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 Electronically Filed Jun 02 2020 03:53 p.m. Elizabeth A. Brown Clerk of Supreme Court Appeal from the Second Judicial District Court, the Honorable Connie J. Steinheimer Presiding

APPELLANTS' APPENDIX, VOLUME 11
(Nos. 1724–1825)

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A-10	Defendants' Sixteenth Supplement to NRCP Disclosure of Witnesses and Documents (dated 05/03/2017)	Vol. 10, 1670–1682
A-11	Rough Draft Transcript of Garry M. Graber, Dated July 12, 2017 (Job Number 394849)	Vol. 10, 1683–1719
A-12	Sept. 15-Sept. 23, 2010 emails by and between Hodgson Russ LLP and Other Parties	Vol. 10, 1720–1723
Reply in Support of Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP, and Opposition to Motion for Sanctions (filed 08/03/2017)		Vol. 11, 1724–1734
Reply in Support of Countermotion for Sanctions and to Compel Resetting of 30(b)(6) Deposition of Hodgson Russ LLP (filed 08/09/2017)		Vol. 11, 1735–1740
Minutes of August 10, 2017 hearing on Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP, and Opposition to Motion for Sanctions (filed 08/11/2017)		Vol. 11, 1741–1742
Recommendation for Order RE: *Defendants' Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP*, filed on July 18, 2017 (filed 08/17/2017)		Vol. 11, 1743–1753
Motion for Partial Summary Judgment (filed 08/17/2017)		Vol. 11, 1754–1796
Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment (filed 08/17/2017)		Vol. 11, 1797–1825

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

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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

	DOCUMENT DESCRIPTION	LOCATION
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

	DOCUMENT DESCRIPTION	LOCATION
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

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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

	DOCUMENT DESCRIPTION	LOCATION
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

	DOCUMENT DESCRIPTION	LOCATION
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

	DOCUMENT DESCRIPTION	LOCATION
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

	DOCUMENT DESCRIPTION	LOCATION
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

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<tr><td colspan="2">Exhibit to Objection to Recommendation for Order</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Plaintiff’s counsel’s Jan. 24, 2017, email memorializing the discovery dispute agreement</td><td>Vol. 18, 2735–2736</td></tr>
<tr><td colspan="2">Opposition to Objection to Recommendation for Order filed August 17, 2017 (filed 09/05/2017)</td><td>Vol. 18, 2737–2748</td></tr>
<tr><td colspan="2">Exhibit to Opposition to Objection to Recommendation for Order</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>A</td><td>Declaration of Teresa M. Pilatowicz, Esq., in Support of Opposition to Objection to Recommendation for Order (filed 09/05/2017)</td><td>Vol. 18, 2749–2752</td></tr>
<tr><td colspan="2">Reply to Opposition to Objection to Recommendation for Order filed August 17, 2017 (dated 09/15/2017)</td><td>Vol. 18, 2753–2758</td></tr>
<tr><td colspan="2">Defendants’ Opposition to Plaintiff’s Motion for Partial Summary Judgment (filed 09/22/2017)</td><td>Vol. 18, 2759–2774</td></tr>
<tr><td colspan="2">Defendants’ Separate Statement of Disputed Facts in Support of Opposition to Plaintiff’s Motion for Partial Summary Judgment (filed 09/22/2017)</td><td>Vol. 18, 2775–2790</td></tr>
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DOCUMENT DESCRIPTION		LOCATION
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 *Consolidated Nevada Corp., et al v. JH. et al.*; 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

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

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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

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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

DOCUMENT DESCRIPTION		LOCATION
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**	

DOCUMENT DESCRIPTION		LOCATION
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

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<tr><td colspan="2">Stipulated Facts (filed 10/29/2018)</td><td>Vol. 20, 3313–3321</td></tr>
<tr><td colspan="2">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)</td><td>Vol. 20, 3322–3325</td></tr>
<tr><td colspan="2">Plaintiff's Points and Authorities Regarding Authenticity and Hearsay Issues (filed 10/31/2018)</td><td>Vol. 20, 3326–3334</td></tr>
<tr><td colspan="2">Clerk's Trial Exhibit List (filed 02/28/2019)</td><td>Vol. 21, 3335–3413</td></tr>
<tr><td colspan="2">Exhibits to Clerk's Trial Exhibit List</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Certified copy of the Transcript of September 13, 2010 Judge's Ruling; Case No. CV07-02764</td><td>Vol. 21, 3414–3438</td></tr>
<tr><td>2</td><td>Findings of Fact, Conclusions of Law, and Judgment; Case No. CV07-02764 (filed 10/12/2010)</td><td>Vol. 21, 3439–3454</td></tr>
<tr><td>3</td><td>Judgment; Case No. CV07-0767 (filed 08/23/2011)</td><td>Vol. 21, 3455–3456</td></tr>
<tr><td>4</td><td>Confession of Judgment; Case No. CV07-02764 (filed 06/18/2013)</td><td>Vol. 21, 3457–3481</td></tr>
<tr><td>5</td><td>November 30, 2011 Settlement Agreement and Mutual Release</td><td>Vol. 22, 3482–3613</td></tr>
<tr><td>6</td><td>March 1, 2013 Forbearance Agreement</td><td>Vol. 22, 3614–3622</td></tr>
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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 NRCP 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

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29	September 20, 2010 email from Yalamanchili to Graber RE: Attorney Client Privileged Communication	Vol. 22, 3688–3689
30	September 21, 2010 email from P. Morabito to Vacco and Cross RE: Attorney Client Privileged Communication	Vol. 22, 3690–3692
31	September 23, 2010 email chain between Graber and P. Morabito RE: Change of Primary Residence from Reno to Laguna Beach	Vol. 22, 3693–3694
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<tr><td colspan="2">Findings of Fact, Conclusions of Law, and Judgment (filed 03/29/2019)</td><td>Vol. 48, 8270–8333</td></tr>
<tr><td colspan="2">Notice of Entry of Findings of Fact, Conclusions of Law, and Judgment (filed 03/29/2019)</td><td>Vol. 48, 8334–8340</td></tr>
<tr><td colspan="2">Memorandum of Costs and Disbursements (filed 04/11/2019)</td><td>Vol. 48, 8341–8347</td></tr>
<tr><td colspan="2">Exhibit to Memorandum of Costs and Disbursements</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Ledger of Costs</td><td>Vol. 48, 8348–8370</td></tr>
<tr><td colspan="2">Application for Attorneys’ Fees and Costs Pursuant to NRCP 68 (filed 04/12/2019)</td><td>Vol. 48, 8371–8384</td></tr>
<tr><td colspan="2">Exhibits to Application for Attorneys’ Fees and Costs Pursuant to NRCP 68</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>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)</td><td>Vol. 48, 8385–8390</td></tr>
<tr><td>2</td><td>Plaintiff’s Offer of Judgment to Defendants (dated 05/31/2016)</td><td>Vol. 48, 8391–8397</td></tr>
<tr><td>3</td><td>Defendant’s Rejection of Offer of Judgment by Plaintiff (dated 06/15/2016)</td><td>Vol. 48, 8398–8399</td></tr>
<tr><td>4</td><td>Log of time entries from June 1, 2016 to March 28, 2019</td><td>Vol. 48, 8400–8456</td></tr>
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DOCUMENT DESCRIPTION		**LOCATION**
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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<tr><th colspan="2"><u>DOCUMENT DESCRIPTION</u></th><th><u>LOCATION</u></th></tr>
<tr><td colspan="2">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)</td><td>Vol. 49, 8638–8657</td></tr>
<tr><td colspan="2">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)</td><td>Vol. 50, 8658–8676</td></tr>
<tr><td colspan="2">Exhibits to Edward Bayuk's Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>February 27, 2019 email with attachments</td><td>Vol. 50, 8677–8768</td></tr>
<tr><td>2</td><td>Declaration of Frank C. Gilmore in Support of Edward Bayuk's Motion for New Trial (filed 04/26/2019)</td><td>Vol. 50, 8769–8771</td></tr>
<tr><td>3</td><td>February 27, 2019 email from Marcy Trabert</td><td>Vol. 50, 8772–8775</td></tr>
<tr><td>4</td><td>February 27, 2019 email from Frank Gilmore to eturner@Gtg.legal RE: Friday Trial</td><td>Vol. 50, 8776–8777</td></tr>
<tr><td colspan="2">Plaintiff's Reply in Support of Application of Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 04/30/2019)</td><td>Vol. 50, 8778–8790</td></tr>
<tr><td colspan="2">Exhibit to Plaintiff's Reply in Support of Application of Attorneys' Fees and Costs Pursuant to NRCP 68</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Case No. BK-13-51237-GWZ, ECF Nos. 280, 282, and 321</td><td>Vol. 50, 8791–8835</td></tr>
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<tr><th colspan="2"><u>DOCUMENT DESCRIPTION</u></th><th><u>LOCATION</u></th></tr>
<tr><td colspan="2">Plaintiff's Opposition to Defendants' Motions for New Trial and/or to Alter or Amend Judgment (filed 05/07/2019)</td><td>Vol. 51, 8836–8858</td></tr>
<tr><td colspan="2">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)</td><td>Vol. 51, 8859–8864</td></tr>
<tr><td colspan="2">Declaration of Edward Bayuk Claiming Exemption from Execution (filed 06/28/2019)</td><td>Vol. 51, 8865–8870</td></tr>
<tr><td colspan="2">Exhibits to Declaration of Edward Bayuk Claiming Exemption from Execution</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Copy of June 22, 2019 Notice of Execution and two Write of Executions</td><td>Vol. 51, 8871–8896</td></tr>
<tr><td>2</td><td>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)</td><td>Vol. 51, 8897–8942</td></tr>
<tr><td colspan="2">Notice of Claim of Exemption from Execution (filed 06/28/2019)</td><td>Vol. 51, 8943–8949</td></tr>
<tr><td colspan="2">Edward Bayuk's Declaration of Salvatore Morabito Claiming Exemption from Execution (filed 07/02/2019)</td><td>Vol. 51, 8950–8954</td></tr>
<tr><td colspan="2">Exhibits to Declaration of Salvatore Morabito Claiming Exemption from Execution</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Las Vegas June 22, 2019 letter</td><td>Vol. 51, 8955–8956</td></tr>
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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

	DOCUMENT DESCRIPTION	LOCATION
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

DOCUMENT DESCRIPTION		LOCATION
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

DOCUMENT DESCRIPTION		LOCATION
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

	DOCUMENT DESCRIPTION	LOCATION
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

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<tr><th colspan="2"><u>DOCUMENT DESCRIPTION</u></th><th><u>LOCATION</u></th></tr>
<tr><td colspan="2">Exhibits to Objection to Plaintiff's Proposed Order Denying Claim of Exemption and Third-Party Claim</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Plaintiff's Proposed Order Denying Claim of Exemption and Third-Party Claim</td><td>Vol. 53, 9241–9245</td></tr>
<tr><td>2</td><td>Defendant's comments on Findings of Fact</td><td>Vol. 53, 9246–9247</td></tr>
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<tr><td colspan="2">Minutes of July 22, 2019 hearing on Objection to Claim for Exemption (filed 08/02/2019)</td><td>Vol. 53, 9253</td></tr>
<tr><td colspan="2">Order Denying Claim of Exemption (filed 08/02/2019)</td><td>Vol. 53, 9254–9255</td></tr>
<tr><td colspan="2">Bayuk's Case Appeal Statement (filed 08/05/2019)</td><td>Vol. 53, 9256–9260</td></tr>
<tr><td colspan="2">Bayuk's Notice of Appeal (filed 08/05/2019)</td><td>Vol. 53, 9261–9263</td></tr>
<tr><td colspan="2">Defendants, Superpumper, Inc., Edward Bayuk, Salvatore Morabito; and Snowshoe Petroleum, Inc.'s, Case Appeal Statement (filed 08/05/2019)</td><td>Vol. 53, 9264–9269</td></tr>
<tr><td colspan="2">Defendants, Superpumper, Inc., Edward Bayuk, Salvatore Morabito; and Snowshoe Petroleum, Inc.'s, Notice of Appeal (filed 08/05/2019)</td><td>Vol. 53, 9270–9273</td></tr>
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<tr><th colspan="2"><u>DOCUMENT DESCRIPTION</u></th><th><u>LOCATION</u></th></tr>
<tr><td colspan="2">Exhibits to Defendants, Superpumper, Inc., Edward Bayuk, Salvatore Morabito; and Snowshoe Petroleum, Inc.’s, Notice of Appeal</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Findings of Fact, Conclusions of Law, and Judgment (filed 03/29/2019)</td><td>Vol. 53, 9274–9338</td></tr>
<tr><td>2</td><td>Order Denying Defendants’ Motions for New Trial and/or to Alter or Amend Judgment (filed 07/10/2019)</td><td>Vol. 53, 9339–9341</td></tr>
<tr><td>3</td><td>Order Granting in Part and Denying in Part Motion to Retax Costs (filed 07/10/2019)</td><td>Vol. 53, 9342–9345</td></tr>
<tr><td>4</td><td>Order Granting Plaintiff’s Application for an Award of Attorneys’ Fees and Costs Pursuant to NRCP 68 (filed 07/10/2019)</td><td>Vol. 53, 9346–9349</td></tr>
<tr><td colspan="2">Plaintiff’s Reply to Defendants’ Objection to Plaintiff’s Proposed Order Denying Claim of Exemption and Third-Party Claim</td><td>Vol. 53, 9350–9356</td></tr>
<tr><td colspan="2">Order Denying Claim of Exemption and Third-Party Claim (08/09/2019)</td><td>Vol. 53, 9357–9360</td></tr>
<tr><td colspan="2">Notice of Entry of Order Denying Claim of Exemption and Third-Party Claim (filed 08/09/2019)</td><td>Vol. 53, 9361–9364</td></tr>
<tr><td colspan="2">Exhibit to Notice of Entry of Order Denying Claim of Exemption and Third-Party Claim</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Order Denying Claim of Exemption and Third-Party Claim (08/09/2019)</td><td>Vol. 53, 9365–9369</td></tr>
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DOCUMENT DESCRIPTION		LOCATION
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

	DOCUMENT DESCRIPTION	LOCATION
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

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<tr><th colspan="2">DOCUMENT DESCRIPTION</th><th>LOCATION</th></tr>
<tr><td colspan="2">Errata to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration (filed 08/20/2019)</td><td>Vol. 57, 9891–9893</td></tr>
<tr><td colspan="2">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)</td><td>Vol. 57, 9894–9910</td></tr>
<tr><td colspan="2">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)</td><td>Vol. 57, 9911–9914</td></tr>
<tr><td colspan="2">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</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Declaration of Gabrielle A. Hamm, Esq.</td><td>Vol. 57, 9915–9918</td></tr>
<tr><td>2</td><td>Plaintiff's Amended NRCP 16.1 Disclosures (February 19, 2016)</td><td>Vol. 57, 9919–9926</td></tr>
<tr><td>3</td><td>Plaintiff's Fourth Supplemental NRCP 16.1 Disclosures (November 15, 2016)</td><td>Vol. 57, 9927–9930</td></tr>
<tr><td>4</td><td>Plaintiff's Fifth Supplemental NRCP 16.1 Disclosures (December 21, 2016)</td><td>Vol. 57, 9931–9934</td></tr>
<tr><td>5</td><td>Plaintiff's Sixth Supplemental NRCP 16.1 Disclosures (March 20, 2017)</td><td>Vol. 57, 9935–9938</td></tr>
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<tr><td colspan="2">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)</td><td>Vol. 57, 9939–9951</td></tr>
<tr><td colspan="2">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</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>19</td><td>Notice of Submission of Disputed Order Denying Claim of Exemption and Third Party Claim (filed 08/01/19)</td><td>Vol. 57, 9952–9993</td></tr>
<tr><td>20</td><td>Notice of Submission of Disputed Order Denying Claim of Exemption and Third Party Claim (filed 08/01/19)</td><td>Vol. 57, 9994–10010</td></tr>
<tr><td colspan="2">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)</td><td>Vol. 57, 10011–10019</td></tr>
<tr><td colspan="2">Bayuk’s Case Appeal Statement (filed 12/06/2019)</td><td>Vol. 57, 10020–10026</td></tr>
<tr><td colspan="2">Bayuk’s Notice of Appeal (filed 12/06/2019)</td><td>Vol. 57, 10027–10030</td></tr>
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<tr><td colspan="2">Exhibits to Bayuk’s Notice of Appeal</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Order Denying [Morabito’s] Claim of Exemption (filed 08/02/19)</td><td>Vol. 57, 10031–10033</td></tr>
<tr><td>2</td><td>Order Denying [Bayuk’s] Claim of Exemption and Third Party Claim (filed 08/09/19)</td><td>Vol. 57, 10034–10038</td></tr>
<tr><td>3</td><td>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)</td><td>Vol. 57, 10039–10048</td></tr>
<tr><td colspan="2">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)</td><td>Vol. 57, 10049–10052</td></tr>
<tr><td colspan="2">Exhibit to Notice of Entry of Order</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>A</td><td>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)</td><td>Vol. 57, 10053–10062</td></tr>
<tr><td colspan="2">Docket Case No. CV13-02663</td><td>Vol. 57, 10063–10111</td></tr>
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Jacqueline Bryant
Clerk of the Court
Transaction # 6232102 : csulezic

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Attorneys for Defendants Snowshoe Petroleum, Inc., Superpumper, Inc., Edward Bayuk, individually and as Trustee of the Edward William Bayuk Living Trust, and Salvatore Morabito.

IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

Plaintiffs,

vs.

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

Defendants.
_____/

CASE NO.: CV13-02663

DEPT. NO.: B1

REPLY IN SUPPORT OF MOTION TO QUASH SUBPOENA, OR, IN THE ALTERNATIVE, FOR A PROTECTIVE ORDER PRECLUDING TRUSTEE FROM SEEKING DISCOVERY FROM HODGSON RUSS LLP, AND OPPOSITION TO MOTION FOR SANCTIONS

Defendants SUPERPUMPER, INC., EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST, SALVATORE MORABITO, and SNOWSHOE PETROLEUM, INC. (collectively, "Defendants") hereby reply in support of their Motion to quash the subpoena, or, in the alternative, enter a protective order regarding the subpoena issued to non-party HODGSON RUSS LLP ("HR") by plaintiff WILLIAM A.

LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito ("Trustee"). Defendants also oppose the Trustee's Motion for Sanctions. This Reply is made and supported by the Memorandum of Points and Authorities, and the Declaration of Salvatore Morabito.

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY

I. INTRODUCTION

Nearly everything the Trustee argued in his Opposition memorandum is either plainly false, or completely misses the point of the Defendants' Motion. Months prior to the close of discovery, the Trustee was in possession of considerable evidence that Hodgson Russ ("HR") was involved in the transfers. The Trustee ignored that information, or deemed it not important. Either way, it is the Trustee's job to exercise diligence in discovery to subpoena and examine all evidence the Trustee deems important. That duty never shifts to the Defendants.

Second, a foundational principle of an attorney's role as an officer of the Court is to vigilantly protect the agreements made between counsel, not to sand-bag, or bait-and-switch. Counsel made an enforceable agreement to limit the HR depositions. Everything that was filed and served after the agreement was subject to that agreement. Defendants had no reason to object to the amended notice or the stipulation, because the scope of the HR deposition was already set by agreement. Had no agreement been reached in January, the Motion for Protective Order would have been immediately filed and nothing further would have occurred.

Third, the Trustee's argument the Defendants lack standing to move to quash the subpoena is plainly ridiculous. Any party to litigation has standing to seek redress from a discovery abuse, which this certainly is. NRCP 26(c). Under the Trustee's reading of the Rules, even the most blatant disregard of the close of discovery could not be remedied by a motion by the other parties. Such a contention has no basis in common sense. Certainly a party aggrieved by untimely discovery has standing to request the Court intervene and prevent the discovery abuses. If, as the Trustee contends, the Defendants (who are the only other parties in the case) don't have standing to address discovery violations, it begs the question who the Trustee would contend does have standing.

The ridiculousness of the Trustee's position aside, it is undisputed that the Trustee noticed

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the HR deposition after the close of discovery. This is not a run-of-the-mill subpoena objection under Rule 45. It is undisputed that the limitation on the extension of discovery was for only those things which the Trustee could not have investigated prior to the close of discovery. NRCP 26(c) expressly authorizes a party to seek a protective order to avoid "annoyance, embarrassment, oppression, or undue burden or expense," which this certainly has become. Noticing a deposition after the close of discovery qualifies as undue burden and expense under Rule 26.

In sum, the Trustee cannot deny – and does not even try to deny – that he was in possession of the information which identified HR as a potential witness, and that the Trustee ignored the information or deemed it immaterial. Either way, the Trustee failed to exercise requisite diligence prior to the close of discovery. When Defendants objected to the subpoena and demanded a meet and confer, the agreement was reached between counsel in order to avoid motion practice on the untimely-served subpoena. Now, despite an email confirmation of the agreement reached in the meet and confer, the Trustee shockingly disavows the agreement, and goes so far to claim that Defendants were dilatory in their objections. The Motion to Quash should be granted.

A. The Trustee's Excuse that "HR's involvement in the fraudulent transfers was not disclosed until production of the Vacco Emails" is absolutely, patently, and demonstrably false.

The Trustee's primary contention that "HR's involvement in the fraudulent transfers was not disclosed until production of the Vacco Emails" is absolutely, patently, and demonstrably false. (Opposition, p.3:12-14). On July 10, 2015, months before discovery closed, undersigned counsel transmitted pages of Lippes billing records filled with references to Hodgson Russ, Sujata Yalamanchili, and Gary Graber's involvement in the transfers. See EXHIBIT 12 to the Motion (LMWF 000533-535, 540). The Trustee ignored the records until after the close of discovery. This is the crux of the entire dispute, and a point which the Trustee entirely ignores in his Opposition. It is not the Defendants' obligation to spoon-feed the Trustee with what may or may not be important to the Trustee's case. The Rules of Civil Procedure, and the authorities applying it are clear on this point: the plaintiff has the duty to exercise reasonable diligence in pursuing the entire discovery that the Trustee deems important. The Trustee now asks the Court to excuse the lack of diligence without any just cause.

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1. The Trustee, and Not Defendants, Maintains the Obligation to Conduct the Discovery He Deems Important.

Subpoenas are a form of discovery that must be exercised during the discovery period. See *Integra Life Sciences i, Ltd. v. Merk KGaA*, 190 F.R.D. 556, 561 (S. D. Ca. 1999). In the present case, discovery closed on March 31, 2016, with a limited extension agreed upon to allow for discovery of information that could not have been reasonably known or knowable prior to the disclosure of the Vacco documents and testimony. Accordingly, the parties' were not permitted to serve subpoenas or any other form of discovery past March 31, 2016, unless for the purpose of obtaining information that could not have been reasonably known or knowable prior to the disclosure of the Vacco documents. A party is required to "exercise diligence" in regards to the discovery process and the pretrial schedule. *Id.* at 559–61. In *Integra*, that Court found that an important piece of information, a 1984 article, which was not formally disclosed, but was provided in the mix of discovery, did *not* entitle the party to an extension of the close of discovery. *Id.* at 560. The Court in *Integra* found that the information at issue was "well known" to the parties because, prior to the close of discovery, the article was cited and referred to in various discovery disclosed. *Id.* The court further held that a party is not entitled to an extension of discovery due only to inattentiveness to the discovery provided to it, which could have been reviewed for information but was not. *Id.* at 560–61.

In the present case, like in *Integra*, HR's identity and involvement was disclosed to the Trustee far in advance of the close of discovery and through multiple sources; this information was or should have been "well known" to the Trustee. Further, the Trustee was required to exercise due diligence in reviewing the discovery information provided to it, during the discovery period.

2. Defendants Were Unaware of HR's Involvement in the Transfers and Would Not Have Had Any Reason to Identify HR as a Potential Witness.

Hodgson Russ never represented the Defendants in their individual capacity. (See Declaration of Salvatore Morabito, ¶3)("Salvatore Decl."). From approximately 2002-2007, HR was corporate counsel for companies in which Bayuk and Sam Morabito held minority interests, but HR was not their personal counsel, and Defendants never discussed issues related to the

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transfers with any attorney at HR. *Id.* at ¶4. Lippes was the Defendants' counsel that assisted with the transfers.. *Id.* at ¶5. HR was Paul Morabito's counsel, and the Trustee knew that. See Exhibits 5-12 to the Motion. Defendants were not aware of HR's role in the transfers until recently and had no reason to include HR as potential witnesses in the case. Salvatore Decl., ¶6. Importantly, the Defendants have never been under an affirmative obligation to investigate the Trustee's case for him.

The Nevada Rules of Civil Procedure ("NRCP") do not require Defendants to do the Trustee's work for them; instead it requires Defendants to provide the names of individuals "then known or reasonably known to have knowledge of any facts relevant." NRCP 16.1(b)(5). Parties must supplement these disclosures if a party learns that the disclosure was incomplete. NRCP 26 (e)(1). Information to correct any shortcomings of the initial disclosures made known during the discovery process "will provide the functional equivalent of the information required" See *Poitra v. School Dis. No. 1 in the County of Denver*, 311 F. R. D. 659, 666 (D. Colo 2015)(applying FRCP 26).

The facts show that there was no failure to comply with the NRCP, including NRCP 16.1. The Defendants effectively supplemented their disclosures in regards to HR when HR's identity and involvement was disclosed to the Defendants in productions to the Trustee. Defendants were not themselves involved with HR, and therefore did not know the extent of HR's involvement. Nonetheless, even if Defendants did not fully effectuate the initial disclosures, that does not provide a sufficient basis to warrant an extension of discovery in this case because the Trustee knew – or could have known with review of the discovery -- the identity and likely the involvement of HR. Where a party failed to comply with a 16.1 requirement, but that failure did not inhibit the opposing party's ability to try its case, the Court found that the opposing party's rights were not substantially affected. *Pizarro-Ortega v. Cervantes-Lopez; Avarca*, 133 Nev., Adv. Op. 37, 2 (2017). In *Pizarro-Ortega*, a party failed to provide a computation of future medical expenses before having a doctor testify as to them, but the Court found that because the same information could be obtained through opposing party's own expert doctor there was not a material effect to opposing party's substantial rights. *Id.*, at 8. Thus, where a party can obtain important information outside of the

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disclosures, an inadvertent failure to formally update one's disclosures does not substantially harm or afford opposing party additional privileges.

Here, like in *Pizarro-Ortega*, Defendants did not initially disclose HR as an entity likely to have discoverable information. And, like in *Pizarro-Ortega*, the Trustee had alternative methods to obtain this information outside of the initial disclosures, through even cursory examination of the documents in his possession.

Moreover, the Trustee's recited facts on this issue are plainly wrong. The Initial Disclosures first provided by Defendants was on December 1, 2014 – not 2015, as the Trustee contends. (Opposition, p.4 ¶2). The Plaintiffs conducted no discovery on the case between December 2014 and June 2015, because the Herbst parties (who filed the action after they commenced the involuntary bankruptcy), were awaiting appointment of their Trustee to substitute in as the Plaintiff. Paul Morabito was never an active Defendant in the case because the bankruptcy §362 Automatic Stay prevented the Herbst from pursuing him at any point in time. In June 2015, Paul Morabito was formally dismissed from the case. The case has always been managed by the Defendants, who had no knowledge of HR's involvement, and had no reason or obligation to identify HR on their list of witnesses. The Trustee, on the other hand, has no such excuse. The Trustee was provided ample proof of HR's involvement, which the Trustee could have, and should have followed-up had he deemed it necessary. This failure of diligence was on the Trustee, and not on the Defendants.

B. The Trustee's Contentions About Defendants' Failure to Timely Object To the HR Subpoena Is So Disingenuous as to Be Sanctionable.

The only three facts that matter here are: (1) when the Trustee served the HR subpoena, Defendants counsel immediately sent an email, "Please explain why this deposition is being noticed in violation of the close of discovery" and demanded a meet and confer; (2) counsel met and conferred about the subpoena and the deposition and Trustee's counsel agreed to provide the emails she intended to use in the deposition; (3) the parties reached an agreement when Defendants had no objection to the "e-mails that [Trustee] intend to discuss at the deposition of Hodgson Russ." (Exhibit 5 to the Motion). Once the parties reached an agreement as to the limitation of the deposition, Defendants had no need nor desire to object to the subpoena or the Notice of

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Deposition, or the stipulations extending discovery. All of those were served and filed AFTER the meet and confer agreement. Why should Defendants object to the formalities of the subpoena and deposition if there was an agreement in place as to the appropriate scope? The Trustee's argument makes no sense in this regard. The Trustee's arguments about the deposition being scheduled without Defendants' objections, or objections to the limited stipulation to extend discovery, are all irrelevant. The Trustee and the Defendants reached an enforceable agreement as to the limitation of the scope of the deposition in order to avoid motion practice. Everything that was filed or served after the agreement was part and parcel to the agreement.

C. The Defendants Did Not Suspend the Deposition On the Issue of Attorney-Client Privilege and Defendants Did Not Instruct Any Witness Not to Answer Any Questions. Defendants Entered the Objection Merely to Preserve the Record.

In an unprecedented ruling which has no support in the law, nor the support of any reported cases anywhere in the Ninth Circuit, Judge Zive of the United States Bankruptcy Court, waived Paul Morabito's personal attorney-client privilege as to Lippes Mathias. See Recommendation for Order, June 13, 2016, citing Judge Zive's February 3, 2016, Order. Based on that ruling, the Trustee invaded the privilege and obtained testimony and documents from Lippes. Judge Zive's Order did not include waiver of Paul Morabito's privilege as to HR. Instead, the Trustee carries around the Order waiving the Lippes privilege, which was obtained based on the Court's examination of specific facts related to Lippes, and the Trustee uses that to claim that all the privileges held by Morabito are waived. The Orders notwithstanding, the Defendants do not intend to concede that the waiver was appropriate, or that the waiver will not, at some point when the appellate issues are available, be reversed by the Ninth Circuit or the Supreme Court of the State of Nevada. Accordingly, it behooves Defendants to enter their objections for the record to preserve their objections pending appeal. Defendants maintain the objection and will raise it at the appropriate appellate level.

Defendants do not seek a protective order on the basis of the attorney-client privilege, and the Defendants did not suspend the deposition on that basis, and the Trustee knows this. See Opposition Ex. A-11, p.17.

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D. Defendants' Suspension of the Deposition was Justified; No Sanction Against Defendants is Warranted.

The Trustee sandbagged the Defendants. Of this there can be no genuine dispute. Sandbagging often works because the opposing parties and counsel know that the price of objecting to unscrupulous sand-bagging conduct can be high. This is particularly true where the parties have traveled long distances for the deposition and the risk of imprudently suspending a deposition comes with it the likelihood of sanctions. Notwithstanding these risks, the Defendants were compelled to suspend the deposition. Where, as here, counsel had reached an agreement, solidified in an undisputed email, as to the scope of the deposition, and then made clear that she did not feel bound by the agreement to limit the deposition according to the agreement, Defendants were well within their rights to object. Defendants should not be punished or exercising the right to require the Trustee to maintain his meet and confer agreement. The deposition was suspended not because of the fear of any testimony being elicited – else Defendants would have objected to the Deposition back in January irrespective of the scope – but because the Trustee confirmed his intent to exceed the agreed-upon scope when counsel inquired about the 30(b)(6) topic areas which were clearly outside the scope of the limitation agreement. No sanctions are warranted against Defendants. To the contrary, if a limited scope deposition is to occur, the Trustee should be compelled to cover the Defendants' costs so that the appropriate scope deposition, which the parties agreed to, can occur.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court enter an order quashing the HR subpoena, or in the alternative, enter a protective order, limiting the scope of the HR deposition pursuant to the meet and confer, along with an award of costs and fees to Defendants associated with another trip to Buffalo to complete the HR depositions.

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AFFIRMATION
Pursuant to NRS 239B.030

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

DATED this 3rd day of August, 2017.

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

/s/ Frank C. Gilmore
FRANK C. GILMORE, ESQ.
Attorneys for Defendants Snowshoe Petroleum, Inc., Superpumper, Inc., Edward Bayuk, individually and as Trustee of the Edward William Bayuk Living Trust, and Salvatore Morabito

DECLARATION OF SALVATORE MORABITO IN SUPPORT OF REPLY IN SUPPORT OF MOTION TO QUASH SUBPOENA, OR, IN THE ALTERNATIVE, FOR A PROTECTIVE ORDER PRECLUDING TRUSTEE FROM SEEKING DISCOVERY FROM HODGSON RUSS LLP, AND OPPOSITION TO MOTION FOR SANCTIONS

I, SALVATORE MORABITO, being first duly sworn under penalty of perjury, depose and say:

1. I am an individual above the age of 18 and make the following statements on my own personal knowledge, except where stated to be on my information and belief.

2. I am one of the Defendants in this case and am represented by Frank C. Gilmore, Esq. and Robison, Belaustegui, Sharp & Low.

3. Hodgson Russ ("HR") never represented me or Edward Bayuk in our individual capacities.

4. HR was corporate counsel for companies in which Bayuk and I held minority interests from approximately, on information and belief, 2002 until the sale of Berry-Hinckley in 2007, but HR was not my personal counsel, and I never discussed issues related to the transfers with any attorney at HR.

5. Lippes Mathias Wexler Friedman were my counsel that assisted me with the transfers.

6. I was not aware of HR's role in the transfers during the discovery period, and I had no reason to identify HR as potential witnesses in the case prior to the close of discovery.

Dated this 3 day of August, 2017.

SALVATORE MORABITO

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Robison, Belaustegui, Sharp & Low, and that on this date I caused to be served a true copy of the **REPLY IN SUPPORT OF MOTION TO QUASH SUBPOENA, OR, IN THE ALTERNATIVE, FOR A PROTECTIVE ORDER PRECLUDING TRUSTEE FROM SEEKING DISCOVERY FROM HODGSON RUSS LLP, AND OPPOSITION TO MOTION FOR SANCTIONS** all parties to this action by the method(s) indicated below:

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

Gerald Gordon, Esq.
Mark M. Weisenmiller, Esq.
Teresa M. Pilatowicz, Esq.
GARMAN TURNER GORDON
650 White Drive, Suite 100
Las Vegas, Nevada 89119
Attorneys for Plaintiff

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

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

____ by personal delivery/hand delivery addressed to:

____ by email addressed to:

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

____ by facsimile (fax) addressed to:

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

DATED: This 3rd day of August, 2017.

Mary Carroll Cates

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Transaction # 6239828 : csulezic

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Attorneys for William A. Leonard, Trustee

IN THE SECOND JUDICIAL DISTRICT COURT OF

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

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, vs. SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, and individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	**CASE NO.: CV13-02663** **DEPT. NO.: B1** **REPLY IN SUPPORT OF COUNTERMOTION FOR SANCTIONS AND TO COMPEL RESETTING OF 30(B)(6) DEPOSITION OF HODGSON RUSS LLP**

Plaintiff William A. Leonard ("Trustee"), by and through its counsel, the law firm of Garman Turner Gordon LLP, hereby submits his Reply (the "Reply") in support of his *Countermotion for Sanctions and to Compel Resetting of 30(B)(6) Deposition of Hodgson Russ*

LLP (the "Countermotion").[1]

MEMORANDUM OF POINTS AND AUTHORITIES

1. Trustee served the Subpoena in January 2017. While Defendants' counsel inquired why the HR Subpoena was not issued until January at that time, Defendants waited *over seventh months*, after the parties had flown to Buffalo, New York, and after the Graber Deposition started to assert a claim that the HR Subpoena was late.

2. As Trustee's counsel explained in January 2017 to Defendants, the HR Subpoena was not made until January for two critical reasons:

a. Trustee was never made aware of the extent of HR's involvement, in large part, because HR was never disclosed as a party having information. This is critical because when the Initial Disclosures were made, Paul Morabito was a Defendant in the State Court Action and could have, and should have, disclosed HR. Defendant's counsel inexplicably denies that Paul Morabito was ever a defendant. See Opposition at 6. When the Initial Disclosures were made, they were made on behalf of "Defendants above named," the first Defendant named being "Paul Morabito, individually and as Trustee of the Arcadia Living Trust;" and Defendants' counsel is listed as counsel for "Defendants Snowshoe Petroleum, Inc., Superpumper, Inc., Paul Morabito, individually and as Trustee of the Arcadia Living Trust Edward Bayuk, individually and as Trustee of the Edward William Bayuk Living Trust, and Salvatore Morabito." Countermotion Ex. A-1.

b. Trustee requested documents from LMWF in September 2015, well before the original discovery cut off. Those documents were ultimately not produced until over a year later, in December 2016 because Defendants continued to challenge orders demanding the production. See Countermotion Ex. A-2 (the Privilege Order); Countermotion Ex. A-3 (the *Recommendation for Order*); and Countermotion Ex. A-4 (the *Confirming Order*). As a result of this delay, the

[1] Capitalized terms not otherwise defined herein shall have those meanings ascribed to them in the Countermotion.

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parties specifically agreed that discovery was extended for purposes of additional information discovered as a result of the LMWF production and during the Vacco testimony.

3. Defendants' counsel's signature on the Sixth Discovery Stipulation, which acknowledges that the late production of the Vacco E-mails "caused the Trustee to issue a subpoena on Hodgson Russ seeking documents and a deposition of the person most knowledgeable of Hodgson Russ (the "Hodgson Deposition")" confirms through its plain language that the discovery cut-off would be extended, at that time to May 31, 2017, "for the purpose of conducting the . . . Hodgson Deposition. . ." Countermotion Ex. A-8 at 3 ¶ 10 and 4 ¶ 1.

4. Defendants' counsel's signature on the Seventh Discovery Stipulation extends the discovery cut-off until July 31, 2017 and repeats these factual assertions once again. Countermotion Ex. A-9 at 3 ¶ 9 and 3 ¶ 1.

5. Further, Defendants themselves disclosed HR after the discovery deadline. In goes without question that that if a party discloses a witness as having information after the discovery deadline, that witness can be deposed after the discovery deadlines.

6. Any allegations of sandbagging are flat out wrong. There was no agreement to limit the documents to be used in the Deposition. This is highlighted by the fact that the Subpoena to HR requesting documents was never withdrawn and HR did, in fact, respond to the Subpoena without objection. Furthermore, Trustee's counsel confirmed with HR, with a copy of Defendants' counsel, that it was seeking documents and was also waiving the privilege. If there was an agreement to limit the Deposition to certain documents, there would have been no need to continue to seek documents.

7. To be clear, the purpose of the January E-mail was to show documents that were discovered as a result of the late LMWF production that led to the HR Subpoena.

8. In any event, and for the avoidance of doubt, the only additional documents, other than those attached to the January E-mail, that are to be used at the Deposition are documents that came from the HR Production.

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9. Notably, Defendants failed to respond to Trustee's point in the Countermotion that it is entirely unclear what limitations on the Deposition would even exist given the breadth of the e-mails attached to the January E-mail. This is because there was no limitation.

10. Finally, Defendant's position on the attorney-client privilege is disingenuous. Trustee sent the Privilege Waiver Letter, on which Defendants' counsel was copied, and there was no objection and no "reservation of rights at that time." Defendant then chose to raise an objection and advise HR, Morabito's former counsel, that Morabito did not waive the privilege. HR is entitled to clarity on the waiver (which was provided by the Privilege Order, the *Recommendation for Order*, and the *Confirming Order*). The clarity was further provided by the Privilege Waiver Letter, without objection. Defendants' counsel created a situation where HR was unable to respond to questions that touched on the privilege thereby effectively suspending the Deposition on that basis.

11. Defendants chose, without any legal authority whatsoever, to suspend the Deposition only after unfavorable testimony started. Any argument that the HR Subpoena was untimely is not only wrong and belied by Defendants' own agreements and disclosures, but has unquestionably been waived. Trustee is entitled to (1) an order continuing the discovery cut-off in the above-captioned matter for the sole purpose of conducting the HR Deposition as requested in the Countermotion, (2) an order clarifying that the attorney-client privilege is waived; and (3) dismissal of the Defendants' Motion in its entirety; and (4) sanctions as requested in the Countermotion.

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AFFIRMATION
Pursuant to NRS 239B.030

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

Dated this 9th day of August, 2017.

GARMAN TURNER GORDON LLP

/s/ Teresa M. Pilatowicz
GERALD E. GORDON, ESQ.
TERESA M. PILATOWICZ, ESQ.
MICHAEL R. ESPOSITO, ESQ.
650 White Drive, Ste. 100
Las Vegas, Nevada 89119
Telephone 725-777-3000

Attorneys for William A. Leonard, Trustee

CERTIFICATE OF SERVICE

I certify that I am an employee of GARMAN TURNER GORDON LLP, and that on this date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **REPLY IN SUPPORT OF COUNTERMOTION FOR SANCTIONS AND TO COMPEL RESETTING OF 30(B)(6) DEPOSITION OF HODGSON RUSS LLP** on the parties as set forth below:

XXX Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, Reno, 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)

addressed as follows:

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

Dated this 9th day of August, 2017.

/s/ Ricky H. Ayala
An Employee of GARMAN TURNER GORDON LLP

Garman Turner Gordon LLP
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2017-08-11 12:51:30 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6245183

CASE NO. CV13-02663
JH, INC. et al. vs. PAUL MORABITO et al.

08/10/2017
DISCOVERY COMMISSIONER
WESLEY AYRES
M. Conway (Clerk)
RECORDED - JAVS

HEARING:
08/10/2017: Motion to Quash Subpoena, or in the Alternative for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ, LLP and Trustee's Countermotion for Sanctions and to Compel Resetting of 30(B)(6) Deposition of Hodgson Russ (HR) LLP.

APPEARANCES:
Teresa Pilatowicz, Esq. was present, telephonically, on behalf of the Plaintiff, William A. Leonard, Trustee of the Bankruptcy Estate of Paul Anthony Morabitio.
Frank Gilmore, Esq. was present telephonically, on behalf of the Defendants Snowshoe Petroleum Inc., Superpumper, Inc., Edward Bayuk, individually and as Trustee of the Edward William Bayuk Living Trust and Salvatore Morabitio.

Counsel Gilmore addressed the Court and argued in support of Defendant's Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP. Counsel discussed the Stipulation/Order in which the original discovery deadlines were reset with the parties agreeing to a close of discovery on March 31, 2016, the discussion between counsel regarding a limited extension of the close of discovery , the Vacco documents and deposition, and the redacted billing statements identifying Hudgson Russ LLP. Counsel Gilmore argued in support of the Motion to Quash Subpoena or limiting the scope of the HR deposition to the 16 emails (exhibit 5 of the Motion to Quash).
Counsel Pilatowicz addressed the Court and presented argument in Opposition to the Motion to Quash Subpoena. Counsel Pilatowicz argued that there are factually inaccurate objections as to the scope and timing of the Deposition. Counsel argued that she never agreed to any limitation on the topics for the Deposition of HR and that the Defendants never challenged the HR deposition. Counsel discussed Defendant's objection (based upon the grounds that there is no court order "explicitly waiving the attorney/client privilege with respect to Hodgson Russ' representation of Paul Morabito). Counsel argued that this objection ignores the findings of the Privilege Order, Recommendation for Order and Confirming Order.

Counsel Gilmore responded and further elaborated regarding the mandatory met and confer, further discussed exhibit 5 of the Motion to Quash and indicated that Defendants did not oppose the document subpoena but argued that the deposition and scope of deposition is at issue.

Further argument presented by Counsel Gilmore in support of Motion to Quash Subpoena, or in the Alternative for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ, LLP.
Further argument presented by Counsel Pilatowicz who argued in support of the Countermotion for Sanctions and to Compel Resetting of 30(B)(6) Deposition of Hodgson Russ (HR) LLP.

Court thanked the parties for the arguments presented, advised the parties that it had reviewed all briefs and confirmed the upcoming trial date of October 9, 2017.

COURT ORDERED: Matter taken UNDER ADVISEMENT. Recommendation to follow.

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Clerk of the Court
Transaction # 6256320

CODE NO. 1945

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

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

Plaintiff,

vs.

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

Defendants.
_____/

Case No. CV13-02663

Dept. No. B1

RECOMMENDATION FOR ORDER

Presently before the Court is a dispute over an NRCP 30(b)(6) deposition of Hodgson Russ LLP ("HR"). On July 18, 2017, a *Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP* was filed by Defendants Superpumper, Inc., Edward Bayuk, individually and as Trustee of the Edward William Bayuk Living Trust, Salvatore Morabito, and Snowshoe Petroleum, Inc. On July 24, 2017, Plaintiff William A. Leonard, as Trustee for the Bankruptcy Estate of Paul Anthony Morabito,[1] filed his *(1) Opposition to Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP; and (2) Countermotion for Sanctions and to Compel Resetting of 30(b)(6) Deposition of Hodgson Russ LLP*. Defendants filed their *Reply in Support of*

[1] In this decision, the term "Mr. Morabito" refers to Paul A. Morabito.

Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP, and Opposition to Motion for Sanctions on August 3, 2017, and the motion to quash was submitted for decision on that same date. Plaintiff's *Reply in Support of Countermotion for Sanctions and to Compel Resetting of 30(b)(6) Deposition of Hodgson Russ LLP* was filed on August 9, 2017, and the countermotion was submitted on that same date. In addition, counsel for both sides participated in a telephonic hearing on these matters with the Discovery Commissioner on August 10, 2017.

On or about January 3, 2017, Plaintiff caused a subpoena duces tecum to be served on HR. Defendants seek an order quashing that subpoena on the basis that it was issued more than eight months after the close of discovery. They also contend that good cause does not exist to extend the discovery deadline for this purpose, since Plaintiff could have obtained information from HR prior to the close of discovery.[2]

The record reflects that on January 30, 2017, the parties entered into a stipulation to continue the discovery deadline to May 31, 2017, for the purpose of conducting the depositions of Dennis Vacco, Esq., HR, and another nonparty who is not pertinent to this discovery dispute. In explaining the basis for their agreement with regard to Mr. Vacco and HR, the parties recited various facts, including the following:

> 1. WHEREAS on September 29, 2015, the Trustee caused a subpoena (the "Subpoena") to be issued to Dennis Vacco ("Vacco") requesting the production of documents on or before October 13, 2015, and scheduling the deposition of Vacco for October 20, 2015.

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[2] Plaintiff argues that Defendants lack standing to bring a motion to quash the HR subpoena, and that their motion is untimely. However, courts generally focus on the substance of a motion rather than its title. See, e.g., BBCA, Inc. v. United States, 954 F.2d 1429, 1431-32 (8th Cir. 1992) ("the substance of a motion rather than the form of a motion is controlling"); Ex Parte Lewter, 726 So.2d 603, (Ala. 2009) ("[t]he substance of a motion, not what a party has called it, determines the nature of the motion"). Defendants' motion makes clear that they are proceeding under NRCP 26(c), which certainly permits a party to oppose another party's efforts to obtain discovery from a nonparty in violation of the discovery deadline. See Lucent Techs., Inc. v. Gateway, Inc., Civil No. 07cv2000-H (CAB), 2008 WL 183637, at * (S.D. Cal. Jan. 17, 2008) (rejecting argument that party lacked standing to move to quash untimely subpoena); see also Joseph v. Linehaul Logistics, Inc., No. CV 11-114-M-JCL, 2012 WL 3779202, at * (D. Mont. Aug. 31, 2012) (subpoenas are subject to same deadlines as other forms of discovery, and party may seek protective order to preclude another party from obtaining discovery from a non-party through untimely subpoena); U & I Corp. v. Advanced Med. Design, Inc., 251 F.R.D. 667, 673 (M.D. Fla. 2008) (defendant showed good cause to quash untimely subpoenas under Rule 26(c)). While a motion for protective order also must be timely filed, Defendants have explained that the basis for their motion was not known until July 12, 2017, when Plaintiff began deposing HR's first NRCP 30(b)(6) designee. Under these circumstances, the Court finds that Defendants' motion is not precluded or untimely.

2. WHEREAS on or about October 15, 2015, Vacco produced approximately 200 pages of documents in response to the Subpoena.

. . . .

6. WHEREAS on or about February 23, 2016, the Trustee's counsel was informed there were as many as thirteen banker's boxes of potentially responsive documents in Vacco's possession that had not been previously produced (the "Additional Documents").

. . . .

10. WHEREAS the Additional Documents [from Mr. Vacco] were ultimately produced on or about October 13, 2016. On or about December 8, 2016, Vacco further produced additional documents responsive to the original document request (the "Supplemental Disclosure"). The Supplemental Disclosure caused the Trustee to issue a subpoena on Hodgson Russ seeking documents and a deposition of the person most knowledgeable of Hodgson Russ (the "Hodgson Deposition").

11. WHEREAS multiple extensions have been stipulated to and filed since the Discovery Cut-Off and the current deadline to complete outstanding discovery relating to the Additional Documents and Supplemental Disclosure is February 1, 2017.

12. WHEREAS the Trustee scheduled Vacco's deposition to be completed on January 27, 2017 but, due to Vacco's unavailability, the Trustee has been unable to complete Vacco's deposition.

13. WHEREAS the Trustee scheduled the Hodgson Deposition to be completed on January 30, 2017 but, in an effort to coordinate and limit travel for the Parties to Buffalo, has coordinated with Defendants to continue the Hodgson Deposition to be completed at the same time as the Vacco Deposition.

This stipulation was approved by the Court on February 3, 2017. On March 7, 2017, HR produced approximately 9,000 pages of documents in response to the HR subpoena, without objection. Thereafter, in another stipulation, the parties stated that they had agreed to conduct Mr. Vacco's deposition on July 10, 2017, and to conduct the HR deposition on July 12, 2017. That stipulation was approved by the Court on May 26, 2017.

The deposition of Mr. Vacco was taken on July 10-11, 2017. On July 12, 2017, Plaintiff commenced the deposition of HR's first NRCP 30(b)(6) designee, Garry M. Graber, Esq. When Plaintiff's counsel asked Mr. Graber to describe his first conversation with Mr. Morabito, Defendants' counsel objected. Although he did not instruct Mr. Graber not to answer the question, he interposed a standing objection to "any questions asked which attempt to invade the attorney/client privilege which I believe has not been affirmatively waived by a court of law, so that rather than suspend the deposition, have that issue litigated and then come back, I'm simply going to assert that objection." Counsel explained that "even in the court orders which have waived the privilege, Mr. Morabito's

privilege, for example, with respect to the Lippes Mathias firm, there was no waiver of the work product privilege." He stated that "to the extent there was work product created for the benefit of Mr. Morabito, I would also assert that we believe that privilege has not been waived and has never been waived and cannot be waived." In addition, counsel objected "to the extent that the subject matter of this deposition exceeds the 18 emails that I was provided in January," on the ground that discovery had closed prior to service of the HR subpoena. After other counsel made statements regarding this matter, Defendants' counsel conferred with HR's designee. Defendants then suspended the HR deposition based upon the objection that Plaintiff was exceeding the scope of the examination that counsel had agreed upon, and based upon concerns over applicability of the attorney-client privilege with regard to HR and Mr. Morabito.

These facts show that Defendants agreed on two occasions to permit HR's NRCP 30(b)(6) deposition after the discovery deadline. Moreover, both of these stipulations were approved by the Court, and HR has produced documents in response to the subpoena. Under these circumstances, the doctrines of estoppel and waiver preclude Defendants from arguing that Plaintiff's subpoena to HR should be quashed on the basis that it was untimely. Whether or not Plaintiff knew or should have known about HR's involvement in the alleged fraudulent transactions prior to earlier discovery deadlines, Defendants expressly agreed to permit HR's NRCP 30(b)(6) deposition to occur with full knowledge that those deadlines had passed. Regardless of whether Plaintiff could have obtained information about HR's involvement before the discovery deadline, he is permitted to proceed with HR's deposition pursuant to the parties' stipulations and the Court's orders.

Alternatively, Defendants argue that the scope of the HR deposition should be limited "to only those emails which were agreed to in January when counsel met and conferred." Defendants state that they decided to forego motion practice over the HR subpoena based upon the representation by Plaintiff's counsel that the HR deposition would be limited to sixteen emails she provided to their counsel on January 24, 2017. Defendants argue that they "are entitled to strict reliance on an agreement among counsel as to the limitations of a deposition after a meet and confer."

The Court does not question the veracity of Defendants' belief that an agreement was reached with Plaintiff's counsel regarding the scope of the HR deposition. Nevertheless, DCR 16 expressly provides as follows:

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

Notwithstanding their belief, Defendants have not provided the Court with a written agreement, signed by Plaintiff's counsel, in which Plaintiff agreed to limit the scope of the HR deposition. The record does not reflect entry of an order to that effect. The stipulation and orders entered with regard to the HR deposition demonstrate only that the parties agreed to extend the discovery deadline so that Plaintiff could conduct its NRCP 30(b)(6) deposition of HR, without any stated limitation. Further, Plaintiff did not withdraw or otherwise modify the HR subpoena.[3] Thus, the Court cannot enforce the agreement that Defendants believe was reached with Plaintiff regarding the scope of the HR deposition.[4]

Defendant emphasizes statements made by Plaintiff's counsel in an email sent to Defendants' counsel on January 24, 2017:

> Attached please find the emails that I intend to discuss at the deposition of Hodgson Russ. I intend to provide Hodgson Russ with the notice of waiver of privilege tomorrow.

Sixteen emails involving HR that had been produced by Mr. Vacco in December 2016 were attached to that email. Defendants state that "[a]s far as Defendants' counsel was concerned, the

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[3] In fact, Plaintiff served Defendants with amended deposition notices regarding HR's NRCP 30(b)(6) in March and April 2017, and those notices included the same descriptions of topics to be addressed at the deposition as the original deposition notice. Defendants essentially contend that those notices could be ignored based upon the unwritten agreement between counsel to limit the scope of this deposition. However, those amended notices should have alerted Defendants to the possibility that Plaintiff did not share their belief regarding limitations on the scope of this deposition.

[4] This point effectively moots Defendants' argument that Plaintiff should not be permitted to examine HR on topic areas which Plaintiff inexcusably failed to explore prior to the close of discovery. The Court appreciates that in earlier stipulations to extend the discovery deadline, the parties agreed that the extension applied only to the deposition of Mr. Vacco and "additional discovery [that] is required based on new information contained in or discovered from the Additional Documents or Continued Vacco Deposition." Whether Plaintiff had information prior to the close of discovery that was sufficient to alert him to the possible involvement of HR in the alleged fraudulent transactions is a debatable point. However, the Court need not resolve that issue to resolve the pending motions. For reasons explained in the text, the Court is precluded from finding that Plaintiff agreed to limit the scope of the HR deposition.

representation from Trustee's counsel about the mails that she 'intended to discuss at the deposition of Hodgson Russ' was a confirmation that the subpoena and deposition notice had been voluntarily limited and that any deposition would be proceedings on that basis."

But to the extent that Defendants are arguing that this email proves the existence of an agreement to limit the scope of the HR deposition, the Court cannot agree. First, the email does not purport to set forth any limitation. It simply identifies documents that Plaintiff's counsel intends to discuss at the HR deposition, without stating that the examination will be limited to those documents. Second, Plaintiff's counsel has stated that these documents were sent to Defendants' counsel in response to his request to see the specific documents produced by Mr. Vacco in December 2016 that led to issuance of the HR subpoena. Defendants disagree with this explanation of why the emails were sent to him, but Plaintiff's explanation remains plausible.[5] Third, when this email was sent, Plaintiff had not yet received documents from HR in response to the subpoena. Plaintiff contends that its counsel would not have agreed to limit the scope of the HR deposition to sixteen emails before reviewing the documents to be produced by the deponent, and this point is persuasive.[6] Fourth, this is precisely the kind of situation that DCR 16 was intended to address—a dispute between parties, or their counsel, about whether an agreement was reached, or about the terms of an unwritten agreement. Without a signed, written agreement to limit the scope of the HR deposition, the Court is precluded from finding that such an agreement was entered into between the parties. See Humana, Inc. v. Nguyen, 102 Nev. 507, 509, 728 P.2d 816, 817 (1986) ("assuming arguendo that there was an actual agreement, it was neither reduced to a signed writing nor entered by consent as an order, so the trial court could not properly have considered it" under DCR 16); see also Resnick v. Valente, 97 Nev. 615, 616-17, 637 P.2d 1205, 1206 (1981) ("[b]y requiring that all

[5] Put differently, the Court has been presented with two reasonable explanations for why the emails were sent to Defendants' counsel. Without DCR 16, the Court would be in the difficult position of trying to determine which side's explanation is correct. DCR 16 avoids that result by placing the onus of executing a clear agreement on the party who wishes to enforce that agreement.

[6] In his reply brief, Plaintiff states that "[i]n any event, and for the avoidance of doubt, the only additional documents, other than those attached to the January E-mail, that are to be used at the Deposition are documents that came from the HR Production" in March 2017.

settlements either be reduced to a signed writing or be entered in the court minutes following a stipulation, the court has an efficient method for determining genuine settlements and enforcing them," so this requirement "does not thwart the policy in favor of settling disputes; instead, it enhances the reliability of actual settlements").

In the countermotion, Plaintiff seeks the imposition of sanctions against Defendants arising out of their decision to suspend the HR deposition, and an award of expenses incurred in connection with the motion and countermotion. Plaintiff also seeks an order further continuing the discovery deadline to permit HR's NRCP 30(b)(6) deposition. Finally, he seeks an order confirming that Defendants may not assert any attorney-client privilege as to the topics identified in the HR subpoena.

Shortly after commencement of the HR deposition, Defendants' counsel made a statement in which he made clear that he was not instructing his client not to answer questions, but that he wanted to state certain objections for the record:

> I am not going to instruct the witness not to answer questions which I believe would otherwise be attorney/client privilege, would be seeking attorney/client privileged information. However, I am going to make a standing objection that any questions asked which attempt to invade the attorney/client privilege which I believe has not been affirmatively waived by a court of law, so that rather than suspend the deposition, have that issue litigated and then come back, I'm simply going to assert that objection.

Defendants' counsel also stated his belief that Plaintiff had agreed to limit the scope of the deposition to the emails sent to Defendants' counsel on January 24, 2017. He therefore asserted another objection to the extent that the scope of the examination went beyond the matter contained in those emails. In addition, HR's counsel made clear that he was not going to direct his client not to answer any proper question on the basis of either the attorney-client privilege or the work-product doctrine.

After Plaintiff's counsel stated her client's position on these matters, Defendants' counsel briefly conferred with his client, Salvatore Morabito, while HR's NRCP 30(b)(6) designee conferred with HR's counsel. When they returned, Defendants' counsel stated that the deposition would be

suspended on the grounds that Plaintiff intended to examine HR's designees about documents in addition to the sixteen emails sent to him in January, and because of concerns over the attorney-client privilege:

> So because defendants are not adequately prepared and have not had the opportunity to review the full scope of the testimony and the documents that plaintiff's counsel now intends to pursue, defendants feel like they are forced to suspend the deposition so that they can go back and assert any protections, scope related or otherwise, before the depositions can be reconvened.
>
> Secondarily, off the record counsel have discussed and agreed that there will be no request to reconvene the Hodgson Russ depositions until there is either a satisfactory stipulation between the parties with respect to the scope of the attorney/client privilege or there is a court order definitively outlining the scope of the attorney/client privilege.
>
> It was my representation to Hodgson Russ counsel that obviously the privilege is my client's privilege to maintain or to waive, at least that's their position. The trustee's position is that the trustee owns the privilege and can be waived or maintained, but I wanted to make it clear that the onus would be upon my office and my clients to litigate and assert any privilege that was related to the representation of Hodgson Russ and Paul Morabito.

Defendants' counsel then had his client confirm that he agreed with these statements, and that he was instructing counsel to suspend the deposition on those grounds.

Notwithstanding statements made at the HR deposition, Defendants have not presented any argument concerning the attorney-client privilege in their motion, nor do they seek any relief in that regard. In their opposition to Plaintiff's countermotion, Defendants make clear that they made privilege-related objections at the HR deposition "for the record to preserve the objections pending appeal." They also confirm that "Defendants do not seek a protective order on the basis of the attorney-client privilege, and the Defendants did not suspend the deposition on that basis."[7] Therefore, the Court finds that the HR deposition must proceed in accordance with all applicable court decisions addressing Plaintiff's right to seek information that otherwise would be protected

[7] The latter point is supported by Defendants' counsel's initial statement that he would not instruct the HR designee not to answer a question based upon the attorney-client privilege. However, toward the end of the examination, counsel asked his client to confirm that "your instruction remains that we are to suspend the deposition until such time as the issue related to the scope of the attorney/client privilege and to revisit the issue related to the meet and confer that occurred in January, it's still your position and your instruction that we should suspend the depositions today." The client's confirmation of that statement suggests that the decision to suspend the deposition was based, in part, on concerns about the extent to which Defendants could assert one or more privileges during the examination.

from disclosure by an evidentiary privilege. If Defendants wish to assert a standing objection to preserve the issue for appeal, they may do so.[8]

With regard to Plaintiff's request for sanctions, the Court finds that Defendants did not have a legitimate basis for suspending the HR deposition on July 12, 2017. At a minimum, even if Defendants believed that Plaintiff was not entitled to ask questions based upon documents other than the emails disclosed to their counsel on January 24, 2017, Defendants should have permitted Plaintiff's counsel to question the HR designee about those emails.[9] Moreover, while the Court appreciates Defendants' belief that their counsel had an agreement to limit the HR deposition to those emails, it cannot find that suspension of the deposition was permissible on that basis absent evidence sufficient to support a finding that such an agreement actually existed. In addition, to the extent that privilege issues might have formed part of the basis for Defendants' decision to suspend the deposition, the failure to raise any arguments based upon privilege issues in their motion, reply brief, or opposition to the countermotion effectively invalidates the decision to suspend the deposition on that basis.

Therefore, Plaintiff is entitled to an award of sanctions for all additional expenses incurred by Plaintiff as a result of Defendants' suspension of the deposition. Specifically, Plaintiff may recover the reasonable attorney's fees and the cost of the court reporter incurred for the July HR deposition.[10] In addition, Plaintiff may recover all reasonable travel costs associated with the rescheduled HR deposition.[11] Finally, Plaintiff is entitled to recover the reasonable expenses incurred in connection with this discovery dispute.

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[8] To be clear, neither HR nor Defendants may disrupt Plaintiff's examination through the use of multiple objections or statements regarding the position of HR or Defendants in connection with privilege issues.

[9] The transcript of the deposition does not reveal any statement to that effect from Defendants' or HR's counsel. Rather, Plaintiff's counsel was informed that Defendants had decided to suspend the deposition.

[10] Plaintiff remains responsible for its own attorney's fees and court reporter costs associated with the rescheduled HR deposition, since it would have had to incur those expenses if the HR deposition had properly proceeded in July.

[11] Plaintiff is not entitled to recover travel expenses incurred in connection with the July deposition, since another deposition was taken during that trip on July 10 and 11, 2017.

ACCORDINGLY, Defendants' *Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP* should be DENIED.

FURTHER, Plaintiff's *Countermotion for Sanctions and to Compel Resetting of 30(b)(6) Deposition of Hodgson Russ LLP* should be GRANTED in part, and DENIED in part.

IT SHOULD, THEREFORE, BE ORDERED that Plaintiff is entitled to proceed with the NRCP 30(b)(6) deposition of Hodgson Russ LLP on the topics set forth in the subpoena previously served upon that nonparty; the Court presumes that the parties will be able to coordinate with each other and with Hodgson Russ LLP to schedule the deposition for an appropriate date and time.

IT SHOULD FURTHER BE ORDERED that the NRCP 30(b)(6) deposition of Hodgson Russ LLP must proceed in accordance with all applicable court decisions addressing Plaintiff's right to seek information that otherwise would be protected from disclosure by an evidentiary privilege.

IT SHOULD FURTHER BE ORDERED that Plaintiff is entitled to recover from Defendants, collectively, the reasonable attorney's fees and the cost of the court reporter incurred for the July deposition of Hodgson Russ LLP; these expenses must be paid within a reasonable time after Plaintiff provides Defendants with an itemized statement of these expenses.

IT SHOULD FURTHER BE ORDERED that Plaintiff may recover from Defendants, collectively, all reasonable travel costs associated with the rescheduled HR deposition; these expenses must be paid within a reasonable time after Plaintiff provides Defendants with an itemized statement of these expenses.

IT SHOULD FURTHER BE ORDERED that Defendants, collectively, pay to Plaintiff the sum of $3,000, as and for the reasonable expenses incurred in connection with this discovery dispute.

DATED: This 17th day of August, 2016.

WESLEY M. AYRES
DISCOVERY COMMISSIONER

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 17th day of August, 2017, 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

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

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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Gabrielle A. Hamm, Esq.
Erick T. Gjerdingen, Esq.
Michael R. Esposito, Esq.
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Beth Hemmila
Administrative Secretary

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Special Counsel to Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF

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

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, vs. SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, and individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	**CASE NO.: CV13-02663** **DEPT. NO.: 1** **MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff William A. Leonard, as Chapter 7 Trustee of the Bankruptcy Estate of Paul Anthony Morabito ("Plaintiff"), by and through his counsel, the law firm of Garman Turner Gordon LLP, hereby moves (the "Motion") this Court for partial summary judgment regarding the First Claim for Relief set forth in the Amended Complaint filed on May 15, 2015 (the "Complaint"). Specifically, Plaintiff requests summary judgment that the transfers described in

the Complaint (the "Transfers") are actually fraudulent, and for a judgment on account thereof. Plaintiff acknowledges that limited genuine issues of material fact remain on the amount of actual damages as it relates to certain of the Transfers and therefore, requests that the time set for trial starting on October 9, 2017 in this matter be reserved for evidence on those issues.

This Motion is brought pursuant to the provisions of Nev. R. Civ. P. 56. The Motion is supported by the attached memorandum of points and authority, the *Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment* ("SSOF") filed concurrently herewith, the other papers and pleadings on file herein, of which Plaintiff requests this Court take judicial notice, and any oral argument the Court may permit at the hearing of this matter.

Dated this 17th day of August 2017.

GARMAN TURNER GORDON LLP

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

Special Counsel for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

I.
SUMMARY OF THE ARGUMENT

On September 13, 2010, the Honorable Brent T. Adams of the Second Judicial District Court announced an oral judgment in the amount of $85,871,364.75 against Paul Morabito ("Morabito") and in favor of the JH Inc. ("JH"), Jerry Herbst, and Berry Hinckley Industries ("BHI," and together with JH and Jerry Herbst, the "Herbst Parties"). Within days after the announcement, Morabito shipped $6,000,000 off shore and Morabito, his then-life partner, Edward Bayuk, individually and as trustee of the Edward William Bayuk Living Trust ("Bayuk"), his brother, Salvatore Morabito ("Sam"), Superpumper, Inc. ("Superpumper"), and

Snowshoe Petroleum, Inc. ("Snowshoe," and together with Bayuk, Sam, and Superpumper, the "Defendants") collectively engaged in a scheme to transfer all of Morabito's assets such that by the time the final judgment in excess of $144,000,000 was entered, the Herbst Parties would be left with nothing upon which they could collect. The scheme was ultimately successful. While Morabito continued to live his extravagant lifestyle with assets he had transferred to others, he retained no assets on which his creditors could execute their judgment. In June 2013, the Herbst Parties were forced to commence an involuntary bankruptcy proceeding (the "Bankruptcy Case") against Morabito, and Plaintiff, appointed the trustee of Morabito's bankruptcy estate (the "Estate"), is left to chase unlawful transfers to provide some recovery for the more than $80 million in claims on file in the Bankruptcy Case.

Plaintiff seeks to avoid and recover three sets of transfers through the Complaint: (1) Morabito's interests in two real properties located in Laguna Beach, California (the "Real Property Transfers"), (2) Morabito's 50% interest in Baruk Properties, LLC (the "Baruk Transfer"), and (3) Morabito's 80% interest in Superpumper, Inc. (the "Superpumper Transfer").

According to Morabito and Defendants, the Transfers were completed to separate Bayuk's interest from Morabito's, and in doing so, make it easier for Morabito's assets to be executed upon by his creditors. Such position is belied by the facts that the Herbst Parties were ultimately unable to collect their Judgment because of the Transfers. Morabito's and Defendants' intentions with respect to the Transfers, is obvious: to delay, hinder, and defraud the Herbst Parties' collection efforts. Before the Transfers, the Herbst Parties had access to multiple assets and could have collected anywhere between $9,000,000 and $14,000,000 as a result thereof. After the Transfers, the Herbst Parties were only able to collect $1,300,000 from the transferred assets.

That the Transfers were fraudulent is obvious when this Court considers the badges of fraud and Morabito's actions in connection with and after the Transfers. Morabito transferred the assets to his brother and boyfriend. He did so without advising the Herbst Parties, who at the time had just been awarded an $85 Million judgment. He made sure that he was left with nothing against which the Herbst Parties could collect, going so far as to exchange the limited

"value" he did receive for foreign assets to further avoid collection efforts. The alleged "value" received was non-existent as it was, in large part, illusory promissory notes that served no purpose other than to allow Morabito to continue his *status quo*, while keeping valuable assets from the Herbst Parties and frustrating their collection efforts. Finally, and perhaps most overwhelming, following the Transfers, Morabito continued to use the transferred assets for his own benefit by using them to settle claims against him, using them to bargain for business deals, and using them to attempt to secure financing for his benefit. Thus, the Transfers were actually fraudulent, as they meet the overwhelming majority of the badges of fraud set forth in the Uniform Fraudulent Transfer Act ("UFTA"), which Nevada has adopted and codified in Chapter 112 of Nevada Revised Statutes ("NRS").

Ultimately, Defendants' actions caused the Herbst Parties to be left with little against which to collect except the Reno Property (as defined herein), albeit at a much lessor value than Morabito claimed. As a result, creditors of Morabito's Estate were left *without* the same recovery that existed prior to the Transfers. There is no genuine issue of material fact that the Transfers occurred or that they were fraudulent. Likewise, with the sole exception of the actual value of the Reno Property and actual value of Superpumper, there is no genuine issue of material fact of the damages suffered as a result of the Transfers. Therefore, this Court can and should grant summary judgment finding actual fraud and awarding damages as set forth herein. The Court may then set a trial on the limited remaining issues of value of the Reno Property and Superpumper as of the time of the Transfers to determine the amount of a final judgment in favor of Plaintiff and against Defendants in this matter.

II.
STATEMENT OF RELEVANT FACTS

A. The Court Announces an $85 Million Judgment Against Morabito.

1. In or about 2007, a dispute developed between JH, Inc. ("JH"), Jerry Herbst, and Berry Hinckley Industries ("BHI" and together with JH and Jerry Herbst, the "Herbst Parties") on the one hand, and Morabito and Consolidated Nevada Corporation ("CNC") on the other,

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regarding the sale of the BHI stock to JH. *See* SSOF ¶ 1.

2. On December 3, 2007, Morabito and CNC filed a lawsuit against the Herbst Parties captioned *Consolidated Nevada Corp., et al. v. JH, et al*. in the Second Judicial District Court (the "State Court"), Case No. CV07-02764 (together with all claims and counterclaims, the "State Court Action"). *See* SSOF ¶ 2.

3. The Herbst Parties filed numerous counterclaims in the State Court Action against Morabito and CNC, including fraud in the inducement, misrepresentation, and breach of contract relating to an Amended and Restated Stock Purchase Agreement ("ARSPA"). *See* SSOF ¶ 3.

4. Ultimately, Judge Brent Adams found that Morabito and CNC fraudulently induced the Herbst Parties to enter into the ARSPA and ruled in favor of the Herbst Parties against Morabito on other fraud-based claims. *See* SSOF ¶ 4.

5. Specifically, as to the fraud, Judge Adams found:

a. Clear and convincing evidence shows that there was no basis whatsoever for the contents of the working capital estimate other than Mr. Morabito's decision to create it.

b. There is not one piece of paper that has been produced in over 5,500 exhibits in this trial, to the Independent Accountants, during discovery or anywhere else, to support the exaggerated value of the company as set forth in the working capital estimate

c. The Court finds by clear and convincing evidence that Mr. Morabito never for a single second had any intention to perform the services of construction manager.

d. Mr. Morbaito's representation under the CMA were intentionally false.

e. Mr. Morabito's representations were made for the purpose of inducing the purchase of the development cites by JH.

See SSOF ¶ 5.

6. On September 13, 2010, the Court announced an oral judgment of $85,871,364.75 with further proceedings to take place regarding the amount of punitive damages (the "Oral Judgment"). *See* SSOF ¶ 6.

7. On October 12, 2010, the State Court entered its findings of fact and conclusions of law (the "FF&CL") which set forth the legal and factual basis for a forthcoming written State

Court judgment, including fraud in the inducement. *See* SSOF ¶ 7.

8. On August 23, 2011, the State Court entered a final judgment awarding the Herbst Parties total damages in the amount of $149,444,777.80 for actual fraud, representing both compensatory and punitive damages as well as an award of attorneys' fees and costs (the "Final Judgment"). *See* SSOF ¶ 8.

B. Immediately After the Oral Judgment, Morabito Begins Planning to Transfer His Assets to Avoid Liability on the Eventual Final Judgment.

9. Immediately after the Oral Judgment, Morabito (on behalf of himself and his trust, the Arcadia Living Trust ("Arcadia")), his boyfriend, Bayuk (on behalf of himself and the Edward William Bayuk Living Trust), his brother, Sam, Superpumper, and Snowshoe engaged in a series of transactions designed to hinder, delay, and defraud the Herbst Parties.

10. *Less than two days after the Oral Judgment*, Morabito engaged two separate law firms in New York to formulate a plan for divesting Morabito of his assets while retaining all of the benefits of his assets. Specifically, Morabito retained Dennis Vacco ("Vacco") at Lippes Mathias Wexler & Friedman ("LMWF"), and Sujata Yalamanchili ("Yalamanchili") and Garry Graber ("Graber") at the law firm of Hodgson Russ ("HR").

11. Graber testified as to the goals of his retention:

> Q. And what were you asked to do for Morabito?
>
> A. I was asked to consider whether there were ways in which he could evade the judgment through bankruptcy, or I shouldn't say evade the judgment. That's not correct. ***If there are ways he could protect himself against -- protect his assets and/or escape liability on account of the judgment.***

See SSOF ¶ 10. (emphasis added).

12. HR had several ideas. In an e-mail dated September 15, 2010 – just two days after the Oral Judgment – Yalamanchili wrote to Morabito:

> I caught up with Garry (who is back in Buffalo today) on our conversation from yesterday.
>
> Garry has a number of additional ideas, ***including a possible marital split between Paul and Edward pursuant to which Edward could retain some***

> ***of Paul's assets***. We need to better understand California domestic partner laws, first.

See SSOF ¶ 11 (emphasis added).

13. Morabito clarified his intent to protect all tangible assets, right down to his clothes and airline miles, with Graber:

> Garry
>
> I have a few questions.
>
> Edward and I plan on changing our primary residence from Reno to Laguna Beach.
>
> Change DMV, voter registration, cancel Nevada club memberships, burial plot, resign from State Board etc
>
> Should Edward buy our household furniture etc from me for the Reno and Palm Springs houses that are not our primary? We have receipts from 2006 for everything worth around $225,000 new.
>
> Also, what about my clothes? I was in the hospital for 5 months last year and came out 200 pounds lighter. I spent $200,000 on a new wardrobe since November.
>
> Finally, are my 2 million American Express airline miles something I can do something with or is that an asset, too?

(the "Graber E-mail"). *See* SSOF ¶ 12.

14. By September 20, 2010, Yalamanchili was advising her firm that she had agreed to "help [Morabito] with some of the asset protection strategies he will need." *See* SSOF ¶ 13.

15. To that end, and in discussing the "quick run-down of Paul's assets" with Graber, Yalamanchili made clear:

> CoWest Co owns 100% of the stock of Superpumper, Inc., an Arizona corporation. This is a profitable business which owns and operates 11 gas stations an [sic] convenience stores in Arizona. Paul, Edward, and Sam all draw "healthy" salaries from this company (e.g. 250k to 500k). I would like to preserve this business and protect it from the Herbsts since it pays salaries to Edward, Sam and Paul and it is a strong, going business.

See SSOF ¶ 14.

16. That same night, after what was clearly a heated call between Morabito and his counsel as to the Transfers and problems associated therewith, Graber wrote to Morabito:

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> And I apologize for my part in the exchange. I feel as though I am being asked under very rushed circumstances with very scant information to come up with a ***foolproof strategy*** in a complicated area of law in which "foolproof" is impossible to achieve and then being prevented from explaining the issues and obstacles involved.

See SSOF ¶ 15 (emphasis added).

17. Morabito is not a stupid man. After being advised that it was improper to transfer assets following a judgment to hinder, delay, and defraud a creditor, Morabito made clear his strategy for protecting the Transfers:

> Dennis & Sujata
>
> Garry asked what my rationale was to do this – and that I would be asked.
>
> Judge Adams specifically exonerated Edward and Sam. I hold assets with them, and they had long standing options to own a majority of Superpumper, Inc.
>
> We agreed amongst ourselves that I was best standing alone with my assets, and on advice of Counsel we sought independent, third party appraisers to do just that.
>
> I have no doubt it will be challenged in court – and they may try and come up with their own appraisals. But in the end, the underlying "selling for value" will be allowed.
>
> Snowshoe Petroleum, Inc. will be an Erie County, New York company. Edward is going to be a resident of Los Angeles and Orange County, California.
>
> ***The Herbsts no longer have home court, good old boy advantage.***

See SSOF ¶ 16 (emphasis added).

18. Yalamanchili cautioned Morabito at that time:

> You need to be very clear on what the law says, Paul. I don't think it simply says you can transfer assets for value. I think Garry is trying to say that Fraud. Conveyance laws are complicated and they look at a lot of factors, including whether you have an intent to frustrate your creditors. I am not an expert in this area but I want to be very clear on what the law says.

See SSOF ¶ 17.

19. Morabito never even pretended that he was not trying to frustrate his creditors, responding:

> Exactly. It allows sale. If you look at what we are doing, we end up in the exact same position with stand alone assets.

See SSOF ¶ 18.

20. Shockingly, despite his constant e-mails dictating exactly how his attorneys would transfer his assets to hinder the Herbst Parties' collection efforts, even challenging his attorneys when they advised as to the consequences of his actions, Morabito later claimed:

> Q. So is it a fair assessment that you told [Vacco] split everything up, and then he just gave you documents to sign and that was your involvement in it?
>
> Morabito: Effectively, I mean, I wasn't involved – I mean, I think I may have identified one – I – I mean, we didn't – I don't know any of the people involved. I never met any of the people involved. I wasn't involved in any of this process, so Mr. Vacco directed the whole thing.

See SSOF ¶ 19.

C. Morabito Starts to Transfer His Assets to Avoid Collection.

1. The $6,000,000 Sefton Trustees Transfer.

21. On September 15, 2010, just *two days* after the Oral Judgment, Morabito transferred $6 million (the "Off-Shore Funds") to an entity known as Sefton Trustees ("Sefton"). *See* SSOF ¶ 20.

22. Morabito confirmed that Sefton is an offshore account. *See* SSOF ¶ 21. However, he then claimed that, notwithstanding the Oral Judgment against him just days before, that (1) he transferred the Off-Shore Funds to Sefton to pay the debts owed by a prior boyfriend, Mr. Marsland, through no documentation regarding the debts or that Morabito has any exposure for the debts has ever been produced and (2) he has no recollection of making this $6 million transfer to Sefton. *See* SSOF ¶ 22.

2. Morabito Exchanges His Majority Interest in the Laguna Properties for Bayuk's Minority Interests in a Reno Property.

23. Immediately prior to the Oral Judgment, Morabito and Bayuk, through their respective trusts, owned three real properties – (1) 371 El Camino del Mar, Laguna Beach, California (the "El Camino Property"), (2) 370 Los Olivos, Laguna Beach, California (the "Los

Olivos Property" and, together with the El Camino Property, the "Laguna Properties"), and (3) 8355 Panorama Drive, Reno, Nevada (the "Reno Property," and together with the Laguna Properties, the "Real Properties"). *See* SSOF ¶ 24.

24. Specifically, Morabito[1] owned 70% of the Reno Property, 75% of the El Camino Property and 50% of the Los Olivos Property. Bayuk owned the remaining interests. *See* SSOF ¶ 25.

25. On September 27, 2010, *just two weeks* after the Oral Judgment, Morabito and Bayuk executed a *Purchase and Sale Agreement*, which was later amended on September 29, 2010 (as amended, the "PSA"), for the transfer of the Real Properties. *See* SSOF ¶ 26.

26. Pursuant to the PSA, Morabito purported to sell his 75% and 50% interests in the Laguna Properties in exchange for Bayuk's 30% interest in the Reno Property (the "Real Property Transfers"). The transaction included Morabito providing a $150,000 credit to Bayuk for a theater system in the Reno Property and $45,000 for excess water rights appurtenant to the Reno Property. *See* SSOF ¶ 27.

27. In other words, following the Real Property Transfers, Bayuk owned the Laguna Properties, and Morabito owned the Reno Property.

28. According to Morabito and Bayuk, the value of the Laguna Properties, after deduction for mortgages, was $1,933,595. Specifically, the Los Olivos Property was valued[2] at $854,954, and the El Camino Property was valued at $1,078,641. *See* SSOF ¶ 28.

29. The valuation of the Reno Property is heavily disputed. According to the Debtor and Bayuk, the value of the Reno Property was $4,300,000 as of September 30, 2010. *See* SSOF ¶ 29.

30. According to Plaintiff, the value of the Reno Property, as of September 30, 2010, was only $2,000,000. The Reno Property was also subject to a $1,028,864 mortgage. *See* SSOF ¶ 30.

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[1] For purposes of this Motion, Morabito and Arcadia are treated as one and the same, and Bayuk and the Bayuk Trust are treated as one and the same.

[2] This value is net of existing mortgages on the Laguna Properties.

31. The differences in the Reno Property valuation are critical. By over-inflating the value of the Reno Property, Morabito gave the appearance that he was retaining more value than he actually was. This allowed the justification, at least on paper at the time, that Bayuk's retention of the Laguna Properties was equal in value to Morabito's retention of the Reno Property.

32. Morabito sold the Reno Property in December 2012 (more than two years after these valuations) for only $2,600,000. *See* SSOF ¶ 31.

33. Along with the real property, Morabito also transferred all personal property at all of the real properties to Bayuk. Critically, Morabito purported to sell all of the personal property in the Reno Property, despite the fact that Morabito retained that real property, for a payment of $29,380.00. This is the same personal property that, in the Graber e-mail just two weeks before, Morabito indicated was purchased for $225,000. Confusingly, Morabito also testified in March 2015 that, as of April 2012, he had furniture and assets in the Reno Property worth $1 Million. Morabito claimed that he would periodically sell this property to Bayuk (long after the Transfers and the alleged sale) in exchange for his living expenses. *See* SSOF ¶ 32.

3. Morabito Exchanges His 50% Equity Interest in Baruk Properties, LLC for an Illusory Promissory Note.

34. Immediately prior to the Oral Judgment, Morabito and Bayuk each owned 50% in a real estate holding company called Baruk Properties, LLC, a Nevada limited liability company ("Baruk"). *See* SSOF ¶ 33.

35. Baruk owned four real properties: 1461 Glenneyre, Laguna Beach, CA ("1461 Glenneyre"); 570 Glenneyre, Laguna Beach, CA ("570 Glenneyre"), 1254 Mary Fleming, Palm Springs, CA (the "Palm Springs Property"), and 49 Clayton, Sparks, NV (the "Sparks Property," and collectively, the "Baruk Properties"). *See* SSOF ¶ 34.

36. Morabito and Bayuk obtained appraisals: (1) valuing 1461 Glenneyre at $1,400,000; (2) valuing 570 Glenneyre at $2,500,000, or $1,129,021 after deduction for the mortgage on property; and (3) valuing the Palm Springs Property at $1,050,000, or $705,079 after deduction for the mortgage. *See* SSOF ¶ 35.

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37. The Sparks Property had a value of $75,000 as of September 30, 2010. *See* SSOF ¶ 36.

38. Thus, as of September 30, 2010, the collective value of the Baruk Properties, and as a result, of Baruk, was $3,309,100. Consequently, Morabito's 50% interest was worth $1,654,550.

39. On October 1, 2010, *just two and half weeks* after the Oral Judgment, Morabito transferred his 50% membership interest in Baruk to Bayuk through the *Membership Interest Transfer Agreement* (the "Baruk Transfer"). *See* SSOF ¶ 37.

40. In exchange Bayuk purportedly provided a promissory note in the amount of $1,617,050 to Morabito (the "Baruk Note"). *See* SSOF ¶ 38.

41. Immediately after the Baruk Transfer, on October 4, 2010, Bayuk merged Baruk Properties, a Nevada entity, into Snowshoe Properties, LLC, a California limited liability company ("Snowshoe Properties"),[3] and transferred the Baruk Properties to Snowshoe Properties. *See* SSOF ¶ 39.

42. Immediately after that, Bayuk transferred the Palm Springs Property from Snowshoe Properties to the Bayuk Trust. *See* SSOF ¶ 40.

43. The Baruk Note was almost immediately assigned (the "Woodland Assignment") by Morabito to Woodland Heights ("Woodland"), a Canadian entity owned by Morabito's father, purportedly in exchange for an interest in Woodland. *See* SSOF ¶ 41.

44. Despite the Woodland Assignment, Morabito and Bayuk now contend that the Baruk Note was not transferred, and Bayuk cannot recall ever making any payments to Woodland. *See* SSOF ¶ 42.

45. The terms of the Baruk Note required principal and interest payments over 360 months in equal monthly installments of $7,7204.04 accruing interest at 4%. *See* SSOF ¶ 43.

46. However, Bayuk testified that he was erratic with paying. In fact, according the Bayuk, Bayuk would just "give [Morabito] money whenever he needs it. He's a friend." *See*

[3] Snowshoe Properties is distinct from Snowshoe Petroleum.

SSOF ¶ 44.

47. Bayuk's and his agents' testimony regarding the Baruk Note has been contradictory:

a. Bayuk testified that the Baruk Note was satisfied in full based on a loan ledger (the "First Ledger") and amortization schedule (the "Amortization Schedule") provided by his accountant, Stanton Bernstein ("Bernstein").

b. According to the First ledger, $735,724.75 was paid in 2012, $531,600 was paid in 2013, $579,362.62 was paid in 2014, and $101,526.70 was paid through March 2015.

c. Bayuk later testified that the First Ledger was wrong, and he produced another, wildly different ledger (the "Second Ledger").

d. According the Second Ledger, $567,009.26 was paid in 2010, $273,412.88 was paid in 2011, $826,232.49 was paid in 2012, and $129,400.00 was paid in 2013.

e. According to the Amortization Schedule, $735,724.75 was paid in 2012 and $1,029,510.57 was paid in 2013.

f. In November 2011, Morabito instructed Vacco: "On this, I have the note that I sold my Dad. Cancel it, convert it back into a 50% share interest in Snowshoe Properties, LLC," proving not only that no payments could have been made prior to November 2011, but that the assignment to Woodland was just another sham.

g. On May 23, 2012, Morabito submitted a Personal Financial Statement to Bank of America ("BofA") in connection with the BofA Settlement (defined herein) listing as an asset a "$1,750,000 Note Receivable" due from Bayuk. Morabito acknowledged that according to the Personal Financial Statement, as of 2012, Bayuk owed him $1.75 million under the Baruk Note, proving that no payment could have been made prior to 2012.

See SSOF ¶ 45.

4. Morabito Transfers His 80% Interest in Superpumper, Inc. for a Small Cash Payment and Another Illusory Promissory Note.

48. Immediately prior to the Oral Judgment, Morabito owned a 100% interest in Consolidated Western Corporation ("CWC"), which owned an 80% interest in Superpumper. *See* SSOF ¶ 46.

49. Prior the Oral Judgment, Morabito consistently represented that his interest in Superpumper was worth at least $20,000,000:

a. In a May 2009 financial statement provided to Superpumper's auditors, Gursey Schneider ("Gursey") Morabito listed the value of his interest in Superpumper at $20,000,000.

b. In March 2010, Morabito confirmed that the value his interest was still $20,000,000, stating to Gursey: "Here is the last PFC done for me – and I can represent that nothing has materially changed."

c. On March 10, 2010, Morabito sent an e-mail in connection with a proposed deal involving Superpumper and ExxonMobil stating that "My intention is to contribute my existing Arizona (11 stores) and Nevada (51% of the truck stop/casino) businesses at a FMV of approximately $40 million."

d. On May 20, 2010, Morabito delivered an e-mail to Vacco in connection with a proposal to place a binding bid for ExxonMobil Chicago stores, instructing: "Arrange paperwork for me to transfer into CCC 100% of the shares of Consolidated Western Corporation which owns 100% of Superpumper, Inc., at a FMV of $30 million."

e. In a Statement of Assets and Liabilities provided to Compass Bank ("Compass"), Superpumper's Lender, on May 30, 2010, Morabito represented the value of Superpumper to be $30,000,000.

f. On June 28, 2010, Morabito delivered another e-mail to employees and ExxonMobil regarding a potential deal that notes "The Arizona company, which I presently own 100% of, has a FMV exceeding $25 million; annual cash flow of $5 million; and has no term debt, just an existing line of credit for $3 million."

See SSOF ¶ 47.

50. On September 28, 2010, *just two weeks* after the Oral Judgement, Morabito merged CWC into and Superpumper and then, on September 30, 2010, Morabito and Snowshoe, an entity created by Vacco for Bayuk and Sam, entered into a *Shareholder Interest Purchase Agreement* (the "Superpumper Agreement") whereby Snowshoe allegedly purchased Morabito's 80% equity interest in Superpumper. *See* SSOF ¶ 48.

51. Snowshoe was established as a New York entity. *See* SSOF ¶ 49.

52. At around the same time, Compass prepared a summary of a request for a forbearance agreement. Compass' report noted that: "Upon learning of the judgment, Mr. Morabito sold SPI, which was not included in the suit, to two minority shareholders. A business appraisal is still being finalized, final purchase price will be roughly $10MM." *See* SSOF ¶ 50.

53. Ultimately, Matrix Capital Markets Group, Inc. ("Matrix") completed a valuation of Superpumper, and on October 13, 2010 (two weeks *after* the Superpumper Agreement),

provided its report to Vacco valuing 100% of the equity interest in Superpumper as of August 31, 2010 at $6,484,514, or $5,187,611.20 for Paul Morbaito's 80% interest (the "Matrix Valuation"). *See* SSOF ¶ 51.

54. The Matrix Valuation lacked credibility for a number of reasons, but particularly because it inexplicably adjusted nearly $9 Million in affiliated accounts receivables due to Superpumper (the "Receivables") to zero, reducing the value of Superpumper, on paper at least, by at least $6,500,000. *See* SSOF ¶ 52.

55. In reality, the value of Superpumper on September 30, 2010 was $13,050,000, and Morabito's 80% interest was worth $10,440,000. *See* SSOF ¶ 53.

56. LMWF, Morbaito's counsel at the time of the Transfers, apparently sought to further reduce the valuation after the parties signed the Superpumper Agreement.

57. Specifically, despite the already reduced valuation because of the elimination of Receivables, LMWF further reduced the Matrix valuation by (1) $1,682,000 for the "Compass Term Loan" (the "LMWF Compass Reduction") and (2) $1,680,880 for a 35% "risk reduction" (the "LMWF Risk Reduction," and together with the LWMF Compass Reduction, the "Additional LMWF Reductions"). *See* SSOF ¶ 54.

58. Ultimately, as a result of the Matrix Valuation excluding the Receivables and the Additional LMWF Reductions, Morabito and Defendants' came up with a transfer valuation for Morabito's 80% interest in Superpumper of only $2,497,307.

59. In exchange for the reduced value of Morabito's 80% interest, Defendants purportedly paid Morabito $1,035,094 in cash, and $1,462,213 through a term note from Snowshoe to Morabito (the "Superpumper Note"). *See* SSOF ¶ 55.

60. However, Morabito submitted a declaration to the Bankruptcy Court on July 1, 2013 (the "Morabito Bankruptcy Declaration") contending that he sold his interest in CWC for "cash payments of approximately $542,000 and a note of approximately $933,694." Morabito further stated that "I had received partial payments on [the note] and the principal balance has been subsequently cancelled based on a post-closing reevaluation of the significant decrease in the fair market value of the business." *See* SSOF ¶ 56.

61. While it is unclear what happened to the cash payment, regardless of the amount, it is without question that the Herbst Parties were never able to collect on it.

62. Furthermore, as to the Superpumper Note, it is entirely unclear what the actual note ever was and what was, if anything, ever actually paid.

63. First, The Superpumper Note was not executed until November 1, 2010, one month after the Superpumper Transfer. The Superpumper Note required monthly payments commencing on December 1, 2010 in the amount of $19,986,71 for 84 months, with interest accruing at 4% per annum. *See* SSOF ¶ 57.

64. The amount due under the Superpumper Note was reduced by $939,000 to $423,213 on February 1, 2011 (the "Superpumper Note Reduction"), leaving a successor note in the amount of $423,213 (the "Successor Note"). *See* SSOF ¶ 58.

65. The Superpumper Note Reduction, however, was another sham designed to ensure that Morabito held no assets on which the Herbst Parties could execute.

a. In short, on or about August 13, 2010 (during trial), Superpumper obtained a term loan from Compass in the amount of $3,000,000 (the "Compass Term Loan").

b. The Compass Term Loan was supposed to be used for operations but instead was withdrawn from Superpumper and distributed to Morabito, Bayuk, and Sam, each of whom received $939,000 (the "Compass Loan Withdrawals").

c. The Compass Loan Withdrawals were made in order for Morabito, Bayuk, and Sam to invest in other companies:

> Sam: The term loan was initiated in August of 2010. The reasons for that term loan is that it was guarantied by the Superpumper. Edward, Paul and I decided we were going to take that money, pre what happened in the judgment, and go invest it in another entity and use that money for equity for us to buy another business, probably in the same field, the convenience store area.

d. While $939,000 withdrawn by Morabito, Bayuk, and Sam (for a total of $2,817,000) and was to be paid back by Morabito, Bayuk, and Sam, they were eliminated as assets of the company when valued by Matrix. At the same time, the same obligations are now being used to reduce the amount due to Morabito and otherwise reduce the value of the company.

See SSOF ¶ 59.

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66. Defendants have been unable to produce any evidence of payments made on the Successor Note, though it provided for 84 monthly payments beginning on March 1, 2011. It is not clear whether the Successor Note was every actually paid

a. As late as October 12, 2012, Morabito's accountant, Stan Bernstein, noted that no payments had been made on the Superpumper Note through 2011, and interest was accrued.

b. Morabito could not say whether the Successor Note was paid.

c. Nor could Vacco: "Since my separation,[4] I don't know what happened to the debtor, how – how much of it's been paid, whether it's been paid, whether it's been paid in total or whether it's in default. I don't know."

d. Finally, as set forth in the Morabito Bankruptcy Declaration, the note was only in the amount of approximately $933,694, and the principal balance was subsequently cancelled based on a post-closing reevaluation of the significant decrease in the fair market value of the business.

See SSOF ¶ 60.

67. After all of these machinations, Morabito ultimately received at most only $542,000 in cash, based on his own Morabito Bankruptcy Declaration (which amount was still uncollectable by the Herbst Parties), for an interest that only a few months before he had valued at $20 million or more.

D. Creditors Are Left with Only One Tangible Asset Against Which They Can Collect After the Transfers.

68. By the end of September, *just 16 days after entry of the Oral Judgment*, in addition to the $6,000,000 Off-Share Funds Transfer to Sefton, Morabito had transferred: (1) all interests in the two Laguna Properties; (2) his 50% interest in Baruk LLC; and (3) his 80% interest in Superpumper, Inc., leaving him with ***only*** the Reno Property at an artificially inflated value to satisfy his creditors.

. . .

. . .

[4] Vacco testified that he terminated his relationship with Morabito prior to the involuntary Bankruptcy Case, which was commenced in June 2013. See Vacco Depo., p. 38, ll. 12-20.

69. The ability to collect before the Transfers, as opposed to what was left after the Transfers, is summarized as follows:

Before Transfers	After Transfers
80% Interest in CWC/Superpumper ($10,440,000)	$542,000 + $423,213 (*at most*) sham Successor Note
70% Interest in the Reno Property ($679,795.20)	100% Interest in Reno Property ($971,136)
75% Interest in El Camino Property ($808,981)	$0.00
50% Interest in Los Olivos Property ($427,477)	$0.00
50% Interest in Baruk LLC ($1,654,549.50)	$1,617,050 sham Baruk Note
Total Value: $14,731,007.50	**Total Value: $3,553,399**

E. Morabito Continues to Control the Transferred Properties.

70. Following the Transfers, Morabito continued to utilize the transferred assets as if he still owned them.

71. This continued control makes clear that the intent of the Transfers was not to separate Morabito and Bayuk's interest. There was never any separation – everything remained very much intertwined, the only change being that the assets were now out of the Herbst Parties' reach.

72. In April 2011, Morabito sought to negotiate a sale on behalf of Snowshoe, and by bargaining with Superpumper. Specifically, Snowshoe sought to acquire Nella Oil Company, LLC and Flyers LLC (the "Nella Deal"). The proposal included the contribution of Snowshoe's 100% interest in Superpumper, "valued at $10,000,000." Despite that the purchaser was to be Snowshoe, Morabito negotiated all of the terms of the Nella Deal and controlled the entire deal. For example:

a. On April 5 and April 15, 2011, Morabito e-mailed Vacco regarding coordinating the Nella Deal, without including Bayuk or Sam. Morabito notes that the deal allowed "SPI to acquire Nella Oil Co" and indicates "attached is an initial $65 million loan offer from Cerebus – they made it out to CWC but I am having it changed to Snowshoe Petroleum Inc…" Morabito makes his role clear: "I am expecting a letter of interest from Getty Realty on the real estate by Tuesday. My goal would be to submit a Letter of Intent to Nella Oil by Wednesday or Thursday. I will circulate the

first draft.

b. These communications continued through August 7, 2011.

c. Throughout the discussions, there were at multiple of proposed Letters of Intent, each negotiated and controlled by Morabito.

See SSOF ¶ 62.

73. In August 2011, Morabito retained Tim Haves, a real estate broker, on behalf of Superpumper Properties, LLC ("Superpumper Properties"), a company purportedly owned by Morabito.[5] Instead of having Mr. Haves paid of our Superpumper Properties, Vacco instructed Morabito, without copying Bayuk and Sam, to simply use Superpumper to make payment: "In order to protect [Tim Haves] from being reached in an enforcement action by the Herbst, I recommend that his agreement be with [Superpumper.] [Superpumper] will need to pay him $58,000 without any corresponding reimbursement from [Superpumper Properties]. If he is paid from Flyer's proceeds, [the Herbst Parties] will go after that money and the fact that he is not broker in NV will be revealed. He has consulted for [Superpumper] so it is logical that he be under contract for that entity." *See* SSOF ¶ 63.

74. In November 2011, Morabito sought to use the assets of Snowshoe Properties (fka Baruk) that he allegedly transferred to Bayuk to settle a lawsuit against Morabito:

a. On April 11, 2011, BofA filed a lawsuit against Morabito in connection with a past due obligation due and owing to BofA by Morabito thereby commencing case no. CV11-01121 (the "BofA Lawsuit").

b. In connection with the BofA Lawsuit, BofA inquired as to the ownership of 1461 Glenneyre, and the Baruk Transfer:

> David Maiorella of the Bank spoke with Mr. Morabito about this situation on October 31, and Mr. Maiorella ***was advised by Mr. Morabito that this transfer represented nothing more than a Borrower name change, and that documentation exists substantiating that such was indeed the case***.

[5] Superpumper Properties LLC ("Superpumper") was an entity for which Morabito purportedly paid Bayuk and Sam for their interests at the time of the Transfers. However, Bayuk stated, under oath, that "Edward Bayuk owned 25%, Salvatore Morabito owned 25% and Morabito owed [sic] 50% until approximately when the assets were sold in 2011 and the company was dissolved." In any event, Morabito sought to, and did, sell Superpumper Properties prior to the Final Judgment again ensuring that the Herbst Parties collection efforts were frustrated.

(emphasis added).

c. Morabito, more than a year after the alleged Baruk Transfer, asked Vacco: "As far as they are concerned it is a name change, correct?"

d. Vacco responded: "Tough to sell if she pulls corporate records which is who the members of Snowshoe Properties, LLC."

e. In order to correct any potential concerns, on November 1, 2011, over a year after the Baruk Transfer, Morabito responded to Vacco:

> On this, I have the note that I sold my Dad. [The Baruk Note] Cancel it, convert it back into a 50% share interest in Snowshoe Properties, LLC, and give me the right to trigger an option to split the assets and take 1461 Glenneyre and [Bayuk] ends up with 570 Glenneyre.

See SSOF ¶ 64.

75. In February 2012, Morabito, Vacco, and Timothy Haves, the same broker Vacco advised Morabito to pay out of Superpumper before, exchanged no less than five e-mails regarding a sale of 1461 Glenneyre. Bayuk was not even copied on any of them. *See* SSOF ¶ 65.

76. On May 8, 2012, Morabito instructed Vacco: The Glenneyre Street property should be in PARADERAS PROPERTIES LLC, Delaware, jointly owned by PM/RW,[6] and sold at $2.75 million . . . $1.75 million mortgage we are getting through Pacific Bank and $1 million is cash equity. Though Bayuk purportedly owned the 1461 Glenneyre property in full at that point, he was not part of this proposed ownership. *See* SSOF ¶ 66.

77. In September 2012, in connection with a settlement of the BofA Lawsuit, which had nothing to do with Bayuk, Morabito caused a second deed of trust to be placed on 1461 Glenneyre. Vacco simply instructed Bayuk when and where to sign for Morabito:

> Edward,
>
> Attached please find various documents which need to be executed by you to fulfill the collateral for the note Paul agreed to in order to settle the BOA litigation. I have reviewed and approved all documents. Please execute these documents and return them to me

[6] RW is Raymond Whiteman ("Whiteman").

> via PDF before Friday and then overnight the originals to me. Please sign in blue ink.

See SSOF ¶ 67.

78. Also in September 2012, in connection with funding for Virsenet, an entity in which Bayuk and Morabito held joint interests, Bayuk stated to Morabito and various attorneys in an e-mail chain regarding funding and security, "Let's just make this simple, ***I think Paul wants to*** put a second deed of trust in place on Mary Fleming House if so, than [sic] just let me sign for the second deed of trust." *See* SSOF ¶ 68 (emphasis added).

79. On October 3, 2012, in an e-mail exchange between Morabito, Vacco, and Christian Lovelace ("Lovelace"), another LMWF attorney, Morabito discussed the terms of a $5 million loan to Snowshoe Properties (in which Morabito supposedly held no interest). Vacco responded to Morabito:

> As I understand your instructions below, Snowshoe Properties, LLC, will borrow $5MM. Snowshoe will provide a FDT on 1461 Glenneyre and a SDT on 570 Glenneyre. The term will be for 36 months with no prepayment penalty. Are the monthly payments interest only or interest and principal. If interest and principal what is the amortization period, 3 years, 10, 15? What interest rate do you want to offer?

Of course, while Bayuk was on some earlier emails, he was not even copied on the e-mails discussing the substantive terms of the deal. *See* SSOF ¶ 70.

80. In March 2013, nearly three years after the Transfers, Morabito was still bargaining with Superpumper. For example, on an e-mail with Vacco, Morabito proposed a settlement with the Herbst Parties:

> Morabito: "Why not offer them Superpumper – they would make $2 million a year and could borrow $3 million against it"
>
> Vacco: "As to your proposal, do you mean you would transfer ownership of Superpumper to BHI or to use it as 'collateral' in exchange for a longer forbearance.
>
> Morabito: We would transfer ownership to them lock, stock and barrel … $2 million is store level cashflow and no debt or PG's.

Though Bayuk and Sam supposedly owned Superpumper at this point, neither was included in

these discussions. *See* SSOF ¶ 71.

81. In March 2014, Morabito caused Bayuk to transfer the Sparks Property to Desi Moreno to settle the case of *Moreno v. Morabito*. Bayuk was not named in the Moreno lawsuit and didn't even know what it was about. *See* SSOF ¶ 72

82. As of December 2016, Morabito continued living in the Palm Springs Property rent-free. *See* SSOF ¶ 73.

F. <u>Bayuk and Sam Funded Morabito's Extravagant Lifestyle, Making the Purported Promissory Notes Illusory.</u>

84. Both before and after the Transfers, Bayuk and Sam would pay his debts and other obligations:

a. According to Morabito, the process of Bayuk and Sam "lending" Morabito money whenever he needed started before 2010, and likely in 2009.

b. Morabito testified with respect to his financial entanglements with Bayuk since 2009:

> Q. You referenced a promissory note that is updated. When did that note first come into existence?
>
> A. Well, it's just a ledger or whatever. He keeps a record of everything that he advances me.
>
> Q. Is there a formal written promissory note?
>
> A. I don't recall.
>
> Q. Do you know who would have that information?
>
> A. No.
>
> Q. Who normally drafts promissory notes on your behalf?
>
> A. I don't know if I ever had anyone draft any promissory notes on my behalf.
>
> Q. Do you know what the balance of the money that Ed Bayuk has lent you is today?
>
> A. No.
>
> Q. Do you know if it is more or less than a million dollars?
>
> A. I would presume more, but I'd be guessing.

Q. Where would that information be?

A. With Mr. Bayuk or Mr. Hawkoette?

Q. Are you aware of a specific ledger that Mr. Bayuk or Mr. Hawkoette keep regarding the money that Mr. Bayuk has lent you?

A. I'm assuming they do.

Q. And is that a continuing note that has existed since 2009?

A. I don't specifically recall it it's a specific note that existed in 2009 or another year or when it was.

A. Do you recall if, at any time, you ever paid Mr. Bayuk in full?

Q. I believe I've, at times, have paid him back, and then I borrowed more money since and…

A. Are you aware of a time when there was a zero obligation owing?

A. At one point, yes.

Q. Do you know when that –

A. I think just after my surgery, around that period of time, I got to a point where I went from – he owed me money, I owed him some money. Ever since then, I've always owed him money.

Q. So when you say since your surgery, we're talking about since 2009 or 2010.

A. 2009, 2010, during that whole period.

See SSOF ¶ 74

85. Similarly, when asked about balances due to Sam since the beginning of 2010, Morabito confirmed, "I've been in debt to my brother my entire life, so I have no idea." *See* SSOF ¶ 75

86. Following, the Transfers, Bayuk and Sam would continue to simply pay any amount requested by Morabito, undoubtedly from funds obtained through their operation of, or ownership of, the transferred assets. None of these transactions were treated as loans, but as Morabito exercising his entitlement to his own money and property. For example, on November 11, 2011, Morabito emailed Vacco, stating:

Dennis

> Tell Sam he has to wire you $1 million by the 21st.
>
> Please get Trevor's commitment to sign – call Edward tomorrow and tell him to HOLD any payment to him until he signed. I guaranty he will delay this process. Edward will absolutely cut him off is he does but requiring him to sign is a huge risk. Speak to Edward and plan on personally driving over the Niagara to get his signature.

See SSOF ¶ 76

87. Likewise, Morabito would demand when and where to send funds, and Sam would immediately comply. For example, in a November 28, 2011 e-mail between Morabito, Sam, and Vacco, Morabito wrote: "Sam. Please wire $560,000 to Lippes Mathias TODAY." Within two hours, Sam responded: "Ok Wire Instructions." *See* SSOF ¶ 77.

88. Morabito could not even guess how much he had received or borrowed from Bayuk since the Transfers:

> Q. "So what is your best guess of how much you owed Mr. Bayuk on December 31, 2012?
>
> A. " I would have – it would be a guess. It could be in the millions of dollars. I don't know."
>
> Q. How much do you think you owed him on December 31, 2014.
>
> A. It would be a guess but I'm sure – I'm sure I owed him a significant amount of money. I would think. I don't know."

See SSOF ¶ 78.

89. As of December 2015, Morabito was paying his approximately $30,000 in monthly expenses through a combination of Bayuk and Sam lending him money. *See* SSOF ¶ 79.

90. For at least several years prior to 2016, Bayuk provided Morabito with a credit card that Morabito uses for groceries. *See* SSOF ¶ 80

91. As late as March 2016, when asked "what do you do for money right now," Morabito testified, "My brother and Mr. Bayuk have been lending me money" and guessed that the amount he then owed to Bayuk was in excess of $1,000,000. *See* SSOF ¶ 81.

92. Morabito further testified that he had been in debt to his brother all of his life, and "If I'm out of money, I ask my brother if I can have some money." *See id.*

93. Bayuk testified that sometimes he removes money from Snowshoe Properties' (formerly Baruk) bank account to lend money to Morabito when he needed it. *See* SSOF ¶ 82.

94. The true scenario of what actually happened is revealed clearly by Morabito in his own testimony.

> Q. [Bayuk is] lending you money to pay your monthly expense?
>
> A. He's lending me *my – my money*, and what I do with it he has no knowledge of.

See SSOF ¶ 83.

95. The arrangements make one thing clear: it didn't matter whether Morabito was owed a note by Bayuk and Sam, or even whether Morabito owed money to Bayuk and Sam. Bayuk and Sam consistently funded Morbaito's extravagant lifestyle, and would continue to do so. Any notes between the two were nothing more than paper to be utilized when convenient. When notes are needed for loans, Morabito and Bayuk will claim they exist. When they do not need to them, they will disappear.

96. For example, when alleged loans from Bayuk to Morabito needed to disappear to reduce known creditors in the Bankruptcy Case, Bayuk testified that he "[i]n consideration of the past friendship, loyalty, and successful past business ventures which Mr. Morabito and I have shared, I made a gift to Mr. Morabito in the amount of the debt to me and I have destroyed the promissory note" *See* SSOF ¶ 85.

G. <u>As a Result of the Transfers, the Herbst Parties Cannot Collect on the Final Judgment and Ultimately Is Forced to File an Involuntary Bankruptcy.</u>

97. In total, Morabito paid the Herbst Parties less than 5% of the total Final Judgment, with payments coming from three sources: (1) $5,000,000 in payments made from the return of Offshore Funds from Sefton nearly two years after that transfer; (2) approximately $1,300,000 in sale proceeds from the Reno Property; and (3) the assumption of certain liabilities by Morabito.

Par for the course, Morabito defaulted on many of the assumed liabilities, ultimately causing increased liabilities to the Herbst Parties. *See* SSOF ¶ 87.

98. As a result, and after Morabito defaulted on a Settlement Agreement and a Forbearance Agreement extended by the Herbst Parties, on June 20, 2013, the Herbst Parties filed an involuntary petition against him and CNC under chapter 7 of the Bankruptcy Code. *See* SSOF ¶ 88.

99. On December 17, 2012, the Bankruptcy Court entered an Order for Relief against Morabito, adjudicating him a chapter 7 debtor. *See* SSOF ¶ 89.

100. On January 22, 2015, Plaintiff was appointed the Trustee of Morabito's Bankruptcy Estate and, on May 15, 2015, was substituted in as Plaintiff for the Herbst Parties to prosecute this action for the benefit of all creditors of the Estate. *See* SSOF ¶ 90.

101. The fraudulent transfers involved in this Complaint are not the only fraudulent transfers of which the Trustee has complained.

a. At the same time as the Transfers, Morabito transferred his 90% interest in watchmyblock.com to Bayuk for $1,000. Morabito valued his interest in watchmyblock.com at between $1,800,000 and $2,250,000 in 2009 and 2010.

b. In case no. 15-05046, pending before the Bankruptcy Court, the Trustee has sought avoidance of the transfer of Morbaito's 60% interest in Virsenet to Bayuk in November 2012 for just $6.00, after Morabito himself valued the entity at over $220 million.

See SSOF ¶ 90.

III.
LEGAL ARGUMENT

A. Legal Standard.

The United States Supreme Court has explained that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [procedural process], which [is] designed 'to secure the just, speedy and inexpensive

determination of every action.'"[7] Summary judgment allows courts to avoid unnecessary trials where no material factual disputes exist.[8]

Summary judgment pursuant to Nev. R. Civ. P. 56(c) is appropriate where the "pleadings . . . show that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law."[9] The party moving for summary judgment "bears the initial burden of production to show the absence of a genuine issue of material fact."[10]

However, once the moving party has met its burden, the opposing party may not rest upon mere allegations or denials in the pleadings but instead assumes a burden of production to set forth specific facts showing that there exists a genuine issue of material fact for trial.[11] Once the burden shifts, summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[12]

B. Each of the Transfers Was Made to Hinder, Delay, or Defraud.

1. Actually Fraudulent Transfers Under the Uniform Fraudulent Transfer Act.

Fraudulent transfers are addressed and analyzed in NRS Chapter 112.[13] The UFTA is designed to prevent a debtor from defrauding creditors by placing the subject property beyond the creditors reach.[14] UFTA "is remedial and as such should be liberally construed."[15] Thus,

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[7] See Celotex v. Catrett, 477 U.S. 317, 327 (1986); Wood v. Safeway, Inc., 121 Nev. 724, 731-32, 121 P.3d 1026, 1031 (2005) (adopting the summary judgment standard set forth in Celotex and other Supreme Court decisions).

[8] Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture, 18 F.3d 1468, 1471 (9th Cir. 1994); see also Celotex, 477 U.S. at 327.

[9] Bird v. Casa Royale West, 97 Nev. 67, 69, 624 P.2d 17, 18 (1981).

[10] See Celotex, 477 U.S. at 323; see also Cuzze v. University and Community College System of Nevada, 123 Nev. 598, 172 P.3d 131, 134 (2007); Wood, 121 Nev. at 731-32, 121 P.3d at 1031.

[11] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also, Celotex, 477 U.S. at 331; Wood, 121 Nev. at 732, 121 P.3d at 1031; Maine v. Stewart, 109 Nev. 721, 726-27, 857 P.2d 755, 758-59 (1993).

[12] Sanborn v. Place Cty., 80 Fed. Appx. 566, 568 (9th Cir. 2007).

[13] Herup v. First Boston Fin., LLC, 123 Nev. 228, 231, 162 P.3d 870, 872 (2007).

[14] Id. at 232, 162 P.3d at 873.

[15] Cortez v. Vogt, 52 Cal. App. 4th 917, 937, 60 Cal.Rptr.2d 841, 853 (Cal. App. 1997); see also Landmark Community Bank, N.A. v. Klingelhutz, 874 N.W.2d 446 (Minn. Ct. App. 2016), review denied, (Apr. 27, 2016) (stating that UFTA is remedial and meant to be construed broadly, applying Minnesota's

courts must construe the UFTA consistent with its purpose of preventing and suppressing fraud.[16] NRS 112.250 directs the Court to apply and construe UFTA "to effectuate its general purposes to make uniform the law with respect to the subject of this chapter among states enacting it."[17] Accordingly, it is appropriate for this Court to look to the application and construction of UFTA by other courts.[18]

A transfer may be set aside if it is made by a debtor "with actual intent to hinder, delay or defraud any creditor of the debtor."[19] "Traditionally, the intent required for actual fraudulent transfers is established by circumstantial evidence, since it will be the rare case in which the debtor testifies under oath that he or she intended to defraud creditors."[20] Intent may be established by circumstantial evidence or inferences drawn from a course of conduct.[21] Knowledge that a transaction will operate to the detriment of creditors is sufficient to establish actual intent.[22] If the debtor has a "motive of effecting the transaction to hinder a creditor," then the transaction is intentionally fraudulent even if the debtor also has non-fraudulent motives.[23]

(continued)

enactment of UFTA); Sigmon v. Goldman Sachs Mortg. Co., 539 B.R. 221 (S.D. N.Y. 2015) (same, applying Utah enactment of UFTA).

[16] See Schmidt v. HSC, Inc., 131 Haw. 497, 508, 319 P.3d 416, 427, 2014 WL 144533 (2014) (interpreting discovery rule under Hawai'i UFTA "consonant with the statutory purpose of preventing fraud"); Donell v. Kowell, 533 F.3d 762, 774 (9th Cir. 2008) (finding that the terms of [UFTA] are abstract in order to protect defrauded creditors, no matter what form a Ponzi scheme or other financial fraud might take) (citing Twyne's Case, 76 Eng. Rep. 809, 815 (1601) (Star Chamber) (". . . all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud") (other citations omitted); Herup, 162 P.3d at 872.

[17] Herup, 123 Nev. at 237; 162 P.3d at 876 (quoting NRS 112.250)

[18] See, e.g., SportsCo Enter. v. Morris, 112 Nev. 625, 917 P.2d 934, 938 (Nev. 1996) (citing to cases from other jurisdictions to support interpretation of Nevada's UFTA).

[19] NRS 112.180(1)(a); Herup, 123 Nev. at 231, 162 P.3d at 872.

[20] In re Nat'l Audit Def. Network, 367 B.R. 207, 219–20 (Bankr. D. Nev. 2007) (citing Dahar v. Jackson (In re Jackson), 318 B.R. 5, 13 (Bankr. D. N.H. 2004) ("Absent a rare admission or declaration against interest by the defendant, a plaintiff is unlikely to discover any direct proof of bad motives because often only the defendant knows his own motivation at the time of the transfer.")).

[21] Mazer, 184 B.R. at 385.

[22] Hayes v. Palm Seedlings Partners–A (In re Agric. Research & Tech. Group, Inc.), 916 F.2d 528, 535 (9th Cir. 1990) (quoting Coleman Am. Mov. Servs., Inc. v. First Nat'l Bank and Trust Co. (In re Am. Prop., Inc.), 14 B.R. 637, 643 (Bankr. D. Kan. 1981)).

[23] In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig., No. 211ML02265MRPMANX, 2013 WL 12148482, at *5 (C.D. Cal. June 7, 2013) (citing Bertram v. WFI Stadium, Inc., 41 A.3d 1239, 1247, 2012 WL 1427788 (D.C. 2012) (even if a debtor has at least one non-fraudulent motive for a transaction, the additional motive of effecting the transaction to hinder a creditor is a sufficient ground for an unassailable conclusion

Where the moving party proves fraudulent intent, the transfer is deemed fraudulent, *even if it is in exchange for valuable or full consideration*.[24]

In Nevada, the badges of fraud are:

> (a) the transfer or obligation was to an insider;
>
> (b) the debtor retained possession or control of the property transferred after the transfer;
>
> (c) the transfer or obligation was disclosed or concealed;
>
> (d) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> (e) the transfer was of substantially all the debtor's assets;
>
> (f) the debtor absconded;
>
> (g) the debtor removed or concealed assets;
>
> (h) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
>
> (i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
>
> (j) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
>
> (k) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.[25]

The Nevada Supreme Court has also recognized the following indicia of fraud:

> lack of consideration for the conveyance, the transfer of the debtor's entire estate, relationship between transferor and transferee, the pendency or threat of litigation, secrecy or hurried transaction, insolvency or indebtedness of the transferor, departure from the usual method of business, the retention by the debtor of possession of the property, and the reservation of benefit to the transferor.[26]

(continued)

fraudulent intent.") (internal quotations omitted).

[24] In re Zeigler, 320 B.R. 362, 373 (Bankr. N.D. Ill. 2005) (applying Illinois enactment of UFTA).

[25] NRS 112.180(2).

[26] Sportsco Enterprises, 112 Nev. at 632, 917 P.2d at 938 (citations omitted).

"The presence of a single badge of fraud may spur mere suspicion; the confluence of several can constitute ***conclusive evidence*** of actual intent to defraud, absent 'significantly clear' evidence of a legitimate supervening purpose."[27] As few as three badges have been held to constitute clear and convincing evidence of actual fraudulent intent.[28] Where certain badges of fraud are present, plaintiff need not prove subjective intent.[29] Where the plaintiff establishes the existence of "certain indicia of badges of fraud, ***the burden shifts*** to the defendant to come forward with rebuttal evidence that a transfer was not made to defraud the creditor."[30]

Here, Morabito's intent is evident from both direct proof of his subjective intent to hinder, delay, or defraud the Herbst Parties and a confluence of at least nine of the eleven badges of fraud amounting to conclusive evidence of actual intent.

2. Morabito's Intent Is Apparent from His Own Statements.

Here, Morabito's intent is clear. Within just two days after Judge Adams announced an $85 Million Oral Judgment against Morabito, Morabito was working out a cover story with his

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[27] In re Acequia, Inc., 34 F.3d 800 (9th Cir. 1994) (emphasis added); see also S. New England Tel. Co. v. Sahara & Arden, Inc., No. 2:09-CV-00534-RCJPAL, 2010 WL 2035330, at *4 (D. Nev. May 24, 2010) ("[a]lthough the 'presence of a single factor, i.e. a badge of fraud, may cast suspicion on the transferor's intent, the confluence of several in one transaction generally provides conclusive evidence of an actual intent to defraud.'") (quoting Gilchinsky v. Nat'l Westminster Bank, 159 N.J. 463, 732 A.2d 482, 490 (N.J. 1999)); In re Nat'l Audit Def., 367 B.R. at 220 ("Although none of the badges standing alone will establish fraud, the existence of several of them will raise a presumption of fraud." (internal quotation marks and citation omitted))

[28] See Blood v. Nofzinger, 162 Ohio App. 3d 545, 559, 834 N.E.2d 358 (6th Dist. Huron County 2005) (discussing Bank One v. Plaza East, Inc., 1997 WL 710664 (Ohio Ct. App. 10th Dist. Franklin County 1997)); see also Merrill Lynch Business Financial Services, Inc. v. Kupperman, 2010 WL 2179181, *25-26 (D.N.J. May 28, 2010) (a grant of summary judgment may be appropriate where four badges of fraud are shown under the UFTA); In re Polaroid Corp., 472 B.R. 22, 56-60 (Bankr. D. Minn. 2012) (granting motion for summary judgment under the UFTA based on six badges); First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors, Inc., --- F.Supp.2d ---, 2012 WL 1711218, *13-14 (E.D.N.Y. May 15, 2012) (granting summary judgment based on the existence of four badges of fraud under New York's fraudulent transfer statute); In re SMTC Mfg. of Texas, 421 B.R. 251, 300 (W.D. Tex. 2009) ("Proof of four to five badges of fraud has been found sufficient in several reported cases.").

[29] See In re Brace, No. 6:11-AP-02053-SY, 2017 WL 1025215, at *6 (B.A.P. 9th Cir. Mar. 15, 2017) ("To require demonstrable certainty of a debtor's knowledge would completely obviate the utility of consideration of circumstantial, and reliable, evidence" in favor of the impossibility of "seeing inside the debtor's conscience") (citing In re Beverly, Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, 235 (B.A.P. 9th Cir. 2007), aff'd in part, dismissed in part, 551 F.3d 1092 (9th Cir. 2008)).

[30] Sportsco Enters., 112 Nev. at 632, 917 P.2d at 938 (emphasis added) (citing Territorial Sav. & Loan Ass'n v. Baird, 781 P.2d 452, 462 n. 18 (Utah Ct. App. 1989); see also Southern New England Telephone Co. v. Sahara & Arden, Inc., 2010 WL 2035330, *4-12 (D. Nev. May 24, 2010) (applying the burden shifting analysis under NRS 112.180(1)(a) and granting summary judgment to creditor).

attorneys for transferring his assets. Within just two days after Judge Adams announced an $85 Million Oral Judgment, Morabito began a series of transactions which resulted in him being divested of his interest in the Laguna Properties, Baruk, and Superpumper by the end of the month, along with $6 Million in cash and the other transfers that are the subject of actions and investigation in the Bankruptcy Case. In return, he received only a 30% interest in the Reno Property and assets that were worthless to his creditors from a collection standpoint. By the time the $145 Million Final Judgment was entered, nothing other than the Reno Property was left that the Herbst Parties could reach.

As he explained to his attorneys, Morabito directed that these transactions occur in order to protect the assets from the Herbst Parties. *See* SSOF ¶¶ 10-18. He not only knew that the Transfers would operate to the detriment of the creditors, specifically the Herbst Parties, but relished the opportunity to hinder the Herbst Parties' collection efforts, telling Graber and Yalamanchili that "The Herbsts no longer have home court, good old boy advantage." *See* SSOF ¶ 18. A clearer case of intent to hinder, delay, or defraud is hard to imagine.

3. The Presence of Nine Badges of Fraud Compel a Finding of Intent to Hinder, Delay, or Defraud the Herbst Parties.

Here, the Transfers are accompanied by no less than ***nine*** badges of fraud, compelling a finding of actual intent to hinder, delay, or defraud.

The transfer or obligation was to an insider (NRS 112.180(2)(a)). The Transfers at issue in this case were made to insiders. Under UFTA, if the debtor is a natural person, insiders include: (1) a relative of the debtor or of a general partner of the debtor; (2) a partnership in which the debtor is a general partner; (3) a general partner in a partnership described in subparagraph (2); and (4) a corporation of which the debtor is a director, officer or person in control. NRS 112.150(7)(a).

However, "UFTA's definition of 'insider' is not intended to limit an insider to the four listed subjects. Instead, the drafters provided the list for purposes of exemplification."[31] The

[31] In re Holloway, 955 F.2d 1008, 110 (5th Cir. 1992) (citing J. Michale Putman, M.S.P.A. Money Purchase Pension Plan v. Stephenson, 805 S.W. 2d 16, 18 (Tex. App. – Dallas, 1991)(analyzing identical

cases evaluating whether a transferee is a non-statutory insider have focused on two factors: (1) the closeness of the relationship between the transferee and the debtor, and (2) whether the transactions between them were conducted at arm's length.[32] "The true test of 'insider' status is whether one's dealings with the debtor cannot accurately be characterized as arm's-length."[33]

Morabito's Transfers were directly or indirectly made to two people: Bayuk and Sam. Sam is Morabito's brother and therefore, a statutory insider. Bayuk was Morabito's long-time business partner and domestic partner. Courts have consistently held that domestic partners, same-sex or otherwise, are, like spouses, insiders for the purposes of an avoidance analysis.[34]

There is no dispute that Morabito and Bayuk were long-time domestic partners. They were together for at least ten years, cohabitated, owned several properties together, and participated in several business partnerships. *See* SSOF ¶¶ 92-96. At the same time the Transfers were occurring (September 30, 2010), Morabito identified Bayuk as his "boyfriend and longtime companion." *See* SSOF ¶ 95. Indeed, Morabito's counsel even suggested one idea to protect Morabito's assets from collection was a "domestic partner split." *See* SSOF ¶ 11. Their joint counsel, Vacco, testified that Morabito and Bayuk remained together following the Transfers, and following the Transfers, they continued to engage in business together and their finances were entangled. *See* SSOF ¶ 96. None of their agreements bore the markers of an arms' length

(continued)

provision under Texas' codified version of UFTA)); Landmark Cmty. Bank, N.A. v. Klingelhutz, 874 N.W.2d 446, 452, 2016 WL 363521 (Minn. Ct. App. 2016), review denied (Apr. 27, 2016) (finding that single-member LLC of spouse was an insider because the definition of "insider" is not limiting) (citing Citizens State Bank Norwood Young Am. v. Brown, 849 N.W.2d 55, 62–63 (Minn. 2014) (finding that former spouse was an insider))

[32] In re Emerson, supra at 707 (citing to In re Holloway, 955 F.2d 1008, 1011 (5th Cir. 1992)); In re Village at Lakeridge, LLC, 814 F.3d 993, 996 (9th Cir. 2016).

[33] In re Craig Systems Corp., 244 B.R. 529, 539 (Bankr. D. Mass. 2000).

[34] See Bloom v. Camp, 336 Ga. App. 891, 895, 785 S.E.2d 573, 578, adopted, (Ga. Super. May 24, 2016) (finding same-sex partner to be an insider though same-sex marriages were not recognized in Georgia at the time of the transfer); In re Fisher, 296 F. App'x 494, 502, 2008 WL 4569946, at *5 (6th Cir. 2008) (though finding no fraudulent transfer occurred, finding that opposite-sex domestic partner was an insider); In re Tanner, 145 B.R. 672, 678 (Bankr. W.D. Wash. 1992) (same-sex partner who had cohabitated with debtor was an insider) (citing Matter of Montanino, 15 B.R. 307 (Bankr. D. N.J. 1981) (parents of debtor's live-in fiancé were insiders); In re Ribcke, 64 B.R. 663 (Bankr. D. Md. 1986) (parents of a debtor's deceased wife were insiders); In re O'Connell, 119 B.R. 311 (Bankr. M.D. Fla. 1990) (a good friend who had made numerous informal loans to a debtor was an insider); In re Standard Stores, Inc., 124 B.R. 318 (Bankr. C.D. Cal. 1991) (a corporate debtor's president's ex-brother-in-law was an insider with respect to a transfer five years after divorce from debtor's president's sister).

transaction – they shared counsel, who was directed exclusively by Morabito, and the Transfers were rushed, occurring within weeks after Judge Adams announced his Oral Judgment. As such, the Transfers were made to insiders.

The debtor retained possession or control of the property transferred after the transfer (NRS 112.180(2)(b)). Morabito retained control of the transferred property following the Transfers in this case. Following the Transfers, Morabito, Bayuk, and Sam maintained the *status quo*. First, Sam and Bayuk continued to fund Morabito's lavish $30,000 a month lifestyle. *See* SSOF ¶¶ 76-79. Indeed, Bayuk testified that when Morabito needed money, he would sometimes take money from Snowshoe Properties (formerly Baruk LLC). *See* SSOF ¶ 82. When Morabito needed money, he simply asked his bookkeeper to direct Sam and Bayuk to send funds, and Sam and Bayuk complied without question. *See* SSOF ¶ 74, 76-77.

Further, after the Transfers, Morabito continued to negotiate deals using Superpumper and Snowshoe as if he owned them. *See* SSOF ¶¶ 62, 63, 71. He also continued to use the Baruk Properties to fund his settlements and obtain financing. *See* SSOF ¶¶ 64-70, 72-73 For example, Morabito negotiated the Nella Deal, which required the contribution of Snowshoe. *See* SSOF ¶ 62. He caused a lien to be placed on 1461 Glenneyre for the BofA Settlement, and he caused the Sparks Property to be transferred to settle the Moreno lawsuit. *See* SSOF ¶¶ 64, 67, 72. He also sought to negotiate a $5 million loan using Snowshoe Properties and the Glenneyre Properties as security. *See* SSOF ¶ 70. As late as December 2016, Morabito was residing, rent free, in the Palm Springs Property. *See* SSOF ¶ 73.

The transfers were concealed (NRS 112.180(2)(c)) and the debtor removed or concealed assets (NRS 112.180(2)(g)).[35] Judge Adams announced the Oral Judgment on September 13, 2010. By October 1, 2010, the Transfers were complete. Neither Morabito, his counsel, nor Defendants informed the Herbst Parties that the Transfers were occurring, despite the fact that Morabito and the Herbst Parties were in the midst of preparing for the punitive damages phase of the trial. *See* SSOF ¶ 86.

[35] These badges of fraud are interrelated, and therefore are discussed together.

With respect to Baruk Transfers, both the name and location of the entity owning the Baruk Properties was changed. Baruk was a Nevada entity. *See* SSOF ¶ 33. After the Baruk Transfer, Bayuk incorporated Snowshoe Properties in California and merged Baruk with Snowshoe Properties. *See* SSOF ¶ 39. Bayuk thereafter completed a transfer of all the Baruk Properties to Snowshoe Properties. *See id.* By October 1, 2010, Bayuk had transferred the Palm Springs Property again, this time to the Bayuk Trust. *See* SSOF ¶ 40. Thereafter, the Baruk Note was purportedly immediately assigned to Woodland, a Canadian entity. *See* SSOF ¶ 86. Superpumper was transferred to Snowshoe, which was incorporated in New York. *See* SSOF ¶¶ 48-49. Thus, not only were Morabito's assets transferred within two weeks of the Oral Judgment, they were transferred in such a way as to make them difficult for the Herbst Parties to trace.

As Morabito made clear, removing and concealing assets in different jurisdictions was intentional to make sure that the assets were out of the reach of the Nevada courts, and so that "The Herbsts no longer have home court, good old boy advantage." *See* SSOF ¶ 16.

Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit (NRS 112.180(2(d)) and the transfer occurred shortly before or shortly after a substantial debt was incurred (NRS 112.180(d)(j)). The presence of these related badges of fraud are the most obvious and compelling. Not only had Morabito been sued by the Herbst Parties, but Judge Adams had announced the $85 million Oral Judgment against him on September 13, 2010. At the time of the Transfers, the punitive damages phase of the trial was just commencing. By the time final judgment was entered in the amount of $149,444,777.80, the assets were gone. It is not even necessary to infer that the Oral Judgment prompted the transfers, because Morabito admitted it.

The transfer was of substantially all the debtor's assets. Within just days after Judge Adams announced the Oral Judgment, Morabito divested himself of almost all, if not all, of his assets: $6 million of the Off-Shore Funds to Sefton, the Laguna Properties, the 50% interest in Baruk LLC, and the 80% interests in Superpumper. He even transferred his furnishings and personal property in the Reno Property, which he purported to retain, to Bayuk for a mere

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$30,000. *See* SSOF ¶ 32. Morabito was left with nothing in his possession upon which the Herbst Parties could collect.

Morabito Received Less Than Reasonably Equivalent for the Transfers. Determination of "reasonably equivalent value" under the UFTA is a two-step process. A court first asks whether the debtor received any value, and only then examines whether the value is reasonably equivalent to what the debtor gave up. Only if a court determines that "some" value was received by the debtor in exchange for the transfers does the court move on to determine whether that value is "reasonably equivalent." In determining "reasonable equivalence," Nevada courts apply the "totality of the circumstances test." The indicia of reasonable equivalence under the "totality of the circumstances test" are: (1) whether the value of what was transferred is equal to the value of what was received; (2) the market value of what was transferred and received; (3) whether the transaction took place at arm's length; and (4) the good faith of the transferee.[36] "[R]easonable equivalence must be determined from the standpoint of creditors."[37] Thus, consideration is "reasonably equivalent" if it leaves creditors in the substantially the same position as before the transfers.

Prior to the Transfers, Morabito's creditors had the ability to execute on his 70% interest in the Reno Property, his 75% interest in the El Camino Property, his 50% interest in the Los Olivos Property, his 50% interest in Baruk, and his 80% interest in Superpumper. After the Transfers, Morabito was left with the Reno Property, a small amount of cash representing a fraction of the value of the interests transferred, and sham promissory notes. Though the exact amount of the value of the assets transferred is an issue for trial, there is no question that the value received by Morabito in exchange was not "reasonably equivalent."

. . .

. . .

[36] In re Zeigler, 320 B.R. at 374–75.

[37] Bay Plastics Inc., 187 B.R. at 329 (citing In re Roosevelt, 176 B.R. 200 (B.A.P. 9th Cir. 1994)).

a. Morabito and Defendants Excluded the Sparks Property from the Valuation of Baruk, and on That Basis Alone, Reasonably Equivalent Value Was Not Transferred for Baruk.

Defendants concede that the Sparks Property was an asset of Baruk as of September 30, 2010, when the Baruk Transfer occurred. *See* SSOF ¶ 34. Plaintiff has valued at $75,000 as of September 30, 2010. *See* SSOF ¶ 36. There is no competing valuation or appraisal for the Sparks Property. In their rush to get Morabito's assets out of his name before entry of the Final Judgment, Morabito and Bayuk failed to include consideration for the Sparks Property in the Baruk Transfer. Therefore, at a minimum, Bayuk did not provide reasonably equivalent value to Morabito for his interest in Baruk.

b. Morabito Did Not Even Receive the Full Cash Payment in Exchange for Superpumper.

Defendants contend that the value of Morabito's interest in Superpumper was $2,497,307. Even acknowledging that value (which Plaintiff disputes), sufficient value was not transferred. Instead of the $1,035,094 cash payment and $1,463,213 Superpumper Note that was required in the Superpumper Agreement, Morabito contends that he only received "cash payments of approximately $542,000 and a note of approximately $933,694," with the principal balance of the note subsequently cancelled based on a "post-closing reevaluation of the significant decrease in the fair market value of the business." *See* SSOF ¶ 56. Thus, by Morbaito's own testimony, he only received, at most, $1,475,694 in exchange for his interest in Superpumper. This amount is $1,021,613 less than the even reduced value of Superpumper.

c. The Baruk Note and Superpumper Notes Were Illusory Promises that Ensured That, From a Creditor Standpoint, No Value Was Received.

A promise is illusory when it appears "so insubstantial as to impose no obligation at all on the promisor – who says, in effect, 'I will if I want to.'"[38] The Baruk Promissory Note and Superpumper Notes (the "Notes") were illusory, because the relationship between Morabito, on the one hand, and Bayuk on the Sam, were such that Bayuk's and Sam's obligations on the Notes were nothing more than "I will if I want to."

[38] Sateriale v. R.J. Reynolds Tobacco Co., 687 F.3d 1132, 1146 (9th Cir. 2012).

First, Bayuk and Sam clearly funded Morabito's extravagant lifestyle long before the Transfers and when neither had any obligation to do so. There was no indication that the funding would cease without the Notes. In fact, Bayuk and Sam continue to fund Morabito's lifestyle through today. *See* SSOF ¶¶ 74-85. In other words, the Notes served no purpose other than to feign value for Baruk and Superpumper. And the only purpose for transferring Baruk and Superpumper was to keep the Herbst Parties from collecting on those assets.

Second, while terms of the Baruk Note required: (1) monthly payments commencing on November 1, 2010 in the amount of $7,720.02; (2) interest to accrue at the rate of 4%; and (3) late fees 4% of the payment due; and the terms of the Superpumper Note required (1) monthly payments commencing on December 1, 2010 in the amount of $19,986.71; (2) interest to accrue at the rate of 4%; and (3) late fees 4% of the payment due, these terms were never complied with and never enforced. To be sure, there is ample inconsistent testimony regarding if, when, and how the Notes were paid; but it is undisputed that the terms of the Notes were meaningless to the parties.

As to the Bayuk Note, Bernstein contends that $732,124.75 was paid in 2012, and that a total of $1,029,510.27 was paid during 2013. *See* SSOF ¶ 47. This differs dramatically from the *two different ledgers* provided by Bayuk, showing payments being made from 2012 through 2014 on the First Ledger and payments being made from September 28, 2010 through June 17, 2013 on the Second Ledger. *See id*. Adding even more contradiction, on November 1, 2011, Morabito instructed Vacco to "Cancel [the Baruk Note], convert it back into a 50% share interest in Snowshoe Properties, LLC" meaning that no payments could have possibly been made on the Baruk Note pursuant to the Second Ledger, contrary to Bayuk's testimony. *See id*. Then, on May 23, 2012, Morabito submitted a financial statement to BofA, under the penalty of perjury, claiming that as of that date, $1,750,000 was still due and owing, contrary to both the First and Second Ledgers. *See id.* Morabito and Bayuk's utter inability to even keep track of payments under the Baruk Note, if any, prove that it was illusory and made solely for the purpose of trying to show "value."

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Like the Baruk Note, the Superpumper Note was also illusory, as there was no real obligation or prospect of payment. First, Morabito contends the amount of the note was "approximately $933,694," which was "further reduced based a post-closing evaluation." *See* SSOF ¶ 56. Furthermore, if we go by Defendants' story, after only three months, the amount due on the Superpumper Note was reduced from $1,462,213 to $492,937.30 as a result of the Superpumper Note Reduction. *See* SSOF ¶ 58. However, the reduction is purportedly a result of the $939,000 Note due from Morabito to Superpumper as a result of his withdrawal from the Compass Loan, which notably, was ignored as a receivable in the Matrix Valuation. *See* SSOF ¶ 59. There was no intent by Morabito to pay the $939,000 Note back so the Superpumper Note Reduction, as far as value to Morabito, was worthless. Furthermore, there has never been any evidence shown to prove that any payments were actually made on the Successor Note, or, in fact, on the $939,000 Note that was assumed by Snowshoe. Furthermore, Defendants were unable to even testify that payments were actually made. In other words, Morabito received nothing on account of the Superpumper Note and likewise, his creditors realized absolutely no value on account of his exchange of the 80% interest in Superpumper to Defendants through the Superpumper Note.

Accordingly, Plaintiff is entitled to summary judgment that the Transfers were made by Morabito with actual intent to hinder, delay, or defraud his creditors.

C. <u>Plaintiff is Entitled to an Award of Avoidance of the Transfers and Return of the Property or the Value Thereof.</u>

NRS 112.210 provides a creditor is entitled to:

> (a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
>
> (b) An attachment or garnishment against the asset transferred or other property of the transferee pursuant to NRS 31.010 to 31.460, inclusive.[39]

Plaintiff therefore seeks an avoidance of the Transfers to the extent necessary to satisfy the Bankruptcy Estate's claim against Morabito pursuant to NRS 112.210(a). Plaintiff requires

[39] NRS 112.210.

at least $81,500,000, the current value of claims filed in the Bankruptcy Case, to satisfy claims against Morabito. The combined value of the property transferred is less than $81,500,000. Therefore, Plaintiff is entitled to avoidance of the Transfers, such that all of the transferred assets are returned to the Estate, with a credit to Bayuk and Sam for their respective interests in the properties.

Alternatively, NRS 112.220(2) states that "to the extent a transfer is voidable in an action by a creditor [under NRS 112.210(a)], the creditor may recover judgment for the value of the asset transferred," subject to adjustment as equities may require.

1. Plaintiff is Entitled to a Return of Morabito's Interest in the Laguna Properties, or, Alternatively, Monetary Judgment Against Bayuk and the Bayuk Trust Based on the Real Property Transfers in the Amount of $1,263,458.

Plaintiff is entitled to avoidance of the Real Property Transfers to the extent necessary to satisfy the Estate's claim against Morabito pursuant to NRS 112.210(a). Therefore, Trustee seeks a return of the Laguna Properties to Morabito's Estate. Alternatively, Plaintiff is entitled to a monetary judgment of the value of Morabito's interest in the Laguna Properties. Morabito's 75% interest in El Camino Property was valued at $808,981 at the time of the Transfers, and his 50% interest in Los Olivos Property had a value of $427,477 at the time of the Transfers, for a total interest in the Laguna Properties at the time of the Transfers of $1,236,458. Therefore, Plaintiff requests a monetary judgment against Bayuk and the Bayuk Trust, in the minimum amount of $1,263,458.

2. Plaintiff is Entitled to Avoid the Baruk Transfer and Recover the Equity Interest in Baruk, or, Alternatively, Monetary Judgment Against Bayuk and the Bayuk Trust Based on the Baruk Transfer in the Amount of $1,654,550.

Plaintiff is entitled to avoidance of the Baruk Transfer to the extent necessary to satisfy the Bankruptcy Estate's claim against Morabito pursuant to NRS 112.210(a). Plaintiff understands that, through Snowshoe Properties and the Baruk Trust, Bayuk still owns and controls Baruk and the Baruk Properties, other than the Sparks Property. Plaintiff seeks avoidance of the Baruk Transfer, such that the equity interest in Baruk, as it existed at the time of the Transfers, is returned to Morabito's Estate.

Alternatively, Plaintiff is entitled to a monetary judgment against Bayuk and the Bayuk Trust based on the Baruk Transfer in the amount of $1,654,550 under NRS 112.220(2). As evidenced by the valuations obtained by Morabito and Defendants, and the appraisal of the Sparks Property which was not valued by Defendants at the time of the Transfers, the total value of Baruk on September 30, 2010 was $3,309,100. Morabito's 50% interest, therefore, was worth $1,654,550. Bayuk did not provide any value in exchange for the Baruk Transfer as the Baruk Note was a sham. As a result, the Trustee is entitled to judgment against Bayuk and the Bayuk Trust in the amount of $1,654,550.

3. Plaintiff is Entitled to a Monetary Judgment Against Bayuk, Sam, Superpumper, and Snowshoe Based on the Superpumper Transfers in an Amount of at least $1,985,307, with the Final Amount to Be Determined at Trial.

Plaintiff is entitled to a judgment of the return of Morabito's 80% interest in Superpumper, or the value thereof. Plaintiff understands that Defendants sold Superpumper and therefore, Plaintiff is requests a judgment in the amount of the value of Morabito's interest at the time of the Transfers.[40]

Morabito exchanged his interest in Superpumper, in part, for the Superpumper Note. The Superpumper Note was illusory and provided no benefit to Morabito. As a result, no value was exchanged as a result of the Superpumper Note. Furthermore, Morabito testified that he only received $542,000 in cash (not the $1,035,094 set forth in the Superpumper Agreement). Plaintiff is therefore entitled to a monetary judgment against Defendants in the amount of, *at least*, $1,985,307, the amount of the Superpumper Note and the difference between the cash that was supposed to be exchanged and the cash Morabito testified he received. Any remaining amount, based on the correct valuation of Superpumper, should be determined at trial.

[40] Superpumper's assets were sold to Supermesa Fuel & Merc, LLC a company owned by Jan Friederich in or about 2016, while the Complaint was pending. Jan Friederich has been designated as Defendants' expert in this case. As Jan Friederich was aware of the fraudulent transfer claims in this case, he did not take in good faith. Plaintiff reserves his right to seek recovery of Superpumper from Supermesa Fuel & Merc, LLC and Jan Friederich.

IV.
CONCLUSION

Plaintiff respectfully requests that the Court grant Plaintiff summary judgment as follows:

1. The Transfers are fraudulent as being actually fraudulent pursuant to NRS 112.180(1)(a);

2. Avoiding the Real Property Transfers pursuant to NRS 112.210 such that the Laguna Properties are returned to the Bankruptcy Estate;

3. Alternatively, awarding judgment in favor of Plaintiff and against Bayuk and the Bayuk Trust as to the Real Properties pursuant to NRS 112.220(2) in amount the minimum amount of $1,236,458;

4. Avoiding the Baruk Transfer pursuant to NRS 112.210 such that the Baruk Properties are restored to Baruk and the 50% interest in Baruk is returned to the Bankruptcy Estate;

5. Alternatively, awarding judgment in favor of Plaintiff and against Bayuk and the Bayuk Trust as to the Baruk Transfer pursuant to NRS 112.220(2) in the amount of $1,654,550;

6. Awarding judgment in favor of Plaintiff and against Defendants, jointly and severally, as to the Superpumper Transfer pursuant to NRS 112.220(2) in the *minimum amount* of $1,985,307;

7. Awarding judgment in favor of Plaintiff and against Defendants, jointly and severally, as to the Superpumper Transfer pursuant to NRS 112.220(2) in an additional amount to be determined at Trial following evidence as to the actual value of Morabito's 80% interest in Superpumper at the time of the Superpumper Transfer;

8. Setting the hearing on valuation of the Reno Property and Superpumper, to the extent necessary, at the time set for Trial; and

. . .

. . .

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9. Awarding such and further relief as to this Court is just and equitable under the facts of this case.

Dated this 17th day of August 2017.

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Special Counsel for Plaintiff

AFFIRMATION
Pursuant to NRS 239B.030

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

GARMAN TURNER GORDON LLP

/s/ Teresa Pilatowicz
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CERTIFICATE OF SERVICE

I certify that I am an employee of GARMAN TURNER GORDON LLP, and that on this date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **MOTION FOR PARTIAL SUMMARY JUDGMENT** 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, Reno, Nevada, postage prepaid, following ordinary business practices

____ Certified Mail, Return Receipt Requested

____ Via Facsimile (Fax)

____ Via E-Mail

XXX 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)

addressed as follows:

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

DATED this 17th day of August, 2017.

/s/ Ricky H. Ayala
An Employee of GARMAN TURNER GORDON LLP

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Special Counsel to Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF

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

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, vs. SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, and individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	**CASE NO.: CV13-02663** **DEPT. NO.: 1** **STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff William A. Leonard, as Chapter 7 Trustee of the Bankruptcy Estate of Paul Anthony Morabito ("Plaintiff"), by and through his counsel, the law firm of Garman Turner Gordon LLP, submits this Separate Statement of Undisputed Facts in Support of his Motion or Partial Summary Judgment, filed concurrently herewith:

A. The Court Announces an $85 Million Judgment Against Morabito.

1. In or about 2007, a dispute developed between JH, Inc. ("JH"), Jerry Herbst, and Berry Hinckley Industries ("BHI" and together with JH and Jerry Herbst, the "Herbst Parties") on the one hand, and Morabito and Consolidated Nevada Corporation ("CNC") on the other, regarding the sale of the BHI stock to JH. *See, Declaration of Timothy Herbst* ("Herbst Declaration"), attached as **Exhibit 1,** ¶ 1.

2. On December 3, 2007, Morabito and CNC filed a lawsuit against the Herbst Parties captioned *Consolidated Nevada Corp., et al. v. JH, et al*. in the Second Judicial District Court (the "State Court"), Case No. CV07-02764 (together with all claims and counterclaims, the "State Court Action"). *Id.*, ¶ 2.

3. The Herbst Parties filed numerous counterclaims in the State Court Action against Morabito and CNC, including fraud in the inducement, misrepresentation, and breach of contract relating to an Amended and Restated Stock Purchase Agreement ("ARSPA"). *Id.*, ¶ 3.

4. Ultimately, Judge Brent Adams found that Morabito and CNC fraudulently induced the Herbst Parties to enter into the ARSPA and ruled in favor of the Herbst Parties against Morabito on other fraud-based claims. *See Findings of Fact and Conclusions of Law*, attached hereto as **Exhibit 2.**

5. Specifically, as to the fraud, Judge Adams found:

a. Clear and convincing evidence shows that there was no basis whatsoever for the contents of the working capital estimate other than Mr. Morabito's decision to create it.

b. There is not one piece of paper that has been produced in over 5,500 exhibits in this trial, to the Independent Accountants, during discovery or anywhere else, to support the exaggerated value of the company as set forth in the working capital estimate

c. The Court finds by clear and convincing evidence that Mr. Morabito never for a single second had any intention to perform the services of construction manager.

d. Mr. Morbaito's representation under the CMA were intentionally false.

e. Mr. Morabito's representations were made for the purpose of inducing the purchase of the development cites by JH.

See id., ¶¶ 34, 35, 69, 70, 71.

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6. On September 13, 2010, the Court announced an oral judgment of $85,871,364.75, with further proceedings to take place regarding the amount of punitive damages (the "Oral Judgment"). *See* Exhibit 1, ¶ 6.

7. On October 12, 2010, the State Court entered its findings of fact and conclusions of law (the "FF&CL") which set forth the legal and factual basis for a forthcoming written State Court judgment, including fraud in the inducement. *See* Exhibit 2.

8. On August 23, 2011, the State Court entered a final judgment awarding the Herbst Parties total damages in the amount of $149,444,777.80 for actual fraud, representing both compensatory and punitive damages as well as an award of attorneys' fees and costs (the "Final Judgment"). *See Judgment*, attached hereto as **Exhibit 3.**

B. Immediately After the Oral Judgment, Morabito Begins Planning to Transfer His Assets to Avoid Liability on the Eventual Final Judgment.

9. *Less than two days after the Oral Judgment*, Morabito engaged two separate law firms in New York to formulate a plan for divesting Morabito of his assets while retaining all of the benefits of his assets. Specifically, Morabito retained Dennis Vacco ("Vacco") at Lippes Mathias Wexler & Friedman ("LMWF"), and Sujata Yalamanchili ("Yalamanchili") and Garry Graber ("Graber") at the law firm of Hodgson Russ ("HR").

10. Graber testified as to the goals of his retention:

> Q. And what were you asked to do for Morabito?
>
> A. I was asked to consider whether there were ways in which he could evade the judgment through bankruptcy, or I shouldn't say evade the judgment. That's not correct. ***If there are ways he could protect himself against -- protect his assets and/or escape liability on account of the judgment.***

See Deposition Transcript of Garry Graber, attached hereto as **Exhibit 4,** p. 17, ll. 3-11 (emphasis added).

11. HR had several ideas. In an e-mail dated September 15, 2010 – just two days after the Oral Judgment – Yalamanchili wrote to Morabito:

> I caught up with Garry (who is back in Buffalo today) on our conversation from yesterday.

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> Garry has a number of additional ideas, ***including a possible marital split between Paul and Edward pursuant to which Edward could retain some of Paul's assets***. We need to better understand California domestic partner laws, first.

See **Exhibit 5**. (emphasis added).

12. Morabito clarified his intent to protect all tangible assets, right down to his clothes and airline miles, with Graber:

> Garry
>
> I have a few questions.
>
> Edward and I plan on changing our primary residence from Reno to Laguna Beach.
>
> Change DMV, voter registration, cancel Nevada club memberships, burial plot, resign from State Board etc
>
> Should Edward buy our household furniture etc from me for the Reno and Palm Springs houses that are not our primary? We have receipts from 2006 for everything worth around $225,000 new.
>
> Also, what about my clothes? I was in the hospital for 5 months last year and came out 200 pounds lighter. I spent $200,000 on a new wardrobe since November.
>
> Finally, are my 2 million American Express airline miles something I can do something with or is that an asset, too?

(the "Graber E-mail") *See* **Exhibit 6**.

13. By September 20, 2010, Yalamanchili was advising her firm that she had agreed to "help [Morabito] with some of the asset protection strategies he will need." *See* **Exhibit 7.**

14. To that end, and in discussing the "quick run-down of Paul's assets" with Graber, Yalamanchili made clear:

> CoWest Co owns 100% of the stock of Superpumper, Inc., an Arizona corporation. This is a profitable business which owns and operates 11 gas stations an [sic] convenience stores in Arizona. Paul, Edward, and Sam all draw "healthy" salaries from this company (e.g. 250k to 500k). I would like to preserve this business and protect it from the Herbsts since it pays salaries to Edward, Sam and Paul and it is a strong, going business.

See **Exhibit 8**.

15. That same night, after what was clearly a heated call between Morabito and his

counsel as to the Transfers and problems associated therewith, Graber wrote to Morabito:

> And I apologize for my part in the exchange. I feel as though I am being asked under very rushed circumstances with very scant information to come up with a ***foolproof strategy*** in a complicated area of law in which "foolproof" is impossible to achieve and then being prevented from explaining the issues and obstacles involved.

See **Exhibit 9**. (emphasis added).

16. Morabito is not a stupid man. After being advised that it was improper to transfer assets following a judgment to hinder, delay, and defraud a creditor, Morabito made clear his strategy for protecting the Transfers:

> Dennis & Sujata
>
> Garry asked what my rationale was to do this – and that I would be asked.
>
> Judge Adams specifically exonerated Edward and Sam. I hold assets with them, and they had long standing options to own a majority of Superpumper, Inc.
>
> We agreed amongst ourselves that I was best standing alone with my assets, and on advice of Counsel we sought independent, third party appraisers to do just that.
>
> I have no doubt it will be challenged in court – and they may try and come up with their own appraisals. But in the end, the underlying "selling for value" will be allowed.
>
> Snowshoe Petroleum, Inc. will be an Erie County, New York company. Edward is going to be a resident of Los Angeles and Orange County, California.
>
> ***The Herbsts no longer have home court, good old boy advantage.***

See **Exhibit 10**. (emphasis added)

17. Yalamanchili cautioned Morabito at that time:

> You need to be very clear on what the law says, Paul. I don't think it simply says you can transfer assets for value. I think Garry is trying to say that Fraud. Conveyance laws are complicated and they look at a lot of factors, including whether you have an intent to frustrate your creditors. I am not an expert in this area but I want to be very clear on what the law says.

See **Exhibit 11**.

18. Morabito never even pretended that he was not trying to frustrate his

creditors, responding:

> Exactly. It allows sale. If you look at what we are doing, we end up in the exact same position with stand alone assets.

See id.

19. Shockingly, despite his constant e-mails dictating exactly how his attorneys would transfer his assets to hinder the Herbst Parties' collection efforts, even challenging his attorneys when they advised as to the consequences of his actions, Morabito later claimed:

> Q. So is it a fair assessment that you told [Vacco] split everything up, and then he just gave you documents to sign and that was your involvement in it?
>
> Morabito: Effectively, I mean, I wasn't involved – I mean, I think I may have identified one – I – I mean, we didn't – I don't know any of the people involved. I never met any of the people involved. I wasn't involved in any of this process, so Mr. Vacco directed the whole thing.

See **Exhibit 13,** p. 82, l. 22 - p. 83. l. 2

C. Morabito Starts to Transfer His Assets to Avoid Collection.

1. The $6,000,000 Sefton Trustees Transfer.

20. On September 15, 2010, just *two days* after the Oral Judgment, Morabito transferred $6 million (the "Off-Shore Funds") to an entity known as Sefton Trustees ("Sefton"). *See* **Exhibit 14**.

21. Morabito confirmed that Sefton is an offshore account. *See* **Exhibit 15**, p. 189, ll. 24-25.

22. However, he then claimed that, notwithstanding the Oral Judgment against him just days before, that (1) he transferred the Off-Shore Funds to Sefton to pay the debts owed by a prior boyfriend, Mr. Marsland, through no documentation regarding the debts or that Morabito has any exposure for the debts has ever been produced *See id.*, p. 190, ll. 9-12

23. Also, at times, he claims to have no recollection of making this $6 million transfer to Sefton. *See* **Exhibit 16,** pp. 119-125

2. Morabito Exchanges His Majority Interest in the Laguna Properties for Bayuk's Minority Interests in a Reno Property.

24. Immediately prior to the Oral Judgment, Morabito and Bayuk, individually and through their respective trusts, owned three real properties – (1) 371 El Camino del Mar, Laguna Beach, California (the "El Camino Property"), (2) 370 Los Olivos, Laguna Beach, California (the "Los Olivos Property" and, together with the El Camino Property, the "Laguna Properties"), and (3) 8355 Panorama Drive, Reno, Nevada (the "Reno Property," and together with the Laguna Properties, the "Real Properties"). *See* **Exhibit 17**.

25. Specifically, Morabito[1] owned 70% of the Reno Property, 75% of the El Camino Property and 50% of the Los Olivos Property. Bayuk owned the remaining interests. [Morabito *See id.*

26. On September 27, 2010, *just two weeks* after the Oral Judgment, Morabito and Bayuk executed a *Purchase and Sale Agreement*, which was later amended on September 29, 2010 (as amended, the "PSA"), for the transfer of the Real Properties. *See id.; see also* Exhibit **18**.

27. Pursuant to the PSA, Morabito purported to sell his 75% and 50% interests in the Laguna Properties in exchange for Bayuk's 30% interest in the Reno Property (the "Real Property Transfers"). The transaction included Morabito providing a $150,000 credit to Bayuk for a theater system in the Reno Property and $45,000 for excess water rights appurtenant to the Reno Property. *See id.*

28. According to Morabito and Bayuk, the value of the Laguna Properties, after deduction for mortgages, was $1,933,595. Specifically, the Los Olivos Property was valued[2] at $854,954, and the El Camino Property was valued at $1,078,641. *See* Exhibits 17-18; **Exhibit 12; Exhibit 36.**

29. The valuation of the Reno Property is disputed. According to the Debtor and

[1] For purposes of this Motion, Morabito and Arcadia are treated as one and the same, and Bayuk and the Bayuk Trust are treated as one and the same.
[2] This value is net of existing mortgages on the Laguna Properties.

Bayuk, the value of the Reno Property was $4,300,000 as of September 30, 2010. *See* **Exhibit 19**; *see also* Exhibit 17.

30. According to Plaintiff, the value of the Reno Property, as of September 30, 2010, was only $2,000,000. The Reno Property was also subject to a $1,028,864 mortgage. *See* **Exhibit 20**.

31. Morabito sold the Reno Property in December 2012 (more than two years after these valuations) for only $2,600,000. *See* **Exhibit 21** and **Exhibit 22**.

32. Along with the real property, Morabito also transferred all personal property at all of the real properties to Bayuk. Critically, Morabito purported to sell all of the personal property in the Reno Property, despite the fact that Morabito retained that real property, for a payment of $29,380.00. *See* **Exhibit 23**. This is the same personal property that, in the Graber e-mail just two weeks before, Morabito indicated was purchased for $225,000. *See* Exhibit 6. Confusingly, Morabito also testified that, as of April 2012, he had furniture and assets in the Reno Property worth $1 Million. Morabito claimed that he would periodically sell this property to Bayuk (long after the Transfers and the alleged sale to Bayuk of the personal property) in exchange for his living expenses. *See* **Exhibit 44**, p. 64, l. 9 - p. 66, l. 18.

3. Morabito Exchanges His 50% Equity Interest in Baruk Properties, LLC for an Illusory Promissory Note.

33. Immediately prior to the Oral Judgment, Morabito and Bayuk, through their trusts, each owned 50% in a real estate holding company called Baruk Properties, LLC, a Nevada limited liability company ("Baruk"). *See* **Exhibit 24**.

34. Baruk owned four real properties: 1461 Glenneyre, Laguna Beach, CA ("1461 Glenneyre"); 570 Glenneyre, Laguna Beach, CA ("570 Glenneyre"), 1254 Mary Fleming, Palm Springs, CA (the "Palm Springs Property"), and 49 Clayton, Sparks, NV (the "Sparks Property," and collectively, the "Baruk Properties"). *See* **Exhibit 25**, interrogatory response no. 2.

35. Morabito and Bayuk obtained appraisals: (1) valuing 1461 Glenneyre at $1,400,000; (2) valuing 570 Glenneyre at $2,500,000, or $1,129,021 after deduction for the mortgage on property; and (3) valuing the Palm Springs Property at $1,050,000, or $705,079

after deduction for the mortgage. *See* **Exhibits 26, 27, 28**.

36. The Sparks Property had a value of $75,000 as of September 30, 2010. *See* Exhibit 20.

37. On October 1, 2010, *just two and half weeks* after the Oral Judgment, Morabito transferred his 50% membership interest in Baruk to Bayuk through the *Membership Interest Transfer Agreement* (the "Baruk Transfer"). *See* **Exhibit 29.**

38. In exchange Bayuk purportedly provided a promissory note in the amount of $1,617,050 to Morabito (the "Baruk Note"). *See id.*; *see also* **Exhibit 30**.

39. Immediately after the Baruk Transfer, on October 4, 2010, Bayuk merged Baruk Properties, a Nevada entity, into Snowshoe Properties, LLC, a California limited liability company ("Snowshoe Properties"),[3] and transferred the Baruk Properties to Snowshoe Properties. *See* **Exhibits 31, 32**; *see also* **Exhibit 33**, p. 87, ll. 1-9; *see also* **Exhibit 59.**

40. Immediately after that, Bayuk transferred the Palm Springs Property from Snowshoe Properties to the Bayuk Trust. *See* **Exhibit 34**.

41. The Baruk Note was almost immediately assigned (the "Woodland Assignment") by Morabito to Woodland Heights ("Woodland"), a Canadian entity owned by Morabito's father, purportedly in exchange for an interest in Woodland. *See* **Exhibit 35.**

42. Despite the Woodland Assignment, Morabito and Bayuk now contend that the Baruk Note was not transferred, and Bayuk cannot recall ever making any payments to Woodland. *See* Exhibit 33, p. 130, ll. 2-7; *see also* **Exhibit 37,** pp. 182-188

43. The terms of the Baruk Note required principal and interest payments over 360 months in equal monthly installments of $7,7204.04 accruing interest at 4%. *See* **Exhibit 30.**

44. However, Bayuk testified that he was erratic with paying. *See* Exhibit 33, p. 110, l. 18.] In fact, according the Bayuk, Bayuk would just "give [Morabito] money whenever he needs it. He's a friend." *See id.,* p. 119, l. 13-18.

45. Bayuk's and his agents' testimony regarding the Baruk Note has been

[3] Snowshoe Properties is distinct from Snowshoe Petroleum.

contradictory:

a. Bayuk testified that the Baruk Note was satisfied in full based on a loan ledger (the "First Ledger") and amortization schedule (the "Amortization Schedule") provided by his accountant, Stanton Bernstein ("Bernstein"). *See* Exhibit 25, interrogatory response no. 8; *see also* **Exhibit 39** *see also* **Exhibit 40**.

b. According to the First ledger, $735,724.75 was paid in 2012, $531,600 was paid in 2013, $579,362.62 was paid in 2014, and $101,526.70 was paid through March 2015. *See* Exhibit 39

c. Bayuk later testified that the First Ledger was wrong, and he produced another, wildly different ledger (the "Second Ledger"). *See* **Exhibit 41**.

d. According the Second Ledger, $567,009.26 was paid in 2010, $273,412.88 was paid in 2011, $826,232.49 was paid in 2012, and $129,400.00 was paid in 2013.

e. According to the Amortization Schedule, $735,724.75 was paid in 2012 and $1,029,510.57 was paid in 2013. *See* Exhibit 40

f. In November 2011, Morabito instructed Vacco: "On this, I have the note that I sold my Dad [the Woodland Assignment]. Cancel it, convert it back into a 50% share interest in Snowshoe Properties, LLC," proving not only that no payments could have been made prior to November 2011, but that the assignment to Woodland was just another sham. *See* **Exhibit 42**

g. On May 23, 2012, Morabito submitted a Personal Financial Statement to Bank of America ("BofA") in connection with the BofA Settlement (defined herein) listing as an asset a "$1,750,000 Note Receivable" due from Bayuk. *See* **Exhibit 43**, p. WL002781. Morabito acknowledged that according to the Personal Financial Statement, as of 2012, Bayuk owed him $1.75 million under the Baruk Note, proving that no payment could have been made prior to 2012. *See* **Exhibit 44**, p. 60, l. 11 – p. 61, l.6.

4. Morabito Transfers His 80% Interest in Superpumper, Inc. for a Small Cash Payment and Another Illusory Promissory Note.

46. Immediately prior to the Oral Judgment, Morabito owned a 100% interest in Consolidated Western Corporation ("CWC"), which owned an 80% interest in Superpumper. *See* **Exhibit 45.**

47. Prior the Oral Judgment, Morabito consistently represented that his interest in Superpumper was worth at least $20,000,000:

a. In a May 2009 financial statement provided to Superpumper's auditors, Gursey Schneider ("Gursey") Morabito listed the value of his interest in Superpumper at $20,000,000. *See* **Exhibit 46**.

b. In March 2010, Morabito confirmed that the value his interest was still $20,000,000, stating to Gursey: "Here is the last PFC done for me – and I can represent that nothing has materially changed." *See* **Exhibit 47**.

c. On March 10, 2010, Morabito sent an e-mail in connection with a proposed deal involving Superpumper and ExxonMobil stating that "My intention is to contribute my existing Arizona (11 stores) and Nevada (51% of the truck stop/casino) businesses at a FMV of approximately $40 million." *See* **Exhibit 48**.

d. On May 20, 2010, Morabito delivered an e-mail to Vacco in connection with a proposal to place a binding bid for ExxonMobil Chicago stores, instructing: "Arrange paperwork for me to transfer into CCC 100% of the shares of Consolidated Western Corporation which owns 100% of Superpumper, Inc., at a FMV of $30 million." *See* **Exhibit 49**.

e. In a Statement of Assets and Liabilities provided to Compass Bank ("Compass"), Superpumper's Lender, on May 30, 2010, Morabito represented the value of Superpumper to be $30,000,000 *See* **Exhibit 50**.

f. On June 28, 2010, Morabito delivered another e-mail to employees and ExxonMobil regarding a potential deal that notes "The Arizona company, which I presently own 100% of, has a FMV exceeding $25 million; annual cash flow of $5 million; and has no term debt, just an existing line of credit for $3 million." *See* **Exhibit 51**

48. On September 28, 2010, *just two weeks* after the Oral Judgement, Morabito merged CWC into and Superpumper and then, on September 30, 2010, Morabito and Snowshoe, an entity created by Vacco for Bayuk and Sam, entered into a *Shareholder Interest Purchase Agreement* (the "Superpumper Agreement") whereby Snowshoe allegedly purchased Morabito's 80% equity interest in Superpumper. *See* **Exhibit 52**; *see also* Exhibit 45.

49. Snowshoe was established as a New York entity. *See* Exhibit 52**.**

50. At around the same time, Compass prepared a summary of a request for a forbearance agreement. Compass' report noted that: "Upon learning of the judgment, Mr. Morabito sold SPI, which was not included in the suit, to two minority shareholders. A business appraisal is still being finalized, final purchase price will be roughly $10MM." *See* **Exhibit 54**, p. 6.

51. Ultimately, Matrix Capital Markets Group, Inc. ("Matrix") completed a valuation of Superpumper, and on October 13, 2010 (two weeks *after* the Superpumper Agreement), provided its report to Vacco valuing 100% of the equity interest in Superpumper as of August

31, 2010 at $6,484,514, or $5,187,611.20 for Paul Morbaito's 80% interest (the "Matrix Valuation"). *See* **Exhibit 55**

52. The Matrix Valuation lacked credibility for a number of reasons, but particularly because it inexplicably adjusted nearly $9 Million in affiliated accounts receivables due to Superpumper (the "Receivables") to zero, reducing the value of Superpumper, on paper at least, by at least $6,500,000. *See* Exhibit 55; *see also* **Exhibit 56**

53. In reality, the value of Superpumper on September 30, 2010 was $13,050,000, and Morabito's 80% interest was worth $10,440,000. *See id.*

54. Despite the already reduced valuation because of the elimination of Receivables, LMWF further reduced the Matrix valuation by (1) $1,682,000 for the "Compass Term Loan" (the "LMWF Compass Reduction") and (2) $1,680,880 for a 35% "risk reduction" (the "LMWF Risk Reduction," and together with the LWMF Compass Reduction, the "Additional LMWF Reductions") *See* **Exhibit 57**.

55. In exchange for the reduced value of Morabito's 80% interest, Defendants purportedly paid Morabito $1,035,094 in cash, and $1,462,213 through a term note from Snowshoe to Morabito (the "Superpumper Note"). *See* Exhibit 45, *see also* **Exhibit 60.**

56. However, Morabito submitted a declaration to the Bankruptcy Court on July 1, 2013 (the "Morabito Bankruptcy Declaration") contending that he sold his interest in CWC for "cash payments of approximately $542,000 and a note of approximately $933,694." Morabito further stated that "I had received partial payments on [the note] and the principal balance has been subsequently cancelled based on a post-closing reevaluation of the significant decrease in the fair market value of the business." *See* **Exhibit 58**, ¶ 10.

57. The Superpumper Note was not executed until November 1, 2010, one month after the Superpumper Transfer. The Superpumper Note required monthly payments commencing on December 1, 2010 in the amount of $19,986,71 for 84 months, with interest accruing at 4% per annum *See* Exhibit 60, Superpumper 000001-02.

58. The amount due under the Superpumper Note was reduced by $939,000 to $423,213 on February 1, 2011 (the "Superpumper Note Reduction"), leaving a successor note in

the amount of $423,213 (the "Successor Note"). *See* Exhibit 60, Superpumper 000003-06.

59. The Superpumper Note Reduction, however, was another sham designed to ensure that Morabito held no assets on which the Herbst Parties could execute.

a. In short, on or about August 13, 2010 (during trial), Superpumper obtained a term loan from Compass in the amount of $3,000,000 (the "Compass Term Loan"). *See* **Exhibit 61**.

b. The Compass Term Loan was not used for operations but instead was withdrawn from Superpumper and distributed to Morabito, Bayuk, and Sam, each of whom received $939,000 (the "Compass Loan Withdrawals").

c. The Compass Loan Withdrawals were made in order for Morabito, Bayuk, and Sam to invest in other companies:

> Sam: The term loan was initiated in August of 2010. The reasons for that term loan is that it was guarantied by the Superpumper. Edward, Paul and I decided we were going to take that money, pre what happened in the judgment, and go invest it in another entity and use that money for equity for us to buy another business, probably in the same field, the convenience store area.

See **Exhibit 62**, p. 98, ll. 6-12.

d. While $939,000 withdrawn by Morabito, Bayuk, and Sam (for a total of $2,817,000) and was to be paid back by Morabito, Bayuk, and Sam, they were eliminated as assets of the company when valued by Matrix. At the same time, the same obligations are now being used to reduce the amount due to Morabito and otherwise reduce the value of the company.

60. Defendants have been unable to produce any evidence of payments made on the Successor Note, though it provided for 84 monthly payments beginning on March 1, 2011. It is unclear whether the Successor Note was every actually paid

a. As late as October 12, 2012, Morabito's accountant, Stan Bernstein, noted that no payments had been made on the Superpumper Note through 2011, and interest was accrued. *See* **Exhibit 65**.

b. Morabito could not say whether the Successor Note was paid. *See* **Exhibit 66**, p. 175, l. 21 – p. 176, l. 4.

c. Nor could Vacco: "Since my separation,[4] I don't know what happened to the debtor, how – how much of it's been paid, whether it's been paid, whether it's been paid in

[4] Vacco testified that he terminated his relationship with Morabito prior to the involuntary Bankruptcy Case, which was commenced in June 2013. See Vacco Depo., p. 38, ll. 12-20.

total or whether it's in default. I don't know." *See* **Exhibit 67**, p. 47, ll. 5-18.

d. Finally, as set forth in the Morabito Bankruptcy Declaration, the note was only in the amount of approximately $933,694, and the principal balance was subsequently cancelled based on a post-closing reevaluation of the significant decrease in the fair market value of the business *See* Exhibit 58.

D. Morabito Continues to Control the Transferred Properties.

61. Following the Transfers, Morabito continued to utilize the transferred assets as if he still owned them.

62. In April 2011, Morabito sought to negotiate a sale on behalf of Snowshoe, and by bargaining with Superpumper. Specifically, Snowshoe sought to acquire Nella Oil Company, LLC and Flyers LLC (the "Nella Deal"). The proposal included the contribution of Snowshoe's 100% interest in Superpumper, "valued at $10,000,000." *See* **Exhibit 68**. Despite that the purchaser was to be Snowshoe, Morabito negotiated the terms of the Nella Deal and controlled the deal *See id.* For example:

a. On April 5 and April 15, 2011, Morabito e-mailed Vacco regarding coordinating the Nella Deal, without including Bayuk or Sam. Morabito notes that the deal allowed "SPI to acquire Nella Oil Co" and indicates "attached is an initial $65 million loan offer from Cerebus – they made it out to CWC but I am having it changed to Snowshoe Petroleum Inc…" Morabito makes his role clear: "I am expecting a letter of interest from Getty Realty on the real estate by Tuesday. My goal would be to submit a Letter of Intent to Nella Oil by Wednesday or Thursday. I will circulate the first draft. *See* **Exhibit 70**

b. These communications continued through August 7, 2011. *See* **Exhibit 71**.

c. Throughout the discussions, there were at multiple versions of proposed Letters of Intent, each negotiated and controlled by Morabito. [5]

63. In August 2011, Morabito retained Tim Haves, a real estate broker, on behalf of Superpumper Properties, LLC ("Superpumper Properties"), a company purportedly owned by Morabito.[6] Instead of having Mr. Haves paid of our Superpumper Properties, Vacco instructed

[5] Plaintiff intends to cite to additional deposition testimony of Vacco. However, at the time of filing, the transcript was unavailable. As a result, this SSOF will be supplemented when the information becomes available.

[6] Superpumper Properties LLC ("Superpumper") was an entity for which Morabito purportedly paid Bayuk and Sam for their interests at the time of the Transfers. However, Bayuk stated, under oath, that "Edward Bayuk owned 25%, Salvatore Morabito owned 25% and Morabito owed [sic] 50% until approximately when

Morabito, without copying Bayuk and Sam, to simply use Superpumper to make payment: "In order to protect [Tim Haves] from being reached in an enforcement action by the Herbst, I recommend that his agreement be with [Superpumper.] [Superpumper] will need to pay him $58,000 without any corresponding reimbursement from [Superpumper Properties]. If he is paid from Flyer's proceeds, [the Herbst Parties] will go after that money and the fact that he is not broker in NV will be revealed. He has consulted for [Superpumper] so it is logical that he be under contract for that entity." *See* **Exhibit 72**.

64. In November 2011, Morabito sought to use the assets of Snowshoe Properties (fka Baruk) that he allegedly transferred to Bayuk to settle a lawsuit against Morabito:

a. On April 11, 2011, BofA filed a lawsuit against Morabito in connection with a past due obligation due and owing to BofA by Morabito thereby commencing case no. CV11-01121 in the State Court (the "BofA Lawsuit"). *See* **Exhibit 73.**

b. In connection with the BofA Lawsuit, BofA inquired as to the ownership of 1461 Glenneyre, and the Baruk Transfer:

> David Maiorella of the Bank spoke with Mr. Morabito about this situation on October 31, and Mr. Maiorella ***was advised by Mr. Morabito that this transfer represented nothing more than a Borrower name change, and that documentation exists substantiating that such was indeed the case***.

See **Exhibit 42** (emphasis added).

c. Morabito, more than a year after the alleged Baruk Transfer, asked Vacco: "As far as they are concerned it is a name change, correct?"

d. Vacco responded: "Tough to sell if she pulls corporate records which is who the members of Snowshoe Properties, LLC."

e. In order to correct any potential concerns, on November 1, 2011, over a year after the Baruk Transfer, Morabito responded to Vacco:

> On this, I have the note that I sold my Dad. [The Baruk Note] Cancel it, convert it back into a 50% share interest in Snowshoe Properties, LLC, and give me the right to trigger an option to split the assets and take 1461 Glenneyre and [Bayuk] ends up with 570 Glenneyre.

(continued)
the assets were sold in 2011 and the company was dissolved." *See* **Exhibit 64**, Response to interrogatory no. 9. In any event, Morabito sought to, and did, sell Superpumper Properties prior to the Final Judgment again ensuring that the Herbst Parties collection efforts were frustrated.

See id.

65. In February 2012, Morabito, Vacco, and Timothy Haves, the same broker Vacco advised Morabito to pay out of Superpumper before, exchanged no less than five e-mails regarding a sale of 1461 Glenneyre. Bayuk was not even copied on any of them. *See* **Exhibit 75**

66. On May 8, 2012, Morabito instructed Vacco: The Glenneyre Street property should be in PARADERAS PROPERTIES LLC, Delaware, jointly owned by PM/RW,[7] and sold at $2.75 million . . . $1.75 million mortgage we are getting through Pacific Bank and $1 million is cash equity. *See* **Exhibit 76** [Lippes.PAM0000410]. Though Bayuk purportedly owned the 1461 Glenneyre property in full at that point, he was not part of this proposed ownership.

67. In September 2012, in connection with a settlement of the BofA Lawsuit, which had nothing to do with Bayuk, Morabito caused a second deed of trust to be placed on 1461 Glenneyre. *See* Exhibit 73.

68. Vacco simply instructed Bayuk when and where to sign for Morabito:

> Edward,
>
> Attached please find various documents which need to be executed by you to fulfill the collateral for the note Paul agreed to in order to settle the BOA litigation. I have reviewed and approved all documents. Please execute these documents and return them to me via PDF before Friday and then overnight the originals to me. Please sign in blue ink.

See **Exhibit 77**.

69. Also in September 2012, in connection with funding for Virsenet, an entity in which Bayuk and Morabito held joint interests, Bayuk stated to Morabito and various attorneys in an e-mail chain regarding funding and security, "Let's just make this simple, ***I think Paul wants to*** put a second deed of trust in place on Mary Fleming House if so, than [sic] just let me sign for the second deed of trust." *See* **Exhibit 78** (emphasis added).

70. On October 3, 2012, in an e-mail exchange between Morabito, Vacco, and Christian Lovelace ("Lovelace"), another LMWF attorney, Morabito discussed the terms of a $5

[7] RW is Raymond Whiteman ("Whiteman").

million loan to Snowshoe Properties (in which Morabito supposedly held no interest). Vacco responded to Morabito:

> As I understand your instructions below, Snowshoe Properties, LLC, will borrow $5MM. Snowshoe will provide a FDT on 1461 Glenneyre and a SDT on 570 Glenneyre. The term will be for 36 months with no prepayment penalty. Are the monthly payments interest only or interest and principal. If interest and principal what is the amortization period, 3 years, 10, 15? What interest rate do you want to offer?

See **Exhibit 79**. Of course, while Bayuk was on some earlier e-mails, he was not even copied the e-mails discussing substantive terms of the deal.

71. In March 2013, nearly three years after the Transfers, Morabito was still bargaining with Superpumper. For example, on an e-mail with Vacco, Morabito proposed a settlement with the Herbst Parties:

> Morabito: "Why not offer them Superpumper – they would make $2 million a year and could borrow $3 million against it"
>
> Vacco: "As to your proposal, do you mean you would transfer ownership of Superpumper to BHI or to use it as 'collateral' in exchange for a longer forbearance.
>
> Morabito: We would transfer ownership to them lock, stock and barrel … $2 million is store level cashflow and no debt or PG's.

See **Exhibit 80**. Though Bayuk and Sam supposedly owned Superpumper at this point, neither was included in these discussions.

72. In March 2014, Morabito caused Bayuk to transfer the Sparks Property to Desi Moreno to settle the case of *Moreno v. Morabito*. Bayuk was not named in the Moreno lawsuit and didn't even know what it was about. *See* Exhibit 33, p. 131, l. 15 – p. 133, l. 25; *see also* Exhibit 25, Response to interrogatory no. 2.

73. As of December 2016, Morabito continued living in the Palm Springs Property rent-free. See **Exhibit 16**, p. 80, l. 19.

Garman Turner Gordon
650 White Drive, Ste. 100
Las Vegas, NV 89119
725-777-3000

E. Bayuk and Sam Funded Morabito's Extravagant Lifestyle, Making the Purported Promissory Notes Illusory.

74. Both before and after the Transfers, Bayuk and Sam would pay his debts and other obligations:

a. According to Morabito, the process of Bayuk and Sam "lending" Morabito money whenever he needed started before 2010, and likely in 2009. *See* Exhibit 13, p. 28, ll. 1-8.

b. Morabito testified with respect to his financial entanglements with Bayuk since 2009:

> Q. You referenced a promissory note that is updated. When did that note first come into existence?
>
> A. Well, it's just a ledger or whatever. He keeps a record of everything that he advances me.
>
> Q. Is there a formal written promissory note?
>
> A. I don't recall.
>
> Q. Do you know who would have that information?
>
> A. No.
>
> Q. Who normally drafts promissory notes on your behalf?
>
> A. I don't know if I ever had anyone draft any promissory notes on my behalf.
>
> Q. Do you know what the balance of the money that Ed Bayuk has lent you is today?
>
> A. No.
>
> Q. Do you know if it is more or less than a million dollars?
>
> A. I would presume more, but I'd be guessing.
>
> Q. Where would that information be?
>
> A. With Mr. Bayuk or Mr. Hawkoette?
>
> Q. Are you aware of a specific ledger that Mr. Bayuk or Mr. Hawkoette keep regarding the money that Mr. Bayuk has lent you?
>
> A. I'm assuming they do.
>
> Q. And is that a continuing note that has existed since 2009?

A. I don't specifically recall it it's a specific note that existed in 2009 or another year or when it was.

A. Do you recall if, at any time, you ever paid Mr. Bayuk in full?

Q. I believe I've, at times, have paid him back, and then I borrowed more money since and…

A. Are you aware of a time when there was a zero obligation owing?

A. At one point, yes.

Q. Do you know when that –

A. I think just after my surgery, around that period of time, I got to a point where I went from – he owed me money, I owed him some money. Ever since then, I've always owed him money.

Q. So when you say since your surgery, we're talking about since 2009 or 2010.

A. 2009, 2010, during that whole period.

See id., p. 28, l. 9 – p. 30, l. 3.

75. Similarly, when asked about balances due to Sam since the beginning of 2010, Morabito confirmed, "I've been in debt to my brother my entire life, so I have no idea." *See id.*, p. 31, ll. 14-18.

76. Following, the Transfers, Bayuk and Sam would continue to simply pay any amount requested by Morabito, undoubtedly from funds obtained through their operation of, or ownership of, the transferred assets. None of these transactions were treated as loans, but as Morabito exercising his entitlement to his own money and property. For example, on November 11, 2011, Morabito emailed Vacco, stating:

Dennis

Tell Sam he has to wire you $1 million by the 21st.

Please get Trevor's commitment to sign – call Edward tomorrow and tell him to HOLD any payment to him until he signed. I guaranty he will delay this process. Edward will absolutely cut him off is he does but requiring him to sign is a huge risk. Speak to Edward and plan on personally driving over the Niagara to get his signature. (November 11, 2011)

See **Exhibit 82**.

77. Likewise, Morabito would demand when and where to send funds, and Sam would immediately comply. For example, in a November 28, 2011 e-mail between Morabito, Sam, and Vacco, Morabito wrote: "Sam. Please wire $560,000 to Lippes Mathias TODAY." Within two hours, Sam responded: "Ok Wire Instructions." *See* **Exhibit 83**.

78. Morabito could not even guess how much he had received or borrowed from Bayuk since the Transfers:

> Q. "So what is your best guess of how much you owed Mr. Bayuk on December 31, 2012?
>
> A. " I would have – it would be a guess. It could be in the millions of dollars. I don't know."
>
> Q. How much do you think you owed him on December 31, 2014.
>
> A. It would be a guess but I'm sure – I'm sure I owed him a significant amount of money. I would think. I don't know."

See Exhibit 15, p. 84, ll. 13-23.

79. As of December 2015, Morabito was paying his approximately $30,000 in monthly expenses through a combination of Mr. Bayuk and Sam lending money. *See* Exhibit, p. 87, l. 13 – p. 88, l. 17.

80. For at least several years prior to 2016, Edward Bayuk provided Morabito with a credit card that Morabito uses for groceries. *See* Exhibit 13, p. 34, l. 11 – p. 35, l. 9.

81. As late as March 2016, when asked "what do you do for money right now," Morabito testified, "My brother and Mr. Bayuk have been lending me money" and guessed that the amount he then owed to Bayuk was in excess of $1,000,000. *See* Exhibit 13, p. 27, l. 12 – 31, l. 6. Morabito further testified that he had been in debt to his brother all of his life, and "If I'm out of money, I ask my brother if I can have some money." *See id.*, p. 31, l. 4 – p. 33, l. 19.

82. Bayuk testified that sometimes he removes money from Snowshoe Properties (formerly Baruk) bank account to lend money to Morabito when he needed it. *See* Exhibit 33, p. 199, l. 12 – p. 200, l. 1.

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83. The true scenario of what actually happened is revealed clearly by Morabito in his own testimony.

> Q. [Bayuk is] lending you money to pay your monthly expense?
>
> A. He's lending me *my – my money*, and what I do with it he has no knowledge of.

See Exhibit 16, p. 83, l. 11-13.

84. When notes are needed for loans, they are created. When notes need to disappear, they will .

85. For example, when alleged loans from Bayuk to Morabito needed to disappear to reduce known creditors in the Bankruptcy Case, Bayuk testified that he "[i]n consideration of the past friendship, loyalty, and successful past business ventures which Mr. Morabito and I have shared, I made a gift to Mr. Morabito in the amount of the debt to me and I have destroyed the promissory note" *See* **Exhibit 84.**

F. <u>As a Result of the Transfers, the Herbst Parties Cannot Collect on the Final Judgment and Ultimately Is Forced to File an Involuntary Bankruptcy.</u>

86. Neither Morabito, his counsel, nor Defendants informed the Herbst Parties that the Transfers were occurring, despite the fact that Morabito and the Herbst Parties were in the midst of preparing for the punitive damages phase of the trial. *See* Exhibit 1, ¶ 7; *see also* Exhibit 13 p. 72, ll. 7-9.

87. In total, Morabito paid the Herbst Parties less than 5% of the total Final Judgment, with payments coming from three sources: (1) $5,000,000 in payments made from the return of Offshore Funds from Sefton nearly two years after that transfer; (2) approximately $1,300,000 in sale proceeds from the Reno Property; and (3) the assumption of certain liabilities by Morabito. Par for the course, Morabito defaulted on many of the assumed liabilities, ultimately causing increased liabilities to the Herbst Parties. <u>See</u> Exhibit 1, ¶ 8.

88. As a result, and after Morabito defaulted on a Settlement Agreement and a Forbearance Agreement extended by the Herbst Parties, on June 20, 2013, the Herbst Parties

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filed an involuntary petition against him and CNC under chapter 7 of the Bankruptcy Code. *See id.* ¶ 9.

89. On December 17, 2012, the Bankruptcy Court entered an Order for Relief against Morabito, adjudicating him a chapter 7 debtor. *See* **Exhibit 86**

90. On January 22, 2015, Plaintiff was appointed the Trustee of Morabito's Bankruptcy Estate and, on May 15, 2015, was substituted in as Plaintiff for the Herbst Parties to prosecute this action for the benefit of all creditors of the Estate. *See* **Exhibits 87, 88**

91. The fraudulent transfers involved in this Complaint are not the only fraudulent transfers of which the Trustee has complained.

a. At the same time as the Transfers, Morabito transferred his 90% interest in watchmyblock.com to Bayuk for $1,000. Morabito valued his interest in watchmyblock.com at between $1,800,000 and $2,250,000 in 2009 and 2010. *See* **Exhibit 89**, *see also* Exhibits 46-47, 50.

b. In case no. 15-05046, pending before the Bankruptcy Court, the Trustee has sought avoidance of the transfer of Morbaito's 60% interest in Virsenet to Bayuk in November 2012 for just $6.00, after Morabito himself valued the entity at over $220 million. *See* **Exhibit 90.**

G. <u>Morabito and Bayuk's History as Life and Business Partners.</u>

92. Bayuk was, at least at the time of the Transfers, Morabito's long-time business partner and boyfriend. According to Morabito, he and the Bayuk began dating in 1997-1998 and dated through at least 2009. *See* Exhibit 13, p. 47, ll. 4 – 12.

93. When asked when they stopped dating, Bayuk could not answer, instead stating:

> I guess you should – sometime in – Well, we're still – I'm still best friends with all my boyfriends. When did I stop dating Paul? Good question. I have to think about it. Well, we shared houses, so the houses were owned tenant-in-common, When did I stop dating him? Maybe the question is, you should ask him when did he start dating someone else.

See Exhibit 33, p. 12, ll. 4-7.

94. Morabito testified that the relationship ended in 2009 or 2010, prior to the judgment in the underlying Herbst Litigation. *See* Exhibit 13, p. 47, l. 11 – p. 48, l. 11. Mr. Morabito's testimony, however, directly contradicts his other actions and statements.

95. First, the Fifth Amendment and Restatement of the Trust Agreement for the Arcadia Living Trust, dated Sept. 30, 2010 and executed by Paul Morabito, under "Family Information," states "I live part-time with my boyfriend and longtime companion EDWARD WILLIAM BAYUK." *See* **Exhibit 91**.

96. Vacco testified "they were domestic partners as of this date and for a long time after this date, meaning September 15 of 2010"… "Frankly, I don't know, I mean, it's possible that they are still domestic partners today." *See* **Exhibit 69,** p. 173, l. 17 – p. 174, l. 8.

97. Between 1998 and the time of the Transfers, that had jointly owned, *at a minimum*, the Real Properties, Baruk LLC, Superpumper, Superpumper Properties, LLC, Big Wheel Lodging, LLC, Big Wheel Gaming, LLC, Big Wheel Hospitality, LLC, and Watchmyblock, LLC. *See* **Exhibit 64,** Response to interrogatory no. 6.

Dated this 17th day of August 2017.

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AFFIRMATION
Pursuant to NRS 239B.030

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

GARMAN TURNER GORDON LLP

/s/ Teresa Pilatowicz
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CERTIFICATE OF SERVICE

I certify that I am an employee of GARMAN TURNER GORDON LLP, and that on this date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **MOTION FOR PARTIAL SUMMARY JUDGMENT** 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, Reno, Nevada, postage prepaid, following ordinary business practices

____ Certified Mail, Return Receipt Requested

____ Via Facsimile (Fax)

____ Via E-Mail

XXX 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)

addressed as follows:

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

DATED this 17th day of August, 2017.

/s/ Ricky H. Ayala
An Employee of GARMAN TURNER GORDON LLP

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