bayuk's Notice of Appeal (filed 08/05/2019) | | Vol. 53, 9261–9263 |
| Defendants, Superpumper, Inc., Edward Bayuk, Salvatore Morabito; and Snowshoe Petroleum, Inc.'s, Case Appeal Statement (filed 08/05/2019) | | Vol. 53, 9264–9269 |
| Defendants, Superpumper, Inc., Edward Bayuk, Salvatore Morabito; and Snowshoe Petroleum, Inc.'s, Notice of Appeal (filed 08/05/2019) | | Vol. 53, 9270–9273 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|--|---|------------------------|
| Exhibits to Defendants, Superpumper, Inc., Edward Bayuk, Salvatore Morabito; and Snowshoe Petroleum, Inc.'s, Notice of Appeal | | |
| Exhibit | Document Description | |
| 1 | Findings of Fact, Conclusions of Law, and Judgment (filed 03/29/2019) | Vol. 53, 9274–9338 |
| 2 | Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment (filed 07/10/2019) | Vol. 53, 9339–9341 |
| 3 | Order Granting in Part and Denying in Part Motion to Retax Costs (filed 07/10/2019) | Vol. 53, 9342–9345 |
| 4 | Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 07/10/2019) | Vol. 53, 9346–9349 |
| Plaintiff's Reply to Defendants' Objection to Plaintiff's Proposed Order Denying Claim of Exemption and Third-Party Claim | | Vol. 53, 9350–9356 |
| Order Denying Claim of Exemption and Third-Party Claim (08/09/2019) | | Vol. 53, 9357–9360 |
| Notice of Entry of Order Denying Claim of Exemption and Third-Party Claim (filed 08/09/2019) | | Vol. 53, 9361–9364 |
| Exhibit to Notice of Entry of Order Denying Claim of Exemption and Third-Party Claim | | |
| Exhibit | Document Description | |
| 1 | Order Denying Claim of Exemption and Third-Party Claim (08/09/2019) | Vol. 53, 9365–9369 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|---|--|------------------------|
| Notice of Entry of Order Denying Claim of Exemption (filed 08/12/2019) | | Vol. 53, 9370–9373 |
| Exhibit to Notice of Entry of Order Denying Claim of Exemption | | |
| Exhibit | Document Description | |
| 1 | Order Denying Claim of Exemption (08/02/2019) | Vol. 53, 9374–9376 |
| Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration (filed 08/19/2019) | | Vol. 54, 9377–9401 |
| Exhibits to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration | | |
| Exhibit | Document Description | |
| 1 | Order Denying Claim of Exemption and Third Party Claim (filed 08/09/19) | Vol. 54, 9402–9406 |
| 2 | Spendthrift Trust Amendment to the Edward William Bayuk Living Trust (dated 11/12/05) | Vol. 54, 9407–9447 |
| 3 | Spendthrift Trust Agreement for the Arcadia Living Trust (dated 10/14/05) | Vol. 54, 9448–9484 |
| 4 | Fifth Amendment and Restatement of the Trust Agreement for the Arcadia Living Trust (dated 09/30/10) | Vol. 54, 9485–9524 |
| 5 | P. Morabito's Supplement to NRCP 16.1 Disclosures (dated 03/01/11) | Vol. 54, 9525–9529 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|------------------------------------|---|------------------------|
| 6 | Transcript of March 3, 2011 Deposition of P. Morabito | Vol. 55, 9530–9765 |
| 7 | Documents Conveying Real Property | Vol. 56, 9766–9774 |
| 8 | Transcript of July 22, 2019 Hearing | Vol. 56, 9775–9835 |
| 9 | Tolling Agreement JH and P. Morabito (partially executed 11/30/11) | Vol. 56, 9836–9840 |
| 10 | Tolling Agreement JH and Arcadia Living Trust (partially executed 11/30/11) | Vol. 56, 9841–9845 |
| 11 | Excerpted Pages 8–9 of Superpumper Judgment (filed 03/29/19) | Vol. 56, 9846–9848 |
| 12 | Petitioners' First Set of Interrogatories to Debtor (dated 08/13/13) | Vol. 56, 9849–9853 |
| 13 | Tolling Agreement JH and Edward Bayuk (partially executed 11/30/11) | Vol. 56, 9854–9858 |
| 14 | Tolling Agreement JH and Bayuk Trust (partially executed 11/30/11) | Vol. 56, 9859–9863 |
| 15 | Declaration of Mark E. Lehman, Esq. (dated 03/21/11) | Vol. 56, 9864–9867 |
| 16 | Excerpted Transcript of October 20, 2015 Deposition of Dennis C. Vacco | Vol. 56, 9868–9871 |
| 17 | Assignment and Assumption Agreement (dated 07/03/07) | Vol. 56, 9872–9887 |
| 18 | Order Denying Morabito's Claim of Exemption (filed 08/02/19) | Vol. 56, 9888–9890 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|---|---|------------------------|
| Errata to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration (filed 08/20/2019) | | Vol. 57, 9891–9893 |
| Plaintiff's Opposition to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 08/30/2019) | | Vol. 57, 9894–9910 |
| Errata to Plaintiff's Opposition to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 08/30/2019) | | Vol. 57, 9911–9914 |
| Exhibits to Errata to Plaintiff's Opposition to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs Pursuant to NRS 7.085 | | |
| Exhibit | Document Description | |
| 1 | Declaration of Gabrielle A. Hamm, Esq. | Vol. 57, 9915–9918 |
| 2 | Plaintiff's Amended NRCP 16.1 Disclosures (February 19, 2016) | Vol. 57, 9919–9926 |
| 3 | Plaintiff's Fourth Supplemental NRCP 16.1 Disclosures (November 15, 2016) | Vol. 57, 9927–9930 |
| 4 | Plaintiff's Fifth Supplemental NRCP 16.1 Disclosures (December 21, 2016) | Vol. 57, 9931–9934 |
| 5 | Plaintiff's Sixth Supplemental NRCP 16.1 Disclosures (March 20, 2017) | Vol. 57, 9935–9938 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|--|--|------------------------|
| Reply in Support of Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs (filed 09/04/2019) | | Vol. 57, 9939–9951 |
| Exhibits to Reply in Support of Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs | | |
| Exhibit | Document Description | |
| 19 | Notice of Submission of Disputed Order Denying Claim of Exemption and Third Party Claim (filed 08/01/19) | Vol. 57, 9952–9993 |
| 20 | Notice of Submission of Disputed Order Denying Claim of Exemption and Third Party Claim (filed 08/01/19) | Vol. 57, 9994–10010 |
| Order Denying Defendants’ Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration and Denying Plaintiff’s Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 11/08/2019) | | Vol. 57, 10011–10019 |
| Bayuk’s Case Appeal Statement (filed 12/06/2019) | | Vol. 57, 10020–10026 |
| Bayuk’s Notice of Appeal (filed 12/06/2019) | | Vol. 57, 10027–10030 |

| <u>DOCUMENT DESCRIPTION</u> | | <u>LOCATION</u> |
|---|--|-------------------------|
| Exhibits to Bayuk's Notice of Appeal | | |
| Exhibit | Document Description | |
| 1 | Order Denying [Morabito's] Claim of Exemption (filed 08/02/19) | Vol. 57, 10031–10033 |
| 2 | Order Denying [Bayuk's] Claim of Exemption and Third Party Claim (filed 08/09/19) | Vol. 57, 10034–10038 |
| 3 | Order Denying Defendants' Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration and Denying Plaintiff's Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 11/08/19) | Vol. 57, 10039–10048 |
| Notice of Entry of Order Denying Defendants' Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration and Denying Plaintiff's Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 12/23/2019) | | Vol. 57, 10049–10052 |
| Exhibit to Notice of Entry of Order | | |
| Exhibit | Document Description | |
| A | Order Denying Defendants' Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration and Denying Plaintiff's Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 11/08/19) | Vol. 57, 10053–10062 |
| Docket Case No. CV13-02663 | | Vol. 57, 10063–10111 |

1 **2645**

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16
17 **IN THE SECOND JUDICIAL DISTRICT COURT OF**
18 **THE STATE OF NEVADA IN AND FOR THE**
19 **COUNTY OF WASHOE**

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

23 Plaintiff,

24 vs.

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

Defendants.

CASE NO.: CV13-02663

DEPT. NO. 1

29
30 **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO**
31 **PARTIALLY QUASH, OR, IN THE ALTERNATIVE, FOR A**
32 **PROTECTIVE ORDER PRECLUDING TRUSTEE FROM SEEKING**
33 **DISCOVERY PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE**

34 William Leonard, Chapter 7 Trustee for the bankruptcy estate of Paul Anthony Morabito
35 and the plaintiff in the above-referenced action (the "Plaintiff" or "Trustee"), by and through his

1 counsel, the law firm of Garman Turner Gordon LLP, hereby submits this opposition (the
2 "Opposition") to the *Motion to Partially Quash, or, in the Alternative, for a Protective Order*
3 *Precluding Trustee From Seeking Discovery Protected by the Attorney-Client Privilege* (the
4 "Motion") filed by defendants Superpumper, Inc. ("Superpumper") Edward Bayuk, individually
5 and as the Trustee of the Edward William Bayuk Living Trust ("Bayuk"), Salvatore Morabito
6 ("Salvatore"), and Showshoe Petroleum ("Snowshoe," and together with Superpumper, Bayuk,
7 and Salvatore, the "Defendants") in connection with the properly-issued and noticed
8 Subpoena/Subpoena Duces Tecum (the "Subpoena") issued to attorney Dennis Vacco ("Vacco")
9 of the law firm of Lippes Mathias Wexler Friedman LLP ("Lippes Mathias") on September 29,
10 2015.

11 This Opposition is supported by the following memorandum of points and authorities, the
12 declaration of Teresa M. Pilatowicz, Esq. (the "Pilatowicz Decl."), the exhibits attached hereto,
13 and pleadings and papers on file in this above-captioned case, judicial notice of which is
14 respectfully requested.

15 Dated this 24th day of March, 2016.

16 GARMAN TURNER GORDON LLP

17 /s/ Teresa Pilatowicz

18 GERALD M. GORDON, ESQ.

19 Nevada Bar No. 229

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28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**
3 **INTRODUCTION**

4 Defendants' Motion is without merit. First, it is an improper collateral attack on an order
5 of the United States Bankruptcy Court for the District of Nevada (the "Bankruptcy Court").
6 Second, the assertion of privilege is not only legally and factually baseless, it is too little, too
7 late. Despite having ample opportunity to do so, Defendants waited *five months* to assert a
8 purported privilege over the requested documents, interfering with Lippes Mathias's production
9 of the documents on the eve of the close of discovery. To the extent any privilege existed with
10 respect to the requested documents, a contention that Plaintiff disputes, it has long since been
11 waived under both the co-client doctrine and because Defendants failed to assert it despite
12 having notice of the subject subpoena since *September 24, 2015*.

13 **II.**
14 **RELEVANT FACTS**

15 **A. Background.**

16 1. On December 17, 2013, JH, Inc., Jerry Herbst, and Berry-Hinckley Industries (the
17 "Herbst Parties") filed a complaint in this Court against Paul A. Morabito (the "Debtor"), his
18 long-term domestic partner, Bayuk, his brother, Salvatore, Superpumper, and Snowshoe, thereby
19 commencing case no. CV13-02663 (the "Fraudulent Transfer Action").

20 2. The Fraudulent Transfer Action seeks to avoid and recover a number of
21 fraudulent transfers of the Debtor's real and personal property which occurred only days after an
22 oral ruling by Judge Brent Adams finding the Debtor liable for fraud against the Herbst Parties
23 resulting in actual damages in excess of \$75 million. Ultimately, final judgment was entered in
24 the approximate amount of \$144 Million against the Debtor and in favor of the Herbst Parties,
25 encompassing actual and punitive damages.

26 3. On June 20, 2013, the Herbst Parties filed an Involuntary Petition (the "Petition")
27 against the Debtor, thereby commencing the chapter 7 case (the "Chapter 7 Case") in the United
28 States Bankruptcy Court for the District of Nevada. Case No. 13-51237-GWZ, ECF No. 1.

1 4. Following the election and appointment of William A. Leonard as the Chapter 7
2 Trustee, Mr. Leonard was substituted as the Plaintiff in this Fraudulent Transfer Action.

3 **B. Commission to Take Deposition and the Subpoena.**

4 5. On September 17, 2015, Plaintiff filed his *Application for Commission to Take*
5 *Deposition* of Vacco of the law firm of Lippes Mathias, a true and correct copy of which is
6 attached hereto as **Exhibit 2**. Defendants' counsel was duly-served with the *Application for*
7 *Commission to Take Deposition*. Id.

8 6. The *Commission to Take Deposition* of Vacco was issued by the Clerk of this
9 Court and entered on the docket on September 21, 2015. A true and correct copy of the
10 *Commission to Take Deposition* is attached hereto as **Exhibit 3**.

11 7. Pursuant to the Interstate Uniform Discovery Act, the Subpoena was served upon
12 Vacco on September 29, 2015 at 665 Main Street, Suite 300, Buffalo, New York 14203. A true
13 and correct copy of the Subpoena is attached hereto as **Exhibit 4**. The Subpoena commanded
14 Vacco to attend a deposition at Key Center, 50 Fountain Plaza, Suite 1400, Buffalo, New York
15 14202 on October 20, 2015 at 10:00 a.m., and to produce documents relating to the Fraudulent
16 Transfers.

17 8. Plaintiff's *Notice of Issuance of Subpoena to Dennis Vacco*, a true and correct
18 copy of which is attached hereto as **Exhibit 5**, was duly-served upon Defendants' counsel on
19 September 29, 2015.

20 9. Vacco served his *Response to Subpoena* (the "Response") upon Plaintiff's counsel
21 on October 15, 2015, a true and correct copy of which is attached hereto as **Exhibit 6**. The
22 Response asserted a boilerplate privilege objection, but failed to identify the purportedly
23 privileged documents or provide a privilege log. See id. Only approximately 200 pages of
24 documents were produced pursuant to the Subpoena. See Pilatowicz Decl., ¶ 4.

25 **C. The October 21, 2015 Deposition and Privilege Dispute.**

26 10. On October 21, 2015, counsel for the Plaintiff conducted a deposition (the "Initial
27 Deposition") of Vacco. A true and correct copy of the transcript of Vacco's deposition (the
28 "Vacco Trans.") is attached hereto as **Exhibit 7**. At that time, Vacco indicated that although

1 privilege objections were asserted, he did not believe any documents were withheld on that basis.
2 See Vacco Trans. at 13:14 - 14:24. Furthermore, at the Initial Deposition, attorney Frank
3 Gilmore (“Gilmore”), objected to various questions to Vacco regarding communications between
4 the Debtor and Vacco, asserting the Debtor’s attorney-client privilege. Based on the assertion of
5 the privilege, Gilmore instructed Vacco not to answer such questions. Id. at 48:22-44-15.

6 11. Vacco testified that he represented Bayuk although he does not know if he has a
7 representation agreement with Bayuk. Vacco does not recall if he represented Salvatore. Id. at
8 16:7-11; 54:24 - 55:22; 115:13-19. Vacco further testified that he has represented Superpumper
9 and Snowshoe, though not in connection with the transfers that are the subject of this Fraudulent
10 Transfer Action. See Id. at 155:13-16.

11 12. Moreover, Vacco testified that in the Response of Lippes Mathias to the
12 Subpoena, Lippes Mathias asserted privilege on behalf of the Debtor and various entities,
13 including Showshoe and Superpumper. See Id. at 39:17 – 44:15, 102:10 – 104:10 (refusing to
14 answer questions regarding conversations with Debtor based on privilege). However, until the
15 Motion was filed in this Fraudulent Transfer Action on March 10, 2016, neither Gilmore nor
16 Lippes Mathias ever asserted a privilege on behalf of Bayuk or Salvatore.¹

17 13. Because the Debtor, a non-party to this Action, asserted a privilege which he is
18 not entitled to assert pursuant to Title 11 of the United States Code (the “Bankruptcy Code”) and
19 for other reasons, counsel for the Trustee filed the *Motion to Compel Responses to Deposition*
20 *Questions* (the “Privilege Motion”) in the Bankruptcy Court, which sought a determination
21 regarding the existence and scope of the Debtor’s privilege for communications occurring prior
22 to the commencement of the Debtor’s bankruptcy case. See Case No. 13-51237-GWZ, ECF No.

23
24
25 ¹ To the extent Defendants argue that an assertion of privilege by the Defendants was suggested or
26 implied, the argument must fail, because the privilege is not preserved unless it is made expressly. See
27 Abueg v. State Farm Mut. Auto. Ins. Co., No. 2:14-CV-00635-GMN, 2014 WL 5503114, at *2 (D. Nev.
28 Oct. 30, 2014) (“A failure to assert privileges in accordance with Rule 26(b)(5) can result in a waiver of
the privilege.”) (citing Koninklijke Philips Elecs. N.V. v. KXD Tech., Inc., No. 2:05CV01532RLH-GWF,
2007 WL 778153 (D. Nev. Mar. 12, 2007)).

1 452.²

2 14. The Bankruptcy Court held that the attorney-client privilege did not protect the
3 Debtor's communications with Vacco and Lippes Mathias (including with respect to the
4 fraudulent transfers complained of in this Fraudulent Transfer Action) under the crime-fraud
5 exception or, even if it did apply, became the property of the bankruptcy estate and held by the
6 Trustee, who has waived the privilege. Attached hereto as **Exhibits 8 and 9** are the transcript of
7 the Bankruptcy Court's oral ruling and the *Order Granting Motion to Compel Responses to*
8 *Deposition Questions* (the "Privilege Order") entered by the Bankruptcy Court on February 3,
9 2016.

10 **D. The Re-Noticed Deposition and Mr. Gilmore's Gamesmanship.**

11 15. Following entry of the Privilege Order, Plaintiff's counsel immediately sent the
12 Privilege Order to Vacco and demanded the production of any documents pursuant to the
13 Subpoena that had been withheld on the basis of privilege. Pilatowicz Decl., ¶ 5. Vacco's
14 continued deposition was re-noticed for March 18, 2016 at 10:00 a.m. in Buffalo, New York. A
15 true and correct copy of the *Notice of Continued Deposition*, served on February 17, 2016, is
16 attached hereto as **Exhibit 10**.

17 16. The Trustee's counsel spoke with Kevin Burke ("Burke"), Vacco's partner at
18 Lippes Mathias, several times regarding the production of documents. On or about March 3,

19 ² The Bankruptcy Court correctly discussed the reason why the existence and scope of the Debtor's
20 privilege could only be addressed by the Bankruptcy Court:

21 The matter before me today, so far as I can determine, based upon the questions
22 that were asked of Mr. Vacco in his October deposition, and that he refused to answer
23 upon being ordered not to do so by Mr. Gilmore on behalf of the debtor, because it is not
24 Mr. Vacco's privilege. It is the debtor's privilege that the debtor invoked, the same
25 debtor who is not a party to the state court action in which the deposition was being
26 taken, but is clearly a party in interest here and it affects property of the estate in the
27 sense of the distributions if they are returned to the estate. If the allegations can be
28 proven, this would appear to be the only court that would have jurisdiction over Mr.
Morabito.

And its jurisdiction over Mr. Morabito is asserting the privilege that is the
critical issue before me. I'm not going to order Mr. Vacco to say anything or not to say
anything. Any order I issue will just be dealing with the privilege that's being asserted
of Mr. Morabito.

Hearing Trans. at 20:2-18.

1 2016, for the first time, Burke advised Plaintiff's counsel that there were at least nine bankers'
2 boxes of responsive documents that had not been produced, notwithstanding Vacco's testimony
3 that no responsive documents had been withheld on the basis of the privilege assertion.³
4 Pilatowicz Decl., ¶ 6. Burke has most recently acknowledged that there are *fifteen bankers'*
5 *boxes of documents* in addition to electronically stored information that may be responsive to the
6 Subpoena that have not been produced (collectively, the "Disputed Documents"). *Id.* ¶ 7.
7 However, Mr. Burke unequivocally advised Plaintiff's counsel that in light of the validly-issued
8 Subpoena and the Privilege Order, Lippes Mathias would produce the responsive documents to
9 Plaintiff's counsel. *Id.*

10 17. On March 9, 2016 (more than five months after receiving notice of the Subpoena
11 and a month after entry of the Privilege Order), Mr. Gilmore, as counsel for both the Defendants
12 and the Debtor, alleged that he "was suddenly made aware" that the Disputed Documents, which
13 were the subject of the *September 29, 2015* Subpoena, may be protected by the attorney-client
14 privilege of the Defendants. Pilatowicz Decl., ¶ 8.

15 18. Despite the passage of more than five months, no privilege log has ever been
16 provided pursuant to NRCp 26(e).⁴ Pilatowicz Decl., ¶ 9.

17 19. In their meet and confer pursuant to NRCp 37, Plaintiff's counsel offered to limit
18 the request to those documents and communications to which the Debtor was a party, which
19 communications the Bankruptcy Court has already ruled are not privileged,⁵ notwithstanding the

20 _____
21 ³ By the happenstance of Plaintiff's counsel contacting a copy service for a quote for copying and
22 digitizing the documents that is the same copy service contacted by Lippes Mathias, Plaintiff's counsel
23 learned that there may be as many as 15 boxes of documents. Burke thereafter confirmed that there are
24 15 boxes of documents, along with electronically stored information that may be responsive to the
25 Subpoena but have not been produced. Pilatowicz Decl., ¶ 6.

26 ⁴ In the Privilege Order, the Bankruptcy Court ordered that, if the Debtor intended to withhold any
27 documents based on privilege, "Within ten (10) calendar days of entry of [the Privilege Order], the Debtor
28 shall provide the Trustee a privilege log with respect to all documents withheld on the basis of privilege."
Privilege Order, at ¶ 4. To date, no privilege log has been provided with respect to the Debtor's claim of
privilege. Pilatowicz Decl., ¶ 10.

⁵ The Trustee has filed a motion in the Bankruptcy Court to compel Lippes Mathias' turnover of all of the
Debtor's files pursuant to 11 U.S.C. § 542, which confirm that communications to which the Debtor was
a party regarding the fraudulent transfers are not privileged, or that any privilege which may have existed
has been waived.

1 Defendants' failure to establish that they are entitled to a privilege. Gilmore nonetheless claims
2 that the documents remain privileged and has refused to allow the production of documents.
3 Pilatowicz Decl., ¶ 11.

4
5 **III.**
6 **LEGAL ARGUMENT**

7 **A. The Motion is an Improper Collateral Attack on the Bankruptcy Court's Privilege**
8 **Order.**

9 As a threshold matter, Defendants' contention that Plaintiff must file a motion to compel
10 in the New York state court to obtain the Disputed Documents is without merit. Had Lippes
11 Mathias simply refused to produce the Disputed Documents, that would surely be true.
12 However, Lippes Mathias's counsel has already represented that the Disputed Documents would
13 be produced, and it is clear that it is the Defendants' counsel in this Fraudulent Transfer Action
14 who is interfering with Lippes Mathias' production of responsive documents. Moreover, it is
15 Defendants who are seeking the imprimatur of *this* Court for Lippes Mathias to refuse the
16 Subpoena by filing the Motion.

17 The Bankruptcy Court has unequivocally held that the attorney-client privilege does not
18 protect the Debtor's communications with Vacco, for two separate, independent reasons. First,
19 the Bankruptcy Court found that the attorney-client privilege did not protect the communications
20 as a result of the crime-fraud exception. Second, the Bankruptcy Court found that even if the
21 attorney-client privilege did apply to the communications involving the Debtor, the Trustee, as
22 owner of the privilege, has waived it. See Privilege Order, 2:10 - 3:3.

23 **1. The Crime-Fraud Exception.**

24 The crime-fraud exception to the privilege is nearly, if not completely, universal. Under
25 federal law, as set forth in Cox v. Administrator US Steel, 17 F.3d 1386, 1416 (11th Cir. 1994),
26 the analysis is two-fold: (1) there must be a *prima facie* showing that the client was engaged in
27 criminal or fraudulent conduct when he sought the advice of counsel, or that he committed a
28 crime or fraud subsequent to receiving the benefit of counsel's advice, and (2) there must be a
showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent
activity or was closely related to it. Id. In Nevada, the exception applies "if the services of the

1 lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the
2 client knew or reasonably should have known to be a crime or fraud.” Nev. Rev. Stat. 49.115(1).
3 Under New York law, the exception applies if the communications encompass “a fraudulent
4 scheme . . . or any accusation of some other wrongful conduct.” Art Capital Group LLC v. Rose,
5 54 A.D.3d 276, 277, 862 N.Y.S.2d 369 [1st Dept. 2008]. Thus, the attorney-client privilege does
6 not shield communications made in furtherance of a client’s tortious conduct. See Duplan Corp.
7 v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974).

8 The crime-fraud exception to the privilege applies to transfers made in fraud of creditors.
9 In re Blier Cedar Co., Inc., 10 B.R. 993 (Bankr. D. Me. 1981) (ordering production of documents
10 relating to transfers shown on a prima facie basis to have constituted fraudulent transfers); In re
11 Cutuli, No. 11-35256-BKC-AJC, 2013 Bankr. LEXIS 3843 (Bankr. S.D. Fla. Sept. 13, 2013)
12 (“Bankruptcy courts have held that merely raising an ‘inference that . . . transfers may have been
13 fraudulent’ is sufficient to invoke the crime-fraud exception.”).

14 Moreover, for the crime fraud exception to apply, the attorney does not even have to be
15 aware of the illegality involved; it is enough that the communication furthered, or was intended
16 by the client to further, the illegality. In re Grand Jury Proceedings, 87 F.3d 377, 381 (9th Cir.
17 1996); see also People v. Clark, 789 P.2d 127, 153, 50 Cal.3d 583, 609 (1990) (quoting United
18 States v. Friedman, 445 F.2d 1076, 1086 (9th Cir.) (“The attorney does not have to be aware of
19 the fraud if the communication furthered the fraud or if the client intended the communication to
20 further the fraud.”). Thus, “asset planning” advice that an attorney provides to a client intending
21 to hinder, delay, or defraud his creditors is not protected, even if the attorney is not aware of the
22 client’s intent.

23 Following briefing by the parties and a hearing on December 22, 2015, the Bankruptcy
24 Court concluded that the Trustee had made a prima facie showing that the crime-fraud exception
25 applied with respect to Vacco and Lippe Mathias. Specifically, the Bankruptcy Court stated in
26 his oral ruling:

27 *I believe that there has been a prima facie showing that has not been*
28 *rebutted regarding the existence of the fraud exception to the*

1 ***attorney-client privilege***. There's certain badges of fraud that exist --
2 Cutuli talks about those -- to determine if the moving party has met its
3 burden to make a prima facie case, and I believe that that has been
4 established.

5 Hearing Trans. at 22:6-11.

6 Even Defendants' counsel acknowledged that the Bankruptcy Court's ruling expressly
7 applied to the transfers at issue in this Fraudulent Transfer Action. Following the December 22,
8 2015 hearing, Gilmore filed an objection to the proposed form of order incorporating the above
9 findings, arguing that the Bankruptcy Court's ruling on the crime/fraud exception was limited to
10 "the Debtor's transfer of the shares of Superpumper to the State Court Case Defendants." See
11 *Debtor's Objection to Proposed Order Granting Motion to Compel Responses to Deposition*
12 *Questions*, Case No. 13-51237-GWZ, ECF No. 482, 2:4-16), attached hereto as **Exhibit 11**.
13 However, while the ruling indisputably included the transfers at issue here, the Bankruptcy Court
14 declined to so limit it. See Privilege Order.

15 **2. Plaintiff's Entitlement to the Documents as Successor to the Debtor.**

16 In addition to the crime-fraud exception, the Bankruptcy Court further found that the
17 privilege was the Trustee's to assert, and that the Trustee was entitled to waive the privilege.
18 Specifically, in the Privilege Order, the Bankruptcy Court stated:

19 (g) the Trustee has met his burden to waive the Debtor's attorney-client
20 privilege under the balancing test; and (h) as a result, the Trustee has,
21 consistent with applicable law, waived the Debtor's attorney-client
22 privilege with Lippes Mathias and Vacco.

23 Privilege Order, 2:25-27.

24 Notwithstanding the clear ruling from the Bankruptcy Court that no attorney-client
25 privilege applies to communications involving the Debtor, Defendants now assert, for the first
26 time, that the Disputed Documents are protected from disclosure on the basis that Vacco was
27 also representing the recipients of the Fraudulent Transfers. This is a clear effort to collaterally
28 attack the Bankruptcy Court's Privilege Order, because a finding that the privilege applies with
29 respect to the Defendants is irreconcilably inconsistent with the Bankruptcy Court's findings that
30 (i) the crime-fraud exception was satisfied and (ii) the Debtor's privilege, to the extent it ever

1 existed, was waived. Because no privilege arose in the first instance, or has been waived, any
2 privilege Defendants may have had no longer protects the Disputed Documents.

3 **B. Vacco's Representation of Multiple Parties to the Transactions Results in Waiver of**
4 **the Privilege.**

5 In order to assert a privilege, the Defendants must first show that Vacco actually had an
6 attorney-client relationship with them. They have not done so. See Vacco Trans. at 16:7-11;
7 54:24 - 55:22; 115:13-19; 155:13-16. That Bayuk and Salvatore were the beneficiaries of the
8 Debtor's transfers in fraud of his creditors does not establish an attorney-client relationship with
9 Lippes Mathias. Even if an attorney-client relationship is established, Defendants would have
10 the burden to establish that the communications at issue were necessary to secure or give legal
11 advice.⁶ However, even if Vacco represented the Defendants, and even if the communications
12 were made in the rendition of legal advice (and the other elements of a valid privilege were
13 established), that privilege does not protect such communications involving the Debtor, because
14 (i) the client file remains property of the bankruptcy estate, and the Plaintiff is entitled to
15 disclosure of Vacco's communications with the alleged co-clients to the same extent the Debtor
16 would be entitled to such disclosure, and (ii) the joint-client privilege does not protect
17 communications with co-clients when they lack a unity of interest.

18 The common interest privilege is an extension of the attorney-client privilege. United
19 States v. Gonzalez, 669 F.3d 974, 978 (9th Cir. 2012). "Under the joint-client privilege, clients
20 may jointly retain (or one client may retain for the joint benefit of others) an attorney as their
21 common agent on a legal matter of common interest. With respect to matters of common
22 interest, *each joint client may be privy to the other's communications with the attorney* without
23 the attorney-client privilege protection being waived by that breach of confidentiality." In re
24 Hotels Nevada, LLC, 458 B.R. at 570 (emphasis added) (citing Griffith v. Davis, 161 F.R.D.
25 687, 693 (C.D. Cal. 1995)). Although generally a protection against disclosure to third parties,
26 the joint-client privilege "does not generally override the responsibilities owed by the attorney to

27 ⁶ This analysis assumes that the Disputed Documents are in fact communications. However, as no
28 privilege log was provided, this is not clear.

1 each client, nor does it protect communications among clients when they become adversaries.”
2 Id. at 570.

3 The attempted use of the joint-client privilege to protect communications from a trustee
4 who has waived the debtor’s attorney-client privilege was expressly considered and rejected by
5 the Nevada Bankruptcy Court in Hotels Nevada. In that case, certain debtors and non-debtor
6 affiliates were represented by the same law firm prepetition in connection with, among other
7 things, litigation and settlement discussions. Id. at 564-565. Following the filing of the debtors’
8 bankruptcy case, the trustee sought documents related to the litigation and any transfers of assets
9 belonging to the debtors. Id. at 565. Although the law firm acknowledged that the debtors’
10 privilege had been waived, it refused to turn over documents that included communications with
11 non-debtor parties, arguing that, because the non-debtor affiliates’ privilege had not been
12 waived, the trustee was not entitled to communications which included both the debtors and non-
13 debtor affiliates. Id. at 565-567.

14 The court disagreed, holding that the joint-client principle did not apply to protect the
15 communications. Id. at 573. First, the court in Hotels Nevada characterized the trustee’s request
16 for documents as follows:

17 Here, no third party seeks access to a confidential communication
18 between a lawyer and her client. Rather, a successor to a client—here,
19 the Trustee—is attempting to gain access to its property, or information
20 related to its property, from its former attorney, all as authorized by
21 Section 542 [of the Bankruptcy Code]. The analog would be if two
22 corporations hired the same attorney for a common task, and then one
23 of the corporations had a change in management, and new management
24 wanted all its old files to give to a new attorney only to be told “no” by
25 the old attorney.

26 Id. at 566.

27 Thus, as set forth by the court in Hotels Nevada, an attorney’s client files become
28 property of the client’s bankruptcy estate under Section 541(a) of the Bankruptcy Code. Thus,
the Debtor’s files at Lippes Mathias are the Plaintiff’s property. Hotels Nevada, LLC, 458 B.R.
at 568; see also Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P., 91 N.Y.2d
30, 689 N.E.2d 879 (1997) (holding that with very narrow exceptions, client has a broad right to

1 attorney's file in New York). As in Hotels Nevada, the Plaintiff seeks documents and
2 information that would be in the *Debtor's files* and communications to which *the Debtor* would
3 have been entitled. Such information is already property that belongs to the Plaintiff in his
4 capacity as a trustee, and he has a right to production because he stands in the shoes of the
5 Debtor under the Bankruptcy Code.

6 In addition to the Plaintiff's entitlement to the Disputed Documents because he owns
7 them under the Bankruptcy Code, Plaintiff is entitled to discover the Disputed Documents
8 because the joint-client privilege does not protect communications once the clients become
9 adversarial. "When former co-clients sue one another, the default rule is that *all communications*
10 *made in the course of the joint representation* are discoverable.... This rule has two bases: (1) the
11 presumed intent of the parties, and (2) the lawyer's fiduciary obligation of candor to both
12 parties." Hotels Nevada, 458 B.R. at 571-572 (quoting Teleglobe USA Inc. v. BCE, Inc. (In re
13 Teleglobe Comm'ns Corp.), 493 F.3d 345, 366 (3d Cir. 2007) (emphasis added)). Thus, when
14 parties formerly under a joint-client privilege become adverse, the privilege no longer applies to
15 any of their communications. Id.; see also Sec. Inv'r Prot. Corp. v. Stratton Oakmont, Inc., 213
16 B.R. 433, 437 (Bankr. S.D.N.Y. 1997) (finding waiver of the joint defense privilege where
17 debtor was one of the parties to the joint defense).

18 The same rule would also apply under New York law. E.g., Bolton v. Weil, Gotshal &
19 Manges LLP, 14 Misc. 3d 1220(A), 836 N.Y.S.2d 483 (Sup. Ct. 2005) (unpublished opinion)
20 (finding joint defense privilege did not protect communications when the matter of their common
21 interest was at issue in later litigation); Finn v. Morgan, 46 A.D.2d 229, 236, 362 N.Y.S.2d 292
22 (1974) (where parties "decided to cast their lot together . . . in a situation implicit with
23 conflicting interests, there is no reason to protect them from the consequences of that choice
24 when their interests later diverge."); Dooley v. Boyle, 140 Misc. 2d 177, 186, 531 N.Y.S.2d 161,
25 167 (Sup. Ct. 1988) ("Where an attorney is consulted by two parties in a matter of common
26 interest for their mutual benefit, nothing said by the parties or the attorney is deemed confidential
27 in litigation between those parties or their personal representatives since their common interest
28

1 forbids concealment of statements made by one from the other.”) (citations omitted).⁷

2 With respect to the Transfers, Vacco represented the Debtor at the same time he was
3 purportedly also representing the Defendants in connection with the transfers that are the subject
4 of this Fraudulent Transfer Action.⁸ Plaintiff, as the Debtor’s representative, has stepped into the
5 shoes of the Debtor and is now seeking to recover fraudulently-conveyed assets for the benefit of
6 all creditors. He is directly adverse to the Defendants in this Fraudulent Transfer Action. As a
7 result, to the extent the joint-client privilege ever applied despite the application of the crime-
8 fraud exception, it no longer protects communications regarding the matter of their common
9 interest.

10 **C. Defendants’ Motion is Untimely.**

11 Nev. R. Civ. P. 45(c)(3)(A) provides that “[o]n timely motion, the court by which a
12 subpoena was issued shall quash or modify the subpoena” under the circumstances specified.
13 The most liberal interpretation of “timely” does not allow Defendants to bring the Motion more
14 than five months after the Subpoena was issued, more than four months after the Initial
15 Deposition of Vacco and the noticed return date for the production of the Disputed Documents,
16 more than a month after the Bankruptcy Court entered the Privilege Order, a scant three weeks
17 before the close of discovery in this Fraudulent Transfer Action, and a mere eight days before
18 Vacco’s continued deposition. Such timing is tactical manipulation at its worst.

19 Interpreting the equivalent federal rule, the District of Nevada held that a motion to quash
20 filed three days before a deposition of which the movant had three-weeks’ notice was untimely.
21 Allstate Ins. Co. v. Nassiri, No. 2:08-CV-369 JCM GWF, 2011 WL 4905639, at *1 (D. Nev. Oct.
22 14, 2011) (applying Fed. R. Civ. P. 45(c)(3), which requires a “timely motion”); see also
23 Innomed Labs, LLC v. Alza Corp., 211 F.R.D. 237, 240 (S.D.N.Y. 2002) (motion to quash is
24 timely only if it is filed before the noticed return date). Defendants’ delay of more than five
25 months after the Subpoena was issued, a month after the entry of the Privilege Order and a mere
26

27 ⁷ There appear to be no Nevada cases on point.

28 ⁸ More likely, he was representing solely the Debtor.

1 eight days before Vacco's continued deposition is far more egregious than the delay in Nassiri
2 and well after the noticed date for production of the Disputed Documents (October 15, 2015).

3 Similarly, the District of Nevada found that a motion for a protective order filed under
4 Fed. R. Civ. P. 26(c) after an initial deposition and shortly before a re-noticed deposition was
5 untimely, as it should have been filed in response to the first notice of deposition. Steelman
6 Partners v. Sanya Gaosheng Inv. Co. Ltd., No. 209CV01016GMNGWF, 2015 WL 9462081, at
7 *2 (D. Nev. Dec. 24, 2015).

8 Though neither Nev. R. Civ. P. 26(c) nor the equivalent Fed. R. Civ. P. 26(c) contain an
9 explicit timeliness requirement, courts consistently hold that a motion for protective order must
10 be timely. See, e.g., Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 413 (M.D.N.C. 1991) (citing
11 United States v. IBM Corp., 70 F.R.D. 700, 701 (S.D.N.Y. 1976)); In re Air Crash Disaster at
12 Detroit Metro. Airport, 130 F.R.D. 627, 630 (E.D. Mich. 1989); 8 Charles A. Wright & Arthur
13 R. Miller, Federal Practice and Procedure, sec. 2035, at 262 (1970). The failure to timely obtain
14 a protective order ordinarily precludes subsequent objection to the discovery requests. See, e.g.,
15 In re Air Crash Disaster, 130 F.R.D. at 630; International Business Machs., 79 F.R.D. at 414.

16 Defendants' counsel's contention that he was somehow unaware that the Vacco
17 Subpoena might implicate his clients' purported privilege until March 9, 2016, notwithstanding
18 the fact that he has had notice of the Subpoena for over five months and the privilege issue was
19 subject to a protracted fight in the Bankruptcy Court, defies credulity. Defendants' Motion, filed
20 not only months after the deadline for Vacco to produce documents, but also long after the
21 Bankruptcy Court ruled on the very same issue and Vacco's deposition was re-noticed, is not
22 timely and should be denied on that basis alone.

23 **D. Defendants' Failure to Timely Establish the Claim of Privilege in Compliance With**
24 **NRCP 26 Waived the Privilege.**

25 Any claim of privilege must be made expressly and with particularity. Nev. R. Civ. P.
26 26(b)(5) provides:

27 **Claims of Privilege or Protection of Trial Preparation Materials.**
28 When a party withholds information otherwise discoverable under these
rules by claiming that it is privileged or subject to protection as trial

1 preparation material, the party *shall make the claim expressly* and shall
2 describe the nature of the documents, communications, or things not
3 produced or disclosed in a manner that, without revealing information
4 itself privileged or protected, will *enable other parties to assess the
applicability of the privilege or protection*.

5 Nev. R. Civ. P. 26(b)(5) (emphasis added).⁹

6 In order to meet its burden to establish all elements of the privilege, the party asserting
7 the privilege “must identify specific communications and the grounds supporting the privilege as
8 to each piece of evidence over which privilege is asserted.” See, e.g., United States v. Martin,
9 278 F.3d 988, 999-1000 (9th Cir. 2002)¹⁰ (citing United States v. Munoz, 233 F.3d 1117, 1128
10 (9th Cir. 2000); United States v. Osborn, 561 F.2d 1334, 1339 (9th Cir. 1977)); see also Painters
11 Joint Committee v. Employee Painters Trust Health & Welfare Fund, 2011 WL 4573349, at *5
12 (D. Nev. 2011) (citing Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975) (the
13 “party resisting discovery bears the burden of showing why a discovery request should be
14 denied”).

15 Boilerplate, blanket assertions are “extremely disfavored.” Martin, 278 F.3d at 1000
16 (citing Clarke v. Am. Commerce Nat’l Bank, 974 F.2d 127, 129 (9th Cir. 1992)). Instead, the
17 objecting party must specifically identify the grounds for its objection and may not rely merely
18 on conclusory or speculative arguments. E.E.O.C. v. Caesars Entertainment, Inc., 237 F.R.D.
19 428, 432 (D. Nev. 2006).

20 Where the party asserting privilege fails to expressly make the claim of privilege and
21 specifically describe the nature of the documents not produced in a manner that enables other
22 parties to assess the claim of the privilege, it is waived. In Bullion Monarch Mining, Inc. v.
23 Newmont USA Ltd., the District of Nevada found that privilege was waived where the defendant

24 ⁹ To the extent Defendants’ Motion is made under Rule 45, it also requires that “the claim shall be made
25 expressly and shall be supported by a description of the nature of the documents, communications, or
26 things not produced that is sufficient to enable the demanding party to contest the claim.” Nev. R. Civ. P.
27 45(d)(2).

28 ¹⁰ “Federal cases interpreting the Federal Rules of Civil Procedure ‘are strong persuasive authority,
because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.’”
Executive Mgmt., Ltd. v. Tigor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (quoting Las
Vegas Novelty v. Fernandez, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990)).

1 produced a privilege log for the first time a year after the documents were required to be
2 produced and after the close of discovery. 271 F.R.D. 643, 650 (D. Nev. 2010). Discussing the
3 lack of timeliness, the court found that though the determination of timeliness must be made in
4 relation to other factors involved, the default 30-days for responding to discovery is a guideline
5 for timeliness. *Id.* (citing Burlington Northern and Santa Fe Railway Company v. United States
6 District Court for the District of Montana, 408 F.3d 1142, 1147-1148 (2005); *comparing* Carl
7 Zeiss Vision Int'l GmbH v. Signet Armorlite, 2009 WL 4642388, *3-4, 2009 U.S. Dist. LEXIS
8 111877, at *14 (S.D. Cal. Dec. 1, 2009) (nine month delay in production of privilege log deemed
9 unreasonable), *with* Coalition for a Sustainable Delta v. Koch, 2009 WL 3378974, *4-5, 2009
10 U.S. Dist. LEXIS 100728, at *11-14 (E.D. Cal. Oct. 15, 2009) (in a case dealing with a universe
11 of 80,000 documents and thousands of emails, defendants' assertion of privilege two months
12 after production of documents was reasonable)).

13 In finding that the defendant's privilege was waived, the Bullion court noted that the
14 excessive delay had effectively nullified the plaintiff's ability to meaningfully inquire into the
15 claimed privilege. Even though the court had granted Bullion's motion for additional briefing to
16 supplement its dispositive motions, the court found that it was unfairly prejudiced, stating:

17 . . . but what are Bullion's options insofar as the privilege log is
18 concerned? At the July 1, 2010 hearing, the court posed this question to
19 Newmont's counsel, who replied that it was up to Bullion's counsel to
20 review the privilege log, decide which among the 1,126 entries it
21 contests, identify new witnesses it would like to depose (which were
22 never identified until Newmont produced the privilege log), re-depose
certain other witnesses, and then file a more targeted motion for
sanctions, if necessary. The court presumes that it, in turn, would be
required to review disputed privilege log entries *in camera* to decide
what is privileged. This takes time, and there is no time left.

23 Bullion Monarch Mining, 271 F.R.D. at 649.¹¹

24
25 ¹¹ The Bullion court had some further observations about the manipulative tactics employed by the
26 defendant in that case:

27 Newmont delayed production of the privilege log, rendering it useless for its intended
28 purpose. There is no conceivable way that Bullion can review the 1,126 entries, compare
them with deposition testimony of numerous witnesses, and review the thousands of
documents produced to challenge the log entries, get a hearing and decision from the court,

The Defendants' shenanigans in this case are comparable to those of the defendant in Bullion, if not worse, and result in similar prejudice to the Plaintiff. Defendants raised the privilege objection for the first time on approximately March 9, 2016, asserting a blanket privilege over at least 9 bankers' boxes of documents that Plaintiff's counsel was not even aware of.¹² No privilege log has been provided, leaving the Plaintiff with no ability to meaningfully evaluate the claim of privilege, much less challenge it. Even if a privilege log is provided immediately, Plaintiff is left with one week left during the discovery period to evaluate the privilege log, determine which entries he contests, move to compel the production of documents that should not be protected by privilege, identify and depose any new witnesses disclosed for the first time in the privilege log, and potentially re-depose witnesses that Plaintiff deposed without the benefit of the Disputed Documents that were not produced.¹³ As in Bullion, "this takes time, and there is no time left." Accordingly, the Court should find that any privilege Defendants may have had in the Disputed Documents has been waived by their failure to timely assert it and to assert it in compliance with the mandates of Rule 26.

...

• • •

...

- (continued)

and then supplement its (continued) oppositions to dispositive motions, all by August 30, 2010. This does not even include the potential necessity to re-depose witnesses or depose new witnesses never disclosed.

...

Given the very late stage of these proceedings and the fact that no amount of post-privilege log discovery now can cure the prejudice Bullion has suffered, the court is left with little choice but to find that Newmont has waived its privilege as to every document designated in the privilege log, including those designated as protected under the work product doctrine.

Bullion Monarch, 271 F.R.D. at 650-53.

¹² Plaintiff's counsel was unaware that Vacco had failed to produce approximately 15 bankers' boxes of responsive documents along with electronically-stored information until the week of March 7, 2016, as Vacco testified that no responsive documents had been withheld pursuant to the assertion of privilege. Pilatowicz Decl., ¶ 10.

¹³ Plaintiff's counsel has just completed the depositions of the Debtor and the Debtor's and Defendants' auditors, Gursev Schneider. In the coming days and weeks, Plaintiff's counsel will be deposing Vacco and the Debtor's and Defendants' accountant, Stanton Bernstein. Pilatowicz Decl., ¶ 12.

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**IV.
CONCLUSION**

Based on the foregoing, Plaintiff respectfully requests that this Court deny Defendants' Motion. Plaintiff seeks such other relief as this Court deems just and proper.

**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 24th day of March, 2016.

GARMAN TURNER GORDON LLP

/s/ Teresa Pilatowicz
GERALD M. GORDON, ESQ.
Nevada Bar No. 229
TERESA M. PILATOWICZ, ESQ.
Nevada Bar No. 9605
GABRIELLE A. HAMM, ESQ.
Nevada Bar No. 11588
650 White Drive, Suite 100
Las Vegas, Nevada 89119
Tel: (735) 777-3000
Attorneys for Plaintiff William A. Leonard

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of GARMAN TURNER GORDON, and that on this date,
3 pursuant to NRCP 5(b), I am serving a true and correct copy of the above **Plaintiff's Opposition**
4 **to Defendants' Motion to Partially Quash, or, in the Alternative, for a Protective Order**
5 **Precluding Trustee From Seeking Discovery Protected by the Attorney-Client Privilege** on
6 the parties as set forth below:

7 XXX Placing an original or true copy thereof in a sealed envelope placed for collection
8 and mailing in the United States Mail, Reno, Nevada, postage prepaid, following
ordinary business practices

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
13 to be personally Hand Delivered

14 _____ Federal Express (or other overnight delivery)

15 addressed as follows:

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

21 DATED this 24th day of March, 2016.

22 /s/ Jenifer Cannon
23 An Employee of GARMAN TURNER
24 GORDON
25
26
27
28

INDEX OF EXHIBITS

| <u>Exhibit No.</u> | <u>Description</u> | <u>Pages</u> |
|---------------------------|--|---------------------|
| <u>1</u> | Declaration of Teresa M. Pilatowicz in Support of Plaintiff's Opposition to Defendants' Motion to Partially Quash, or, in the Alternative, for a Protective Order Precluding Trustee From Seeking Discovery Protected by the Attorney-Client Privilege | |
| <u>2</u> | Application for Commission to Take Deposition of Dennis Vacco (September 17, 2015) | 8 |
| <u>3</u> | Commission to Take Deposition of Dennis Vacco (September 21, 2015) | 3 |
| <u>4</u> | Subpoena/Subpoena Duces Tecum to Dennis Vacco (September 29, 2015) | 12 |
| <u>5</u> | Notice of Issuance of Subpoena to Dennis Vacco (September 29, 2015) | 14 |
| <u>6</u> | Response to Subpoena (October 15, 2015) | 9 |
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EXHIBIT 1

1 **DECLARATION OF TERESA M. PILATOWICZ IN SUPPORT OF PLAINTIFF'S**
2 **OPPOSITION TO DEFENDANTS' MOTION TO PARTIALLY QUASH, OR, IN THE**
3 **ALTERNATIVE, FOR A PROTECTIVE ORDER PRECLUDING TRUSTEE FROM**
4 **SEEKING DISCOVERY PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE**

5 I, TERESA M. PILATOWICZ, declare and state under penalty of perjury the following:

6 1. I am an attorney with the law firm of Garman Turner Gordon LLP and am counsel to the
7 plaintiff, William Leonard, in this matter. I am duly-licensed in Nevada and Arizona.

8 2. I have personal knowledge of the facts set forth herein, and if called upon to
9 testify, could and would do so.

10 3. I submit this declaration in support of *Plaintiff's Opposition to Defendants'*
11 *Motion to Partially Quash, or, in the Alternative, for a Protective Order Precluding Trustee*
12 *From Seeking Discovery Protected by the Attorney-Client Privilege* (the "Motion").

13 4. Vacco¹ served his *Response to Subpoena* (the "Response") upon Plaintiff's
14 counsel on October 15, 2015, a true and correct copy of which is attached hereto as **Exhibit 6**.
15 The Response asserted a boilerplate privilege objection, but failed to identify the purportedly
16 privileged documents or provide a privilege log. Only approximately 200 pages of documents
17 were produced pursuant to the Subpoena.

18 5. Following entry of the *Order Granting Motion to Compel Responses to*
19 *Deposition Questions* on February 3, 2016, I immediately sent the Privilege Order to Vacco and
20 demanded the production of any documents pursuant to the Subpoena that had been withheld on
21 the basis of privilege. Vacco's continued deposition was re-noticed for March 18, 2016 at 10:00
22 a.m. in Buffalo, New York. A true and correct copy of the *Notice of Continued Deposition*,
23 served on February 17, 2016, is attached hereto as **Exhibit 10**.

24 6. I spoke with Kevin Burke, Vacco's partner at Lippes Mathias, several times
25 regarding the production of documents. On or about March 3, 2016, for the first time, Burke
26 advised me that there were at least nine bankers' boxes of responsive documents that had not
27 been produced, notwithstanding Vacco's testimony that no responsive documents had been

28 ¹ Capitalized terms not defined in this declaration have the meanings set forth in the Motion.

1 withheld on the basis of the privilege assertion. By the happenstance of Plaintiff's counsel
2 contacting a copy service for a quote for copying and digitizing the documents that is the same
3 copy service contacted by Lippes Mathias, Plaintiff's counsel learned that there may be as many
4 as 15 boxes of documents.

5 7. Burke has most recently acknowledged that there are *fifteen bankers' boxes of*
6 *documents* in addition to electronically stored information that may be responsive to the
7 Subpoena that have not been produced (the "Disputed Documents"). However, Burke
8 unequivocally advised me that in light of the validly-issued Subpoena and the Privilege Order,
9 Lippes Mathias would produce the responsive documents to Plaintiff's counsel.

10 8. On March 9, 2016 (more than five months after receiving notice of the Subpoena
11 and a month after entry of the Privilege Order), Mr. Gilmore, as counsel for both the Defendants
12 and the Debtor, represented that he "was suddenly made aware" that the Disputed Documents,
13 which were the subject of the *September 29, 2015* Subpoena, may be protected by the attorney-
14 client privilege of the Defendants.

15 9. Despite the passage of more than five months, no privilege log has ever been
16 provided pursuant to NRCP 26(e).

17 10. Similarly, the Debtor has never produced a privilege log, though in the Privilege
18 Order, the Bankruptcy Court ordered that, if the Debtor intended to withhold any documents based on
19 privilege, "Within ten (10) calendar days of entry of [the Privilege Order], the Debtor shall provide the
20 Trustee a privilege log with respect to all documents withheld on the basis of privilege." Privilege Order,
21 at ¶ 4.

22 11. In our meet and confer pursuant to NRCP 37, I offered to limit the request to
23 those documents and communications to which the Debtor was a party, which communications
24 the Bankruptcy Court has already ruled are not privileged, notwithstanding the Defendants'
25 failure to establish that they are entitled to a privilege. Gilmore nonetheless claims that all
26 documents remain privileged and has refused any compromise related to the production.

27 12. I have just completed the depositions of the Debtor and the Debtor's and
28 Defendants' auditors, Gursev Schneider, and will be deposing Vacco and the Debtor's and

1 Defendants' accountant, Stanton Bernstein, in the near future. Further depositions of these
2 parties may be required as a result of information discovered in Vacco's testimony or the
3 Disputed Documents. Though Defendants have stipulated to a very limited extension of the
4 discovery period, this does little to ameliorate the prejudice that Plaintiff suffers as a result of the
5 failure to allow Plaintiff access to the Disputed Documents.

6 Dated this 24th day of March, 2016.

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8 TERESA M. PILATOWICZ, ESQ.
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Exhibit 2

1 1270
2 GARMAN TURNER GORDON LLP
3 GERALD M. GORDON, ESQ.
4 Nevada Bar No. 229
5 E-mail: ggordon@gtg.legal
6 TERESA M. PILATOWICZ, ESQ.
7 Nevada Bar No. 9605
8 E-mail: tpilatowicz@gtg.legal
9 650 White Drive, Ste. 100
10 Las Vegas, Nevada 89119
11 Telephone 725-777-3000

12 *Special Counsel to Trustee*

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

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

15 Plaintiff,

16 vs.

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

24 Defendants.

CASE NO.: CV13-02663

DEPT. NO.: 1

TIME: 10:00 A.M.

DATE: 10/20/2015

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APPLICATION FOR COMMISSION TO TAKE DEPOSITION

23 Plaintiff William A. Leonard, Jr. ("Leonard"), trustee for the bankruptcy estate of Paul
24 Anthony Morabito, by and through his special, Garman Turner Gordon, LLP ("GTG"), and
25 pursuant to Rule 28(a) of the Nevada Rules of Civil Procedure make application to this Court for
26 issuance of a Commission to take the deposition of Dennis Vacco, on October 20th, 2015, in
27 Buffalo, New York, and respectfully show the Court as follows:

- 28 1. GTG is the attorney of record for plaintiff in the above-entitled case.

2. Dennis Vacco is located in Buffalo, New York.

3. Applicant will provide for the attendance of a court reporter at the time and place of 10:00 a.m. on October 20th, 2015 at Key Center, 50 Fountain Plaza, Suite 1400, Buffalo, New York 14202, who is authorized to administer oaths under the laws of the State of New York, for the taking of the deposition of Dennis Vacco.

4. A copy of the *Notice of Deposition of Dennis Vacco* (the "Notice") is attached hereto as **Exhibit "1"** by this reference incorporated herein as if set forth in full.

5. Under Rule 28(a) of the Nevada Rules of Civil Procedure, upon application and proof that the Notice to take a deposition out of the State of Nevada has been given as provided in NRCP 30(b)(1), the Clerk of this Court is authorized to issue a commission for the taking of deposition of witnesses outside the State of Nevada.

WHEREFORE, Applicant prays that the clerk of this Court issue a Commission to take the deposition of Dennis Vacco, at 10:00 a.m. on the 20th day of October, 2015, or such date as continued by agreement of the parties or order of the Court.

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 17th day of September, 2015.

GARMAN TURNER GORDON LLP

/s/ Teresa M. Pilatowicz
GERALD E. GORDON, ESQ.
TERESA M. PILATOWICZ, ESQ.
650 White Drive, Ste. 100
Las Vegas, Nevada 89119
Special Counsel for Trustee

1 CERTIFICATE OF SERVICE

2 I certify that I am an employee of GARMAN TURNER GORDON, and that on this date,
3 pursuant to NRCP 5(b), I am serving a true and correct copy of the attached APPLICATION
4 FOR COMMISSION TO TAKE DEPOSITION 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
17 71 Washington Street
Reno, NV 89503

18 DATED this 17th day of September 2015.

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21 An Employee of GARMAN TURNER
22 GORDON
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INDEX OF EXHIBITS

1. Notice of Deposition of Dennis Vacco 3 pages

FILED
Electronically
2015-09-17 04:26:16 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5147154 - csulezic

EXHIBIT 1

EXHIBIT 1

1 2582
2 GARMAN TURNER GORDON LLP
3 GERALD M. GORDON, ESQ.
4 Nevada Bar No. 229
5 E-mail: ggordon@gtg.legal
6 TERESA M. PILATOWICZ, ESQ.
7 Nevada Bar No. 9605
8 E-mail: tpilatowicz@gtg.legal
9 650 White Drive, Ste. 100
10 Las Vegas, Nevada 89119
11 Telephone 725-777-3000

12 *Special Counsel to Trustee*

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

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

13 Plaintiff,

14 vs.

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

22 Defendants.

CASE NO.: CV13-02663

DEPT. NO.: 1

TIME: October 20, 2015
DATE: 10:00 a.m.

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NOTICE OF DEPOSITION OF DENNIS VACCO

PLEASE TAKE NOTICE that on the 20th day of October, 2015, at 10:00 o'clock a.m., at
Key Center, 50 Fountain Plaza, Suite 1400, Buffalo, New York 14202, Plaintiff William A.
Leonard, by and through his special counsel, Garman Turner Gordon LLP, will take the
deposition of Dennis Vacco.

The deposition will be taken upon oral examination and stenographically recorded
pursuant to Rules 26 and 30 of the Nevada Rules of Civil Procedure, before a Notary Public, or

1 before some other officer authorized by law to administer oaths. The oral examination will
2 continue from day to day until completed. You are invited to attend and cross-examine.

3 **AFFIRMATION**

4 Pursuant to NRS 239B.030

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

7 Dated this 20th of August, 2015.

8
9 GARMAN TURNER GORDON LLP

10
11 /s/ Teresa M. Pilatowicz

12 GERALD E. GORDON, ESQ.

13 TERESA M. PILATOWICZ, ESQ.

14 650 White Drive, Ste. 100

15 Las Vegas, Nevada 89119

16 Telephone 725-777-3000

17 *Special Counsel for Trustee*
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1
2 CERTIFICATE OF SERVICE

3 I certify that I am an employee of GARMAN TURNER GORDON LLP, and that on this
4 date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **NOTICE OF**
5 **DEPOSITION OF DENNIS VACCO** on the parties as set forth below:
6

7 ☒ XXX Placing an original or true copy thereof in a sealed envelope placed for collection
8 and mailing in the United States Mail, Reno, Nevada, postage prepaid, following
9 ordinary business practices

10 ☐ Certified Mail, Return Receipt Requested

11 ☐ Via Facsimile (Fax)

12 ☐ Via E-Mail

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

15 ☐ Federal Express (or other overnight delivery)

16 addressed as follows:

17 Barry Breslow
18 Frank Gilmore
19 ROBISON, BELAUSTEGUI, SHARP & LOW
20 71 Washington Street
21 Reno, NV 89503

22 DATED this 20 day of August, 2015.

23 
24 An Employee of GARMAN TURNER
25 GORDON LLP
26
27
28

Exhibit 3


CV-13-02663
JH, INC. ET AL. VS. PRL MOR & P
District Court
Washoe County
09/21/2015 04:47 PM
1417
PMSFMR11

1417
GARMAN TURNER GORDON LLP
GERALD M. GORDON, ESQ.
Nevada Bar No. 229
E-mail: ggordon@gtg.legal
TERESA M. PILATOWICZ, ESQ.
Nevada Bar No. 9605
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650 White Drive, Ste. 100
Las Vegas, Nevada 89119
Telephone 725-777-3000

Special Counsel to Trustee

FILED

2015 SEP 21 PM 4:47

JACQUELINE BRYANT
CLERK OF THE COURT
BY  DEPUTY

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.: 1

DATE: 10/20/2015

TIME: 10:00 a.m.

COMMISSION TO TAKE DEPOSITION

YOU ARE HEREBY COMMISSIONED AND FULLY AUTHORIZED to take the
deposition of Dennis Vacco, in accordance with the Rules of Civil Procedure of the State of
Nevada, at Key Center, 50 Fountain Plaza, Suite 1400, Buffalo, New York 14202, on the 20th
day of October, 2015, at the hour of 10:00 a.m. and on succeeding days until concluded, or at
such other time and place as may be mutually agreed upon by counsel for the respective parties
hereto.

GARMAN TURNER GORDON LLP
650 White Drive, Ste. 100
Las Vegas, NV 89119
725-777-3000

1 You shall put the witness on oath and his testimony shall be recorded by someone acting
2 under your direction, stenographically, and thereafter transcribed. Objections to evidence
3 presented shall be noted, and the evidence shall be taken subject to said objections. When the
4 testimony is fully transcribed, it shall be signed by the respective witness, after a full opportunity
5 to make corrections or changes. You shall certify on the deposition transcript that the witness
6 was duly sworn by you, and that the deposition is a deposition, and place it in an envelope
7 endorsed with the title of the action and marked "Deposition of Dennis Vacco" and send it by
8 registered mail to the law offices of Garman Turner Gordon LLP.

9 Dated this 21st day of September, 2015.

10 JACQUELINE BRYANT
11 CLERK OF THE COURT

12 By: P. Sowell
13 Deputy
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SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, _____

Commission to Take Deposition

(Title of Document)

filed in case number: _____



Document does not contain the social security number of any person

-OR-



Document contains the social security number of a person as required by:



A specific state or federal law, to wit:

(State specific state or federal law)

-or-



For the administration of a public program

-or-



For an application for a federal or state grant

-or-



Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: 9/21/15

Alexandra Shippe
(Signature)

Alexandra Shippe
(Print Name)

Courier
(Attorney for)

Exhibit 4

STATE OF NEW YORK
COUNTY OF ERIE

| | |
|--|--|
| <u>William A. Leonard</u> Plaintiff/Petitioner, v. <u>Superpumper, Inc., et al</u> Defendant/Respondent. | SUBPOENA (pursuant to the Uniform Interstate Deposition and Discovery Act and CPLR §3119) Originating State: <u>Nevada</u> Originating County: <u>Washoe</u> Originating Court: <u>Second Judicial District</u> Originating Case number: <u>CV13-02863</u> |
|--|--|

SUBPOENA/ SUBPOENA DUCES TECUM
pursuant to the Uniform Interstate Discovery Act
(Personal Attendance Required)

TO: Dennis Vacco

Lippes Mathias Waxler Friedman LLP

665 Main Street, Suite 300

Buffalo, New York 14203

WE COMMAND YOU to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action: and each of you appear and attend before an authorized court reporter at Key Center, 50 Fountain Plaza, Suite 1400, Buffalo, New York 14202 on the 20th day of October, 20 15 at 10 o'clock, in the a.m. and at any recessed or adjourned date to give testimony in this action on the part of _____;

and/or that you bring with you, and produce at the time and place aforesaid, the following documents, electronically stored information, or objects, and permit their inspection, copying, testing or sampling of the material:

see items requested in "Items to Be Produced" on attached subpoena issued from the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, to be produced on or before October 15, 2015

NEW YORKAFFIDAVIT OF SERVICE

STATE OF NEVADA

} ss:

COUNTY OF CLARK

withCarly Benicourt

being duly sworn says: That at all times

herein affiant was over 18 years of age, not a party to nor interested in the proceeding in which

this affidavit is made. That affiant received the Subpoena on the ⁷⁴29 day of Septembe, 2015,and served the same on the 29th day of Septembe, 2015 by delivering a copy tothe witness at: 665 Main Street, Suite 300Buffalo, New York 14203

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

EXECUTED this 29th day of Septembe, 2015.

Dawn M Kornaker
DAWN M Kornaker

SB. Macquie
Signature of person making service

DAWN M. KORNAKER
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN NIAGARA COUNTY
My Commission Expires June 1, 2017

1 3980

2 GARMAN TURNER GORDON LLP

3 GERALD M. GORDON, ESQ.

4 Nevada Bar No. 229

5 E-mail: ggordon@gtg.legal

6 TERESA M. PILATOWICZ, ESQ.

7 Nevada Bar No. 9605

8 E-mail: tpilatowicz@gtg.legal

9 650 White Drive, Ste. 100

10 Las Vegas, Nevada 89119

11 Telephone 725-777-3000

12 Attorneys for William A. Leonard

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

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

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

18 Plaintiff,

19 vs.

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

27 Defendants.

CASE NO.: CV13-02663

DEPT. NO.: 1

SUBPOENA - CIVIL

XX Regular XX Duces Tecum

28 **THE STATE OF NEVADA SENDS GREETINGS TO:**

Dennis Vacco
Lippes Mathias Wexler Friedman LLP
665 Main Street, Suite 300
Buffalo, New York 14203

YOU ARE HEREBY COMMANDED that all and singular, business and excuses set aside, you (1) shall produce the documents requested below for inspection and copying¹ on

¹ Alternatively, the documents may be delivered electronically to tpilatowicz@gtg.legal prior to October 15, 2015. If documents are provided electronically, no appearance to produce and permit inspection is necessary on October

1 October 15, 2015 at 10:00 a.m. and (2) shall appear and attend to present testimony on the 20th
2 day of October, 2015 at 10:00 a.m.. The address where you are required to appear is Key Center,
3 50 Fountain Plaza, Suite 1400, Buffalo, New York 14202. Your attendance is required to give
4 testimony and/or produce and permit inspection and copying of designated books, documents or
5 tangible things in your possession, custody or control, or to permit inspection of premises. If you
6 fail to attend, you may be deemed guilty of contempt of Court and liable to pay all losses and
7 damages caused by your failure to appear. Please see Exhibit "A" attached hereto for
8 information regarding the rights of the person subject to this Subpoena.

9 Dated this 24th day of September, 2015.

10 GARMAN TURNER GORDON LLP

11
12 /s/ Teresa M. Pilatowicz
13 GERALD E. GORDON, ESQ.
14 TERESA M. PILATOWICZ, ESQ.
15 650 White Drive, Ste. 100
Las Vegas, Nevada 89119
Telephone 725-777-3000

16 *Attorneys for William A. Leonard*

17
18 ITEMS TO BE PRODUCED

19
20 DEFINITIONS

- 21 1. "Action" means the above-captioned case pending in the Second Judicial District Court,
22 Washoe County, Nevada, at Case No. A CV13-02663.
- 23 2. "Communication" means any contact, oral or written, formal or informal, at any time or
24 any place under any circumstance whatsoever whereby any information of any nature
25 was transmitted or transferred, including but not limited to personal conversation,
conferences, telephone conversations, memoranda, letters, correspondence, electronic
correspondence, texts, reports, and publications.
- 26 3. "Document" shall be deemed to mean any printed, typewritten, handwritten, electronic,
27

28 (Continued)
15, 2015.

1 or otherwise recorded matter of whatever character, whether original, master or copy
2 (whether still active, archived or transparent) and any copies or reproductions that are not
3 identical to the original, that is or has been in the possession, control or custody of you,
4 your attorney and/or all other person acting in your behalf or of which any of the
5 aforementioned persons have knowledge, other person acting in your behalf or of which
6 any of the aforementioned persons have knowledge, including, but not limited to, letters,
7 e-mail (internal and external), communications, correspondence, memoranda,
8 confirmations, facsimile transmittal sheets, transmittal forms, telegrams, notes,
9 summaries, minutes, contracts, subcontracts, purchase orders, leases, amendments,
10 change orders, proposals, requests for proposal, bids, marketing documents, reports,
11 studies, drawings, charts, diagrams, sketches, estimates, specifications, addenda,
12 schedules, directives, records of telephone conversations, staffing projections, records of
13 meetings and conferences, including lists of persons attending meetings or conferences,
14 summaries and records of personal conversations or interviews, exhibits, transcripts,
15 books, manuals, publications, diaries, logs, daily reports, status reports, minutes of
16 meetings, records, journals, entries in journals, charts, financial records and/or summaries
17 of financial records, work papers, bills, ledgers, financial statements, audit reports,
18 financial data, status sheets, contract status reports, tax returns, certificate of insurance,
19 agreements of suretyship and/or indemnification, insurance policies, calendars,
20 summaries of investigations and/or surveys, statistical compilations, audio or visual
21 recordings, photographs, cpm schedules, spreadsheets, computer or magnetic records,
22 computer memory (including that of any "transparent" information, information deleted
23 from the personal computer or file but not from the system), hard drives, floppy discs,
24 optical discs, CD-ROM discs, Bernoulli discs and their equivalents, magnetic tape,
25 disaster recovery back-up, compact disks, computer generated reports or summaries,
26 drafts of original or preliminary notes on and marginal comments appearing on any
27 documents, other reports and records, any other paper or physical thing containing
28 writing, photographic, imaged, or electronically recorded data, every copy of such
writing or records where the original is not in the possession, custody or control of the
aforementioned persons, and every copy of every such writing or record where such copy
contains any commentary or notation whatsoever that does not appear on the original.

4. "Morabito" means Paul Morabito.

5. "Plaintiff" or "Leonard" refers to Plaintiff William A. Leonard, Trustee.

6. "Relate" or "Relating to" or "Relative to" means constituting, comprising, containing,
setting forth, showing, disclosing, describing, explaining, summarizing, concerning, or
referring to directly or indirectly.

7. "YOU" OR "YOUR" means Dennis Vacco and Lipkes Mathias Wexler Friedman LLP
and their agents, employees, heirs, assignees or representatives.

INSTRUCTIONS

1. These requests shall be deemed continuing and as additional information concerning the
answers is secured, such additional information shall be supplied to Plaintiff.

2. You shall produce all Documents in the manner in which they are maintained in the usual

1 course of business and/or shall organize and label Documents to correspond with the
2 categories of these requests. A request shall be deemed to include a request for any and
3 all file folders within which the document was contained, transmittal sheets, cover letters,
4 exhibits, enclosures, or attachments to the Document in addition to the Document itself.

5 3. In producing Documents and other materials, You are requested to furnish all Documents
6 or things in Your possession, custody, or control, regardless of whether such Documents
7 or materials are possessed by You directly or Your directors, officers, agents, employees,
8 representatives, subsidiaries, managing agents, affiliates, investigators, or by Your
9 attorneys or their agents, employees, representatives, or investigators.

10 4. If any Document is held under claim of privilege, please identify the Document for which
11 there is a claim of privilege and a full description thereof, including without limitation:

- 12 1. The date it bears;
- 13 2. The name of each person who prepared it or who participated in any way
14 in its preparation;
- 15 3. The name of each person who signed it;
- 16 4. The name of each person to whom it, or a copy of it was addressed;
- 17 5. The name of each person who presently has custody of it or a copy of it;
- 18 6. The subject matter and its substance; and
- 19 7. What factual basis there is for the claim of privilege.

20 5. If any Document requested to be produced was but is no longer in Your possession or
21 control, or is no longer in existence, state whether it is (1) missing or lost, (2) destroyed,
22 (3) transferred voluntarily or involuntarily to others and if so to whom, or (4) otherwise
23 disposed of; and in each instance explain the circumstances surrounding an authorization
24 of such disposition thereof and state the approximate date thereof.

25 6. In the event that Documents called for by any particular request have been lost or
26 destroyed, please state: (i) the date on which the Document(s) were lost or destroyed; (ii)
27 the manner in which the Document(s) were lost or destroyed; (iii) the identity of the
28 Document(s); (iv) the information contained within such Document(s) and the nature of
the Document(s); and (v) the identity of any person(s) who has knowledge of the
contents of the Document(s) or has received a copy of such Document(s).

7. Documents attached to each other should not be separated.

8. Documents not otherwise responsive to these requests shall be produced if such
Documents mention, discuss, refer to, or explain the Documents that are called for in a
request.

9. The term "and" as well as "or" shall be construed either disjunctively or conjunctively, as
necessary, to bring within the scope of these requests any information which might
otherwise be construed to be outside their scope.

10. Whenever appropriate, the singular form of a word shall be interpreted as plural and the
masculine gender shall be deemed to include feminine.

1 11. The fact that a Document has been produced by You or any other defendant in any other
2 litigation does not relieve You of Your obligation to produce your copy of the same
3 Document, even if the two Documents are identical

4 **DISCOVERY REQUESTS**

5 1. Any and all Documents constituting, relating to, or referring to your engagement
6 as counsel for Morabito between January 1, 2007 and December 31, 2014.

7 2. Any and all statements from January 1, 2010 through December 31, 2010
8 detailing the descriptions of and amount billed for services provided by you to Paul A. Morabito
9 or any third party on his behalf.

10 3. Any and all documents sufficient to identify any and all payments made from
11 January 1, 2010 through December 31, 2010 to you by Paul Morabito or a third party on his
12 behalf.

13 4. Any and all documents sufficient to identify any and all payments made by You
14 to any third party on Morabito's behalf from January 1, 2010 through December 31, 2010.

15 5. Any and all Documents constituting, relating to, or referring to services
16 performed by you with respect to the transfer of property located at 8355 Panorama Drive, Reno,
17 Nevada to the Arcadia Living Trust on or about October 1, 2010. This includes, but is not limited
18 to, opinion letters, written agreements relating to the transfer, including drafts, and valuations of
19 the real and personal property located at 8355 Panorama Drive, Reno, Nevada whether ordered
20 by You, obtained by You, or otherwise in Your file.

21 6. Any and all Documents constituting, relating to, or referring to services
22 performed by you with respect to the transfer of property located at 371 El Camino Del Mar,
23 Laguna Beach, California to the Edward William Bayuk Living Trust (the "Bayuk Living Trust")
24 on or about October 1, 2010. This includes, but is not limited to, opinion letters, written
25 agreements relating to the transfer, including drafts, and valuations of the real and personal
26 property located at 371 El Camino Del Mar, Laguna Beach, California whether ordered by You,
27 obtained by You, or otherwise in Your file.

28 7. Any and all Documents constituting, relating to, or referring to services

1 performed by you with respect to the transfer of property located at 370 Los Olivos, Laguna
2 Beach, California to the Bayuk Living Trust on or about October 1, 2010. This includes, but is
3 not limited to, opinion letters, written agreements relating to the transfer, including drafts, and
4 valuations of the real and personal property located at 370 Los Olivos, Laguna Beach, California
5 whether ordered by You, obtained by You, or otherwise in Your file.

6 8. Any and all Documents constituting, relating to, or referring to services
7 performed by you with respect to the transfer of the Arcadia Living Trust's ownership interest in
8 Baruk Properties, LLC on or about October 1, 2010. This includes, but is not limited to, opinion
9 letters, written agreements relating to the transfer, including drafts, and valuations of the assets
10 owned by Baruk Properties, LLC whether ordered by You, obtained by You, or otherwise in
11 Your file. Such assets include, but are not limited to, the real and personal property located at
12 1254 Mary Flemming Circle, Palm Springs, California; 1461 Glenneyre St., Laguna Beach,
13 California; 520 Glenneyre St., Laguna Beach, California; and 49 Clayton Place, Sparks, Nevada.

14 9. Any and all Documents constituting, relating to, or referring to services
15 performed by you relating to the sale of Paul A. Morabito's 80% interest in Superpumper, Inc. to
16 Snowshoe Petroleum on or about September 30, 2010. This includes, but is not limited to,
17 opinion letters, written agreements relating to the transfer, including drafts, and valuations of
18 Morabito's interest in Superpumper, Inc. whether ordered by You, obtained by You, or otherwise
19 in Your file.

20 10. Any and all Documents constituting, relating to, or referring to Communications
21 between you and any employee of Matrix Capital Markets Group, Inc. regarding any valuations
22 requested by You of Superpumper, Inc.

23 11. Any and all promissory notes drafted by You between January 1, 2010 and
24 December 31, 2010 at the request of Morabito, or at the request of any third party on Morabito's
25 behalf.

26 12. Any and all Documents related to or referring to promissory notes drafted by You
27 between January 1, 2010 and December 31, 2010 at the request of Morabito, or at the request of
28 any third party on Morabito's behalf including, but not limited to, any ledgers regarding

1 payments on such promissory notes.

2 13. Any and all Communications between You and any third party regarding
3 promissory notes drafted by You between January 1, 2010 and December 31, 2012 at the request
4 of Morabito, or at the request of any third party on Morabito's behalf.

5 14. Any and all Documents sufficient to identify any and all payments Received in
6 any of Your accounts from Sefton Trustees on Morabito's behalf between September 15, 2010
7 and the date of Your response to these requests.
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AFFIDAVIT OF SERVICE

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

_____, being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to nor interested in the proceeding in which this affidavit is made. That affiant received the Subpoena on the ____ day of _____, 2015, and served the same on the _____ day of _____, 2015 by delivering a copy to the witness at: _____

_____.

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

EXECUTED this ____ day of _____, 2015.

Signature of person making service

EXHIBIT "A"

NEVADA RULES OF CIVIL PROCEDURE

Rule 45:

(c) **Protection of Persons Subject to Subpoenas.**

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

- (i) fails to allow reasonable time for compliance;
- (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or
- (iii) requires disclosure of privileged or other protected material and no exception or waiver applies, or
- (iv) subjects a person to undue burden.

(B) If a subpoena

- (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
- (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

1
2 **(d) Duties in Responding to Subpoena.**

3 (1) A person responding to a subpoena to produce documents shall produce them as
4 they are kept in the usual course of business or shall organize and label them to correspond with
5 the categories in the demand.

6 (2) When information subject to a subpoena is withheld on a claim that it is
7 privileged or subject to protection as trial preparation materials, the claim shall be made
8 expressly and shall be supported by a description of the nature of the documents,
9 communications, or things not produced that is sufficient to enable the demanding party to
10 contest the claim.
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Exhibit 5

1 2610
2 GARMAN TURNER GORDON LLP
3 GERALD M. GORDON, ESQ.
4 Nevada Bar No. 229
5 E-mail: ggordon@gtg.legal
6 TERESA M. PILATOWICZ, ESQ.
7 Nevada Bar No. 9605
8 E-mail: tpilatowicz@gtg.legal
9 650 White Drive, Ste. 100
10 Las Vegas, Nevada 89119
11 Telephone 725-777-3000

12 *Attorneys for William A. Leonard*

13
14
15 **IN THE SECOND JUDICIAL DISTRICT COURT OF**
16 **THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE**

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

20 Plaintiff,

21 vs.

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

Defendants.

CASE NO.: CV13-02663

DEPT. NO.: 1

**NOTICE OF ISSUANCE OF SUBPOENA
TO DENNIS VACCO**

Plaintiff, WILLIAM A LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, by and through his counsel, GERALD M. GORDON and TERESA M. PILATOWIZ, of the law firm of Garman Turner Gordon, hereby provide notice to Defendants of the issuance of a Subpoena to testify at a deposition and produced documents upon Dennis Vacco. A copy of the subpoena is attached hereto as Exhibit "1."

///

///

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 29th day of January 2015.

GARMAN TURNER GORDON LLP

/s/ Teresa M. Pilatowicz
GERALD M. GORDON, ESQ.
Nevada Bar No. 229
TERESA M. PILATOWICZ, ESQ.
Nevada Bar No. 9605
650 White Drive, Suite 100
Las Vegas, Nevada 89119
Tel: (735) 777-3000
Attorneys for William A. Leonard

CERTIFICATE OF SERVICE

The undersigned, an employee of Garman Turner Gordon, hereby certifies that on the 29th day of September, 2015, she served a copy of the NOTICE OF ISSUANCE OF SUBPOENA TO DENNIS VACCO, to all interested parties via e-mail and U.S Mail system addressed to:

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


An employee of Garman Turner Gordon

EXHIBIT 1

EXHIBIT 1

1 3980
2 GARMAN TURNER GORDON LLP
3 GERALD M. GORDON, ESQ.
4 Nevada Bar No. 229
5 E-mail: ggordon@gtg.legal
6 TERESA M. PILATOWICZ, ESQ.
7 Nevada Bar No. 9605
8 E-mail: tpilatowicz@gtg.legal
9 650 White Drive, Ste. 100
10 Las Vegas, Nevada 89119
11 Telephone 725-777-3000

12 *Attorneys for William A. Leonard*

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

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

13 Plaintiff,

14 vs.

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

19 Defendants.

CASE NO.: CV13-02663

DEPT. NO.: 1

SUBPOENA - CIVIL

XX Regular XX Duces Tecum

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28
THE STATE OF NEVADA SENDS GREETINGS TO:

**Dennis Vacco
Lippes Mathias Wexler Friedman LLP
665 Main Street, Suite 300
Buffalo, New York 14203**

YOU ARE HEREBY COMMANDED that all and singular, business and excuses set
aside, you (1) shall produce the documents requested below for inspection and copying¹ on

¹ Alternatively, the documents may be delivered electronically to tpilatowicz@gtg.legal prior to October 15, 2015.
If documents are provided electronically, no appearance to produce and permit inspection is necessary on October

1 October 15, 2015 at 10:00 a.m. and (2) shall appear and attend to present testimony on the 20th
2 day of October, 2015 at 10:00 a.m.. The address where you are required to appear is Key Center,
3 50 Fountain Plaza, Suite 1400, Buffalo, New York 14202. Your attendance is required to give
4 testimony and/or produce and permit inspection and copying of designated books, documents or
5 tangible things in your possession, custody or control, or to permit inspection of premises. If you
6 fail to attend, you may be deemed guilty of contempt of Court and liable to pay all losses and
7 damages caused by your failure to appear. Please see Exhibit "A" attached hereto for
8 information regarding the rights of the person subject to this Subpoena.

9 Dated this 24th day of September, 2015.

10 GARMAN TURNER GORDON LLP

11
12 /s/ Teresa M. Pilatowicz
13 GERALD E. GORDON, ESQ.
14 TERESA M. PILATOWICZ, ESQ.
15 650 White Drive, Ste. 100
16 Las Vegas, Nevada 89119
17 Telephone 725-777-3000

18 *Attorneys for William A. Leonard*

19 ITEMS TO BE PRODUCED

20 DEFINITIONS

- 21 1. "Action" means the above-captioned case pending in the Second Judicial District Court,
22 Washoe County, Nevada, at Case No. A CV13-02663.
- 23 2. "Communication" means any contact, oral or written, formal or informal, at any time or
24 any place under any circumstance whatsoever whereby any information of any nature
25 was transmitted or transferred, including but not limited to personal conversation,
26 conferences, telephone conversations, memoranda, letters, correspondence, electronic
27 correspondence, texts, reports, and publications.
- 28 3. "Document" shall be deemed to mean any printed, typewritten, handwritten, electronic,

(Continued)

15, 2015.

1 or otherwise recorded matter of whatever character, whether original, master or copy
2 (whether still active, archived or transparent) and any copies or reproductions that are not
3 identical to the original, that is or has been in the possession, control or custody of you,
4 your attorney and/or all other person acting in your behalf or of which any of the
5 aforementioned persons have knowledge, other person acting in your behalf or of which
6 any of the aforementioned persons have knowledge, including, but not limited to, letters,
7 e-mail (internal and external), communications, correspondence, memoranda,
8 confirmations, facsimile transmittal sheets, transmittal forms, telegrams, notes,
9 summaries, minutes, contracts, subcontracts, purchase orders, leases, amendments,
10 change orders, proposals, requests for proposal, bids, marketing documents, reports,
11 studies, drawings, charts, diagrams, sketches, estimates, specifications, addenda,
12 schedules, directives, records of telephone conversations, staffing projections, records of
13 meetings and conferences, including lists of persons attending meetings or conferences,
14 summaries and records of personal conversations or interviews, exhibits, transcripts,
15 books, manuals, publications, diaries, logs, daily reports, status reports, minutes of
16 meetings, records, journals, entries in journals, charts, financial records and/or summaries
17 of financial records, work papers, bills, ledgers, financial statements, audit reports,
18 financial data, status sheets, contract status reports, tax returns, certificate of insurance,
19 agreements of suretyship and/or indemnification, insurance policies, calendars,
20 summaries of investigations and/or surveys, statistical compilations, audio or visual
21 recordings, photographs, cpm schedules, spreadsheets, computer or magnetic records,
22 computer memory (including that of any "transparent" information, information deleted
23 from the personal computer or file but not from the system), hard drives, floppy discs,
24 optical discs, CD-ROM discs, Bernoulli discs and their equivalents, magnetic tape,
25 disaster recovery back-up, compact disks, computer generated reports or summaries,
26 drafts of original or preliminary notes on and marginal comments appearing on any
27 documents, other reports and records, any other paper or physical thing containing
28 writing, photographic, imaged, or electronically recorded data, every copy of such
writing or records where the original is not in the possession, custody or control of the
aforementioned persons, and every copy of every such writing or record where such copy
contains any commentary or notation whatsoever that does not appear on the original.

4. "Morabito" means Paul Morabito.

5. "Plaintiff" or "Leonard" refers to Plaintiff William A. Leonard, Trustee.

6. "Relate" or "Relating to" or "Relative to" means constituting, comprising, containing,
setting forth, showing, disclosing, describing, explaining, summarizing, concerning, or
referring to directly or indirectly.

7. "YOU" OR "YOUR" means Dennis Vacco and Lippes Mathias Wexler Friedman LLP
and their agents, employees, heirs, assignees or representatives.

INSTRUCTIONS

1. These requests shall be deemed continuing and as additional information concerning the
answers is secured, such additional information shall be supplied to Plaintiff.

2. You shall produce all Documents in the manner in which they are maintained in the usual

1 course of business and/or shall organize and label Documents to correspond with the
2 categories of these requests. A request shall be deemed to include a request for any and
3 all file folders within which the document was contained, transmittal sheets, cover letters,
4 exhibits, enclosures, or attachments to the Document in addition to the Document itself.

5 3. In producing Documents and other materials, You are requested to furnish all Documents
6 or things in Your possession, custody, or control, regardless of whether such Documents
7 or materials are possessed by You directly or Your directors, officers, agents, employees,
8 representatives, subsidiaries, managing agents, affiliates, investigators, or by Your
9 attorneys or their agents, employees, representatives, or investigators.

10 4. If any Document is held under claim of privilege, please identify the Document for which
11 there is a claim of privilege and a full description thereof, including without limitation:

- 12 1. The date it bears;
- 13 2. The name of each person who prepared it or who participated in any way
14 in its preparation;
- 15 3. The name of each person who signed it;
- 16 4. The name of each person to whom it, or a copy of it was addressed;
- 17 5. The name of each person who presently has custody of it or a copy of it;
- 18 6. The subject matter and its substance; and
- 19 7. What factual basis there is for the claim of privilege.

20 5. If any Document requested to be produced was but is no longer in Your possession or
21 control, or is no longer in existence, state whether it is (1) missing or lost, (2) destroyed,
22 (3) transferred voluntarily or involuntarily to others and if so to whom, or (4) otherwise
23 disposed of; and in each instance explain the circumstances surrounding an authorization
24 of such disposition thereof and state the approximate date thereof.

25 6. In the event that Documents called for by any particular request have been lost or
26 destroyed, please state: (i) the date on which the Document(s) were lost or destroyed; (ii)
27 the manner in which the Document(s) were lost or destroyed; (iii) the identity of the
28 Document(s); (iv) the information contained within such Document(s) and the nature of
the Document(s); and (v) the identity of any person(s) who has knowledge of the
contents of the Document(s) or has received a copy of such Document(s).

7. Documents attached to each other should not be separated.

8. Documents not otherwise responsive to these requests shall be produced if such
Documents mention, discuss, refer to, or explain the Documents that are called for in a
request.

9. The term "and" as well as "or" shall be construed either disjunctively or conjunctively, as
necessary, to bring within the scope of these requests any information which might
otherwise be construed to be outside their scope.

10. Whenever appropriate, the singular form of a word shall be interpreted as plural and the
masculine gender shall be deemed to include feminine.

1 11. The fact that a Document has been produced by You or any other defendant in any other
2 litigation does not relieve You of Your obligation to produce your copy of the same
3 Document, even if the two Documents are identical

4 **DISCOVERY REQUESTS**

5 1. Any and all Documents constituting, relating to, or referring to your engagement
6 as counsel for Morabito between January 1, 2007 and December 31, 2014.

7 2. Any and all statements from January 1, 2010 through December 31, 2010
8 detailing the descriptions of and amount billed for services provided by you to Paul A. Morabito
9 or any third party on his behalf.

10 3. Any and all documents sufficient to identify any and all payments made from
11 January 1, 2010 through December 31, 2010 to you by Paul Morabito or a third party on his
12 behalf.

13 4. Any and all documents sufficient to identify any and all payments made by You
14 to any third party on Morabito's behalf from January 1, 2010 through December 31, 2010.

15 5. Any and all Documents constituting, relating to, or referring to services
16 performed by you with respect to the transfer of property located at 8355 Panorama Drive, Reno,
17 Nevada to the Arcadia Living Trust on or about October 1, 2010. This includes, but is not limited
18 to, opinion letters, written agreements relating to the transfer, including drafts, and valuations of
19 the real and personal property located at 8355 Panorama Drive, Reno, Nevada whether ordered
20 by You, obtained by You, or otherwise in Your file.

21 6. Any and all Documents constituting, relating to, or referring to services
22 performed by you with respect to the transfer of property located at 371 El Camino Del Mar,
23 Laguna Beach, California to the Edward William Bayuk Living Trust (the "Bayuk Living Trust")
24 on or about October 1, 2010. This includes, but is not limited to, opinion letters, written
25 agreements relating to the transfer, including drafts, and valuations of the real and personal
26 property located at 371 El Camino Del Mar, Laguna Beach, California whether ordered by You,
27 obtained by You, or otherwise in Your file.

28 7. Any and all Documents constituting, relating to, or referring to services

1 performed by you with respect to the transfer of property located at 370 Los Olivos, Laguna
2 Beach, California to the Bayuk Living Trust on or about October 1, 2010. This includes, but is
3 not limited to, opinion letters, written agreements relating to the transfer, including drafts, and
4 valuations of the real and personal property located at 370 Los Olivos, Laguna Beach, California
5 whether ordered by You, obtained by You, or otherwise in Your file.

6 8. Any and all Documents constituting, relating to, or referring to services
7 performed by you with respect to the transfer of the Arcadia Living Trust's ownership interest in
8 Baruk Properties, LLC on or about October 1, 2010. This includes, but is not limited to, opinion
9 letters, written agreements relating to the transfer, including drafts, and valuations of the assets
10 owned by Baruk Properties, LLC whether ordered by You, obtained by You, or otherwise in
11 Your file. Such assets include, but are not limited to, the real and personal property located at
12 1254 Mary Flemming Circle, Palm Springs, California; 1461 Glenneyre St., Laguna Beach,
13 California; 520 Glenneyre St., Laguna Beach, California; and 49 Clayton Place, Sparks, Nevada.

14 9. Any and all Documents constituting, relating to, or referring to services
15 performed by you relating to the sale of Paul A. Morabito's 80% interest in Superpumper, Inc. to
16 Snowshoe Petroleum on or about September 30, 2010. This includes, but is not limited to,
17 opinion letters, written agreements relating to the transfer, including drafts, and valuations of
18 Morabito's interest in Superpumper, Inc. whether ordered by You, obtained by You, or otherwise
19 in Your file.

20 10. Any and all Documents constituting, relating to, or referring to Communications
21 between you and any employee of Matrix Capital Markets Group, Inc. regarding any valuations
22 requested by You of Superpumper, Inc.

23 11. Any and all promissory notes drafted by You between January 1, 2010 and
24 December 31, 2010 at the request of Morabito, or at the request of any third party on Morabito's
25 behalf.

26 12. Any and all Documents related to or referring to promissory notes drafted by You
27 between January 1, 2010 and December 31, 2010 at the request of Morabito, or at the request of
28 any third party on Morabito's behalf including, but not limited to, any ledgers regarding

1 payments on such promissory notes.

2 13. Any and all Communications between You and any third party regarding
3 promissory notes drafted by You between January 1, 2010 and December 31, 2012 at the request
4 of Morabito, or at the request of any third party on Morabito's behalf.

5 14. Any and all Documents sufficient to identify any and all payments Received in
6 any of Your accounts from Sefion Trustees on Morabito's behalf between September 15, 2010
7 and the date of Your response to these requests.

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AFFIDAVIT OF SERVICE

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

_____, being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to nor interested in the proceeding in which this affidavit is made. That affiant received the Subpoena on the ____ day of _____, 2015, and served the same on the _____ day of _____, 2015 by delivering a copy to the witness at: _____

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

EXECUTED this ____ day of _____, 2015.

Signature of person making service

EXHIBIT "A"

NEVADA RULES OF CIVIL PROCEDURE

Rule 45:

(c) **Protection of Persons Subject to Subpoenas.**

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

- (i) fails to allow reasonable time for compliance;
- (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or
- (iii) requires disclosure of privileged or other protected material and no exception or waiver applies, or
- (iv) subjects a person to undue burden.

(B) If a subpoena

- (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
- (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

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(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

Exhibit 6

[insert document code]
LIPES MATHIAS WEXLER FRIEDMAN LLP
Stacey L. Moar, Esq.
E-mail: smoar@lipes.com
665 Main Street, Suite 300
Buffalo, New York 14203
Telephone: 716-853-5100

Attorneys for Defendants

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.: 1

RESPONSE TO SUBPOENA - CIVIL

RESPONSE TO SUBPOENA

Dennis C. Vacco and Lipes Mathias Wexler Friedman LLP (collectively "LMWF") by
and through the undersigned counsel, provide the following responses and objections to the
Subpoena Duces Tecum to Dennis C. Vacco and Lipes Mathias Wexler Friedman LLP with
Document Demands ("Document Demands") of Trustee William A. Leonard, made through his
counsel, Garman Turner Gordon LLP.

LMWF reserves the right to amend or supplement these responses and objections as may
be appropriate, and any objection or failure to object to any particular Document Demand, or any
response that LMWF will produce documents, is not to be construed as an admission that such
documents are within LMWF's possession, custody or control or that such documents exist. A
statement that LMWF will produce documents means that LMWF will conduct a reasonable

1 search for and, if they exist, produce non-privileged responsive documents in his possession,
2 custody or control.

3 Any documents produced by LMWF in response to the Document Demands are subject
4 to LMWF's right to object to the admission in evidence of any and all such documents on the
5 ground that they are irrelevant to the issues in this action or otherwise inadmissible.

6
7 **GENERAL OBJECTIONS**

8 1. Each and every general objection is expressly incorporated by the specific
9 Responses labeled Response No. 1 through Response No. 14 below.

10 2. LMWF objects to each paragraph of the Document Demand to the extent that
11 paragraph seeks privileged information, proprietary information or other information that has been
12 gathered or prepared in the course of litigation or which is otherwise subject to the lawyer-client
13 privilege, the accountant-client privilege, the joint-defense privilege, the husband-wife privilege,
14 the work product doctrine, or any other applicable privilege or immunity, including trade secrets,
15 proprietary information, information that is confidential pursuant to a statute or court order,
16 confidential business information, or other information subject to an expectation of privacy or
17 confidentiality. Information described by this paragraph is referred to herein as "privileged."
18
19

20 3. LMWF objects to each paragraph of the Document Demand to the extent it requests
21 information subject to the attorney-client privilege and attorney work product doctrine. Such
22 privileged information includes but is not limited to detailed descriptions of attorney work product
23 and attorney advice contained in invoices sent by LMWF.
24

25 4. LMWF further objects to each paragraph of the Document Demand to the extent it
26 requests information subject to attorney-client privilege held by corporate a client-entity of LMWF
27 that is not a party to these proceedings.
28

1 5. LMWF objects to each paragraph of the Document Demand to the extent that
2 paragraph conflicts with, or seeks to impose any obligation beyond, the applicable rules and law.
3

4 6. LMWF objects to each paragraph of the Document Demand to the extent that
5 paragraph is not reasonably calculated to lead to the discovery of admissible evidence.
6

7 7. LMWF objects to each paragraph of the Document Demand to the extent it requests
8 information that is not relevant to this proceeding. Such irrelevant information includes but is not
9 limited to detailed descriptions of attorney work product and attorney advice contained in invoices
10 sent by LMWF.
11

12 8. LMWF objects to each paragraph of the Document Demand to the extent that
13 paragraph seeks documents that are not in LMWF's possession, custody or control.
14

15 9. LMWF objects to each paragraph of the Document Demand to the extent that
16 paragraph is unduly burdensome.
17

18 10. LMWF specifically reserves the right to object, as appropriate, to the admission of
19 these documents or these written responses as evidence at trial or for any other purpose.
20

21 11. An objection does not mean that LMWF possesses documents or information
22 responsive to the objectionable paragraph.
23

24 RESPONSE TO DOCUMENT DEMANDS

25 Request No. 1: Any and all documents constituting, relating to, or referring to your
26 engagement as counsel for Morabito between January 1, 2007 and December 31, 2014.

27 Response: LMWF objects to this Document Demand as unduly burdensome and further
28 objects to the extent it calls for the production of documents subject to the attorney client

1 privilege or attorney work product doctrine, or for the production of evidence not relevant to
2 these proceedings. LMWF reserves the right to supplement this response upon receipt of a
3 properly limited document demand.
4

5 **Request No. 2:** Any and all statements from January 1, 2010 through December 31, 2010
6 detailing the descriptions of and amount billed for services provided by you to Paul A.
7 Morabito or any third party on his behalf.
8

9 **Response:** LMWF objects to this Document Demand as seeking documents already in the
10 custody and control of the Trustee. Notwithstanding this objection, LMWF refers to documents
11 it previously produced to the Trustee in the Paul A. Morabito Involuntary Bankruptcy, Case No.
12 BK-N-13-51237-GWZ.
13

14 **Request No. 3:** Any and all documents sufficient to identify any and all payments made from
15 January 1, 2010 through December 31, 2010 to you by Paul Morabito or a third party on his
16 behalf.
17

18 **Response:** LMWF objects to this Document Demand as seeking documents already in the
19 custody and control of the Trustee. Notwithstanding this objection, LMWF refers to documents
20 it previously produced to the Trustee in the Paul A. Morabito Involuntary Bankruptcy, Case No.
21 BK-N-13-51237-GWZ.
22

23 **Request No. 4:** Any and all documents sufficient to identify any and all payments made by
24 You to any third party on Morabito's behalf from January 1, 2010 through December 31, 2010.
25

26 **Response:** LMWF objects to this Document Demand as seeking documents already in the
27 custody and control of the Trustee. Notwithstanding this objection, LMWF refers to documents
28

1 it previously produced to the Trustee in the Paul A. Morabito Involuntary Bankruptcy, Case No.
2 BK-N-13-51237-GWZ.

3
4 **Request No. 5:** Any and all documents constituting, relating to, or referring to services
5 performed by you with respect to the transfer of property located at 8355 Panorama Drive,
6 Reno, Nevada to the Arcadia Living Trust on or about October 1, 2010. This includes, but is not
7 limited to, opinion letters, written agreements relating to the transfer, including drafts, and
8 valuations of the real and personal property located at 8355 Panorama Drive, Reno, Nevada
9 whether ordered by You, obtained by You, or otherwise in Your file.
10

11 **Response:** LMWF objects to this Document Demand as seeking documents subject to the
12 attorney-client privilege and documents already in the custody and control of the Trustee.
13 Notwithstanding this objection, LMWF refers to documents it previously produced to the
14 Trustee in the Paul A. Morabito Involuntary Bankruptcy, Case No. BK-N-13-51237-GWZ.
15

16 **Request No. 6:** Any and all documents constituting, relating to, or referring to services
17 performed by you with respect to the transfer of property located at 371 El Camino Del Mar,
18 Laguna Beach, California to the Edward William Bayuk Living Trust (the "Bayuk Living
19 Trust") on or about October 1, 2010. This includes drafts, and valuations of real and personal
20 property located at 371 El Camino Del Mar, Laguna Beach, California whether ordered by You,
21 obtained by You, or otherwise in Your file.
22

23 **Response:** LMWF objects to this Document Demand as seeking documents subject to the
24 attorney-client privilege and documents already in the custody and control of the Trustee.
25 Notwithstanding this objection, LMWF refers to documents it previously produced to the
26 Trustee in the Paul A. Morabito Involuntary Bankruptcy, Case No. BK-N-13-51237-GWZ.
27
28

1 **Request No. 7:** Any and all documents constituting, relating to, or referring to services
2 performed by you with respect to the transfer of property located at 370 Los Olivos, Laguna
3 Beach, California to the Bayuk Living Trust on or about October 1, 2010. This includes, but is
4 not limited to, opinion letters, written agreements relating to the transfer, including drafts, and
5 valuations of the real and personal property located at 370 Los Olivos, Laguna Beach,
6 California whether ordered by You, obtained by You, or otherwise in Your file.
7

8 **Response:** LMWF objects to this Document Demand as seeking documents subject to the
9 attorney-client privilege and documents already in the custody and control of the Trustee.
10 Notwithstanding this objection, LMWF refers to documents it previously produced to the
11 Trustee in the Paul A. Morabito Involuntary Bankruptcy, Case No. BK-N-13-51237-GWZ.
12

13 **Request No. 8:** Any and all documents constituting, relating to, or referring to services
14 performed by you with respect to the transfer of the Arcadia Living Trust's ownership interest
15 in Baruk Properties, LLC on or about October 1, 2010. This includes, but is not limited to,
16 opinion letters, written agreements relating to the transfer, including drafts, and valuations of
17 the assets owned by Baruk Properties, LLC whether ordered by You, obtained by You, or
18 otherwise in Your file. Such assets include, but are not limited to, the real and personal property
19 located at 1254 Mary Flemming Circle, Palm Springs, California; 1461 Glenneyre St., Laguna
20 Beach, California; 520 Glenneyre St., Laguna Beach, California; and 49 Clayton Place, Sparks,
21 Nevada.
22

23 **Response:** LMWF objects to this Document Demand as seeking documents subject to the
24 attorney-client privilege and documents already in the custody and control of the Trustee.
25 Notwithstanding this objection, LMWF refers to documents it previously produced to the
26 Trustee in the Paul A. Morabito Involuntary Bankruptcy, Case No. BK-N-13-51237-GWZ.
27
28

1 **Request No. 9:** Any and all documents constituting, relating to, or referring to services
2 performed by you relating to the sale of Paul A. Morabito's 80% interest in Superpumper, Inc.
3 to Snowshoe Petroleum on or about September 30, 2010. This includes, but is not limited to,
4 opinion letters, written agreements relating to the transfer, including drafts, and valuations of
5 Morabito's interest in Superpumper, Inc. whether ordered by You, obtained by You, or
6 otherwise in Your file.
7

8 **Response:** LMWF objects to this Document Demand as seeking documents subject to the
9 attorney-client privilege and documents already in the custody and control of the Trustee.
10 Notwithstanding this objection, LMWF refers to documents it previously produced to the
11 Trustee in the Paul A. Morabito Involuntary Bankruptcy, Case No. BK-N-13-51237-GWZ.
12

13 **Request No. 10:** Any and all documents constituting, relating to, or referring to
14 Communications between you and any employee of Matrix Capital Markets Group, Inc.
15 regarding any valuations requested by You of Superpumper, Inc.
16

17 **Response:** Notwithstanding this objection, LMWF refers to documents bates labeled
18 LMWF000001 – LMWF000180 for its response.
19

20 **Request No. 11:** Any and all promissory notes drafted by You between January 1, 2010 and
21 December 31, 2010 at the request of Morabito, or at the request of any third party on
22 Morabito's behalf.
23

24 **Response:** LMWF objects to this Document demand as seeking documents subject to the
25 attorney client privilege and documents already in the custody and control of the Trustee.
26 Notwithstanding this objection, LMWF refers to documents it previously produced to the
27 Trustee in the Paul A. Morabito Involuntary Bankruptcy, Case No. BK-N-13-51237-GWZ.
28

1 **Request No. 12:** Any and all documents related to or referring to promissory notes drafted by
2 You between January 1, 2010 and December 31, 2010 at the request of Morabito, or at the
3 request of any third party on Morabito's behalf including, but not limited to, any ledgers
4 regarding payments on such promissory notes.
5

6 **Response:** LMWF objects to this Document Demand as seeking documents subject to the
7 attorney-client privilege and documents already in the custody and control of the Trustee.
8 Notwithstanding this objection, LMWF refers to documents it previously produced to the
9 Trustee in the Paul A. Morabito Involuntary Bankruptcy, Case No. BK-N-13-51237-GWZ.
10

11 **Request No. 13:** Any and all Communications between You and any third party regarding
12 promissory notes drafted by You between January 1, 2010 and December 31, 2012 at the
13 request of Morabito, or at the request of any third party on Morabito's behalf.
14

15 **Response:** LMWF states that no responsive documents exist and reserves the right to
16 supplement should it become aware of any responsive documents.
17

18 **Request No. 14:** Any and all documents sufficient to identify any and all payments Received
19 in any of Your accounts from Sefion Trustees on Morabito's behalf between September 15,
20 2010 and the date of Your response to these requests.
21

22 **Response:** LMWF objects to this Document Demand as seeking documents subject to the
23 attorney-client privilege and documents already in the custody and control of the Trustee.
24 Notwithstanding this objection, LMWF refers to documents it previously produced to the
25 Trustee in the Paul A. Morabito Involuntary Bankruptcy, Case No. BK-N-13-51237-GWZ.
26
27
28

1 Dated: October 15, 2015
2 Buffalo, New York

3 Respectfully submitted,

4 **LIPPES MATHIAS WEXLER FRIEDMAN LLP**

5
6 By: Stacey Moar
7 Stacey L. Moar, Esq.
8 665 Main Street, Suite 300
9 Buffalo, New York 14203-1425
10 (716) 853-5100

11 smoar@lippes.com

12
13 TO: Garman Turner Gordon LLP
14 Teresa M. Pilatowicz, Esq.
15 Gerlad E. Gordon, Esq.
16 650 White Drive, Ste. 100
17 Las Vegas, Nevada 89119
18 Telephone 725-777-3000
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Exhibit 7

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 - Case No. CV13-02663

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.

Examination before trial of DENNIS C.

VACCO, taken pursuant to Subpoena, at
Regus Business Center, 50 Fountain Plaza,
Suite 1400, Buffalo, New York, on October 20, 2015,
commencing at 10:09 a.m., before MARY SCHULZE, RPR,
RMR, Notary Public.

JOB NUMBER: 262502-A

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| <p>1 APPEARANCES: GARMAN TURNER GORDON LLP, 2 BY TERESA M. PILATOWICZ, ESQ., 3 665 White Drive, Suite 300, 4 Las Vegas, Nevada 89119, 5 (775) 777-3000, 6 tpilatowicz@gtg-legal, 7 Appearing for the Plaintiff. 8 ROBISON, BELAUSTEGUI, SHARP & LOW, 9 By FRANK C. GILMORE, ESQ., 10 71 Washington Street, 11 Reno, Nevada 89503, 12 (775) 329-3151, 13 fgilmore@rbsllaw.com, 14 Appearing for the Defendants. 15 PRESENT: SALVATORE MORABITO</p> | <p>Page 2</p> <p>1 THE REPORTER: Are there any stipulations? 2 MR. GILMORE: No. 3 D E N N I S C. V A C C O, 665 Main Street, 4 Suite 300, Buffalo, New York 14203, after being 5 duly called and sworn, testified as follows: 6 EXAMINATION BY MS. PILATOWICZ: 7 Q. Good afternoon, or morning. 8 A. Good morning. 9 Q. Good morning, Mr. Vacco. My name is 10 Teresa Pilatowicz. I represent William Leonard in 11 the case that you're being deposed in today. 12 Can you please state and spell your name for 13 the record? 14 A. Dennis C. Vacco, D-E-N-N-I-S, middle 15 initial C, last name V as in victory A-C-C-O. 16 MS. PILATOWICZ: And I'll allow everyone 17 else in the room to make their appearances. 18 MR. GILMORE: My name is Frank Gilmore. I'm 19 an attorney with the firm of Robison, Belaustegui, 20 Sharp & Low of Reno, Nevada. I represent all the 21 defendants in this case. 22 I understand that Mr. Vacco will be -- will 23 be deposed today under two different formalities. 24 One is as his -- in his individual capacity, having 25 been subpoenaed directly by the plaintiff, and,</p> |
| <p>Page 4</p> <p>1 secondarily, as a 30(b)(6) person most 2 knowledgeable witness for Superpumper, Inc., which 3 is a defendant in this case. 4 I will be -- I'm not representing Mr. Vacco, 5 but I am representing the defendants, and so I will 6 assert various objections on behalf of the 7 defendants, considering that Mr. Vacco is being 8 produced by my client to testify today in the 9 second of those cases. 10 So just wanted to make that clear. 11 BY MS. PILATOWICZ: 12 Q. All right. And let me -- let me make 13 one clarification. We're going to proceed with 14 your deposition in your capacity as the attorney -- 15 and can you -- can you state your -- your firm name 16 for me? 17 A. Before I -- yes. It's Lippes, 18 L-I-P-P-E-S, Mathias, M-A-T-H-I-A-S, Wexler & 19 Friedman, F-R-I-E-D-M-A-N. 20 So just -- just a point of clarification for 21 me, this is not the 2004 exam in the bankruptcy 22 case, or is it? 23 MR. GILMORE: It is not. 24 BY MS. PILATOWICZ: 25 Q. Is it not. This is --</p> | <p>Page 5</p> <p>1 A. It is not. Okay. So this is a 2 deposition in the -- 3 Q. State court matter. 4 A. -- the state court case. Okay. 5 Q. And to follow up with what Mr. Gilmore 6 was saying, you -- you are appearing today in two 7 different capacities: In your individual capacity 8 and also as the personal -- person most 9 knowledgeable, or the 30(b)(6) representative of 10 Snowshoe Petroleum. We're going to handle those 11 two depositions separately. There'll likely be 12 some overlap, but we're going to take you as an 13 individual first, and then later, we'll do the 14 Snowshoe Petroleum deposition. 15 Do you understand that? 16 A. Okay. Sure. 17 MR. GILMORE: Okay. 18 MR. MORABITO: I'm Salvatore Morabito, 19 Phoenix, Arizona. I'm a defendant in the case. 20 MS. PILATOWICZ: Mark this as Exhibit 1. 21 The following was marked for Identification: 22 EXHIBIT 1 Subpoena 23 BY MS. PILATOWICZ: 24 Q. Mr. Vacco, you've been handed what's 25 been marked as Exhibit 1. Do you see recognize</p> |

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| <p>1 Exhibit 1?</p> <p>2 A. Yes.</p> <p>3 Q. And can you tell me what Exhibit 1 is?</p> <p>4 A. It's a subpoena in this matter.</p> <p>5 Q. Have you seen this document before?</p> <p>6 A. Yes. Several times.</p> <p>7 Q. Is it pursuant to this document that</p> <p>8 you're appearing today?</p> <p>9 A. Well, I -- I'm -- I'm not sure about</p> <p>10 that because I thought that this was a subpoena for</p> <p>11 documents, but I'm here, in any event.</p> <p>12 Q. Okay. And so we're on the same page</p> <p>13 for the deposition, I'm going to go over some</p> <p>14 ground rules.</p> <p>15 Have you ever testified previously in a</p> <p>16 deposition?</p> <p>17 A. Yes.</p> <p>18 Q. How many times?</p> <p>19 A. Several.</p> <p>20 Q. More than ten? Less than ten?</p> <p>21 A. Probably -- where I've actually</p> <p>22 testified?</p> <p>23 Q. Where you've actually testified, yes.</p> <p>24 A. Probably -- probably ten.</p> <p>25 Q. When was the last time you've testified</p> | <p>1 in a deposition?</p> <p>2 A. Earlier this year.</p> <p>3 Q. When was that?</p> <p>4 A. I -- I just don't recall. Sometime,</p> <p>5 you know, when the weather was -- after the snow,</p> <p>6 but before the fall.</p> <p>7 Q. Fair enough.</p> <p>8 A. So sometime within the last six months.</p> <p>9 Q. What case was that?</p> <p>10 A. It's a federal court matter pending in</p> <p>11 the Southern District of New York.</p> <p>12 Q. What is your involvement in it?</p> <p>13 A. I am a defendant.</p> <p>14 Q. Who are the parties to that matter?</p> <p>15 A. Jeffrey Camp is the plaintiff, and</p> <p>16 Robert Berman, Robert Wong, W-O-N-G, and one other</p> <p>17 are the defendants. Probably some corporate</p> <p>18 defendants too.</p> <p>19 Q. What's the nature of that case?</p> <p>20 A. It's a dispute between shareholders of</p> <p>21 a company.</p> <p>22 Q. And why are you named as a defendant?</p> <p>23 A. That's a good question. I represented</p> <p>24 the company for a -- a brief period of time.</p> <p>25 Q. Okay. Prior to that deposition, when</p> |
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| <p>1 was the last time you were deposed?</p> <p>2 A. I can't recall.</p> <p>3 Q. Have you taken depositions before?</p> <p>4 A. Several. Many.</p> <p>5 Q. Approximately how many?</p> <p>6 A. I don't know. Too numerous to count.</p> <p>7 Q. Now, you've been given an oath by the</p> <p>8 court reporter today. Do you understand that that</p> <p>9 oath that you gave today is subject to the same</p> <p>10 penalty of perjury as if we were sitting in a court</p> <p>11 of law?</p> <p>12 A. Sure.</p> <p>13 Q. And so we're getting a clear record of</p> <p>14 everything that's being said today, I'll ask you to</p> <p>15 wait for me to finish my questions before you</p> <p>16 answer, and I will do my best to wait for you to</p> <p>17 answer to ask my next question. Do you understand</p> <p>18 that?</p> <p>19 A. Yes.</p> <p>20 Q. Also, since the court reporter is</p> <p>21 taking down everything that we say, it will be best</p> <p>22 to use audible answers. A head -- head nods, head</p> <p>23 shakes don't translate on the record. Uh-huhs,</p> <p>24 uh-uhs don't as well. So do your best, too, to</p> <p>25 answer with verbal responses that are clear. Do</p> | <p>1 you understand that?</p> <p>2 A. Yes.</p> <p>3 Q. If you don't understand a question,</p> <p>4 feel free to ask me to rephrase. If you answer the</p> <p>5 question, I'm going to under -- I'll assume that</p> <p>6 you understood it. Is that -- do you understand</p> <p>7 that?</p> <p>8 A. Yep. Yes.</p> <p>9 Q. Now, I don't want you to guess today,</p> <p>10 but I am entitled to your best estimate. Do you</p> <p>11 understand that?</p> <p>12 A. To the best of my ability, I'll give it</p> <p>13 to you.</p> <p>14 Q. Now, at the end of this deposition, the</p> <p>15 court reporter will finalize the transcript of</p> <p>16 everything that was said today. You'll have an</p> <p>17 opportunity to review that transcript and make</p> <p>18 corrections. If you do make corrections, then any</p> <p>19 party can comment on those at the time of any</p> <p>20 hearing or any trial in the matter. Do you</p> <p>21 understand that?</p> <p>22 A. Yes.</p> <p>23 Q. I'm going to try to get through today</p> <p>24 as quickly as possible, but should you need a</p> <p>25 break, feel free to go ahead and ask me for one.</p> |

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| <p style="text-align: right;">Page 10</p> <p>1 The only thing that I'll ask is that you 2 don't ask for a break while a question is pending. 3 Do you understand that? 4 A. Yes. 5 Q. Are you under the influence of any 6 drugs, alcohol, or medication that would impair -- 7 impair your ability to be truthful today? 8 A. No. 9 Q. Are you under the influence of any 10 drugs, alcohol, or medication that would impair 11 your -- impair your ability to accurately remember 12 events today? 13 A. No. 14 Q. Do you know of any reason why we cannot 15 go forward today with your best testimony? 16 A. No. 17 By the way, so I've looked at the subpoena, 18 and I do see now that it was -- it's both a -- 19 request for documents and my appearance here. 20 Q. Okay. Thank you for that 21 clarification. 22 A. Referring to Exhibit 1. 23 MS. PILATOWICZ: If you could mark that as 24 Exhibit 2, please. 25 The following was marked for identification:</p> | <p style="text-align: right;">Page 11</p> <p>1 EXHIBIT 2 Response to subpoena 2 MS. PILATOWICZ: Whoops. I may have to -- 3 that might have been my copy. Just one second. My 4 apologies. Yes. Can you change this to number 2? 5 (Discussion off the record.) 6 BY MS. PILATOWICZ: 7 Q. Mr. Vacco, you've been handed what's 8 been marked as Exhibit 2. Do you recognize 9 Exhibit 2? 10 A. Yes. 11 Q. Did you prepare Exhibit 2? 12 A. I collaborated in its preparation. 13 Q. Who else worked on -- well, let me ask 14 you, what is -- what is Exhibit 2? Can you 15 identify it, please? 16 A. It's the response to the subpoena 17 requesting documents. 18 Q. Who worked with you on completing 19 Exhibit number 2? 20 A. My litigation team: Stacey Moar, who 21 signed the document, who's an associate in my 22 practice group; Ben Wisniewski, who's another 23 associate in my practice group. I'm not going to 24 try to spell that for you. I think it's 25 W-E-T-S-N-E-W-S-K-I.</p> |
| <p style="text-align: right;">Page 12</p> <p>1 My legal assistant, Stephanie Canastraro, 2 and a partner in the -- in our firm's corporate 3 group, Christian Lovelace, to the best of my 4 knowledge. 5 Q. Did you review Exhibit 2 when it was 6 completed? 7 A. Yes. I -- yes. I worked extensively 8 on responding, so the subpoena, Exhibit number 1, 9 which led to Exhibit number 2, I worked extensively 10 on this, yes. 11 Q. And is Exhibit 2 a complete response to 12 the request for productions in the subpoena? 13 A. Well, other than as it -- you know, as 14 it's qualified. I'll let the document speak for 15 itself. 16 Q. Okay. If you could turn to page 2 of 17 Exhibit 2 and look down at number 4 of the general 18 objections. It says, LMWF further objects to each 19 paragraph of the document demand to the extent it 20 requests information subject to attorney-client 21 privilege held by -- I believe there's a typo -- a 22 corporate client entity of LMWF that is not a party 23 to these proceedings. 24 A. Correct. 25 Q. Is there somebody -- is there a</p> | <p style="text-align: right;">Page 13</p> <p>1 specific client that you're referring to there? 2 A. Certainly, it's in reference to 3 Snowshoe Petroleum, Inc., and Supergump, Inc., 4 but there might be others that don't immediately 5 come to my attention, just reading that -- that 6 paragraph 4. 7 Q. Okay. Can you turn to page 5 of 8 Exhibit 2? And under -- well, let me ask you to 9 read -- to yourself is fine -- request number 5 and 10 the response to request number 5. And let me know 11 when you've read it. 12 A. I've read both the request and the 13 response. 14 Q. Okay. The response indicates that LMWF 15 objects to this document demand as seeking 16 documents subject to the attorney-client privilege 17 and documents already in the custody and control of 18 the trustee. 19 Were there any documents that have been 20 withheld because of the attorney-client privilege? 21 A. You'd have to ask Mr. Gilmore that. 22 Q. Did you produce documents to 23 Mr. Gilmore in response to the subpoena? 24 A. Well, as the response indicates, 25 notwithstanding -- quoting, notwithstanding this</p> |

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| <p>1 objection, LMWF refers to documents it previously 2 produced to the trustee in the Paul A. Morabito 3 involuntary bankruptcy case, and then it lists the 4 case number.</p> <p>5 Q. Okay. So any document that you've had 6 that would be responsive to request number 5, 7 you've given to Mr. Gilmore?</p> <p>8 A. Well, I don't recall whether they were 9 given to Mr. Gilmore and then he disclosed them to 10 you or your firm, or whether we gave them directly 11 to your firm.</p> <p>12 But the -- the documents that are requested 13 in -- you can see in many of the responses, we -- 14 we indicate that the documents had been previously 15 provided to your firm on behalf of the trustee, who 16 is the plaintiff in this case.</p> <p>17 So all of these documents in these -- so it 18 looks like requests number 2, 3, 4, 5, 6, 7, 8, 9 19 have been previously produced.</p> <p>20 Q. Okay. And my -- my question is, just 21 to clarify, that you are not withholding any 22 documents based on the attorney-client privilege. 23 Is that correct?</p> <p>24 A. My firm is not.</p> <p>25 Q. Okay. So to further clarify, the</p> | <p>1 documents that have been produced to the trustee in 2 the bankruptcy case, have they been produced 3 directly by you?</p> <p>4 A. I don't recall.</p> <p>5 Q. And as to your request number 6, have 6 any documents been withheld based on the 7 attorney-client privilege?</p> <p>8 A. My answer that I gave you previously 9 would apply to all of these.</p> <p>10 Q. Okay. If you could look at page 11 number 7 of Exhibit 2.</p> <p>12 A. Okay.</p> <p>13 Q. Request number 10.</p> <p>14 A. Correct.</p> <p>15 Q. The response indicates, notwithstanding 16 this objection, LMWF refers to documents Bates 17 labeled LMWF's 1 through 180 for its response. 18 Do you know what objection is being referred 19 to in that response?</p> <p>20 A. The qualification is in regard to, to 21 the extent that the demand is seeking documents 22 subject to the attorney-client privilege and 23 documents already in the control and custody of the 24 trustee.</p> <p>25 Q. Did you communicate with anyone about</p> |
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| <p>1 being deposed here today?</p> <p>2 A. The individuals at Lippes Mathias 3 Wexler Friedman that I previously mentioned, with 4 the exclusion of my legal assistant, but the 5 lawyers, yes. Them. Mr. Gilmore, and briefly Mr. 6 Salvatore Morabito.</p> <p>7 Q. Do you currently represent Mr. 8 Salvatore Morabito?</p> <p>9 A. Individually?</p> <p>10 Q. Correct.</p> <p>11 A. No.</p> <p>12 Q. What did you discuss with Mr. Gilmore 13 about your deposition today?</p> <p>14 A. Mostly around the production of 15 documents that were requested in the subpoena.</p> <p>16 Q. When did --</p> <p>17 A. Almost exclusively, I mean except for 18 the logistics of -- of this and, you know, just 19 trying to separate the bankruptcy proceeding from 20 this proceeding.</p> <p>21 But most of our dialogue was regarding the 22 documents that we had previously produced.</p> <p>23 Q. When was the last time you spoke with 24 Mr. Gilmore about your deposition?</p> <p>25 A. Probably last week, as we were</p> | <p>1 concluding the pulling together of those documents. 2 And, once again, so it wasn't just pulling together 3 the documents; it was reviewing all the documents, 4 again, to make sure that Frank, Mr. Gilmore, had 5 the documents that were requested and that they had 6 been previously produced.</p> <p>7 Q. When did you speak with Mr. Salvatore 8 Morabito about your deposition?</p> <p>9 A. I don't know. A couple weeks ago.</p> <p>10 Q. Was it by phone call?</p> <p>11 A. I think it was.</p> <p>12 Q. What did you discuss with Mr. Morabito 13 about your deposition?</p> <p>14 A. Whether I would be the person most 15 knowledgeable for Snowshoe Petroleum or not.</p> <p>16 Q. Were there any other discussions?</p> <p>17 A. Nope.</p> <p>18 Q. Did you review any documents in 19 preparation for your deposition?</p> <p>20 A. Other than, you know, the exercise that 21 we went through last week, which was more designed 22 to identify what's already been produced, no.</p> <p>23 Q. Okay. Other than the conversations 24 with Mr. Gilmore, with your litigation team, and 25 with Mr. Morabito, Salvatore Morabito, have you</p> |

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| <p>1 done anything today -- anything else to prepare for 2 your deposition today? 3 A. No. 4 Q. Let's talk a little bit about your 5 background. Where did you attend college? 6 A. Colgate University, BA economics, 1974. 7 Q. And after you graduated, what did you 8 do next? 9 A. University of Buffalo Law School, JD, 10 1978. 11 Q. Did you take time off between college 12 and law school? 13 A. No. 14 Q. When were you licensed to practice law? 15 A. February 2000 -- February 1979. 16 Q. Where do you currently hold licenses to 17 practice law? 18 A. State of New York. 19 Q. Is that it? 20 A. Correct. 21 Q. Have you ever held a license in any 22 other state? 23 A. No. 24 Q. Between 1979 and today, have you always 25 been a practicing attorney?</p> | <p>1 A. I've always been registered with the 2 bar of the State of New York, but there was a brief 3 hiatus when I didn't formally practice law. 4 Q. When was that? 5 A. '99 through 2003. 6 Q. What were you doing during that time? 7 A. I was the regional vice president of 8 the New York subsidiary of Waste Management, Inc., 9 a publicly traded company, based in Houston, Texas. 10 Q. Why did you start doing that in 1999? 11 A. I wanted a break from the law, and it 12 was a great opportunity to run a company. 13 Q. Was there any particular reason you 14 wanted a break from the law? 15 A. I had just lost an election to the 16 future governor of the State of New York and 17 decided that I was going to take a break from 18 public service and practicing law. 19 Q. Okay. What made you go back to law in 20 2003? 21 A. Because that's -- that's my training 22 and background. 23 Q. Is there a reason you left the position 24 with the Waste Management open, or the Waste 25 Management subsidiary?</p> |
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| <p>1 A. Because I took a position with a law 2 firm and a consulting firm in Albany, New York. 3 Q. Is that your current firm? 4 A. No. 5 Q. What firm was that? 6 A. The consulting firm was Crane & Powers, 7 and it was affiliated with the law firm of Crane, 8 Greene, Parente & Cherubin. 9 Q. And there was a law firm at the same 10 time that you went and worked for? 11 A. Powers & Crane was the consulting firm. 12 Crane -- Crane, Greene, Parente & Cherubin was the 13 law firm. 14 Q. Okay. 15 A. I was affiliated with both. 16 Q. Did you voluntarily leave the Waste 17 Management position? 18 A. My contract ran out. 19 Q. And how long did you work for the firm 20 that -- the consulting firm and the law firm that 21 you went to after leaving Waste Management? 22 A. Well, Crane & Powers imploded before 23 too long after I arrived there, for reasons beyond 24 my control. 25 And the result of that implosion was we</p> | <p>1 formed an LLC known as Crane & Vacco. And that 2 survived from 2004 to roughly 2008. 3 Q. And at that time were you practicing 4 law, or were you consulting, or were you -- or 5 both? 6 A. Both. 7 Q. When did you leave Crane & Vacco? 8 A. March 31st of -- so I -- I terminated 9 my affiliation with the consulting firm Crane & 10 Vacco. By that time it was Crane, Vacco & Sanders, 11 otherwise known as CVS. So I terminated my 12 affiliation with that LLC and dissolved it in March 13 of 2008, and that's the same time that I ended my 14 affiliation with the law firm. 15 Q. Okay. What was the reason for ending 16 those affiliations? 17 A. I -- I was offered a job to serve as 18 in-house counsel to a New York domiciled insurance 19 company. 20 Q. What's the name of that company? 21 A. Upper Hudson -- Upper Hudson National 22 Insurance Company. 23 Q. Were you the general counsel there? 24 A. I was the counsel. 25 Q. So did they have a legal department, or</p> |

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| <p>1 they just had you?</p> <p>2 A. Just me.</p> <p>3 Q. How long did you work for Upper Hudson</p> <p>4 Insurance?</p> <p>5 A. Well, thanks to the economic implosion</p> <p>6 of 2008, the company mothballed its surplus in the</p> <p>7 fall of 2008, so I went from being a W-2 employee</p> <p>8 sometime in October, November of 2008, to being an</p> <p>9 outside counsel. And that role lasted for a couple</p> <p>10 years.</p> <p>11 Q. So 2008 till approximately --</p> <p>12 A. The fall of 2008.</p> <p>13 Q. To 2011? Before or after 2011?</p> <p>14 A. Well, it gets a little complicated,</p> <p>15 because then I joined this law firm, and a lot of</p> <p>16 that work came into this law firm.</p> <p>17 Q. Okay. That's a fair distinction. And</p> <p>18 "this law firm," are you talking about your current</p> <p>19 law firm?</p> <p>20 A. Lippes Mathias Wexler Friedman.</p> <p>21 Q. Why did you join your current law firm?</p> <p>22 A. Because I was tired of -- of practicing</p> <p>23 law from my -- my home office. Albany was no</p> <p>24 longer relevant to me and my practice, and this was</p> <p>25 a great opportunity to grow my practice and the</p> | <p>1 firm.</p> <p>2 Q. So at that time did you move from</p> <p>3 Albany to Buffalo?</p> <p>4 A. I never physically moved out of Western</p> <p>5 New York.</p> <p>6 Q. Okay. Do you have any areas of</p> <p>7 concentration in your law practice?</p> <p>8 A. I'm a litigator. We -- we do a lot of</p> <p>9 work -- we have a government investigations</p> <p>10 practice group that I head up. So while we try to</p> <p>11 avoid representing white collar defendants, I have</p> <p>12 the ability to pick and choose, but, mostly, we</p> <p>13 represent entities that are corporate entities that</p> <p>14 are the subject of some type of governmental</p> <p>15 investigation or regulatory compliance effort.</p> <p>16 Q. Do you have any special certifications?</p> <p>17 A. No. Besides my resumé?</p> <p>18 Q. Any -- any sort of special state</p> <p>19 designation or license --</p> <p>20 A. No.</p> <p>21 Q. -- other than a law degree?</p> <p>22 A. I don't -- other than a law degree? So</p> <p>23 outside of the practice of law?</p> <p>24 Q. Correct.</p> <p>25 A. No.</p> |
| Page 24 | Page 25 |
| <p>1 Q. Do you know Paul Morabito?</p> <p>2 A. I do.</p> <p>3 Q. When did you first meet Mr. Morabito?</p> <p>4 A. Hmm. Physically meet him, I don't</p> <p>5 recall precisely, but I would say that</p> <p>6 representation of him or some of his entities began</p> <p>7 in around about August or September 2007. I did</p> <p>8 not immediately meet him in person.</p> <p>9 Q. Okay. How -- how did you first become</p> <p>10 acquainted with Mr. Morabito?</p> <p>11 A. During the Reagan administration, I was</p> <p>12 the United States Attorney for the Western District</p> <p>13 of New York.</p> <p>14 My then colleague from San Francisco called</p> <p>15 me one day and asked me if I was interested in</p> <p>16 representing a friend of his, who had -- was --</p> <p>17 whose companies were the subject of a complaint in</p> <p>18 federal district court here in the Western</p> <p>19 District.</p> <p>20 Q. Who was that colleague in</p> <p>21 San Francisco?</p> <p>22 A. Joe Russoniello. Frankly, I think that</p> <p>23 Joe at that time was -- so this would have been the</p> <p>24 second of the -- the two Bush terms. I believe</p> <p>25 that Joe was actually back in the U.S. Attorney's</p> | <p>1 seat. So he had been a Reagan appointee, left, and</p> <p>2 then came back later as a Bush appointee.</p> <p>3 So Joe was the U.S. Attorney when he called</p> <p>4 me and asked me if I was interested in representing</p> <p>5 Morabito's companies.</p> <p>6 Q. Okay. And at that time you were</p> <p>7 working from your home office?</p> <p>8 A. So that at that time I was still</p> <p>9 affiliated with the Albany law firm of Crane, so</p> <p>10 no -- and by that time it probably wasn't Crane,</p> <p>11 Greene, Parente & Cherubin; it was probably, at</p> <p>12 that point in time, Crane Parente. But I was still</p> <p>13 affiliated with the Albany law firm.</p> <p>14 Q. And who were -- or what were Paul's</p> <p>15 companies that you were asked to represent at that</p> <p>16 time?</p> <p>17 A. Oh, man. So there was a -- Tibarom</p> <p>18 sticks out in my mind, T-I-B-A-R-O-M, and maybe</p> <p>19 other Tibarom affiliates. I just don't recall</p> <p>20 precisely.</p> <p>21 Q. Okay. What was the nature of that</p> <p>22 litigation?</p> <p>23 A. It was a complaint in federal district</p> <p>24 court brought by a company -- I want to say a</p> <p>25 company out of Boston, Massachusetts, that was</p> |

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| <p>1 suing over a sale of property.</p> <p>2 Q. Do you recall what the dispute was</p> <p>3 about the sale of property?</p> <p>4 A. We -- the Morabito entities was</p> <p>5 impleaded into the case by the primary defendant.</p> <p>6 So this company sued. And I forgot the name of the</p> <p>7 company or the individuals who were the primary</p> <p>8 defendants, and then they impleaded in Morabito's</p> <p>9 companies over the value of the -- the property.</p> <p>10 Q. Okay. And did you represent</p> <p>11 Mr. Morabito and his companies in that litigation?</p> <p>12 A. I don't remember if Mr. Morabito</p> <p>13 himself individually was a defendant, but the</p> <p>14 companies -- to the extent that companies that he</p> <p>15 controlled were defendants, yes, I represented</p> <p>16 them. And if he was individually, I represented</p> <p>17 him as well.</p> <p>18 Q. Okay. How was that litigation</p> <p>19 ultimately resolved?</p> <p>20 A. It was dismissed against the Morabito</p> <p>21 entities.</p> <p>22 Q. Do you recall when that was?</p> <p>23 A. I don't.</p> <p>24 Q. Did you represent Mr. Morabito or any</p> <p>25 of his companies while that litigation was pending</p> | <p>1 in other matters?</p> <p>2 A. Well, your -- your qualification "while</p> <p>3 that litigation was pending" is pretty broad. So I</p> <p>4 would have to say the answer to that -- because it</p> <p>5 was pending for a long time, for many months, if</p> <p>6 not longer, so the answer to that is yes.</p> <p>7 Q. Okay. What other companies of</p> <p>8 Mr. Morabito's have you represented?</p> <p>9 A. It would be difficult to enumerate</p> <p>10 them. I'll try my best but --</p> <p>11 MR. GILMORE: Sorry. Can I get some</p> <p>12 clarification on the question? Mr. Morabito's</p> <p>13 companies, are you talking about ones in which he</p> <p>14 had complete or partial ownership or control, or he</p> <p>15 was the contact liaison, or all of the above?</p> <p>16 BY MS. PILATOWICZ:</p> <p>17 Q. Let's start with ones that he had any</p> <p>18 type of ownership in that you're aware of.</p> <p>19 A. Again, that's going to be difficult for</p> <p>20 me to give you a complete and comprehensive list</p> <p>21 without something more to refresh my recollection.</p> <p>22 But along the way to the Tibarom -- Tibarom</p> <p>23 entities, or some iteration of Tibarom, because</p> <p>24 there were -- you know, there were several</p> <p>25 Tibarom -- Tibarom entities, many of which were not</p> |
| Page 28 | Page 29 |
| <p>1 involved in this Western District of New York</p> <p>2 litigation.</p> <p>3 Eventually, while this case was pending,</p> <p>4 the -- the case in Nevada that is the -- the root</p> <p>5 cause of these proceedings, eventually, I</p> <p>6 represented him in that case, or represented the</p> <p>7 company and his interest in that case.</p> <p>8 A Superpumper, a Snowshoe Petroleum,</p> <p>9 obviously, not a company that he is -- controls,</p> <p>10 but Superpumper, at one point in time he was</p> <p>11 involved in Superpumper. CWC, CNC. There was a</p> <p>12 Superpumper Properties.</p> <p>13 Some of the California entities are escaping</p> <p>14 me at this moment.</p> <p>15 Q. Okay.</p> <p>16 A. Because there was also litigation, as</p> <p>17 I'm sure you're aware, in I believe the Middle</p> <p>18 District of -- Central District of California,</p> <p>19 maybe the Northern District, wherever San Jose is.</p> <p>20 And they were entities in that litigation that I</p> <p>21 represented him in as well.</p> <p>22 Q. What litigation are you referring to?</p> <p>23 A. We referred to it as the eclectic</p> <p>24 litigation. This was a -- styled as a RICO claim</p> <p>25 that failed twice in being able to state a cause of</p> | <p>1 action, dismissed by the trial court judge in</p> <p>2 round 1, amended complaint, dismissed in round 2,</p> <p>3 and then affirmed by the circuit court.</p> <p>4 Q. So other than the litigation in the</p> <p>5 eclectic litigation, the litigation with the</p> <p>6 Tibarom entities that was pending in the federal</p> <p>7 district court of Western District of New York? Is</p> <p>8 that correct?</p> <p>9 A. There are actually two, now that you</p> <p>10 mention it. Two in the Western District of</p> <p>11 New York.</p> <p>12 Q. Okay.</p> <p>13 A. Same result in both cases. I forgot</p> <p>14 about --</p> <p>15 Q. Same results --</p> <p>16 A. Dismissed. Dismissed in both</p> <p>17 instances.</p> <p>18 Q. Both relating to the Tibarom entities?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. So other than the two that were</p> <p>21 pending and dismissed in the Western District of</p> <p>22 New York, the eclectic litigation, and the</p> <p>23 litigation in Reno, Nevada, that stemmed -- that</p> <p>24 all of this stems from, which I'll refer to as the</p> <p>25 Herbst litigation, have you represented</p> |

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| <p style="text-align: right;">Page 30</p> <p>1 Mr. Morabito individually or any of his companies 2 in any other litigation? 3 A. Yes. 4 Q. What other litigation? 5 A. Again, that would have been some of the 6 California entities that I just don't recall. 7 There -- there was -- there were -- besides 8 eclectic, which is -- which was in federal court, 9 there were -- there were a couple of other state 10 court cases in California. And while there was 11 local counsel in those cases, we did also represent 12 Mr. Morabito and the entities involved. 13 And there was another Nevada litigation. 14 Q. Okay. Let's start with the California 15 state court litigations. How many -- approximately 16 how many were there? 17 A. Besides eclectic, which was the federal 18 court case, for sure one sticks out in my mind. We 19 called -- we referred to it as the Barbieri 20 litigation. 21 And there's -- my recollection is that there 22 was one other, but it just doesn't ring a bell with 23 me at the moment. 24 Q. Let's start with the Barbieri 25 litigation.</p> | <p style="text-align: right;">Page 31</p> <p>1 A. Barbieri. 2 Q. Barbieri litigation. What was that 3 litigation? 4 A. They were -- all of these cases, except 5 for Herbst, were of the same theory, that somehow 6 these people that bought properties from 7 individuals that Morabito had -- Morabito's 8 entities had sold properties to, that somehow, the 9 properties were -- the value of the properties were 10 artificially inflated. 11 Q. How was the Barbieri -- 12 A. So just so I make myself clear, my -- 13 my recollection is that in none of these cases was 14 Morabito or Morabito's entity the entity that sold 15 the property to the complaining plaintiff. 16 Strikes me that I could be wrong, maybe, 17 about Barbieri, for instance, but the case here in 18 the -- the two cases here in the Western District 19 of New York, the Morabito entity would have sold to 20 a third party. 21 The third party was then sued, along with 22 the Morabito entity, when the third party sold that 23 property to the eventual plaintiff. 24 Q. Okay. Thank you for that 25 clarification.</p> |
| <p style="text-align: right;">Page 32</p> <p>1 In the Barbieri litigation, do you recall 2 the Morabito entities that were defendants? 3 A. I don't. Again, it's, you know, 4 Tibaron CA. I just don't recall. 5 Q. Okay. And there was one other 6 litigation that you don't necessarily recall out of 7 California. Was it the same type of litigation? 8 A. Yes. 9 Q. Do you know where in litigation -- 10 where in California it was pending? 11 Do you know approximately what year? 12 THE REPORTER: I didn't get an answer. 13 THE WITNESS: No. I'm sorry. No. 14 BY MS. PIATONICZ: 15 Q. Do you recall what years? 16 A. Sometime between 2007 and 2014. 17 Q. Okay. And what about the other Nevada 18 litigation that you mentioned? What was that 19 litigation? 20 A. Actually, there were -- now that you 21 jogged my memory, I believe there were two -- 22 Q. Okay. 23 A. -- in addition to the infamous Herbst 24 case. There was a case that we referred to as 25 Oppio Ranches, and I believe Desi Moreno sued, so I</p> | <p style="text-align: right;">Page 33</p> <p>1 believe that that case was also in -- in suit. 2 Desi Moreno was part of the settlement, I believe, 3 of -- of the original judgment in the Herbst case. 4 But I do believe that Moreno had an independent 5 action in Nevada, which may have included the 6 Herbsts. I just don't recall at the moment. 7 Q. Was Oppio Ranches and Desi Moreno, 8 those were two separate cases? 9 A. Correct. 10 Q. Okay. What was the Oppio Ranches case? 11 A. Again, they're all the same. They're 12 all about value of property. The allegation's that 13 property -- value of property was artificially 14 inflated. 15 Q. And do you recall what the 16 Morabito-related entities in Oppio Ranches were? 17 A. I don't. 18 Q. And is Desi Moreno the same type of 19 case that you've been discussing? 20 A. Yes. 21 Q. Who is Desi Moreno? 22 A. He was an individual who bought 23 property in a suburb of Reno. I forgot exactly 24 where. Starks, maybe. I don't know. It's a 25 suburb of Reno. Bought property, and he eventually</p> |

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| <p>Page 34</p> <p>1 was the landlord to the Herbsts.</p> <p>2 Q. Do you recall how the Desi Moreno</p> <p>3 litigation concluded?</p> <p>4 A. There was a settlement, which I believe</p> <p>5 was then somehow incorporated into the master</p> <p>6 settlement with the Herbsts.</p> <p>7 Q. Do you know when the Desi Moreno --</p> <p>8 A. It might have been -- it might have</p> <p>9 been separate, but there was a settlement.</p> <p>10 Q. Do you know when the Desi Moreno</p> <p>11 settlement was?</p> <p>12 A. So the Herbst settlement, which is the</p> <p>13 settlement of the -- the judgment that had been</p> <p>14 issued by Judge Adams. So, as you know, that that</p> <p>15 was eventually settled.</p> <p>16 The Moreno settlement would have been</p> <p>17 contemporaneous. Either -- either just slightly</p> <p>18 before or slightly after or incorporated. I do</p> <p>19 believe it was incorporated into the Herbst</p> <p>20 settlement. But it's all in the same time frame,</p> <p>21 which was -- I think that we had an agreement in</p> <p>22 principle in October of 2011, with John Desmond and</p> <p>23 Brian Irvine and company.</p> <p>24 Q. Are you aware of any settlements with</p> <p>25 Desi Moreno after 2011?</p> | <p>Page 35</p> <p>1 A. It -- it could have been into 2012.</p> <p>2 Q. Okay. Are you aware of any settlements</p> <p>3 of Desi Moreno after 2012?</p> <p>4 A. My recollection, it was one settlement</p> <p>5 with Desi Moreno. When it happened, my -- my</p> <p>6 recollection is that it's -- it's all part of the</p> <p>7 same attempt to resolve issue -- Morabito-related</p> <p>8 issues in Nevada.</p> <p>9 Q. Okay. Do you know how the Oppio</p> <p>10 Ranches --</p> <p>11 A. Settled.</p> <p>12 Q. -- litigation concluded?</p> <p>13 A. It was settled.</p> <p>14 Q. Do you know when that was settled?</p> <p>15 A. My sense is that it was -- predated the</p> <p>16 Herbst settlement, but maybe not by much. So</p> <p>17 2000 -- 2011. Again, it's all kind of in the same</p> <p>18 time frame. Which came first or second or third, I</p> <p>19 just don't recall.</p> <p>20 Q. Okay. Do you recall what the terms of</p> <p>21 the Oppio Ranches settlement was?</p> <p>22 A. The defendants were going to pay, over</p> <p>23 a period of time, some amount of money that was</p> <p>24 embedded in the settlement document.</p> <p>25 Q. But as you sit here, you -- today, you</p> |
| <p>Page 36</p> <p>1 don't recall how much that was?</p> <p>2 A. No.</p> <p>3 Q. What about with the Moreno settlement?</p> <p>4 Do you recall what the terms of that settlement</p> <p>5 was?</p> <p>6 A. The same thing. You know. Payment</p> <p>7 over time from some entity. But I think there was</p> <p>8 a nuance in the Moreno settlement that called for</p> <p>9 the build-out of a "warm shell."</p> <p>10 Q. What is your understanding of what a</p> <p>11 warm shell is?</p> <p>12 A. Was -- it was going to be a</p> <p>13 structure -- there was, you know, some dialogue</p> <p>14 around the definition of the warm shell, but,</p> <p>15 ultimately, it was the company that entered into</p> <p>16 the settlement was to build a structure of so many</p> <p>17 square feet that had the ability to serve multiple</p> <p>18 uses. So it was going to be a structure that was,</p> <p>19 you know, fully -- had all the utilities, all the</p> <p>20 mechanicals in it, which made it warm. Had all the</p> <p>21 mechanicals in it but was not built for any</p> <p>22 specific purpose.</p> <p>23 Q. And who was responsible for building</p> <p>24 that?</p> <p>25 A. I don't recall the entity.</p> | <p>Page 37</p> <p>1 Q. Was it on the plaintiff's side or the</p> <p>2 defendant's side?</p> <p>3 A. Defendant's side. It was originally a</p> <p>4 Herbst obligation that they reneged on.</p> <p>5 Q. Who was the dialogue about the warm</p> <p>6 shell, who was part of that dialogue?</p> <p>7 A. Moreno's lawyer. Three years ago, I</p> <p>8 would have been able to give you all of these</p> <p>9 guys', chapter and verse, names, cellphone numbers,</p> <p>10 telephone numbers. I just don't recall.</p> <p>11 Q. Okay.</p> <p>12 A. Sharp guy. I want to say his offices</p> <p>13 were in Truckee. I don't remember his name. Nice</p> <p>14 offices, though.</p> <p>15 Q. Besides Moreno's lawyer, who else was</p> <p>16 part of that dialogue?</p> <p>17 A. On behalf of Moreno?</p> <p>18 Q. On behalf of any party.</p> <p>19 A. So there's a piece of me that says John</p> <p>20 Desmond and Brian Irvine played a role in the</p> <p>21 Moreno settlement because it was part and parcel to</p> <p>22 the Herbst/Morabito settlement. Herbsts were also</p> <p>23 defendants in the Moreno case, to the best of my</p> <p>24 recollection. So John Desmond, Brian Irvine,</p> <p>25 perhaps Frank Gilmore and Barry Breslow because</p> |

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| <p>1 they were local counsel in Nevada.</p> <p>2 Q. Were you a party to those -- to that</p> <p>3 dialogue?</p> <p>4 A. Yes.</p> <p>5 Q. Was there anyone else besides,</p> <p>6 potentially, Mr. Gilmore and Mr. Breslow and</p> <p>7 yourself on Morabito's side that you were party to?</p> <p>8 A. My team.</p> <p>9 Q. Do you still currently represent Paul</p> <p>10 Morabito?</p> <p>11 A. No.</p> <p>12 Q. When did you stop representing</p> <p>13 Mr. Morabito?</p> <p>14 A. I don't recall.</p> <p>15 Q. Was it prior to January 1st, 2013?</p> <p>16 A. No.</p> <p>17 Q. Was it prior to January 1st, 2014?</p> <p>18 A. So that's my confusion. It was either</p> <p>19 April or May 2013 or 2014. I just don't recall as</p> <p>20 I sit here.</p> <p>21 Q. Was there something that led to you no</p> <p>22 longer representing Mr. Morabito?</p> <p>23 A. I don't think there was any singular</p> <p>24 item.</p> <p>25 Q. Were there a collection of items?</p> | <p>1 A. There were a collection of items,</p> <p>2 including collections.</p> <p>3 Q. Other than collections, what led to you</p> <p>4 no longer representing Mr. Morabito?</p> <p>5 A. I would say the outstanding AR was the</p> <p>6 issue.</p> <p>7 Q. So that was it? Outstanding AR was the</p> <p>8 reason that you terminated your relationship with</p> <p>9 Mr. Morabito?</p> <p>10 A. Principally.</p> <p>11 MR. GILMORE: Well, I'm sorry. He didn't</p> <p>12 testify he terminated his relationship with him but</p> <p>13 just his representation of him.</p> <p>14 MS. PILATOWICZ: That's fair.</p> <p>15 THE WITNESS: Principally.</p> <p>16 BY MS. PILATOWICZ:</p> <p>17 Q. What else led to the decision to no</p> <p>18 longer represent Mr. Morabito?</p> <p>19 A. We were here in Buffalo. The world --</p> <p>20 his world was imploding in Nevada. I just think</p> <p>21 that we both decided it was time to -- for him to</p> <p>22 seek other counsel.</p> <p>23 Q. So the collections and the distance</p> <p>24 were two factors. Were there any other factors?</p> <p>25 A. I just think that we lost the dialogue.</p> |
| Page 40 | Page 41 |
| <p>1 Q. What makes you say that you lost the</p> <p>2 dialogue?</p> <p>3 A. That's -- that's just a conclusion</p> <p>4 based upon many conversations that I'm not going to</p> <p>5 get into that the relationship, attorney-client</p> <p>6 relationship, had been frayed.</p> <p>7 Q. Were those conversations prior to his</p> <p>8 involuntary bankruptcy filing or after?</p> <p>9 A. I believe that our representation</p> <p>10 terminated prior to the involuntary.</p> <p>11 Q. Okay. And are you aware that</p> <p>12 Mr. Leonard, who is the trustee in the Chapter 11</p> <p>13 case, has waived Mr. Morabito's privilege?</p> <p>14 A. Yes. I know that he has asserted a</p> <p>15 waiver.</p> <p>16 Q. Okay. Are you also aware that</p> <p>17 Mr. Leonard has asserted that the privilege has</p> <p>18 been waived as a result of the crime-fraud</p> <p>19 exception? Are you aware of that?</p> <p>20 A. I am aware of that as well.</p> <p>21 Q. And is it still your position today</p> <p>22 that you're not going to answer questions regarding</p> <p>23 conversations with Mr. Morabito?</p> <p>24 A. Well, it's Morabito's privilege to</p> <p>25 assert, so I'll leave that to Mr. Gilmore.</p> | <p>1 MR. GILMORE: And, yes, Mr. Morabito does</p> <p>2 intend to assert all applicable attorney-client</p> <p>3 privileges until there's been a determination by</p> <p>4 the Court as to the assertion of waiver.</p> <p>5 BY MS. PILATOWICZ:</p> <p>6 Q. Okay. And based on that, are you</p> <p>7 refusing to answer questions about conversations</p> <p>8 with Mr. Morabito relating to the breakdown in</p> <p>9 dialogue that led to the termination of your</p> <p>10 representation of Mr. Morabito?</p> <p>11 A. Again, I'm going to let Mr. Gilmore</p> <p>12 speak to the issues of privilege.</p> <p>13 MR. GILMORE: I haven't heard any questions</p> <p>14 that have been asked to which the witness was not</p> <p>15 able to answer on the basis of privilege.</p> <p>16 He testified as to general communications</p> <p>17 with a client, which would not rise to the level of</p> <p>18 attorney-client privileged communication.</p> <p>19 So he can answer questions until I think you</p> <p>20 ask one which might ask him to divulge an</p> <p>21 attorney-client communication.</p> <p>22 BY MS. PILATOWICZ:</p> <p>23 Q. Okay. What was the last conversation</p> <p>24 you had with Paul Morabito prior to -- or sorry.</p> <p>25 Let me rephrase that.</p> |

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| <p>1 When was the last conversation you had with 2 Mr. Morabito prior to terminating the 3 attorney-client relationship? 4 A. I don't recall. 5 Q. Do you recall if it was a telephone 6 conversation? 7 A. Most likely. 8 Q. Okay. Do you recall what was said 9 during that conversation? 10 A. I recall just general -- the general 11 topic. 12 Q. And what was the general topic? 13 A. Our outstanding -- 14 MR. GILMORE: I will -- I would say if it 15 has anything to do with delivery or seeking of 16 legal advice, I'd ask you not to answer it. But if 17 it has something other than that, those two topics, 18 then you're free to answer. 19 THE WITNESS: The outstanding AR. 20 BY MS. PILATOWICZ: 21 Q. Okay. Did you discuss anything else on 22 that phone call? 23 A. I don't recall. 24 Q. Okay. When did you have a conversation 25 with Mr. Morabito that led you to believe that the</p> | <p>1 attorney-client relationship had broken down? 2 A. I don't remember precisely. 3 Q. Okay. What was said during a 4 conversation that made you think that the 5 attorney-client relationship had broken down? 6 A. I don't recall precisely what was said. 7 Q. What gave you the sense that the 8 attorney-client privilege or attorney-client 9 relationship had broken down? 10 A. I think I took the position that we 11 weren't going to continue representation. 12 Q. Why did you determine that you weren't 13 going to continue representation? 14 A. Because of the -- the extent of the 15 outstanding accounts receivable. 16 Q. Okay. But you testified earlier that 17 there were other factors that went into that 18 decision, one being that the relationship had 19 become frayed, I believe is the term you used. Is 20 that correct? 21 A. But it was around the AR. 22 Q. Okay. Was there any advice that you 23 provided to Mr. Morabito that he refused to follow 24 that led to your decision to terminate your 25 relationship with Mr. Morabito?</p> |
| Page 44 | Page 45 |
| <p>1 MR. GILMORE: That, I'm going to object to. 2 If you offered him advice, that would be centered 3 around the attorney-client privilege. 4 THE WITNESS: Mr-hmm. 5 BY MS. PILATOWICZ: 6 Q. No. I'm not asking for the advice -- 7 MR. GILMORE: Well, you asked -- 8 MS. PILATOWICZ: -- right now. 9 MR. GILMORE: You asked, did he fail to 10 follow some advice that Mr. Vacco had provided, and 11 that does delve into it. 12 BY MS. PILATOWICZ: 13 Q. Are you going to refuse to answer -- 14 A. Yes. 15 Q. -- based on the privilege? 16 Do you still have a personal relationship 17 with Mr. Morabito? 18 A. Yes. 19 Q. When was the last time you spoke with 20 Mr. Morabito? 21 A. Around about the middle of September of 22 this year. 23 Q. What was the nature of that 24 conversation? 25 A. He invited me to Thanksgiving dinner in</p> | <p>1 Canada. 2 Q. Was that a -- how was that 3 communication? And let me -- 4 A. I don't understand. 5 Q. Let me rephrase. 6 Was that a telephone conversation? 7 A. Yes. 8 Q. Okay. How often do you speak with 9 Mr. Morabito? 10 A. Now, infrequently. 11 Q. Okay. By infrequently, do you mean 12 more than -- I'm sorry. Less than every three 13 months? 14 A. I don't -- I don't think that we 15 communicate on a monthly basis. 16 Q. Okay. Do you plan on attending 17 Thanksgiving in Canada? 18 A. It's passed. Canada Thanksgiving has 19 passed. 20 Q. Thank you for that clarification. When 21 was -- when was Canadian Thanksgiving? 22 A. Canadian Thanksgiving was October 12th, 23 I believe, which is our Columbus Day. And I did 24 not attend. 25 Q. What was the reason you didn't attend?</p> |

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| <p style="text-align: right;">Page 46</p> <p>1 A. Actually, the invitation was for the 2 week before, and my 20-year-old son was planning on 3 coming home from college to attend a football game 4 with his friends and me, so it was a conflict. 5 Q. When did you first meet Mr. Gilmore? 6 Mr. Frank Gilmore? 7 A. I think that we -- I -- I engaged his 8 law firm in 2010. When precisely Frank and I 9 personally met would have been sometime after the 10 engagement. Precisely when, I don't remember. 11 Q. Who made the decision to hire 12 Mr. Gilmore's law firm in 2010? 13 A. Well, after the debacle of the trial in 14 front of Judge Adams, Mr. Morabito was dissatisfied 15 with his then Reno counsel. He turned to me for 16 advice and counsel on a successor counsel in Reno. 17 This law firm was referred to me by some other 18 lawyer whose name now escapes me. 19 So then I vetted the law firm, proposed the 20 law firm to Mr. Morabito, and, obviously, he's the 21 client; he made the decision. 22 Q. Do you know Jeff Hartman? 23 A. The name Hartman sounds familiar. I 24 don't know in what context. 25 Q. Okay. Do you know Scott Gautier? Let</p> | <p style="text-align: right;">Page 47</p> <p>1 me spell that for you so I make sure I'm saying it 2 correctly. G-A-U-T-I-E-R. 3 A. I believe he was, if not still does, 4 represent Morabito in the involuntary bankruptcy. 5 Q. Did you have any connection with the 6 retention of Scott Gautier? 7 A. No. 8 Q. Have you ever met Scott Gautier? 9 A. Personally, no. 10 Q. Do you know -- and I'm probably going 11 to ask for your help on this one -- Sue -- 12 A. Sujata Yalamanchili. 13 Q. Okay. 14 A. She is in the attorney directory here. 15 I'm not even going to try to spell Yalamanchili for 16 you. 17 I do know her. 18 Q. When did you meet her? 19 A. In 2007. 20 Q. How did you meet her? 21 A. Well, after Joe Russonicchio connected 22 me to Morabito on the case here in the Western 23 District and Mr. Morabito and I had some 24 preliminary discussions about the background of 25 that case, I was pleased to learn that it was a</p> |
| <p style="text-align: right;">Page 48</p> <p>1 Buffalo attorney, Sujata Yalamanchili, who was 2 principally involved in the underlying 3 transactions. I didn't know her personally prior 4 to then. 5 Q. And did you work with her in the 6 litigation that was pending in the federal court of 7 the Western District of New York? 8 A. She was an invaluable resource for this 9 matter, the Western District of New York case, both 10 Western District of New York cases. And she was 11 also a resource in the so-called Herbst litigation. 12 Q. Have you worked with her in any other 13 cases that deal with Paul Morabito or any of his 14 entities? 15 A. Beyond the three that I just mentioned, 16 I don't believe so. 17 Q. Have you worked with her on any 18 transactional matters related to Paul Morabito or 19 his entities? 20 A. No. 21 Q. Now, we've been discussing a little bit 22 the Herbst litigation, which is the litigation that 23 was pending in Reno, Nevada. There was an 24 approximately \$140 million judgment entered. 25 Do you recall when that judgment --</p> | <p style="text-align: right;">Page 49</p> <p>1 A. Well, it was an \$85 million judgment. 2 The judgment that was entered was -- I could be 3 wrong, but that was the settlement amount. 4 Q. Okay. There was a substantial judgment 5 at some point, though, entered. 6 A. There was a substantial judgment, 7 correct. 8 Q. Do you recall when that was entered? 9 A. September 2010. 10 Q. And how were you advised that the 11 judgment was entered? 12 A. Phone call from Leif Reid. 13 Q. And who is Leif Reid? 14 A. Trial counsel on the case in Reno, 15 Nevada. 16 Q. What was your reaction to that 17 judgment? 18 A. Utter surprise. 19 Q. Did you or your office start taking any 20 actions with respect to Morabito's assets? 21 A. There came a point in time when -- 22 after having analyzed the decision, so it was a 23 written decision, we -- we worked with Paul and 24 other owners of properties to get valuations on 25 properties and to -- to -- the -- the goal was very</p> |

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| <p>1 simple. The decision entered by Judge Adams, for 2 as much as Herbst and their litigation team wanted 3 to wave that decision around as it related to Paul 4 Morabito, they were not as willing to wave it 5 around as it related to Salvatore Morabito and 6 Edward Bayuk, both of whom were exonerated, if you 7 will, by Judge Adams. 8 Judge Adams found that they were not 9 involved in any of the alleged fraud that was the 10 subject of the judgment, and the -- the decision of 11 Judge Adams dismissed the claims, rejected the 12 claims against Salvatore Morabito and Edward Bayuk. 13 The -- the effort was because they owned -- 14 all three of them, in many instances, owned assets 15 together, the goal, after researching Nevada law 16 and consulting with Nevada counsel, was to 17 right-size the investment so that everybody walked 18 away with their proportionate share of the 19 investment, including Paul A. Morabito. 20 For instance, the Panorama property, which 21 was located in Reno, my recollection serves me that 22 it was owned by a Morabito entity and an Edward 23 Bayuk entity but not in equal proportions, if I 24 recall correctly. 25 There were properties in California, Laguna</p> | <p>1 Beach, California, that was jointly owned, again, 2 not in equal proportions. 3 And then there was Superpumper, where all 4 three of them had an ownership interest. 5 So the goal was to essentially take all of 6 those assets and to -- to identify the value of 7 Morabito's stake in those assets, and to transfer 8 that value exclusively to him, and then separate 9 the equity, if you will, to the extent it existed, 10 for Edward and Sam, because they were now relieved 11 of this lawsuit. 12 And in an effort to not embroil them, 13 ironically, as they are now, in litigation, the 14 properties were, again, valued and moved so that 15 everybody, at the end of the day, as you took the 16 whole and you took the percentages that each one of 17 them owned in the whole, the goal was to have 18 Morabito walk away with the same value that he had 19 in the whole, while separating from Morabito the 20 interest that Edward and Sam also owned. 21 Q. When did you start that process? 22 A. Mid -- mid to late September of 2010. 23 Q. Who ultimately decided to commence this 24 separation of the assets? 25 A. Well, the parties.</p> |
| Page 52 | Page 53 |
| <p>1 Q. The parties being Paul Morabito, Sam 2 Morabito, and Edward Bayuk? 3 A. Sure. Edward and Sam didn't want to 4 be -- be chased because they had an equity interest 5 in properties that were also attached to Paul. 6 Q. So who raised the idea of separating 7 the assets? 8 A. I don't recall. 9 Q. Do you recall the first discussion 10 regarding separating the assets? 11 A. No. 12 Q. Do you recall any discussions regarding 13 separating the assets? 14 A. Yes. 15 Q. When was the first discussion that you 16 can remember? 17 A. I don't recall. 18 Q. Do you recall what that discussion was? 19 A. No. 20 Q. Do you recall who was present during 21 any of these discussions? 22 A. Keep in mind, most of these discussions 23 were telephonic. 24 Q. Okay. 25 A. So, again, I don't remember.</p> | <p>1 Q. Do you recall who was on any of the 2 phone calls? 3 A. Well, certainly Paul and, from time to 4 time, Edward and Sam. I would say Sam less so 5 than -- than Edward. And the -- the Broslow people 6 too. Belaustegui people. 7 Q. Do you recall whether you raised the 8 idea of separating assets or if it was raised to 9 you? 10 A. It might have come from me, mostly 11 because I was fixated on the fact that Edward and 12 Sam had been exonerated. So the Panorama 13 property's a perfect example. Again, I don't 14 remember the two specific entities that Edward and 15 Paul controlled that were the actual owners of the 16 property. My recollection -- and I could stand 17 corrected on this if you show me a document -- is 18 that the split wasn't 50/50; it was either 60/40 or 19 70/30, including, you know, mortgage obligation. 20 We separated Edward's interest, ownership 21 interest, in that so that the property located in 22 Nevada would be a ripe target for the Herbsts and 23 their collection efforts, minus the satisfaction of 24 the underlying mortgage, because they didn't have 25 to then deal with Edward, and Edward was tired of</p> |

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| <p>Page 54</p> <p>1 the litigation, and Edward didn't want to be 2 embroiled in any more litigation with the Herbsts. 3 Judge Adams exonerated him. He wanted out. 4 And this effort was to -- to maintain value, 5 maintain value -- maintain the value of Morabito's 6 ownership interest, while separating the ownership 7 interest of the two individuals who were exonerated 8 by Judge Adams. 9 So going back to the Panorama property, just 10 for illustration purposes, if it was worth a 11 million dollars, but because Edward's ownership 12 interest -- let's just say it was 30 percent as 13 opposed to 50 percent. That means that the best 14 that the Herbsts could do, free and clear of the 15 mortgage, was \$700,000 or Paul's interest in the 16 Panorama property. By virtue of what we did, they 17 now had access to the full million dollar value. 18 Q. Do you recall any of your discussions 19 with Paul Morabito regarding the separation of 20 assets? 21 A. There were many. 22 Q. Do you recall any specific discussions? 23 A. No. 24 Q. Did you represent Edward Bayuk 25 individually?</p> | <p>Page 55</p> <p>1 A. Yes. At that time. Yes. 2 Q. Did you have a retention agreement with 3 Mr. Bayuk? 4 A. I don't believe so. 5 Q. Is it your normal practice to have 6 retention agreements with clients that you 7 represent? 8 A. Usually. 9 Q. Is there a reason why you didn't have 10 one with Mr. Bayuk? 11 A. I don't recall. 12 Q. Did you represent Sam Morabito during 13 this separation of assets? 14 A. I -- I don't remember whether Sam had 15 independent counsel or not. 16 Q. Do you recall if you had a retention 17 agreement with Mr. -- with Mr. Sam Morabito? 18 A. No. 19 Q. No, you don't recall, or no, you do -- 20 A. Did not. 21 Q. Did not have one? 22 A. Correct. To the best of my knowledge. 23 Q. Do you recall any of your discussions 24 with Edward -- with Sam Morabito regarding the 25 separation of assets?</p> |
| <p>Page 56</p> <p>1 A. I don't recall particular 2 conversations. 3 Q. Do you recall the general sense of your 4 discussions? 5 A. Again, it was -- so, you know, I have 6 an ownership interest in property X or in asset X. 7 How am I going to get that out? 8 Q. Other than Paul Morabito, Sam Morabito, 9 and Edward Bayuk, was there anyone else that you 10 discussed the separation of assets with? 11 A. So I mentioned the Belaustegui people. 12 But maybe even before then, Leif Reid. 13 Q. What was your conversation with Leif 14 Reid? 15 MR. GILMORE: I'll ask you not to disclose 16 attorney-client communications -- 17 THE WITNESS: Yeah. 18 MR. GILMORE: -- but you can testify as to 19 nonattorney-client communications. 20 THE WITNESS: We -- we were researching 21 Nevada law on these types of transfers. We were -- 22 we were -- we were spend -- obviously, we weren't 23 Nevada attorneys, so we were researching Nevada 24 law, and we wanted a better understanding of what 25 the -- the, you know, body of caselaw was out</p> | <p>Page 57</p> <p>1 there. So it was more technical nature with -- 2 with -- whether it was Leif or with the Belaustegui 3 firm, although, eventually, the Belaustegui firm 4 got more involved in the mechanics, if you will. 5 We were very cognizant of the claims that 6 are made in this lawsuit now. And we went to great 7 lengths to avoid these claims, which is why -- 8 eventually, you'll get to it because you asked for 9 it -- why we went to Matrix to get an independent 10 third-party appraisal of the so-called Supertanker 11 asset. We just didn't stick a finger in the wind 12 because Nevada law said that you can make these 13 transfers, as long as they're arm's length and for 14 fair market value. That was our understanding of 15 Nevada law. 16 And that's how we tried to arrange each one 17 of these separations, if you will, of the various 18 equity interest. 19 BY MS. PILATOWICZ: 20 Q. When you say the -- and I can never say 21 the name of Mr. Gilmore's firm. 22 A. Belaustegui. 23 Q. -- Belaustegui were involved in more 24 the mechanics of it, what do you mean by that? 25 A. Well, eventually, so as the -- the</p> |

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| <p>1 Lewis & Roca firm transitioned out of 2 representation and Barry Breslow and Mr. Gilmore 3 stepped into the role of primary Nevada counsel, 4 you know, we worked on a variety of issues 5 collaboratively. 6 So when I say they -- they were more -- they 7 got more involved in the mechanics, it wasn't just 8 a matter of giving us their assessment of Nevada 9 law. We were working collaboratively to -- for 10 instance, these -- these settlements or, you know, 11 I recall there was -- you know, there was even some 12 depositions in these -- I want to say that there 13 was a deposition, for instance, in the Moreno case 14 that Mr. Breslow -- 'cause I'm not admitted in 15 Nevada, so we worked very closely with this law 16 firm. 17 Q. Was there any specific work that 18 Mr. Gilmore's law firm did with respect to the 19 separation of assets you've been describing? 20 A. I don't -- I don't think that they were 21 that deep in the weeds. 22 MS. PILATOWICZ: Would you mark this as 23 Exhibit 3, please. 24 The following was marked for Identification: 25 EXHIBIT 3 Purchase and sale agreement</p> | <p>1 dated September 27, 2010 2 BY MS. PILATOWICZ: 3 Q. Mr. Vacco, you've been handed what's 4 been marked as Exhibit 3. Do you recognize 5 Exhibit 3? 6 A. Yes. Generally, I do. 7 Q. And what is Exhibit 3? 8 A. It's a purchase and sale agreement. 9 Q. Did you prepare Exhibit 3? 10 A. My law firm did. 11 Q. Do you know who in your law firm did? 12 A. I don't recall specifically. 13 Q. Did you represent Paul Morabito with 14 respect to this purchase and sale agreement? 15 A. Yes. 16 Q. Did you represent the Arcadia Living 17 Trust dated February 14, 2006, with respect to this 18 purchase and sale agreement? 19 A. Yes. 20 Q. Do you have a retention agreement with 21 the Arcadia Living Trust? 22 A. I don't -- I don't recall. 23 Q. If you reviewed your internal records, 24 would you be able to locate whether you have a 25 retention agreement?</p> |
| Page 60 | Page 61 |
| <p>1 A. Yes. 2 Q. Did you represent Mr. Edward Bayuk with 3 respect to this purchase and sale agreement? 4 A. I don't recall whether Edward had 5 independent counsel look at this or not. I don't 6 recall. 7 Q. Do you recall if you were representing 8 Mr. Bayuk, though? 9 A. On this transaction, I just -- I just 10 don't recall. There's -- there's -- there's a 11 piece of me that says that Edward was consulting 12 counsel in California. 13 Q. Do you have any idea who that counsel 14 would be? 15 A. I'm guessing Mark Lehman. 16 Q. Who's Mark Lehman? 17 A. A lawyer in Los Angeles. 18 Q. Did he work at a firm? 19 A. I think he had his own firm. 20 Q. Okay. Had you worked with Mr. Lehman? 21 A. Did I work with him? 22 Q. Yes. 23 A. What do you mean by that? 24 Q. Did you -- how were you aware of 25 Mr. Lehman?</p> | <p>1 A. Edward or Paul brought him to my 2 attention. 3 Q. Did you represent the Edward William 4 Bayuk Living Trust dated 6/18/2008, with respect to 5 this purchase and sale agreement? 6 A. I've -- I've already said that I 7 don't -- I don't recall. 8 Q. I'm sorry. I was asking you about 9 the -- the trust as opposed to -- 10 A. I'm sorry. 11 Q. -- him individually. 12 A. Yeah. I don't recall. 13 Q. Now, this document represents the 14 transfer of multiple properties -- 15 A. Right. 16 Q. -- one being 371 El Camino Del Mar, 17 another one being 370 Los Olivos, and the other one 18 being 8355 Panorama Drive. 19 Do you recognize those properties? 20 A. I do. 21 Q. What do you -- what was your 22 recollection about who owned the El Camino 23 property? 24 A. Well, I'm looking at the document, so 25 it's refreshed my recollection.</p> |

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| <p>1 Q. Okay.</p> <p>2 A. I mean, the property --</p> <p>3 Q. So who owned it?</p> <p>4 A. -- according to the document, all of</p> <p>5 these -- so it appears as though the El Camino and</p> <p>6 Los Olivos property were both owned, in some</p> <p>7 proportion or percentage, by the Arcadia Living</p> <p>8 Trust and the William Bayuk Living Trust.</p> <p>9 Q. Okay. And how did -- how was it</p> <p>10 determined who would receive which properties</p> <p>11 through this purchase and sale agreement?</p> <p>12 A. Well, so earlier, without this document</p> <p>13 in front of me, I gave you just the rough example</p> <p>14 of the Panorama property in Nevada. So this</p> <p>15 document speaks for itself. But it -- it lays out</p> <p>16 more particularly the logic that I -- that I gave</p> <p>17 you in my -- my example response a few moments ago.</p> <p>18 So as you could see, in the recitals, one --</p> <p>19 one of the big problems here was that Paul and</p> <p>20 Edward, if you will, through their trusts, did not</p> <p>21 own these properties even-steven. They did not own</p> <p>22 them equally.</p> <p>23 So, for instance, the 371 El Camino in</p> <p>24 Laguna Beach was owned 75/25 by -- 75 Morabito, 25</p> <p>25 by Bayuk Trust.</p> | <p>1 Then the next piece of property, the</p> <p>2 373 Los Olivos, was owned 50/50 between the two of</p> <p>3 them but did not have the same value, if you will,</p> <p>4 as the -- the El Camino property.</p> <p>5 And then the -- it appears from this</p> <p>6 agreement that they then individually owned</p> <p>7 interests, two-thirds and one-third, as tenants in</p> <p>8 common in the Panorama Drive property.</p> <p>9 So as you were trying to assess, what did</p> <p>10 the Arcadia Living Trust own, it -- it -- it was --</p> <p>11 so that that could be segregated and -- and put in</p> <p>12 Morabito's name, versus what did the Bayuk Trust --</p> <p>13 and Edward and -- again, was exonerated in Judge</p> <p>14 Adams' decision, what portion of these properties</p> <p>15 did he own so that his interests could be</p> <p>16 separated. It -- it was just a matter of simple</p> <p>17 math based upon independent third-party property</p> <p>18 valuations.</p> <p>19 All of these properties, those three -- so</p> <p>20 let's stick with those three -- all three had</p> <p>21 independent third-party appraisals.</p> <p>22 So we had a fair market value, if you will,</p> <p>23 as determined by a third-party appraiser, for each</p> <p>24 of the properties. We then took the ownership</p> <p>25 interest of each of them, of each of the properties</p> |
| Page 64 | Page 65 |
| <p>1 and of each of the entities, to come up with the</p> <p>2 proportionate value of -- in dollars of -- for both</p> <p>3 the trust -- the Morabito -- the Arcadia Living</p> <p>4 Trust and the Bayuk Trust.</p> <p>5 Q. Was there -- how was it determined that</p> <p>6 the Arcadia Living Trust would get the Reno</p> <p>7 property, and Edward Bayuk's Trust would get the</p> <p>8 California properties?</p> <p>9 A. I -- I mentioned earlier that because</p> <p>10 Edward, either individually or through his trust,</p> <p>11 wanted to, my words, shake the dust of Reno from</p> <p>12 his sandals as a result of Judge Adams' decision</p> <p>13 and get as far away from the Herbsts as possible,</p> <p>14 it made perfect sense, since the judgment was a</p> <p>15 Nevada judgment, that the -- the judgment debtor,</p> <p>16 Paul Morabito, should own the Nevada property.</p> <p>17 Why would we have given the Nevada property</p> <p>18 to Edward, who was looking to cut -- sever his ties</p> <p>19 with Nevada and distance himself from the Herbst</p> <p>20 litigation machine?</p> <p>21 Q. So the decision was made based on it</p> <p>22 being a Nevada judgment and Edward Bayuk not</p> <p>23 wanting to be affiliated with Nevada anymore?</p> <p>24 A. And -- and the Herbsts. He had been</p> <p>25 exonerated. He didn't want to continue to be</p> | <p>1 embroiled.</p> <p>2 If the property -- if the property had</p> <p>3 not -- had been taken out of Edward's name, it was</p> <p>4 clear that, sooner or later, through collection</p> <p>5 efforts on the judgment against Paul, that Edward</p> <p>6 was -- Edward's interest in that property was going</p> <p>7 to be implicated.</p> <p>8 So we made it easier for the Herbsts, if you</p> <p>9 will -- and I know you understand that -- by -- by</p> <p>10 saying that the property in Nevada that is most --</p> <p>11 most reachable by the Herbsts, belongs to the</p> <p>12 judgment debtor.</p> <p>13 Q. Who retained the appraisers to appraise</p> <p>14 the properties?</p> <p>15 A. So do you mean who found them?</p> <p>16 Q. Yes. Who found them?</p> <p>17 A. I -- I don't recall. I want to say</p> <p>18 that -- that it strikes me that the then sheriff --</p> <p>19 I don't know if he still is or not, but the sheriff</p> <p>20 of Washoe County, Sheriff Haley, recommended the</p> <p>21 appraiser for the Reno property, and I don't know</p> <p>22 who came up with the appraiser for the California</p> <p>23 properties.</p> <p>24 Q. Did you have any conversations with the</p> <p>25 appraisers?</p> |

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| <p>1 A. Yes, I did.</p> <p>2 Q. What was your conversation with --</p> <p>3 let's start with the appraiser for the Nevada</p> <p>4 property. Do you recall specifically who that was?</p> <p>5 A. I don't.</p> <p>6 Q. Okay. Do you recall having any</p> <p>7 conversations with the appraiser for the Reno</p> <p>8 property?</p> <p>9 A. I -- I would have had a conversation</p> <p>10 with both appraisers, just giving them the general</p> <p>11 outlines of -- of what we were looking for and that</p> <p>12 was, you know, a comparable fair market value for</p> <p>13 these properties.</p> <p>14 Q. Do you recall if it was somebody from</p> <p>15 your office who retained the appraisers?</p> <p>16 A. I don't remember.</p> <p>17 Q. Okay. So you don't recall if it was</p> <p>18 Edward Bayuk or Paul Morabito?</p> <p>19 A. I don't remember. I don't remember</p> <p>20 how -- how they were paid. I just -- I remember --</p> <p>21 I do -- so especially the Reno appraiser, because</p> <p>22 I -- I seem to remember a conversation with him</p> <p>23 about -- there was a -- an auxiliary building that</p> <p>24 wasn't finished, and what sticks out in my mind, a</p> <p>25 conversation with him about how the -- you know, he</p> | <p>1 was coming in a little bit lower on the value</p> <p>2 because of the unfinished nature of the -- the</p> <p>3 auxiliary -- auxiliary building.</p> <p>4 Q. Was this an auxiliary building that was</p> <p>5 on the Panorama property?</p> <p>6 A. Yeah. Yes.</p> <p>7 MS. PILATOWICZ: Okay.</p> <p>8 The following was marked for Identification:</p> <p>9 EXHIBIT 4 First amendment to purchase and</p> <p>10 sale agreement dated</p> <p>11 September 28, 2010</p> <p>12 BY MS. PILATOWICZ:</p> <p>13 Q. Mr. Vacco, you've been handed what's</p> <p>14 been marked Exhibit 4. Do you recognize Exhibit 4?</p> <p>15 A. So I generally recognize -- recognize</p> <p>16 it. I -- yes.</p> <p>17 Q. What is it?</p> <p>18 A. It's a first amendment to the purchase</p> <p>19 and sale agreement, which is Exhibit 3 in this</p> <p>20 deposition.</p> <p>21 Q. Do you recall the reason for the first</p> <p>22 amendment to the purchase agreement?</p> <p>23 A. I don't. But, I mean, it speaks for</p> <p>24 itself as I'm reading it.</p> <p>25 Q. It indicates that there's a change in</p> |
| Page 68 | Page 69 |
| <p>1 the fair market value based on appraisals that were</p> <p>2 conducted in Section B -- well, in Section 2? Do</p> <p>3 you see that?</p> <p>4 A. I do.</p> <p>5 Q. Do you recall where these amounts came</p> <p>6 from in number 2?</p> <p>7 A. Just, I mean, reading paragraph 2, it</p> <p>8 says MAI appraisals were conducted. So these, I'm</p> <p>9 assuming -- I -- I don't know where they came from.</p> <p>10 Q. Do you know where the values in the</p> <p>11 original purchase and sale agreement came from?</p> <p>12 A. I don't. I thought they were based on</p> <p>13 the appraisals.</p> <p>14 Q. There's a reference in number 3 to the</p> <p>15 deletion of a promissory note based on the new</p> <p>16 appraisals. Do you see that?</p> <p>17 A. I do.</p> <p>18 Q. Do you know why there was supposed to</p> <p>19 be an exchange of a promissory note as opposed to a</p> <p>20 cash payment in the original purchase agreement?</p> <p>21 A. So I'm just referring back to Exhibit 3</p> <p>22 to help refresh my recollection here. So</p> <p>23 Exhibit 3, which was the purchase and sale</p> <p>24 agreement, in paragraph D, it references the</p> <p>25 theater equipment that was personalty inside the</p> | <p>1 Panorama Drive property valued at approximately</p> <p>2 \$300,000.</p> <p>3 So the promissory note that's referenced in</p> <p>4 paragraph C of \$500,000 represents the value of the</p> <p>5 equipment of \$300,000, plus, without doing the</p> <p>6 math, the differential of the dollar value of the</p> <p>7 respective interest of these three properties. So,</p> <p>8 in other words, when -- when we had added up, you</p> <p>9 know, the property -- the total amount of the</p> <p>10 properties, the value, the net value, so it would</p> <p>11 have been net value, deducting the mortgage</p> <p>12 liabilities. So the net equity value of each of</p> <p>13 the three, and then you took each owners'</p> <p>14 respective interest, whether it was one-third or</p> <p>15 two-thirds, 75/25, 50/50, you came up with</p> <p>16 Morabito's equity holdings in the whole and Bayuk's</p> <p>17 equity interest in the whole.</p> <p>18 And without doing the math, the note looked</p> <p>19 like there was probably \$200,000 differential.</p> <p>20 In other words, Bayuk was getting \$200,000</p> <p>21 more in value than Morabito was getting, and that's</p> <p>22 why Bayuk then entered into the note, which also</p> <p>23 then included the equipment.</p> <p>24 Q. Do you know why it was done through a</p> <p>25 note instead of a cash payment?</p> |

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| <p>1 A. I don't recall.</p> <p>2 Q. Do you know if Mr. Bayuk had the funds</p> <p>3 to make a cash payment?</p> <p>4 A. I don't -- I don't -- I don't know.</p> <p>5 The following was marked for identification:</p> <p>6 EXHIBIT 5 Invoices, several pages</p> <p>7 BY MS. PILATOWICZ:</p> <p>8 Q. Mr. Vacco, you've been handed what's</p> <p>9 been marked as Exhibit 5. Do you recognize</p> <p>10 generally what Exhibit 5 is?</p> <p>11 A. Yes.</p> <p>12 Q. What is Exhibit 5?</p> <p>13 A. It's a Lippes Mathias Wexler Friedman</p> <p>14 invoice dated October 5th, 2010, for professional</p> <p>15 services rendered through the month of September</p> <p>16 2010.</p> <p>17 Q. Okay. I'll represent to you that the</p> <p>18 entire exhibit is a group of invoices --</p> <p>19 A. Okay.</p> <p>20 Q. -- over different periods --</p> <p>21 A. I'm sorry.</p> <p>22 Q. -- that we'll talk about at various</p> <p>23 times.</p> <p>24 But can you --</p> <p>25 A. So that -- okay. Let me just -- so</p> | <p>1 it's not just the October --</p> <p>2 Q. Correct.</p> <p>3 A. -- 2010 invoice. Okay.</p> <p>4 Q. Can you turn to page 7 of the -- of</p> <p>5 Exhibit 5? Do you recall at some point the</p> <p>6 Panorama property was sold to a third party?</p> <p>7 A. You want me to look at page 7?</p> <p>8 Q. It's page 2 of Bill 5 -- 45028 or</p> <p>9 page 7 of the exhibit.</p> <p>10 MR. GILMORE: There's a Bates stamp in the</p> <p>11 top corner too.</p> <p>12 MS. PILATOWICZ: Correct. The --</p> <p>13 THE WITNESS: So 000844?</p> <p>14 BY MS. PILATOWICZ:</p> <p>15 Q. Correct.</p> <p>16 A. Okay. What do you want me to look at?</p> <p>17 Q. Do you recall that in 2012, the</p> <p>18 Panorama property was listed for sale?</p> <p>19 A. Yes. Pursuant to the settlement</p> <p>20 agreement.</p> <p>21 Q. What was your involvement in the</p> <p>22 listing of the sale?</p> <p>23 A. So I might have misspoke earlier. When</p> <p>24 I invoked Sheriff Haley, it's possible that it was</p> <p>25 Sheriff Haley who recommended the realtor to sell</p> |
| Page 72 | Page 73 |
| <p>1 the property as opposed to the appraiser.</p> <p>2 Q. Okay.</p> <p>3 A. So my role was through the course of</p> <p>4 the settlement agreement. I mean, this was selling</p> <p>5 the property, the Panorama property, that Morabito</p> <p>6 or his trust now owned a hundred percent of,</p> <p>7 selling it was a condition of the -- the settlement</p> <p>8 agreement. Herbst wanted to monetize it.</p> <p>9 Q. Do you know why there's a reference to</p> <p>10 marketing it without pictures? On the last time</p> <p>11 entry dated 3/28/12, looks like the biller's RMS,</p> <p>12 who I believe is Richard Scherer?</p> <p>13 A. Richard Scherer was an associate in the</p> <p>14 firm.</p> <p>15 Paul, a very private individual, did not</p> <p>16 want photos of the interior of the house, and I</p> <p>17 don't remember whether there was furniture then in</p> <p>18 the house or not. I don't remember the disposition</p> <p>19 of the furniture. By, primarily, Paul did not want</p> <p>20 photos of the interior of his home in Reno exposed</p> <p>21 on the Internet, especially since there was nobody</p> <p>22 living there.</p> <p>23 I seem to recall, in the back of my mind,</p> <p>24 that there was some unwanted -- I don't want to say</p> <p>25 it was a break-in, but there -- there was -- the</p> | <p>1 home was vacant now. So Paul didn't want the</p> <p>2 interior of the home displayed on the Internet, and</p> <p>3 maybe it was because there was no furniture in it.</p> <p>4 But as you can see, Richard also spoke to</p> <p>5 John Desmond about it. So whatever was decided was</p> <p>6 conveyed to John Desmond contemporaneous with this</p> <p>7 decision. And Desmond was representing at that</p> <p>8 time, as you know, the Herbsts.</p> <p>9 Q. Mm-hmm. Can you turn to page 5 of</p> <p>10 Exhibit 5, which is Bates number -- Bates number</p> <p>11 536?</p> <p>12 A. Okay.</p> <p>13 Q. And there's a list of disbursements.</p> <p>14 A. Okay.</p> <p>15 Q. Do you see on 9/22/10, there's a</p> <p>16 disbursements to Alves Appraisal?</p> <p>17 A. Alves Appraisal's, yes.</p> <p>18 Q. Alves Appraisal?</p> <p>19 Do you know who that is?</p> <p>20 A. I -- I would just be guessing. It's</p> <p>21 one of the appraisers for the properties. Whether</p> <p>22 it was the Reno property or the California</p> <p>23 properties, I don't recall.</p> <p>24 Q. Do you know why you were paying them</p> <p>25 directly through your firm?</p> |

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| <p>1 A. I don't.</p> <p>2 Q. And the next entry is 9/27/10, for the</p> <p>3 retainer for Mark Lehman?</p> <p>4 A. Right.</p> <p>5 Q. Is that the attorney that you</p> <p>6 represented before you believe may have been</p> <p>7 represented Ed Bayuk?</p> <p>8 A. Same person. Right.</p> <p>9 Q. Okay. Do you know why there's a</p> <p>10 \$25,000 retainer being paid through your firm to</p> <p>11 Mr. Lehman?</p> <p>12 A. I don't recall.</p> <p>13 Q. And the next entry is 9/27/10, to</p> <p>14 Justmann & Associates. Do you know who</p> <p>15 Justmann & Associates are?</p> <p>16 A. I don't. I -- I don't. I'm -- I'm</p> <p>17 thinking that they're appraisers as well. I just</p> <p>18 don't -- I don't know.</p> <p>19 Q. Do you know why Justmann & Associates</p> <p>20 would be paid through your firm?</p> <p>21 A. I don't recall.</p> <p>22 Q. If you look back at Exhibit 4, which</p> <p>23 was the amended and restated --</p> <p>24 A. Right.</p> <p>25 Q. -- amended and restated agreement,</p> | <p>1 there was a payment that was to be made from Bayuk</p> <p>2 to Morabito -- let me make sure I have the parties</p> <p>3 right.</p> <p>4 Under Section 3, there's a payment of</p> <p>5 \$60,117 from Ed Bayuk to the Arcadia Trust at</p> <p>6 closing?</p> <p>7 A. Correct.</p> <p>8 Q. Did you have any -- did that payment go</p> <p>9 through your trust account?</p> <p>10 A. I don't recall.</p> <p>11 Q. Okay. Do you normally at closings have</p> <p>12 clients make payments through your trust account?</p> <p>13 A. I don't do real estate, so I really</p> <p>14 don't know the answer to that.</p> <p>15 MS. PILATOWICZ: Okay.</p> <p>16 The following was marked for identification:</p> <p>17 EXHIBIT 6 Membership interest transfer</p> <p>18 agreement dated October 1,</p> <p>19 2010</p> <p>20 MR. GILMORE: It's noon. Is this a good</p> <p>21 time? Do you want to go through this or -- just</p> <p>22 putting that on the radar.</p> <p>23 MS. PILATOWICZ: We can take a break right</p> <p>24 now. We're moving into a different subject, so we</p> <p>25 can go off the record.</p> |
| Page 76 | Page 77 |
| <p>1 (Discussion off the record.)</p> <p>2 (A luncheon recess was taken.)</p> <p>3 BY MS. PILATOWICZ:</p> <p>4 Q. Back on the record. Mr. Vacco, we're</p> <p>5 back from our lunch break. Do you understand that</p> <p>6 you're still under the same --</p> <p>7 A. Yes.</p> <p>8 Q. -- penalty of perjury that we discussed</p> <p>9 previously?</p> <p>10 A. Still under oath.</p> <p>11 Q. Prior to the break, I handed you what</p> <p>12 was marked as Exhibit 6. Do you recognize</p> <p>13 Exhibit 6?</p> <p>14 A. Generally, yes.</p> <p>15 Q. What is Exhibit 6?</p> <p>16 A. It's a membership interest transfer</p> <p>17 agreement.</p> <p>18 Q. For Baruk Properties, LLC?</p> <p>19 A. Correct.</p> <p>20 Q. Did you prepare this membership</p> <p>21 interest transfer agreement?</p> <p>22 A. Somebody in my law firm did.</p> <p>23 Q. Do you know who in your law firm did?</p> <p>24 A. No.</p> <p>25 Q. Did you represent Arcadia Living Trust</p> | <p>1 with respect to this membership interest transfer</p> <p>2 agreement?</p> <p>3 A. And/or Paul A. Morabito, yes.</p> <p>4 Q. Would you normally have a separate</p> <p>5 retention agreement for an individual and their</p> <p>6 trust, or would you put them all under one?</p> <p>7 A. In this instance, I would probably</p> <p>8 be -- it was probably a joint retainer.</p> <p>9 Q. Did you represent Edward Bayuk with</p> <p>10 respect to this membership -- membership interest</p> <p>11 transfer agreement?</p> <p>12 A. I don't recall.</p> <p>13 Q. What about the Edward William Bayuk</p> <p>14 Living Trust?</p> <p>15 A. I don't recall.</p> <p>16 Q. Do you know if either of those were</p> <p>17 represented by outside counsel?</p> <p>18 A. I -- I don't recall.</p> <p>19 Q. Can you tell me what the Baruk</p> <p>20 Properties, LLC, is?</p> <p>21 A. Well, this is refreshing my</p> <p>22 recollection. It was an LLC owned in equal</p> <p>23 membership interest by the Bayuk Trust and the</p> <p>24 Arcadia Living Trust. And the assets of the LLC,</p> <p>25 Baruk Properties, LLC, were properties in</p> |

| Page 78 | Page 79 |
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| <p>1 California.</p> <p>2 Q. Do you know where you got that list of</p> <p>3 properties that's in the fifth paragraph of the</p> <p>4 membership interest transfer agreement?</p> <p>5 A. From Edward or Paul.</p> <p>6 Q. And that's your understanding of all of</p> <p>7 the assets of Baruk Properties, LLC?</p> <p>8 A. I don't recall if it owned other assets</p> <p>9 besides this. Besides those three.</p> <p>10 Q. Do you know if there's a reason why</p> <p>11 other properties owned by Baruk Properties, LLC,</p> <p>12 wouldn't be in this list?</p> <p>13 A. There probably wouldn't be any reason</p> <p>14 to not include them, so, I mean, I -- I can't tell</p> <p>15 you definitively, as I look at this document,</p> <p>16 whether there were other properties. I don't</p> <p>17 believe there were.</p> <p>18 MR. GILMORE: Are we talking real</p> <p>19 properties?</p> <p>20 MS. PILATOWICZ: Real properties.</p> <p>21 BY MS. PILATOWICZ:</p> <p>22 Q. 1 point -- Section 1.1 of the agreement</p> <p>23 has a -- a transfer of the property -- of the</p> <p>24 interest in LLC in return for a promissory note in</p> <p>25 the amount of \$1,617,050.</p> | <p>1 A. Correct.</p> <p>2 Q. Do you see that?</p> <p>3 Do you know how that number was arrived at?</p> <p>4 A. I believe, much like the other</p> <p>5 properties that we've discussed, there was an</p> <p>6 appraisal of these three, and because the</p> <p>7 membership interest was split down the middle,</p> <p>8 50/50, it was easier to arrive at the Arcadia</p> <p>9 Living Trust interest versus the Bayuk Trust</p> <p>10 interest net of any encumbrances.</p> <p>11 So the \$1.617 million would represent the</p> <p>12 Arcadia Living Trust value in the collective --</p> <p>13 the -- the three collective properties together.</p> <p>14 Q. When you say "easier to arrive at the</p> <p>15 Arcadia Trust interest than the Bayuk Trust</p> <p>16 interest," what do you mean?</p> <p>17 A. I -- I either misspoke or you</p> <p>18 misunderstood me. So in the other properties that</p> <p>19 we talked about, where you had a 75/25 split, a</p> <p>20 50/50 split as individuals as opposed to amongst</p> <p>21 the trust, and then I think there was a two-thirds,</p> <p>22 one thirds, individually, a 75/25 and a 50/50, just</p> <p>23 made the math more difficult based upon the</p> <p>24 ownership percentages.</p> <p>25 Here, the math was much easier. You had an</p> |
| Page 80 | Page 81 |
| <p>1 appraisal for all three properties, and you netted</p> <p>2 out -- frankly, I don't recall. I don't see any</p> <p>3 reference here to any debt.</p> <p>4 So it -- it strikes me, just looking at this</p> <p>5 document, that this \$1.617 million was a 50 percent</p> <p>6 interest in the value of all three properties</p> <p>7 combined.</p> <p>8 Q. Okay. If there were other properties</p> <p>9 with value not included -- other properties owned</p> <p>10 by Baruk Properties, LLC, with value not included,</p> <p>11 would that increase what should have been paid for</p> <p>12 the membership interest?</p> <p>13 MR. GILMORE: Object to form.</p> <p>14 THE WITNESS: Logically speaking, yes. So,</p> <p>15 earlier -- I don't want to confuse you with my</p> <p>16 earlier answer. I -- as I sit here, looking at</p> <p>17 this document, I say that these three properties</p> <p>18 are the sum total of the assets of the -- of Baruk</p> <p>19 Properties, LLC. But I just don't recall that with</p> <p>20 precise clarity.</p> <p>21 BY MS. PILATOWICZ:</p> <p>22 Q. Do you know why the interest in Baruk</p> <p>23 Properties went to the Bayuk Living Trust as</p> <p>24 opposed to the Arcadia Trust?</p> <p>25 A. No, I don't.</p> | <p>1 Well, because, as I think about it, the --</p> <p>2 the ownership of the properties wasn't going to</p> <p>3 change. The ownership of the properties was going</p> <p>4 to stay in the name of the Baruk Properties, LLC.</p> <p>5 Q. Okay. Do you know why the Bayuk Trust</p> <p>6 obtained all the interest in Baruk Properties, as</p> <p>7 opposed to the Arcadia Trust obtaining the interest</p> <p>8 in Baruk Properties?</p> <p>9 A. 'Cause pursuant to this agreement, the</p> <p>10 Arcadia Living Trust is surrendering -- is</p> <p>11 transferring its interest to the Bayuk Living</p> <p>12 Trust.</p> <p>13 Q. Do you know how it was decided the</p> <p>14 interest would go to the Bayuk Living Trust?</p> <p>15 A. I don't.</p> <p>16 Q. Do you know if appraisers were hired</p> <p>17 with respect to these properties?</p> <p>18 A. I can't say with absolute certainty,</p> <p>19 but that was the standard operating procedure. Get</p> <p>20 a third-party independent value, appraised value of</p> <p>21 the properties. So I can't tell you whether it was</p> <p>22 Alves. We saw, you know, in the invoice Alves and</p> <p>23 Justmann and whatever.</p> <p>24 I -- I -- I'm confident that there were</p> <p>25 appraisals done. I don't know who did them.</p> |

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| <p style="text-align: right;">Page 82</p> <p>1 Q. Had you worked with Alves before these</p> <p>2 transactions?</p> <p>3 A. No.</p> <p>4 Q. Had you worked with Justmann before</p> <p>5 these transactions?</p> <p>6 A. No.</p> <p>7 Q. Okay. In Section 1.1 there's a</p> <p>8 reference to the 1.6 -- approximate \$1.6 million</p> <p>9 note.</p> <p>10 Do you know why there was a note in</p> <p>11 consideration instead of a cash payment?</p> <p>12 A. I don't.</p> <p>13 Q. Did you discuss Mr. Bayuk's ability to</p> <p>14 make a cash payment?</p> <p>15 A. I don't believe that we negotiated the</p> <p>16 terms, so the -- whether he had the wherewithal to</p> <p>17 make a \$1.6 million cash payment or not was unknown</p> <p>18 to me.</p> <p>19 Q. Negotiated the terms of the agreement</p> <p>20 or the promissory note?</p> <p>21 A. The agreement.</p> <p>22 Q. Who negotiated the terms of the</p> <p>23 agreement?</p> <p>24 A. I didn't.</p> <p>25 Q. Do you know who did?</p> | <p style="text-align: right;">Page 83</p> <p>1 A. No.</p> <p>2 Q. Who gave you the information as to --</p> <p>3 or do you know who gave your office information as</p> <p>4 to what terms should go in the membership interest</p> <p>5 transfer agreement?</p> <p>6 A. My assumption is Paul and Edward both.</p> <p>7 Q. Okay. Who in your office could have</p> <p>8 drafted this transfer agreement? And --</p> <p>9 A. Chris -- Chris --</p> <p>10 Q. -- and let me rephrase. Sorry.</p> <p>11 I'm not talking about ability. Who do you</p> <p>12 think, of the people in your office, may have</p> <p>13 drafted this?</p> <p>14 A. Yeah. I understood that. Christian</p> <p>15 Lovelace.</p> <p>16 Q. Anyone else?</p> <p>17 A. Based upon the invoices embedded in</p> <p>18 Exhibit 5, it could have been, in addition to</p> <p>19 Lovelace, Paul Wells, who's out -- in our real</p> <p>20 estate group, may have assisted, or Greg T.</p> <p>21 Ivancic, who is also in our corporate group.</p> <p>22 MS. PILATOWICZ: Okay.</p> <p>23 The following was marked for Identification:</p> <p>24 EXHIBIT 7 Promissory note dated</p> <p>25 October 1, 2010</p> |
| <p style="text-align: right;">Page 84</p> <p>1 BY MS. PILATOWICZ:</p> <p>2 Q. Mr. Vacco, you've been handed what's</p> <p>3 been marked as Exhibit 7. Do you recognize</p> <p>4 Exhibit 7?</p> <p>5 A. Yes.</p> <p>6 Q. What is Exhibit 7?</p> <p>7 A. It's the promissory note.</p> <p>8 Q. The promissory note --</p> <p>9 A. The promissory note that's referenced</p> <p>10 in Exhibit 6.</p> <p>11 Q. Okay. So for the transfer of the</p> <p>12 interests in Baruk Properties?</p> <p>13 A. Yes.</p> <p>14 Q. Did you draft this note?</p> <p>15 A. I believe our office did.</p> <p>16 Q. Do you know who in your office did?</p> <p>17 A. No.</p> <p>18 Q. Do you believe it may have been</p> <p>19 Christian Lovelace?</p> <p>20 A. It -- it's -- it's possible.</p> <p>21 Q. Do you know who negotiated the</p> <p>22 promissory note?</p> <p>23 A. No.</p> <p>24 Q. Do you know how your office got the</p> <p>25 terms of the promissory note?</p> | <p style="text-align: right;">Page 85</p> <p>1 A. No. I don't recall.</p> <p>2 Q. Did your office have any involvement</p> <p>3 with respect to following up on payments on the</p> <p>4 promissory note?</p> <p>5 MR. GILMORE: Object to form.</p> <p>6 THE WITNESS: I -- I don't recall. I just</p> <p>7 don't recall any specific follow-up regarding the</p> <p>8 monthly payments. I don't recall it being brought</p> <p>9 to my attention that it was not happening.</p> <p>10 BY MS. PILATOWICZ:</p> <p>11 Q. Okay. Are you aware of any payments</p> <p>12 that were made?</p> <p>13 A. That were made?</p> <p>14 Q. Yes.</p> <p>15 A. So my -- my recollection on this is --</p> <p>16 is fuzzy as to whether or not there was follow-up</p> <p>17 or -- my sense is that payments were made, yes.</p> <p>18 Q. What gave -- what gives you a sense</p> <p>19 that payments were made?</p> <p>20 A. Because Edward from time to time would</p> <p>21 ask me about when the payment was due.</p> <p>22 Q. Did the payments go through your</p> <p>23 office?</p> <p>24 A. No. Certainly not.</p> <p>25 The following was marked for Identification:</p> |

| Page 86 | Page 87 |
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| <p>1 EXHIBIT 8 Membership interest purchase 2 agreement dated October 6, 3 2010, with resignation 4 BY MS. PILATOWICZ: 5 Q. Mr. Vacco, you've been handed what's 6 been marked as Exhibit 8. Do you recognize 7 Exhibit 8? 8 A. Generally, I recognize it, yes. 9 Q. What is Exhibit 8? 10 A. It is a membership interest purchase 11 agreement. 12 Q. What is it a membership interest 13 purchase agreement for? 14 A. watchmyblock LLC. 15 Q. Do you know what watchmyblock LLC is? 16 A. I don't know if it still exists, but it 17 was a -- an LLC formed by Edward and Paul at some 18 point in time. I don't recall when. 19 I mean, are you asking me what watchmyblock 20 is? 21 Q. Yes. Do you know what it is? 22 A. It was a concept. 23 Q. What was the concept? 24 A. I will do it a disservice as I try to 25 describe it, but, essentially, it was going to be</p> | <p>1 an interactive social media connected, if you will, 2 neighborhood block club, if you will. 3 So, you know, in the old days, when -- I'm 4 much older than you, but when I was a kid, you 5 know, people watched out for themselves by, you 6 know, kind of shouting off the front porch. 7 Watched out for their neighborhood. 8 So the concept here was to protect the 9 neighborhood, protect the block, if you will, 10 through interactive social media. 11 Q. Do you know if it -- if watchmyblock 12 LLC owned anything? 13 A. It owned zero, other than the idea, 14 which, you know, was at that point in time just an 15 idea. 16 Q. Did you incorporate watchmyblock LLC in 17 New York? 18 A. I don't know if we incorporated it. I 19 don't recall that. It may have been a preexisting 20 entity. My sense is that it was a preexisting 21 entity. In other words, preceded our 22 representation of Morabito interest. I do not 23 believe it's a New York LLC. 24 Q. Do you know if you're listed as the 25 resident agent for a New York LLC?</p> |
| Page 88 | Page 89 |
| <p>1 A. I don't. But if you're looking at 2 corporate documents, and so if you're -- if you 3 know that's been incorporated in New York, then 4 show me something to refresh my recollection, but I 5 just don't recall. 6 Q. Okay. Do you know how you came up with 7 the value of the -- 8 Well, let me back up. Did you draft this 9 agreement? 10 A. Somebody in my office did. 11 Q. Do you know who in your office? 12 A. I don't. 13 Q. Do you know who negotiated the terms of 14 this agreement? 15 A. I do not. 16 Q. Do you know how the purchase price of 17 \$1,000 was arrived at? 18 A. I don't, but what I do know is that 19 this wasn't -- the LLC owned an idea. It owned no 20 assets. It owned no trademarks. It owned no 21 patent rights. It owned an amorphous idea. 22 Frankly, as you research Paul A. Morabito, 23 you'll find that there's a plethora of LLCs, 24 because every time he had a business idea, he 25 formed an LLC. Those LLCs, much like this one,</p> | <p>1 were hollow shells, virtually worthless. 2 Q. Do you know why, if it was a hollow 3 shell, there was a purchase agreement to transfer 4 the interest in it? 5 A. Because I believe it was at its nascent 6 stage, where there was some sense that, sooner or 7 later, it was going to become a robust social media 8 security device for neighborhoods. 9 Q. Did you have that belief, or that was 10 just conveyed to you? 11 A. Did I have what belief? 12 Q. That this was on the verge of 13 potentially being something at some point? That 14 that -- 15 A. Well, on the verge of being something 16 at some point is kind of contradictory. I -- I 17 understood the concept. It was an interesting 18 concept. But even though my -- my residence is 19 Erie County, State of New York, I'm intellectually 20 from Missouri. Show me. So -- the Show Me State. 21 Q. Mm-hmm. 22 A. So there was a lot of ideas. A lot of 23 concepts. But most, 99.9 percent of the ideas and 24 concepts never, ever came to fruition. 25 Q. Do you know if there were other LLCs</p> |

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| <p style="text-align: right;">Page 90</p> <p>1 that were in existence, at the time that you were 2 doing the restructuring of Morabito's assets, that 3 you didn't do transfer agreements for? 4 A. That's a -- I don't mean to be 5 critical, but there's a lot of qualifications in 6 that -- in that sentence, starting with during -- 7 during these transfers. 8 Q. Okay. So -- 9 A. So I can't -- 10 Q. -- between -- 11 A. I can't -- I can't, with any sense of 12 clarity, say precisely when. So, you know, 13 probably not during these transfers. 14 Q. Okay. Between September 1st of 2010 15 and September 30th of 2010, did someone from your 16 office do an investigation as to what LLCs 17 Mr. Morabito had an interest in? 18 A. No. 19 Q. Okay. How did you decide -- 20 A. Not that I recall. 21 Q. Okay. How did you decide what entities 22 to create membership transfer interest -- 23 membership interest transfer agreements for? 24 A. I didn't decide any of that. 25 Q. Who gave you that information?</p> | <p style="text-align: right;">Page 91</p> <p>1 A. The membership interest direction would 2 have come from Paul and/or Edward. 3 Q. Were there any entities that they 4 brought to you that you didn't do a membership 5 interest transfer agreement for? 6 A. I -- I don't recall. 7 And, by the way, I -- I didn't mean my 8 answer three answers ago to be snarky or snide. 9 But it is -- there was a big time frame there and a 10 lot of different elements, so I -- I apologize 11 for -- 12 Q. No. That's -- that's fair. I -- I 13 will happily rephrase my question anytime -- 14 A. Okay. 15 Q. -- you misunderstand it or think it 16 needs to be narrowed. Just go ahead and ask me. 17 The following was marked for Identification: 18 EXHIBIT 9 Four-page document 19 THE WITNESS: Thank you. 20 BY MS. PILATOWICZ: 21 Q. Mr. Vacco, you've been handed what's 22 been marked as Exhibit 9. Do you recognize 23 Exhibit 9? 24 A. I've seen it before, sure. 25 Q. Do you know where you've seen it?</p> |
| <p style="text-align: right;">Page 92</p> <p>1 A. In our files. 2 Q. Do you know who created it? 3 A. Well, so just for the record, 9 is -- 4 is one, two, three, four pages. The first page 5 looks like a reconciliation -- for lack of a better 6 way to describe it, a reconciliation page. And 7 then the -- the other -- the remaining Bates 8 number 00002 through 4 appear to be an amortization 9 schedule. 10 So, frankly, I -- I -- they were separately 11 created. So you've -- you've made it one exhibit, 12 but in my mind, they're -- they're not necessarily 13 connected. 14 Q. Okay. Let's talk about the first page 15 of Exhibit 9. Do you know who created the first 16 page of Exhibit 9? 17 A. This is -- this is a document provided 18 to us by Paul A. Morabito. 19 Q. Do you know if Paul Morabito created 20 it? 21 A. I don't. I know that we did not. 22 Q. There's -- about two-thirds of the way 23 down the page -- 24 A. Right. 25 Q. -- under -- between Baruk Properties</p> | <p style="text-align: right;">Page 93</p> <p>1 and Superpumper Properties, it says net amount owed 2 by Edward Bayuk to Paul Morabito, see 3 reconciliation, below. 4 A. Right. 5 Q. Do you know what that is referring to? 6 A. Well, we've seen that, so the 7 corresponding amount is \$1.617 million that we've 8 seen in the note, which was Exhibit 7 and that we 9 saw referred to in -- in prior exhibits. What was 10 it? 4 or 5, or 3 and 4. I'm sorry. 3 and 4. 11 Q. Okay. Do you know what the actual 12 reconciliation that he's referring to, though, is? 13 A. See reconciliation, below. So this may 14 be more graphically than what I tried to do earlier 15 is -- is the reconciliation around -- starting, 16 first and foremost -- I know I'm repeating myself, 17 but starting first and foremost with the appraised 18 value of these properties and then separating the 19 debt, which would be mortgages. 20 So I'm looking under bullet point number 1. 21 Personal residences. So, for instance, the net 22 value for Los Olivos, appraised value minus the 23 mortgage was 834,954. Same amount for El Camino 24 was -- the same category, net equity for El Camino 25 was 1,078,641. And for Panorama Drive, 3,271,136.</p> |

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1 Then, as you can see, working down on the
2 sheet, the next column was for each of those
3 properties to divvy up the equity interest pursuant
4 to the corresponding ownership interest of Morabito
5 and Bayak.

6 So, you know, the -- the -- the nicety of
7 the trust was left out. But the trust actually
8 owned -- well, the trust didn't own Panorama, but
9 the trust owned the California properties. The
10 respective trust. So you come up with the --
11 the -- the net net value owned by each interest of
12 these collective properties.

13 Then you implicated the -- the Baruk
14 Properties, which we've talked about now, which was
15 the Mary Fleming Circle and the 1461 Glenneyre in
16 Laguna Beach. Same methodology. And the math
17 comes up to the \$1.6 million.

18 Q. Mm-hmm.

19 A. I don't know -- well, so
20 reconciliation, below, so then there was the
21 Superpumper Properties, LLC. These were known in
22 my -- my world as the card lock properties. They
23 were all in Nevada, so you can see the addresses.

24 Frankly, this morning, that -- you know,
25 when I was still lying in bed thinking about this,

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1 Q. Similar -- a document that looks like
2 Exhibit 9 but has something else below where it
3 cuts off now?

4 A. I don't -- I don't know. I don't
5 recall.

6 Q. Do you know when Paul Morabito provided
7 this to your office?

8 A. I would be guessing. But, having said
9 that, I mean, the numbers, especially, you know,
10 the numbers under bullet point 1 and 2 we've seen
11 embedded in these documents, so I would say that
12 it's contemporaneous with these documents.

13 And there has to be some -- some similar
14 documents that we've -- you've asked me to testify
15 to for the personal residence and the Baruk
16 Properties, I believe similar documents exist for
17 Superpumper Properties, LLC.

18 Q. Do you know if your office drafted
19 those documents?

20 A. If they exist, I would say yes, but if
21 you don't have them, then they must not exist.

22 Q. Do you know if the BEVA Compass
23 mortgage that is referenced is a loan that was made
24 to Superpumper Properties, LLC?

25 A. I believe, yes. As opposed to

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1 I was trying to figure out what card lock means. I
2 don't know. You know, I -- I think you had to
3 like, you know, put a -- like a credit card into a
4 property to go in and get some gas or fuel or
5 whatever.

6 But these were properties that were owned by
7 Superpumper Properties, LLC.

8 And you can see that they were appraised for
9 BEVA, so boy, boy, victor, apple, Compass Bank, I
10 think there was indebtedness on this property. And
11 that debt was as recent as February of 2010.

12 So there's -- to further the reconciliation,
13 so this is an independent reconciliation from the
14 1.6, because as you can see now, Sam and Edward are
15 partners with Paul.

16 So when it says see reconciliation, below, I
17 don't know what it means.

18 Q. Okay.

19 A. A long explanation to get -- I thought
20 I was going to, you know, just work down the math
21 and I was going to get there, but it didn't happen.

22 Q. Have you ever seen a document that has
23 anything below -- that -- that has more information
24 on it than Exhibit 9?

25 A. You mean similar to this document?

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1 Superpumper, Inc.

2 Q. Correct.

3 A. But there was a comprehensive -- I know
4 that we're kind of now morphing into the next
5 topic, but there was a comprehensive banking
6 relationship between Superpumper, Inc., and BBVS as
7 well. BB -- BEVA.

8 Q. What was Superpumper Properties, LLC's
9 relationship to Superpumper, Inc.?

10 A. Just a name. I believe it was just the
11 name. There was no -- the common ownership were
12 the -- the three shareholders. But you can see the
13 percentages here. The percentages were not to the
14 same percentages that they were involved in
15 Superpumper, Inc.

16 Q. Did you form Superpumper Properties,
17 LLC?

18 A. No. Nor Superpumper, Inc. They were
19 preexisting entities. Prior to our representation.

20 Q. So going back to the overall transfer
21 of Morabito's assets, the corporate --

22 A. Paul A. Morabito.

23 Q. -- Paul Morabito's assets, we've talked
24 about the Panorama property, the two California
25 properties, Los Olivos and El Camino, the

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| <p style="text-align: right;">Page 98</p> <p>1 membership interest in Baruk Properties, the 2 membership interest in watchmyblock LLC and then 3 there was an interest in Superpumper that was 4 transferred. 5 Besides those -- 6 A. Superpumper Properties, LLC. 7 Q. Superpumper Properties, LLC -- 8 A. -- Inc. 9 Q. -- and Superpumper, Inc. 10 A. So I'm -- I'm -- I'm not sure about 11 Superpumper Properties, LLC. There's a piece of me 12 that says that -- that those properties went over 13 to the Herbsts in the settlement agreement. I 14 can't -- I -- I just don't recall the disposition 15 of the Superpumper, LLC, properties. 16 Q. Okay. So -- 17 A. I'm -- I'm -- I -- I believe -- and you 18 have to have a settlement agreement, I think, that 19 they went over to the Herbsts. 20 Q. Okay. So -- 21 A. I could be wrong about that. 22 Q. Of the properties I previously 23 mentioned, taking out Superpumper Properties, 24 LLC -- 25 A. Right.</p> | <p style="text-align: right;">Page 99</p> <p>1 Q. -- are there any other transfers of 2 assets that you're aware of that took place in 3 September or October of 2010? 4 A. Well, the complicated CWC, 5 Superpumper, Inc., Snowshoe. 6 Q. Okay. Other than that and the ones 7 I've mentioned, is there anything else that you're 8 aware of that was transferred? 9 A. I don't believe so. 10 Q. Why was -- all of the -- it -- it would 11 appear, looking at the documents, that 12 September 30th was a target date to have all the 13 properties transferred. Is that fair? 14 A. It does look like everything's 15 happening in, you know, 28th, 29th, 30th from the 16 documents, sure. 17 Q. Do you know why everything happened in 18 that time period? 19 A. Edward wanted out. Edward was free and 20 clear, as far as he was concerned, from the Herbst 21 litigation, and he wanted out. Sam equally but not 22 as -- you know, Edward is a hand wringer. He's -- 23 he worries about, you know, whether the sun's going 24 to come up in the morning. 25 Sam is -- is -- is concerned, but Sam wasn't</p> |
| <p style="text-align: right;">Page 100</p> <p>1 calling me every day wondering how he's going to be 2 free and clear of the Herbsts. Edward was. 3 Q. So the -- the fast timeline was based 4 on Bayuk's insistence? 5 A. Yes. He was the primary motivation, as 6 far as my recollection serves me. 7 Q. Were there other motivators? 8 A. That was the prime one. I don't -- if 9 there were secondary or tertiary, I don't recall 10 what they were, but Edward wanted out. 11 Q. Do you know what Sefton, S-E-F-T-O-N, 12 Trustees is? 13 A. Well, I came to -- to know it, yes. 14 Q. What is your understanding of what 15 Sefton Trustees is? 16 A. I'm glad you couched it in terms of my 17 understanding, because I don't know precisely. But 18 my understanding is that Sefton Trustees is an 19 international repository of -- of assets. 20 Q. How did you become aware of Sefton 21 Trustees? 22 A. From Paul Morabito. 23 Q. When did you become aware of it? 24 A. Postjudgment and probably -- 25 postjudgment in the context of the enforcement</p> | <p style="text-align: right;">Page 101</p> <p>1 action. So the net worth -- the net worth 2 deposition, in that context. So as now Brian and 3 John have the judgment at hand, and now they begin 4 enforcement actions, my recollection is that there 5 was an awful lot of discovery around that, and 6 there was a net worth deposition of Morabito, and 7 it was in that context that I became aware of it. 8 Q. So the first time you heard of it was 9 when Morabito mentioned it at a deposition? Is 10 that accurate? 11 A. It was in the context of the net worth 12 either discovery or deposition. 13 Q. Do you recall when that deposition or 14 discovery was? 15 A. I'm just going on feel here. I would 16 say that it was early 2011. It was sometime in 17 2011. But that's -- I just don't believe that it 18 happened in 2010. 19 Q. Okay. Do you know why Paul Morabito 20 transferred \$6 million to Sefton Trustees on 21 September 15th, 2010? 22 A. No. On what date? 23 Q. September 15th of 2010. 24 A. No. 25 Q. Do you know why Morabito transferred</p> |

| Page 102 | Page 103 |
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| <p>1 any funds at any time to Sefton Trustees? 2 A. I know what he testified to in the net 3 worth deposition. 4 Q. But you don't have any independent 5 knowledge? 6 A. Not that would be independent of 7 communications directly with him. 8 Q. Well, communications other than what 9 was said in the deposition? Let me back up. 10 Have you had conversations with Paul 11 Morabito about transfers to Sefton Trustees? 12 A. I have. 13 Q. When did you have those conversations? 14 A. Generally, in the context of -- 15 sometime in the time frame of the discovery or 16 deposition around the net worth. 17 Q. Okay. But have you had conversations 18 that weren't -- 19 A. Privileged? 20 Q. -- weren't on record in the deposition? 21 A. Yes. 22 Q. Okay. What were those conversations? 23 MR. GILMORE: I'm going to object on the 24 basis of attorney-client privilege. 25 BY MS. PILATOWICZ:</p> | <p>1 Q. Okay. You're aware that Mr. Leonard 2 has waived Mr. Morabito's -- or has waived the 3 attorney-client privilege, correct? 4 A. Yes. 5 Q. And you're aware that -- 6 MR. GILMORE: Well, these aren't questions 7 that should be directed to Mr. Vacco. Those -- you 8 can direct them to me. 9 We are aware -- I am, both as Mr. Morabito's 10 counsel in several matters, as well as the 11 defendants' counsel in this matter -- that the 12 trustee has sent a letter to debtor's counsel 13 purporting to waive the applicable attorney-client 14 privilege of the debtor, both in the personal and 15 corporate capacity. 16 And, of course, having cited no Ninth 17 Circuit or Nevada jurisprudence to support such a 18 waiver, we are not in the position to accept that 19 waiver at this time. 20 So as far as I'm concerned, the 21 attorney-client privilege exists, and I'm going to 22 assert it. 23 BY MS. PILATOWICZ: 24 Q. Okay. Did you also receive a letter 25 from John Murtha regarding a waiver of the</p> |
| Page 104 | Page 105 |
| <p>1 attorney-client privilege? 2 A. We did. 3 Q. Okay. Did you -- did that letter also 4 indicate a waiver of the privilege -- privilege 5 based on the crime-fraud exception? 6 A. I believe it did. 7 Q. Okay. Are you going to refuse to 8 answer the question based on the attorney-client 9 privilege? 10 A. I am. 11 MR. GILMORE: And the record should reflect, 12 it's not Mr. Vacco's privilege to waive or to 13 assert. It's Mr. Morabito's or other clients of 14 the firms that are here to waive or assert the 15 privilege. So Mr. Vacco's neither waiving nor 16 asserting privilege. It's the clients that are 17 asserting the privilege. Does that make sense? 18 MS. PILATOWICZ: I understand your position, 19 but so that the record's clear, my client, we've 20 taken the position, holds the privilege and has 21 waived it. I am simply asking if you are refusing 22 to answer based on counsel's assertion of the 23 privilege. 24 MR. GILMORE: Thank you. 25 THE WITNESS: His assertion of the privilege</p> | <p>1 on behalf of his clients, yes. 2 BY MS. PILATOWICZ: 3 Q. Okay. Did -- do you know what happened 4 with -- well, do you understand that \$6 million was 5 transferred from Paul Morabito to Sefton Trustees? 6 A. I know that generally, yes. 7 Q. Okay. 8 A. I don't know it particularly. 9 Q. Okay. Do you know what happened to 10 those funds? 11 MR. GILMORE: You know, I'm going to insert 12 an objection here. Is the Sefton claim part and 13 parcel to the state court litigation, or are we now 14 walking into the -- the bankruptcy -- 15 MS. PILATOWICZ: No. The -- 16 MR. GILMORE: -- claims? 17 MS. PILATOWICZ: The Sefton trustee, the 18 \$6 million transfer is one of the allegations in 19 the state court complaint. 20 MR. GILMORE: As to which defendants? 21 MS. PILATOWICZ: As to Paul Morabito. 22 MR. GILMORE: Well, he's not a defendant. 23 MS. PILATOWICZ: Well, the -- the transfer 24 of the funds has to do with the overall fraudulent 25 transfer.</p> |

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| <p style="text-align: right;">Page 106</p> <p>1 MR. GILMORE: Well, there's no allegation 2 that any of the defendant recipients had anything 3 to do with it. You -- you get my drift? 4 So the original complaint had a Sefton 5 allegation because Paul was a defendant. Now 6 Paul's not a party to the lawsuit. The only 7 parties to the lawsuit are Mr. Bayuk, Mr. Sam 8 Morabito, and the respective Superpumper and 9 Snowshoe entities. 10 So I'm having a hard time understanding why 11 we're crossing the streams here on the Sefton 12 Trustee transfers that have nothing to do -- 13 there's no allegation in the complaint that has 14 anything to do with the pending defendants. 15 MS. PILATOWICZ: Well, there was a transfer 16 of \$6 million to Sefton Trustees, and we are 17 investigating where it went. And we're entitled in 18 the litigation to investigate what happened to that 19 money. 20 MR. GILMORE: If -- if the -- if you're 21 telling me that the line of questioning is intended 22 to determine whether or not those transfers have 23 some relation to the defendants, then I suppose 24 you're going to get some latitude, but -- 25 MS. PILATOWICZ: Mm-hmm.</p> | <p style="text-align: right;">Page 107</p> <p>1 MR. GILMORE: -- if this witness doesn't 2 have that kind of testimony, then I'm going to 3 object that we're crossing the streams here. 4 BY MS. PILATOWICZ: 5 Q. So do you have any understanding of 6 what happened to the \$6 million that was 7 transferred to Sefton Trustees? 8 A. I really don't. 9 Q. Did any of that money come back through 10 your trust account? 11 A. Well, so that's why I hesitated a 12 moment ago. The record doesn't reflect my 13 hesitation. But recognizing that money's fungible, 14 and never having access to Sefton's records, what 15 I -- what I do know with clarity is what was 16 transferred into our trust account from Sefton, or 17 Lakud and Dash, which, you know, I believe 18 represented Sefton or had something to do with the 19 Sefton money. 20 MS. PILATOWICZ: Okay. 21 THE REPORTER: How do I spell Lakud and Dash? 22 MR. GILMORE: Actually. It's Liburd, 23 L-I-B-U-R-D. 24 (Discussion off the record.) 25 The following was marked for identification:</p> |
| <p style="text-align: right;">Page 108</p> <p>1 EXHIBIT 10 Trust Ledger History, six pages 2 BY MS. PILATOWICZ: 3 Q. Mr. Vacco, I've handed you what has 4 been marked as Exhibit 10. Thank you. Do you 5 recognize Exhibit 10? 6 A. I do. 7 Q. What is Exhibit 10? 8 A. It's a trust ledger history of Lippe 9 Mathias Wexler Friedman for matter number 3540, 10 which is Paul A. Morabito. 11 Q. Is the 3540 number, does that reflect 12 all matters of Paul Morabito, or is that just a 13 Paul Morabito general file? 14 A. I believe it's -- I don't know with 15 clarity. So some of the entities, you know, I'm 16 thinking of some of the -- the LLCs might have had 17 separate matter numbers. 18 Q. The second entry of that trust ledger 19 appears to be a deposit of \$449,975 from Sefton 20 Trustees Limited. Do you see that? 21 A. I do. 22 Q. Do you know what that money was? 23 A. What do you mean? 24 Q. Do you know why it was deposited into 25 your trust account?</p> | <p style="text-align: right;">Page 109</p> <p>1 A. Yes. 2 Q. Why was it? 3 A. Because it was going to form the basis 4 of the first cash payment under the Herbst 5 settlement to the Herbsts. 6 Q. Do you know how it got from Sefton 7 Trustees to your trust account? 8 A. Wire transfer. 9 Q. Do you know who initiated that wire 10 transfer? 11 A. Sefton Trustees. 12 Q. Do you know -- do you know -- let me 13 back up. 14 Did your firm have any contact with Sefton 15 Trustees to have that money transferred? 16 A. No. 17 Q. Okay. 18 A. Other than, you know, receiving the 19 wire transfer. 20 Q. When you saw it -- did you see the 21 deposit from Sefton Trustees come in? 22 A. I was aware of it. 23 Q. Okay. Did you question who Sefton -- 24 Sefton Trustees was? 25 A. Well, by this time, I knew.</p> |

| Page 110 | Page 111 |
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| <p>1 Q. Okay. And you also mentioned that</p> <p>2 Liburd and Dash was someone who you believed to</p> <p>3 represent?</p> <p>4 A. Yes. So excuse me for the</p> <p>5 mispronunciation previously. It's L-I-B-U-R-D and</p> <p>6 Dash.</p> <p>7 Q. And there's a receipt of 1,999,950?</p> <p>8 A. Correct. Ten -- ten days after the</p> <p>9 receipt of the half million. So the amounts that</p> <p>10 are received are net of the wire transfer fees.</p> <p>11 Q. Okay.</p> <p>12 A. So the 449,975 is really 450,000</p> <p>13 because you add the 25,000 -- the \$25, it becomes</p> <p>14 500,000. I'm sorry. 450,000.</p> <p>15 Q. And do you know what that money was</p> <p>16 for?</p> <p>17 A. The Liburd and Dash?</p> <p>18 Q. Yes.</p> <p>19 A. Well, sure. You can see that -- just</p> <p>20 follow the trust ledger down. So the amount -- the</p> <p>21 receipt amounts and then -- so on the 18th is the</p> <p>22 449. So just for easy discussion, the 450 on</p> <p>23 November 18 from Sefton and then on November 28th,</p> <p>24 ten days later, is the Liburd and Dash, essentially</p> <p>25 \$2 million on that day. And then a deposit from</p> | <p>1 Sam Morabito of 559, or roughly 560.</p> <p>2 But then on November 30th, a day before the</p> <p>3 payment was due, 2.5 -- 2.564 million goes out to</p> <p>4 First American, which was the escrow agent for the</p> <p>5 Herbsts.</p> <p>6 So of the -- of the \$2,450,000 that came in</p> <p>7 from Sefton and Liburd and Dash, it forred the</p> <p>8 lion's share of the money that went to the Herbsts</p> <p>9 for the first payment.</p> <p>10 Q. Okay. Are you aware of other deposits</p> <p>11 from Sefton Trustees into your firm's trust</p> <p>12 account?</p> <p>13 A. Well, in the interest of time, can you</p> <p>14 point to me where they exist?</p> <p>15 Q. I don't see them on this ledger.</p> <p>16 A. Oh. Sure. So go to 5/11. So it would</p> <p>17 be page Bates number 000481, and go down one, two,</p> <p>18 three, four up from the bottom. And you can see a</p> <p>19 receipt on May 11th, 2012, another \$2,274,389.53.</p> <p>20 So, again, that's essentially \$2,275,000 once you</p> <p>21 net out the -- the -- the transfer fee.</p> <p>22 And that came from Liburd and Dash, and lo</p> <p>23 and behold, 14 days later, that 2.274 forms the</p> <p>24 lion's share of the next cash payment to the</p> <p>25 Herbsts of \$2.5 million. So the Sefton moneys, the</p> |
| Page 112 | Page 113 |
| <p>1 Herbsts got.</p> <p>2 Q. Do you know if there were any other</p> <p>3 deposits besides the -- the 2.5 -- there --</p> <p>4 there -- there would appear to be another million</p> <p>5 dollars that was transferred to Sefton Trustees.</p> <p>6 Do you know what happened to that money?</p> <p>7 A. I don't know how much was transferred</p> <p>8 into Sefton. I never knew that.</p> <p>9 Q. Okay.</p> <p>10 A. All I know is what we received.</p> <p>11 Q. Do you -- are you aware of any other</p> <p>12 receipts, from Sefton Trustees or Liburd and Dash,</p> <p>13 other than the ones that we've just gone over?</p> <p>14 A. If they're not on this Exhibit 10, they</p> <p>15 didn't happen.</p> <p>16 MR. GILMORE: There is actually another</p> <p>17 Lippes trust lodger, which you know about.</p> <p>18 MS. PILATOWICZ: Right. That deals with</p> <p>19 JCH --</p> <p>20 MR. GILMORE: USFEOC has one as well. It</p> <p>21 may have Liburd money in it.</p> <p>22 BY MS. PILATOWICZ:</p> <p>23 Q. Yeah. Let me be clear. I'm not trying</p> <p>24 to trick you. I didn't pull that one because it --</p> <p>25 A. Well, okay. So let's be a little bit</p> | <p>1 more careful about this from my perspective.</p> <p>2 Q. Okay.</p> <p>3 A. So let's go back to page 1, or 478 of</p> <p>4 Bates stamp of the trust ledger, Exhibit 10. So</p> <p>5 now as I look at this document more thoroughly, as</p> <p>6 opposed to responding to your questions just now,</p> <p>7 analyzing it, there is a Sefton transfer on</p> <p>8 November 18th of -- if we -- if you don't mind, if</p> <p>9 we could just round it up to the -- to the full</p> <p>10 amount minus the fee, or before the fee is</p> <p>11 deducted, of \$450,000.</p> <p>12 So for the record, that's the second entry</p> <p>13 on this page 1.</p> <p>14 Q. Mm-hmm.</p> <p>15 A. Right? Do you see that?</p> <p>16 Q. Yes.</p> <p>17 A. Okay. Then we go down to</p> <p>18 November 28th. And there's essentially a</p> <p>19 \$2 million transfer from Liburd and Dash on</p> <p>20 November 28th.</p> <p>21 And then we see the entry or the -- the</p> <p>22 disbursement of \$2,564,067.21 on November 30th</p> <p>23 drawing down the Sefton and Liburd deposits.</p> <p>24 Then on December 13th is another \$750,000</p> <p>25 receipt from Liburd and Dash. So on this page, you</p> |

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| <p style="text-align: right;">Page 114</p> <p>1 have 2.75 -- you have over \$3 million of -- you got 2 close to \$3.2 million on this page from Sefton or 3 Liburd and Dash. And that \$750,000, as you could 4 see, was then disbursed, for the most part, toward 5 settlement obligations. 6 And why I qualify "for the most part," 7 because as you go down and reconcile the trust 8 agreements, so -- the trust ledger, there was a 9 payment to my firm for fees. But all the other 10 entries, Berry-Hinckley Trust of \$3,000 on 11 January 3rd, that's a settlement payment. 12 The Marine Midland wire accounts, so the 13 disbursement on 1 -- January 31st, 2012, that's a 14 settlement payment. And when I say, "settlement" 15 because there were other obligations in the 16 settlement besides cash to the Herbsts. So 17 there's -- the -- those are -- those monies are 18 coming out of the \$750,000 that came from Liburd 19 and Dash on November 30th. 20 And we could just keep going here. You 21 know, Washoe County Treasurer is a settlement. 22 That's tax payments. Again, Midland wire account 23 on 2/27. Settlement payment. Straight-line 24 Merchant Capital. Off the top of my head, that 25 doesn't ring a bell, but I believe that also was a</p> | <p style="text-align: right;">Page 115</p> <p>1 settlement payment, but I could be wrong about 2 that. 3 But my point is, so between -- this trust 4 ledger reveals over \$5 million, substantially more 5 than \$5 million coming in from Sefton and Liburd 6 and Dash. What happened to the rest of it, if it 7 didn't hit here, I don't know. 8 Q. Okay. 9 A. And by "here," I mean Exhibit 10. 10 Q. Are you aware of any offshore accounts 11 that Paul Morabito held? 12 A. Other than this one, no. 13 Q. Do you currently represent Edward 14 Bayuk? 15 A. I currently represent Snowshoe but not 16 Edward personally. 17 Q. Do you currently represent Salvatore 18 Morabito? 19 A. No. 20 MS. PILATOWICZ: Okay. I am through with 21 the portion of the questions that -- other than the 22 questions that deal with Superpumper and Snowshoe 23 and CWC. 24 At this time I am going to suspend the 25 deposition based on the asserted privilege, as I</p> |
| <p style="text-align: right;">Page 116</p> <p>1 think it's an issue that the Court's going to have 2 to decide. So we're not concluding the deposition 3 today of you personally; it's being suspended with 4 the potential of bringing you back if it is 5 determined that the attorney-client privilege is 6 properly waived by the trustee. 7 MR. GILMORE: But you have concluded 8 nonattorney-client privileged questions with 9 respect to the subpoena of this witness? 10 MS. PILATOWICZ: Correct. 11 MR. GILMORE: Okay. Let's close this 12 record, then. 13 MS. PILATOWICZ: If you have no questions, 14 we can close this record. 15 (Deposition concluded at 1:49 p.m.) 16 * * * 17 18 19 20 21 22 23 24 25</p> | <p style="text-align: right;">Page 117</p> <p>1 I hereby CERTIFY that I have read the 2 foregoing 116 pages, and that they are a true and 3 accurate transcript of the testimony given by me in 4 the above-entitled action on October 20, 2015. 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">DENNIS C. VACCO</p> <p>Sworn to before me this _____ day of _____, 2015.</p> <p>_____ NOTARY PUBLIC</p> |

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| <p>1</p> <p>2 In order to make this deposition more</p> <p>3 nearly conform to the testimony, the witness wishes</p> <p>4 to make the following changes:</p> <p>5</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 15%;">PAGE</th> <th style="width: 15%;">LINE</th> <th style="width: 70%;">DESIRED CHANGE</th> </tr> </thead> <tbody> <tr><td>6</td><td></td><td></td></tr> <tr><td>7</td><td></td><td></td></tr> <tr><td>8</td><td></td><td></td></tr> <tr><td>9</td><td></td><td></td></tr> <tr><td>10</td><td></td><td></td></tr> <tr><td>11</td><td></td><td></td></tr> <tr><td>12</td><td></td><td></td></tr> <tr><td>13</td><td></td><td></td></tr> <tr><td>14</td><td></td><td></td></tr> <tr><td>15</td><td></td><td></td></tr> <tr><td>16</td><td></td><td></td></tr> <tr><td>17</td><td></td><td></td></tr> <tr><td>18</td><td></td><td></td></tr> <tr><td>19</td><td></td><td></td></tr> <tr><td>20</td><td></td><td></td></tr> <tr><td>21</td><td></td><td></td></tr> <tr><td>22</td><td></td><td></td></tr> <tr><td>23</td><td></td><td></td></tr> <tr><td>24</td><td></td><td></td></tr> <tr><td>25</td><td></td><td></td></tr> </tbody> </table> <p>Signature of Witness _____ Date _____</p> | PAGE | LINE | DESIRED CHANGE | 6 | | | 7 | | | 8 | | | 9 | | | 10 | | | 11 | | | 12 | | | 13 | | | 14 | | | 15 | | | 16 | | | 17 | | | 18 | | | 19 | | | 20 | | | 21 | | | 22 | | | 23 | | | 24 | | | 25 | | | <p>1 STATE OF NEW YORK)</p> <p>2 ss:</p> <p>3 COUNTY OF ERIE)</p> <p>4</p> <p>5 I DO HEREBY CERTIFY as a Notary Public in and</p> <p>6 for the State of New York, that I did attend and</p> <p>7 report the foregoing deposition, which was taken</p> <p>8 down by me in a verbatim manner by means of machine</p> <p>9 shorthand. Further, that the deposition was then</p> <p>10 reduced to writing in my presence and under my</p> <p>11 direction. That the deposition was taken to be</p> <p>12 used in the foregoing captioned action. That the</p> <p>13 said deponent, before examination, was duly sworn</p> <p>14 by me to testify to the truth, the whole truth and</p> <p>15 nothing but the truth, relative to said action.</p> <p>16 <i>Mary Scholze</i></p> <p>17</p> <p>18</p> <p>19 MARY SCHOLZE, RPS, 1001,</p> <p>20 Notary Public.</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
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Exhibit 8

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA (RENO)

IN RE: Case No. 13-51237-gwz
PAUL A. MORABITO, Chapter 7
Debtor.
.....
WILLIAM A. LEONARD, JR., Adv. No. 15-05046-gwz
Chapter 7 Trustee for the Estate
of Paul Anthony Morabito,
Plaintiffs,
v.
PAUL ANTHONY MORABITO, an
individual; MEADOW FARMS TRUST,
a Delaware Trust; EDWARD BAYUK,
an individual and grantor and
trustee of The Meadow Farms Trust;
VIRSENET, LLC, a Delaware
limited liability company;
USHF CELLULAR COMMUNICATIONS, LLC,
a Delaware limited liability
company; and LIPPES MATHIAS
WEXLER FRIEDMAN, LLP, a New York
limited liability partnership,
Defendants.
.....
Tuesday, December 22, 2015
9:13 a.m.

TRANSCRIPT OF MOTION FOR SCHEDULING CONFERENCE RELATING TO
TRUSTEE'S MOTION FOR PRELIMINARY INJUNCTION (11 U.S.C. 105)
FILED BY JOHN F. MURTHA ON BEHALF OF WILLIAM A. LEONARD, JR.;
MOTION TO COMPEL RESPONSES TO DEPOSITION QUESTIONS FILED BY
TERESA M. PILATOWICZ ON BEHALF OF WILLIAM A. LEONARD, JR.

**BEFORE THE HONORABLE GREGG W. ZIVE
UNITED STATES BANKRUPTCY COURT JUDGE**

APPEARANCES CONTINUED

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ACCESS TRANSCRIPTS, LLC



1-855-USE-ACCESS (873-2223)

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ACCESS TRANSCRIPTS, LLC



1-855-USE-ACCESS (873-2223)

1 (Proceedings commence at 9:13 a.m.)

2 THE COURT: In the Matter of Paul A. Morabito, the
3 first matter on the calendar is an adversary, 15-05046.

4 May I have appearances in that matter, please?

5 MR. GORDON: Good morning.

6 MR. ESMONT: Your Honor, Joseph --

7 THE COURT: In the --

8 MR. ESMONT: -- Esmont on behalf --

9 THE COURT: Excuse me. In the courtroom first,
10 please. Thank you.

11 MR. GORDON: Good morning, Your Honor.

12 MR. ESMONT: Apologies.

13 MR. GORDON: Gerald Gordon of Gordon Silver -- I'm
14 sorry, of Garman Turner Gordon; I keep on doing that -- on
15 behalf of the trustee, special counsel to the trustee, in the
16 adversary matter.

17 MR. GILMORE: Good morning, Your Honor. Frank
18 Gilmore and Jeff Hartman on behalf of the debtor.

19 MS. ESTES: Good morning, Your Honor. Holly Estes on
20 behalf of Edward Bayuk and the Meadows Farm Irrevocable Trust.

21 MS. CHUBB: Good morning, Your Honor. Janet Chubb
22 for Virsenet, LLC, and on the telephone are my co-counsel,
23 Pamela Johnson and Joseph Esmont. His pro hac has been
24 granted; her application has been filed, but I don't know if
25 it's been granted yet.



1 THE COURT: All right.

2 MR. MURTHA: Good afternoon, Your Honor -- good
3 morning, Your Honor. John Murtha appearing on behalf of the
4 trustee as the plaintiff in the adversary.

5 MR. LUKAS: Good morning, Your Honor. Tim Lukas on
6 behalf of the USHF Cellular Communication.

7 THE COURT: By telephone, please? May I have
8 appearances?

9 MS. JOHNSON: Your Honor, Pamela Johnson on behalf of
10 Virsenet.

11 MR. ESMONT: And, Your Honor, Joseph Esmont on behalf
12 of Virsenet.

13 THE COURT: Are there any other counsel on the
14 telephone? I thought you were going to have a couple lawyers
15 from your firm, Mr. Gordon.

16 MR. GORDON: I thought they were. I thought I heard
17 Mr. Weisenmiller earlier. They're not going to say anything,
18 just --

19 THE COURT: Well, I'm assuming that all argument is
20 going to be made by counsel in the courtroom. Is that
21 accurate?

22 MR. GILMORE: That's accurate from my end, Your
23 Honor.

24 THE COURT: All right, because that's what I assumed.
25 All right. On November 24th, I signed an order

1 shortening time in the adversary, Docket Number 21, to conduct
2 a scheduling conference. And that's all I'm going to do. I am
3 not going to resolve any factual issues.

4 I know that there was a complaint filed on October
5 15th of this year. I have the complaint in front of me. I've
6 read it. I certainly haven't studied it. I have read the
7 answer that was filed by the debtor on December 3rd, Docket
8 Number 25. I read Virsenet's answer filed on December 10th,
9 and I read USHF Cellular Communication's answer filed on
10 December 1.

11 The -- all of the answers demanded jury trials, and
12 if I read them correctly, there's no consent to the Bankruptcy
13 Court conducting the jury trial. And obviously at some point
14 there may have to be a determination of whether this matter and
15 the issues are Stern-related issues, and if so, this Court
16 would not then have constitutional authority to enter a final
17 judgment. And in the absence of consent, either implied or
18 express, and certainly none that I can see so far that rise to
19 the level of implied, then the United States District Court
20 would have to enter final judgment. This Court would function
21 in a manner analogous to a magistrate judge and could prepare
22 proposed findings and conclusions and proposed order, and then
23 the process would be dictated by 28 U.S.C. 157(c), Federal Rule
24 of Bankruptcy Procedure 9033, and that would be the steps that
25 would be taken.



1 That, of course, is not in front of me today. The
2 scheduling conference is for the purpose of this Court to
3 consider a motion for a preliminary injunction, which by its
4 terms is not a final adjudication.

5 And I have read the motion for preliminary
6 injunction, Docket Number 11, and I read the declaration of
7 John Murtha filed in support thereof, Docket Number 12, and it
8 contains exhibits that I believe are identical to the exhibits
9 that were attached to the complaint. Is that correct?

10 MR. MURTHA: That is correct, Your Honor.

11 THE COURT: Yes. All right. It is the movant's
12 belief that there is going to be discovery that must be taken
13 prior to the Court conducting the hearing on the preliminary
14 injunction and that the hearing itself might take some time.
15 Is that accurate?

16 MR. MURTHA: That is correct, Your Honor.

17 THE COURT: Is there any disagreement with that by
18 any of the defendants?

19 MR. GILMORE: I don't believe so, Your Honor.

20 MR. LUKAS: Your Honor, in terms of USHFCC, I don't
21 believe that the issues -- because the claims essentially are
22 prohibition, bar sought against the receipt of funds --

23 THE COURT: Well, what it does --

24 MR. LUKAS: -- directed to the debtor.

25 THE COURT: What the -- really, what the motion for



1 preliminary injunction, in shorthand, means to me is that the
2 trustee wants to freeze the funds and no further distributions.
3 That's how I read it.

4 MR. MURTHA: That is correct, Your Honor.

5 THE COURT: All right.

6 MR. MURTHA: And then can I update the Court on
7 some --

8 THE COURT: Wait, I just want to make sure that --
9 I'm not sure I understood what you just told me, Mr. Lukas.

10 MR. LUKAS: The issue is, Your Honor, there's no
11 allegations against USHFCC per se in terms of trying to get any
12 ownership interest or anything. It's an indirect vis-a-vis
13 Virsenet -- it's kind of upstream, if you will. What they're
14 trying to do to USHFCC, which is similar to Lippes, is saying
15 don't make any payment distribution --

16 THE COURT: That's exactly what they're saying.

17 MR. LUKAS: Right, to Morabito, but it's not a claim
18 of ownership.

19 THE COURT: And I'm all -- asking do you need any
20 discovery before I have a hearing on the motion for preliminary
21 injunction? That's all I'm asking.

22 MR. MURTHA: The answer to that, I believe, is yes,
23 although we've made some progress in getting it resolved by
24 stipulation.

25 THE COURT: All right. And then to hear from counsel



1 from Virsenet, please.

2 MS. CHUBB: Yes, Your Honor. We agree that -- I
3 don't know whether we'll be taking any discovery or not. I --

4 THE COURT: All right.

5 MS. CHUBB: But it depends to some extent on what the
6 trustee --

7 THE COURT: Mr. Gilmore, first you said you thought
8 you didn't disagree, then you stood up.

9 MR. GILMORE: I don't disagree with the Court's
10 assessment as to Mr. Murtha's request for the necessity for
11 discovery. If Mr. Murtha -- the trustee wants to obtain the
12 relief they've sought in the motion, there's certainly going to
13 be required depositions and exchange of discovery.

14 THE COURT: I totally agree with that.

15 MR. GILMORE: From the debtor's perspective, I agree
16 with that. From the perspective of USHFCC or Lippes or perhaps
17 the Meadow Farms trust or whomever, I don't believe any
18 discovery would be required because, as I understand, there's
19 likely to be a stipulation that no payments will be forthcoming
20 from any of those persons or entities to the debtor, indeed,
21 and there is a possibility even a stipulation vis-a-vis the
22 trustee and the debtor that would likely occur before the
23 discovery even takes place.

24 THE COURT: Well, that certainly would be the
25 preferable way of doing it. It would hold down the



1 administrative expense for the state and, of course, eliminate
2 the associated expense for any responding defendant.

3 Ms. Chubb?

4 MS. CHUBB: Well, we're trying very hard to work all
5 of that out.

6 THE COURT: Good.

7 MS. CHUBB: But there might be distributions. They
8 would be --

9 THE COURT: I'm not here to -- I don't want to know
10 about distributions. All I have in front of me is the request
11 for a scheduling conference so that the motion can come on.

12 What I will tell you, my time is pretty well taken up
13 for the next three months, so you have plenty of time to do
14 whatever discovery you need, plenty of time to enter into any
15 stipulations that you need. We really don't have any time. In
16 fact, I have a two-week trial set that I had to shorten to one
17 week, and I'll make sure it only lasts one week, that -- I
18 don't think I have any time until April now. Is that correct?

19 THE CLERK: That's correct, Judge.

20 THE COURT: Okay. What -- give me a date in April --
21 if you do not arrive at a consensual resolution, I think you
22 need at least a day.

23 MR. MURTHA: I agree. Maybe two.

24 THE COURT: Yeah. Set aside two days, please.

25 THE CLERK: Your Honor, that would be April 7th and



1 8th.

2 THE COURT: April 7th and 8th, and that's when we'll
3 have it.

4 MR. MURTHA: At nine o'clock?

5 THE COURT: We'll start at 10:00 on the 7th because I
6 always get late pleadings and I like to read them. That's a
7 Thursday and a Friday.

8 THE CLERK: Yes, Your Honor.

9 THE COURT: And I don't give up my Fridays. That's
10 my retirement are my Fridays, so try to get it worked out.

11 That -- anything else, Mr. Murtha?

12 MR. MURTHA: No, I don't believe so, Your Honor. We
13 will start discovery and there might be issues that arise
14 that --

15 THE COURT: I really encourage --

16 MR. MURTHA: -- we have, but --

17 THE COURT: Okay. I strongly encourage the parties
18 to work at it, at some type of resolution. Maybe there's some
19 mandatory type of distributions that have to be made in some
20 amount. I have no idea, but I know I'm troubled when I see
21 money go away before we've had a --

22 MR. MURTHA: Sure.

23 THE COURT: -- chance to look at the underlying
24 facts.

25 MR. MURTHA: I guess I do have one other issue, Your

1 Honor.

2 THE COURT: What's that?

3 MR. MURTHA: With the hearing on April 7th, under the
4 rules, no opposition to the preliminary injunction motion will
5 be needed until two weeks previously.

6 THE COURT: Well, let me set up a schedule. I'd want
7 opposition -- on April's -- I'm not going to push it right away
8 because I want the parties to continue to negotiate without
9 incurring the fees that would be incurred in preparing
10 oppositions at this point. But I would like an -- if it can't
11 be agreed to, I'd like an opposition filed by Friday, February
12 10th, and then replies filed by March 10th. And knowing that
13 there may be discovery, if you can't arrive, I will allow
14 supplements from both sides simultaneously, and no later than
15 March 24th. All right?

16 And the point of the supplements is not to restate
17 every argument you've made. It's just if there have been any
18 developments between March 10th and that final date.

19 Prepare the order, please, Mr. Murtha. Have opposing
20 counsel sign off under Local Rule 9021.

21 MR. MURTHA: Yes, Your Honor, will do.

22 THE COURT: Thank you. The next matter I have on
23 calendar was set pursuant to a notice of hearing on order
24 shortening time that I signed on November 24, 2015. Of course,
25 here we are on December 22nd, so it wasn't really all that

1 short. And that was Docket 256 in the main case. The motion
2 is Docket 452. I've read it, it was filed on November 20th,
3 and I've read the exhibits attached thereto.

4 Now, that motion was filed by special counsel for the
5 Chapter 7 trustee, and then the trustee, through his counsel,
6 filed a joinder. So in a sense the trustee has filed two
7 pleadings regarding this motion, if I've read it correctly.

8 MR. MURTHA: That is correct, Your Honor.

9 THE COURT: From the -- in the future, do what you
10 did with the reply. Give me one pleading so I know what the
11 trustee is saying.

12 MR. MURTHA: Understood, Your Honor.

13 THE COURT: Thank you. There was a limited objection
14 filed on December 14th, Docket Number 460, on behalf of USHF
15 Cellular Communications. There has to be an easier way of
16 referring to that client because I find that it becomes a
17 tongue twister with all of the initials. So let's see if we
18 can come up with something that makes sense.

19 MR. GILMORE: I'll work on it, Your Honor.

20 THE COURT: Yeah, it's just difficult. The debtor
21 filed an opposition on December 14th, Docket 461, supported by
22 the declaration of Mr. Gilmore, Docket 462. I've read it and
23 I've read the exhibits. There was a stipulation for extension
24 of time. I denied it because it wouldn't have given me any
25 time to prepare, but I think I also agreed to allow a shorter

1 extension than that was asked.

2 Then I read the declaration of Teresa M. Pilatowicz
3 filed in support of the motion to compel, that's Docket 464.
4 There was an omnibus reply filed on December 17th, Docket 466.
5 And that's a far more preferable way for the trustee to advance
6 his arguments. I read Docket Number 467, which is another
7 declaration of Teresa M. Pilatowicz, and there's -- I read 465,
8 which is the service.

9 Are those all the pleadings that have been filed in
10 support of and in opposition to the motion?

11 MR. GORDON: Yes, Your Honor.

12 MR. LUKAS: I believe so, Your Honor.

13 MR. GILMORE: I believe that's correct, Your Honor,
14 yes.

15 THE COURT: Okay. I did not see any pleadings filed
16 by Virsenet. Is that correct?

17 MS. CHUBB: Yes, it is.

18 THE COURT: All right. Then I won't listen to
19 Virsenet today. Then I have also read the order partially
20 granting the motion to compel production of documents that I
21 entered on June 12th, 2015, following a hearing on May 13th,
22 2015. And since there are references to what occurred at that
23 hearing of May 13th, I've read the transcript, which is Docket
24 Number 339. I've annotated it.

25 I must say that the issues that were before me in May

1 are not the same issues that are before me today, factual
2 issues. The legal issues tend to be the same, but the analysis
3 must be different, upon my reading of the cases, and I'll go
4 through that in a minute.

5 I've read the following cases, among the many that
6 have been cited by the parties, and if I do not refer to one,
7 it just means I don't have it in front of me today. It does
8 not mean I didn't read them.

9 The first is Commodity Futures Trading Commission v.
10 Weintraub. I'm not going to give the cites. You know what the
11 cites are. In that the Supreme Court allowed, after the
12 application of balancing test, the trustee to have the ability
13 to waive the privilege on behalf of a corporate debtor, and
14 expressly indicated that it was not making any determination in
15 the event of an individual debtor, said that it would be
16 different considerations.

17 I've read Swidler & Berlin v. United States. In
18 fact, I referred to this at the May hearing. It was decided in
19 1998 and raises some interesting points. I've read In Re
20 Kincaid, a Ninth Circuit case in 1990, which I think clearly
21 indicates this Court has jurisdiction over this matter today.
22 Page 1165, the Ninth Circuit noted:

23 "Moreover, as the BAP pointed out, determining the
24 nature and the extent of the case is also a
25 fundamental function of a bankruptcy court and



1 fundamental to the administration of a bankruptcy
2 case."

3 Moreover, you know, when one looks at the Fietz
4 decision, which deals with the subject matter jurisdiction, not
5 by -- and then incorporated the Pacor decision in its totality,
6 it's a broad definition and it's -- could conceivably have an
7 effect on the administration on the estate of the debtor. And
8 clearly what's before me today does. This is -- involves
9 potential fraudulent conveyance and transfer of property that
10 would be property of the estate and available to debtors.

11 I also read the Murdoch case. Now, this case, which
12 is at 609 F.3d 983, it's a 2010 Ninth Circuit case, refers to
13 Swidler, and specifically at Page 994, it did not hold, I
14 believe, that the balancing test is totally inapplicable in the
15 Ninth Circuit. It is limited, and I think Judge Tighe's
16 reading of it is, I think, perhaps broader.

17 And it simply held that the United States Supreme
18 Court in Swidler, quote:

19 "Explicitly stated that it was not deciding whether
20 the attorney-client privilege might have to yield to
21 a criminal defendant's constitutional rights."

22 It had nothing to do with the crime-fraud exception
23 which the United States Supreme Court in Swidler recognized was
24 one of two existing exceptions to the attorney-client
25 privilege, along with the testamentary exception.



1 All Swidler dealt with was a posthumous waiver of
2 privilege. It said, no, it was not going to create a new one.
3 It did not address directly the crime-fraud nor the
4 testamentary exceptions. And I would notice that Murdoch has
5 not been cited for that proposition except by Judge Tighe, and
6 then Judge Tighe's decision in Ginzburg, which I also referred
7 to in May, found at 517 B.R. 175, which as I noted at that
8 time, and I'm incorporating by reference, the analysis that I
9 placed on the record on May 13th of this year.

10 This was a motion for reconsideration where Judge
11 Tighe changed her decision based on Swidler and that the
12 balancing test could not be applied regarding waiver of the
13 attorney-client privilege. It has not, so far as we can
14 determine, been followed by any other course. It was not
15 appealed. It's not precedential. It's well-written and I
16 understand the reasoning.

17 And Judge Tighe, based upon Swidler, held that there
18 was no balancing test. She noted that:

19 "In Swidler, Independent Counsel argued that existing
20 exceptions to the privilege, such as the crime-fraud
21 exception and the testamentary exception, make the
22 impact of one more exception marginal. The Supreme
23 Court rejected this rationale."

24 She's correct. But that -- but the Supreme Court did
25 not say there was no balancing test for either of those two



1 exceptions. It just said it wasn't going to create another
2 exception. Then, at page 182, as well, in the Ginzburg
3 opinion, the judge wrote:

4 "Even when faced with the question of whether a
5 criminal defendant's constitutional rights to cause
6 the attorney-client privilege to yield, the Ninth
7 Circuit also relied on Swidler to uphold the trial
8 court's refusal to waive the privilege."

9 Well, that's not exactly correct. What it said was
10 the Supreme Court hadn't decided it, and then held that the
11 privilege couldn't be waived, over a strong dissent by a number
12 of judges on the Ninth Circuit, including Judge Kozinski.

13 And thus I think it may be a reach to say, as this
14 opinion states at Page 182:

15 "Federal common law simply prohibits the balancing of
16 the trustee's duties and the need for the information
17 with the debtor's attorney-client privilege."

18 I think that's too much. We know that's true for the
19 creation of a new privilege -- or, excuse me, for the creation
20 of a new exception to the privilege in Swidler, and Murdoch was
21 trying to fill the void because it found that the United States
22 Supreme Court didn't deal with a waiver of a privilege when it
23 affects a criminal defendant's constitutional rights, including
24 a right under the confrontation clause, because that was a
25 murder case where Mr. Murdoch was convicted when Mr. Dinardo

1 kind of pointed his finger at him and -- even though he had
2 written a letter years ago saying he was coerced into making
3 that identification. And one only has to read Judge Kozinski's
4 dissent to see, in my opinion, how important that letter was,
5 but the Ninth Circuit ruled it wouldn't come in. It has
6 nothing to do with the crime-fraud exception.

7 By the way, the only portion of crime-fraud exception
8 in front of me is fraud. I do not have any criminal -- it's
9 fraud. It's fraudulent conveyance transfer.

10 I've also read United States v. Graf, 2010, Ninth
11 Circuit case, where it indicates what is covered by the
12 privilege. There's an eight-part test. I've employed --
13 applied that. Again, I've read Cutuli, which deals with the
14 crime -- this is a case out of the Southern District of Florida
15 Bankruptcy, deals with the crime-fraud exception, Page 3 of the
16 opinion. I've read it. Bazmore out of the Southern District
17 -- Bankruptcy Court, Southern District of Georgia. By the way,
18 this involved a state court action.

19 I've read In re Hotels Nevada. This is a decision by
20 Judge Markell found at 458 B.R. 560, decided in 2011. Now,
21 reliance on this case I think has to be careful. First of all,
22 it deals with a 2004 exam and certain documents that were
23 requested to be produced. If you remember, what I -- the
24 matter that was in front of me earlier in this case were
25 documents, and the documents themselves are property of the

1 estate.

2 The matter before me today, so far as I can
3 determine, based upon the questions that were asked of
4 Mr. Vacco in his October deposition, and that he refused to
5 answer upon being ordered not to do so by Mr. Gilmore on behalf
6 of the debtor, because it is not Mr. Vacco's privilege. It is
7 the debtor's privilege that the debtor invoked, the same debtor
8 who is not a party to the state court action in which the
9 deposition was being taken, but is clearly a party in interest
10 here and it affects property of the estate in the sense of the
11 distributions if they are returned to the estate. If the
12 allegations can be proven, this would appear to be the only
13 court that would have jurisdiction over Mr. Morabito.

14 And its jurisdiction over Mr. Morabito is asserting
15 the privilege that is the critical issue before me. I'm not
16 going to order Mr. Vacco to say anything or not to say
17 anything. Any order I issue will just be dealing with the
18 privilege that's being asserted of Mr. Morabito.

19 Then if Mr. Vacco determines that he doesn't want to
20 answer, believes it would be inappropriate to answer, I think
21 then the citation to the -- it's kind of ironic, Federal Rules
22 of Civil Procedure that I read, even though it's alleged that
23 it really should be under state law, but assuming that the same
24 type of provision applies, then it probably should be
25 determined by the court in the district where the deposition is



1 being taken, even though I believe that there was -- it was
2 issued pursuant to state law, the summons was issued pursuant
3 to -- and subpoenas were issued pursuant to state law.

4 But nevertheless I'm not determining anything
5 regarding Mr. Vacco except that he was undisputedly counsel for
6 the debtor and for a number of other clients who are
7 represented here today. So this may only be the first step in
8 the process.

9 I've also read In Re Andrews, 186 B.R. 219 (Bankr.
10 E.D. Va.). It's got a good analysis of the crime-fraud
11 exception. I've read Napster (In Re Napster, Inc.), 479 F.3d
12 1078 (9th Cir. 2007); In Re Grand Jury Proceedings, 87 F.3d 377
13 (9th Cir. 1996); KL Group, 829 F.2d 909 (9th Cir. 1987); and
14 others. So I think I've made the record. I've given you some
15 indication of how I've analyzed this matter.

16 I'm going to allow some short argument because I have
17 other matters that I need to attend to this morning and I just
18 squeezed this matter in. But -- so I think I'll provide a
19 tentative conclusion, and I believe that the eight-part test
20 applies, that there is an attorney-client privilege.

21 You'll note that in my prior decision I ordered a
22 privilege log. I still don't see a privilege log here, so all
23 I have are some disputed questions. I'm also being asked, I
24 think, to find that the waiver is applicable to all counsel in
25 -- who may have represented the debtor. Is that correct?

1 MR. MURTHA: That's absolutely correct, Your Honor.

2 THE COURT: I'm not going to do that. I think it is
3 too close to an advisory opinion, and if waiver requires some
4 type of a balancing test, then I think I have to balance it for
5 each of them.

6 I believe that there has been a prima facie showing
7 that has not been rebutted regarding the existence of the fraud
8 exception to the attorney-client privilege. There's certain
9 badges of fraud that exist -- Cutuli talks about those -- to
10 determine if the moving party has met its burden to make a
11 prima facie case, and I believe that that has been established.

12 Remember, we're not -- or I'm not in any way making
13 any finding regarding the deponent, Mr. Vacco's, credibility or
14 not saying he participated in a fraud. As we know, the case
15 law says he doesn't even have to be aware of it; it's just if
16 the attorney's assistance was obtained in furtherance of the
17 fraudulent activity. And I'm not even convinced that timing
18 makes any difference or, in fact, was -- the attorney's
19 assistance was closely related.

20 The query is what the client wanted to accomplish,
21 whether the client, Mr. Morabito, intended to further some
22 fraudulent activity and that he engaged counsel to assist in
23 that activity. The debtor is not subject to the motion to
24 compel because he was not the deponent, but he is the holder of
25 the privilege. And that's why there is jurisdiction, and

1 that's why this motion isn't brought under Rule 37. And I'm
2 not making any determination of Rule 37.

3 Moreover, I'm not being asked to enter any type of a
4 final order or a judgment against Mr. Vacco. Not aware of law
5 that says there must be in personam jurisdiction over a
6 deponent who's not a party. And Mr. Vacco himself, who is a --
7 obviously a skilled and knowledgeable practitioner, indicated
8 that he needed a judicial determination so he could make his
9 own judgment whether or not he was going to answer the
10 questions. I don't know of any other court that can make that
11 determination.

12 In other words, while related to discovery, what I'm
13 really being asked to do is not to participate in the discovery
14 process except to find whether or not there is a privilege -- I
15 think there is -- and whether or not it's been waived. By the
16 balancing test, I think it may -- it has been, and whether the
17 crime-fraud exception applies, and I think it does. But I'm
18 not going to go any further than find -- making those findings
19 applicable to this particular deponent. That's why it's not an
20 advisory opinion.

21 Moreover, this is a procedural issue. It's not
22 really substantive, and state law does not supply the rule
23 decision for privilege determination. Moreover, based upon the
24 citations contained in the opposition, it would appear to me
25 that both New York and Nevada have a very similar exception

1 based upon fraud, which is the equivalent of the federal law
2 crime-fraud exception.

3 And federal law, and the cases so hold, does
4 determine the scope of the privilege as it relates to estate
5 property, and the allegation is that this is estate property
6 that was improperly or fraudulently transferred by the debtor.

7 Moreover, there are a number of issues, even if
8 timing was important, that Mr. Vacco already testified to that
9 he had no knowledge of, or didn't, at least, until sometime
10 near the time that he terminated his relationship with
11 Mr. Morabito, which was in 2013. Specifically I'm talking
12 about the septen (phonetic) transfers by Mr. Morabito.

13 One thing that is a little bit perplexing to me is
14 the state court action in which the deposition was taken. It's
15 not been removed. It's not in this court. Is that correct?

16 MR. GORDON: Your Honor, we were not able to remove
17 it pursuant to the rules because of the manner by which it was
18 filed in that gap period between -- we were not able to do it,
19 so it had to stay in state court. So what we did was we
20 substituted in the trustee --

21 THE COURT: I know. The trustee is now a party. I
22 read that.

23 MR. GORDON: And we substituted out Mr. Morabito.

24 THE COURT: The adversary in which I conducted the
25 status conference this morning, does that contain similar



1 allegations to the allegations that are in the state court
2 action?

3 MR. MURTHA: Only in that it's a fraudulent transfer
4 case, Your Honor. But it has nothing to do with the issues
5 that are in place in the state court issue -- state court
6 matter. For example, we're not addressing real property
7 transfers. We're not addressing the payment of --

8 THE COURT: In the adversary.

9 MR. MURTHA: In the adversary, that's correct. Our
10 adversary focuses on the transfer of whatever interest the
11 debtor may have had in USHFCC, and it deals with that only.

12 MR. LUKAS: If I can correct, you mean in Virsenet.

13 MR. MURTHA: In Virsenet.

14 THE COURT: Virsenet, okay.

15 MR. MURTHA: Generically, I refer to it as the
16 USHFCC.

17 THE COURT: All right. You've heard my tentative
18 conclusion. I'll hear argument from the trustee.

19 MR. GORDON: Again, good morning, Your Honor. I will
20 keep it very short given the Court's comments and summary
21 conclusions. Just a few things. One is the Court is
22 absolutely correct, we were trying to be very careful in that
23 this is not directed at Mr. Vacco. This is directed at the
24 holder of the privilege, and in this case it's the debtors.
25 And I use the word "debtors" as CNC and Mr. Morabito.



1 THE COURT: I forgot to mention because CNC is also a
2 debtor. That's a corporate debtor and Weintraub makes it very
3 clear that the trustee has that privilege.

4 MR. GORDON: The second point I'd like to clarify is
5 the Court has talked about the privilege log. In fact, when
6 the Court reviewed the transcript of Mr. Vacco's deposition,
7 there was a lengthy discussion with regard to both Exhibit 1
8 and Exhibit 2. Exhibit 1 was a subpoena for documentation
9 issued to Mr. Vacco. Exhibit 2 was the response from
10 Mr. Vacco. And they're both attached to the deposition.

11 In the response, Mr. Vacco -- in the subpoena
12 response, Mr. Vacco states in paragraph LMWF, which is
13 Lippes --

14 THE COURT: That's Lippes.

15 MR. GORDON: -- objects to each paragraph of the
16 document demand to the extent that paragraph seeks privileged
17 information, proprietary information, or other information that
18 has been gathered or prepared in the course of litigation or
19 which is otherwise subject to the lawyer-client privilege, the
20 accountant-client privilege, the joint defense privilege, the
21 husband-wife privilege, the work product doctrine, or any other
22 applicable privilege or immunity, including trade secrets,
23 proprietary information, information that is confidential
24 pursuant to a statute or a court order, confidential business
25 information, other information subject to an exception of



1 privacy or confidentiality, information described by this
2 paragraph as referred to herein as privileged.

3 Now, he did in each -- Mr. Vacco and Lippes did, in
4 each of the responses, assert that privilege subject to
5 whatever documentation that's already been produced, which is
6 basically billing records and that -- the two two-page trust
7 account documents for USHFCC and Mr. Morabito.

8 In fact, in the deposition, in response to -- on
9 Page 12, beginning at Line 16, here's a question from
10 Ms. Pilatowicz.

11 "Q Okay, if you could turn to Page 2 of Exhibit 2 and look
12 down at Number 4, the general objections, it says LMWA further
13 objects to any -- each paragraph of the document, and to the
14 extent it requests information subject to a client -- attorney-
15 client privilege held by" -- I believe that's a typo -- "a
16 corporate client entity of LMWA that is not a party to these
17 proceedings?"

18 "A Correct."

19 So there is no privilege log, as the Court said.
20 There has been response whatsoever, obviously, from Mr. Vacco
21 since he's not the target of this motion.

22 THE COURT: The privilege log should come from the
23 debtor.

24 MR. GORDON: That's exactly right.

25 THE COURT: Well, maybe both debtors.

1 MR. GORDON: But when the Court said there wasn't a
2 -- there is a subpoena, there were documents requested. There
3 -- Mr. Vacco did --

4 THE COURT: Okay.

5 MR. GORDON: -- refuse to produce any of those
6 documents.

7 THE COURT: That's -- the documents, I -- in that
8 case, I believe the documents then would constitute property of
9 the estate. The Ninth Circuit has so held.

10 MR. GORDON: Not Section 541. I mean, there's no
11 Section 542, turnover by the trustee, but it's clear, the
12 exception to Section 541, and as we cite back to the very
13 genesis of that, which is 28 U.S.C. 157(2)(b)(1), which is
14 administration of the case.

15 I appreciate how limited this is, and basically,
16 based on what I believe will be the Court's order and the
17 clarity of the Court's order, we will go back and depose --
18 further depose Mr. Vacco since his deposition was suspended,
19 not concluded.

20 However, I would point out something, and this is
21 really where the trustee needs to go, but I will point it out.
22 This -- as the Court commented, this is not going to be the
23 first or last hearing in this regard. If the Court looks very
24 clear -- carefully at the objection from Mr. Gilmore, he made
25 the objection on behalf of the debtor, which I assume was



1 Mr. Morabito, not the debtor CNC.

2 THE COURT: That's what I assumed, as well.

3 MR. GORDON: But he also made the objection on behalf
4 of the other defendants. So I imagine we're going to be back
5 here on the issue of the joint client exception, which --

6 THE COURT: I don't have it in front of me.

7 MR. GORDON: And we will go further on that. But
8 that's basically what I believe is where the Court is. I would
9 also point out the Ginzburg case. In Ginzburg, they -- this is
10 what the Court said with regard to the crime-fraud exception,
11 this also has no bearing on the well-established crime-fraud
12 exception, which the trustee has stipulated does not apply
13 here. So in Ginzburg, all the Court had was the balancing of
14 the equities. I think we meet both tests, but the crime-fraud
15 exception is clear. A fraudulent conveyance matter is crime-
16 fraud.

17 THE COURT: The balancing is for the waiver of crime-
18 fraud is the exception --

19 MR. GORDON: And with regard to the balance, I mean,
20 ultimately what it comes down to on the balance is pretty
21 simple. You balance the --

22 THE COURT: Well, my tentative conclusion was a belt
23 and suspenders.

24 MR. GORDON: Yes. But in essence, in the balancing
25 test, Your Honor, you look at the interest of the debtor and

1 the preservation of the privilege versus the interest of the
2 trustee. The debtor is not a party to this. We're not seeking
3 in this matter recovery from the debtor. We're seeking
4 recovery from third parties who we believe received fraudulent
5 transfers.

6 THE COURT: The transferees.

7 MR. GORDON: Pardon me?

8 THE COURT: The transferees.

9 MR. GORDON: The transferees. The interest to the
10 estate is to maximize the estate for the benefit of the
11 creditors, to provide -- and to carry out the burden and the
12 obligations of the trustee, and that is to maximize an estate.
13 We believe that the interests of the debtor are minor in this.
14 He did this transaction back in 2010. He has nothing coming
15 back to him. He has nothing that he has to give up. As the
16 Court said, we said, he's not a defendant. Therefore, I really
17 think the balancing of the -- balancing test is met.

18 THE COURT: As to the objection filed by Mr. Lukas, I
19 believe you've addressed that in the reply and his concerns
20 have been --

21 MR. LUKAS: It appears to be so, yes, Your Honor.

22 THE COURT: Thank you.

23 MR. GORDON: Yeah, we're --

24 THE COURT: Yeah. I --

25 MR. GORDON: -- not focused on USHFCC. In fact, to

1 be candid with the Court, we look at USHFCC as being the golden
2 goose, or the golden egg in this case. That's where we believe
3 the value is as --

4 THE COURT: The licenses and such.

5 MR. GORDON: And where the trustee is going in the
6 adversary.

7 THE COURT: Okay.

8 MR. GORDON: We have no intent to have any impact
9 whatsoever on USHFCC. We wish it well and we hope it thrives.

10 THE COURT: Thank you. Mr. Gilmore.

11 MR. GILMORE: Thank you, Your Honor. Your Honor, I
12 think the debtor has the right to rely on the request sought in
13 the motion. What we have here is a motion that's very clear as
14 to what relief it seeks, and then we have an about-face by
15 counsel at the table.

16 The motion says we are seeking -- the trustee is
17 seeking an order directing Dennis Vacco to respond to
18 categories of questions asked in a deposition, paren, in the
19 state court, for which Vacco was instructed not to respond by
20 counsel for the debtor. That's what the motion seeks, and that
21 is what the debtor responded to.

22 The Court is absolutely correct. In the deposition
23 transcript, I was very clear. I said to Ms. Pilatowicz, don't
24 direct those arguments at Mr. Vacco. It's not his privilege.
25 He doesn't have a dog in this fight. If Mr. Morabito wishes to



1 waive the privilege or assert the privilege, that's a
2 Mr. Morabito issue. She said, well, I'm going to instruct Mr.
3 Vacco to answer, and I said, I'm going to assert the privilege
4 on behalf of the debtor. She said fine, we're going to have a
5 motion. I said, okay.

6 I was also very careful to assert only the privilege
7 where I was confident and assured that it applied. If you want
8 to talk about general things that the debtor and counsel did or
9 that Mr. Vacco did with other defendants, have at it. But as
10 soon as she said, what advice did you give to which
11 Mr. Morabito did not follow, I said, well, I'm sorry, counsel,
12 there you are asking for advice and that's clearly attorney-
13 client privilege and I'm going to have to assert the objection.
14 So this motion is entirely premised on those disputed questions
15 raised in the deposition.

16 Then the trustee comes in and bootstraps everything
17 it wants into this motion and into a joinder that essentially
18 says, Your Honor, I'm going to refer you to the February letter
19 which was sent to me, it was sent to Mr. Hartman, it was sent
20 to Mr. Vacco, that basically says since you represent the
21 debtor, I get everything you've ever said or done with respect
22 to advice you've given to the debtor.

23 THE COURT: I'm not making any finding in that
24 regard.

25 MR. GILMORE: Okay. The point I'm making on that

1 today, Your Honor --

2 THE COURT: The big fear that I read in your
3 opposition would be even -- not only the matters that Mr. Vacco
4 might be ordered to testify to, but perhaps what your firm
5 might be required to testify about, and I'm not going there
6 today.

7 MR. GILMORE: Sure. Okay.

8 THE COURT: Not at all. Done.

9 MR. GILMORE: And so I would ask the Court not to go
10 there. I would ask the Court --

11 THE COURT: I just said I wasn't.

12 MR. GILMORE: The -- to address the issue that is
13 raised in the motion, which is is this Court willing to compel
14 Mr. Vacco, who has not received a subpoena in this matter, to
15 answer questions in a state court deposition --

16 THE COURT: The answer is yes.

17 MR. GILMORE: The answer is the Court is --

18 THE COURT: I am.

19 MR. GILMORE: The Court is -- I think what the Court
20 said, respectfully, was it's going to issue findings that
21 essentially render the objections meritless.

22 THE COURT: Here's how -- here's my thinking. The
23 only reason Mr. Vacco didn't answer the questions is because he
24 was told -- he was instructed not to by you on behalf of your
25 client. Obviously, a lawyer is going to follow the

1 instructions that are given by you because that was his client.
2 Done. He even said, I need a ruling from a court. I am going
3 to give him that ruling. What he chooses to do thereafter is
4 within his purview, and as I've already said, at that time,
5 maybe folks have to go back to state court and figure out how
6 to solve this problem.

7 But I believe that the administration of this estate
8 is implicated, property of the estate is implicated, that I
9 have the jurisdiction to enter this order, and then what
10 Mr. Vacco wants to do with it is up to Mr. Vacco. That's why
11 I'm not telling -- if Mr. Vacco still refuses to answer the
12 question, I'm not willing to say at this time that he'd be in
13 contempt of this order.

14 MR. GILMORE: Right.

15 THE COURT: I'm not -- understand, I think it was a
16 limited motion. My order is going to be limited.

17 MR. GILMORE: Okay. So --

18 THE COURT: I did it the last time we were here. I
19 think the attorney-client privilege is extraordinarily
20 important for all the reasons cited by the cases. At the same
21 time, in a bankruptcy context, when you read the cases, there
22 can be even a greater necessity for some -- for discovery
23 either under the fraud exception or if you're taking a look at
24 whether or not the trustee has the ability to waive the
25 privilege on behalf of the debtor.



1 I -- in this instance, I found both. If I'm wrong on
2 one, I'm probably right on the other because I just want this
3 matter to move forward in a way that I think is efficient and
4 economical and protects the debtor's rights.

5 MR. GILMORE: With that clarification, I interpreted
6 the Court's tentative ruling to essentially say nothing more
7 than the Court finds a prima facie showing which would then
8 potentially open the door to subsequent proceedings, either in
9 New York or potentially the state court where that then --

10 THE COURT: And only regarding Mr. Vacco.

11 MR. GILMORE: Okay. With that, I'll skip down and
12 address only a few other things. The Court's reference to the
13 privilege log, I think, was first with regard to the May
14 proceeding and then secondary with regard to --

15 THE COURT: But if I --

16 MR. GILMORE: -- today's proceeding. With May, it
17 didn't really matter, if Your Honor remembers, because --

18 THE COURT: Oh, I remember well.

19 MR. GILMORE: -- there was no privilege asserted.

20 There --

21 THE COURT: I know why I ruled.

22 MR. GILMORE: Okay.

23 THE COURT: I read the transcript.

24 MR. GILMORE: There would be no privilege log
25 provided in this proceeding because the motion says we want

1 Mr. Vacco to answer two questions and nothing more.

2 THE COURT: And everybody has given me those
3 questions. I've read the --

4 MR. GILMORE: Okay.

5 THE COURT: -- declarations. I've read the
6 transcript. I understand that, but I'm also well aware that
7 one of the reasons this motion was filed and one of the reasons
8 you've opposed it is everybody is trying to find some guidance
9 so you're not back here the next time there's a third question
10 that's asked. And that's what I've tried to do.

11 MR. GILMORE: Okay.

12 THE COURT: And if you want to come back, great.
13 That's what I'm here for.

14 MR. GILMORE: Now, I understand the Court's tentative
15 ruling on the prima facie showing. I certainly don't want to
16 concede that. I don't think my opposition --

17 THE COURT: I'm not asking you to.

18 MR. GILMORE: -- concedes that, so -- but I won't
19 belabor the point other than to say with respect to the
20 disputed questions, the --

21 THE COURT: The disputed questions, those that were
22 actually asked at the deposition.

23 MR. GILMORE: Correct, correct. And I understand the
24 Court's tentative ruling to say, well, the Court's tentative
25 ruling would involve any other potential questions where we

1 could have been there all day and she would have been asking
2 various questions and I would have been asserting the
3 objection.

4 THE COURT: And I -- and there are number of cases
5 that say there has to be a specific question and a specific --
6 but usually those arise in the Fifth Amendment areas and not so
7 -- not all the time when you're raising attorney-client
8 privilege. I think there can be just we're going to assert the
9 privilege. I think in the civil action, the courts understand
10 the economics. That's how I took it.

11 MR. GILMORE: Okay. So my request for a further --
12 to further box exactly what the Court's ruling today is,
13 Mr. Vacco's deposition involved a very discrete set of
14 transfers that are not in any way implicated by the adversarial
15 proceeding.

16 THE COURT: Which is why I asked the question.

17 MR. GILMORE: Okay. So if I understand the Court's
18 tentative today, the Court's suggesting that with respect to
19 those discrete transactions, what we call sort of the
20 Superpumper transactions --

21 THE COURT: The ones where there were appraisals and
22 why they were done and who -- and I know -- that's why I kind
23 of wonder what this fight is really about because I also read
24 what Mr. Vacco did answer, and he was trying to separate
25 Mr. Morabito's brother and Ms. Estes' client from Paul Morabito

1 and distribute them fairly. Well, I think that's a real good
2 question for the trustee to examine is just how fair are these.
3 And that's where the fraudulent conveyance is, that's why
4 (indiscernible) jurisdiction, that's why I think there's a
5 prima facie case.

6 MR. GILMORE: Okay. And --

7 THE COURT: I thought Mr. Vacco tried to answer the
8 questions to the best of his ability subject to the limitation
9 that you imposed upon him.

10 MR. GILMORE: So did I. And I believe discovery has
11 only somewhat commenced in the state court action, the
12 Superpumper action. What the trustee, Mr. Murtha, seeks is
13 something totally unrelated to what was going on in the state
14 court action. And what I'm primarily here today to understand
15 for the Court's tentative ruling is the letter that I received
16 and that Mr. Vacco and Mr. Murtha received from the trustee
17 that essentially says I'm trying to find out what the financial
18 condition of the debtor is, and in my effort to do so, I'm
19 waiving all of your client's applicable privileges.

20 THE COURT: Then --

21 MR. GILMORE: That's not where the Court's going
22 today.

23 THE COURT: I do not -- as I'm saying, if you take a
24 look at the case law, if you take a look -- I can't remember
25 the particular case now, but the one in which there was a -- it

1 was turnover, it was a 542 action that also implicated 541
2 because the documents that were sought to be produced were
3 property of the estate. That's how you get to 541; the
4 turnover is under 542. That's a little bit different than what
5 I have here. That's why I'm not willing to go as far as the
6 joinder asked me to go.

7 MR. GILMORE: Okay. If the Court has no further
8 questions of me, that would be my --

9 THE COURT: I don't think so. Anybody else?

10 MR. GORDON: You're absolutely right, Your Honor.
11 This is -- there's no 542 action before you. That would be
12 brought by the trustee in the case in chief, and we'll see what
13 the trustee does in that regard.

14 I would make the following: That the Court -- and I
15 think we're very clear in our points and authorities. We're
16 looking to Mr. Vacco to answer the questions. The privilege
17 has been imposed. We short circuited --

18 THE COURT: And let me give you a hint, if you want
19 to avoid some of this. Maybe you don't, maybe because it's a
20 state law issue. But since it affects the debtor's privilege
21 and assertion of that privilege, I would do the same thing that
22 I do in matters that are -- in any adversary pending in front
23 of me. If you have a question on privilege, pick up the
24 telephone.

25 MR. GORDON: And, Your Honor, what I was --

1 THE COURT: We'll go on the record right there.

2 MR. GORDON: What I was going to say as a suggestion
3 to the Court was exactly that; that we will recommence the
4 deposition, obviously we will ask the questions, but we will
5 ask additional questions. I would --

6 THE COURT: I'm not compelling anybody to do that.

7 MR. GORDON: Nope.

8 THE COURT: There may be --

9 MR. GORDON: Nope.

10 THE COURT: -- other issues that I'm not aware of.

11 MR. GORDON: Nope, we will also very clearly, in that
12 record, deal with the subpoena and the refusal to produce
13 documents and try to figure out what documents there are. Part
14 of it was short circuited. I don't even know what documents he
15 has. I assume communications, et cetera. We don't really
16 know, and that's fine.

17 I will tell the Court that I would expect that
18 Mr. Gilmore will reimpose the -- or assert the privilege on
19 behalf of the joint, and that will bring us back here.

20 THE COURT: Then I would -- my only guidance I'd
21 provide is that if that is going to occur, I mean, discuss it
22 in advance. You folks be ready at the time of the deposition
23 to make cogent argument at that time. If I can't resolve it on
24 the telephone, I'll set a briefing schedule. But let's not --
25 we're all -- I've got nothing but good lawyers in this room.

1 Let's not -- I don't think anybody's playing hide the ball.
2 Let's not do it. Make your positions known in advance, and
3 then if you can't work them out and if I can't -- I'll attempt
4 to do it telephonically. If I can't do it, then we'll come
5 back here.

6 MR. GORDON: Understood.

7 THE COURT: Let's try to be efficient and not incur
8 any administrative expense on the state's behalf or any
9 unnecessary attorneys' fees on behalf of any of the other
10 parties in interest, if we can avoid it. That's what I'm
11 seeking to do.

12 MR. GORDON: And I understand that. We'll
13 coordinate, obviously, with Mr. Gilmore. We put our positions
14 on the record in terms of the brief. We know what it is.

15 THE COURT: And so to Mr. Gilmore, I have no
16 problem --

17 MR. GORDON: Understood.

18 THE COURT: -- with the conduct of -- with any
19 counsel, including Mr. Vacco, up to this point, no problem at
20 all.

21 MR. GORDON: No. And by the way, as we said in our
22 pleadings, this has nothing to do with Mr. Vacco.

23 THE COURT: I already said that.

24 MR. GORDON: Yeah. And we've said that also, Your
25 Honor.



1 THE COURT: Okay.

2 MR. GILMORE: One last thing, if you don't mind, Your
3 Honor.

4 THE COURT: Okay.

5 MR. GILMORE: One -- ten seconds. When --

6 THE COURT: Don't ever say that because you can't do
7 it.

8 MR. GILMORE: It will be ten seconds for me, I
9 promise you that. When the Court says it would like cogent
10 arguments in the event of a further dispute, would the argument
11 be related to the relationship between the advice sought and
12 the fraud asserted?

13 THE COURT: Whatever you want.

14 MR. GILMORE: Okay.

15 THE COURT: I'm not going to limit what your argument
16 can be.

17 MR. GILMORE: Well, I'm thinking in terms of pointing
18 it to where --

19 THE COURT: I --

20 MR. GILMORE: -- the Court would be going.

21 THE COURT: I don't know. And it might be helpful --
22 and you can think about this. I won't do an advisory opinion,
23 but you could be -- both folks could submit to me a short brief
24 in advance of deposition if you think these issues should come
25 up so that I could be briefed on them. Not that I would issue

1 an opinion -- I wouldn't -- but at least then I'd have your
2 authority. And I'd limit you each to ten pages, tell me what
3 you think may come up at the deposition, and let me read it.
4 And then I can do it by telephone rather than bringing you back
5 here.

6 MR. GORDON: That's --

7 MR. GILMORE: Understood.

8 MR. GORDON: From our standpoint, that's an excellent
9 idea. It would be in the joint -- whatever the defenses are,
10 whatever the claims are, and --

11 THE COURT: Do a joint or you can do separate, I
12 don't care.

13 MR. GORDON: Okay.

14 THE COURT: Just simultaneous. Let me have it, let
15 me read it before your deposition. Get it to me in plenty --

16 MR. GORDON: That's fine with us.

17 THE COURT: -- of time so I can read it. That way we
18 can save some time and money.

19 MR. GILMORE: I'd prefer to not do the briefing and
20 not have the objections, and not have objectionable questions,
21 but --

22 THE COURT: Yeah, and I'm sure he'd just as soon --

23 MR. GILMORE: -- I don't always get my way.

24 THE COURT: Well, you know what? That choice is
25 yours. Okay.



1 MR. GORDON: Thank you, Your Honor.

2 THE COURT: Okay. Mr. Gordon, I'm going to order you
3 to prepare the order that is consistent with the oral --
4 tentative conclusion that I placed on the record as detailed in
5 the dialogue that has occurred since I entered that tentative
6 ruling. And I've made my oral findings and conclusions on the
7 record pursuant to Federal Rule of Bankruptcy Procedure 7052
8 that incorporates by reference Federal Rule of Civil Procedure
9 52. And we'll go from there. You're scheduled. And I'd put
10 in the order that the procedure that we've established for
11 assertion of any privilege in future deposition of Mr. Vacco,
12 and that way it's clear and we can go forward.

13 MR. GORDON: Will do. Thank you, Your Honor.

14 THE COURT: I wish you all the happiest of holidays.
15 Thank you very much.

16 THE CLERK: All rise.

17 (Proceedings concluded at 10:13 a.m.)

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C E R T I F I C A T I O N

I, Ilene Watson, court-approved transcriber, hereby
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter.



ILENE WATSON, AAERT NO. 447

DATE: December 28, 2015

ACCESS TRANSCRIPTS, LLC

ACCESS TRANSCRIPTS, LLC



1-855-USE-ACCESS (873-2223)

Exhibit 9

The undersigned has reviewed the objection to proposed order, the response, the transcript of the December 22, 2015 hearing and the underlying pleadings prior to executing this order.



Honorable Gregg W. Zive
United States Bankruptcy Judge



Entered on Docket
February 03, 2016

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA

In re:

PAUL A. MORABITO,

Debtor.

Case No.: BK-S-13-51237-GWZ
Chapter: 7

Hearing:

Date: December 22, 2015
Time: 9:00 a.m.

**ORDER GRANTING MOTION TO COMPEL
RESPONSES TO DEPOSITION QUESTIONS**

The *Motion to Compel Responses to Deposition Questions* [ECF No. 452] (the "Motion"), filed by William Leonard, Chapter 7 Trustee (the "Trustee"), by and through his counsel, the law firm of Garman Turner Gordon LLP, with regard to the deposition of Dennis Vacco ("Vacco") in the State Court Case¹ came on for hearing before the above-captioned Court

¹ Terms not otherwise defined in this Order are as defined in the Motion.

1 on December 22, 2015, at 9:00 a.m. (the "Hearing"). Gerald M. Gordon, Esq. of Garman Turner
2 Gordon LLP appeared as special counsel and John F. Murtha, Esq. of Woodburn & Wedge
3 appeared as general counsel on behalf of the Trustee. Frank C. Gilmore, Esq. of Robison
4 Belaustegui Sharp & Low and Jeffrey L. Hartman, Esq. of Hartman & Hartman appeared on
5 behalf of the debtor Paul A. Morabito (the "Debtor"). Timothy A. Lukas, Esq. of Holland &
6 Hart appeared on behalf of USHF Cellular Communications, LLC and Janet L. Chubb, Esq. of
7 Kaempfer Crowell appeared on behalf of Virsenet, LLC. Holly Estes, Esq. of Walter & Wilhelm
8 Law Group appeared on behalf of Edward Bayuk and the Meadow Farms Irrevocable Trust. All
9 other appearances were noted on the record at the Hearing.

10 The Court having reviewed the Motion and all matters submitted therewith as well as the
11 oppositions [ECF Nos. 460 & 461] and the Trustee's omnibus reply [ECF No. 466] filed thereto;
12 notice of the Motion having been proper; the Court finding and concluding that: (a) the Court has
13 jurisdiction to hear and decide the Motion; (b) the attorney-client privilege related to Lippes
14 Mathias Wexler Friedman, LLP's ("Lippes Mathias") production of documents and Vacco's
15 testimony during the deposition is that of the Debtor; (c) it is the Debtor's obligation to provide a
16 privilege log with respect to the documents being withheld on the basis of privilege because the
17 Debtor is asserting the privilege; (d) the invocation of the privilege by the Debtor affects
18 property of his estate pursuant to Section 541 of the Bankruptcy Code that is alleged to have
19 been fraudulently transferred; (e) the Trustee has made a prima facie showing of fraud as
20 required by the crime/fraud exception to the attorney-client privilege, which showing has not
21 been rebutted; (f) the inquiry required by the crime/fraud exception is focused on what the client
22 wanted to accomplish – whether the client intended to further some fraudulent activity and
23 engage counsel to assist in that activity; the timing of the legal services or whether the attorney's
24 legal services were closely related have no effect on whether the crime/fraud exception is
25 established; (g) the Trustee has met his burden to waive the Debtor's attorney-client privilege
26 under the balancing test; and (h) as a result, the Trustee has, consistent with applicable law,
27 waived the Debtor's attorney-client privilege with Lippes Mathias and Vacco. Having stated the
28 Court's additional findings of fact and conclusions of law on the record at the Hearing, which are

1 hereby incorporated herein by reference in accordance with Rule 52 of the Federal Rules of Civil
2 Procedure, made applicable pursuant to Rule 9014 of the Federal Rules of Bankruptcy
3 Procedure; and good cause appearing therefore,

4 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** as follows:

5 1. The Motion is granted as provided herein.

6 2. The elimination of Debtor's attorney-client privilege with Lippes Mathias and
7 Vacco as provided for herein extends to the Disputed Questions that were asked and objected to
8 in the deposition of Vacco, any other questions that may be asked of Vacco at the continued
9 deposition, and any documents that may have been withheld by Lippes Mathias, the Debtor, or
10 Debtor's counsel in response to the subpoenas for documents on grounds that disclosure was not
11 required because of the Debtor's attorney-client privilege with Lippes Mathias and Vacco.

12 3. Lippes Mathias and Vacco shall disclose and make available to the Trustee
13 documents and information related to the representation of the Debtor that would otherwise be
14 protected from disclosure under the privilege.

15 4. Within ten (10) calendar days of entry of this Order, the Debtor shall provide the
16 Trustee a privilege log with respect to all documents withheld on the basis of privilege.

17 5. The deposition of Vacco shall recommence in the State Court Case.

18 6. The parties may submit briefs simultaneously of no longer than ten (10) pages, by
19 5:00 p.m. on the last business day which is ten (10) calendar days prior to the recommenced
20 deposition, in which the parties may brief attorney-client privilege issues and disputes that the
21 Debtor and parties to the State Court Case anticipate arising at the continued deposition to
22 expedite the resolution any additional disputes.

23 7. The parties shall coordinate with the Court's staff so that the Court is available
24 telephonically to resolve any disputes that arise during the continued deposition.

25 **IT IS SO ORDERED.**

1 **PREPARED AND SUBMITTED:**

2 GARMAN TURNER GORDON LLP

3
4 /s/ Mark M. Weisenmiller

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5 Nevada Bar No. 229

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9 *Attorneys for Chapter 7 Trustee.*

William A. Leonard

LR 9021 CERTIFICATION

In accordance with LR 9021, counsel submitting this document certifies as follows:

- ☐ The Court waived the requirement of approval under LR 9021(b)(1).
- ☐ No party appeared on the Motion at the hearing or filed an objection to the Motion.
- ☒ I have delivered a copy of this proposed order to all counsel who appeared at the hearing, and any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order as stated below.

FRANK C. GILMORE, ESQ. & JEFFREY L. HARTMAN, ESQ. – For Debtor – **DISAPPROVED**

TIMOTHY A. LUKAS, ESQ. – For USHF Cellular Communications, LLC – **APPROVED**

HOLLY ESTES, ESQ. – For Edward Bayuk and Meadow Farms Irrevocable Trust – **DISAPPROVED**

JOHN F. MURTHA, ESQ. – for Chapter 7 Trustee – **APPROVED**

- ☐ I have certified that under Chapter 7 or 13, that I have served a copy of this order with the motion pursuant to LR 9014(g), and that no party has objection to the form or content of the order.

###

Exhibit 10

2582
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Special Counsel to 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.: 1

TIME: March 18, 2016
DATE: 10:00 a.m.

NOTICE OF CONTINUED DEPOSITION OF DENNIS VACCO

PLEASE TAKE NOTICE that on the 18th day of March 2016, at 10:00 o'clock a.m., at
Key Center, 50 Fountain Plaza, Suite 1400, Buffalo, New York 14202, Plaintiff William A.
Leonard, by and through his special counsel, Garman Turner Gordon LLP, will take the
continued deposition of Dennis Vacco.

The deposition will be taken upon oral examination and stenographically recorded
pursuant to Rules 26 and 30 of the Nevada Rules of Civil Procedure, before a Notary Public, or

1 before some other officer authorized by law to administer oaths. The oral examination will
2 continue from day to day until completed. You are invited to attend and cross-examine.

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 18th of February, 2016.
8

9 GARMAN TURNER GORDON LLP

10
11 /s/ Teresa M. Pilatowicz

12 GERALD E. GORDON, ESQ.
13 TERESA M. PILATOWICZ, ESQ.
14 650 White Drive, Ste. 100
15 Las Vegas, Nevada 89119
16 Telephone 725-777-3000

17 *Special Counsel for Trustee*
18
19
20
21
22
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26
27
28

1
2 **CERTIFICATE OF SERVICE**

3 I certify that I am an employee of GARMAN TURNER GORDON LLP, and that on this
4 date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **NOTICE OF**
5 **DEPOSITION OF DENNIS VACCO** on the parties as set forth below:

6
7 ☒ XXX Placing an original or true copy thereof in a sealed envelope placed for collection
8 and mailing in the United States Mail, Reno, Nevada, postage prepaid, following
ordinary business practices

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
13 to be personally Hand Delivered

14 ☐ Federal Express (or other overnight delivery)

15 addressed as follows:

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

20 DATED this ____ day of August, 2015.

21
22
23 An Employee of GARMAN TURNER
24 GORDON LLP
25
26
27
28

Exhibit 11

Barry L. Breslow, Esq. (SBN 3023)
Frank C. Gilmore, Esq. (SBN 10052)
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71 Washington Street
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Jeffrey L. Hartman, Esq. (SBN 1607)
HARTMAN & HARTMAN
510 W. Plumb Ln., Suite B
Reno, Nevada 89509
Tel: (775) 334-2800 / Fax: (775) 324-1818

Counsel for Paul A. Morabito

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA
(RENO)

In re
PAUL A. MORABITO, an individual,
Debtor.

Case No. BK-N-13-51237

Chapter 7

**DEBTOR'S OBJECTION TO PROPOSED
ORDER GRANTING MOTION TO
COMPEL RESPONSES TO DEPOSITION
QUESTIONS**

Hearing Date: December 22, 2015
Hearing Time: 9:00 a.m.

Debtor Paul A. Morabito ("Morabito"), by and through his counsel, Robison, Belaustegui, Sharp & Low, hereby brings his objection to the Trustee William J. Leonard Jr.'s ("Trustee") proposed Order Granting Motion to Compel Responses to Deposition Questions, which was lodged with the Court by Trustee's counsel after the December 22, 2015, hearing on the Trustee's Motion to Compel Responses to Deposition Questions (Doc#452). This Objection is made and supported by Local Rule 9021(b)(2)(A).

STATEMENT OF OBJECTIONS TO PROPOSED ORDER

The Trustee's proposed Order goes well beyond the scope of the Court's oral and tentative conclusion that was placed on the record on December 22, 2015. Debtor's proposed order is attached hereto as EXHIBIT 1. A redlined version of the Trustee's Order is attached as

1 EXHIBIT 2, in order to show the difference between the Trustee's proposed order and the
2 Debtor's proposed order. Debtor takes issue with the following provisions of the Trustee's
3 proposed order:

4 1. Page 2, lines 18-21, subsection "e".

5 The Trustee's proposed order suggests and implies that there has been a prima facie
6 showing of fraud as to all advice rendered to the Debtor from Dennis Vacco or the Lippes
7 Mathias law firm. The Court's oral findings did not reach so broadly. The issue before the
8 Court was the advice Lippes and Vacco gave to the Debtor as to the State Court Case
9 transactions which were the subject of the Motion (Doc #452), to wit: the Debtor's transfer of the
10 shares of Superpumper to the State Court Case Defendants. The Court did not find a prima facie
11 showing of fraud as to all advice rendered by Vacco to the Debtor, or all documents maintained
12 or created by Vacco on behalf of the Debtor, unlimited in time or in scope. The Debtor has
13 proposed that the paragraph include a provision that the prima facie showing has been made only
14 "as to the allegations made in the First Amended Complaint in the State Court Case regarding the
15 transfer of the shares of Superpumper, Inc., in which Dennis Vacco was counsel for the
16 transferor and the transferees, . . ."

17 2. Page 2, lines 23-24.

18 The Court did not hold that timing of the legal services or advice rendered has no bearing
19 on the crime/fraud exception. The Court explained that it was "not even convinced that timing
20 makes any difference . . ." (Transcript, December 22, 2015, p. 22:17-18). Debtor's proposed
21 order is more in line with the Court's findings. Debtor understands that the Court is not
22 convinced that timing makes any difference, but that is different than Trustee's order which
23 states that the timing "has no effect," which is not what the Court found.

24 3. Page 2, lines 25-26, subsection "g".

25 As with number 1, above, the Trustee has proposed an order that the Trustee has met his
26 burden, under the balancing test, as to all of Debtor's attorney-client privilege with Vacco or the
27 Lippes firm, irrespective of the scope of the advice, and the connection between the advice and
28 the alleged fraud. Debtor has proposed limiting language more in keeping with the Court's oral

1 findings that the balancing test is limited to the issues put before the Court in the Motion, to wit:
2 the Debtor's transfer of the shares of Superpumper to the State Court Case Defendants.

3 **4. Page 2, lines 26-27, subsection "h".**

4 As with number 1, above, the Trustee has proposed an order that purports to waive all of
5 Debtor's attorney-client privilege with Vacco or the Lippes firm, irrespective of the scope of the
6 advice, and the connection between the advice and the alleged fraud. Debtor has proposed
7 limiting language more in keeping with the Court's oral findings that the balancing test is limited
8 to the issues put before the Court in the Motion, to wit: the Debtor's transfer of the shares of
9 Superpumper to the State Court Case Defendants. The Court's willingness to be available in the
10 event of Vacco's continued deposition to render decisions if the parties have "a question on
11 privilege" confirms that the Court had not entered a wholesale waiver of the Debtor's privilege
12 as to Vacco or the Lippes firm. (Transcript, December 22, 2015, p. 39:23-24). Debtor has
13 proposed limiting language more in keeping with the Court's oral findings that the waiver is
14 limited to the issues put before the Court in the Motion, to wit: the Debtor's transfer of the
15 shares of Superpumper to the State Court Case Defendants.

16 **5. Page 3, lines 6-11, subsection "2".**

17 The Court left open the possibility that certain questions asked of Vacco at a continued
18 deposition, or documents sought from him, would not be subject to the waiver of the Debtor's
19 privilege. (Transcript, December 22, 2015, p. 39:23-24). The Trustee's proposed order provides
20 that the Debtor's privilege with Vacco has been eliminated in its entirety. Debtor has provided
21 proposed language which limits the waiver of the privilege to only those issues which have some
22 relation to the alleged fraud.

23 **6. Page 3, lines 12-17, subsections "3-5".**

24 The Court did not order the production of any documents. Indeed, the Court specifically
25 stated that it was "not going to order Mr. Vacco to say anything or not say anything."
26 (Transcript, December 22, 2015, p. 20:15-17). The issue of production of documents from
27 Vacco was not before the Court and the Court did not enter any order on the subject. That
28 portion of the proposed order violates Local Rule 9021(a)(2).

1 The Court did not Order any party to produce a privilege log. That portion of the
2 proposed order violates Local Rule 9021(a)(2).

3 The Court did not, and cannot, order that the Vacco deposition be recommenced. The
4 State Court has jurisdiction over the Vacco deposition in the State Court Case, and if the
5 deposition is to be recommenced, it would be recommenced by authority of the subpoena power
6 of the State Court, irrespective of the privilege issue. That portion of the proposed order violates
7 Local Rule 9021(a)(2).

8 **II. CONCLUSION**

9 For the reasons set forth above, Debtor respectfully requests the Court enter the proposed
10 order attached hereto as EXHIBIT 1.

11 Date: January 21, 2016

ROBISON, BELAUSTEGUI, SHARP & LOW
71 Washington Street
Reno, Nevada 89503

HARTMAN & HARTMAN
510 W. Plumb Ln., Suite B
Reno, Nevada 89509

16 By: /s/ FRANK C. GILMORE

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Frank C. Gilmore, Esq. (SBN 10052)
Jeffrey L. Hartman, Esq. (SBN 1607)
Attorneys for Paul A. Morabito

EXHIBIT 1

EXHIBIT 1

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Counsel for Paul A. Morabito

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA**

In re:
PAUL A. MORABITO,
Debtor.

Case No.: BK-S-13-51237-GWZ
Chapter: 7

Hearing:
Date: December 22, 2015
Time: 9:00 a.m.

[DEBTOR'S PROPOSED]

**ORDER GRANTING MOTION TO COMPEL
RESPONSES TO DEPOSITION QUESTIONS**

The *Motion to Compel Responses to Deposition Questions* [ECF No. 452] (the "Motion"), filed by William Leonard, Chapter 7 Trustee (the "Trustee"), by and through his counsel, the law firm of Garman Turner Gordon LLP, with regard to the deposition of Dennis

1 Vacco ("Vacco") in the State Court Case¹ came on for hearing before the above-captioned Court
2 on December 22, 2015, at 9:00 a.m. (the "Hearing"). Gerald M. Gordon, Esq. of Garman Turner
3 Gordon LLP appeared as special counsel and John F. Murtha, Esq. of Woodburn & Wedge
4 appeared as general counsel on behalf of the Trustee. Frank C. Gilmore, Esq. of Robison
5 Belaustegui Sharp & Low and Jeffrey L. Hartman, Esq. of Hartman & Hartman appeared on
6 behalf of the debtor Paul A. Morabito (the "Debtor"). Timothy A. Lukas, Esq. of Holland &
7 Hart appeared on behalf of USHF Cellular Communications, LLC and Janet L. Chubb, Esq. of
8 Kaempfer Crowell appeared on behalf of Virsenet, LLC. Holly Estes, Esq. of Walter & Wilhelm
9 Law Group appeared on behalf of Edward Bayuk and the Meadow Farms Irrevocable Trust. All
10 other appearances were noted on the record at the Hearing.

11 The Court having reviewed the Motion and all matters submitted therewith as well as the
12 oppositions filed thereto; notice of the Motion having been proper; the Court finding and
13 concluding that: (a) the Court has jurisdiction to hear and decide the Motion; (b) the attorney-
14 client privilege related to Lippes Mathias Wexler Friedman, LLP's ("Lippes Mathias")
15 production of documents and Vacco's testimony during the deposition is that of the Debtor; (c) it
16 is the Debtor's obligation to provide a privilege log with respect to the documents being withheld
17 on the basis of privilege because the Debtor is asserting the privilege; (d) the invocation of the
18 privilege by the Debtor affects property of his estate pursuant to Section 541 of the Bankruptcy
19 Code that is alleged to have been fraudulently transferred; (e) as to the allegations made in the
20 First Amended Complaint in the State Court Case regarding the transfer of the shares of
21 Superpumper, Inc., in which Dennis Vacco was counsel for the transferor and the transferees, the
22 Trustee has made a prima facie showing of fraud as required by the crime/fraud exception to the
23 attorney-client privilege, which showing has not been rebutted; (f) the inquiry required by the
24 crime/fraud exception is focused on what the client wanted to accomplish – whether the client
25 intended to further some fraudulent activity and engage counsel to assist in that activity; the
26 Court is not convinced that the timing of the legal services or whether the attorney's legal

27
28 ¹ Terms not otherwise defined in this Order are as defined in the Motion.

1 services were closely related has any effect on whether the crime/fraud exception is established;
2 (g) as to the allegations made in the First Amended Complaint in the State Court Case regarding
3 the transfer of the shares of Superpumper, Inc., in which Dennis Vacco was counsel for the
4 transferor and the transferees, the Trustee has met his burden to waive the Debtor's attorney-
5 client privilege under the balancing test; and (h) as a result, the Trustee has, consistent with
6 applicable law, waived the Debtor's attorney-client privilege with Lippes Mathias and Vacco as
7 to the allegations made in the First Amended Complaint in the State Court Case regarding the
8 transfer of the shares of Superpumper, Inc., in which Dennis Vacco was counsel for the
9 transferor and the transferees. Having stated the Court's additional findings of fact and
10 conclusions of law on the record at the Hearing, which are hereby incorporated herein by
11 reference in accordance with Rule 52 of the Federal Rules of Civil Procedure, made applicable
12 pursuant to Rule 9014 of the Federal Rules of Bankruptcy Procedure; and good cause appearing
13 therefore,

14 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** as follows:

- 15 1. The Motion is granted as provided herein.
- 16 2. The elimination of Debtor's attorney-client privilege with Lippes Mathias and
17 Vacco as provided for herein extends to the Disputed Questions that were asked and objected to
18 in the deposition of Vacco, any other questions that may be asked of Vacco at the continued
19 deposition, and any documents that may have been withheld by Lippes Mathias, the Debtor, or
20 Debtor's counsel in response to the subpoenas for documents on grounds that disclosure was not
21 required because of the Debtor's attorney-client privilege with Lippes Mathias and Vacco,
22 provided that the Trustee can establish, to the Court's satisfaction, that the questions asked, or
23 the documents sought, have a connection or nexus between the advice sought and the alleged
24 fraud.
- 25 3. If the Trustee desires to re-commence the deposition of Dennis Vacco, the parties
26 may submit briefs simultaneously of no longer than ten (10) pages, by 5:00 p.m. on the last
27 business day which is ten (10) calendar days prior to the recommenced deposition, in which the
28 parties may brief any attorney-client privilege issues and disputes that the Debtor and parties to

1 the State Court Case anticipate arising at the continued disposition to expedite the resolution any
2 additional disputes.

3 4. The parties shall coordinate with the Court's staff so that the Court is available
4 telephonically to resolve any disputes that arise during the continued deposition.

5 **IT IS SO ORDERED.**

6
7
8 **PREPARED AND SUBMITTED:**

9
10 /s/ Frank C. Gilmore
11 Barry L. Breslow, Esq. (SBN 3023)
12 Frank C. Gilmore, Esq. (SBN 10052)
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22 Counsel for Paul A. Morabito
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24
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EXHIBIT 2

EXHIBIT 2

1
2
3
4
5
6
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Attorneys for William Leonard, Chapter 7 Trustee

16
17 **UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA**

18 In re: Case No.: BK-S-13-51237-GWZ
19 PAUL A. MORABITO, Chapter: 7
20 Debtor. Hearing:
Date: December 22, 2015
21 Time: 9:00 a.m.

22 **ORDER GRANTING MOTION TO COMPEL
23 RESPONSES TO DEPOSITION QUESTIONS**

24 The *Motion to Compel Responses to Deposition Questions* [ECF No. 452] (the
25 "Motion"), filed by William Leonard, Chapter 7 Trustee (the "Trustee"), by and through his
26 counsel, the law firm of Garman Turner Gordon LLP, with regard to the deposition of Dennis
27 Vacco ("Vacco") in the State Court Case¹ came on for hearing before the above-captioned Court

28 ¹ Terms not otherwise defined in this Order are as defined in the Motion.

1 on December 22, 2015, at 9:00 a.m. (the "Hearing"). Gerald M. Gordon, Esq. of Garman Turner
 2 Gordon LLP appeared as special counsel and John F. Murtha, Esq. of Woodburn & Wedge
 3 appeared as general counsel on behalf of the Trustee. Frank C. Gilmore, Esq. of Robison
 4 Belaustegui Sharp & Low and Jeffrey L. Hartman, Esq. of Hartman & Hartman appeared on
 5 behalf of the debtor Paul A. Morabito (the "Debtor"). Timothy A. Lukas, Esq. of Holland &
 6 Hart appeared on behalf of USHF Cellular Communications, LLC and Janet L. Chubb, Esq. of
 7 Kaempfer Crowell appeared on behalf of Virsenet, LLC. Holly Estes, Esq. of Walter & Wilhelm
 8 Law Group appeared on behalf of Edward Bayuk and the Meadow Farms Irrevocable Trust. All
 9 other appearances were noted on the record at the Hearing.

10 The Court having reviewed the Motion and all matters submitted therewith as well as the
 11 oppositions filed thereto; notice of the Motion having been proper; the Court finding and
 12 concluding that: (a) the Court has jurisdiction to hear and decide the Motion; (b) the attorney-
 13 client privilege related to Lippes Mathias Wexler Friedman, LLP's ("Lippes Mathias")
 14 production of documents and Vacco's testimony during the deposition is that of the Debtor; (c) it
 15 is the Debtor's obligation to provide a privilege log with respect to the documents being withheld
 16 on the basis of privilege because the Debtor is asserting the privilege; (d) the invocation of the
 17 privilege by the Debtor affects property of his estate pursuant to Section 541 of the Bankruptcy
 18 Code that is alleged to have been fraudulently transferred; (e) as to the allegations made in the
 19 First Amended Complaint in the State Court Case regarding the transfer of the shares of
 20 Superpumper, Inc., in which Dennis Vacco was counsel for the transferor and the transferees, the
 21 Trustee has made a prima facie showing of fraud as required by the crime/fraud exception to the
 22 attorney-client privilege, which showing has not been rebutted; (f) the inquiry required by the
 23 crime/fraud exception is focused on what the client wanted to accomplish – whether the client
 24 intended to further some fraudulent activity and engage counsel to assist in that activity; the
 25 Court is not convinced that the timing of the legal services or whether the attorney's legal
 26 services were closely related has any effect on whether the crime/fraud exception is established;
 27 (g) as to the allegations made in the First Amended Complaint in the State Court Case regarding
 28 the transfer of the shares of Superpumper, Inc., in which Dennis Vacco was counsel for the

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transferor and the transferees, the Trustee has met his burden to waive the Debtor's attorney-client privilege under the balancing test; and (h) as a result, the Trustee has, consistent with applicable law, waived the Debtor's attorney-client privilege with Lippes Mathias and Vacco as to the allegations made in the First Amended Complaint in the State Court Case regarding the transfer of the shares of Superpumper, Inc., in which Dennis Vacco was counsel for the transferor and the transferees. Having stated the Court's additional findings of fact and conclusions of law on the record at the Hearing, which are hereby incorporated herein by reference in accordance with Rule 52 of the Federal Rules of Civil Procedure, made applicable pursuant to Rule 9014 of the Federal Rules of Bankruptcy Procedure; and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. The Motion is granted as provided herein.
2. The elimination of Debtor's attorney-client privilege with Lippes Mathias and Vacco as provided for herein extends to the Disputed Questions that were asked and objected to in the deposition of Vacco, any other questions that may be asked of Vacco at the continued deposition, and any documents that may have been withheld by Lippes Mathias, the Debtor, or Debtor's counsel in response to the subpoenas for documents on grounds that disclosure was not required because of the Debtor's attorney-client privilege with Lippes Mathias and Vacco, provided that the Trustee can establish, to the Court's satisfaction, that the questions asked, or the documents sought, have a connection or nexus between the advice sought and the alleged fraud.
3. If the Trustee desires to re-commence the deposition of Dennis Vacco, the parties may submit briefs simultaneously of no longer than ten (10) pages, by 5:00 p.m. on the last business day which is ten (10) calendar days prior to the recommenced deposition, in which the parties may brief any attorney-client privilege issues and disputes that the Debtor and parties to the State Court Case anticipate arising at the continued disposition to expedite the resolution any additional disputes.
4. The parties shall coordinate with the Court's staff so that the Court is available

Deleted: Lippes Mathias and Vacco shall disclose and make available to the Trustee documents and information related to the representation of the Debtor that would otherwise be protected from disclosure under the privilege.
 * Within ten (10) calendar days of entry of this Order, the Debtor shall provide the Trustee a privilege log with respect to all documents withheld on the basis of privilege.
 * The deposition of Vacco shall recommence in the State Court Case.
Deleted: ?

1 telephonically to resolve any disputes that arise during the continued deposition.

2 **IT IS SO ORDERED.**

3
4
5
6
7 **PREPARED AND SUBMITTED:**

8 GARMAN TURNER GORDON LLP

9
10 GERALD M. GORDON, ESQ.

11 Nevada Bar No. 229

12 TERESA M. PILATOWICZ, ESQ.

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14 MARK M. WEISENMILLER, ESQ.

15 Nevada Bar No. 12128

16 650 White Drive, Suite 100

17 Las Vegas, Nevada 89119

18 Tel: (735) 777-3000

19 *Attorneys for Chapter 7 Trustee, William A. Leonard*

LR 9021 CERTIFICATION

In accordance with LR 9021, counsel submitting this document certifies as follows:

- ☐ The Court waived the requirement of approval under LR 9021(b)(1).
- ☐ No party appeared on the Motion at the hearing or filed an objection to the Motion.

- ☒ I have delivered a copy of this proposed order to all counsel who appeared at the hearing, and any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order as stated above.

FRANK C. GILMORE, ESQ. & JEFFREY L. HARTMAN, ESQ. -- For Debtor -- APPROVED

JANET L. CHUBB, ESQ. -- For Virsenet, LLC -- APPROVED

TIMOTHY A. LUKAS, ESQ. -- For USHF Cellular Communications, LLC -- APPROVED

HOLLY ESTES, ESQ. -- For Edward Bayuk and Meadow Farms Irrevocable Trust -- APPROVED

JOHN F. MURTHA, ESQ. -- for Chapter 7 Trustee -- APPROVED

- ☐ I have certified that under Chapter 7 or 13, that I have served a copy of this order with the motion pursuant to LR 9014(g), and that no party has objection to the form or content of the order.

###

CERTIFICATE OF SERVICE

Pursuant to FRBP 7005 and FRCP 5(b), I certify that I am an employee of ROBISON, BELAUSTEGUI, SHARP & LOW, that I am over the age of 18 and not a party to the above-referenced case, and that on the date below I caused to be served a true copy of the **DEBTOR'S OBJECTION TO PROPOSED ORDER GRANTING MOTION TO COMPEL RESPONSES TO DEPOSITION QUESTIONS** on all parties to this action by the method(s) indicated below:

X I hereby certify that on the date below, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which served the following parties electronically:

Gabrielle A. Hamm
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U.S. Trustee

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Creditor JH, Inc., Creditor Jerry Herbst*

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Leonard*

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Communications, LLC

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Howard J. Weg, Esq.
hweg@robinskaplan.com
Attorney for Debtor Paul Morabito

X 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:

BMW Financial Services NA, LLC Department
Post Office Box 201347
Arlington, TX 76006

Recovery Management Systems
Corporation
25 SE 2nd Avenue, Suite 1120
Miami, Florida 331331-1605

Garman Turner Gordon
650 White Drive Suite 100
Las Vegas, NV 89119

Gordon Silver
3960 Howard Hughes Parkway, 9th
Floor
Las Vegas, NV 89169

DATED: This 22 day of January, 2016.

