

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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Appeal from the Second Judicial
District Court, the Honorable Connie
J. Steinheimer Presiding

APPELLANTS' APPENDIX, VOLUME 7
(Nos. 1038–1135)

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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>
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>
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
32	September 23, 2010 email from Yalamanchili to Graber RE: Change of Primary Residence from Reno to Laguna Beach	Vol. 22, 3695–3696
33	September 24, 2010 email from P. Morabito to Vacco RE: Superpumper, Inc.	Vol. 22, 3697–3697
34	September 26, 2010 email from Vacco to P. Morabito RE: Judgment for a fixed debt	Vol. 22, 3698–3698
35	September 27, 2010 email from P. Morabito to Vacco RE: First Amendment to Residential Lease executed 9/27/2010	Vol. 22, 3699–3701
36	November 7, 2012 emails between Vacco, P. Morabito, C. Lovelace RE: Attorney Client Privileged Communication	Vol. 22, 3702–3703
37	Morabito BMO Bank Statement – September 2010	Vol. 22, 3704–3710
38	Lippes Mathias Trust Ledger History	Vol. 23, 3711–3716

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
39	Fifth Amendment & Restatement of the Trust Agreement for the Arcadia Living Trust dated September 30, 2010	Vol. 23, 3717–3755
42	P. Morabito Statement of Assets & Liabilities as of May 5, 2009	Vol. 23, 3756–3756
43	March 10, 2010 email chain between Afshar and Takemoto RE: Current Personal Financial Statement	Vol. 23, 3757–3758
44	Salazar Net Worth Report (dated 03/15/2011)	Vol. 23, 3759–3772
45	Purchase and Sale Agreement	Vol. 23, 3773–3780
46	First Amendment to Purchase and Sale Agreement	Vol. 23, 3781–3782
47	Panorama – Estimated Settlement Statement	Vol. 23, 3783–3792
48	El Camino – Final Settlement Statement	Vol. 23, 3793–3793
49	Los Olivos – Final Settlement Statement	Vol. 23, 3794–3794
50	Deed for Transfer of Panorama Property	Vol. 23, 3795–3804
51	Deed for Transfer for Los Olivos	Vol. 23, 3805–3806
52	Deed for Transfer of El Camino	Vol. 23, 3807–3808
53	Kimmel Appraisal Report for Panorama and Clayton	Vol. 23, 3809–3886
54	Bill of Sale – Panorama	Vol. 23, 3887–3890
55	Bill of Sale – Mary Fleming	Vol. 23, 3891–3894
56	Bill of Sale – El Camino	Vol. 23, 3895–3898

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
57	Bill of Sale – Los Olivos	Vol. 23, 3899–3902
58	Declaration of Value and Transfer Deed of 8355 Panorama (recorded 12/31/2012)	Vol. 23, 3903–3904
60	Baruk Properties Operating Agreement	Vol. 23, 3905–3914
61	Baruk Membership Transfer Agreement	Vol. 24, 3915–3921
62	Promissory Note for \$1,617,050 (dated 10/01/2010)	Vol. 24, 3922–3924
63	Baruk Properties/Snowshoe Properties, Certificate of Merger (filed 10/04/2010)	Vol. 24, 3925–3926
64	Baruk Properties/Snowshoe Properties, Articles of Merger	Vol. 24, 3927–3937
65	Grant Deed from Snowshoe to Bayuk Living Trust; Doc No. 2010-0531071 (recorded 11/04/2010)	Vol. 24, 3938–3939
66	Grant Deed – 1461 Glenneyre; Doc No. 2010000511045 (recorded 10/08/2010)	Vol. 24, 3940–3941
67	Grant Deed – 570 Glenneyre; Doc No. 2010000508587 (recorded 10/08/2010)	Vol. 24, 3942–3944
68	Attorney File re: Conveyance between Woodland Heights and Arcadia Living Trust	Vol. 24, 3945–3980
69	October 24, 2011 email from P. Morabito to Vacco RE: Attorney Client Privileged Communication	Vol. 24, 3981–3982

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
70	November 10, 2011 email chain between Vacco and P. Morabito RE: Baruk Properties, LLC/Paul Morabito/Bank of America, N.A.	Vol. 24, 3983–3985
71	Bayuk First Ledger	Vol. 24, 3986–3987
72	Amortization Schedule	Vol. 24, 3988–3990
73	Bayuk Second Ledger	Vol. 24, 3991–3993
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75	March 30, 2012 email from Vacco to Bayuk RE: Letter to BOA	Vol. 24, 4054–4055
76	March 10, 2010 email chain between P. Morabito and jon@aim13.com RE: Strictly Confidential	Vol. 24, 4056–4056
77	May 20, 2010 email chain between P. Morabito, Vacco and Michael Pace RE: Proceed with placing a Binding Bid on June 22nd with ExxonMobil	Vol. 24, 4057–4057
78	Morabito Personal Financial Statement May 2010	Vol. 24, 4058–4059
79	June 28, 2010 email from P. Morabito to George Garner RE: ExxonMobil Chicago Market Business Plan Review	Vol. 24, 4060–4066
80	Shareholder Interest Purchase Agreement	Vol. 24, 4067–4071
81	Plan of Merger of Consolidated Western Corporation with and Into Superpumper, Inc.	Vol. 24, 4072–4075

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84	Unanimous Written Consent of the Directors and Shareholders of Consolidated Western Corporation	Vol. 24, 4081–4083
85	Arizona Corporation Commission Letter dated October 21, 2010	Vol. 24, 4084–4091
86	Nevada Articles of Merger	Vol. 24, 4092–4098
87	New York Creation of Snowshoe	Vol. 24, 4099–4103
88	April 26, 2012 email from Vacco to Afshar RE: Ownership Structure of SPI	Vol. 24, 4104–4106
90	September 30, 2010 Matrix Retention Agreement	Vol. 24, 4107–4110
91	McGovern Expert Report	Vol. 25, 4111–4189
92	Appendix B to McGovern Report – Source 4 – Budgets	Vol. 25, 4190–4191
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105	Superpumper Successor Note in the amount of \$939,000 (dated 02/01/2011)	Vol. 25, 4196–4197

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106	Superpumper Stock Power transfers to S. Morabito and Bayuk (dated 01/01/2011)	Vol. 25, 4198–4199
107	<i>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 Transferring Assets Pursuant to 11 U.S.C. §§ 105 and 303(f) Pending Appointment of Trustee, Case 13-51237, ECF No. 22 (filed 07/01/2013)</i>	Vol. 25, 4200–4203
108	October 12, 2012 email between P. Morabito and Bernstein RE: 2011 Return	Vol. 25, 4204–4204
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110	P. Morabito – Term Note in the amount of \$939,000.000 (dated 09/01/2010)	Vol. 25, 4214–4214
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112	Consent Agreement (dated 12/28/2010)	Vol. 25, 4245–4249
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122	Salvatore Morabito Term Note \$2,563,542.00 as of December 31, 2010	Vol. 26, 4324–4325
123	Edward Bayuk Term Note \$2,580,500.00 as of December 31, 2010	Vol. 26, 4326–4327
125	April 21, 2011 Management letter	Vol. 26, 4328–4330
126	Bayuk and S. Morabito Statements of Assets & Liabilities as of February 1, 2011	Vol. 26, 4331–4332
127	January 6, 2012 email from Bayuk to Lovelace RE: Letter of Credit	Vol. 26, 4333–4335
128	January 6, 2012 email from Vacco to Bernstein	Vol. 26, 4336–4338
129	January 7, 2012 email from Bernstein to Lovelace	Vol. 26, 4339–4343
130	March 18, 2012 email from P. Morabito to Vacco	Vol. 26, 4344–4344
131	April 21, 2011 Proposed Acquisition of Nella Oil	Vol. 26, 4345–4351
132	April 15, 2011 email chain between P. Morabito and Vacco	Vol. 26, 4352

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134	April 16, 2012 email from Vacco to Morabito	Vol. 26, 4354–4359
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137	August 24, 2011 email from Vacco to P. Morabito RE: Tim Haves	Vol. 26, 4366
138	November 11, 2011 email from Vacco to P. Morabito RE: Getting Trevor's commitment to sign	Vol. 26, 4367
139	November 16, 2011 email from P. Morabito to Vacco RE: Vacco's litigation letter	Vol. 26, 4368
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141	December 7, 2011 email from Vacco to P. Morabito RE: Moreno	Vol. 26, 4371
142	February 10, 2012 email chain between P. Morabito Wells, and Vacco RE: 1461 Glenneyre Street - Sale	Vol. 26, 4372–4375
143	April 20, 2012 email from P. Morabito to Bayuk RE: BofA	Vol. 26, 4376
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148	September 4, 2012 email from Bayuk to Vacco RE: Wire	Vol. 26, 4423–4426
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152	September 3, 2012 email from P. Morabito to Vacco RE: Wire	Vol. 26, 4435
153	March 14, 2013 email chain between P. Morabito and Vacco RE: BHI Hinckley	Vol. 26, 4436
154	Paul Morabito 2009 Tax Return	Vol. 26, 4437–4463
155	Superpumper Form 8879-S tax year ended December 31, 2010	Vol. 26, 4464–4484
156	2010 U.S. S Corporation Tax Return for Consolidated Western Corporation	Vol. 27, 4485–4556
157	Snowshoe form 8879-S for year ended December 31, 2010	Vol. 27, 4557–4577
158	Snowshoe Form 1120S 2011 Amended Tax Return	Vol. 27, 4578–4655

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161	December 18, 2012 email from Vacco to P. Morabito RE: Attorney Client Privileged Communication	Vol. 27, 4659
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174	October 15, 2015 Certificate of Service of copy of Lippes Mathias Wexler Friedman’s Response to Subpoena	Vol. 27, 4670
175	Order Granting Motion to Compel Responses to Deposition Questions ECF No. 502; Case No. 13-51237-gwz (filed 02/03/2016)	Vol. 27, 4671–4675
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189	Mortgage – Mary Fleming	Vol. 28, 4864
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191	Settlement Statement – 370 Los Olivos	Vol. 28, 4866
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193	Mortgage – 8355 Panorama Drive	Vol. 28, 4869–4870
194	Compass – Certificate of Custodian of Records (dated 12/21/2016)	Vol. 28, 4871–4871
196	June 6, 2014 Declaration of Sam Morabito – Exhibit 1 to Snowshoe Reply in Support of Motion to Dismiss Complaint for Lack of Personal Jurisdiction – filed in Case No. CV13-02663	Vol. 28, 4872–4874
197	June 19, 2014 Declaration of Sam Morabito – Exhibit 1 to Superpumper Motion to Dismiss Complaint for Lack of Personal Jurisdiction – filed in Case No. CV13-02663	Vol. 28, 4875–4877
198	September 22, 2017 Declaration of Sam Morabito – Exhibit 22 to Defendants’ SSOF in Support of Opposition to Plaintiff’s MSJ – filed in Case No. CV13-02663	Vol. 28, 4878–4879

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225	Bank of America Records for Edward Bayuk (dated 09/05/2012)	Vol. 28, 4887–4897
226	June 11, 2007 Wholesale Marketer Agreement	Vol. 29, 4898–4921
227	May 25, 2006 Wholesale Marketer Facility Development Incentive Program Agreement	Vol. 29, 4922–4928
228	June 2007 Master Lease Agreement – Spirit SPE Portfolio and Superpumper, Inc.	Vol. 29, 4929–4983
229	Superpumper Inc 2008 Financial Statement (dated 12/31/2008)	Vol. 29, 4984–4996
230	November 9, 2009 email from P. Morabito to Bernstein, Yalaman RE: Jan Friederich – entered into Consulting Agreement	Vol. 29, 4997
231	September 30, 2010, Letter from Compass to Superpumper, Morabito, CWC RE: reducing face amount of the revolving note	Vol. 29, 4998–5001
232	October 15, 2010, letter from Quarles & Brady to Vacco RE: Revolving Loan Documents and Term Loan Documents between Superpumper and Compass Bank	Vol. 29, 5002–5006

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235	August 31, 2010 Superpumper Inc., Valuation of 100 percent of the common equity in Superpumper, Inc on a controlling marketable basis	Vol. 29, 5014–5059
236	June 18, 2014 email from S. Morabito to Vanek (WF) RE: Analysis of Superpumper Acquisition in 2010	Vol. 29, 5060–5061
241	Superpumper March 2010 YTD Income Statement	Vol. 29, 5062–5076
244	Assignment Agreement for \$939,000 Morabito Note	Vol. 29, 5077–5079
247	July 1, 2011 Third Amendment to Forbearance Agreement Superpumper and Compass Bank	Vol. 29, 5080–5088
248	Superpumper Cash Contributions January 2010 thru September 2015 – Bayuk and S. Morabito	Vol. 29, 5089–5096
252	October 15, 2010 Letter from Quarles & Brady to Vacco RE: Revolving Loan documents and Term Loan documents between Superpumper Prop. and Compass Bank	Vol. 29, 5097–5099
254	Bank of America – S. Morabito SP Properties Sale, SP Purchase Balance	Vol. 29, 5100
255	Superpumper Prop. Final Closing Statement for 920 Mountain City Hwy, Elko, NV	Vol. 29, 5101
256	September 30, 2010 Raffles Insurance Limited Member Summary	Vol. 29, 5102

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257	Equalization Spreadsheet	Vol. 30, 5103
258	November 9, 2005 Grant, Bargain and Sale Deed; Doc #3306300 for Property Washoe County	Vol. 30, 5104–5105
260	January 7, 2016 Budget Summary – Panorama Drive	Vol. 30, 5106–5107
261	Mary 22, 2006 Compilation of Quotes and Invoices Quote of Valley Drapery	Vol. 30, 5108–5116
262	Photos of 8355 Panorama Home	Vol. 30, 5117–5151
263	Water Rights Deed (Document #4190152) between P. Morabito, E. Bayuk, Grantors, RCA Trust One Grantee (recorded 12/31/2012)	Vol. 30, 5152–5155
265	October 1, 2010 Bank of America Wire Transfer –Bayuk – Morabito \$60,117	Vol. 30, 5156
266	October 1, 2010 Check #2354 from Bayuk to P. Morabito for \$29,383 for 8355 Panorama funding	Vol. 30, 5157–5158
268	October 1, 2010 Check #2356 from Bayuk to P. Morabito for \$12,763 for 370 Los Olivos Funding	Vol. 30, 5159–5160
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270	Bayuk Payment Ledger Support Documents Checks and Bank Statements	Vol. 31, 5163–5352
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277	Assessor's Map/Home Comparisons for 8355 Panorama Drive, Reno, NV	Vol. 32, 5401–5437
278	December 3, 2007 Case Docket for CV07-02764	Vol. 32, 5438–5564
280	May 25, 2011 Stipulation Regarding the Imposition of Punitive Damages; Case No. CV07-02764 (filed 05/25/2011)	Vol. 33, 5565–5570
281	Work File for September 24, 2010 Appraisal of 8355 Panorama Drive, Reno, NV	Vol. 33, 5571–5628
283	January 25, 2016 Expert Witness Report Leonard v. Superpumper Snowshoe	Vol. 33, 5629–5652
284	February 29, 2016 Defendants' Rebuttal Expert Witness Disclosure	Vol. 33, 5653–5666
294	October 5, 2010 Lippes, Mathias Wexler Friedman, LLP, Invoices to P. Morabito	Vol. 33, 5667–5680
295	P. Morabito 2010 Tax Return (dated 10/16/2011)	Vol. 33, 5681–5739
296	December 31, 2010 Superpumper Inc. Note to Financial Statements	Vol. 33, 5740–5743
297	December 31, 2010 Superpumper Consultations	Vol. 33, 5744

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301	September 15, 2010 email from Vacco to P. Morabito RE: Tomorrow	Vol. 33, 5749–5752
303	Bankruptcy Court District of Nevada Claims Register Case No. 13-51237	Vol. 33, 5753–5755
304	April 14, 2018 email from Allen to Krausz RE: Superpumper	Vol. 33, 5756–5757
305	Subpoena in a Case Under the Bankruptcy Code to Robison, Sharp, Sullivan & Brust issued in Case No. BK-N-13-51237-GWZ	Vol. 33, 5758–5768
306	August 30, 2018 letter to Mark Weisenmiller, Esq., from Frank Gilmore, Esq.,	Vol. 34, 5769
307	Order Granting Motion to Compel Compliance with the Subpoena to Robison, Sharp, Sullivan & Brust filed in Case No. BK-N-13-51237-GWZ	Vol. 34, 5770–5772
308	Response of Robison, Sharp, Sullivan & Brust's to Subpoena filed in Case No. BK-N-13-51237-GWZ	Vol. 34, 5773–5797
309	Declaration of Frank C. Gilmore in support of Robison, Sharp, Sullivan & Brust's Opposition to Motion for Order Holding Robison in Contempt filed in Case No. BK-N-13-51237-GWZ	Vol. 34, 5798–5801
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Minutes of November 2, 2018, Non-Jury Trial, Day 5 (filed 11/08/2018)	Vol. 39, 6818–7007
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Minutes of November 6, 2018, Non-Jury Trial, Day 7 (filed 11/08/2018)	Vol. 41, 7170–7269
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Plaintiff’s Motion to Reopen Evidence (filed 01/30/2019)		Vol. 46, 7894–7908
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Exhibit	Document Description	
1	Declaration of Gabrielle A. Hamm, Esq. in Support of Plaintiff’s Motion to Reopen	Vol. 46, 7909–7913
1-A	September 21, 2017 Declaration of Salvatore Morabito	Vol. 46, 7914–7916
1-B	Defendants’ Proposed Findings of Fact, Conclusions of Law, and Judgment (Nov. 26, 2018)	Vol. 46, 7917–7957
1-C	Judgment on the First and Second Causes of Action; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 123 (April 30, 2018)	Vol. 46, 7958–7962
1-D	Amended Findings of Fact and Conclusions of Law in Support of Judgment Regarding Plaintiffs’ First and Second Causes of Action; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 126 (April 30, 2018)	Vol. 46, 7963–7994
1-E	Motion to Compel Compliance with the Subpoena to Robison Sharp Sullivan Brust; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 191 (Sept. 10, 2018)	Vol. 46, 7995–8035

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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		
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1	Plaintiff's Motion to Reopen Evidence	Vol. 47, 8081–8096
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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>
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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
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Plaintiff's Reply to Defendants' Response to Motion to Reopen Evidence (filed 02/07/2019)		Vol. 47, 8136–8143
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[Defendants' Proposed Amended] Findings of Fact, Conclusions of Law, and Judgment (filed 03/08/2019)		Vol. 47, 8225–8268
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Memorandum of Costs and Disbursements (filed 04/11/2019)		Vol. 48, 8341–8347
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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

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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

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13 Inc., Superpumper, Inc., Edward Bayuk, individually
14 and as Trustee of the Edward William Bayuk Living
15 Trust, and Salvatore Morabito.

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

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

CASE NO.: CV13-02663

DEPT. NO.: B1

20 Plaintiffs,

21 vs.

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

28 Defendants.

OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF
DOCUMENTS

29 Defendants EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM
30 BAYUK LIVING TRUST (collectively, "Bayuk") hereby oppose Plaintiff's Motion to Compel
31 Production of Documents, filed on April 8, 2016. This Opposition is made and supported by the
32 following Memorandum of Points and Authorities.

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION**

2 **I. INTRODUCTION**

3 This case is an off-shoot from a dispute between the original Plaintiffs to this case, JH,
4 INC., JERRY HERBST, and BERRY-HINCKLEY INDUSTRIES, and their long-time adversary,
5 PAUL MORABITO. That original dispute centered around disagreement as to the post-closing
6 obligations related to the purchase and sale of BERRY-HINCKLEY INDUSTRIES, which owned
7 and managed several gas stations and convenience stores in Northern Nevada. That original
8 dispute – which is commonly referred to as the Herbst Litigation – was commenced in 2007, and
9 tried to Department 6 in the summer of 2009. Edward Bayuk (“Bayuk”) and Salvatore Morabito
10 (“Salvatore”) were counter-defendants in the Herbst Litigation, *but were exonerated and*
11 *dismissed* from the case at trial.

12 After the trial resulted in a substantial judgment against Paul Morabito, both Bayuk and
13 Salvatore, who were found to have no liability to Herbst whatsoever, undertook to separate their
14 businesses and jointly-owned properties from Paul Morabito so as to avoid the post-trial
15 entanglements with the Herbsts that were sure to occur.

16 In furtherance of their effort to separate their business lives from Paul Morabito, Bayuk and
17 Salvatore hired Dennis Vacco, Esq., an attorney of unimpeachable credentials¹, to facilitate the
18 business division. Using certified appraisers and business valuers, Mr. Vacco assisted Bayuk
19 and Salvatore with valuing their respective interests in the jointly-held entities and interests, and
20 dividing them equitably and transparently. Paul Morabito took title to some property and Bayuk
21 and Salvatore to title to others.

22 As Mr. Vacco and his partners have testified, the process was done with an eye toward
23 separating Bayuk and Salvatore from the now 9-year old dispute between Paul Morabito and the
24 Herbsts, and with the goal of ensuring that the transfers were done fair, commercially reasonable,
25 and not subject to subsequent challenge. Unfortunately, neither Mr. Vacco nor Bayuk or Salvatore
26 understood the lengths the Herbsts would be willing to go in order to destroy Paul Morabito and

27

28 ¹ Mr. Vacco had previously served as the United States Attorney for the Western District of New
 York, and was the former elected New York Attorney General.

1 his erst-while business partners. The Herbst promptly used their judgment in Department 6² to
2 obtain a Confession of Judgment from Paul Morabito in settlement – in which neither Bayuk nor
3 Salvatore were involved – which they then used to direct Paul Morabito into Involuntary
4 Bankruptcy, a move quite obviously designed to use the power of the United States Trustee to
5 collect their debts.

6 After the bankruptcy was initiated, Herbsts sued Bayuk and Salvatore in this action,
7 contending that the property division was fraudulent, and was done for less than equivalent value.
8 The Herbsts have challenged each and every division of assets that Mr. Vacco facilitated,
9 remarkably, even those where the Herbsts' expert witnesses have concluded that exchange was for
10 fair value. Herbsts then convinced the bankruptcy trustee to sue Dennis Vacco and his firm.
11 Herbsts served demands and subpoenas on Bayuk and Salvatore's lawyers (including the
12 undersigned) to turn over their entire files, without regard for any work-product or attorney-client
13 privilege. In other words, this case, and the dispute from which it stems, is a scorched-earth, no-
14 holds-barred, "grind him into the dirt," battle to the death. A cursory review of the Herbsts'
15 conduct in this case reveals that these superlatives are not over-dramatization of the dispute.
16 Bayuk and Salvatore are the collateral damage, caught in the middle.

17 The present Motion is a simple one. William Leonard, as the bankruptcy trustee (who
18 substituted into this case as Plaintiff for Herbsts), seeks production of all insurance policies held
19 by Bayuk and the Bayuk Living Trust, for a 7-year time period, and without limitation in scope.
20 Bayuk objected because the demand seeks confidential and personal information, is overbroad, is
21 not narrowly tailored, and the bulk of the information that Leonard seeks is not reasonably
22 calculated to lead to the discovery of admissible evidence. Moreover, the information Leonard
23 seeks - "the value ascribed to that property by Bayuk" (Motion, p.9:16-18) is available from other
24 sources without resort to invading Bayuk's personal and confidential information to obtain it.

25 Think of it this way: this trial is not a debtor's exam. Leonard does not get Bayuk and
26 Salvatore's personal and confidential information simply because he demands it. Just like the

27 _____
28 ² Which was on appeal based on numerous evidentiary and legal infirmities.

1 response to Leonard's improper demand for 7-years-worth of tax returns and working papers,
2 Bayuk and Salvatore have a right to protection of their private and confidential documents and
3 information which deal not with this case, but with their personal assets, financial lives and
4 livelihoods. The Motion should be denied.

5 **II. ARGUMENT**

6 **A. The Information Sought is Private and Confidential and Should Not Be** 7 **Produced, Particularly When The Information is Available From Less** 8 **Invasive Sources.**

8 The Nevada Rules of Civil Procedure do not provide a basis for "invasion into a litigant's
9 private affairs merely" because an opposing party is seeking redress for a grievance. Schlatter, 93
10 Nev. at 192, 561 P.2d at 1344. These private affairs include both private, personal information
11 and financial information. See Rock Bay, LLC v. Eighth Judicial Dist. Ct., 129 Nev. ___, ___,
12 298 P.3d 441, 447 (2013) ("Although Nevada does not recognize a privilege for financial
13 documents . . . this court has recognized that 'public policy suggests that. . . financial status
14 [should] not be had for the mere asking.'" (second alteration in original) (quoting Hetter v. Eighth
15 Judicial Dist. Ct., 110 Nev. 513, 520, 874 P.2d 762, 766 (1994)). Financial information, in
16 particular, "is inherently sensitive." Willeford v. Toys "R" Us-Del., Inc., 895 N.E.2d 83, 91 (Ill.
17 App. Ct. 2008). Thus, even if relevant, "a limited protection is given to sensitive information
18 which people may wish to keep confidential, such as their financial dealings." Hofmann Corp. v.
19 Super. Ct., 218 Cal. Rptr. 355, 357 (Ct. App. 1985).

20 While this state does not recognize a privilege for tax returns or
21 necessarily require that liability for punitive damages be
22 established before discovery of financial condition, public policy
23 suggests that tax returns or financial status not be had for the mere
24 asking. Claims for punitive damages can be asserted with ease and
25 can result in abuse and harassment if their assertion alone entitles
26 plaintiff to financial discovery. We hold that before tax returns or
27 financial records are discoverable on the issue of punitive damages,
28 the plaintiff must demonstrate some factual basis for its punitive
damage claim. Disclosure of tax returns at this point is
unwarranted.

26 Hetter v. Eighth Judicial Dist. Court of State In & For Cnty. of Clark, 110 Nev. 513, 519-
27 20, 874 P.2d 762, 765-66 (1994). "Accordingly, *Clark* and *Schlatter* do not hold that tax
28 returns are privileged information, but instead conclude that tax returns must be relevant

1 to be discoverable, and may not be discoverable in the absence of a showing that the
2 information is otherwise unobtainable. McNair v. Eighth Judicial Dist. Court In & For
3 Cnty. of Clark, 110 Nev. 1285, 1290, 885 P.2d 576, 579 (1994); (citing *Clark*, 101 Nev.
4 at 64, 692 P.2d at 516; *Schlatter*, 93 Nev. at 192, 561 P.2d at 1343).

5 Insurance policies, and the information they contain, are undoubtedly “private,
6 personal information and financial information,” just like tax returns. An unlimited
7 production of all insurance policies would essentially open the door to the entire financial
8 and asset structure of the insured. Insurance policies are entitled to protection, just like
9 tax returns, particularly when the information sought – Bayuk’s subjective belief of the
10 value of a limited number of assets – can be obtained elsewhere.

11 **B. The Request for Production of “Any and All Insurance Policies” from**
12 **January 2005 to December 2011 is Overbroad and Clearly Seeks**
Irrelevant Information.

13 The Request for Production is not properly limited in time or in scope. Leonard essentially
14 contends in his Motion that if Edward Bayuk owned a car in 2005 and insured it with any policy of
15 insurance, that policy is responsive to the discovery request and should be produced. Further, if
16 Bayuk were the beneficiary of his mother’s will, and Bayuk desired to purchase an insurance
17 policy on his mother’s diamond ring in anticipation of inheritance, Leonard essentially contends
18 that the policy is responsive to his request and must be produced.

19 These hypothetical examples are only two of hundreds of examples which illustrate the
20 improper scope of the Request for Production. Neither of those hypothetical assets could be, in
21 any way, relevant to the allegations in this case. In his Complaint, Leonard makes very specific
22 allegations about seven or eight very specific asset transfers. There are, as reflected in Leonard’s
23 attached exhibits, only a small number of expressly identified assets that are relevant to this case.
24 Insurance policies which pre-date the alleged transfers by nearly 4-years, and which potentially
25 sweep in all of Bayuk’s assets, are not properly discoverable.

26 In his Motion, Leonard sets out the facts of this case as he believes them to be, and then,
27 without any treatment of the direct connection between the scope of the documents sought and the
28 claims at issue, concludes that he is entitled to everything he seeks. Leonard then states

1 conclusively that “defendant’s counsel is not the arbiter of whether the insurance policies are
2 relevant. . . .” Leonard has it wrong. Defendant, through counsel, *is* the gatekeeper of his own
3 confidential and personal information. That protection is not evaporated simply because Leonard
4 asks for protected documents and then summarily concludes in a Motion that it is relevant. Before
5 the burden shifts entirely to Bayuk on this request, Leonard must at least attempt in his Motion to
6 explain why a policy of automobile insurance from January 2005, or his mother’s diamond ring,
7 could be relevant to any claim or defense in this action, or how obtaining such a policy could lead
8 to the discovery of admissible information. Leonard has not, and cannot make such a showing
9 because it is obvious that the unlimited scope of the request undoubtedly seeks documents which
10 have no possibility of leading to the discovery of admissible evidence. This is the very definition
11 of overbreadth. A Motion which seeks documents which have no possibility of leading to the
12 discovery of admissible evidence must be denied.

13 **III. CONCLUSION**

14 For the reasons set forth above, Bayuk respectfully requests this Court enter its Order
15 denying the Motion to Compel.

16 **AFFIRMATION** 17 **Pursuant to NRS 239B.030**

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

20 DATED this 25th day of April, 2016.

21 ROBISON, BELAUSTEGUI, SHARP & LOW
22 A Professional Corporation
23 71 Washington Street
24 Reno, Nevada 89503

25 /s/ Frank C. Gilmore
26 BARRY L. BRESLOW, ESQ.
27 FRANK C. GILMORE, ESQ.
28 Attorneys for Defendants

J:\WPData\BLB\14359.001 Snowshoe adv. Herbst\P-Opposition to Motion ot Compel.4.25.16.doc

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCp 5(b), I certify that I am an employee of Robison, Belaustegui, Sharp &
3 Low, and that on this date I caused to be served a true copy of the **OPPOSITION TO**
4 **PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS** all parties to
5 this action by the method(s) indicated below:

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

9 Gerald Gordon, Esq.
10 Mark M. Weisenmiller, Esq.
11 Teresa M. Pilatowicz, Esq.
12 GARMAN TURNER GORDON
13 650 White Drive, Suite 100
14 Las Vegas, Nevada 89119
15 *Attorneys for Plaintiff*

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

17 Gerald Gordon, Esq.
18 Email: ggordon@Gtg.legal
19 Mark M. Weisenmiller, Esq.
20 Email: mweisenmiller@Gtg.legal
21 Teresa M. Pilatowicz, Esq.
22 Email: tpilatowicz@Gtg.legal

23 _____ by personal delivery/hand delivery addressed to:

24 _____ by email addressed to:

25 Gerald Gordon, Esq.
26 Email: ggordon@Gtg.legal
27 Mark M. Weisenmiller, Esq.
28 Email: mweisenmiller@Gtg.legal
Teresa M. Pilatowicz, Esq.
Email: tpilatowicz@Gtg.legal

_____ by facsimile (fax) addressed to:

_____ by Federal Express/UPS or other overnight delivery addressed to:

24 DATED: This 25th day of April, 2016.

25 
26 _____
27
28

1 **3790**

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15 *Special Counsel to William A. Leonard, Plaintiff*

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

REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS

Plaintiff William A. Leonard. ("Trustee"), by and through his counsel, Garman Turner Gordon LLP ("GTG"), hereby submits his reply (the "Reply") to Defendant Edward Bayuk, individually and as Trustee of the Edward William Bayuk Living Trust's ("Bayuk") *Opposition*

1 to Plaintiff's Motion to Compel Production of Documents (the "Opposition") and in support of
2 Plaintiff's Motion to Compel Production of Documents (the "Motion"). This Reply is based on
3 the Memorandum of Points and Authorities and the Declaration of Gabrielle A. Hamm, Esq.,
4 filed herewith as **Exhibit 1**.

5 Bayuk's Opposition is patently without merit and littered with irrelevant and unsupported
6 facts in a transparent attempt at obfuscation. The claims asserted by the Plaintiff are not
7 complex. Among other transfers, Plaintiff is seeking the recovery of fraudulent transfers of
8 personal property from the Debtor to Bayuk. Plaintiff asserts both actual fraud – i.e., that the
9 Debtor transferred the property with the actual intent to hinder, delay, or defraud his creditors,
10 primarily the Herbst Parties, and constructive fraud – i.e., that the Debtor transferred the property
11 for less than reasonably equivalent value when the Debtor was insolvent or about to become
12 insolvent. Under either claim, the value of the property transferred is relevant to Plaintiff's
13 claims. See Nevada Revised Statute ("NRS") 112.180(2)(h) (value of the consideration received
14 reviewed in determining badges of fraud for a transfer made with actual intent to hinder, delay,
15 or defraud creditors); 112.180(1)(b) (constructive fraudulent transfer where, inter alia, debtor
16 transfers property "[w]ithout receiving a reasonably equivalent value in exchange for the transfer
17 or obligation").

18 Under either subsection (a) or (b) of NRS 112.180, the value of the property transferred is
19 relevant to Plaintiff's recovery. See Cadle Co. v. Woods & Erickson, LLP, 131 Nev. Adv. Op.
20 15, 345 P.3d 1049, 1053 (2015) ("creditors have recourse in *equitable* proceedings in order to
21 recover the property, or payment for its value, by which they are returned to their pre-transfer
22 position.") (citing NRS 112.210, NRS 112.220(2)). Accordingly, discovery relating to the value
23 of the property transferred is directly relevant to Plaintiff's claims.

24 **A. Bayuk's "Introduction" is an Amalgamation of Irrelevant, Unsupported**
25 **Facts Which Should be Stricken or Disregarded.**

26 First, the fact that Defendants Bayuk and Salvatore were dismissed from the original
27 litigation against Debtor Paul Morabito arising from the Debtor's massive fraud against the
28 Herbst Parties is irrelevant to any issue before the Court. As Defendants are apparently unaware,

1 this action is a fraudulent transfer action under NRS Chapter 112 pertaining to the *Debtor's*
2 fraudulent transfer of real and personal property to the Defendants *after* a significant judgment
3 was entered against the Debtor in September 2010 in the original litigation. It is the Debtor's
4 intent to hinder, delay, or defraud his creditors which Plaintiff must establish under NRS 112.180
5 – Plaintiff does not have to prove Defendants' intent.

6 While Defendants' intent to hinder the Herbst Parties or their knowledge that the property
7 received from the Debtor was received for less than fair value would certainly constitute a
8 "badge of fraud," the fact that the Defendants were not party to the Debtor's fraud scheme
9 directed to the Herbst Parties in 2007 has nothing whatsoever to do with any element of
10 Plaintiff's claims or Defendants' defenses in this fraudulent transfer action.

11 Second, the Defendants' litany of complaints about the Herbst Parties and the actions of
12 other courts is irrelevant, inappropriate, and unsupported by any factual record. The Debtor's
13 argument that the Confessed Judgment was improperly obtained has been rejected by the United
14 States Bankruptcy Court and the state courts. See Exhibit 2 (Am. Findings of Fact and
15 Conclusion of Law in Support of Order Granting Mot. for Summ. Judgment, Case No. 13-51237-
16 gwz, ECF No. 167);¹ Exhibit 3 (Order compelling deposition of Debtor dated March 13, 2014 in
17 Consolidated Nevada Corp., et al. v. JH. et al., Case No. CV07-02764); Exhibit 4 (Emergency
18 Mot. Under NRCP 27(e): Pet. for Writ of Prohibition, *Paul A. Morabito v. The Second Judicial*
19 *District Court of the State of Nevada in and for the County of Washoe*, Case No. 65319, Apr. 1,
20 2014); Exhibit 5 (Ord. Denying Pet. for Writ of Prohibition, Case No. 65319, Apr. 18, 2014).

21 The argument that the Involuntary Petition was improper was also soundly rejected by
22 the Bankruptcy Court. See Ex. 2; Exhibit 6 (Ord. Granting Summ. Judgment and Judgment,
23 Case No. 13-51237-gwz, ECF No. 161).

24 ¹ Stating "[a]s previously determined in denying the Dismissal Motion, the Confessed Judgment is not subject
25 to a bona fide dispute" and "[t]he Confessed Judgment was filed as a result of Morabito's failure to comply
26 with the terms of that certain *Settlement Agreement and Mutual Release dated November 30, 2011* (the
27 "Settlement Agreement"), which resolved [] Morabito's appeal of a State Court judgment rendered in
28 Consolidated Nevada Corp., et al. v. JH. et al., Case No. CV07-02764 (together with all claims and
counterclaims, the "State Court Action"), in favor of the Petitioning Creditors for \$149,444,777.80. . ." Why
the Debtor persists in his position that the Confessed Judgment, which represents a significant *reduction* in the
Debtor's liability, is invalid, is unclear. Even more unclear is why the Debtor's counsel is taking that position
ostensibly on behalf of Bayuk.

1 What is relevant, and what Bayuk does not dispute, is that immediately following the
2 entry of a \$150,000,000 fraud judgment against the Debtor, Debtor transferred numerous items
3 of personal property to Bayuk for a total of \$88,812. See Motion, Exhibits 2, 3, 4. What is
4 relevant, and what Bayuk does not dispute, is that shortly before the transfers, the Debtor insured
5 various items of personal property for \$2,000,000 – significantly more than the price paid by
6 Bayuk. See Motion, Exhibit 5. And yet, Bayuk has refused to produce any documents relating
7 to the value of the property transferred.

8 **B. Bayuk Fails to Cite Any Authority to Support His Failure to Produce**
9 **Relevant Discovery.**

10 None of Bayuk’s cited authorities are on point, nor do they support a presumption against
11 the discovery of relevant financial information that Bayuk is asking this Court to adopt.
12 Schlatter stands for the unremarkable proposition that “discovery in civil actions is limited to
13 matter, not privileged, ‘which is relevant to the subject matter involved in the pending action, . .
14 .’” Schlatter v. Eighth Judicial Dist. Court In & For Clark Cty., 93 Nev. 189, 192, 561 P.2d
15 1342, 1343 (1977) (quoting NRCp 26(b)(1)). Specifically, the Court found:

16 Where, as here, a litigant’s physical condition is in issue, a court may order
17 discovery of medical records containing information relevant to the injury
18 complained of or any pre-existing injury related thereto. Similarly, when a
19 litigant puts the amount of her income in issue by alleging the impairment of
20 ability to earn a living, a court may require disclosure of matter contained in
21 tax records which is relevant to this issue . . . Still, from the record, any such
consideration appears to be satisfied; thus, we think the court could properly
compel disclosure of matters in petitioner’s tax returns and medical records
relating to issues raised by her action.

22 Schlatter, 93 Nev. at 192, 561 P.2d at 1343-44 (citations omitted). Where the trial court went
23 wrong, however, was entering a discovery order permitting blanket discovery of her medical
24 records and income tax returns far beyond that which was relevant to the injuries allegedly
25 sustained and the income allegedly lost. Id., 93 Nev. at 192-93, 561 P.2d at 1343-44. Contrary
26 to Bayuk’s representations, however, Schlatter does not suggest that relevant information is
27 undiscoverable because it is deemed private, confidential, or financial information.

1 Rock Bay, LLC bears no relationship to this case or the discovery sought whatsoever, and
2 Bayuk's out-of-context quotation is disingenuous. The discovery order challenged in Rock Bay
3 was an order refusing to quash a post-judgment third party subpoena issued pursuant to NRCP
4 69(a). Rock Bay, LLC v. Dist. Ct., 129 Nev. Adv. Op. 21, 298 P.3d 441 (2013). Though
5 holding that discovery of a non-party's assets is permissible in certain circumstances in post-
6 judgment discovery of a judgment debtor's assets, the Court held that the subpoena to one of the
7 non-party witnesses should have been quashed because there was no showing that he was an
8 alter ego of the judgment debtors and there was no evidence that he ever held or transferred
9 assets with the judgment debtors. Id., 298 P.3d at 446. The Court stated:

10 In the context of post-judgment discovery, courts have recognized that a
11 nonparty's privacy interests must be balanced against the need of the judgment
12 creditor for the requested information. Thus, a nonparty's financial assets are
13 generally protected where the information sought was critical to the financial
14 health of the non-party's business and was being requested by a direct
15 competitor.

16 However, the need of a judgment creditor to examine a nonparty's financial
17 records outweighs the nonparty's privacy interest where, as in this case, there
18 are reasonable doubts as to the good faith of the transfer of assets between the
19 nonparty and the judgment debtor, and the judgment creditor is not a
20 competitor of the nonparty.

21 Rock Bay, LLC, 298 P.3d at 447 (quotations and citations omitted). The court concluded that
22 the district court properly refused to quash the judgment creditors' subpoena to U.S. Bank
23 because the creditors were not competitors of Rock Bay and the banking records sought were
24 relevant. Id. at 448. Bayuk is a party, and this is not post-judgment discovery under NRCP
25 69(a). Therefore, to the extent Rock Bay could be construed as requiring some kind of
26 heightened standard for third party financial records in the judgment debtor context, it certainly
27 is not applicable here.

28 Willeford v. Toys "R" Us-Delaware, Inc. was an Illinois case addressing the scope of
protective orders under Illinois Rule 201(c), which is somewhat similar to NRCP 26(c).
Willeford v. Toys "R" Us-Delaware, Inc., 385 Ill. App. 3d 265, 273, 895 N.E.2d 83, 90 (2008)
(discussing Ill. Sup.Ct.Rules, Rule 201(c)). In that case, the defendants sought a protective order

1 to prohibit the production of documents which would identify other persons injured at Toys “R”
2 Us stores in a similar manner as the plaintiff (i.e., pattern and practice discovery), on the basis
3 that plaintiff’s counsel could use that information to recruit people as plaintiffs. Willeford, 385
4 Ill. App. 3d at 271-72, 895 N.E.2d at 88-89. The court discussed at length the history of Illinois
5 cases granting protective orders in connection with confidential business information, and
6 concluded that there was no requirement that a trial court enter a protective order any time a
7 litigant alleged that the requested material could be used by another party in another suit. Id.,
8 385 Ill. App. 3d at 274, 895 N.E.2d at 91.

9 Regarding the “inherently sensitive” quote, which as with all of Bayuk’s other citations is
10 taken so drastically out of context as to be affirmatively misleading, the court made clear that it
11 was referring the disclosure to non-parties of competitive business information, the disclosure of
12 which could result in business injury to the producing party. Id., 385 Ill. App. 3d at 275, 895
13 N.E.2d at 91 (discussing Statland v. Freeman, 112 Ill.2d 494, 493 N.E.2d 1075 (1986)
14 (protective order to prevent party from disseminating to third parties purchase and sale records of
15 partnership interests, ownership records, and records of negotiations concerning the partnerships
16 and legal fees paid by the partnerships produced by former law partners in discovery) and May
17 Centers, Inc. v. S.G. Adams Printing & Stationery Co., 153 Ill.App.3d 1018, 506 N.E.2d 691
18 (1987)); see also Hofmann Corp. v. Superior Court, 172 Cal. App. 3d 357, 360, 218 Cal. Rptr.
19 355, 356 (Ct. App. 1985) (refusing to compel disclosure in personal injury action of proprietary
20 customer list that was only tangentially relevant to the action after partial discovery of requested
21 information was made).

22 Apart from the fact that Bayuk’s insurance policy records do not constitute competitive
23 business information, much less information that could result in a business injury, Bayuk did not
24 seek a protective order to prohibit Plaintiff from disclosing his financial information to third
25 parties, nor has Bayuk shown that production of the documents would result in some kind of
26 business injury. Instead, Bayuk chose to refuse to produce such information to the Plaintiff in
27 response to multiple written discovery requests. Whether or not such a protective order could
28 issue therefore is irrelevant.

1 Bayuk's citation to Hetter v. Eighth Judicial District Court is similarly baffling. Hetter v.
2 Eighth Judicial Dist. Court of State In & For Cty. of Clark, 110 Nev. 513, 874 P.2d 762 (1994).
3 In Hetter, the Court found that policy concerns, including federal policy considerations of
4 protecting taxpayer privacy and encouraging the filing of full and accurate tax returns, weighed
5 against requiring the production of tax returns without some showing of relevance. Id., 110 Nev.
6 at 520, 874 P.2d at 766. Specifically, the Court stated

7 Claims for punitive damages can be asserted with ease and can result in abuse
8 and harassment if their assertion alone entitles plaintiff to financial discovery.
9 We hold that before tax returns or financial records are discoverable on the
10 issue of punitive damages, the plaintiff must demonstrate some factual basis
11 for its punitive damage claim.

12 Id. (citations omitted).

13 Plaintiff is not seeking punitive damages. He is not seeking to compel the production of
14 income tax returns. Bayuk fails to demonstrate that insurance policies are subject to the same
15 policy considerations as income tax returns, or that there is any policy, whether under state or
16 federal law, favoring the privacy of insurance information. More importantly, however, the
17 value of the personal property transferred to Bayuk by the Debtor immediately following entry of
18 the judgment is directly relevant to Plaintiff's claims.

19 McNair also involves the production of tax returns. McNair v. Eighth Judicial Dist.
20 Court In & For Cty. of Clark, 110 Nev. 1285, 1290, 885 P.2d 576, 579 (1994). The Court in
21 McNair refused to hold that tax returns were entitled to any privilege, concluding instead that
22 "tax returns must be relevant to be discoverable, and may not be discoverable in the absence of a
23 showing that the information is otherwise unobtainable." McNair, 110 Nev. at 1290, 885 P.2d at
24 579 (citing Clark v. District Court, 101 Nev. 58, 64, 692 P.2d 512, 516 (1985), Schlatter, 93 Nev.
25 at 192, 561 P.2d at 1343). Ultimately, the Court ordered the tax returns were discoverable,
26 where the judgment creditors had been unsuccessful in their efforts to discover the judgment
27 debtors' assets and the information contained in the tax returns may be relevant in identifying
28 assets and collecting the judgment. Id. Contrary to Bayuk's contention, McNair does not hold,

1 nor even imply, that financial records need only be produced by a party in litigation if they are
2 unobtainable from some other source.

3 C. **Refusing to Produce Relevant, Responsive Documents is Not an Acceptable**
4 **Response to Requests, Even if Overly Broad.**

5 In light of the commingling of Bayuk's and the Debtor's assets over a number of years,
6 Plaintiff does not believe the subject discovery requests were overly broad. The temporal scope
7 of the requests at issue² is necessary to determine which assets were in the Debtor's possession
8 and which were in Bayuk's possession before and after the subject transfers, along with
9 differences in valuation attributed to such assets before and after the transfers reflected in the
10 Bills of Sale. See Motion, Exhibits 2, 3, and 4.

11 Nonetheless, overbreadth is not an excuse for simply refusing to produce any responsive
12 documents. Rule 34(b)(2)(B) provides:

13 (B) Responding to Each Item. For each item or category, the response
14 must either state that inspection and related activities will be permitted
15 as requested or state the ground for objecting to the request, *with*
specificity, including the reasons.

16 Nev. R. Civ. P. 34(b)(2)(B) (emphasis added). Meeting the burden of asserting a discovery
17 objection requires more than Bayuk's boilerplate objection of "this request seeks documents
18 which contain sensitive personal information which is not relevant to the claims and defenses
19 pled in this case. The request is overbroad, not limited to the specific issues in dispute in this
20 case, and is not reasonably calculated to lead to the discovery of admissible evidence." Bare
21 assertions do not suffice. See, e.g., Pleasants v. Allbaugh, 208 F.R.D. 7, 12 (D.D.C. 2002), on
22 reconsideration, No. CIV.A. 00-3094(JMF), 2002 WL 31520105 (D.D.C. Nov. 12, 2002);
23 Jackson v. Montgomery Ward & Co., 173 F.R.D. 524 (D. Nev. 1997); Josephs v. Harris Corp.,
24 677 F.2d 985, 992 (3d Cir. 1982) ("the mere statement by a party that the interrogatory was
25 'overly broad, burdensome, oppressive and irrelevant' is not adequate to voice a successful
26

27 ² Bayuk does not clearly identify the requests that he contends are "unlimited in scope," but from the context it
28 appears he is referring to requests relating to "insurance policies in effect for any real or personal property
[Bayuk] owned between January 1, 2005 and December 31, 2011." See Motion, pp. 6-7.

1 objection to an interrogatory. On the contrary, the party resisting discovery 'must show
2 specifically how ... each interrogatory is not relevant or how each question is overly broad,
3 burdensome or oppressive.'" (citing Roesberg v. Johns-Manville Corp., 85 F.R.D. 292, 296-97
4 (E.D.Pa.1980)).³

5 Thus, the burden is on the party resisting discovery (Bayuk) to explain precisely why
6 each request is objectionable given the broad discovery rules. See, e.g., McLeod, Alexander,
7 Powel &Apffel, P.C. v. Quarles, 894 F.2d 1482, 1485 (5th Cir. 1990). The burden of showing
8 that an objection is proper is on the objecting party, and it is only after the objecting party makes
9 a proper and valid showing that the materials sought are improper does the burden shift to the
10 requesting party. See Redland Soccer Club, Inc. v. Department of the Army, 55 F.3d 827, 856
11 (3rd Cir.1995); Heller v. City of Dallas, 303 F.R.D. 466, 490-91 (N.D. Tex. 2014) (the party
12 resisting discovery must "show how the requested discovery was overly broad, unduly
13 burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of
14 the burden.") (citations omitted); Etienne v. Wolverine Tube, Inc., 185 F.R.D. 653, 656 (D. Kan.
15 1999); Hilt v. SFC, Inc., 170 F.R.D. 182, 186 (D.Kan 1997).⁴

16 Further, Rule 34(b)(2)(C) requires not only that Bayuk identify responsive documents
17 that are not produced pursuant to an objection, but that he produce any responsive documents
18 that are not subject to an objection. Specifically, Rule 34(b)(2)(C) provides:

19 (C) Objections. An objection must state whether any responsive
20 materials are being withheld on the basis of that objection. An objection
21 to part of a request must specify the part and permit inspection of the
22 rest.

23 ³ See Burns v. Imagine Films Entertainment, Inc., 164 F.R.D. 589, 592-93 (W.D.N.Y. 1996) (generalized
24 objections are not sufficiently specific to allow the Court to ascertain the objectionable character of the
25 discovery request); Chubb Integrated Sys. Ltd. v. National Bank of Washington, 103 F.R.D. 52, 58 (D.D.C.
26 1984) (general objections do not fulfill a party's burden to explain its objections and therefore are not useful to
27 the court.).

28 ⁴ See also Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 359 (D. Md. 2008) (finding that boilerplate
objections resulted in waiver of objections, and stating "[i]t would be difficult to dispute the notion that the very
act of making such boilerplate objections is *prima facie* evidence of a Rule 26(g) violation, because if the
lawyer had paused, made a reasonable inquiry, and discovered facts that demonstrated the burdensomeness or
excessive cost of the discovery request, he or she should have disclosed them in the objection, as both Rule 33
and 34 responses must state objections with particularity, on pain of waiver.").

1 Nev. R. Civ. P. 34(b)(2)(C). Interpreting the parallel Federal Rule, Wright & Miller states:

2 The producing party does not need to provide a detailed description or
3 log of all documents withheld, but does need to alert other parties to the
4 fact that documents have been withheld and thereby facilitate an
5 informed discussion of the objection. An objection that states the limits
6 that have controlled the search for responsive and relevant materials
7 qualifies as a statement that the materials have been "withheld."

8 8B Fed. Prac. & Proc. Civ. § 2213 (3d ed.) (citing Committee Note to 2015 Amendment to Fed.
9 R. Civ. P. 34).

10 Similarly, the Southern Nevada Discovery Commissioner stated:

11 The rule of common sense dictates a responding party *has a duty to*
12 *answer to the extent a discovery inquiry is not objectionable.* . . .
13 Answers must be complete and unevasive. If the answering party lacks
14 the necessary information to make a full, fair and specific answer to an
15 interrogatory, it should so state under oath and should set forth in detail
16 the efforts made to obtain the information.

17 Olivarez v. Rebel Oil Company, et al., Discovery Commissioner Opinion #11 (2003) (internal
18 citations omitted) (emphasis added) (citing Miller v. Doctor's General Hospital, 76 F.R.D. 136
19 (W.D.Okla. 1997); Zanowic v. Reno, 2000 U.S. Dist. Lexis 13845 (S.D.N.Y. 2000)).

20 Bayuk failed to produce documents that are plainly unobjectionable, including insurance
21 applications, policies, and schedules of assets for the assets transferred by the Debtor to Bayuk,
22 an insider, for the period immediately preceding and immediately following the transfers, nor did
23 he advise Plaintiff in any way that responsive documents were withheld. Only *after* the Motion
24 was filed did Bayuk explain the basis for his objections, arguing for the first time in his
25 Opposition that insurance on his mother's diamond ring or his vehicle would be deemed
26 responsive to the requests. However, his contention that the requests encompass irrelevant
27 information or were overly broad did not entitle him to refuse to produce (or even identify)
28 documents which were both responsive and relevant.

29 **D. Conclusion.**

30 There is no presumption in Nevada against the discovery of relevant financial
31 information, especially from a defendant in a fraudulent transfer action. Accordingly, the
32 documents requested by Plaintiff are required to be produced. Bayuk's objection that the

1 requests were overly broad did not permit him to withhold indisputably relevant documents that
2 are fairly within the scope of authority, particularly without disclosing to Plaintiff that documents
3 were withheld. Unfortunately, had Bayuk's counsel conferred in good faith regarding the scope
4 of the requests rather than categorically refusing to respond, the disputed issues could have been
5 narrowed and the supposed overbreadth of Plaintiff's request may have been resolved without
6 court intervention. However, Bayuk's refusal to comply with his discovery obligations
7 whatsoever requires an order compelling the requested discovery by this Court.

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

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

12 DATED this 9th day of May, 2016.

13 GARMAN TURNER GORDON LLP

14 /s/ Gabrielle A. Hamm

15 GERALD E. GORDON, ESQ.
16 GABRIELLE A. HAMM, ESQ.
17 TERESA M. PILATOWICZ, ESQ.
18 650 White Drive, Ste. 100
19 Las Vegas, Nevada 89119
20 Telephone 725-777-3000

21 *Special Counsel to the Plaintiff William M. Leonard*

CERTIFICATE OF SERVICE

I certify that I am an employee of GARMAN TURNER GORDON, and that on this date, pursuant to NRCP 5(b), I served a true and correct copy of the foregoing **REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS** on the parties as set forth below:

- ☐ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, Las Vegas, Nevada, postage prepaid, following ordinary business practices
- ☐ Certified Mail, Return Receipt Requested
- ☐ Via Facsimile (Fax)
- ☐ Via E-Mail
- ☐ Placing an original or true copy thereof in a sealed envelope and causing the same to be personally Hand Delivered
- ☐ Federal Express (or other overnight delivery)
- ☒ By using the Court's CM/ECF Electronic Notification System addressed to:
Barry L. Breslow, Esq.
Frank C. Gilmore, Esq.

Addressed as follows:

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

DATED this 9th day of May, 2016.

/s/ Patty Pierson
Patty Pierson, an Employee of GARMAN
TURNER GORDON

INDEX OF EXHIBITS

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2.	Amended Findings of Fact and Conclusion of Law in Support of Order Granting Motion for Summary Judgment, Case No. 13-51237-gwz, ECF No. 167	9
3.	Order compelling deposition of Paul A. Morabito dated March 13, 2014 in Consolidated Nevada Corp., et al. v. JH. et al., Case No. CV07-02764	3
4.	Emergency Motion Under NRCP 27(e): Petition for Writ of Prohibition, <i>Paul A. Morabito v. The Second Judicial District Court of the State of Nevada in and for the County of Washoe</i> , Case No. 65319, Apr. 1, 2014	29
5.	Order Denying Petition for Writ of Prohibition, Case No. 65319, Apr. 18, 2014	3
6.	Order Granting Summary Judgment and Judgment, Case No. 13-51237-gwz, ECF No. 161	3

EXHIBIT 1

EXHIBIT 1

1 **DECLARATION OF GABRIELLE A. HAMM, ESQ. IN SUPPORT OF REPLY IN**
2 **SUPPORT OF PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF**
3 **DOCUMENTS**

4 I, GABRIELLE A. HAMM, declare and state under penalty of perjury the following:

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

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 *Reply in Support of Plaintiff's Motion to*
11 *Compel Production of Documents* (the "Reply").

12 4. Attached hereto as Exhibit 2 is a true and correct copy of the *Amended Findings*
13 *of Fact and Conclusion of Law in Support of Order Granting Motion for Summary Judgment*,
14 entered by the United States Bankruptcy Court for the District of Nevada in *In re: Paul A.*
15 *Morabito*, Case No. 13-51237-gwz, ECF No. 167.

16 5. Attached hereto as Exhibit 3 is a true and correct copy of the *Order* compelling
17 deposition of Paul A. Morabito, entered by the Hon. Judge Brent Adams on March 13, 2014 in
18 *Consolidated Nevada Corp., et al. v. JH. et al.*, Case No. CV07-02764.

19 6. Attached hereto as Exhibit 4 is a true and correct copy of the *Emergency Motion*
20 *Under NRCP 27(e): Petition for Writ of Prohibition*, filed on April 1, 2014 in *Paul A. Morabito*
21 *v. The Second Judicial District Court of the State of Nevada in and for the County of Washoe*,
22 Case No. 65319.

23 7. Attached hereto as Exhibit 5 is a true and correct copy of the *Order Denying*
24 *Petition for Writ of Prohibition*, issued by the Nevada Supreme Court on April 18, 2014 in Case
25 No. 65319.

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8. Attached hereto as Exhibit 6 is a true and correct copy of the *Order Granting Summary Judgment and Judgment*, entered by the United States Bankruptcy Court for the District of Nevada in *In re: Paul A. Morabito*, Case No. 13-51237-gwz, ECF No. 161

Dated this 9th day of May, 2016.

/s/ Gabrielle A. Hamm
GABRIELLE A. HAMM, ESQ.

EXHIBIT 2

EXHIBIT 2

by W F

Honorable Gregg W. Zive
United States Bankruptcy Judge



Entered on Docket
December 22, 2014

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JH, Inc., Jerry Herbst, and Berry-Hinckley Industries

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA

In re:

PAUL A. MORABITO,

Alleged Debtor,

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

Date: November 21, 2014
Time: 10:00 a.m.

**AMENDED¹ FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF
ORDER GRANTING SUMMARY JUDGMENT AND JUDGMENT**

JH, Inc. ("JH"), Jerry Herbst ("Herbst"), and Berry-Hinckley Industries ("BHI" and collectively with JH and Herbst, the "Petitioning Creditors"), by and through their counsel, the law firm of Gordon Silver, filed their *Motion for Summary Judgment* [ECF No. 131] (the

¹ Amended to correct the petition date to June 20, 2013.

1 “Motion”) on August 14, 2014.² The Court reviewed the Motion, the *Petitioning Creditors’*
 2 *Separate Statement of Undisputed Facts in Support of Motion for Summary Judgment* [ECF No.
 3 132] (the “SSOF”), the *Declaration of Brian R. Irvine, Esq. in Support of Petitioning Creditors’*
 4 *Separate Statement of Undisputed Facts in Support of Motion for Summary Judgment* [ECF No.
 5 133], the *Opposition to Motion for Summary Judgment* [ECF No. 146] (the “Opposition”), the
 6 *Reply to Opposition to Motion for Summary Judgment* [ECF No. 147] (the “Reply”) and the
 7 other pleadings and declarations noted on the record at the hearing on the Motion held on
 8 November 21, 2014 (the “Hearing”).

9 At the Hearing and after due deliberation and sufficient cause appearing in accordance
 10 with FRCP³ 52, as incorporated pursuant to Bankruptcy Rule 9014, and Bankruptcy Rules 1013,
 11 1018 and 7056, the Court granted the Motion for the reasons set forth below.

12 **IT IS HEREBY FOUND AND DETERMINED** by the Court (together with the
 13 findings of fact and conclusions of law made on the record at the Hearing (the “Findings and
 14 Conclusions”) as follows:

15 1. The Court has jurisdiction over the Involuntary Proceeding pursuant to 28 U.S.C.
 16 § 1334.

17 2. Determining whether an order for relief is appropriate is a core proceeding in
 18 which the Court may enter a final order in accordance with 28 U.S.C. § 157(b)(2).

19 3. Venue of the Involuntary Proceeding in this District is proper pursuant to 28
 20 U.S.C. § 1408.

21 4. Good, sufficient, and timely notice of the Hearing has been given to holders of
 22 claims and other parties-in-interest to whom notice is required to be given in accordance with the
 23 Bankruptcy Code, the Bankruptcy Rules and the Local Rules. Notice of all proceedings
 24 regarding or relating to the Motion was adequate under the circumstances and materially

25
 26 ² Any capitalized but undefined terms set forth herein shall be defined in the Motion and SSOF (defined below).

27 ³ All references to “Chapter” or “Section” herein shall be to the Bankruptcy Code appearing in Title 11 of the U.S.
 28 Code; all references to a “Bankruptcy Rule” shall refer to the Federal Rules of Bankruptcy Procedure; all references
 to “FRCP” shall refer to the Federal Rules of Civil Procedure; and all references to “Local Rule” are to the Local
 Rules of Bankruptcy Practice for the U.S. District Court for the District of Nevada.

1 complied with applicable provisions of the Bankruptcy Code, the Bankruptcy Rules and the
2 Local Rules.

3 5. On June 20, 2013 (the "Petition Date"), the Petitioning Creditors filed an
4 involuntary petition for relief under Chapter 7 of the Bankruptcy Code [ECF No. 1] (the
5 "Involuntary Petition"), thereby commencing the Chapter 7 involuntary proceeding (the
6 "Involuntary Proceeding") against Paul A. Morabito (the "Morabito").

7 6. The Involuntary Petition alleged that the Petitioning Creditors' claims were for
8 \$77,000,000, based upon the *Confession of Judgment* and a *Stipulation to Confession of*
9 *Judgment* (the "Stipulated Judgment" and referred to with the Confession of Judgment as the
10 "Confessed Judgment"), filed on June 18, 2013, in the Second Judicial District Court in and for
11 the County of Washoe (the "State Court"), and entered onto the judgment roll by the clerk of the
12 State Court.

13 7. On July 15, 2013, Morabito filed his *Motion to Dismiss Involuntary Chapter 7*
14 *Petitions; Memorandum of Points and Authorities in their respective Chapter 7 Cases* [ECF No.
15 42] (the "Dismissal Motion").

16 8. On September 25, 2013, Morabito filed his *Notice of Withdrawal of Alleged*
17 *Debtors' Argument Regarding 11 U.S.C. 303(b) Numerosity Contained in the Motion to Dismiss*
18 [ECF No. 78], which provided that the Morabito withdraws that argument from the Dismissal
19 Motion and it shall not be presented as a basis for dismissal of the Involuntary Petition.

20 9. The Petitioning Creditors filed their *Joint Opposition to Motion to Dismiss*
21 *Involuntary Chapter 7 Petitions* [ECF No. 82] (the "Joint Opposition"), in which they argued
22 that the Confessed Judgment was not subject to a bona fide dispute and the Involuntary
23 Proceeding before the Court was more than a two-party dispute. The Petitioning Creditors also
24 maintained that they filed the Involuntary Petition primarily to address the fraudulent dissipation
25 and transfer of Morabito's assets. See Opposition to Dismissal at 3:18-19.

26 10. Morabito responded to the Joint Opposition in the *Joint Reply in Support of*
27 *Motion to Dismiss Involuntary Chapter 7 Petitions* [ECF No. 91].

11. The Bankruptcy Court held a hearing on the Dismissal Motion on October 22, 2013, and on December 17, 2013, the Bankruptcy Court entered its *Order Denying Motion to Dismiss Involuntary Chapter 7 Petition and Suspending Proceedings Pursuant to 11 U.S.C. § 305(a)(1)* [ECF No. 94] (the "Suspension Order") for the reasons set forth on the record at the hearing and in the Suspension Order and as reiterated at the Hearing.

12. On March 20, 2014, Morabito filed his *Motion for Clarification of Order* [ECF No. 99] (the "Clarification Motion"), which requested clarification of the Suspension Order and authorization to settle an undisclosed claim against Morabito after it was already settled by state court order.

13. The Court lifted the Suspension Order on July 10, 2014, in its *Order Re: June 26, 2014 Status Conference* [ECF No. 123] ("Order Lifting Suspension") for the reasons stated on the record at the hearing and in the Order Lifting Suspension and reiterated at the Hearing. The Court also provided that Morabito answer the Involuntary Petition on or before July 21, 2014.

14. On July 21, 2014, Morabito filed his *Answer to Involuntary Petition* [ECF No. 128] (the "Answer"). While the Answer addressed Exhibit A to the Petition, it did not address the three allegations set forth on the face of the Involuntary Petition.

15. On November 21, 2014, the Court held the Hearing on the Motion.

16. The Court finds and concludes that summary judgment is appropriate because there is no genuine dispute as to any material fact and the Petition Creditors are entitled to judgment as a matter of law.

17. The Court finds that the following factual findings are based upon undisputed facts. Although Morabito had the opportunity to provide declarations and other evidence in support of his Opposition, he failed to do so. As such, there is no genuine dispute as to any material fact.

a. There is no dispute as to the facts set forth in the Petitioning Creditors' SSOF, except for Morabito's assertion that he was generally paying his debts when due, which assertion is not supported by any genuine material fact.

1 b. As previously determined in denying the Dismissal Motion, the Confessed
2 Judgment is not subject to a bona fide dispute.

3 c. The Confessed Judgment was filed as a result of Morabito's failure to
4 comply with the terms of that certain *Settlement Agreement and Mutual Release dated*
5 *November 30, 2011* (the "Settlement Agreement"), which resolved the Morabito's appeal
6 of a State Court judgment rendered in Consolidated Nevada Corp., et al. v. JH. et al.,
7 Case No. CV07-02764 (together with all claims and counterclaims, the "State Court
8 Action"), in favor of the Petitioning Creditors for \$149,444,777.80 (the "Judgment").

9 d. The Petitioning Creditors were eligible to file the Involuntary Petition
10 pursuant Section 303(b).

11 e. Morabito is a person against whom an order for relief may be entered.

12 f. There is no genuine dispute that Morabito was not paying at least 98% of
13 his debt on the Petition Date.

14 g. The Involuntary Proceeding is not a one-creditor dispute.

15 h. Special circumstances exist that would permit the Court to enter an order
16 for relief even if the Involuntary Proceeding is a one-creditor dispute.

17 i. Even if the Involuntary Proceeding was a one-creditor dispute, it is
18 because Morabito and Bayuk sought to isolate the Petitioning Creditors by paying all of
19 Morabito's other debts.

20 j. The materiality of the debt owed to the Petitioning Creditors swamped
21 Morabito's other debt.

22 k. The conduct of Morabito before the State Court and the Bankruptcy Court
23 was gamesmanship.

24 l. Exhibit 4 to the Opposition, which is the *Declaration of Edward Bayuk in*
25 *Support of Paul A. Morabito's Opposition to Motion for Summary Judgment* ("Bayuk
26 Declaration"), demonstrates that, on the Petition Date, Morabito was not paying his debts
27 himself, but that Bayuk was paying Morabito's debts.

1 m. The Bayuk Declaration also evidences that Bayuk was the holder of a
2 promissory note in the amount of \$600,000 (the "Bayuk Note") on the Petition Date.

3 n. Morabito acknowledged during his deposition that the \$600,000 was used
4 to pay his expenses.

5 o. The Bayuk Declaration establishes that Bayuk expected, as of the Petition
6 Date, to be repaid by Morabito the amounts due under the Bayuk Note.

7 p. Bayuk was a creditor of Morabito on the Petition Date and, as a result, the
8 Involuntary Proceeding was not a one-creditor dispute on the Petition Date.

9 q. Although Bayuk suggested in the Bayuk Declaration that he gifted the
10 debt owed to him under the Bayuk Note and destroyed the Bayuk Note after the Petition
11 Date, debt that is forgiven is not paid.

12 r. Morabito was not paying the amounts due and owing to Bayuk under the
13 Bayuk Note in addition to failing to pay the Petitioning Creditors under the Confessed
14 Judgment.

15 s. What has occurred here is isolation by Morabito and Bayuk of the
16 obligation of \$77 million under the Confessed Judgment.

17 t. The amount of delinquency, the materiality of debt and nonpayment, the
18 nature of the conduct of Morabito's affairs, and the inconsistent positions taken by
19 Morabito and Bayuk before the Court by declarations, pleadings and Morabito's
20 testimony in deposition demonstrate that, under a totality of circumstances, Morabito was
21 not generally paying his debts as they became due on the Petition Date.

22 u. No evidence could be presented at trial that could vary these undisputed
23 facts.

24 18. The Court concludes that since no evidence could be presented at trial that could
25 vary these undisputed facts, and there is no question that the Court would render a directed
26 verdict in favor of the Petitioning Creditors at trial.

27 19. Genuine disputes as to material facts cannot be created by contradictory or
28 conflicting testimony or declarations of Morabito.

1 20. The Court concludes that the Petitioning Creditors were eligible to file the
2 Involuntary Petition pursuant Section 303(b).

3 21. The Court concludes that Morabito waived any argument that the Petitioning
4 Creditors did not meet the numerosity requirement pursuant to Section 303(b)(1).

5 22. The Court concludes that even if the numerosity requirement was not waived, as
6 provided for in Section 303(b), there are less than twelve eligible holders of claims against
7 Morabito.

8 23. The Court concludes that Morabito is a person against whom an order for relief
9 may be entered.

10 24. The Court concludes that the Section 303(h)(1) test of whether Morabito was
11 generally paying his debts as they became due is to be applied as of the date of the filing of the
12 Involuntary Petition.

13 25. The Court concludes that what happens post-Petition does not affect the Court's
14 determination as to whether Morabito was generally paying his debts as the debts become due.

15 26. Morabito's request in the Opposition that the Court dismiss the Involuntary
16 Petition under Section 305 was denied when the Court lifted the Suspension Order and is not
17 properly before the Court at the Hearing as required by Section 305(a).

18 27. The Court concludes that Morabito was not generally paying his debts as his debt
19 became due on the Petition Date.

20 28. The Court concludes that, consistent with Section 303, it is appropriate for the
21 Court to enter an order for relief under Chapter 7 of the Bankruptcy Code against Morabito.

22 **IT IS SO ORDERED.**
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1 PREPARED AND SUBMITTED BY:	APPROVED/ DISAPPROVED
2 GORDON SILVER	ROBISON, BELAUSTEGUI, SHARP &
3	LOW
4	
5 By: <u>/s/ Mark M. Weisenmiller</u>	By: <u>/s/ Frank C. Gilmore</u>
6 GERALD M. GORDON, ESQ.	FRANK C. GILMORE, ESQ.
7 BRIAN R. IRVINE, ESQ.	BARRY L. BRESLOW, ESQ.
8 MARK M. WEISENMILLER, ESQ.	71 Washington Street
9 100 W. Liberty Street	Reno, Nevada 89503
10 Reno, Nevada 89501	<i>Attorneys for Paul A. Morabito and</i>
11 <i>Attorneys for Petitioning Creditors</i>	<i>Consolidated Nevada Corporation</i>

LR 9021 CERTIFICATION

In accordance with LR 9021, counsel submitting this document certifies that the order accurately reflects the court's ruling and that (check one):

- ☐ The court waived the requirement of approval under LR 9021(b)(1).
- ☐ No party appeared 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, or failed to respond, as indicated above.

FRANK C. GILMORE, ESQ. and JEFFREY L. HARTMAN, ESQ.

- ☐ I certify that this is a case 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 3

EXHIBIT 3

1 Code 3370

2
3 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
4 IN AND FOR THE COUNTY OF WASHOE
5

6 CONSOLIDATED NEVADA CORP., et al.,

Case No. CV07-02764

7 Plaintiffs,

Dept. No. 6

8 v.

9 JH, INC., et al.,

10 Defendants.
11 _____/

12 JH, INC., et al.,

13 Counter-Claimants,

14 v.
15

16 CONSOLIDATED NEVADA CORP., et al.,

17 Counter-Defendants.
18 _____/

19 ORDER

20 On March 3, 2014, Defendants/Counter-Claimants, JH, INC. and BERRY-
21 HINCKLEY INDUSTRIES (hereinafter "Herbst Parties"), filed a motion to compel the
22 deposition of Plaintiff/Counter-Defendant, PAUL A. MORABITO (hereinafter "Mr.
23 Morabito"), and for monetary sanctions. Mr. Morabito opposed this motion on March 7,
24 2014 on the ground a deposition under this case number is improper as the underlying case
25 was dismissed with prejudice and the confession of judgment improperly placed upon the
26 judgment roll of the clerk of the Second Judicial District Court.

27 After carefully considering the Herbst Parties' motion and good cause appearing, it
28 is hereby ordered the Herbst Parties' motion to compel is GRANTED. The Court does not

find any violation of N.R.S. 17.090, N.R.S. 17.100, or N.R.S. 17.110 by filing the confession of judgment under the above case number. The Court finds there is nothing in N.R.S. 17.090, N.R.S. 17.100, nor in N.R.S. 17.110 that requires a confession of judgment be filed in a new case. N.R.S. 17.110 provides:

The statement must be filed with the clerk of the court in which the judgment is to be entered. The clerk shall endorse upon it and enter in the judgment book a judgment of the court for the amount confessed...

There is no evidence the Herbst Parties failed to abide by N.R.S. 17.110.

Additionally, the Court does not find Mr. Morabito's argument that even though his counsel agreed to a date and location of the deposition, there was never an understanding that Mr. Morabito would attend said deposition persuasive. If this had been the case, Mr. Morabito's counsel should have informed the Herbst Parties' counsel that Mr. Morabito might not attend.

The Court does not find the Herbst Parties' are entitled to fees and costs of bringing this motion. Accordingly, the Herbst Parties' motion for costs and fees is DENIED.

Accordingly, the Herbst Parties' motion is granted in part and denied in part. The parties shall conduct the deposition of Paul A. Morabito within thirty (30) days of the entry of this order. If counsel cannot agree as to the time and place of the deposition they shall notify the Judicial Assistant of this department and the Court will designate the time and place of the deposition.

DATED: This 30 day of March, 2014.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;
that on the 13th day of March, 2014, I electronically filed the foregoing with the clerk of
the Court:

JOHN DESMOND, ESQ.

BRIAN IRVINE, ESQ.

BARRY BRESLOW, ESQ.

FRANK GILMORE, ESQ.

And, I deposited in the County mailing system for postage and mailing with the
United States Postal Service in Reno, Nevada, a true and correct copy of the attached
document addressed as follows:



Judicial Assistant

EXHIBIT 4

EXHIBIT 4

Electronically Filed
Apr 01 2014 01:37 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

IN THE SUPREME COURT FOR THE STATE OF NEVADA

PAUL A. MORABITO,

Supreme Court

Case No.: _____

Petitioner,

v.

Second Judicial District Court
Case No. CV07-02764

THE SECOND JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA IN AND FOR THE
COUNTY OF WASHOE, and the
HONORABLE BRENT ADAMS,

Respondents,

and

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

EMERGENCY MOTION
UNDER NRCP 27(e):
PETITION FOR WRIT OF
PROHIBITION
(Action needed by April 12,
2014)

Real parties in Interest

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Attorneys for Petitioner

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(775) 329-3151

Docket 65319 Document 2014-10259

1 **NRAP 26.1 DISCLOSURE STATEMENT**

2 The undersigned counsel of record certifies that the following are
3 persons and entities as described in NRAP 26.1(a), and must be disclosed.
4
5 These representations are made in order that the justices of this court may
6 evaluate possible disqualifications or recusal.
7

8 Petitioner Paul Morabito is an individual, and is not an entity. The
9 undersigned counsel plans to appear on behalf of petitioner in this writ
10 proceeding, and is his counsel in the action before the district court.
11

12 DATED this 1st day of April, 2014.

13
14 Robison, Belaustegui, Sharp & Low
15 71 Washington Street
16 Reno, Nevada 89503

17 
18 BARRY L. BRESLOW (SBN 3023)
19 FRANK C. GILMORE (SBN 10052)
20 Attorneys for Petitioner
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<i>Coast to Coast Demolition & Crushing, Inc. v. Real Equity Pursuit, LLC</i> , 126 Nev. ___, 226 P.3d 605 (2010)	12
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1	<u>Federal Case Law</u>	
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8	<i>U.S. v. \$160,066.98 from Bank of Am.</i> , 202 F.R.D. 626 (S.D. Cal. 2009)	8,9
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1 nullified *nunc pro tunc* almost three years ago.

2 After the underlying case was dismissed, Herbst filed the confession
3 of judgment in the same dismissed case. Herbst then sought to commence
4 discovery upon Morabito pursuant to the confession of judgment. Morabito
5 objected to the entry of the confession of judgment in the dismissed case.
6 Herbst then moved to compel Morabito's appearance at a deposition in
7 Nevada. Morabito objected on the ground that (1) he resides in California,
8 and (2) the district court lacked jurisdiction to compel his attendance
9 because the confession of judgment had been improperly filed and the trial
10 court lacked jurisdiction to enter *any* orders in the dismissed case. Over
11 Morabito's objections, the district court granted the motion to compel. This
12 emergency petition for a writ of prohibition follows.
13

14 **FACTUAL BACKGROUND OF THE CASE**

15 Morabito and Herbst were previously parties to district court case
16 number CV07-02764. Petitioner's Appendix ("PA") 1. On December 1,
17 2011, Morabito and Herbst stipulated and requested that the district court
18 enter an order (1) withdrawing and vacating the district court's findings of
19 fact, conclusions of law, and judgment in the case CV07-02764; (2) vacating
20 a judgment entered after a jury trial, and entering that order *nunc pro tunc*.
21 *Id.* at 1-2. That same date, Herbst and Morabito stipulated that case CV07-
22

1 02764 be dismissed with prejudice. *Id.* at 3-4. Finally, Herbst and Morabito
2 stipulated to seal the record of case CV07-02764. *Id.* at 5-6.
3

4 Once the parties had agreed to dismiss CV07-02764, Morabito signed
5 a confession of judgment in favor of Herbst. *Id.* at 12-25. That confession
6 of judgment did not contain the caption for CV07-02764 because *it was not*
7 *entered into before the district court in that case.* See *id.* at 12.
8

9 Confusingly, when Morabito defaulted on his confession of judgment,
10 in June 2013 Herbst filed the confession of judgment in CV07-02764, which
11 was no longer a pending case. *Id.* at 7-8. Herbst then filed an "Emergency
12 Motion to Compel Deposition of Paul A. Morabito and for Sanctions"
13 pursuant to a deposition notice which Morabito explained he was not
14 inclined to comply with. *Id.* at 32-49. In that emergency motion, Herbst
15 sought an order requiring Morabito to attend an NRCP 30 deposition in
16 Nevada, despite the undisputed fact that Morabito has been a California
17 resident for several years. *Id.* at 32-33. Morabito opposed that emergency
18 motion and argued that (1) the district court lacked subject matter
19 jurisdiction over the confession of judgment execution proceedings because
20 the confession of judgment was improperly before the court in CV07-02764,
21 which had been dismissed with prejudice in 2011; and (2) Morabito, a
22 judgment debtor under the confession of judgment, cannot be required to
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1 attend a deposition at a place that is not in the county where he resides. *Id.* at
2 151-58.

3
4 Over Morabito's objections, the district court granted the motion to
5 compel. *Id.* at 182-84. It found that it had subject matter jurisdiction over
6 the confession of judgment proceedings because "there is nothing in NRS
7 17.090, NRS 17.100, nor in NRS 17.110 that requires a confession of
8 judgment be filed in a new case." *Id.* at 183. It further ordered the parties to
9 conduct the deposition of Morabito within thirty days of March 13, 2014.

10
11
12 *Id.*

13 Morabito offered to have his deposition taken in Los Angeles County,
14 where he resides on April 14, 2014. Aff. Frank C. Gilmore, Esq., ¶4. When
15 counsel could not agree to a time, date and location for the deposition, a
16 telephonic hearing was set with the district court. *Id.* The telephonic
17 hearing was held with the district court on March 26, 2014. *Id.* At that
18 hearing, the district court ordered Morabito to attend a deposition in Washoe
19 County, Nevada on April 12, 2014. *Id.* at ¶ 5. *The district court then*
20 *abruptly terminated the hearing before Morabito's counsel could ask the*
21 *court to explain its reasoning for requiring Morabito to appear at a*
22 *deposition in Nevada, and before counsel could make his record.* *Id.* This
23 writ petition follows.
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SUMMARY OF THE ARGUMENT

A writ of prohibition is the appropriate remedy in this matter because Morabito is requesting this Court to restrain the district court from (1) ordering improper discovery, and (2) exercising jurisdiction over a case in which it lacks subject matter jurisdiction. *Rock Bay, LLC v. Eighth Judicial Dist. Ct.*, 129 Nev. ___, ___, 298 P.3d 441, 444, 446 (2013).

This Court must enter a writ of prohibition restraining the district court from ordering Morabito to attend a post-judgment deposition in Nevada because Morabito resides in California. Herbst moved to compel Morabito's attendance at a deposition in Washoe County. During the telephonic hearing on this issue, the district court ordered Morabito's attendance at a deposition on Saturday, April 12, 2014, in Washoe County, over counsel's objections. The district court then abruptly terminated the telephonic hearing without explaining its reasons for compelling Morabito's attendance, and without permitting counsel to make a record. Because a defendant must be afforded the opportunity to be deposed in the district in which he resides, *Fausto v. Credigy Servs. Corp.*, 251 F.R.D. 427, 429 (N.D. Cal. 2009), the district court's decision was a clear abuse of discretion.

Furthermore, this Court should enter a writ of prohibition restraining the district court from compelling Morabito to attend a deposition in Nevada

1 because the district court's order is void, given that it lacks subject matter
2 jurisdiction over the confession of judgment proceedings.

3
4 Herbst seeks discovery pursuant to a confession of judgment that was
5 filed in case number CV07-02764. That case was dismissed with prejudice,
6 and all findings and judgments were vacated and withdrawn – *nunc pro tunc*
7 -- *almost two years before Herbst filed the confession of judgment with*
8 *the district court.* Notably, *Morabito did not execute the confession of*
9 *judgment in CV07-02764.* The confession of judgment was not executed the
10 dismissed case. Accordingly, the district court did not retain jurisdiction
11 over the matter. *Ravera v. City of Reno*, 100 Nev. 68, 71, 675 P.2d 407, 409
12 (1982). Therefore, the order compelling Morabito to attend his deposition
13 is void. *Cox v. Eighth Judicial Dist. Ct.*, 124 Nev. 918, 925, 193 P.3d 503,
14 534 (2008).
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19 ARGUMENT

20 I. WRIT RELIEF IS APPROPRIATE.

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22 Morabito respectfully requests that this Court enter a writ of prohibition
23 restraining the district court from (1) ordering Morabito to appear for a
24 deposition in Nevada, and (2) exercising jurisdiction over the execution
25 proceedings on the confession of judgment. "A writ of prohibition may be
26 granted when the district court exceeds its jurisdiction." *Rock Bay, LLC v.*
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1 *Eighth Judicial Dist. Ct.*, 129 Nev. ___, ___, 298 P.3d 441, 444 (2013); see
2 also NRS 34.320. This relief is an extraordinary remedy that is not available
3 if there is a “plain, speedy and adequate remedy in the ordinary course of
4 law.” *Rock Bay*, 298 P.3d at 444-45 (quoting NRS 34.170).

5
6 Morabito has no adequate legal remedy because post-judgment orders
7 compelling discovery are not substantively appealable. See NRAP 3A(b).
8 Furthermore, it is well established that a writ of prohibition is the
9 appropriate remedy to prevent improper discovery. *Rock Bay*, 298 P.3d at
10 444; *Wardleigh v. Second Judicial Dist. Ct.*, 111 Nev. 345, 351, 891 P.2d
11 1180, 1184 (1995) (holding that “a writ of prohibition will issue to prevent
12 discovery required by court order entered in excess of the court’s
13 jurisdiction”).
14

15
16 In addition, writ relief is also appropriate because the district court lacked
17 jurisdiction to enter the order compelling Morabito to attend a deposition in
18 Nevada. Writs of prohibition are “designed to prevent the district court from
19 acting beyond its authority.” *Rock Bay*, 298 P.3d at 444; see also NRS
20 34.320. Therefore, a writ of prohibition is the appropriate remedy in this
21 matter.
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26 **II. THE DISTRICT COURT ABUSED ITS DISCRETION IN**
27 **ORDERING MORABITO TO ATTEND A DEPOSITION IN**
28 **NEVADA.**

1 This Court must enter a writ of prohibition restraining the district court
2 from ordering Morabito to attend a post-judgment deposition in Nevada
3 because Morabito resides in California. Herbst moved to compel Morabito's
4 attendance at a deposition in Washoe County. PA 32-33. During the
5 telephonic hearing on this issue, the district court ordered Morabito's
6 attendance at a deposition on Saturday, April 12, 2014, in Washoe County,
7 over counsel's objections. Aff. Frank C. Gilmore, Esq. ¶¶ 4-5. The district
8 court then abruptly terminated the telephonic hearing without explaining its
9 reasons for compelling Morabito's attendance, and without permitting
10 counsel to make a record. *Id.* at ¶ 5. Because a defendant must be given the
11 opportunity to be deposed in the district in which he resides, *Fausto v.*
12 *Credigy Servs. Corp.*, 251 F.R.D. 427, 429 (N.D. Cal. 2009), the district
13 court's decision was a clear abuse of discretion.
14

15 This Court reviews an order compelling post-judgment discovery for an
16 abuse of discretion. *Rock Bay*, 129 Nev. at ___, 298 P.3d at 446. An abuse
17 of discretion occurs when the court acts "in clear disregard of the guiding
18 legal principles." *McKnight Family, LLP v. Adept Mgmt.*, 129 Nev. ___.
19 ___, 310 P.3d 555, 559 (2013) (quoting *Bergmann v. Boyce*, 109 Nev. 670,
20 674, 856 P.2d 560, 563 (1993)).
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1 The deposition Herbst seeks was noticed pursuant to NRCP 30. PA 32.
2 This Rule does not contain a geographical limitation. This does not,
3 however, mean that Herbst may require Morabito to travel to Nevada to be
4 deposed.
5

6 Under FRCP 30, NRCP 30's federal counterpart, "there is general
7 presumption that the deposition of the defendant should be conducted in the
8 district of his residence." *Fausto*, 251 F.R.D. at 429 (internal quotations
9 omitted); *see also U.S. v. \$160,066.98 from Bank of Am.*, 202 F.R.D. 626,
10 627 (S.D. Cal. 2009); *Cont'l Fed. Sav. & Loan Ass'n v. Delta Corp. of Am.*,
11 71 F.R.D. 697, 699 (W.D. Okla. 1976). This is because the defendant is
12 "not before the court by choice," since the plaintiff brought the action and
13 chose the forum. *Fausto*, 251 F.R.D. at 429 (internal quotations omitted);
14 *\$160,066.98 from Bank of Am.*, 202 F.R.D. at 627. Therefore, absent special
15 circumstances, the "party seeking discovery must go where the desired
16 witnesses are normally located." *\$160,066.98 from Bank of Am.*, 202 F.R.D.
17 at 627 (internal quotations omitted).
18

19 This reasoning is "strong persuasive authority, because the Nevada
20 Rules of Civil Procedure are based in large part upon their federal
21 counterpart." *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119, 787
22 P.2d 772, 776 (1990)). Here, Morabito does not reside in Nevada. He is not
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1 before the district court by choice. In fact, as will be shown later in this
2 petition, he executed the confession of judgment to *avoid* coming before this
3 district court. His deposition should be conducted in Los Angeles,
4 California, where he resides. The district court did not address this issue in
5 its hearing, did not provide its reasoning for requiring Morabito to attend his
6 deposition, and terminated the telephonic hearing before counsel could make
7 a record. *See* Aff. Frank Gilmore, Esq. ¶¶ 4-5. Therefore, the district court
8 clearly abused its discretion in requiring Morabito to appear for a deposition
9 in Washoe County, Nevada. Accordingly, this Court should enter a writ of
10 prohibition restraining the district court from requiring Morabito to attend a
11 deposition in Nevada.
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17 **III. THE DISTRICT COURT ERRED IN DETERMINING IT**
18 **HAS SUBJECT MATTER JURISDICTION OVER**
19 **EXECUTION PROCEEDINGS UNDER THE CONFESSION**
20 **OF JUDGMENT.**

21 This Court should also enter a writ of prohibition restraining the district
22 court from compelling Morabito to attend a deposition in Nevada because
23 the district court's order is void, given that it lacks subject matter jurisdiction
24 over the confession of judgment proceedings. Herbst improperly filed the
25 confession of judgment in case number CV07-02764. PA 7. Morabito did
26 not execute his confession of judgment before the district court in that case,
27 *see id.* at 12-25, because that case was dismissed with prejudice, and all
28

1 findings and judgments were vacated and withdrawn *nunc pro tunc* almost
2 *two years before Herbst filed the confession of judgment in the dismissed*
3 *case. Id.* at 1-6. Because the confession of judgment was not executed in
4 CV07-02764, the district judge did not retain jurisdiction over this matter.
5 *Ravera v. City of Reno*, 100 Nev. 68, 71, 675 P.2d 407, 409 (1982).
6 Therefore, the order compelling Morabito to attend his deposition is void.
7 *Cox v. Eighth Judicial Dist. Ct.*, 124 Nev. 918, 925, 193 P.3d 503, 534
8 (2008).

12 Subject matter jurisdiction permits the district court to exercise authority
13 over the controversy between the parties. *Landreth v. Malik*, 127 Nev. ___,
14 ___, 251 P.3d 163, 168 (2011). Absent subject matter jurisdiction, the
15 district court has no authority to enter orders in the case. *In re Parental*
16 *Rights as to S.M.M.D.*, 128 Nev. ___, ___, 272 P.3d 126, 130 (2012); *see*
17 *also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)
18 ("Without jurisdiction the court cannot proceed at all in any cause.
19 Jurisdiction is the power to declare the law, and when it ceases to exist, the
20 only function of the court is that of announcing the fact and dismissing the
21 cause." (internal quotations omitted)). This means that "[e]very act of a
22 court beyond its jurisdiction is void." *Ex parte Reed*, 100 U.S. 13, 23
23 (1879).

1 Voluntary dismissals with prejudice under NRCP 41(a), like the one that
2 dismissed case number CV07-02764, deprive the district court of further
3 subject matter jurisdiction on the case. *Jeep Corp. v. Second Judicial Dist.*
4 *Ct.*, 98 Nev. 440, 444, 652 P.2d 1183, 1186 (1982). Once the case is
5 dismissed, the district "court loses jurisdiction to consider further
6 proceedings." *Ravera*, 100 Nev. at 71, 675 P.2d at 407. "Any subsequent
7 orders entered by the district court," such as the one compelling Morabito to
8 attend his deposition in Washoe County, are void. *Cox*, 124 Nev. at 925,
9 193 P.3d at 534.

13 Here, Herbst and Morabito voluntarily dismissed case number CV07-
14 02764 with prejudice, and vacated and withdrew all findings of the district
15 court *nunc pro tunc*. PA 1-6. This had the practical effect of declaring that
16 the case never existed. Once the parties agreed to do this, Morabito then
17 confessed judgment to Herbst on terms independent of the district court's
18 involvement. *Id.* at 12-25.

21 A confession of judgment permits a party to confess liability without
22 getting involved in additional litigation. *See* NRS 17.090. In order for a
23 judgment creditor to execute upon a confession of judgment, the confession
24 of judgment must be filed with the district court. *See* NRS 21.020
25 (discussing the requirements for seeking a writ of execution on a judgment).
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1 Confession of judgments may be filed “without action.” NRS 17.090. The
2 term “without action” refers to the fact that a confessed judgment may be
3 filed and executed upon without requiring the judgment creditor to undergo
4 the pleading process, i.e., to file an action. *Coast to Coast Demolition &*
5 *Crushing, Inc. v. Real Equity Pursuit, LLC*, 126 Nev. ___, ___, 226 P.3d
6 605, 608-09 (2010).
7

8
9 However, the phrase “without action” *does not mean that the confession*
10 *of judgment may be filed in a case that has been dismissed with prejudice*
11 *for almost two years*, as Herbst has attempted to do here. PA 1-6, 7. Had
12 the judgment been entered by the district court in case number CV07-02764,
13 the district court would have retained jurisdiction to execute it. *Fishman v.*
14 *Las Vegas Sun, Inc.*, 75 Nev. 13, 14-15, 333 P.2d 988, 989 (1959)
15 (explaining that a district court retains jurisdiction under NRCP 69 to aid in
16 the execution of judgments entered into before the court).
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18
19 However, Morabito’s confession of judgment was not delivered by the
20 district court in case number CV07-02764, and the district court played no
21 part in the process that led to the confession. The face of the judgment itself
22 demonstrates this. The confession contains a different caption than the
23 dismissed case, and a blank case number space was provided. PA 12.
24 Moreover, Morabito did not confess judgment until the parties had agreed
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1 that case number CV07-02764 (1) *was dismissed with prejudice*, (2) *had all*
2 *its findings, orders and judgments withdrawn*, and (3) the records were
3 *sealed and expunged*. *Id.* at 1-6.

5 Morabito executed the confession on the basis that all findings,
6 judgment, and orders of the district court were null and void, *nunc pro tunc*.
7 He well understood that he would not ever be required to appear before that
8 district judge in that case. Morabito properly expected Herbst would do what
9 all other judgment creditors of confessed judgments do – file the confessed
10 judgment so that it may be entered upon the judgment roll and then be
11 randomly assigned to a judge if executory proceedings required district court
12 attention.
13

14 Instead, Herbst filed the confession of the judgment under case number
15 CV07-02764 for the express purpose of obtaining the same district judge
16 which had adjudicated the case prior to its dismissal and nullification of all
17 findings. *Id.* at 7. This Court has repeatedly frowned upon judge-shopping.
18 *See Moore v. City of Las Vegas*, 92 Nev. 402, 404, 551 P.2d 244, 246
19 (1975); *Smith v. Eighth Judicial Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849,
20 852 (1991). Here, Morabito confessed judgment in order to *avoid* litigating
21 further in front of this judge. Prior to the dismissal of the action and the
22 vacating of the findings, Herbst had obtained a favorable (and excessive)
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1 monetary judgment with punitive damages award. Herbst knew the district
2 judge's stance on the case. Herbst filed the confession with the intent of
3 utilizing the district court to favorably assist Herbst in its execution efforts.
4 Herbst's scheme worked. As shown above, the district court abused its
5 discretion when it compelled Morabito to attend a deposition in Nevada, and
6 then abruptly terminated the telephonic hearing before counsel could even
7 make a record. Counsel did not have the opportunity to ask the reason for its
8 ruling or to make a record for appellate review. Aff. Frank C. Gilmore, Esq.
9 ¶¶ 4-5.

13 Herbst cannot now attempt "to fan the ashes of that action into life,"
14 because the district court "has no role to play" in case number CVO7-02764.
15 *Jeep Corp.*, 98 Nev. at 444, 652 P.2d at 1186. Instead, Herbst should be
16 required to file the confession of judgment with the district court and permit
17 the random selection process to decide who will preside over the collection
18 process. Accordingly, the district court's order should be declared void for
19 lack of subject matter jurisdiction, and this Court should enter a writ of
20 prohibition restraining the district court from exercising jurisdiction over the
21 collection proceedings.

26 CONCLUSION

27 This Court should enter a writ of restraining the district court from (1)
28

1 ordering improper discovery, and (2) exercising jurisdiction over a case in
2 which it lacks subject matter jurisdiction. The district court clearly abused
3 its discretion when it ordered Morabito to attend a post-judgment deposition
4 in Nevada because Morabito resides in California. The district court
5 rendered this order without explaining its reasons for doing so, without
6 taking into account the well-established fact that a defendant must be
7 deposed in the district in which he resides, and without permitting counsel to
8 make a record for this Court's review. Furthermore, this Court should enter
9 a writ of prohibition restraining the district court from compelling Morabito
10 to attend a deposition in Nevada because the district court's order is void,
11 given that it lacks subject matter jurisdiction over the confession of
12 judgment proceedings. Herbst improperly filed the confession of judgment
13 in case number CV07-02764. That case was dismissed with prejudice, and
14 all findings and judgments were vacated, nullified and expunged, *before*
15 Morabito confessed judgment, and *over two years before Herbst filed the*
16 *confession of judgment with the district court.* The district court lacked
17 jurisdiction to preside over the proceedings and to enter any orders thereon.

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1 Therefore, the order compelling Morabito to attend his deposition is
2 void, and a writ of prohibition is necessary to restrain the district court from
3 acting in excess of its jurisdiction.
4

5 DATED this 1st day of April, 2014.
6

7 Robison, Belaustegui, Sharp & Low
8 71 Washington Street
9 Reno, Nevada 89503

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11 BARRY L. BRESLOW (SBN 3023)
12 FRANK C. GILMORE (SBN 10052)
13 Attorneys for Petitioner
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Frank C. Gilmore, being first duly sworn deposes and states under penalty of perjury, as follows:

2. This Petition concerns an order compelling attendance at a deposition.

4. When the trial court granted the Motion to Compel, I notified counsel for Herbst that Morabito would appear for his deposition in Los Angeles, California on the 14th of April. Notably, I expressly reserved the

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1 right to seek appellate review of the trial court's order on the Motion. When
2 counsel could not agree as to the date and time of the deposition, a
3 telephonic hearing was set for March 26, 2014. The hearing on this order
4 occurred telephonically between myself, counsel for real parties in interest,
5 and District Judge Brent Adams.
6

7
8 5. Judge Adams announced his ruling that Morabito must attend a
9 deposition in Washoe County, Nevada, on Saturday, April 12, 2014. He
10 then terminated the hearing without permitting me to object or make my
11 record. He did not explain his reasoning for the order, and I was unable to
12 make a record for this Court. I immediately notified opposing counsel, via
13 letter, that I objected to the deposition and that I intended to seek appellate
14 court review of the Order.
15

16
17 6. I certify and affirm that this Petition for Writ of Prohibition is
18 made in good faith and not for delay.
19

20 DATED this 1st day of April, 2014

21
22 
FRANK C. GILMORE
23

24 Subscribed and Sworn to before me
25 this 1st day of April, 2014, by
26 Frank C. Gilmore.
27

28 
NOTARY PUBLIC



1 **NRAP 27(e) CERTIFICATE**

2 Frank C. Gilmore, the undersigned attorney, hereby certifies that:

- 3
- 4 1. I have made every effort possible notify the clerk of the Supreme
- 5 Court and opposing counsel of this emergency writ petition;
- 6
- 7 2. I have served this emergency writ petition at the earliest possible time.

8 The district court's order was made on March 26, 2014, compelling Mr.

9 Morabito's attendance at a deposition on April 12, 2014, in Nevada;

10

- 11 3. The contact information for the parties' attorneys is:

- 12 a. Paul A. Morabito
- 13 Barry L. Breslow, Esq.
- 14 Frank C. Gilmore, Esq.
- 15 Robison Belaustegui Sharp & Low
- 16 71 Washington Street
- 17 Reno, Nevada 89503
- 18 (775) 329-3151
- 19
- 20 b. JH, Inc., Jerry Herbst, and Berry-Hinckley Industries
- 21 John Desmond, Esq.
- 22 Brian Irvine, Esq.
- 23 Gordon Silver
- 24 100 West Liberty Street, Suite 940
- 25 Reno, Nevada 89501
- 26 (775) 343-7500

- 27 4. Emergency relief is sought because the district court has ordered
- 28 Morabito to attend a deposition in Nevada on Saturday, April 12, 2014. As
- set forth in our motion, this order was entered in excess of the court's
- jurisdiction and was an abuse of discretion since Mr. Morabito resides in

Robison, Belaustegui,
Sharp & Low
71 Washington St.
Reno, NV 89503
(775) 329-3151

1 California. Emergency action is needed in order to avoid Mr. Morabito from
2 being held in contempt of court;

3
4 5. We have served opposing counsel with notice of the petition, which
5 was filed in Second Judicial District Court Case No. CV07-02764, on the
6 same date as this petition; and
7

8 6. The relief sought in this motion is not available in the district court.
9 The district court has exercised jurisdiction over this matter over Morabito's
10 objection that it lacks jurisdiction. Moreover, the district court ordered
11 Morabito to attend a deposition in Nevada during a telephonic hearing. The
12 district court hung up the telephone before counsel could ask its reasoning,
13 or make a record.
14

15
16 DATED this 1st day of April, 2014.

17
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19 
20 FRANK C. GILMORE

21 Subscribed and Sworn to before me
22 this 1st day of April, 2014, by
23 Frank C. Gilmore.

24 
25 NOTARY PUBLIC



CERTIFICATE OF COMPLIANCE

1
2 1. I hereby certify that this Petition complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP
4 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

5
6 This brief has been prepared in a proportionally spaced typeface using
7 Microsoft Word 2010 in 14 size font and Times New Roman style.
8

9 2. I further certify that this Petition complies with the page- or
10 type- volume limitations of NRAP 32(a)(7) because, excluding the parts of
11 the Petition exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has
12 a typeface of 14 points or more and contains 3,489 words.
13

14 3. Finally, I hereby certify that I have read this Petition for Writ of
15 Mandamus, and to the best of my knowledge, information and belief, it is
16 not frivolous or interposed for any improper purpose. I further certify that
17 this Petition complies with all applicable Nevada Rules of Appellate
18 Procedure, in particular NRAP 28(e)(1), which requires every assertion in
19 the Petition regarding matters in the record to be supported by a reference to
20 the page and volume number, if any, of the transcript or appendix where the
21 matter relied on is to be found. I understand that I may be subject to
22 sanctions in the event that the accompanying Petition is not in conformity
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with the requirements of Nevada Rules of Appellate Procedure.

DATED this 1st day of April, 2014.

Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, Nevada 89503


~~BARRY L. BRESLOW (SBN 3023)~~
~~FRANK C. GILMORE (SBN 10052)~~
Attorneys for Petitioner

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Honorable Brent Adams
Second Judicial District Court
75 Court Street
Reno, Nevada 89501

DATED this 1st day of April, 2014.

Mary Carroll Davis
Employee of Robison, Belaustegui,
Sharp & Low

EXHIBIT 5

EXHIBIT 5

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL A. MORABITO,
Petitioner,

vs.

THE SECOND JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF WASHOE;
AND THE HONORABLE BRENT ADAMS,
Respondents,

and

JH, INC., A NEVADA CORPORATION;
JERRY HERBST; AND BERRY-
HINCKLEY INDUSTRIES, A NEVADA
CORPORATION,
Real Parties in Interest.

No. 65319

FILED

APR 18 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF PROHIBITION

This original petition for a writ of prohibition challenges a district court order granting a motion to compel petitioner's deposition.

This court may issue a writ of prohibition to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the district court's jurisdiction. NRS 34.320; *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Whether to consider a writ petition is within this court's discretion. *Smith*, 107 Nev. at 677, 818 P.2d at 851. Petitioner bears the burden of demonstrating that extraordinary relief is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

According to the petition, during a telephonic hearing, the district court ordered petitioner, who is a California resident, to appear for a deposition in Washoe County, Nevada. Petitioner contends that a writ of prohibition is appropriate because he should have been "afforded the opportunity to be deposed in the district in which he resides." Petitioner further contends that the district court should be restrained from

SUPREME COURT
OF
NEVADA

(2) 1947A 

14-12510

compelling his attendance at a deposition in Nevada because real parties in interest improperly filed the underlying confession of judgment with the same district court case number as a previous district court action that was dismissed on the parties' stipulation, making the order compelling petitioner's deposition in the confessed judgment proceeding void.

Having considered the petition, answer, reply, and the appendices, we conclude that our extraordinary intervention is not warranted at this time. *Smith*, 107 Nev. at 677, 818 P.2d at 851. In particular, petitioner did not provide this court with a copy of a written order memorializing the district court's ruling that petitioner appear in Washoe County for a deposition, see *Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 688-89, 747 P.2d 1380, 1382 (1987) (recognizing that an oral ruling is ineffective for any purpose), and we are not otherwise convinced that petitioner's argument regarding the district court's jurisdiction over the confession of judgment proceedings warrants our extraordinary intervention, at least at this point in the proceedings. See *Pan*, 120 Nev. at 228, 88 P.3d at 844; *Smith*, 107 Nev. at 677, 818 P.2d at 851. Thus, under these circumstances, we

ORDER the petition DENIED.¹

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

¹In light of our resolution of this matter, we vacate the temporary stay imposed by our April 4, 2014, order.

cc: Hon. Brent T. Adams, District Judge
Robison Belaustegui Sharp & Low
Gordon Silver/Reno
Washoe District Court Clerk

EXHIBIT 6

EXHIBIT 6

by W F

Honorable Gregg W. Zive
United States Bankruptcy Judge



Entered on Docket
December 17, 2014

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JH, Inc., Jerry Herbst, and Berry-Hinckley Industries

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

In re:
PAUL A. MORABITO, an individual,

Alleged Debtor.

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

Date: November 21, 2014
Time: 10:00 a.m.

ORDER GRANTING SUMMARY JUDGMENT AND JUDGMENT

The *Motion for Summary Judgment* [ECF No. 131] (the "Motion"), filed by JH, Inc. ("JH"), Jerry Herbst ("Herbst"), and Berry-Hinckley Industries ("BHI" and together with JH and Herbst, the "Petitioning Creditors") came on for hearing before the above-captioned court on November 21, 2014 (the "Hearing"). Gerald M. Gordon, Esq. and Brian R. Irvine, Esq., of the law firm of Gordon Silver, appeared on behalf of the Petitioning Creditors. Frank C. Gilmore,

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Esq. and Jeffrey L. Hartman, Esq. appeared for the alleged debtor, Paul A. Morabito ("Morabito").

Based upon the *Findings of Fact and Conclusions of Law in Support of Order Granting Summary Judgment and Judgment*, entered concurrently herewith, which is incorporated into this Order by reference, it having been determined after the Hearing on notice that the requirements of Federal Rule of Civil Procedure 56, applicable to this Involuntary Proceeding pursuant to Federal Rules of Bankruptcy Procedure 1018 and 7056, have been satisfied, and good cause appearing;

IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. The Motion is granted.
2. An order for relief shall be entered against Morabito.
3. All pretrial hearings and other hearings related to a trial on the Involuntary Petition shall be vacated.

IT IS SO ORDERED.

PREPARED AND SUBMITTED BY:

GORDON SILVER

By: /s/ Mark M. Weisenmiller
GERALD M. GORDON, ESQ.
BRIAN R. IRVINE, ESQ.
MARK M. WEISENMILLER, ESQ.
100 W. Liberty Street
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Attorneys for Petitioning Creditors

APPROVED/DISAPPROVED

ROBISON, BELAUSTEGUI, SHARP &
LOW

By: /s/ Frank C. Gilmore
FRANK C. GILMORE, ESQ.
BARRY L. BRESLOW, ESQ.
71 Washington Street
Reno, Nevada 89503
*Attorneys for Paul A. Morabito and
Consolidated Nevada Corporation*

LR 9021 CERTIFICATION

In accordance with LR 9021, counsel submitting this document certifies that the order accurately reflects the court's ruling and that (check one):

- ☐ The court waived the requirement of approval under LR 9021(b)(1).
- ☐ No party appeared 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, or failed to respond, as indicated above.

FRANK C. GILMORE, ESQ. and JEFFREY L. HARTMAN, ESQ.

- ☐ I certify that this is a case 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.

###

1 CODE NO. 1945

2
3
4
5
6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF WASHOE

8 * * *

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

11 Plaintiff,

Case No. CV13-02663

12 vs.

Dept. No. B1

13 SUPERPUMPER, INC., an Arizona corporation,
14 et al.,

15 Defendants.
16 _____/

17 **RECOMMENDATION FOR ORDER**

18 This action began with the filing of a complaint by JH, Inc., Jerry Herbst, and Berry-Hinckley
19 Industries ("Herbst") on December 17, 2013; however, an amended complaint was filed by Plaintiff
20 William A. Leonard, as Trustee for the Bankruptcy Estate of Paul A. Morabito, on May 15, 2015.
21 Essentially, Plaintiff alleges that Herbst prevailed against Paul A. Morabito and Consolidated
22 Nevada Corporation ("CNC") in a separate lawsuit, with the Court informing the parties that Herbst
23 was entitled to a substantial money judgment on September 13, 2010.¹ Thereafter, those parties
24 negotiated and entered into a settlement agreement and a subsequent forbearance agreement.
25 Ultimately, the judgment debtors defaulted under these agreements, which led Herbst to file an
26 involuntary petition for relief against Mr. Morabito and CNC under Chapter 7 of the Bankruptcy Code

¹ The supporting findings of fact and conclusions of law were entered on October 12, 2010, and a final judgment was entered on August 23, 2011.

1 (among other measures).² Plaintiff claims that the judgment debtors induced Herbst to negotiate
2 and enter into these agreements as a delay tactic to avoid execution and collection efforts, and to
3 allow them to thwart collection efforts by transferring and dissipating assets. He alleges that various
4 fraudulent transfers occurred, and that these transfers began shortly after September 13, 2010.
5 Defendants—Superpumper, Inc., Edward Bayuk, individually and as trustee of the Edward William
6 Bayuk Living Trust, Salvatore Morabito, and Snowshoe Petroleum, Inc.—are individuals and entities
7 who received real and personal property that were the subject of those alleged fraudulent transfers.
8 Plaintiff seeks compensatory and punitive damages, garnishment, avoidance of transfers or
9 obligations, attachment, and other relief. Defendants deny any liability to Plaintiff and oppose his
10 requests for relief.

11 Based upon the relief sought, this case is automatically exempt from the Court Annexed
12 Arbitration Program. See NAR 3(A); see also NRS 38.255(3) (2015) (cases that must be excluded
13 from mandatory arbitration). Counsel for both sides participated in an early case conference on
14 October 20, 2014, and the parties filed a joint case conference report on November 6, 2014. The
15 parties are scheduled to commence trial in this action on October 31, 2016.

16 Dennis Vacco is a New York attorney with the law firm of Lippes Mathias Wexler Friedman
17 LLP ("LMWF"). Mr. Vacco represents Mr. Morabito, and apparently has represented Defendants at
18 various times. On August 20, 2015, Plaintiff served Defendants with a notice informing them that he
19 would be taking the deposition of Mr. Vacco in New York, on October 20, 2015. On September 29,
20 2015, Plaintiff caused a New York subpoena duces tecum to be served on Mr. Vacco and LMWF,
21 which directed them to produce various documents—including documents relating to specified
22 transfers of property involving Mr. Morabito—at Mr. Vacco's deposition. On that same date, Plaintiff
23 served Defendants with a Notice of Issuance of Subpoena to Dennis Vacco.³

24 _____
25 ² The petition was filed in Nevada. See In re Morabito, No. BK-S-13-51237-GWZ (Bankr. D. Nev. filed June 20,
2013). Plaintiff was elected to serve as the Chapter 7 Trustee in the bankruptcy proceedings in January 2015.

26 ³ The New York subpoena effectively incorporated the provisions of a subpoena duces tecum directed to Mr.
Vacco that was issued by this Court on September 24, 2015. The Nevada subpoena, along with a commission issued by
this Court, was the basis for issuance of the New York subpoena. Defendants were served with a copy of the Nevada
subpoena.

1 On October 15, 2015, Mr. Vacco and LMWF served Plaintiff with their Response to
2 Subpoena. Mr. Vacco and LMWF raised objections to almost all categories of the subpoena—
3 including objections based upon various privileges—but also referred Plaintiff to various documents
4 already produced in the Morabito bankruptcy proceeding (as well as 180 pages of documents
5 produced with the response). The response did not contain or reference a privilege log for any
6 responsive documents withheld from production, nor did it state that a privilege log would be
7 forthcoming. During his deposition on October 21, 2015, Mr. Vacco testified that he and his firm
8 were not actually withholding any documents based on the attorney-client privilege, despite raising
9 those objections in the response. However, he was instructed by Defendants' counsel not to answer
10 certain questions about communications between himself and Mr. Morabito, based upon the
11 attorney-client privilege.

12 Thereafter, Plaintiff filed a motion in the bankruptcy court to determine the extent to which
13 Mr. Vacco could refuse to provide testimony and documents based upon the attorney-client
14 privilege.⁴ In an order entered on February 3, 2016, the bankruptcy court concluded, inter alia, that

15 (b) the attorney-client privilege related to . . . [LMWF's] production of documents and
16 Vacco's testimony during the deposition is that of the Debtor; (c) it is the Debtor's
17 obligation to provide a privilege log with respect to the documents being withheld on
18 the basis of privilege because the Debtor is asserting the privilege; (d) the invocation
19 of the privilege by the Debtor affects property of his estate pursuant to Section 541 of
20 the Bankruptcy Code that is alleged to have been fraudulently transferred; (e) the
21 Trustee has made a prima facie showing of fraud as required by the crime/fraud
22 exception to the attorney-client privilege, which showing has not been rebutted; (f) the
23 inquiry required by the crime/fraud exception is focused on what the client wanted to
accomplish—whether the client intended to further some fraudulent activity and
engage counsel to assist in that activity; the timing of the legal services or whether
the attorney's legal services were closely related have no effect on whether the
crime/fraud exception is established; (g) 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 . . . [LMWF]. . . .

24 The bankruptcy court therefore granted Plaintiff's motion, and ordered that Mr. Vacco re-appear for
25 his continued deposition in the state court action. In that regard, it ruled that the attorney-client

26 ⁴ Although the deposition took place in connection with this pending state court action, Plaintiff believed that any
withholding of documents and refusal to answer questions by Mr. Vacco was based upon an improper assertion of Mr.
Morabito's attorney-client privilege, an issue that implicated the bankruptcy estate.

1 privilege had been waived as to the questions asked during the first deposition, and that waiver
2 would extend to "any other questions that may be asked of Vacco at the continued deposition, and
3 any documents that may have been withheld . . . on grounds that disclosure was not required
4 because of the Debtor's attorney-client privilege with" LMWF. Vacco and LMWF were directed to
5 provide information and documents that were previously withheld based upon the attorney-client
6 privilege, and Mr. Morabito was directed to provide Plaintiff with a privilege log regarding all
7 documents previously withheld on the basis of privilege. In connection with the renewed deposition,
8 the parties were directed to coordinate with the bankruptcy court's staff so that the judge would be
9 available telephonically to resolve any disputes that might arise during the continued deposition.

10 On or about February 18, 2016, Plaintiff served Defendants with a notice informing them that
11 the continued deposition of Mr. Vacco would be held on March 18, 2016 in New York. Plaintiff's
12 counsel also contacted LMWF to discuss the production of documents requested in the earlier
13 subpoena. Ultimately, LMWF acknowledged that it had possession of fifteen boxes of documents
14 and electronically stored information that may be responsive to the subpoena, but that were not
15 previously produced.

16 In a letter emailed on March 9, 2016, LMWF advised Defendants' counsel of the subpoena
17 directed to Mr. Vacco requiring him to appear and produce documents, and asked that counsel
18 notify the firm if Defendants intend to challenge any part of that subpoena. Defendants' counsel
19 then contacted Plaintiff's counsel to discuss his concerns about the Plaintiff's request and the extent
20 to which Defendants can assert privileges to preclude Mr. Vacco and LMWF from providing
21 information and documents. Counsel thereafter exchanged emails on this matter, but were unable
22 to resolve their disagreement in that regard.

23 On March 10, 2016, Defendants filed a *Motion to Partially Quash, or, in the Alternative, for a*
24 *Protective Order Precluding Trustee from Seeking Discovery Protected by the Attorney-Client*
25 *Privilege*. Defendants observe that at Mr. Vacco's renewed deposition, Plaintiff intends to seek
26 information and documents regarding their confidential communications with him. Defendants

1 maintain that their confidential communications with Mr. Vacco are protected by the attorney-client
2 privilege.⁵ They acknowledge the bankruptcy court's order concerning communications between Mr.
3 Morabito and Mr. Vacco, but they argue that this order did not purport to affect their confidential
4 communications with Mr. Vacco. Moreover, they contend that only this Court can determine whether
5 those communications are protected, and that Plaintiff must bring a motion in the appropriate New
6 York court if he wishes to compel Mr. Vacco to provide information and documents that previously
7 were withheld by him.

8 *Plaintiff's Opposition to Defendants' Motion to Partially Quash, or, in the Alternative, for a*
9 *Protective Order Precluding Trustee from Seeking Discovery Protected by the Attorney-Client*
10 *Privilege* was filed on March 25, 2016. Plaintiff notes that his request is limited to those documents
11 and communications to which Mr. Morabito was a party. Plaintiff maintains that the bankruptcy court
12 has already determined that those communications between Mr. Morabito and Mr. Vacco are not
13 protected from disclosure, and that they remain unprotected irrespective of Defendants' involvement
14 in some of those communications. Indeed, Plaintiff contends that Defendants have not established
15 that Mr. Vacco even had an attorney-client relationship with them. In any event, he argues that Mr.
16 Vacco's client file for Mr. Morabito is now property of the bankruptcy estate, and that as trustee of
17 that estate he is entitled to disclosure of Mr. Vacco's communications with co-clients to the same
18 extent that Mr. Morabito would be entitled to such disclosure. Further, those co-clients have now
19 become adversarial, which precludes application of any attorney-client privilege as to the requested
20 documents and communications. Plaintiff also argues that Defendants' motion is untimely, and that
21 their failure to expressly assert and support their privilege claims earlier has resulted in a loss of any
22 protection.

23 *Defendants' Reply in Support of Motion to Modify Subpoena, or, in the Alternative, for a*
24 *Protective Order Precluding Trustee from Seeking Discovery Protected by the Attorney-Client*
25 *Privilege* was filed on April 6, 2015. Defendants again emphasize that they do not dispute the loss

26 ⁵ Defendants recognize Plaintiff's right to discover nonprivileged information, and they seek no relief in that regard.

1 of protection for communications between Mr. Morabito and Mr. Vacco. But Defendants maintain
2 that they have a right to assert protection as to any such communications that also involved them,
3 under either a joint-defense or common-interest theory. They again observe that protections for
4 their communications with Mr. Vacco have not been waived, and that Mr. Morabito's involvement in
5 those communications does not preclude them from asserting their privilege in this action. In that
6 regard, they note that for a waiver to be effective under either a joint-defense or common-interest
7 theory, all clients must concur in the waiver. Defendants also deny that they are adverse to Mr.
8 Morabito in this case. Finally, they argue that this motion is timely. The motion was submitted for
9 decision on April 6, 2015.

10 However, on April 8, 2016, Plaintiff filed *Plaintiff's Ex Parte Motion for Leave to File a*
11 *Supplement to Plaintiff's Opposition to Defendants' Motion to Partially Quash, or, in the Alternative,*
12 *for a Protective Order Precluding Trustee from Seeking Discovery Protected by the Attorney-Client*
13 *Privilege*. In that motion, Plaintiff maintains that the Court should consider another factor that arose
14 on April 5, 2016—the bankruptcy court's rejection of the same arguments that Defendants have
15 made in the underlying motion and reply brief. On April 13, 2016, Defendants filed their *Opposition*
16 *to Ex Parte Motion for Leave to File a Supplement to Plaintiff's Opposition to Defendants' Motion to*
17 *Quash*. Defendants contend that the bankruptcy court's rulings have no bearing on this state court
18 action and should not be considered in connection with the underlying motion. Plaintiff filed his
19 *Reply in Support of Motion to File Supplement* on April 25, 2016, and that motion was submitted for
20 decision on that same date.

21 As an initial matter, the Court will grant Plaintiff's motion for leave to supplement his
22 opposition to the underlying motion. In that motion, Plaintiff merely seeks to advise of the Court of a
23 new development that he contends should be considered in connection with Defendants' motion.
24 Because the bankruptcy court order at issue was entered on April 5, 2016, it could not have been
25 included within Plaintiff's opposition filed on March 26, 2016. Whatever impact that order should
26 have on the Court's resolution of Defendants' motion, Plaintiff could properly request to supplement

1 its opposition with a matter that he could not have included in his original opposition, and the Court
2 is persuaded that he should be permitted to advise the Court of that new development.

3 The subpoena to Mr. Vacco contains fourteen categories, but nine of those categories are
4 not implicated in this motion (since they do not in any way seek documents that pertain to
5 Defendants). In Category Nos. 5, 6, 7, 8, and 9, Plaintiff asks Mr. Vacco and LMWF to produce
6 “[a]ny and all Documents constituting, relating to, or referring to services performed by you with
7 respect to” the transfer or sale of certain real or personal property identified in each category on or
8 about October 1, 2010, to the persons identified therein, which include Defendants Edward William
9 Bayuk Living Trust and Snowshoe Petroleum, Inc. Defendants were served with a copy of this
10 subpoena on September 29, 2015. To the extent that Mr. Vacco and LMWF represented
11 Defendants in connection with the referenced transactions, Defendants arguably should have
12 appreciated that the scope of these categories, as drafted, could encompass privileged
13 communications between themselves and Mr. Vacco, and timely sought any desired relief prior to
14 Mr. Vacco’s deposition (or, at the latest, at that deposition).⁶

15 Defendants, however, maintain that they were not aware that Plaintiff might be seeking their
16 privileged documents until Mr. Vacco advised them of that possibility in his letter of March 9, 2016.
17 In that regard, the Court notes that most or all of the other categories of the subpoena appear to be
18 clearly focused on Mr. Vacco’s representation of Mr. Morabito. Further, Defendants’ counsel
19 attended Mr. Vacco’s deposition on October 21, 2016. While he instructed Mr. Vacco not to answer
20 certain questions, he apparently provided that instruction to protect Mr. Morabito’s attorney-client
21 privilege. The Court has not been advised of any question, objection, or discussion at that
22 deposition concerning confidential communications between Mr. Vacco and any Defendants.
23 Finally, Defendants brought the pending motion one day after being advised by Mr. Vacco about the
24 possibility that Plaintiff may seek Defendants’ protected information at his upcoming deposition. On

25
26 ⁶ Alternatively, of course, Defendants could have contacted Plaintiff to determine whether Plaintiff was actually seeking documents that Defendants believe are protected from disclosure.

1 this record, the Court finds that the motion is timely or, alternatively, that any untimeliness is
2 excused.⁷

3 Nevertheless, Defendants' motion is problematic. Defendants essentially seek an order
4 relieving Mr. Vacco from having to provide any information or documents that are protected by
5 Defendants' attorney-client privilege, or precluding Defendants from seeking such information and
6 documents. But NRCP 26(b)(1) already limits the scope of discovery to information that is relevant
7 and nonprivileged. More important, this request begs the question of whether specific information or
8 documents are, in fact, protected from disclosure. However, Defendants have not identified specific
9 information or documents that they believe are protected and which they believe Plaintiff will request
10 during Mr. Vacco's deposition. The closest Defendants come to doing so in the motion is a
11 reference to "Defendants' communications with Vacco," but not every communication Defendants
12 have had with Mr. Vacco is automatically protected from disclosure by the attorney-client privilege.

13 A court typically will not issue a broad preemptive order directing the examining party not to
14 engage in behavior that is already prohibited by our discovery rules. The party who is concerned
15 that an opponent will request privileged information at a nonparty's deposition ordinarily must attend
16 that deposition, assert objections as appropriate, and instruct the witness not to answer questions
17 that would require the revelation of privileged information. If necessary, the parties could later
18 present any dispute over those objections and instructions to the appropriate court. With regard to a
19 request that the nonparty produce documents at his or her deposition, the usual procedure is to work
20 with the nonparty to provide a privilege log of any responsive documents that the producing party
21 believes are protected from disclosure, under NRCP 26(b)(5).⁸ If the examining party violates one or
22 more of those rules, the witness or an opposing party could avail itself of any appropriate remedy,
23 which could include suspension of the deposition and moving for a protective order to address
24 specific questions and requests for documents deemed improper by the movant.

25 ⁷ To the extent that Defendants might have been required to provide a privilege log had this motion been brought
26 in October 2016, the same circumstances would excuse that omission.

⁸ The obligation to provide a privilege log would also apply to a nonparty who separately wishes to withhold any responsive documents on the basis of an evidentiary privilege or immunity. See NRCP 45(d)(2).

1 In addition, Plaintiff's counsel provided greater clarity regarding the documents sought from
2 Mr. Vacco in an email to Defendants' counsel sent on March 10, 2016. In that email, Defendants'
3 counsel stated as follows: "For purposes of Vacco's deposition and the subpoena relating thereto,
4 we will not seek documents to which Morabito is not a party." Thus, Plaintiff seeks confidential
5 communications between Mr. Morabito and Mr. Vacco; indeed, the bankruptcy court has already
6 determined that any such protection has been waived. In addition, Plaintiff does not seek
7 confidential communications between any Defendant and Mr. Vacco that did not involve Mr.
8 Morabito (although he has reserved his right to seek such documents in the future). The only
9 dispute concerns confidential communications involving Mr. Vacco, Mr. Morabito, and one or more
10 Defendants.

11 In their reply brief, Defendants indicate that they do not believe Plaintiff is entitled to
12 confidential communications that included Mr. Vacco, Mr. Morabito, and one or more Defendants.
13 Without question, the attorney-client privilege in Nevada extends to "confidential communications . . .
14 [m]ade for the purpose of facilitating the rendition of professional legal services to the client, by the
15 client or the client's lawyer to a lawyer representing another in a matter of common interest." See
16 NRS 49.095(3) (2015); see also id. 49.055 ("[a] communication is 'confidential' if it is not intended to
17 be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of
18 professional legal services to the client or those reasonably necessary for the transmission of the
19 communication").⁹ But no privilege exists "[a]s to a communication relevant to a matter of common
20 interest between two or more clients if the communication was made by any of them to a lawyer

21 _____
22 ⁹ To the extent that the law of Nevada and the law of New York differ with regard to the attorney-client privilege
23 (e.g., elements of the privilege, scope of protection, kinds of exceptions, circumstances constituting waiver, burdens or
24 proof, etc.), an application of the rules regarding conflict of laws may be appropriate. See Restatement (Second) of
25 Conflict of Laws § 139 (1971 & 1988 rev.) (addressing privileged communications). However, neither side has raised that
26 issue in connection with this discovery dispute, and the record does not provide sufficient facts for the Court to provide an
appropriate analysis of the issue sua sponte. Therefore, the Court will proceed with the understanding that the relevant
laws of Nevada and New York do not conflict in connection with any of the issues raised by the pending motion. See, e.g.,
Nat'l Ass'n of Sporting Goods Wholesalers, Inc. v. F.T.L. Mktg. Corp., 779 F.2d 1281, 1285 (7th Cir. 1985) ("unless the
parties argue otherwise, it is assumed that the law of the forum and the laws of the applicable jurisdiction are in substance
the same"); BK Entm't Grp., Inc. v. Bendeth, Civil Action No. 11-6432 (SRC), 2013 WL 3821476, at *5 (D.N.J. July 22,
2013) (since no party argued that laws of New Jersey and California were in conflict, federal court in New Jersey applied
New Jersey law).

1 retained or consulted in common, when offered in an action between any of the clients.” See NRS
2 49.115(5) (2015).

3 Although Mr. Morabito and Defendants may have been joint clients of Mr. Vacco and LMWF
4 in connection with certain transfers of property, Plaintiff is now investigating transfers that he
5 believes were made to defraud Mr. Morabito's creditors, and he is doing so on behalf of the
6 bankruptcy estate. Defendants argue that the exception quoted above does not apply because, “[i]n
7 order to stand in Mr. Morabito's shoes for purposes of the joint-defense or common-interest
8 privilege, the Trustee would need to show this Court that the Trustee is the holder, or owner, of Mr.
9 Morabito's attorney-client privileges.” That contention overstates Plaintiff's burden. Mr. Morabito
10 might very well be the holder of his individual attorney-client privilege in contexts unrelated to the
11 bankruptcy proceedings, but Plaintiff does not need to show that he controls that aspect of Mr.
12 Morabito's attorney-client privilege to obtain confidential communications that included Mr. Vacco,
13 Mr. Morabito, and one or more Defendants. Moreover, the bankruptcy court has already determined
14 that Plaintiff is adverse to at least one Defendant, and that “[b]y reason of the adversity as between
15 the Trustee and Bayuk . . . , any Common Interest Privilege that may have protected the
16 communications among Lippes, the Debtor, [and] Bayuk . . . are discoverable by the Trustee who
17 has stepped into the shoes of the Debtor” (emphasis added). That finding has support in decisions
18 from other bankruptcy courts. See In re Taproot Sys., Inc., No. 11-05255-8-JRL, 2012 WL 2253743,
19 at *3 (Bankr. E.D.N.C. June 15, 2012); In re Indiantown Realty Partners, Ltd. P'ship, 270 B.R. 532,
20 538-39 (Bankr. S.D. Fla. 2001); In re Lynch, Nos. 97-10381, 97-1084, 1998 WL 908950, at *2 & n.6
21 (Bankr. D. Vt. Dec. 17, 1998). Moreover, as explained by the bankruptcy court, “[t]he contents of
22 legal files created during the course of a joint representation belong jointly to the clients with each
23 having an undivided ownership interest in them.” See In re Kaleidoscope, Inc., 15 B.R. 232, 244
24 (Bankr. N.D. Ga. 1981). As trustee of the bankruptcy estate, Plaintiff has the same right to review
25 the entire contents of Mr. Vacco's and LMWF's files concerning their representation of him—
26 including communications that involved Mr. Morabito, Mr. Vacco, and any Defendants—as Mr.

1 Morabito would have had prior to Plaintiff's appointment as trustee. Defendants therefore may not
2 claim a privilege to prevent disclosure of these communications to Plaintiff.

3 For the foregoing reasons, the Court finds that Defendants are not entitled to an order
4 partially quashing the subpoena to Mr. Vacco, or the issuance of a protective order. To the extent
5 that categories of the subpoena could be read so broadly as to require production of confidential
6 communications between Defendants and Mr. Vacco, Plaintiff has clarified that he does not we not
7 seek documents to which Mr. Morabito is not a party. Therefore, no protection is needed in that
8 regard. But Plaintiff is entitled to, and may seek information regarding, otherwise confidential
9 communications between Mr. Vacco and any Defendant that fall within the scope of the subpoena
10 served on Mr. Vacco, to the extent that Mr. Morabito was a party to that communication.

11 ACCORDINGLY, Defendants' *Motion to Partially Quash, or, in the Alternative, for a*
12 *Protective Order Precluding Trustee from Seeking Discovery Protected by the Attorney-Client*
13 *Privilege* should be DENIED.

14 DATED: This 13th day of June, 2016.

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16 
17 WESLEY M. AYRES
18 DISCOVERY COMMISSIONER
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CERTIFICATE OF SERVICE

CASE NO. CV13-02663

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 13 day of June, 2016, I electronically filed the **RECOMMENDATION FOR ORDER** with the Clerk of the Court by using the ECF system.

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

Electronically filed with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

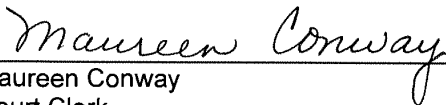
TERESA M. PILATOWICZ, ESQ. for WILLIAM A. LEONARD, TRUSTEE OF THE
BANKRUPTCY ESTATE OF PAUL ANTHONY MORABITO

BARRY L. BRESLOW, ESQ. for SUPERPUMPER, INC. et al.

FRANK C. GILMORE, ESQ. for SUPERPUMPER, INC. et al.

Deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada:

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Mark M. Weisenmiller, Esq.
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Maureen Conway
Court Clerk

1 CODE NO. 2690
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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

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

11 Plaintiff,

Case No. CV13-02663

12 vs.

Dept. No. B1

13 SUPERPUMPER, INC., an Arizona corporation,
14 et al.,

Defendants.

15 CONFIRMING ORDER

16 On June 13th, 2016, the Discovery Commissioner served a *Recommendation for*
17 *Order* in this action. None of the parties to this action has filed an objection regarding that
18 recommendation and the period for filing any objection concerning that recommendation
19 has expired. See NRCP 16.1(d)(2).
20

21 ACCORDINGLY, the Court hereby CONFIRMS, APPROVES, and ADOPTS the
22 Discovery Commissioner's Recommendation for Order served on June 13th, 2016.

23 DATED this 5th day of July, 2016.
24

25 Janet Berry
26 DISTRICT JUDGE

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 6 day of July, 2016, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed the individuals listed herein and/or electronically filed the foregoing document with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

VIA ECF

Barry Breslow, Esq./Frank Gilmore, Esq.

Teresa Pilatowicz, Esq./Gerald Gordon, Esq./Mark Weisenmiller, Esq.


JUDICIAL ASSISTANT

1 CODE NO. 1945

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

8 * * *

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

11 Plaintiff,

Case No. CV13-02663

12 vs.

Dept. No. B1

13 SUPERPUMPER, INC., an Arizona corporation,
et al.,

14 Defendants.
15 _____/

16 **RECOMMENDATION FOR ORDER**

17 This is an action in which Plaintiff William A. Leonard, as Trustee for the Bankruptcy Estate
18 of Paul Anthony Morabito, seeks to avoid and recover a number of allegedly fraudulent transfers
19 from the Debtor (i.e., Paul Anthony Morabito) to Defendants.¹ On January 29, 2016, Plaintiff served
20 separate requests for production of documents on Defendant Edward Bayuk, both individually and
21 as Trustee of the Edward William Bayuk Living Trust. Each request for production contains the
22 following two categories, which are designated as Category Nos. 26 and 27 in the request to
23 Defendant Bayuk individually, and as Category Nos. 24 and 25 in the request to Defendant Bayuk
24 as trustee:

25 ///

26 ¹ The background of this action is set forth in greater detail in previous decisions of this Court.

1 • Produce all Documents related to, referring to, or constituting any and all insurance
2 policies in effect for any real or personal property You owned between January 1,
2005 and December 31, 2011.

3 • Produce all Documents related to, referring to, or constituting any and all insurance
4 policies for which you applied relating to any real or personal property You owned
between January 1, 2005 and December 31, 2011.

5 Defendant's separate responses to each of these categories, served on March 9, 2016, are as
6 follows:

7 Objection, this request seeks documents which contain sensitive personal information
8 which is not relevant to the claims and defenses pled in this case. The request is
overbroad, not limited to specific issues in dispute in this case, and is not reasonably
9 calculated to lead to the discovery of admissible evidence.

10 Plaintiff's counsel perceived Defendant Bayuk's responses to be insufficient. Thereafter, counsel
11 conferred regarding the propriety of these categories and the sufficiency of Defendant Bayuk's
12 responses; however, they were unable to resolve their dispute.

13 On April 8, 2016, Plaintiff filed *Plaintiff's Motion to Compel Production of Documents*.
14 Essentially, Plaintiff argues that the requested documents are discoverable because insurance
15 coverage that Defendant Bayuk sought and obtained for the subject property will reflect his belief
16 regarding the true value of that property which, in turn, is relevant to whether he actually gave
17 Debtor reasonably equivalent value for that property. On April 25, 2016, Defendant Bayuk filed his
18 *Opposition to Plaintiff's Motion to Compel Production of Documents*. Defendant maintains that the
19 categories at issue are overbroad and that the information contained in insurance policies is private
20 and confidential. Plaintiff's *Reply in Support of Plaintiff's Motion to Compel Production of*
21 *Documents* was filed on May 9, 2016, and the motion was submitted on that same date.²

22 As drafted, the categories described above³ are objectionably overbroad. This action does
23

24 ² Due to a data entry error regarding the request for submission, this motion was not referred to the Discovery
Commissioner until June 29, 2016.

25 ³ In the motion to compel, Plaintiff asserts that earlier requests for production contained several other categories
26 which would have encompassed insurance policies. But Defendant Bayuk served responses to those earlier requests in
September 2015. To the extent that Plaintiff might currently seek to enforce those other categories, he has waited too long
to seek relief regarding those categories and the motion is therefore untimely. See, e.g., Pearce v. E.F. Hutton Grp., Inc.,
117 F.R.D. 477, 478 (D.D.C. 1986) (motion to compel concerning discovery responses served five months earlier was
denied, with court finding that moving party "should have budgeted his time sufficient to bring the issue before the court at

1 not implicate every conceivable item of real or personal property owned by Defendant Bayuk,
2 individually or as trustee, during the stated period. In addition, the requests at issue define the term
3 "You" to mean "Edward William Bayuk, and his agents, heirs, assignees or representatives." These
4 categories would therefore require Defendant Bayuk to produce insurance policies concerning items
5 of real and personal property owned by all of his agents, heirs, assignees, and representatives
6 during the stated period. The request for documents "related to" or "referring to" insurance policies
7 is also objectionable in this context, on the ground that the request is not stated with reasonable
8 particularity.⁴

9 However, during prefiling consultation, Plaintiff addressed Defendant Bayuk's objection
10 regarding overbreadth. In emails, Plaintiff's counsel explained that "[t]he request seeks information
11 related [to] the value of both real and personal property transferred, which is the subject of the state
12 court complaint," and that the "personal property was transferred by and between Mr. Bayuk and his
13 Trust and Paul Morabito in connection with the transfers of the real properties." Thus, Plaintiff made
14 clear that he does not seek insurance policies regarding all property owned by Defendant Bayuk,
15 individually or as trustee, during the stated period. Rather, he seeks only insurance policies that
16 provided coverage for items of real or personal property that were transferred by Debtor to
17 Defendant Bayuk, individually or as trustee, and which are the subject of this action. From the
18 amended complaint and other filings and requests in this case, Defendant Bayuk knew or should
19 have known that Plaintiffs are seeking insurance policies providing coverage for real and personal
20 property located at (a) 1254 Mary Fleming Circle, Palm Springs, California; (b) 371 El Camino Del

21 a much earlier stage in the discovery timetable"); Lapenna v. Upjohn Co., 110 F.R.D. 15, 18 (E.D. Pa. 1986) (court may
22 require that motions to compel be submitted within a reasonable time "to prevent delay and harassment and to allow for
calendar control").

23 ⁴ The requirement of reasonable particularity applies to document requests through NRCP 34(b)(1)(A), and this
24 Court generally will not enforce requests that fail to satisfy that requirement. See, e.g., Perez v. El Tequila LLC, No. 12-
25 CV-588-JED-PJC, 2014 WL 5341766, at *1 (N.D. Okla. Oct. 20, 2014) ("discovery requests seeking 'all documents
26 referring to, concerning, relating to' . . . are generally too vague and overbroad on their face and do not describe with
'reasonable particularity' what is being sought") (emphasis added); Hartford Fire Ins. Co. v. P & H Cattle Co., No. 05-2001-
DJW, 2009 WL 2951120, at *11 (D. Kan. Sept. 11, 2009) (request for "all documents maintained by the Plaintiff concerning
any of the Defendants" not made with reasonable particularity) (emphasis added); Lopez v. Chertoff, No. CV 07-1566-
LEW, 2009 WL 1575214, at *2 (E.D. Cal. June 2, 2009) (request for all documents "referring to [or] relating to" plaintiff from
defendant sheriff was overly broad and lacked reasonable particularity). For a detailed explanation of why this kind of
phrasing is objectionable, see Wesley M. Ayres, Conversations on Discovery, The Writ, Jan. 2001, at 3-4.

1 Mar, Laguna Beach, California; and (c) 370 Los Olivos, Laguna Beach, California. The Court finds
2 that Plaintiff provided sufficient explanation to address Defendant's concerns about overbreadth in
3 the categories described above, and reliance on that objection is therefore unavailing.⁵

4 Defendant's other objection is that the requested insurance policies contain information that
5 is personal, private, and confidential, and that they should therefore be protected from discovery by
6 Plaintiff. As explained by Defendant:

7 Insurance policies, and the information they contain, are undoubtedly "private,
8 personal information and financial information," just like tax returns. An unlimited
9 production of all insurance policies would essentially open the door to the entire
10 financial and asset structure of the insured. Insurance policies are entitled to
11 protection, just like tax returns, particularly when the information sought—Bayuk's
12 subjective belief of the value of a limited number of assets—can be obtained
13 elsewhere.

14 Plaintiff counters that insurance policy records do not automatically qualify for protection from
15 discovery, and that Defendant failed to seek a protective order for those documents.

16 Essentially, Defendant Bayuk is seeking protection for the requested insurance policies.⁶ A
17 party seeking protection under NRCP 26(c) has the burden of establishing good cause for the
18 requested order. See, e.g., Hawley v. Hall, 131 F.R.D. 578, 583 (D. Nev. 1990).⁷ The existence of
19 good cause is a factual matter to be determined from the nature and character of the information
20 sought weighed in the balance of the factual issues involved in each action. See Glick v. McKesson
21 & Robbins, Inc., 10 F.R.D. 477, 479 (W.D. Mo. 1950). In that regard, courts insist upon a particular
22 and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, in
23 order to establish good cause. See, e.g., Hawley, 131 F.R.D. at 583. Broad allegations of harm,

24 ⁵ Alternatively, if Defendant Bayuk truly could not identify the real and personal property transferred to him which
25 is at issue in this case, then he should have asked for further explanation about the description provided by Plaintiff's
26 counsel in her emails to Defendants' counsel in March 2016 (attached as Exhibit 14 to the motion to compel). Significantly,
in his response to the first email, Defendants' counsel did not cite overbreadth or confusion about the real and personal
property at issue.

⁶ NRCP 37(a)(4)(B) and (C) allow the Court to "enter any protective order authorized under Rule 26(c)" in
connection with its decision concerning a motion to compel.

⁷ "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.'" See Exec. Mgmt. v. Tigor Title
Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (quoting Las Vegas Novelty, Inc. v. Fernandez, 106 Nev. 113, 119, 787
P.2d 772, 776 (1990)).

1 unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.
2 See Cipollone v. Liggett Grp., Inc., 785 F.2d 1108, 1121 (3d Cir. 1986).

3 Defendant Bayuk's contention that insurance policies are inherently entitled to protection is
4 not compelling. In fact, certain kinds of insurance policies must be disclosed in most Nevada civil
5 actions, and the rule requiring disclosure does not purport to provide any special protection for those
6 policies. See NRCP 16.1(a)(1)(D). Moreover, insurance policies typically contain numerous
7 provisions concerning definitions, coverages, exclusions, and other contractual requirements that
8 reveal no confidential information about the insured. The Court appreciates that Defendant's
9 objection might have been partly based on the overbroad nature of Plaintiff's requests; but those
10 concerns have now been addressed and the scope of Plaintiff's requests for insurance policies has
11 been substantially narrowed. As noted above, Defendant need only produce insurance policies that
12 provided coverage for items of real or personal property that were transferred by Debtor to
13 Defendant Bayuk, individually or as trustee, and which are the subject of this action.

14 In addition, while courts have recognized protection for documents such as medical records,
15 tax returns, and documents revealing a party's financial condition (e.g., bank records), see, e.g.,
16 Hetter v. Dist. Court, 110 Nev. 513, 520, 874 P.2d 762, 766 (1994); Schlatter v. Dist. Court, 93 Nev.
17 189, 192-93, 561 P.2d 1342, 1343-44 (1979), those kinds of documents necessarily implicate an
18 individual's privacy concerns. A patient's medical records reveal information about his or her
19 condition. Tax returns require individuals to provide substantial information about their income and
20 assets. Statements from financial institutions directly reveal information about an individual's
21 financial condition. In contrast, property insurance policies are contractual agreements which do not
22 inherently reveal information typically regarded as confidential. Perhaps some policies of this sort
23 reveal private information; but they do not automatically do so, and Defendant has not identified the
24 personal, private, confidential information that would be revealed in the policies at issue.
25 Significantly, no case has been cited in which a court held that insurance policies are automatically
26 entitled to protection under NRCP 26(c), or the analogous federal rule.

1 In any event, even medical records, tax returns, and financial statements are presumptively
2 discoverable if they are relevant to the subject matter involved in the pending action.⁸ See NRCP
3 26(b)(1). As explained above, Plaintiff's request for insurance policies is limited to those that
4 provided coverage for items of real or personal property that were transferred by Debtor to
5 Defendant Bayuk, individually or as trustee, and which are the subject of this action. That property
6 is part of the subject matter of this litigation. The Court agrees with Plaintiff that the value ascribed
7 to that property by Defendant Bayuk, and the amount of coverage he sought and obtained, are
8 relevant to his beliefs about the value of that property. When compared with the value of
9 consideration actually exchanged for that property, it may constitute evidence about whether the
10 transfers of that property to Defendant Bayuk were made in good faith, or whether they were
11 fraudulent. Therefore, Plaintiff is entitled to the insurance policies he seeks.

12 ACCORDINGLY, *Plaintiff's Motion to Compel Production of Documents* should be
13 GRANTED.

14 IT SHOULD, THEREFORE, BE ORDERED that Defendant Bayuk produce for inspection and
15 copying by Plaintiff, no later than September 16, 2016, all insurance policies within the possession,
16 custody, or control of Defendant Bayuk that were in effect at any time between January 1, 2005 and
17 December 31, 2011, and which provided coverage for real or personal property located at (a) 1254
18 Mary Fleming Circle, Palm Springs, California; (b) 371 El Camino Del Mar, Laguna Beach,
19 California; and (c) 370 Los Olivos, Laguna Beach, California.

20 DATED: This 1st day of September, 2016.

21
22 
23 WESLEY M. AYRES
DISCOVERY COMMISSIONER

24 ⁸ In Nevada, the discovery of tax returns generally will not be permitted unless the information sought is
25 otherwise unobtainable. See McNair v. Dist. Court, 110 Nev. 1285, 1290, 885 P.2d 576, 579 (1994); Clark v. Dist. Court,
101 Nev. 58, 64, 692 P.2d 512, 516 (1985). That degree of protection is appropriate for documents in which most income-
26 earners are required to reveal substantial amounts of information about their income and assets, and which then must be
filed with the Internal Revenue Service. See Hetter v. Dist. Court, 110 Nev. 513, 519, 874 P.2d 762, 765-66 (1994)
("because of the policy considerations of protecting taxpayer privacy and encouraging the filing of full and accurate tax
returns, both state and federal courts have subjected discovery requests for income tax returns to a heightened scrutiny").
Insurance policies concerning noncompulsory coverage for items of real and personal property simply do not raise the
same kinds of privacy concerns as tax returns.

CERTIFICATE OF SERVICE

CASE NO. CV13-02663

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 1st day of September, 2016, I electronically filed the **RECOMMENDATION FOR ORDER** with the Clerk of the Court by using the ECF system.

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

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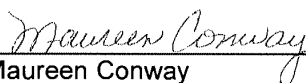
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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
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8 * * *

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

11 Plaintiff,

Case No. CV13-02663

12 vs.

Dept. No. B1

13 SUPERPUMPER, INC., an Arizona corporation,
14 et al.,

15 Defendants.

16 CONFIRMING ORDER

17 On September 1, 2016, the Discovery Commissioner served a *Recommendation for Order* in
18 this action. None of the parties to this action has filed an objection regarding that recommendation
19 and the period for filing any objection concerning that recommendation has expired. See NRCP
20 16.1(d)(2).

21 ACCORDINGLY, the Court hereby CONFIRMS, APPROVES, and ADOPTS the Discovery
22 Commissioner's Supplemental Recommendation for Order served on August 26, 2016.

23 DATED this 14th day of SEPTEMBER, 2016.

24 Jonathan Berry
DISTRICT JUDGE

CERTIFICATE OF SERVICE

CASE NO. CV13-02663

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 16 day of SEPTEMBER, 2016, I electronically filed the **CONFIRMING ORDER** with the Clerk of the Court by using the ECF system.

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

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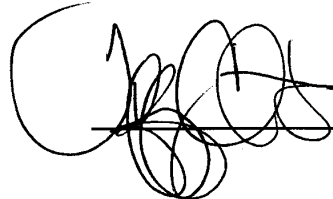
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A handwritten signature in black ink, appearing to be 'G. Gordon', is written over a horizontal line.