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 04:31 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 19
(Nos. 2965–3205)

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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

DOCUMENT DESCRIPTION		LOCATION
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

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

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

DOCUMENT DESCRIPTION		LOCATION
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

DOCUMENT DESCRIPTION		LOCATION
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

DOCUMENT DESCRIPTION		LOCATION
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

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

DOCUMENT DESCRIPTION		LOCATION
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

DOCUMENT DESCRIPTION		LOCATION
29	September 20, 2010 email from Yalamanchili to Graber RE: Attorney Client Privileged Communication	Vol. 22, 3688–3689
30	September 21, 2010 email from P. Morabito to Vacco and Cross RE: Attorney Client Privileged Communication	Vol. 22, 3690–3692
31	September 23, 2010 email chain between Graber and P. Morabito RE: Change of Primary Residence from Reno to Laguna Beach	Vol. 22, 3693–3694
32	September 23, 2010 email from Yalamanchili to Graber RE: Change of Primary Residence from Reno to Laguna Beach	Vol. 22, 3695–3696
33	September 24, 2010 email from P. Morabito to Vacco RE: Superpumper, Inc.	Vol. 22, 3697–3697
34	September 26, 2010 email from Vacco to P. Morabito RE: Judgment for a fixed debt	Vol. 22, 3698–3698
35	September 27, 2010 email from P. Morabito to Vacco RE: First Amendment to Residential Lease executed 9/27/2010	Vol. 22, 3699–3701
36	November 7, 2012 emails between Vacco, P. Morabito, C. Lovelace RE: Attorney Client Privileged Communication	Vol. 22, 3702–3703
37	Morabito BMO Bank Statement – September 2010	Vol. 22, 3704–3710
38	Lippes Mathias Trust Ledger History	Vol. 23, 3711–3716

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

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

DOCUMENT DESCRIPTION		LOCATION
70	November 10, 2011 email chain between Vacco and P. Morabito RE: Baruk Properties, LLC/Paul Morabito/Bank of America, N.A.	Vol. 24, 3983–3985
71	Bayuk First Ledger	Vol. 24, 3986–3987
72	Amortization Schedule	Vol. 24, 3988–3990
73	Bayuk Second Ledger	Vol. 24, 3991–3993
74	Opposition to Motion for Summary Judgment and Declaration of Edward Bayuk; Case No. 13-51237, ECF No. 146 (filed 10/03/2014)	Vol. 24, 3994–4053
75	March 30, 2012 email from Vacco to Bayuk RE: Letter to BOA	Vol. 24, 4054–4055
76	March 10, 2010 email chain between P. Morabito and jon@aim13.com RE: Strictly Confidential	Vol. 24, 4056–4056
77	May 20, 2010 email chain between P. Morabito, Vacco and Michael Pace RE: Proceed with placing a Binding Bid on June 22nd with ExxonMobil	Vol. 24, 4057–4057
78	Morabito Personal Financial Statement May 2010	Vol. 24, 4058–4059
79	June 28, 2010 email from P. Morabito to George Garner RE: ExxonMobil Chicago Market Business Plan Review	Vol. 24, 4060–4066
80	Shareholder Interest Purchase Agreement	Vol. 24, 4067–4071
81	Plan of Merger of Consolidated Western Corporation with and Into Superpumper, Inc.	Vol. 24, 4072–4075

DOCUMENT DESCRIPTION		LOCATION
82	Articles of Merger of Consolidated Western Corporation with and Into Superpumper, Inc.	Vol. 24, 4076–4077
83	Unanimous Written Consent of the Board of Directors and Sole Shareholder of Superpumper, Inc.	Vol. 24, 4078–4080
84	Unanimous Written Consent of the Directors and Shareholders of Consolidated Western Corporation	Vol. 24, 4081–4083
85	Arizona Corporation Commission Letter dated October 21, 2010	Vol. 24, 4084–4091
86	Nevada Articles of Merger	Vol. 24, 4092–4098
87	New York Creation of Snowshoe	Vol. 24, 4099–4103
88	April 26, 2012 email from Vacco to Afshar RE: Ownership Structure of SPI	Vol. 24, 4104–4106
90	September 30, 2010 Matrix Retention Agreement	Vol. 24, 4107–4110
91	McGovern Expert Report	Vol. 25, 4111–4189
92	Appendix B to McGovern Report – Source 4 – Budgets	Vol. 25, 4190–4191
103	Superpumper Note in the amount of $1,462,213.00 (dated 11/01/2010)	Vol. 25, 4192–4193
104	Superpumper Successor Note in the amount of $492,937.30 (dated 02/01/2011)	Vol. 25, 4194–4195
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107	*Declaration of P. Morabito in Support of Opposition to Motion of JH, Inc., Jerry Herbst, and Berry- Hinckley Industries for Order Prohibiting Debtor from Using, Acquiring or Transferring Assets Pursuant to 11 U.S.C. §§ 105 and 303(f) Pending Appointment of Trustee*, Case 13-51237, ECF No. 22 (filed 07/01/2013)	Vol. 25, 4200–4203
108	October 12, 2012 email between P. Morabito and Bernstein RE: 2011 Return	Vol. 25, 4204–4204
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110	P. Morabito – Term Note in the amount of $939,000.000 (dated 09/01/2010)	Vol. 25, 4214–4214
111	Loan Agreement between Compass Bank and Superpumper (dated 12/21/2016)	Vol. 25, 4215–4244
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113	Superpumper Financial Statement (dated 12/31/2007)	Vol. 25, 4250–4263
114	Superpumper Financial Statement (dated 12/31/2009)	Vol. 25, 4264–4276
115	Notes Receivable Interest Income Calculation (dated 12/31/2009)	Vol. 25, 4277–4278
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119	Superpumper Unaudited August 2010 Balance Sheet	Vol. 25, 4303–4307
120	Superpumper Financial Statements (dated 12/31/2010)	Vol. 25, 4308–4322
121	Notes Receivable Balance as of September 30, 2010	Vol. 26, 4323
122	Salvatore Morabito Term Note $2,563,542.00 as of December 31, 2010	Vol. 26, 4324–4325
123	Edward Bayuk Term Note $2,580,500.00 as of December 31, 2010	Vol. 26, 4326–4327
125	April 21, 2011 Management letter	Vol. 26, 4328–4330
126	Bayuk and S. Morabito Statements of Assets & Liabilities as of February 1, 2011	Vol. 26, 4331–4332
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128	January 6, 2012 email from Vacco to Bernstein	Vol. 26, 4336–4338
129	January 7, 2012 email from Bernstein to Lovelace	Vol. 26, 4339–4343
130	March 18, 2012 email from P. Morabito to Vacco	Vol. 26, 4344–4344
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133	April 5, 2011 email from P. Morabito to Vacco	Vol. 26, 4353
134	April 16, 2012 email from Vacco to Morabito	Vol. 26, 4354–4359
135	August 7, 2011 email exchange between Vacco and P. Morabito	Vol. 26, 4360
136	August 2011 Lovelace letter to Timothy Halves	Vol. 26, 4361–4365
137	August 24, 2011 email from Vacco to P. Morabito RE: Tim Haves	Vol. 26, 4366
138	November 11, 2011 email from Vacco to P. Morabito RE: Getting Trevor's commitment to sign	Vol. 26, 4367
139	November 16, 2011 email from P. Morabito to Vacco RE: Vacco's litigation letter	Vol. 26, 4368
140	November 28, 2011 email chain between Vacco, S. Morabito, and P. Morabito RE: $560,000 wire to Lippes Mathias	Vol. 26, 4369–4370
141	December 7, 2011 email from Vacco to P. Morabito RE: Moreno	Vol. 26, 4371
142	February 10, 2012 email chain between P. Morabito Wells, and Vacco RE: 1461 Glenneyre Street - Sale	Vol. 26, 4372–4375
143	April 20, 2012 email from P. Morabito to Bayuk RE: BofA	Vol. 26, 4376
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147	September 4, 2012 email from P. Morabito to Vacco RE: Wire	Vol. 26, 4419–4422
148	September 4, 2012 email from Bayuk to Vacco RE: Wire	Vol. 26, 4423–4426
149	December 6, 2012 email from Vacco to P. Morabito RE: BOA and the path of money	Vol. 26, 4427–4428
150	September 18, 2012 email chain between P. Morabito and Bayuk	Vol. 26, 4429–4432
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152	September 3, 2012 email from P. Morabito to Vacco RE: Wire	Vol. 26, 4435
153	March 14, 2013 email chain between P. Morabito and Vacco RE: BHI Hinckley	Vol. 26, 4436
154	Paul Morabito 2009 Tax Return	Vol. 26, 4437–4463
155	Superpumper Form 8879-S tax year ended December 31, 2010	Vol. 26, 4464–4484
156	2010 U.S. S Corporation Tax Return for Consolidated Western Corporation	Vol. 27, 4485–4556
157	Snowshoe form 8879-S for year ended December 31, 2010	Vol. 27, 4557–4577
158	Snowshoe Form 1120S 2011 Amended Tax Return	Vol. 27, 4578–4655

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159	September 14, 2012 email from Vacco to P. Morabito	Vol. 27, 4656–4657
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161	December 18, 2012 email from Vacco to P. Morabito RE: Attorney Client Privileged Communication	Vol. 27, 4659
162	April 24, 2013 email from P. Morabito to Vacco RE: BHI Trust	Vol. 27, 4660
163	Membership Interest Purchases, Agreement – Watch My Block (dated 10/06/2010)	Vol. 27, 4661–4665
164	Watch My Block organizational documents	Vol. 27, 4666–4669
174	October 15, 2015 Certificate of Service of copy of Lippes Mathias Wexler Friedman's Response to Subpoena	Vol. 27, 4670
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181	Appraisal of 1461 Glenneyre Street	Vol. 28, 4729–4777
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187	Mortgage – Los Olivos	Vol. 28, 4862
188	Mortgage – Glenneyre	Vol. 28, 4863
189	Mortgage – Mary Fleming	Vol. 28, 4864
190	Settlement Statement – 371 El Camino Del Mar	Vol. 28, 4865
191	Settlement Statement – 370 Los Olivos	Vol. 28, 4866
192	2010 Declaration of Value of 8355 Panorama Dr	Vol. 28, 4867–4868
193	Mortgage – 8355 Panorama Drive	Vol. 28, 4869–4870
194	Compass – Certificate of Custodian of Records (dated 12/21/2016)	Vol. 28, 4871–4871
196	June 6, 2014 Declaration of Sam Morabito – Exhibit 1 to Snowshoe Reply in Support of Motion to Dismiss Complaint for Lack of Personal Jurisdiction – filed in Case No. CV13-02663	Vol. 28, 4872–4874
197	June 19, 2014 Declaration of Sam Morabito – Exhibit 1 to Superpumper Motion to Dismiss Complaint for Lack of Personal Jurisdiction – filed in Case No. CV13-02663	Vol. 28, 4875–4877
198	September 22, 2017 Declaration of Sam Morabito – Exhibit 22 to Defendants' SSOF in Support of Opposition to Plaintiff's MSJ – filed in Case No. CV13-02663	Vol. 28, 4878–4879

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224	March 24, 2011 email from Naz Afshar RE: telephone call regarding CWC	Vol. 28, 4885–4886
225	Bank of America Records for Edward Bayuk (dated 09/05/2012)	Vol. 28, 4887–4897
226	June 11, 2007 Wholesale Marketer Agreement	Vol. 29, 4898–4921
227	May 25, 2006 Wholesale Marketer Facility Development Incentive Program Agreement	Vol. 29, 4922–4928
228	June 2007 Master Lease Agreement – Spirit SPE Portfolio and Superpumper, Inc.	Vol. 29, 4929–4983
229	Superpumper Inc 2008 Financial Statement (dated 12/31/2008)	Vol. 29, 4984–4996
230	November 9, 2009 email from P. Morabito to Bernstein, Yalaman RE: Jan Friederich – entered into Consulting Agreement	Vol. 29, 4997
231	September 30, 2010, Letter from Compass to Superpumper, Morabito, CWC RE: reducing face amount of the revolving note	Vol. 29, 4998–5001
232	October 15, 2010, letter from Quarles & Brady to Vacco RE: Revolving Loan Documents and Term Loan Documents between Superpumper and Compass Bank	Vol. 29, 5002–5006

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233	BMO Account Tracker Banking Report October 1 to October 31, 2010	Vol. 29, 5007–5013
235	August 31, 2010 Superpumper Inc., Valuation of 100 percent of the common equity in Superpumper, Inc on a controlling marketable basis	Vol. 29, 5014–5059
236	June 18, 2014 email from S. Morabito to Vanek (WF) RE: Analysis of Superpumper Acquisition in 2010	Vol. 29, 5060–5061
241	Superpumper March 2010 YTD Income Statement	Vol. 29, 5062–5076
244	Assignment Agreement for $939,000 Morabito Note	Vol. 29, 5077–5079
247	July 1, 2011 Third Amendment to Forbearance Agreement Superpumper and Compass Bank	Vol. 29, 5080–5088
248	Superpumper Cash Contributions January 2010 thru September 2015 – Bayuk and S. Morabito	Vol. 29, 5089–5096
252	October 15, 2010 Letter from Quarles & Brady to Vacco RE: Revolving Loan documents and Term Loan documents between Superpumper Prop. and Compass Bank	Vol. 29, 5097–5099
254	Bank of America – S. Morabito SP Properties Sale, SP Purchase Balance	Vol. 29, 5100
255	Superpumper Prop. Final Closing Statement for 920 Mountain City Hwy, Elko, NV	Vol. 29, 5101
256	September 30, 2010 Raffles Insurance Limited Member Summary	Vol. 29, 5102

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257	Equalization Spreadsheet	Vol. 30, 5103
258	November 9, 2005 Grant, Bargain and Sale Deed; Doc #3306300 for Property Washoe County	Vol. 30, 5104–5105
260	January 7, 2016 Budget Summary – Panorama Drive	Vol. 30, 5106–5107
261	Mary 22, 2006 Compilation of Quotes and Invoices Quote of Valley Drapery	Vol. 30, 5108–5116
262	Photos of 8355 Panorama Home	Vol. 30, 5117–5151
263	Water Rights Deed (Document #4190152) between P. Morabito, E. Bayuk, Grantors, RCA Trust One Grantee (recorded 12/31/2012)	Vol. 30, 5152–5155
265	October 1, 2010 Bank of America Wire Transfer –Bayuk – Morabito $60,117	Vol. 30, 5156
266	October 1, 2010 Check #2354 from Bayuk to P. Morabito for $29,383 for 8355 Panorama funding	Vol. 30, 5157–5158
268	October 1, 2010 Check #2356 from Bayuk to P. Morabito for $12,763 for 370 Los Olivos Funding	Vol. 30, 5159–5160
269	October 1, 2010 Check #2357 from Bayuk to P. Morabito for $31,284 for 371 El Camino Del Mar Funding	Vol. 30, 5161–5162
270	Bayuk Payment Ledger Support Documents Checks and Bank Statements	Vol. 31, 5163–5352
271	Bayuk Superpumper Contributions	Vol. 31, 5353–5358

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272	May 14, 2012 email string between P. Morabito, Vacco, Bayuk, and S. Bernstein RE: Info for Laguna purchase	Vol. 31, 5359–5363
276	September 21, 2010 Appraisal of 8355 Panorama Drive Reno, NV by Alves Appraisal	Vol. 32, 5364–5400
277	Assessor's Map/Home Caparisons for 8355 Panorama Drive, Reno, NV	Vol. 32, 5401–5437
278	December 3, 2007 Case Docket for CV07-02764	Vol. 32, 5438–5564
280	May 25, 2011 Stipulation Regarding the Imposition of Punitive Damages; Case No. CV07-02764 (filed 05/25/2011)	Vol. 33, 5565–5570
281	Work File for September 24, 2010 Appraisal of 8355 Panorama Drive, Reno, NV	Vol. 33, 5571–5628
283	January 25, 2016 Expert Witness Report Leonard v. Superpumper Snowshoe	Vol. 33, 5629–5652
284	February 29, 2016 Defendants' Rebuttal Expert Witness Disclosure	Vol. 33, 5653–5666
294	October 5, 2010 Lippes, Mathias Wexler Friedman, LLP, Invoices to P. Morabito	Vol. 33, 5667–5680
295	P. Morabito 2010 Tax Return (dated 10/16/2011)	Vol. 33, 5681–5739
296	December 31, 2010 Superpumper Inc. Note to Financial Statements	Vol. 33, 5740–5743
297	December 31, 2010 Superpumper Consultations	Vol. 33, 5744

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301	September 15, 2010 email from Vacco to P. Morabito RE: Tomorrow	Vol. 33, 5749–5752
303	Bankruptcy Court District of Nevada Claims Register Case No. 13-51237	Vol. 33, 5753–5755
304	April 14, 2018 email from Allen to Krausz RE: Superpumper	Vol. 33, 5756–5757
305	Subpoena in a Case Under the Bankruptcy Code to Robison, Sharp, Sullivan & Brust issued in Case No. BK-N-13-51237-GWZ	Vol. 33, 5758–5768
306	August 30, 2018 letter to Mark Weisenmiller, Esq., from Frank Gilmore, Esq.,	Vol. 34, 5769
307	Order Granting Motion to Compel Compliance with the Subpoena to Robison, Sharp, Sullivan & Brust filed in Case No. BK-N-13-51237-GWZ	Vol. 34, 5770–5772
308	Response of Robison, Sharp, Sullivan & Brust's to Subpoena filed in Case No. BK-N-13-51237-GWZ	Vol. 34, 5773–5797
309	Declaration of Frank C. Gilmore in support of Robison, Sharp, Sullivan & Brust's Opposition to Motion for Order Holding Robison in Contempt filed in Case No. BK-N-13-51237-GWZ	Vol. 34, 5798–5801
Minutes of October 29, 2018, Non-Jury Trial, Day 1 (filed 11/08/2018)		Vol. 35, 5802–6041
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Transcript of November 2, 2018, Non-Jury Trial, Day 5	Vol. 39, 7008–7011
Minutes of November 5, 2018, Non-Jury Trial, Day 6 (filed 11/08/2018)	Vol. 40, 7012–7167
Transcript of November 5, 2018, Non-Jury Trial, Day 6	Vol. 40, 7168–7169
Minutes of November 6, 2018, Non-Jury Trial, Day 7 (filed 11/08/2018)	Vol. 41, 7170–7269
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Minutes of November 7, 2018, Non-Jury Trial, Day 8 (filed 11/08/2018)	Vol. 43, 7475–7476
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Minutes of November 26, 2018, Non-Jury Trial, Day 9 (filed 11/26/2018)		Vol. 44, 7616
Transcript of November 26, 2018, Non-Jury Trial – Closing Arguments, Day 9		Vol. 44, 7617–7666 Vol. 45, 7667–7893
Plaintiff's Motion to Reopen Evidence (filed 01/30/2019)		Vol. 46, 7894–7908
Exhibits to Plaintiff's Motion to Reopen Evidence		
Exhibit	**Document Description**	
1	Declaration of Gabrielle A. Hamm, Esq. in Support of Plaintiff's Motion to Reopen	Vol. 46, 7909–7913
1-A	September 21, 2017 Declaration of Salvatore Morabito	Vol. 46, 7914–7916
1-B	Defendants' Proposed Findings of Fact, Conclusions of Law, and Judgment (Nov. 26, 2018)	Vol. 46, 7917–7957
1-C	Judgment on the First and Second Causes of Action; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 123 (April 30, 2018)	Vol. 46, 7958–7962
1-D	Amended Findings of Fact and Conclusions of Law in Support of Judgment Regarding Plaintiffs' First and Second Causes of Action; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 126 (April 30, 2018)	Vol. 46, 7963–7994
1-E	Motion to Compel Compliance with the Subpoena to Robison Sharp Sullivan Brust; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 191 (Sept. 10, 2018)	Vol. 46, 7995–8035

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1-F	Order Granting Motion to Compel Compliance with the Subpoena to Robison Sharp Sullivan Brust; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 229 (Jan. 3, 2019)	Vol. 46, 8036–8039
1-G	Response of Robison, Sharp, Sullivan & Brust[] To Subpoena (including RSSB_000001 – RSSB_000031) (Jan. 18, 2019)	Vol. 46, 8040–8067
1-H	Excerpts of Deposition Transcript of Sam Morabito as PMK of Snowshoe Petroleum, Inc. (Oct. 1, 2015)	Vol. 46, 8068–8076
Errata to: Plaintiff's Motion to Reopen Evidence (filed 01/30/2019)		Vol. 47, 8077–8080
Exhibit to Errata to: Plaintiff's Motion to Reopen Evidence		
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1	Plaintiff's Motion to Reopen Evidence	Vol. 47, 8081–8096
Ex Parte Motion for Order Shortening Time on Plaintiff's Motion to Reopen Evidence and for Expedited Hearing (filed 01/31/2019)		Vol. 47, 8097–8102
Order Shortening Time on Plaintiff's Motion to Reopen Evidence and for Expedited Hearing (filed 02/04/2019)		Vol. 47, 8103–8105
Supplement to Plaintiff's Motion to Reopen Evidence (filed 02/04/2019)		Vol. 47, 8106–8110

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

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

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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

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

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

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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

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

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

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

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

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

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

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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 MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff William A. Leonard ("Trustee"), by and through his counsel, the law firm of Garman Turner Gordon LLP, hereby submits his Reply (the "Reply") in support of his *Motion for Partial Summary Judgment* (the "Motion").[1]

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

INTRODUCTION

Morabito transferred nearly all of his assets just days after an Oral Judgment to ensure that the Herbst Parties could not collect on their eventual $150 million Final Judgment. When the dust cleared, Bayuk and Sam held the majority of tangible assets, while Morabito held on to property that Morabito and Defendants knew was insufficient to satisfy the Herbst Parties. Defendants assisted in Morabito's asset protection scheme by taking possession of certain property which Morabito continued to control. The lengthy undisputed facts and chronology, set forth in the Motion, are resounding proof of Morabito and Defendants' intent to hinder, delay, and defraud the Herbst Parties and thus, that the Transfers were fraudulent

In an attempt to defeat the Motion, Defendants set forth their allegations, which are largely unsupported, that the Transfers were not fraudulent. However, Defendants have failed entirely to provide a genuine dispute as to the material facts that establish Morabito's fraudulent intent, which is sufficient on its own to grant partial summary judgment. Defendants also fail to establish any genuine dispute as to the material facts establishing the majority of the badges of fraud further supporting summary judgment. Simply put, Defendants have not adequately disputed the proof that Plaintiff has set forth showing that the Transfers were made to hinder, delay, and defraud the Herbst Parties' collection efforts.

LEGAL ANALYSIS AND ARGUMENT

Summary Judgment must be granted where there are no genuine disputes as to material issues of fact, and the moving party is entitled to judgment as a matter of law. See Nev. R Civ. P. 56(c). A dispute as to a material fact exists where "a reasonable jury could return a verdict for the nonmoving party." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)(citations omitted). When the burden of proof shifts to the non-moving party, that party may not rest on allegations or denials, but "the adverse party must set forth specific facts showing that there is a genuine issue for trial." See Anderson, 477 U.S. at 250; see also Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

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A. Morabito Completed the Transfers to Protect His Assets from the Herbst Parties After the Oral Judgment and Final Judgment, Which Conclusively Establishes Intent.

There is a fraudulent transfer under NRS § 112.180(1)(a) if a debtor makes the transfer "[with] actual intent to hinder, delay, or defraud any creditor of the debtor." See Motion at pp. 27-31. In determining a debtor's intent for fraudulent transfer purposes under the UFTA, courts consider an admission that transfers were made for liability protection as evidence of intent. See e.g. U.S. v. Evseroff, 2006 WL 2792750 (E.D.N.Y. 2006)(*vacated on other grounds*). Plaintiff presented evidence that the intent of the Transfers was for asset protection purposes in the Motion. See Motion at pp. 30-31.

Despite the lengthy evidence provided in the Motion, Defendants contend that "plaintiff does not have direct proof of fraudulent intent." See Motion at p.8, ll. 11. However, Defendants have now agreed that Morabito made the Transfers for the purpose of asset protection. See Opposition at p. 10, ll. 5-6 ("Paul owed no duty to disclose ***his asset protection***") (emphasis added). As Defendants concede that the Transfers were part of an asset protection plan, and Defendants had knowledge of that plan, there is no genuine dispute that Morabito made the Transfers with actual intent to hinder, delay, and defraud the Herbst Parties.

B. Defendants Have Not Established Any Genuine Issues of Material Fact as to the Badges of Fraud and Therefore, the Motion Must be Granted.

"[P]roof of actual intent will often be impossible to procure… [and therefore] direct evidence of fraudulent intent is not essential." Blood v. Nofzinger, 834 N.E.2d 358, 368 (Ohio. App. 2005). Thus, where the Court is not satisfied that proof of actual intent has been established, a creditor "may still establish a debtor's actual fraudulent intent if the circumstances demonstrate badges of fraud." Id. As noted in the Motion, in numerous cases, courts have granted summary judgment to creditors with as few as three badges of fraud. See Motion at p. 20

Plaintiff discusses nine badges of fraud in the Motion. In Opposition, Defendants did not discuss, and therefore concedes, three of the badges of fraud: (1) that before the Transfers occurred, Morabito had been sued (NRS § 112.180(2)(d)); (2) that the Transfers occurred shortly

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after a substantial debt was incurred (NRS § 112.180(2)(j)); and (3) that Morabito removed or concealed assets (NRS § 112.180(2)(g)).[2] As to the remaining six badges, Defendants fail to establish that there exists genuine issues of material fact sufficient to deny summary judgment.

1. Bayuk, as Morbaito's Boyfriend and Business Partner, Is an Insider.

Defendants do not dispute that Sam in an insider. They do, however, claim that whether Bayuk is an insider is a question of fact that needs to be determined at trial. However, Defendants have not disputed the significant details regarding Morabito and Bayuk's close relationship as set forth in the Motion, or otherwise set forth which facts they believe are in dispute. See Motion at pp. 31-33. Instead, Defendants merely contend that these facts cannot support a finding that Bayuk is an insider.[3] Defendants argument ignores the clear caselaw set forth in the Motion, which has not been countered by Defendants. See id. at pp. 31-32. As Plaintiff established undisputed facts that Morabito and Bayuk had both a romantic and a business relationship, Morabito and Bayuk's dealings cannot be accurately characterized as arms-length.

2. Defendants' Only Attempts to Dispute Morabito's Continued Control Over Superpumper Consist of Self-Serving Statements Made by Sam That Are Insufficient to Defeat Summary Judgment.

Plaintiff set forth significant factual evidence that Morabito continued to control the transferred property following the Transfers. In opposition, Defendants discuss only the continued use of Superpumper, ignoring entirely all evidence regarding Morabito's continued use and control over the Real Properties. As to the overwhelming evidence of Morabito's continued control over Superpumper, Defendants only contend that these communication regarding Snowshoe or Superpumper after the sale were "whiteboard" discussions but none of

[2] Defendants do dispute that the *transfers* were concealed. See Opposition at p. 10; ll. 6-11. It is unclear whether this is intended to apply to both NRS § 112.180(2)(c) and NRS § 112.180 (2)(g).

[3] Defendants also reference that the Bankruptcy Court declined to grant summary judgment on Bayuk's insider status in relation to a December 2012 transfer of a $220 million asset from Morabito to Bayuk for $6.00 (the "Virsenet Transfer"). See Opposition at p. 9, ll. 12-15; see also Motion at p. 26, ll. 16-18. However, the Virsenet Transfer occurred at a time when Morabito and Bayuk were alleged to have terminated their relationship and thus, no longer had the closeness of relationship they maintained in 2010. See Motion at pp. 32-33.

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them came to pass. See DSSOF,[4] Ex. 22, ¶ 7. Sam then, without any support, provides the self-serving statement that he vehemently denies that Morabito continued to control. Id., ¶ 9.

Defendants' self-serving conclusory statements, in light of the evidence to the contrary, are insufficient to deny summary judgment for two reasons. First, Defendants do not address the continuing use of the real property or negotiations and business deals with respect thereto. Thus, there is absolutely no dispute, as least as to Real Properties, that Morabito continued to use and control the assets. Second, as set forth in Anderson, an adverse party must set forth *specific facts* showing that there is a genuine issue for trial and not rest on mere allegations or denial. Defendants have failed to set forth sufficient proof defeating Plaintiff's evidence or otherwise establishing a genuine issue of material fact.

3. The Transfers Were Concealed Because Morabito and Defendants Changed Entity Names and Incorporated Them in Foreign Jurisdictions.

Defendants contend that "there is no evidence presented by Plaintiff that Paul owed Herbst a duty to disclose his private activities. Thus, this badge is inapposite." See Opposition at p. 10, ll. 7-8. However, the question is not whether Morabito owed the Herbst a duty to disclose. Instead, NRS § 112.180(2)(c) specifically enumerates that whether the debtor removed or concealed asserts is a badge of fraud to be reviewed by this Court

Defendants argue that the Transfers were documented and publicly recorded and therefore, not concealed.[5] However, Defendants completely ignore the undisputed facts set forth in the Motion that names were changed and entities were established in foreign jurisdictions to complete the Transfers. See Motion at p. 34, ll. 1-14. These undisputed facts demonstrate that the Transfers were hidden and concealed.

4. The Transfers Were Part of a Disposal of All of Morabito's Assets for Which Reasonably Equivalent Value Was Not Provided.

Defendants contend that Plaintiff has not established that the Transfers represented a

[4] The "DSSOF" refers to the *Defendants' Separate Statement of Disputed Facts in Support of Opposition to Plaintiff's Motion or Partial Summary Judgment*.

[5] At the same time, in the Opposition, Defendants argue that the Herbst Parties should have acted quicker to prevent Morabito from completing the Transfers. See Opposition at pp. 12-13. Plaintiff assumes that the Herbst Parties would have sought to halt the transfers had they not been concealed, further demonstrating that this badge favors a finding of fraudulent intent.

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disposal of all of Morabito's assets or that reasonably equivalent value was not provided because: (1) Morabito held $6 million with Sefton Trustees; (2) Morabito received no less than he gave; and (3) factual issues remain as to the value of certain Real Properties and Superpumper. See Opposition at pp. 10-11. Each of Defendants' arguments fail.

First, with respect to the Off-Shore Funds, Morabito did not have $6 million that could be used by the Herbst Parties to satisfy their judgment. Instead, at the same time of the Transfers, Morabito transferred the Off-Shore Funds to Sefton to protect it from collection. Therefore, that the Off-Shore Funds did not go to the Defendants, but instead went to an off-shore account, does not defeat that the overwhelming majority of Morabito's assets were transferred.

Second, Morabito did not receive the same value as he exchanged. As set forth at length in the Motion, even assuming correct valuations, Morabito was left with assets, the Promissory Notes, that were essentially worthless because they were illusory. See Motion at pp. 35-43. This point is highlighted by Defendants' new argument which further demonstrates Bayuk and Sam simply funded whatever requests Morabito made without regard to amounts owed. Specifically, Defendants contend that Sam paid $560,000 to Morabito in November 2011 to complete payment on the Superpumper Note, despite that only $492,000 was allegedly due. See DSSOF at p. 11, ll. 5-13; see Motion at pp. 38, ll. 1-16. While Defendants contend the difference was for "interested accrued and fees associate with the transaction," there is nothing to support this. See DSSOF at p. 11, ll. 5-13.

Finally, that there are questions of fact as to the exact valuations of certain Real Properties and Superpumper does not prohibit summary judgment. Notably, Plaintiff conceded that such factual issues exist but, as set forth in the Motion, given that (among other things) the Promissory Notes provided zero value, the exact valuations are not necessary. While Plaintiff does acknowledge that the valuations will ultimately need to be determined to establish the amount of damages, this Court can grant partial summary judgment as to the fraudulent intent now.

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C. Considering the Undisputed Facts, Including Morabito's Intent to Protect His Assets, Defendants Cannot Possibly Establish Facts that Would Support an Objective Good Faith Defense.

"A majority of courts applying the UFTA hold that a transferee must prove that he received the transfer in objective good faith. That is, good faith must be determined on a case-by-case basis by examining whether the facts would have caused a reasonable transferee to inquire into whether the transferor's purpose in effectuating the transfer was to delay, hinder, or defraud the transferor's creditors." Herup v. First Boston Financial, LLC, 123 Nev. 228, 236- 237, 162 P.3d 870, 876 (2007). "[T]o establish a good faith defense to a fraudulent transfer claim, the transferee must show objectively that he or she did not know or had no reason to know of the transferor's fraudulent purpose to delay, hinder, or defraud the transferor's creditors." Id. at 237, 163 P.3d 876.

Here, the undisputed facts, as acknowledged by Defendants, show that Defendants were aware of the Oral Judgment and Morabito's obligations to the Herbst Parties. See generally, Opposition. The undisputed facts also establish that Defendants were aware of the fraudulent transfer concerns, yet accepted the Transfers anyway. See id. Considering these concessions, there are simply no facts that Defendants could establish at trial that could cause any trier of fact to determine that Defendants objectively received the Transfers in good faith. As such, a trial is not necessary for Defendants to assert the defense, which fails as a matter of law, and summary judgment should be granted in Plaintiff's favor.

CONCLUSION

While Morabito and Defendants went to great lengths to devise a mechanism to defeat Nevada's fraudulent transfer statutes, the undisputed facts established that they have failed to do so. Therefore, Plaintiff requests that the Court grant partial summary judgment against Defendants and find that the Transfers were actually fraudulent. Plaintiff further requests that the Court award damages as requested in the Motion, and for such other relief as this Court deems just and proper.

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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 10th day of October, 2017.

GARMAN TURNER GORDON LLP

/s/ Teresa M. Pilatowicz
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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 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

____ 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)

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

Frank Gilmore, Esq.
fgilmore@rssblaw.com

_____

Dated this 10th day of October, 2017.

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

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

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IN THE SECOND JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morobito, Plaintiff, v. SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually, and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, an individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	Case No. CV13-02663 Department No.: B4

ORDER REGARDING DISCVOERY COMMISIONER'S RECOMMENDATION FOR ORDER DATED AUGUST 17, 2017

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

Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP and a *Countermotion for Sanctions to Compel Resetting of 30(b)(6) Deposition of Hodgson Russ LLP* on July 24, 2017. On August 2, 2017, Defendants filed a reply in support of their motion, and opposed the countermotion for sanctions. On August 9, 2017, Plaintiff filed a reply in support of the countermotion for sanctions. The Commissioner held a telephonic hearing on August 10, 2017 on the matters and issued a *Recommendation* on August 17, 2017. On August 28, 2017, Defendants filed *Objection to Recommendation for Order*. On September 5, 2017, Plaintiff filed an *Opposition to Objection to Recommendation for Order.* On September 15, 2017, Defendants filed a reply and submitted the matter to the Court for consideration.

In the *Recommendation*, the Commissioner denied the *Motion to Quash* and granted in part the countermotion for sanctions. The Commissioner ordered: i) Plaintiff is entitled to proceed with the NRCP 36(b)(6) deposition of Hodgson Russ LLP (hereinafter "HR") on the topics set forth in the subpoena previously served; ii) the deposition 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; iii) Plaintiff is entitled to recover from Defendants the reasonable attorney's fees and costs of the court reporter incurred in the July deposition of HR (after an itemized statement of expenses is provided); iv) Plaintiff may recover from Defendants all reasonable travel costs associated with the rescheduled HR deposition (after an itemized statement of expenses is provided); and v) Defendants are to pay Plaintiff the sum of $3,000 for the reasonable expenses incurred in this discovery dispute.

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

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

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

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

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

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

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

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

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

expressly considered whether the Jan 24, 2017 email from Plaintiff's counsel to Defendants' counsel showed an agreement to limit the scope of the deposition to emails attached therein. However, the Commissioner could not agree because i) the email does not purport to set forth any limitation, and ii) Plaintiff's counsel has stated 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 the issuance of the HR subpoena. The Commissioner found this is "precisely the situation 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." The Commissioner noted DCR 16 avoids the court having to make a determination of which side's explanation is correct because it places the onus of executing a clear agreement on the party who wishes to enforce that agreement.

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

> Frank,
>
> Attached please find the e-mails that I intend to discuss at the deposition of Hodgson Russ. I intended to provide Hodgson Russ with the notice of waiver of privilege tomorrow.
>
> If you have any questions, please let me know.
>
> Teresa M. Pilatowicz

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

> 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.

For the reasons articulated by the Discovery Commissioner and referenced herein, as well as for the other findings in the *Recommendation*, the Court agrees with the Commissioners' conclusion there was no express agreement to limit the scope of the deposition and therefore Defendants did not have a justification to suspend the deposition. The January email does not expressly limit the scope of the deposition. To the extent that the email was a reflection of other verbal discussions to limit the scope of the deposition, the Court agrees DCR 16 requires a writing

to reflect such agreement. See Humana, Inc. v. Nguyen, 102 Nev. 507, 509, 728 P.2d 816, 817 (1986).

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

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

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

[Recommendation, at 9].

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

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

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

Upon review of the file and good cause appearing,

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

DATED this 7 day of December, 2017.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

CASE NO. CV13-02663

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

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

✓ **Personal delivery to the following:**

Commissioner Wesley Ayres
Discovery Commissioner
Second Judicial District Court

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

TERESA PILATOWICZ, ESQ. for WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

FRANK GILMORE, ESQ. for EDWARD WILLIAM BAYUK LIVING TRUST et al

MARK WEISENMILLER, ESQ.

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

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

_____ Reno/Carson Messenger Service – **[NONE]**

_____ Federal Express or other overnight delivery service **[NONE]**

DATED this 7 day of December, 2017.

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Clerk of the Court
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IN THE SECOND JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, v. SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually, and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, an individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	Case No. CV13-02663 Department No.: 4

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff William A. Leonard, Trustee for the Bankruptcy Estate of Paul Anthony Morabito (hereinafter "Trustee") filed a *First Amended Complaint* (hereinafter "FAC") on May 15, 2015 against Defendants Superpumper, Inc. (hereinafter "Superpumper"), Edward Bayuk, individually and as Trustee of the Edward Williams Bayuk Living Trust (hereinafter "Bayuk"), Salvatore Morabito (hereinafter "Sam[1]"), and Snowshoe Petroleum, Inc. (hereinafter "Snowshoe"), (hereinafter and collectively "Defendants"). On August 17, 2017, Trustee moved for partial summary judgment regarding the first claim for relief set forth in the FAC. Trustee filed a separate

[1] The Court will refer to Salvatore Morabito as "Sam" as Defendants do in order to distinguish him from Paul Morabito (hereinafter "Paul") who is central to this action.

Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment on August 17, 2017 (hereinafter "PSOF"). On September 22, 2017 Defendants filed *Opposition to Plaintiff's Motion for Partial Summary Judgment* and *Defendants' Separate Statement of Disputed Facts in Support of Opposition to Plaintiff's Motion for Partial Summary Judgment* (hereinafter "DSOF"). Trustee replied on October 10, 2017. The matter was submitted to the Court for consideration on October 11, 2017.

Trustee requests summary judgment that the transfers described in the FAC are actually fraudulent pursuant to NRS 112.180(1)(a). Trustee acknowledges limited genuine issues of material fact remain on the amount of actual damages as it relates to certain transfers. Pursuant to NRS 112.210, Trustee seeks to avoid and recover three sets of transfer: i) Paul's transfer of his interest in two real properties located in Laguna Beach, California (hereinafter the "Laguna Beach Transfer") and ii) Paul's transfer of his 50% interest in Baruk Properties, LLC (hereinafter the "Baruk Transfer"). Alternatively, Trustee seeks a judgment in its favor against Bayuk for the Laguna Transfer in the amount of $1,236,458 and as to the Baruk Transfer in the amount of $1,654,550. Trustee also seeks a judgment in its favor, against Defendants, jointly and severally, for the transfer of Paul's 80% interest in Superpumper (hereinafter the "Superpumper Transfer") pursuant to NRS 112.220(2) in the minimum amount of $1,985,307. Trustee seeks an additional amount to be determined at trial following a finding of the actual value of Paul's 80% interest in Superpumper at the time of the Superpumper Transfer.

Trustee offers extensive detail about the above transfers made my Paul and alleges each transfer was made with the intent to hinder, delay, or defraud Paul's creditors. Therefore, Trustee alleges the transfers were actually fraudulent under Nevada's Uniform Fraudulent Transfer Act (hereinafter "NUFTA"). In short, Trustee theorizes Paul transferred essentially all of his assets within days after an oral judgment of over $85,000,000 was announced against Paul, in favor of the JH Inc., Jerry Herbst, and Berry Hinckley Industries BHI (hereinafter "BHI") (hereinafter the "Herbst Entities"). The assets were transferred to Paul's then life partner (Bayuk), Paul's brother Sam, and companies owned/controlled by those insiders. After the final judgment was entered in the Herbst action in the excess of $144,000,000, the Herbst Entities were only able to collect

approximately $1,300,000 and therefore filed an involuntary bankruptcy action against Paul. Prior to the fraudulent transfers, Trustee contends, the Herbst Entities had access to multiple assets and could have collected anywhere between $9,000,000 and $14,000,000.

Trustee alleges the following badges of fraud are present and establish Paul's actual fraudulent intent: i) the transfers were made to insiders, ii) the debtor retained possession or control of the property transfers after the transfers, iii) the transfers were concealed; iv) the debtor removed or concealed assets; v) before the transfers were made, the debtor had been sued or threatened with suit; vi) the transfers occurred shortly before or shortly after a substantial debt was incurred; vii) the transfers were of substantially all of the debtor's assets; viii) and the debtor received less than reasonably equivalent value for the transfers. As to the value received for the transfers, Trustee argues Paul and Defendants excluded a property located in Sparks, Nevada from the valuation of the Baruk Transfer, and on that basis alone, reasonably equivalent value was not transferred. Additionally, Trustee advances, promissory notes made in conjunction with the Superpumper Transfer and Baruk Transfer were illusory, and Paul did not receive the full cash payments in exchange for those transfers.

Defendants paint a different story as to the reasons behind the transfers. Defendants contend they had legitimate reasons for dividing their jointly held property with Paul, and they did so in good faith, paying fair market value for the property they acquired and received fair market value for the property they gave to Paul. Defendants explain they were exonerated by Judge Adams in the Herbst lawsuit. Nearly everything Paul owned was held jointly with his former partner, Bayuk, and his brother Sam. Defendants met with counsel to seek advice on how to avoid harassment that would surely come from when the Herbst Entities attempted to execute their judgment on jointly held assets.

Defendants argue there exists multiple questions of material fact regarding Paul's intent. Defendants allege the facts show it was Paul's lawyers, not Paul, who first considered the property division. Paul explained it was his intention to simply extricate himself from Bayuk and Sam. Defendants argue a material issue of fact exists as to the badges of fraud. First, Defendants claim the transfers to Bayuk were not made to an insider. Second, there is no competent and compelling

evidence to support Trustee's claim Paul continued to control the properties after the division. Third, Paul owed the Herbst Entities no duty to disclose his asset protection and moreover, the transfers were in the public record and transparent. Fourth, the transfers were not a disposal of all of Paul's assets. Even by Trustee's count, before the exchange with Defendants, Paul had $6,000,000 with the Sefton Trustees which was not transferred to Defendants. Fifth, Paul received equivalent value in exchange for the transfers. Paul received title to a $4,000,000 home in Reno, Nevada in exchange for the $2,000,000 homes in Laguna Beach. Paul also received the "card lock" properties (unmanned gas station terminals in Elko and Lovelock, Nevada) in exchange for cash buy-outs of Sam and Bayuk (worth nearly $1,500,000 at the time). Paul also received over a million in cash from the Superpumper sale and a promissory note of another $492,000. Further Paul was the beneficiary of $1,670,000 note from Bayuk.

Additionally, Defendants argue, even if Trustee were to convince the Court Paul had actual intent to defraud the Herbst Entities in making the property division that finding alone would not achieve summary judgment for Trustee as Defendants are entitled to trial on their complete defense as good faith transferees. Defendants have a justifiable reason for engaging in the transfers. The Herbst judgment excluded Bayuk and Sam from liability and they had equity interest in properties that were also attached to Paul, so they went through great lengths to separate the assets. Further Defendants exchanged fair market value for the assets they acquired, Defendants argue.

Standard of Review

NRCP 56(c) provides, "[summary judgment] shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A genuine issue of material fact exists when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party. Woods v. Safeway, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). When deciding whether summary judgment is appropriate, the court must view all evidence in light most favorable to the non-moving party and accept all properly supported evidence, factual allegations, and reasonable inferences favorable to

the non-moving party as true. C. Nicholas Pereos, Ltd. V. Bank of Am., 131 Nev. Adv. Op. 44, 352 P.3d 1133, 1136 (2015).

The Nevada Supreme Court has adopted the federal approach outlined in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), with respect to burdens of proof and persuasion in summary judgment proceedings. See Cruzz v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). The party moving for summary judgment must meet his or her initial burden of production and show that there is no genuine issue of material fact. Id. "The manner in which each party may satisfy its burden of production depends on which party will bear the burden of persuasion on the challenged claim at trial." Id. When the moving party bears the burden at trial, that party must present evidence that would entitle it to judgment as a matter of law absent contrary evidence. Id. After the moving party meets his or her initial burden of production, the opposing party "must transcend the pleadings and by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." Id.

Conclusions of Law

Pursuant to NUFTA a creditor may void a transfer against the initial transferee of the asset, or any subsequent transferee that did not take in good faith for value. NRS 112.220(2). NRS 112.250 directs this court to apply and construe NUFTA "to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it." Herup v. First Boston Fin., LLC, 123 Nev. 228, 237, 162 P.3d 870, 876 (2007). Therefore, the Court may look to the application and construction of the Uniform Fraudulent Transfer Act (hereinafter "UFTA") by other courts. See id.

Three types of transfers may be set aside under the NUFTA: (1) actual fraudulent transfers (NRS 112.180(1)(a)); (2) constructive fraudulent transfers (NRS 112.180(1)(b)); and (3) certain transfers by insolvent debtors (NRS 112.190). Herup, 123 Nev. at 233, 162 P.3d at 873. To succeed on a claim brought under NUFTA, the claimant must prove either the debtor made the alleged fraudulent transfer with (a) "actual intent actual intent to hinder, delay or defraud any creditor of the debtor" or (b) "without receiving a reasonably equivalent value in exchange for the transfer or obligation." If pursuing a claim in relation to (b), there must also be proof the debtor

"(1) [w]as engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) "[i]ntended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond his or her ability to pay as they became due." NRS 112.180(1)(B).[2]

Because the intent required for actual fraudulent transfers will normally be established by circumstantial evidence as the debtor will rarely testify he or she intended to defraud creditors, "courts have developed 'badges of fraud'—that is, recurring actions that historically have been associated with the actual intent to hinder, delay or defraud creditors." In re Nat'l Audit Def. Network, 367 B.R. 207, 219-20 (Bankr. D. Nev. 2007). In determining actual intent, NRS 112.180(2) lists eleven "badges of fraud" that may be considered, among other factors. See id. at 220. These badges 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.

NRS 112.180(2).

The United States Bankruptcy Court for the District of Nevada has provided guidance on the implication of presence of these badges:

> "Proof of the existence of any one or more of the factors enumerated in subsection (b) may be relevant evidence as to the debtor's actual intent but does not create a presumption that the debtor has made a fraudulent transfer or incurred a fraudulent

[2] It appears Trustee is only moving for summary judgment under 112.180(1)(a). To the extent Trustee also seeks to void the transfers pursuant to NRS 112.180(1)(b), the Court's denial of summary judgment would not change, as there is a material issue of fact as to whether reasonably equivalent value was received for the transferred assets, as will be explained below.

> obligation." Comment (5) to UFTA, *reprinted in* 7A, pt. II, Unif. Laws Ann. 303 (1999). Moreover, none of the badges standing alone are necessary or sufficient; the range of activities that fraudsters may use to commit fraud cannot and should not be definitively cataloged. *Fleming Companies, Inc. v. Rich*, 978 F.Supp. 1281, 1297–98 (E.D.Mo.1997) ("Although none of the badges standing alone will establish fraud, the existence of several of them will raise a presumption of fraud.") (under Missouri version of UFTA); *Dahar*, 318 B.R. at 14 ("The law, therefore, allows the badges to act as a substitute for direct proof of intent and permits, but does not require, the fact finder to draw inferences of bad intent from them. Any badge of fraud is potentially relevant to proving fraudulent intent, but no single badge alone creates a presumption of bad intent.").

In re Nat'l Audit Def. Network, 367 B.R. at 220. Where the plaintiff "establishes the existence of certain existence of badges of fraud, the burden shifts to the defendant to come forward with rebuttal evidence that the transfer was not made to defraud the creditor." Sportsco Enters. v. Morris, 112 Nev. 625, 632, 917 P.2d 934, 938 (1996).

NRS 112.220(1) provides a complete defense for an action for avoidance under NRS 112.180(1)(a). Herup, 123 Nev. at 234, 162 P.3d at 874. It provides, "[a] transfer or obligation is not voidable under paragraph (a) of subsection 1 of NRS 112.180 against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or oblige." Id. (citing 112.220(1)). "[I]n order to establish a good faith defense to a fraudulent transfer claim, the transferee must show objectively that he or she did not know or had no reason to know of the transferor's fraudulent purpose to delay, hinder, or defraud the transferor's creditors." Id. at 237, 876. Good faith must be determined "by examining whether the facts would have caused a reasonable transferee to inquire into whether the transferor's purpose in effectuating the transfer was to delay, hinder, or defraud the transferor's creditors." Id. at 236–37, 875.

Findings of Fact

This case is factually intensive, and involves a number of disputed facts. A brief summation of the evidence of relevant transactions and areas which are in dispute follows.

State Court Action (Herbst Lawsuit)

Prior to the action presently before the Court, a separate state court action arose resulting in a final judgment of $149,444,777.80 against Paul. On September 13, 2010, an oral judgment in the amount of $85,871.364.75 was announced against Paul in favor of the Herbst Entities. On October 12, 2010, the court entered its findings of fact and conclusions of law. On August 23,

2011, the court entered a judgment awarding the Herbst Entities total damages in the amount of $149,444,777.90 for actual fraud, representing both compensatory and punitive damages as well as an award of attorney's fees and costs. [PSOF ¶ 1, Ex. 1- Decl. of Timothy Herbst; Ex. 2 (Oct. 12, 2010 Order)].

Defendants' Purported Reasons for the Transfers

Defendants explain at the time of the oral pronouncement of judgment in the Herbst lawsuit, Paul co-owned residential properties with Bayuk, as well as co-owned an interest in Superpumper with Bayuk and Sam. Defendants advance through the deposition testimony of Paul, Bayuk and Dennis Vacco (hereinafter "Vacco") (a New York attorney who assisted with the division of property at issue in this case) the purpose of the transfers was twofold. First, Paul and Bayuk were separating both their legal ownership and personal lives at this time and were each deciding where they were going to live. [DSOF, Ex. 5 (Bayuk Depo), at pp. 175-176]. Second, the decision was based on the fact there was Nevada judgment against Paul, and Bayuk and Sam were exonerated from the judgment. [DSOF, Ex. 2, at 50-52]. Vacco explained the goal was to take all of the assets and identify the value of Paul's stake in those assets and transfer the value exclusively to him, and then separate the equity to the extent it existed to Bayuk and Sam, as they were now relieved of the Herbst lawsuit. [DSOF, Ex. 2, at 50-51]. As to the residences, Vacco explained, "if the property had not been taken out of [Bayuk's] name, it was clear that, sooner or later, through collection efforts on the judgment against Paul, that [Bayuk's] interest in that property was going to be implicated. So we made it easier for the Herbsts…by saying the property in Nevada that is the most—most reachable by the Herbsts, belongs to the judgment debtor." [DSOF, Ex. 2 at 64-65].

Laguna Beach Transfer

Background: Paul and Bayuk, individually and through their respective trusts, owned three real properties – (1) 371 El Camino del Mar, Laguna Beach, California (hereinafter the "El Camino Property"), (2) 370 Los Olivos, Laguna Beach, California (hereinafter the "Los Olivos Property," and together with the El Camino Property, the "Laguna Properties"), and (3) 8355 Panorama Drive, Reno Nevada (hereinafter the "Reno Property"). [PSOF at ¶ 24, Ex. 17; DSOF, p. 4 -5]. Paul

owned 70% of the Reno Property, 75% of the El Camino Property, and 50% of the Los Olivos Property. Bayuk owned the remaining interest. [PSOF at ¶ 25, Ex. 17]. On September 27, 2010, Paul and Bayuk executed a Purchase and Sales Agreement, which was amended on September 29, 2010, for the transfer of the real properties. [PSOF at ¶ 26, Ex. 17, 18]. Pursuant to the Amended Purchase and Sales Agreement, Paul purported to sell his interest in the Laguna Properties in exchange for Bayuk's interest in the Reno Property. See id.

Value: Trustee admits the valuation of the Reno Property is heavily disputed. [Mot. Summ. Jud. at p. 10:20]. Trustee, pursuant to an appraisal conducted by William G. Kimmel, values the Reno Property (as of September 30, 2010) at $2,000,000 and notes it was subject to at $1,028,864 mortgage. [PSOF at ¶ 30, Ex. 20]. Defendants point to a valuation conducted by Alves Appraisal Associates that determined as of December 7, 2011, the Reno Property was valued at $4,000,000, and subject to a $1,028,864 mortgage. [DSOF at p.5, PSOF, Ex. 19]. Additionally, as of September 2010, a Purchase and Sales Agreement between Paul and Bayuk represents the Reno Property having a value of $4,300,000 subject to the mortgage. [PSOF, Ex. 17]. The Los Olivos Property appraised for $1,900,000 but was subject to a $1,045,046 mortgage. [DSOF at p. 5, PSOF, Ex. 12]. The El Camino property appraised for $1,950,000 and was subject to an $871,359 mortgage. [PSOF, Ex. 36; DSOF, Ex. 6]. Thus, according to Defendants' appraisals and after a deduction of mortgages, the value of the Laguna Properties was $1,933.595. [PSOF, ¶ 28].

Defendants advance after Bayuk took the Laguna Properties and Paul took the Reno Property, the difference in value of the exchange was $60,117. The Defendants have provided a "property Division Matrix" which was created after the certified appraisal. [DSOF, Ex. 6]. Bayuk testified he wrote a check to Paul for that amount, although he does not know where Paul deposited the money. [DSOF, Ex 5 at p. 181].

Baruk Transfer

Prior to the oral judgment, Paul and Bayuk each owned a 50% interest in a real estate holding company called Baruk Properties, LLC (hereinafter "Baruk"). [PSOF, Ex. 24; DSOF, p. 6:27]. Baruk owned four real properties. [PSOF, Ex. 25; DSOF, p. 6:28]. Paul and Bayuk obtained appraisals of three of the properties valuing: i) 1461 Glenneyre, Laguna Beach, California

at $1,400,000; ii) 570 Glenneyre, California at $2,500,000 or $1,129,021 after deduction for the mortgage; and iii) 1254 Mary Fleming, Palm Springs, California at $1,050,000 or $705,079 after deduction for the mortgage. [PSOF, ¶36, DSOF, p. 6-7.]. The fourth property was located at 49 Clayton, Sparks Nevada (hereinafter the "Sparks Property").

In exchange for Paul's 50% membership interest in Baruk, Bayuk executed a promissory note in Paul's favor in the amount of $1,617.050 (hereinafter "Baruk Note)." [PSOF, ¶ 38, Ex. 30; DSOF, at 7:13-14]. The parties dispute whether this was a "sham note." Inconsistent evidence has been introduced regarding the repayment of the Baruk Note. [See PSOF, ¶ 45]. Defendants contend although Bayuk testified he was erratic at paying the Baruk Note, he paid the note in full by June 2013. To support this, Defendants point to a payment ledger. [See PSOF, Ex. 41]. To demonstrate the note was a sham, Trustee points to the testimony of Bayuk who said he would give Paul money whenever he needs it. [See PSOF, ¶ 44 Ex. 30, p. 119].

Additionally, Trustee provides the testimony of Bayuk and his agent offering additional contradictory evidence. For instance, Bayuk testified the Baruk Note was satisfied in full based on a loan ledger (hereinafter the " First Ledger") and amortization schedule, and then subsequently testified the First Ledger was wrong and produced a second ledger which indicated different amounts and days payments were made. [PSOF, Ex. 25, Interrogatory Response No. 8; Ex, 39; Ex. 40; Ex 41]. Further, Trustee offers evidence of a Personal Financial Statement to Bank of America in connection with a settlement in a separate lawsuit that listed an asset of $1,750,000 Note Receivable due from Bayuk. Trustee asserts Paul acknowledged that according to the Personal Financial Statement, as of 2012, Bayuk owed him $1,750,000 under the Baruk Note, proving no payment could have been made prior to 2012. [PSOF, ¶ 43, 44, 45].

Trustee has also offered contradictory evidence whether the Baruk Note was assigned by Paul to Woodland Heights, a Canadian entity owned by Paul's father purportedly in exchange for an interest in Woodland Heights. [PSOF, ¶ 40; Ex. 35]. Paul and Bayuk have contended the Note was not transferred, and Bayuk cannot recall making payments to Woodland. [PSOF, ¶ 42; Ex.33, at 130, 11.2-7; see also Ex. 37, p. 182-188].

Sparks Property: Trustee advances the Sparks Property was not appraised and the value was not even considered in the Baruk Transfer. Trustee had the property appraised at $75,000.00. [PSOF, Ex. 20]. Defendants contend Bayuk acquired Paul's interest in the Baruk Properties and he paid Paul $50,000 for his interest in the Sparks Property. Defendants point to a payment ledger in support of this contention. [See PSOF, Ex. 41].

Superpumper Transfer

Background: Paul owned a 100% interest in Consolidated Western Corporation (hereinafter "CWC"), which owned an 80% interest in Superpumper, while Sam and Bayuk each held 10% interest in Superpumper. [PSOF, Ex. 45; DSOF, Ex. 4. at 40]. During the property division, Bayuk and Sam determined they would buy Paul out of the company. [DSOF, Ex. 5. at 192]. Sam and Bayuk formed Snowshoe Petroleum Inc., a holding company (defined *supra* as "Snowshoe"), for this purpose.

Value: The value of Superpumper is greatly disputed. Defendants had Superpumper appraised by Matrix Capital Market Group, which appraised Superpumper at $6,484.515. [PSOF, Ex. 55; DSOF, Ex. 15]. Vacco enlisted Christina Lovelace, a transactional lawyer at his office to assist in drafting documents for the transaction. After reducing the value based on the line of credit, and applying risk discounts determined, Defendants assert Superpumper equity was valued at $3,121,634, giving Paul's 80% ownership interest a value of $2,497,307. [DSOF, Ex. 15]. Trustee challenges the valuation of Superpumper pointing to the Expert Report of James. L. McGovern, dated January 25, 2016 (Trustee's expert). Trustee contends the Matrix valuation lacks credibility for a number of reasons, and in realty, the value of Superpumper on September 30, 2010 was $13,050,000, and therefore Paul's interest was worth $10,440,000. [PSOF, Ex. 56].

Promissory Notes: Snowshoe issued a promissory note, dated November 1, 2010, to Paul for $1,462,213, representing the remainder[3] of the purchase price (hereinafter "Superpumper Note"). [PSOF, Ex, 60; DSOF, Ex. 17]. A Successor Promissory Note in the amount of $492,937.30, dated February 1, 2011, was issued by Snowshoe in favor of Paul. This Successor

[3] The rest was allegedly to be paid in cash. [See PSOF, ¶ 55; DSOF, Ex. 15].

Note was purportedly a result of the following transaction: Superpumper had obtained a term loan in the amount of $3,000,000 (hereinafter "Compass Term Loan"). [PSOF, ¶ 59; Ex.61; DSOF, a p. 10, Ex 5, at 205]. Paul's share of the term loan was $939,000. Paul executed a "Term Note" promising to pay CWC $939,000, plus interest. [DSOF, Ex. 18]. According to Defendants, Paul and Bayuk were not willing to assume Paul's share to assume in their purchase of the company, and as such, the $939,000 was used to offset the remaining amount owed to Paul.

While the fact promissory notes were issued is not in dispute, whether the notes were merely a "sham" is disputed. Trustee asserts as to the Superpumper Note it is entirely unclear what the actual note ever was and what if anything, ever actually could be paid. Trustee assert the Superpumper note reduction, which resulted in the Successor Note, was another sham. Trustee points to the fact the Superpumper Note was reduced after only a few months. Additionally, Trustee provides the deposition testimony of Sam and argues the Compass Term Loan withdraws were made in order for Paul, Bayuk, and Sam to invest in other companies. [PSOF, Ex. 62, at 98:6-12]. Therefore, Trustee contends, Paul never had the intent to pay the $939,000 Note back, so the Superpumper Note reduction was, as far as value to Paul, worthless.

Payment: Whether Paul received value for the transfer in his interest in Superpumper is in dispute. Defendants advance after the $939,000 offset, Paul was owed a total of $1,528,031. Of that purchase price, $1,035.094 was to be paid in cash, and the balance was paid through the Successor Note in the amount of $492.937.30. [DSOF, Ex. 19 (Successor Promissory Note)]. Defendants advance Bayuk and Sam both paid Paul $1,035.094 in cash, by each wiring Paul $517,547.20. [DSOF, Ex. 20 (2010 Wire Transfers)]. Defendants assert the note was paid in full on November 28, 2011 when Sam wired $560,000 to pay off one of Paul's obligations. [DSOF, Ex. 21 (Sam's Bank of Montreal, September 2011 Wire Transfer)]. Defendants contend the wire transfer represented payment on the note, plus interest accrued and fees associated with the transaction. [DSOF, Ex. 22 ¶ 3-4 (Decl. of Sam)]. Trustee asserts, even acknowledging the $2,497,307 value of Superpumper (which it does not), sufficient value was not transferred. Rather, a declaration Paul submitted to the bankruptcy court indicates he received $1,021,613 less than the even reduced value of Superpumper. [PSOF, ¶ 56; Ex. 58 ¶ 10].

Analysis

The Court will now consider whether Trustee has met its burden and established Paul's actual intent to hinder, delay or defraud any creditor of the debtor. In order to make this finding, the Court must consider the badges of fraud (although this is a non-exhaustive list).

The transfer or obligation was to an insider (NRS 112.180(2)(a)): For purposes of NUFTA, if the debtor is a natural person, an insider includes: (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.

Here, the alleged fraudulent transfers were to Sam and Bayuk (and their related entities). There is no dispute that Sam was Paul's brother, and therefore would be a statutory insider. However, Defendants have put forth evidence in September of 2010 of Paul and Bayuk's relationship was deteriorating. The two allegedly parted around October of 2010, but had been discussing it for a while. [DSOF, Ex. 4, at 58-69; Ex. 5 175-176]. Taking the evidence in light most favorable to Defendants, the Court finds a material issue of fact exists as to whether Bayuk should be considered an insider for the purpose of NUFTA.

The debtor retained possession or control of the property transferred after the transfer (NRS 112.180(2)(b)): Trustee has raised numerous allegations to demonstrate Paul remained in control of the transferred property. Trustee also has alleged Paul continued to use the Baruk Properties to fund his settlements and obtain financing. Trustee points to another email exchange when arguing Paul sought to negotiate a $5,000,000 loan using Snowshoe Properties and Glenneyre Properties as security. [PSOF, ¶ 70, Ex. 79]. Trustee also points to the testimony of Bayuk and Paul for the proposition that Sam and Bayuk continued to fund Paul's lavish $30,000 a month lifestyle.

Here the Court finds a material issue of fact exists as to whether Paul maintained possession or control of all the transferred property.

The transfer or obligation was disclosed or concealed; The debtor removed or concealed assets (NRS 112.180(2)(c) & (g)): Trustee sets forth a detailed history of the transfers including

subsequent transfers of the assets. [See gen. PSOF]. In short, Trustee contends the transfers were never disclosed to the Herbst Entities despite the fact they were in the middle of a lawsuit. While the Court finds Trustee's evidence supports a reasonable inference there may have been an attempt to conceal the transfers, the Court also considers Defendants contention that transfers were accomplished with appraisers, documented with legal contracts and deeds prepared by lawyers, and the properties were transferred with publically recorded deeds. [See e.g. PSOF, Ex. 34]. The Court finds the inclusion of appraisers and lawyers to the various transaction cuts against the evidence that the transfers were concealed. Therefore, the Court finds a material issue of fact exists as to this badge of fraud.

Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit. (NRS 112.180(2)(d)): This factor does not appear to be in dispute.

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 (NRS 112.180(2)(h)):

The Court finds there are a material issues of fact as to whether Paul received reasonably equivalent value for the various transfers. As set forth in detail above, there exists material issues of fact as to whether transfer of the Laguna Properties for the Reno Property was a transfer of reasonable equivalent value, as well as the value of the Reno Property being in dispute.

As to the transfer of Paul's interest in the Baruk Properties, there is a material issue of fact as to whether the Baruk Note was a "sham note" and whether the Baruk Note has been paid. Further, because some evidence has been provided that Paul was compensated for the Sparks Property, the Court cannot find because the Property was not considered in the appraisal matrix, that this alone shows fair value was not given for the Baruk Transfer.

Similarly, the Court finds multiple issues of fact exist concerning whether fair value was received in regards to Superpumper Transfer. First, the value of Superpumper at the time of the transfer is greatly disputed. There are factual issues concerning whether the promissory notes issued in connection with the transfer were illusory. Additionally, there exists material issues of fact as to whether promissory notes were paid.

The transfer occurred shortly before or shortly after a substantial debt was incurred (NRS 112.180(2)(j)): This badge does not appear to be in dispute.

Conclusion

Here, Defendants have not opposed the Transfers occurred after Paul had already been sued or that the transfers occurred after a substantial debt was incurred. However, as set forth in detail above, there remains material issues of fact as to many of the badges of fraud. Because the Court has already determined that issues of fact exist as to many of the badges of fraud, and the Court finds taking the evidence as whole there remains a material issue of fact as to Paul's actual intent to defraud creditors, the Court will not analyze the remaining few badges. Therefore, summary judgment must be denied.

Furthermore, even assuming the Court concluded Paul had the actual intent to defraud his creditors, the grant of summary judgment would still be improper because a material issue of fact exists as to whether the Defendants took the transferred property in good faith for a reasonably equivalent value.

Upon review of the pleadings and evidence discussed and good cause appearing,

IT IS HEREBY ORDERED that Plaintiff William A. Leonard's, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Motion for Partial Summary Judgment is DENIED.

DATED this 11 day of December, 2017.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

CASE NO. CV13-02663

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 11 day December, 2017, I filed the **ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT** with the Clerk of the Court.

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

_____**Personal delivery to the following: [NONE]**

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

MARK WEISENMILLER, ESQ. for WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

TERESA PILATOWICZ, ESQ. for WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

FRANK GILMORE, ESQ. for EDWARD WILLIAM BAYUK LIVING TRUST et al

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

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

_____ Reno/Carson Messenger Service – **[NONE]**

_____ Federal Express or other overnight delivery service **[NONE]**

DATED this 11 day of December, 2017.

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Attorneys for Defendants

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.: 4

DEFENDANTS' MOTIONS IN LIMINE

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 bring their Motions in Limine in anticipation of the trial set to commence on October 29, 2018. This Motion is made and supporting by the following Memorandum of Points and Authorities, the attached exhibits, the attached Declaration, and the pleadings and papers on file herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The instant case involves claims originally initiated by judgment creditors of Paul Morabito,

who asserted damages for fraudulent transfers under Nevada law. The current Plaintiff is the Trustee of the involuntary Chapter 7 bankruptcy of Paul Morabito. The Court is familiar with the facts, having already adjudicated Plaintiff's Motion for Summary Judgment.

This Motion in Limine seeks exclusion of damages evidence on the basis that Plaintiff has failed to comply with NRCP 16.1(a)(1)(C).

II. MOTION IN LIMINE #1: FAILURE TO PRODUCE NRCP 16.1(a)(1)(C) COMPUTATION OF DAMAGES.

Plaintiff is obligated to present evidence to substantiate each individual claims. Plaintiff is obligated to honor the mandatory requirements of NRCP 16.1. Plaintiff has not complied with the mandatory provisions of this crucial aspect of mandatory discovery related to the computation of damages.

The mandatory pretrial discovery requirements of Rule 16.1 obligate Plaintiff to provide "a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered."

Plaintiff has not complied with this mandatory rule. See attached as **EXHIBIT 1**, the latest version of Plaintiff's 16.1 Amended Disclosures which address the damages issues. In Plaintiff's disclosures, he has identified:

> **C. A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered:**
>
> Plaintiff is entitled to recover assets transferred or the value thereof pursuant to Nev. Rev. Stat.§§ 112.210 and 112.220, which Plaintiff believes to be no less than $8,500,000.

This response is insufficient under the Rules. A party must disclose "[a] computation of any category of damages" it seeks to recover, NRCP 16.1(a)(1)(C). A court may sanction a party

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for failure to disclose damages. NRCP 16.1(e)(3); NRCP 37(c)(1). Permissible sanctions include "[a]n order striking out pleadings or parts thereof ... or dismissing the action or proceeding or any part thereof. . . ." NRCP 37(b)(2)(C); *see* NRCP 37(c)(1); NRCP 16.1(e)(3)(A). NRCP 37(c)(1) further provides that "[a] party that without substantial justification fails to disclose information required by Rule 16.1 ... is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed."

Where, as here, a party fails to comply with a significant requirement under the Rules, the Court is authorized to consider a number of sanctions. Defendants contend that due to the nature and significance of the violation, the sanction should be an order striking evidence of damages, and effectively striking Plaintiff's claims for relief.

A. **The Disclosures Prejudice the Defendants Because Neither the Alleged Assets Nor the Alleged Values Are Disclosed**.

Over the course of this nearly five-year litigation, Plaintiff (and the Herbst Plaintiffs before him), have undertaken discovery on numerous assets which Plaintiff contends might have been fraudulently transferred to Defendants. Hundreds of thousands of pages have been discovered and disclosed, more than a dozen depositions have been taken, along with dozens more subpoenas. The potential scope of Plaintiff's case involves nearly everything that Paul Morabito owned over the last twenty years. Rules like 16.1(a)(1)(C) are intended to ensure that each party knows the scope of the potential damages that their opponent seeks. Here, Plaintiff has willfully deprived Defendants of that right.

Without a properly designated and disclosed computation of damages, Defendants are facing trial by ambush. They do not know precisely what assets Plaintiff is alleging were transferred; they do not know exactly what values Plaintiff intends to try to prove as to each asset; Defendants do not know if Plaintiff is seeking the current value of the assets or the value at the time of the alleged transfer. Critically, not all Defendants are implicated in all the alleged transfers. For example, the allegation surrounding the transfer of a fractional share of Paul Morabito's Reno residence involves only Edward Bayuk, but not Snowshoe, Inc., Sam Morabito, nor Superpumper, Inc.

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Without an appropriate computation of damages, each Defendant has no ability to ascertain their respective exposure for trial preparation, or for settlement purposes, for that matter. "[T]he purpose of providing a computation of damages is not necessarily to pinpoint an exact dollar figure but to 'enable the defendants to understand the contours of their potential exposure and make informed decisions regarding settlement and discovery'" *Pizarro-Ortega v. Cervantes-Lopez*, 396 P.3d 783, 787 (Nev. 2017)(citing *Calvert v. Ellis,* No. 2:13-cv-00464-APG-NJK, 2015 WL 631284, at *1–2 (D. Nev. Feb. 12, 2015)).

In *Picon v. Ryon*, 99 Nev. 801, 671 P.2d 1133 (1983), the Supreme Court held "when a party's failure to provide discovery information was unexplained and unwarranted," and not "accidental or involuntary," case concluding sanctions were warranted. The same applies here.

In *Edy v. McManus Auctions*, No. 70737, 2017 WL 4996831, at *1 (Nev. App. Oct. 31, 2017), the Court of Appeals upheld the trial court's striking of the plaintiff's fraudulent misrepresentation and deceptive trade practices claims after he failed to timely submit a NRCP 16.1 damages calculation.

The Supreme Court was faced with this issue as it related to the common practice amongst Nevada attorneys that disclosing future medical expenses was not required under NRCP 16.1(a)(1)(C). In *Pizarro-Ortega v. Cervantes-Lopez*, 396 P.3d 783, 787 (Nev. 2017), the court explained that "to the extent that the aforementioned general understanding amongst Nevada practitioners is premised on the perceived difficulty in providing a precise dollar figure for a future surgery, that premise is not a valid basis for disregarding NRCP 16.1(a)(1)(C)." The court then clarified "that when a party has failed to abide by NRCP 16.1's disclosure requirements, NRCP 37(c)(1) provides the appropriate analytical framework for district courts to employ in determining the consequence of that failure. Under NRCP 37(c)(1), a party is prohibited from 'us[ing] as evidence at trial ... any witness or information not so disclosed' unless the party can show there was 'substantial justification' for the failure to disclose or 'unless such failure is harmless.'" *Id.* at 787.

Here, there exists no substantial justification, and the failure was certanly not harmless.

Discovery in this case opened on November 6, 2014. *See* filed Joint Case Conference Report. Current counsel for Plaintiff noticed their appearance on May 26, 2015. Discovery only finally

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closed on or about July 11, 2017, when Plaintiff took their final two depositions. Plaintiff's last Rule 16.1 supplement was served on March 20, 2017. At no time in the prior four years has Plaintiff disclosed a comprehensive (or even basic) computation of damages, putting Defendants on notice as to the amount of damage Plaintiff seeks from each Defendant as to each asset alleged. Indeed, it is not even entirely clear to Defendants which transferred assets Plaintiff is intending to include in the upcoming trial, as the shotgun discovery practice investigated myriad assets, many of which were never pled. Without an amended pleading, and without any computation of damages, Defendants are left to guess as to Plaintiff's damages presentation at trial. Critically, unlike in typical cases, Defendants here had no ability to obtain discovery from a personally knowledgable accuser. The Plaintiff in this case has *no* personal knowledge of *any* of the facts of this case.

When Defendants deposed him and inquired about the factual support for the claims he has brought against the Defendants, he admitted that he lacked knowledge of even the basic facts, and had no information on the scope or specifics of the damages. He conceded that all information he possessed about the case came from his counsel. In deposition, Plaintiff was asked:

> Q. I want to know everything you did in review and consideration of the strengths of the claims that were made against the defendants in the state court action.
>
> A. I would rely upon my counsel there, John Murtha [counsel for the trustee in the bankruptcy].

See Deposition Transcript of William A. Leonard attached hereto as **EXHIBIT 2**, p. 60::11-61:10.

When it came to the issue of damages, Plaintiff asserted the attorney-client privilege when asked what amount of damges he was seeking:

> Q. . . . did you undertake any individual efforts to determine whether or not the estate should pursue the claims against the defendants in the state court action?
>
> A. My individual efforts would have been to speak with Mr. Murtha and find out why he wanted to pursue this and if he thought there was going to be recovery, and if there's a recovery, how much.

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Id. at 61:6-10.

* * * *

Q. . . . do you have an independent knowledge outside of what Mr. Murtha has told you as to how Mr. Murtha arrived at the conclusion that this was a case that the trustee should pursue?

A. I think that would be protected under attorney-client privilege.

Id. at 61:24-62:4.

Additionally, early on in the case, each of the Defendants served interrogatories on the Plaintiff seeking computations of damages. *See* **EXHIBIT 3**. Those interrogatories were objected to and never supplemented according to Rule 26, despite the duty under Rule 26(e) "seasonably to amend a prior response to an interrogatory . . . if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." No supplementation was ever provided. Plaintiff has no substantial justification for failing to comply with the Rule.

Failure to comply with the Rule is not harmless here. Nevada jurisprudence considers harmless failure to include instances where the amount of damages sought are readily available to the Defendants, either in the Complaint, or in the primary contracts at issue. See, e.g. *Turner v. SBSS Holdings, LLC*, No. 67315, 2016 WL 2870743, at *2 (Nev. App. May 9, 2016)(defendants were "on notice from the outset of the case that [plaintiff] sought to recover amounts due under the lease and guaranty agreements, and [plaintiff] disclosed tenant ledgers setting forth the amounts [plaintiff] believed were owed"). No such guidance is readily available here. When Defendants inquired of Plaintiff about the scope of the damages Plaintiff intended to offer at trial, he was not able to answer:

Q. Okay. Let's get to the prayer for relief. Plaintiff prays for award of compensatory damages against all the defendants in an amount to be proven at trial. Do you, as you sit here today, know what compensatory damage amount you are seeking against my clients at trial?

A. I do not have the dollar value. It will be proven at trial.

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See **EXHIBIT 2**, p. 113:10-16. And when Plaintiff was asked if he knew whether the values that Defendants had assigned to various assets was accurate, or how those values were arrived at, he admitted, "I have no idea." *Id.*, at p.118.

All Defendants are provided is that the value of the anticipated damges claim "is believed to be" no less than $8,500,000. This is intentionally vague, and intentionally ambiguous. Indeed, Defendants might be preparing for trial in which the damages calculation could be between $8.5 million and ten times that. Defendants do not know the scope of the damages sought because it is Plaintiff's obligation under the Rules to disclose it. They never have. The failure is not harmless, it's the single most important aspect of the case.

"A party seeking damages has the burden of providing the court with an evidentiary basis upon which it may properly determine the amount of damages." *Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000). If the computation of damages has not been produced in discovery, then the Rules require that the evidence supporting any damages claim be excluded.

III. CONCLUSION

For the reasons stated above, Defendants request that the Court enter its order in limine, exlcuding any evidence of damages as a result of Plaintiff's failure to comply with Rule 16.1(a)(1)(C).

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 12th day of September, 2018.

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

/s/ Frank C. Gilmore
FRANK C. GILMORE, ESQ.
LINDSAY L. LIDDELL, ESQ.
Attorneys for Defendants

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

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Robison, Simons, Sharp & Brust, and that on this date I caused to be served a true copy of the **DEFENDANTS' MOTIONS IN LIMINE** 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 12th day of September, 2087.

Mary Carroll Davis

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

LIST OF EXHIBITS

EXHIBIT NO.	DESCRIPTION	NO. OF PAGES
1	Plaintiff's Second Supplement to Amended Disclosures Pursuant to NRCP 16.1(A)(1)	9
2	Portions of the William Leonard deposition transcript	6
3	Plaintiff, Jerry Herbst's Responses to Defendant Snowshoe Petroleum, Inc.'s Set of Interrogatories and Plaintiff, Jerry Herbst's Responses to Defendant Salvatore Morabito's Set of Interrogatories	20

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

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Jacqueline Bryant
Clerk of the Court
Transaction # 6875627 : yviloria

EXHIBIT 1

EXHIBIT 1

DISC
GARMAN TURNER GORDON LLP
GERALD M. GORDON, ESQ.
Nevada Bar No. 229
E-mail: ggordon@gtg.legal
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Las Vegas, Nevada 89119
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Special Counsel to William A. Leonard, 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** **PLAINTIFF'S SECOND SUPPLEMENT TO AMENDED DISCLOSURES PURSUANT TO NRCP 16.1(A)(1)**

TO: ALL PARTIES IN INTEREST

Plaintiff William A. Leonard ("Plaintiff"), by and through his attorneys, Garman Turner Gordon, hereby provides the following supplemental N.R.C.P. 16.1 Disclosures:

. . .

. . .

A. NRCP 16.1(a)(1)(A) WITNESS LIST

The following witnesses have knowledge regarding the facts and circumstances out of which this matter arises:

1. William Leonard, Trustee
   c/o Garman Turner Gordon LLP
   650 White Drive, Suite 100
   Las Vegas, Nevada 89119

Mr. Leonard is expected to have knowledge regarding the allegations in the amended complaint, including creditors in Paul Morabito's Chapter 11 case that remain unpaid and the inability to collect against the assets that have been transferred.

2. Sean Higgins
   9811 W. Charleston Blvd. Suite 2-379
   Las Vegas, NV 89117
   (702) 327-0295

Mr. Higgins is expected to have knowledge regarding the allegations in the amended complaint, including the unpaid amounts owed to JH, Inc., Jerry Herbst, and Berry-Hinckley Industries.

3. Timothy Herbst
   5195 Las Vegas Blvd. S.
   Las Vegas, Nevada 89119

Mr. Herbst is expected to have knowledge regarding the allegations in the amended complaint, including the unpaid amounts owed to JH, Inc., Jerry Herbst, and Berry-Hinckley Industries.

4. Paul Morabito
   c/o Frank Gilmore, Esq.
   Robison, Belaustegui, Sharp & Low
   71 Washington Street
   Reno, Nevada 89503

Mr. Morabito is expected to have knowledge regarding the allegations in the amended complaint, and assertions and defenses in the Answer including, but not limited to, the assets that have been transferred.

5. Edward Bayuk
   c/o Frank Gilmore, Esq.

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

Mr. Bayuk, individually and in his capacity as Trustee of the Edward William Bayuk Living Trust, is expected to have knowledge regarding the allegations in the amended complaint, and assertions and defenses in the Answer including, but not limited to, the assets that have been transferred.

6. Salvatore Morabito
c/o Frank Gilmore, Esq.
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, Nevada 89503

Mr. Morabito is expected to have knowledge regarding the allegations in the amended complaint, and assertions and defenses in the Answer including, but not limited to, the assets that have been transferred.

7. Dennis Vacco
Lippes Mathias Wexler Friedman LLP
50 Fountain Plaza, Suite 1700
Buffalo, New York 14202

Mr. Vacco is expected to have knowledge regarding the allegations in the amended complaint, and assertions and defenses in the Answer including, but not limited to, the assets that have been transferred.

8. Person Most Knowledgeable, Gursey Schneider LLP
1888 Century Park E, Suite 900
Los Angeles, California 90067

The Person Most Knowledgeable of Gursey Schneider is expected to have knowledge regarding the allegations in the amended complaint, including, but not limited to, the assets that have been transferred and the assets and liabilities of Superpumper, Inc.

9. Person Most Knowledgeable, Superpumper, Inc.
c/o Frank Gilmore, Esq.
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, Nevada 89503

The Person Most Knowledgeable of Superpumper, Inc. is expected to have knowledge regarding the allegations in the amended complaint, and assertions and defenses in the Answer including, but not limited to, the assets that have been transferred and the assets and liabilities of Superpumper, Inc.

10. Person Most Knowledgeable, Snowshoe Petroleum, Inc.
c/o Frank Gilmore, Esq.
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, Nevada 89503

The Person Most Knowledgeable of Superpumper, Inc. is expected to have knowledge regarding the allegations in the amended complaint, and assertions and defenses in the Answer including, but not limited to, the assets that have been transferred.

11. Stanton Bernstein
6320 Canoga Ave - Ste 1500
Woodland Hills, CA 91367
(818) 596-2139

Mr. Bernstein is expected to have knowledge regarding the allegations in the amended complaint including, but not limited to, the assets that have been transferred and the assets and liabilities of Superpumper, Inc.

12. Custodian of Records,
Hancock Park Insurance Services
2338 E. Anaheim St., No. 444
Long Beach, California 90804

The Custodian of Records of Hancock Park Insurance Services is expected to have knowledge regarding the allegations in the amended complaint, including, but not limited to, the value of the assets that have been transferred.

13. Custodian of Records
Compass Bank
c/o CT Corp. System, its Registered Agent
3800 N. Central Ave., Suite 460
Phoenix, Arizona 85012

The Custodian of Records of Compass Bank is expected to have knowledge regarding the allegations in the amended complaint, including, but not limited to, assets that have been

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

transferred.

B. NRCP 16.1(a)(1)(B) DOCUMENTS, DATA COMPILATION AND TANGIBLE THINGS

1. All Documents disclosed in the bankruptcy case of Paul Morabito, Case No. BK-N-13-51237-GWZ, including but not limited to:

    a. Morabito (341).000001-007104
    b. LMWF000001-LMWF000477, LMWF000500-LMWF001000
    c. RBSL_Morabito 000001-RBSL_Morabito 000364
    d. PAM000001-PAM000006
    e. PW001-PW020

2. Documents disclosed by Lippes Mathias Wexler Friedman LLP in the above-captioned case, LMWF000001-LMWF000180.

3. Deposition of Stanton R. Bernstein dated May 11, 2011, Bates No. WL000001 – WL000256.

4. Deposition of Paul A. Morabito dated March 3, 2011, Bates No. WL000257 – WL002108.

5. Expert Report of Craig L. Greene, CCPA/CFF, CFE, MCJ, Bates No. WL002109 – WL002187.

6. Settlement Agreement and Mutual Release, Bates No. WL002188 – WL002139.

7. Joint Deposition and 2004 examination of Paul A. Morabito dated July 23, 2014, Bates No. WL002320 – WL002535

8. Transcript from Paul Morabito's 341 Meeting of Creditors dated March 12, 2015, Bates No. WL002536 – WL002726.

9. Paul Morabito's responses to discovery responses related to dismissal motion in Bankruptcy Case, Bates No. WL002727 – WL002743.

10. Documents produced by Peitzman Weg LLP, Bates No. WL002743 – WL002776.

11. Documents related to Settlement Agreement, Loan Agreement, Modification & Release between Paul Morabito and Bank of America, Bates No. WL002777 – WL002801.

12. Paul Morabito's 2013 Tax Return, Bates No. WL002802 – WL002852.

13. Judgment dated August 23, 2011 and entered in Consolidated Nevada Corp. v. JH, Inc., et al, Case No. CV07-02764, Bates Nos.WL002853 – WL002854.

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

14. Findings of Facts, Conclusions of Law, and Judgment dated October 12, 2010 and entered in Consolidated Nevada Corp. v. JH, Inc., et al, Case No. CV07-02764, Bates Nos.WL002855 – WL002870.

15. Confession of Judgment dated June 18, 2013 and entered in Consolidated Nevada Corp. v. JH, Inc., et al, Case No. CV07-02764, Bates No. WL002871 – WL002895.

16. State of California, Office of Real Estate Appraisers, Decision and Order related to Mark Justmann dated April 26, 2013, Bates Nos. WL002896 – WL002908.

17. All claims filed in in the bankruptcy case of Paul Morabito, Case No. BK-N-13-51237-GWZ, Bates Nos. WL002909 – WL003114.

18. Declarations of Paul Morabito filed in the in the bankruptcy case of Paul Morabito, Case No. BK-N-13-51237-GWZ, including but not limited to ECF Nos. 22, 43, 46, 115. Bates Nos. WL003115 – WL003131.

19. Schedules and Statements of Financial Affairs filed in the in the bankruptcy case of Paul Morabito, Case No. BK-N-13-51237-GWZ, including but not limited to ECF Nos. 211, 249. Bates Nos. WL003132 – WL003183.

20. Communications with Ronald Buss, Bates Nos. WL003184 – WL003717, produced on March 18, 2016.

21. Communications with James McGovern, Bates Nos. WL003718 – WL004190, produced on March 18, 2016.

22. Communications with William Kimmel, Bates Nos. WL004191 – WL004529, produced on March 18, 2016.

23. James McGovern file, produced on March 28, 2016 as MG00001 – MG02705.

24. Documents produced in electronic form by Gursey Schneider, produced herewith as Gursey000001 – Gursey023414.

25. Documents produced in hard copy by Gursey Schneider, produced herewith as Gursey023415 – Gursey023422.

26. Michelle Salazar Updated Expert Report dated March 15, 2011, produced herewith as WL004530 – WL004543.

27. Statement of Financial Accounting Standards No. 78, produced herewith as WL004544 – WL004556.

28. Will of Paul A. Morabito, produced herewith as WL004557 – WL004574.

29. Grant, Bargain, and Sale Deed recorded 12/31/2012, produced herewith as WL004575-WL004576.

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

30. Declaration of Value, produced herewith as WL004577.

31. Documents produced by Stanton Bernstein in the bankruptcy case of Paul Morabito pending in the United States Bankruptcy Court for the District of Nevada, Case No. BK-S-13-51237-GWZ as SPCPA000001 – SBCPA002234.

32. Documents produced by Stanton Bernstein in response to a subpoena issued in the above-captioned case as SPCPA002235 –SBCPA002493, SPCPA007529 – SBCPA009729

33. Documents produced by Compass Bank in response to a subpoena issued in the above-captioned case as COMPASS 000001-000955.

34. All documents identified by any other party to this lawsuit.

C. NRCP 16.1(a)(1)(C) DAMAGES

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

D. NRCP 16.1(a)(1)(D) INSURANCE AGREEMENT

Plaintiff is unaware of any insurance agreements that are applicable to this matter.

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 26th of April, 2016.

GARMAN TURNER GORDON LLP

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

Special Counsel for Trustee

CERTIFICATE OF SERVICE

I certify that I am an employee of GARMAN TURNER GORDON, and that on this date, pursuant to NRCP 5(b), I am serving a true and correct copy of the above **Plaintiff's Second Supplement to Amended Disclosures Pursuant to NRCP 16.1(a)(1)** 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, Las Vegas, Nevada, postage prepaid, following ordinary business practices

____ Certified Mail, Return Receipt Requested

____ Via Facsimile (Fax)

XXX 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 28th day of April, 2016.

/s/ Patty Pierson
An employee of GARMAN TURNER GORDON LLP

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

Name	Date modified	Type	Size
Files Ready to Be Written to the Disc (17)			
Compass Bank documents (Bates-stamped 000001-955) password Sub4Res	4/27/2016 5:10 PM	Nuance Power PD...	54,645 KB
SBCPA002235 - SBCPA002280 CWC 2006-2010	4/26/2016 4:08 PM	Nuance Power PD...	1,603 KB
SBCPA002281 - SBCPA002351 CWC 2006-2010	4/26/2016 4:10 PM	Nuance Power PD...	4,499 KB
SBCPA002352 - SBCPA002392 CWC 2006-2010	4/26/2016 4:11 PM	Nuance Power PD...	1,399 KB
SBCPA002393 - SBCPA002421 CWC 2006-2010	4/26/2016 4:13 PM	Nuance Power PD...	2,416 KB
SBCPA002422 - SBCPA002493 CWC 2006-2010	4/26/2016 4:13 PM	Nuance Power PD...	4,164 KB
SBCPA007529 - SBCPA007728 Superpumper Inc.	4/26/2016 4:59 PM	Nuance Power PD...	1,525 KB
SBCPA007729 - SBCPA008346 Superpumper Inc.	4/26/2016 5:39 PM	Nuance Power PD...	41,030 KB
SBCPA008347 - SBCPA008379 Superpumper Inc.	4/26/2016 5:40 PM	Nuance Power PD...	676 KB
SBCPA008380 - SBCPA008419 Superpumper Inc.	4/26/2016 5:41 PM	Nuance Power PD...	1,592 KB
SBCPA008420 - SBCPA008953 Superpumper Inc.	4/26/2016 5:43 PM	Nuance Power PD...	42,599 KB
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SBCPA009271 - SBCPA009301 Superpumper Inc.	4/26/2016 5:46 PM	Nuance Power PD...	2,304 KB
SBCPA009302 - SBCPA009317 - Superpumpter Inc.	4/26/2016 5:47 PM	Nuance Power PD...	535 KB
SBCPA009318 - SBCPA009333 - Superpumper Inc.	4/26/2016 5:48 PM	Nuance Power PD...	701 KB
SBCPA009334 - SBCPA009346 Superpumper Inc.	4/26/2016 5:49 PM	Nuance Power PD...	313 KB
SBCPA009347 - SBCPA009729 Superpumper Inc.	4/26/2016 5:50 PM	Nuance Power PD...	21,867 KB

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Clerk of the Court
Transaction # 6875627 : yviloria

EXHIBIT 2

EXHIBIT 2

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

-o0o-

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

Department No. 1

DEPOSITION OF

WILLIAM A. LEONARD

March 25, 2016

Reno, Nevada

REPORTED BY: CONSTANCE S. EISENBERG, CCR #142, RMR, CRR

Job No. 293094

1 possibly lead to the discovery of admissible evidence.
2 It's pretty broad, so I'm going to continue to do that.
3 BY MR. GILMORE:
4 Q **Paragraph 3 of Exhibit 2 -- can you keep Exhibit -- can**
5 **you keep Exhibit 3 and Exhibit 4 open for me, Exhibit 3 and**
6 **Exhibit 4.**
7 A What happened to Exhibit 2?
8 Q **It should be there.**
9 A You want that open, too?
10 Q **I just want Exhibit 3 right now.**
11 **Here is where I'm headed. Paragraph 3 of Exhibit 3 says**
12 **"After review and consideration, I intend to pursue, on behalf of**
13 **the estate, certain fraudulent transfer claims against the named**
14 **defendants."**
15 **Do you see that?**
16 A Yes.
17 Q **That's a statement you made, correct?**
18 A Yes.
19 Q **You believed it when you made it?**
20 A Yes.
21 Q **And it was true when you made it?**
22 A Yes.
23 Q **I want to know everything you did in review and**
24 **consideration of the strengths of the claims that were made**
25 **against the defendants in the state court action.**

1 A I would rely upon my counsel there, John Murtha.
2 **Q So without getting into the specific contents of the**
3 **communications, your mental impressions were that John Murtha**
4 **relayed to you that this was a case that you should pursue?**
5 A Yes.
6 **Q Did you do any independent examination on your own**
7 **behalf, independent of what your counsel had done, in order to**
8 **reach that conclusion?**
9 A I would have spoken with Mr. Murtha to find out why he
10 came up with that recommendation.
11 **Q Okay. I respect that answer, but it still didn't quite**
12 **answer my question, which is did you undertake any individual**
13 **efforts to determine whether or not the estate should pursue the**
14 **claims against the defendants in the state court action?**
15 A My individual efforts would have been to speak with
16 Mr. Murtha and find out why he wanted to pursue this and if he
17 thought there was going to be recovery, and if there's a recovery,
18 how much.
19 **Q And then he gave you his answers, which I don't want to**
20 **get into, and based on his answers, you said yes?**
21 A Yes.
22 **Q And you took his word for it?**
23 A Yes.
24 **Q Don't tell me what Mr. Murtha told you, but do you have**
25 **an independent knowledge outside of what Mr. Murtha has told you**

able to pay the judgments. It all constitutes bad work.

Q Okay. And it's your understanding that based on that explanation, there is some basis for an award of attorney's fees?

A I believe so.

Q Okay.

A In 53, I don't have an answer for that, nor do you have a question.

Q Well, we denied it.

53 is blank, as we both noticed.

Okay. Let's get to the prayer for relief. Plaintiff prays for award of compensatory damages against all the defendants in an amount to be proven at trial.

Do you, as you sit here today, know what compensatory damage amount you are seeking against my clients at trial?

A I do not have the dollar value. It will be proven at trial.

Q Okay. And prayer for relief number 2, "an award of punitive damages against Defendants."

Do you know if there is a basis for a punitive damage award in this case?

A Bad acts by the defendants.

Q Okay. Other than that?

A That's the basis for punitive.

Q In your opinion?

A No.

A I have no idea.

Q Okay. Is there anything -- as you look at Exhibit 5, is there anything that you can point to me which you expect at trial you will have a quarrel with?

MS. HAMM: Objection, vague.

THE WITNESS: I would point out one word, "estimated."

BY MR. GILMORE:

Q Okay.

A You have an appraised value and you have a guess.

Q I understand that contention.

Anything else?

A At this time, I am not sure.

Q Okay. Do you know if any portion of this document or the figures that are identified in this document will be utilized by the plaintiffs to compute their damages?

A I have no idea.

Q Okay. I said "plaintiffs." I didn't mean to make that plural. I meant that to mean just you. So for -- not to confuse you, but your answer is you don't have any idea?

A I do not.

Q Turn to page 2 of Exhibit 5, please.

Do you have any idea what this document is?

A I do not.

Q Okay. Have you ever seen it before?

A No.

REPORTER'S CERTIFICATION

I, CONSTANCE S. EISENBERG, a Certified Court Reporter in and for the State of Nevada, do hereby certify;

That on Friday, March 25, 2016, at the hour of 1:01 p.m. of said day, at 71 Washington Street, Reno, Nevada, personally appeared WILLIAM A. LEONARD, who was duly sworn by me to testify in the within-entitled proceedings;

That said deposition was taken in verbatim stenotype notes by me and thereafter transcribed into typewriting as herein appears;

That I am not a relative nor an employee of any of the parties, nor am I financially or otherwise interested in this action;

That the foregoing transcript, consisting of pages 1 through 127, is a full, true and correct transcription of my stenotype notes of said deposition.

DATED: At Reno, Nevada, this 1st day of April, 2016.

Constance S. Eisenberg

CONSTANCE S. EISENBERG, CCR #142, RMR, CRR

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Jacqueline Bryant
Clerk of the Court
Transaction # 6875627 : yviloria

EXHIBIT 3

EXHIBIT 3

DISC
GORDON SILVER
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Fax: (775) 786-0131

Attorneys for Plaintiffs

IN THE SECOND JUDICIAL DISTRICT COURT OF

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

JH, INC., a Nevada corporation; JERRY HERBST, an individual; and BERRY-HINCKLEY INDUSTRIES, a Nevada corporation, Plaintiffs, vs. PAUL MORABITO, individually and as Trustee of the ARCADIA LIVING TRUST; SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, and individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	**CASE NO.: CV13-02663** **DEPT. NO.: 6**

PLAINTIFF, JERRY HERBST'S RESPONSES TO DEFENDANT SNOWSHOE PETROLEUM, INC.'S SET OF INTERROGATORIES

Plaintiff Jerry Herbst, by and through its attorneys of record, Gordon Silver, and pursuant to Rule 33 of the Nevada Rules of Civil Procedure, responds to Defendant Snowshoe Petroleum, Inc.'s First Set of Interrogatories as follows:

GENERAL RESPONSES AND OBJECTIONS

1. Plaintiff objects to the interrogatories to the extent that they seek the disclosure of information that is neither relevant to this action nor reasonably calculated to lead to the discovery of admissible evidence.

2. Plaintiff objects to the interrogatories to the extent that they seek the disclosure of information that is protected by the attorney-client privilege, or that is otherwise protected from disclosure under applicable privileges, laws, or rules.

3. Plaintiff objects to the interrogatories to the extent that they seek information that constitutes or requires disclosure of mental impressions, conclusions, opinions, or legal theories of any attorney for Defendant.

4. Plaintiff objects to the interrogatories to the extent that they seek information containing trade secrets or proprietary information.

5. Plaintiff objects to the extent that where the information requested by the interrogatories is not in Plaintiff's control, possession, or custody, such discovery is overbroad and would impose an undue burden and expense on Plaintiff. Plaintiff further objects to any interrogatory to the extent that the information requested is already in the control, possession, or custody of Defendant.

6. Plaintiff objects to the interrogatories to the extent the discovery sought is publicly available.

7. Plaintiff objects to the interrogatories to the extent that they are vague, ambiguous, or indefinite.

8. Plaintiff objects to Defendant's interrogatories to the extent that discovery in this matter is ongoing and pertinent information necessary to fully and accurately respond to these interrogatories may not yet be available to Plaintiff. Plaintiff reserves the right to further supplement these responses.

9. Plaintiff's responses to Defendant's interrogatories are made subject to and without waiver of any stated or unstated applicable objections. Plaintiff specifically incorporates each of the above-recited General Objections into its responses to Claimant's interrogatories.

Gordon Silver
Attorneys At Law
Suite 940
100 West Liberty Street
Reno, Nevada 89501
(775)343-7500

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1:

In your sixth claim for relief, you allege that Snowshoe aided and abetted fraudulent misrepresentation. As to this allegation, please identify the following:

(a) All facts or evidence you believe supports the allegation, including why you believe such conduct aided and abetted fraud;

(b) The damages you claim to have incurred as alleged in your sixth claim for relief, as to Snowshoe alone, and, if different, as to all Defendants in total. In this response, please identify how you calculated such alleged damages;

(c) The name, contact information and a summary of their knowledge of all persons you maintain have information in support of your responses to answers 1(a) and 1(b);

(d) The identify, location and custodian of all documents which support your responses to interrogatory parts 1(a), (b), and (c); and

RESPONSE TO INTERROGATORY NO. 1:

Objection. Plaintiffs object to this discovery request because this fraudulent transfer action may now belong to the Chapter 7 Trustee in *In re Morabito*, Case Number: 13-51237-gwz. Courts have determined "that creditors' fraudulent transfer claims belong to the Trustee under the strong-arm powers of Section 544 and are property of the estate once the case is filed," meaning that "the trustee has the right to pursue state law fraudulent transfer claims by virtue of the operation of Section 544." *In re C.D. Jones & Co., Inc.*, 482 B.R. 449, 456-59 (Bankr. N.D. Fla. 2012) (citing *In re Moore,* 608 F.3d 253, 261 (5th Cir. 2010) (holding that fraudulent transfer claims "become estate property once bankruptcy is under way by virtue of the trustee's successor rights under § 544(b)."); *In re Zwirn*, 362 B.R. 536, 539, 541-42 (Bankr. S.D. Fla. 2007) (stating that "[p]ursuant to 11 U.S.C. § 541 and its broad definition of property of the estate, fraudulent conveyance claims are property of the estate that with rare exception may only be prosecuted by the trustee" and indicating that the trustee may intervene in a previously filed state court action). In light of this relevant law, Plaintiffs understand that the Trustee is currently evaluating whether to pursue the action himself. Accordingly, Plaintiffs cannot respond to the

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discovery request while the Trustee is deciding whether to assume Plaintiffs' role.

Moreover, many of the documents upon which Plaintiffs would rely to respond to this discovery request are in the possession of certain of the Defendants and/or counsel for Defendants.

INTERROGATORY NO. 2:

In your fifth claim for relief, you allege that Snowshoe engaged in a civil conspiracy which caused you harm. As to this claim against Snowshoe, please identify and describe the following:

(a) All facts or evidence you maintain supports this allegation, including why you believe such conduct was conspiratorial;

(b) The damages you claim to have incurred as alleged in your fifth claim for relief, as to Snowshoe alone, and, if different, as to all Defendants in total. In this response, please identify how you calculated such alleged damages.

(c) The name, contact information and a summary of their knowledge, of all persons you maintain have information in support of your responses to answers 2(a) and 2(b);

(d) The identity, location and custodian of all documents or other tangible things you maintain support your response to interrogatory parts 2(a), (b) and (c);

RESPONSE TO INTERROGATORY NO. 2:

Objection. Plaintiffs object to this discovery request because this fraudulent transfer action may now belong to the Chapter 7 Trustee in *In re Morabito*, Case Number: 13-51237-gwz. Courts have determined "that creditors' fraudulent transfer claims belong to the Trustee under the strong-arm powers of Section 544 and are property of the estate once the case is filed," meaning that "the trustee has the right to pursue state law fraudulent transfer claims by virtue of the operation of Section 544." *In re C.D. Jones & Co., Inc.*, 482 B.R. 449, 456-59 (Bankr. N.D. Fla. 2012) (citing *In re Moore,* 608 F.3d 253, 261 (5th Cir. 2010) (holding that fraudulent transfer claims "become estate property once bankruptcy is under way by virtue of the trustee's successor rights under § 544(b)."); *In re Zwirn*, 362 B.R. 536, 539, 541-42 (Bankr. S.D. Fla. 2007) (stating that "[p]ursuant to 11 U.S.C. § 541 and its broad definition of property of the

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estate, fraudulent conveyance claims are property of the estate that with rare exception may only be prosecuted by the trustee" and indicating that the trustee may intervene in a previously filed state court action). In light of this relevant law, Plaintiffs understand that the Trustee is currently evaluating whether to pursue the action himself. Accordingly, Plaintiffs cannot respond to the discovery request while the Trustee is deciding whether to assume Plaintiffs' role.

Moreover, many of the documents upon which Plaintiffs would rely to respond to this discovery request are in the possession of certain of the Defendants and/or counsel for Defendants.

INTERROGATORY NO. 3:

In your first claim for relief, you allege that Snowshoe is liable to you for conduct which violates NRS 112.140. As to this claim, please identify and describe the following:

(a) All facts or evidence you believe supports this allegation, including why you believe such conduct violates NRS 112.140;

(b) The damages you claim to have incurred as alleged in your first claim for relief, as to Snowshoe alone, and, if different, as to all Defendants in total. In this response, please identify how you calculated such alleged damages.

(c) The name, contact information and a summary of their knowledge, of all persons you maintain have information in support of your responses to answers 3(a) and 3(b);

(d) The identity, location and custodian of all documents or other tangible things you maintain support your responses to interrogatory parts 3(a), (b) and (c);

RESPONSE TO INTERROGATORY NO. 3:

Objection. Plaintiffs object to this discovery request because this fraudulent transfer action may now belong to the Chapter 7 Trustee in *In re Morabito*, Case Number: 13-51237-gwz. Courts have determined "that creditors' fraudulent transfer claims belong to the Trustee under the strong-arm powers of Section 544 and are property of the estate once the case is filed," meaning that "the trustee has the right to pursue state law fraudulent transfer claims by virtue of the operation of Section 544." *In re C.D. Jones & Co., Inc.*, 482 B.R. 449, 456-59 (Bankr. N.D. Fla. 2012) (citing *In re Moore,* 608 F.3d 253, 261 (5th Cir. 2010) (holding that fraudulent

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transfer claims "become estate property once bankruptcy is under way by virtue of the trustee's successor rights under § 544(b)."); *In re Zwirn*, 362 B.R. 536, 539, 541-42 (Bankr. S.D. Fla. 2007) (stating that "[p]ursuant to 11 U.S.C. § 541 and its broad definition of property of the estate, fraudulent conveyance claims are property of the estate that with rare exception may only be prosecuted by the trustee" and indicating that the trustee may intervene in a previously filed state court action). In light of this relevant law, Plaintiffs understand that the Trustee is currently evaluating whether to pursue the action himself. Accordingly, Plaintiffs cannot respond to the discovery request while the Trustee is deciding whether to assume Plaintiffs' role.

Moreover, many of the documents upon which Plaintiffs would rely to respond to this discovery request are in the possession of certain of the Defendants and/or counsel for Defendants.

INTERROGATORY NO. 4:

In paragraph 34 of your Complaint, you identified certain transfers which you maintain were fraudulent. Are you aware of any other transfers which you maintain were fraudulent, and which support any of the claims you have brought? If so, please identify such transfers, including:

(a) All facts or evidence you maintain support this allegation, including why you believe such transfers were fraudulent;

(b) The damages you claim to have incurred as alleged in the claims you have brought, as to Snowshoe alone, and, if different, as to all Defendants in total. In this response, please identify how you calculated such alleged damages;

(c) The name, contact information and a summary of their knowledge, of all persons you maintain have information in support of your responses to answers 4(a) and 4(b);

(d) The identify, location and custodian of all documents or other tangible things you maintain support your responses to interrogatory parts 4(a), (b) and (c).

RESPONSE TO INTERROGATORY NO. 4:

Objection. Plaintiffs object to this discovery request because this fraudulent transfer action may now belong to the Chapter 7 Trustee in *In re Morabito*, Case Number: 13-51237-

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gwz. Courts have determined "that creditors' fraudulent transfer claims belong to the Trustee under the strong-arm powers of Section 544 and are property of the estate once the case is filed," meaning that "the trustee has the right to pursue state law fraudulent transfer claims by virtue of the operation of Section 544." *In re C.D. Jones & Co., Inc.*, 482 B.R. 449, 456-59 (Bankr. N.D. Fla. 2012) (citing *In re Moore,* 608 F.3d 253, 261 (5th Cir. 2010) (holding that fraudulent transfer claims "become estate property once bankruptcy is under way by virtue of the trustee's successor rights under § 544(b)."); *In re Zwirn*, 362 B.R. 536, 539, 541-42 (Bankr. S.D. Fla. 2007) (stating that "[p]ursuant to 11 U.S.C. § 541 and its broad definition of property of the estate, fraudulent conveyance claims are property of the estate that with rare exception may only be prosecuted by the trustee" and indicating that the trustee may intervene in a previously filed state court action). In light of this relevant law, Plaintiffs understand that the Trustee is currently evaluating whether to pursue the action himself. Accordingly, Plaintiffs cannot respond to the discovery request while the Trustee is deciding whether to assume Plaintiffs' role.

Moreover, many of the documents upon which Plaintiffs would rely to respond to this discovery request are in the possession of certain of the Defendants and/or counsel for Defendants.

INTERROGATORY NO. 5:

For any litigation or arbitration in which you have been a named party in the past five (5) years, please identify:

(a) The case or matter name, number and jurisdiction;

(b) As for any written or live testimony (including Declaration of Affidavits) given by any of your representatives, the name of your representative who gave such testimony and the matter and date in which it was given;

(c) All such testimony, including its location and custodian;

(d) The name, contact information and a summary of their knowledge, of all persons you maintain have information in support of your responses to answers 5(a), (b) and (c).

RESPONSE TO INTERROGATORY NO. 5:

Objection. Plaintiffs object to this discovery request because this fraudulent transfer

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action may now belong to the Chapter 7 Trustee in *In re Morabito*, Case Number: 13-51237-gwz. Courts have determined "that creditors' fraudulent transfer claims belong to the Trustee under the strong-arm powers of Section 544 and are property of the estate once the case is filed," meaning that "the trustee has the right to pursue state law fraudulent transfer claims by virtue of the operation of Section 544." *In re C.D. Jones & Co., Inc.*, 482 B.R. 449, 456-59 (Bankr. N.D. Fla. 2012) (citing *In re Moore,* 608 F.3d 253, 261 (5th Cir. 2010) (holding that fraudulent transfer claims "become estate property once bankruptcy is under way by virtue of the trustee's successor rights under § 544(b)."); *In re Zwirn*, 362 B.R. 536, 539, 541-42 (Bankr. S.D. Fla. 2007) (stating that "[p]ursuant to 11 U.S.C. § 541 and its broad definition of property of the estate, fraudulent conveyance claims are property of the estate that with rare exception may only be prosecuted by the trustee" and indicating that the trustee may intervene in a previously filed state court action). In light of this relevant law, Plaintiffs understand that the Trustee is currently evaluating whether to pursue the action himself. Accordingly, Plaintiffs cannot respond to the discovery request while the Trustee is deciding whether to assume Plaintiffs' role.

Moreover, many of the documents upon which Plaintiffs would rely to respond to this discovery request are in the possession of certain of the Defendants and/or counsel for Defendants.

INTERROGATORY NO. 6:

Please identify all persons who provided substantive input towards the response to these interrogatories, including which interrogatory and subparts such input applies to.

RESPONSE TO INTERROGATORY NO. 6:

Objection. Plaintiffs object to this discovery request because this fraudulent transfer action may now belong to the Chapter 7 Trustee in *In re Morabito*, Case Number: 13-51237-gwz. Courts have determined "that creditors' fraudulent transfer claims belong to the Trustee under the strong-arm powers of Section 544 and are property of the estate once the case is filed," meaning that "the trustee has the right to pursue state law fraudulent transfer claims by virtue of the operation of Section 544." *In re C.D. Jones & Co., Inc.*, 482 B.R. 449, 456-59 (Bankr. N.D. Fla. 2012) (citing *In re Moore,* 608 F.3d 253, 261 (5th Cir. 2010) (holding that fraudulent

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transfer claims "become estate property once bankruptcy is under way by virtue of the trustee's successor rights under § 544(b)."); *In re Zwirn*, 362 B.R. 536, 539, 541-42 (Bankr. S.D. Fla. 2007) (stating that "[p]ursuant to 11 U.S.C. § 541 and its broad definition of property of the estate, fraudulent conveyance claims are property of the estate that with rare exception may only be prosecuted by the trustee" and indicating that the trustee may intervene in a previously filed state court action). In light of this relevant law, Plaintiffs understand that the Trustee is currently evaluating whether to pursue the action himself. Accordingly, Plaintiffs cannot respond to the discovery request while the Trustee is deciding whether to assume Plaintiffs' role.

Moreover, many of the documents upon which Plaintiffs would rely to respond to this discovery request are in the possession of certain of the Defendants and/or counsel for Defendants.

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 11th day of February, 2015.

GORDON SILVER

By: _____

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that I am an employee of GORDON SILVER, and that on this date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **PLAINTIFF, JERRY HERBST'S RESPONSES TO DEFENDANT SNOWSHOE PETROLEUM, INC.'S SET OF INTERROGATORIES** 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 L. Breslow
Frank C. Gilmore
ROBISON, BELAUSTEGUI, SHARP & LOW
71 Washington Street
Reno, NV 89503

DATED this 11th day of February, 2015.

Cindy S. Grinstead
An Employee of GORDON SILVER

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Attorneys for Plaintiffs

IN THE SECOND JUDICIAL DISTRICT COURT OF

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

JH, INC., a Nevada corporation; JERRY HERBST, an individual; and BERRY-HINCKLEY INDUSTRIES, a Nevada corporation, Plaintiffs, vs. PAUL MORABITO, individually and as Trustee of the ARCADIA LIVING TRUST; SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, and individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	**CASE NO.: CV13-02663** **DEPT. NO.: 6**

PLAINTIFF, JERRY HERBST'S RESPONSES TO DEFENDANT SALVATORE MORABITO'S FIRST SET OF INTERROGATORIES

Plaintiff Jerry Herbst, by and through his attorneys of record, Gordon Silver, and pursuant to Rule 33 of the Nevada Rules of Civil Procedure, responds to Defendant Salvatore Morabito's First Set of Interrogatories as follows:

GENERAL RESPONSES AND OBJECTIONS

1. Plaintiff objects to the interrogatories to the extent that they seek the disclosure of information that is neither relevant to this action nor reasonably calculated to lead to the discovery of admissible evidence.

2. Plaintiff objects to the interrogatories to the extent that they seek the disclosure of information that is protected by the attorney-client privilege, or that is otherwise protected from disclosure under applicable privileges, laws, or rules.

3. Plaintiff objects to the interrogatories to the extent that they seek information that constitutes or requires disclosure of mental impressions, conclusions, opinions, or legal theories of any attorney for Defendant.

4. Plaintiff objects to the interrogatories to the extent that they seek information containing trade secrets or proprietary information.

5. Plaintiff objects to the extent that where the information requested by the interrogatories is not in Plaintiff's control, possession, or custody, such discovery is overbroad and would impose an undue burden and expense on Plaintiff. Plaintiff further objects to any interrogatory to the extent that the information requested is already in the control, possession, or custody of Defendant.

6. Plaintiff objects to the interrogatories to the extent the discovery sought is publicly available.

7. Plaintiff objects to the interrogatories to the extent that they are vague, ambiguous, or indefinite.

8. Plaintiff objects to Defendant's interrogatories to the extent that discovery in this matter is ongoing and pertinent information necessary to fully and accurately respond to these interrogatories may not yet be available to Plaintiff. Plaintiff reserves the right to further supplement these responses.

9. Plaintiff's responses to Defendant's interrogatories are made subject to and without waiver of any stated or unstated applicable objections. Plaintiff specifically incorporates

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each of the above-recited General Objections into its responses to Claimant's interrogatories.

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1:

In your first claim for relief, you allege that Salvatore Morabito is liable to you for violation of NRS 112.140. As to this first claim for relief, please identify the following:

(a) All facts or evidence you believe supports the allegation that Salvatore Morabito, as opposed to other Defendants, engaged in activity which violates NRS 112.140;

(b) The damages which you believe that Salvatore Morabito's violation of NRS 112.140 has caused you, including the manner in which it was calculated;

(c) The date that you first became aware that Salvatore Morabito had violated NRS 112.140, including the manner in which you first learned of such violation;

(d) The identify, location and custodian of all documents which support your responses to subparts 1(a) through (c) above; and

(e) The identity of all persons with knowledge supporting your responses to interrogatory 1(a) through (d), including their contact information and a description of the knowledge you maintain they have.

RESPONSE TO INTERROGATORY NO. 1:

Objection. Plaintiffs object to this discovery request because this fraudulent transfer action may now belong to the Chapter 7 Trustee in *In re Morabito*, Case Number: 13-51237-gwz. Courts have determined "that creditors' fraudulent transfer claims belong to the Trustee under the strong-arm powers of Section 544 and are property of the estate once the case is filed," meaning that "the trustee has the right to pursue state law fraudulent transfer claims by virtue of the operation of Section 544." *In re C.D. Jones & Co., Inc.*, 482 B.R. 449, 456-59 (Bankr. N.D. Fla. 2012) (citing *In re Moore,* 608 F.3d 253, 261 (5th Cir. 2010) (holding that fraudulent transfer claims "become estate property once bankruptcy is under way by virtue of the trustee's successor rights under § 544(b)."); *In re Zwirn*, 362 B.R. 536, 539, 541-42 (Bankr. S.D. Fla. 2007) (stating that "[p]ursuant to 11 U.S.C. § 541 and its broad definition of property of the estate, fraudulent conveyance claims are property of the estate that with rare exception may only

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be prosecuted by the trustee" and indicating that the trustee may intervene in a previously filed state court action). In light of this relevant law, Plaintiffs understand that the Trustee is currently evaluating whether to pursue the action himself. Accordingly, Plaintiffs cannot respond to the discovery request while the Trustee is deciding whether to assume Plaintiffs' role.

Moreover, many of the documents upon which Plaintiffs would rely to respond to this discovery request are in the possession of certain of the Defendants and/or counsel for Defendants.

INTERROGATORY NO. 2:

In your fifth claim for relief, you allege that Salvatore Morabito engaged in a civil conspiracy which caused you harm. As to this fifth claim for relief, please identify the following:

(a) All facts or evidence you believe supports the allegation that Salvatore Morabito, as opposed to other Defendants, engaged in a civil conspiracy including why you believe such conduct was conspiratorial;

(b) The damages you claim to have incurred as alleged in your fifth claim for relief, as to Salvatore Morabito alone, and, if different, as to all Defendants in total. In this response, please identify how you calculated such alleged damages.

(c) The date that you first became aware that Salvatore Morabito had engaged in civil conspiracy, including the manner in which you first learned of such conspiracy;

(d) The identity, location and custodian of all documents which support your responses to subparts 2(a) through (c) above; and

(e) The identity of all persons with knowledge supporting your responses to interrogatory 2(a) through (d), including their contact information and a description of the knowledge you maintain they have.

RESPONSE TO INTERROGATORY NO. 2:

Objection. Plaintiffs object to this discovery request because this fraudulent transfer action may now belong to the Chapter 7 Trustee in *In re Morabito*, Case Number: 13-51237-gwz. Courts have determined "that creditors' fraudulent transfer claims belong to the Trustee

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under the strong-arm powers of Section 544 and are property of the estate once the case is filed," meaning that "the trustee has the right to pursue state law fraudulent transfer claims by virtue of the operation of Section 544." *In re C.D. Jones & Co., Inc.*, 482 B.R. 449, 456-59 (Bankr. N.D. Fla. 2012) (citing *In re Moore,* 608 F.3d 253, 261 (5th Cir. 2010) (holding that fraudulent transfer claims "become estate property once bankruptcy is under way by virtue of the trustee's successor rights under § 544(b)."); *In re Zwirn*, 362 B.R. 536, 539, 541-42 (Bankr. S.D. Fla. 2007) (stating that "[p]ursuant to 11 U.S.C. § 541 and its broad definition of property of the estate, fraudulent conveyance claims are property of the estate that with rare exception may only be prosecuted by the trustee" and indicating that the trustee may intervene in a previously filed state court action). In light of this relevant law, Plaintiffs understand that the Trustee is currently evaluating whether to pursue the action himself. Accordingly, Plaintiffs cannot respond to the discovery request while the Trustee is deciding whether to assume Plaintiffs' role.

Moreover, many of the documents upon which Plaintiffs would rely to respond to this discovery request are in the possession of certain of the Defendants and/or counsel for Defendants.

INTERROGATORY NO. 3:

In your sixth claim for relief, you allege that Salvatore Morabito aided and abetted fraudulent misrepresentation which caused you harm. As to this claim for relief please identify:

(a) All facts or evidence you believe supports the allegation that Salvatore Morabito, as opposed to other Defendants, aided and abetted fraud;

(b) The damages you claim to have incurred as alleged in your sixth claim for relief, as to Salvatore Morabito alone, and, if different, as to all Defendants in total. In this response, please identify how you calculated such alleged damages.

(c) The date that you first became aware that Salvatore Morabito had engaged in a fraudulent misrepresentation, including the manner in which you first learned of such fraud;

(d) The identity, location and custodian of all documents which support your responses to subparts 3(a) through (c) above; and

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(e) The identity of all persons with knowledge supporting your responses to interrogatory 3(a) through (d), including their contact information and a description of the knowledge you maintain they have.

RESPONSE TO INTERROGATORY NO. 3:

Objection. Plaintiffs object to this discovery request because this fraudulent transfer action may now belong to the Chapter 7 Trustee in *In re Morabito*, Case Number: 13-51237-gwz. Courts have determined "that creditors' fraudulent transfer claims belong to the Trustee under the strong-arm powers of Section 544 and are property of the estate once the case is filed," meaning that "the trustee has the right to pursue state law fraudulent transfer claims by virtue of the operation of Section 544." *In re C.D. Jones & Co., Inc.*, 482 B.R. 449, 456-59 (Bankr. N.D. Fla. 2012) (citing *In re Moore,* 608 F.3d 253, 261 (5th Cir. 2010) (holding that fraudulent transfer claims "become estate property once bankruptcy is under way by virtue of the trustee's successor rights under § 544(b)."); *In re Zwirn*, 362 B.R. 536, 539, 541-42 (Bankr. S.D. Fla. 2007) (stating that "[p]ursuant to 11 U.S.C. § 541 and its broad definition of property of the estate, fraudulent conveyance claims are property of the estate that with rare exception may only be prosecuted by the trustee" and indicating that the trustee may intervene in a previously filed state court action). In light of this relevant law, Plaintiffs understand that the Trustee is currently evaluating whether to pursue the action himself. Accordingly, Plaintiffs cannot respond to the discovery request while the Trustee is deciding whether to assume Plaintiffs' role.

Moreover, many of the documents upon which Plaintiffs would rely to respond to this discovery request are in the possession of certain of the Defendants and/or counsel for Defendants.

INTERROGATORY NO. 4:

Please identify what actions, if any, you have taken to mitigate the harm alleged in your Complaint against Salvatore Morabito. Please identify in your response:

(a) All facts or evidence you maintain support your response;

(b) All documents or other tangible things you maintain support your response, including their location and custodian;

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(c) The name contact information and a summary of their knowledge, of all persons you maintain have information in support of your response to this interrogatory.

RESPONSE TO INTERROGATORY NO. 4:

Objection. Plaintiffs object to this discovery request because this fraudulent transfer action may now belong to the Chapter 7 Trustee in *In re Morabito*, Case Number: 13-51237-gwz. Courts have determined "that creditors' fraudulent transfer claims belong to the Trustee under the strong-arm powers of Section 544 and are property of the estate once the case is filed," meaning that "the trustee has the right to pursue state law fraudulent transfer claims by virtue of the operation of Section 544." *In re C.D. Jones & Co., Inc.*, 482 B.R. 449, 456-59 (Bankr. N.D. Fla. 2012) (citing *In re Moore,* 608 F.3d 253, 261 (5th Cir. 2010) (holding that fraudulent transfer claims "become estate property once bankruptcy is under way by virtue of the trustee's successor rights under § 544(b)."); *In re Zwirn*, 362 B.R. 536, 539, 541-42 (Bankr. S.D. Fla. 2007) (stating that "[p]ursuant to 11 U.S.C. § 541 and its broad definition of property of the estate, fraudulent conveyance claims are property of the estate that with rare exception may only be prosecuted by the trustee" and indicating that the trustee may intervene in a previously filed state court action). In light of this relevant law, Plaintiffs understand that the Trustee is currently evaluating whether to pursue the action himself. Accordingly, Plaintiffs cannot respond to the discovery request while the Trustee is deciding whether to assume Plaintiffs' role.

Moreover, many of the documents upon which Plaintiffs would rely to respond to this discovery request are in the possession of certain of the Defendants and/or counsel for Defendants.

INTERROGATORY NO. 5:

Please identify all persons who provided substantive input towards the response to these interrogatories, including which interrogatory and subparts such input applies to.

RESPONSE TO INTERROGATORY NO. 5:

Objection. Plaintiffs object to this discovery request because this fraudulent transfer action may now belong to the Chapter 7 Trustee in *In re Morabito*, Case Number: 13-51237-gwz. Courts have determined "that creditors' fraudulent transfer claims belong to the Trustee

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under the strong-arm powers of Section 544 and are property of the estate once the case is filed," meaning that "the trustee has the right to pursue state law fraudulent transfer claims by virtue of the operation of Section 544." *In re C.D. Jones & Co., Inc.*, 482 B.R. 449, 456-59 (Bankr. N.D. Fla. 2012) (citing *In re Moore,* 608 F.3d 253, 261 (5th Cir. 2010) (holding that fraudulent transfer claims "become estate property once bankruptcy is under way by virtue of the trustee's successor rights under § 544(b)."); *In re Zwirn*, 362 B.R. 536, 539, 541-42 (Bankr. S.D. Fla. 2007) (stating that "[p]ursuant to 11 U.S.C. § 541 and its broad definition of property of the estate, fraudulent conveyance claims are property of the estate that with rare exception may only be prosecuted by the trustee" and indicating that the trustee may intervene in a previously filed state court action). In light of this relevant law, Plaintiffs understand that the Trustee is currently evaluating whether to pursue the action himself. Accordingly, Plaintiffs cannot respond to the discovery request while the Trustee is deciding whether to assume Plaintiffs' role.

Moreover, many of the documents upon which Plaintiffs would rely to respond to this discovery request are in the possession of certain of the Defendants and/or counsel for Defendants.

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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 12th day of February, 2015.

GORDON SILVER

By: _____

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that I am an employee of GORDON SILVER, and that on this date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **PLAINTIFF, JERRY HERBST'S RESPONSES TO DEFENDANT SALVATORE MORABITO'S FIRST SET OF INTERROGATORIES** 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

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____ Via Facsimile (Fax)

____ Via E-Mail

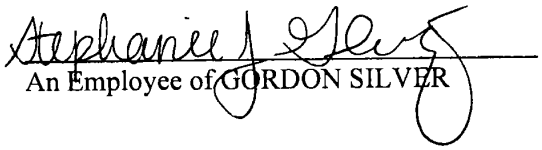
____ Placing an original or true copy thereof in a sealed envelope and causing the same to be personally Hand Delivered

____ Federal Express (or other overnight delivery)

addressed as follows:

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

DATED this 17th day of February, 2015.



An Employee of GORDON SILVER

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IN THE SECOND JUDICIAL DISTRICT COURT OF

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

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, vs. SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, and individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	**CASE NO.: CV13-02663** **DEPT. NO.: 4** **MOTION IN LIMINE TO EXCLUDE TESTIMONY OF JAN FRIEDERICH**

Plaintiff William A. Leonard (the "Trustee" or "Plaintiff"), by and through his counsel, the law firm of Garman Turner Gordon LLP, hereby brings his *Motion in Limine to Exclude Testimony of Jan Friederich* (the "Motion") in anticipation of the trial set to commence on October 29, 2018.

/ / /

This Motion is supported by the following Memorandum of Points and Authorities, the attached exhibits, the pleadings and papers on file herein, and any oral argument the Court may permit at the hearing of this matter.

Dated this 20th day of September, 2018.

GARMAN TURNER GORDON LLP

/s/ Andrew P. Dunning, Esq.
GERALD E. GORDON, ESQ.
TERESA M. PILATOWICZ, ESQ.
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Special Counsel for Trustee

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Defendants disclosed Jan Friederich ("Friederich") as a "non-retained" expert witness in rebuttal to the report of Plaintiff's valuation expert, James L. McGovern, dated January 25, 2016 (the "McGovern Report"). Under the guise of disclosing him as a non-retained expert, Defendants failed, however, to provide a written report for Friederich, or even an adequate summary of his opinions. Worse, Friederich's deposition revealed that he lacks the most basic qualifications to opine on business valuation and his opinions lack any methodology whatsoever. Because Friederich was not properly disclosed as an expert witness as required under NRCP 16.1(a)(2)(B) and may not be qualified as an expert under Hallmark v. Eldridge and related caselaw, the Court should issue an order *in limine* precluding Friederich from testifying. Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008).

II.

BACKGROUND

A. Defendants' Deficient Rebuttal Expert Disclosures.

On February 29, 2016, Defendants served their Rebuttal Expert Witness Disclosure (the "Rebuttal Disclosure"),[1] listing Jan Friederich as "Defendants' non-retained expert rebuttal witness."[2] The Rebuttal Disclosure further stated that Superpumper hired Friederich as a consultant "to assist with the Matrix evaluation" conducted in 2010, and, in that capacity, he "liaised" with Defendants' counsel and Matrix to accomplish the valuation and provide insight as to the Superpumper financials."[3] The entirety of the summary of Friederich's opinions are set forth in a single paragraph, as follows:

[1] A copy of the Rebuttal Disclosure is attached as "Exhibit 1."

[2] Exh. 1 at p. 2.

[3] Id.

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1. James McGovern's Market Value analysis is faulty:

   a. Fuel Sales should be measured in Gallons and not in dollars, and a reasonable Margin in cents/gallon should be applied to determine an Income stream;

   b. A multiple of 5.9 for future expected EBITDA is almost twice as high as the industry standard. Industry standard for leased stores with above Market lease rates are closer to a multiple of 3 times EBITDA;

   c. Receivables should not be assumed as collectible [sic] and will not be acquired by any buyer without certainty and should not be party of a company's market value solely based on an assumption; and

   d. The company's value in 2010 was negatively impacted by the fact that the money Superpumper received upfront from Shell would have to be repaid or amortized over the term of the contract. The unamortized portion is still today $2.5 million.[4]

Defendants conclude the Rebuttal Disclosure with the conclusion that "Mr. Friedrich believes the Matrix Valuation is much closer to a realistic Market price than is McGovern's opinion of value."[5]

B. <u>Friederich's Relationship with Superpumper</u>.

Plaintiffs deposed Friederich on March 29, 2016.[6] In his testimony, Friederich confirmed that he was a "consultant" for Superpumper only until approximately 2013.[7] Additionally, Friederich testified that Defendants' counsel contacted him to request that he testify in rebuttal to the McGovern Report, and that Defendants agreed to pay his expenses for doing so.[8]

III.

LEGAL ARGUMENT

The trial court maintains the authority to rule on motions *in limine* by allowing advance rulings on the admissibility of evidence. NRCP 16(c). The court is vested with discretion to

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[4] Id. at pp. 2-3.

[5] Id. at p. 3.

[6] See Excerpts of Deposition Transcript of Jan Friederich ("Friederich Trans."), attached as "Exhibit 2."

[7] Id. at pp. 15:1-2; 13-18.

[8] Id. at pp. 12:25 – 13:17; 38:2-16.

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simplify issues for trial and to determine whether to admit or exclude evidence. See Uniroyal Goodrich Tire Co. v. Mercer, 111 Nev. 318, 320–21, 890 P.2d 785, 787 (1995).[9]

A. Friederich Was Not Properly Disclosed.

Expert disclosures are governed by NRCP 16(a)(2), which requires that the disclosure of any "witness who is retained or specially employed to provide expert testimony in the case [. . .] be accompanied by a written report prepared and signed by the witness." NRCP 16(a)(2)(B). The expert's report "shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary or support for the opinions." Id. Further, the expert must disclose his or her qualifications, publications within the preceding 10 years, the compensation to be paid for the study and testimony, and a list of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. Id.

For a witness not retained or specially employed to provide expert testimony in the case, or one whose duties as the party's employee regularly involve giving expert testimony, the expert witness disclosure "must state the subject matter on which the witness is expected to present evidence [. . .] a summary of the facts and opinions to which the witness is expected to testify; the qualifications of that witness to present evidence [. . .] and the compensation of the witness for providing testimony at deposition and trial." Id.; see NRCP 16.1, 2012 Drafter's Note (discussing non-retained expert witnesses in the context of treating physicians); see also FCH1, LLC v. Rodriguez, 130 Nev. 425, 335 P.3d 183 (2014); Cabrera v. Clark Cty. Det. Ctr., 2015 WL 1815426, at *2; accord Moshi v. State Farm Mut. Auto. Ins. Co., 2013 WL 9600669, at *2 (D. Nev. May 30, 2013) ("Treating physicians or other health care professionals are primary examples of those who must be identified [] and provide disclosures pursuant to [the Federal counterpart to NRCP 16.1(a)(2)(B)] as they may testify as both a fact and expert witness.").

[9] NRCP 12(f) allows a party, upon motion, to seek an order striking "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

1. Friedrich is not a "Non-Retained" Expert Witness.

Defendants' designation of Friedrich as a "non-retained" expert is a transparent ploy to avoid producing a written report that sets forth, among other things, his opinions and the basis for them and the facts, data, and exhibits supporting his opinions. But designation of a witness as a non-retained expert permits fact witnesses whose observations are necessarily informed by their expertise to testify regarding their observations without the burdens of producing an expert report; is not a tool for side-stepping the requirements of Rule 16(a)(2)(B).

For example, a treating physician is exempt because the physician is a percipient witness whose personal knowledge of the facts is necessarily informed by, and the product of, her expertise. See Gonzalez v. Executive Airlines, Inc., 236 F.R.D. 73, 78–79 (D.P.R. 2006) ("Because treating physicians are generally presented to provide testimony arising from their roles as actors in the events giving rise to the litigation, they are treated as fact witnesses and are not subject to the more stringent requirements that Rule 26 . . .") (citing Gómez v. Rivera Rodríquez, 344 F.3d 103, 113 (1st Cir. 2003));[10] McCloughan v. City of Springfield, 208 F.R.D. 236, 242 (C.D. Ill. 2002) ("doctors do not operate in a vacuum . . . causation, diagnosis, and prognosis would be based on the treating physician's personal knowledge...."); Davoll v. Webb, 194 F.3d 1116 (10th Cir. 1999) ("[a] treating physician is not considered an expert witness if he or she testifies about observations based on personal knowledge, including treatment of the party.").

However, the treating physician's testimony is limited to the witness's knowledge of those events in which the physician played a personal role in the events at issue. Gonzalez, 236 F.R.D. at 78 (citing Gómez, 344 F.3d at 113). To the extent the witness will provide expert, rather than percipient testimony, the witness must be designated as an expert. See Musser v. Gentiva Health Servs., 356 F.3d 751, 756–57 (7th Cir. 2004) (in affirming the district court's exclusion of the expert testimony of several treating physicians and nurses because the plaintiff

[10] Federal cases interpreting the Federal Rules of Civil Procedures "are strong persuasive authority, because the Nevada Rules of Civil Procedures are based on large part upon their federal counterparts. Exec. Mgmt. v. Ticor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872 (2002).

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failed to identify them as expert witnesses, the court held that "[e]ven treating physicians and treating nurses must be designated as experts if they are to provide expert testimony."); Gonzalez, 236 F.R.D. at 78-79 ("…for a treating physician not to be bound by the expert witness requirements of Rule 26, the physician's testimony must be closely constrained to the facts of the treatment administered and discussed in his notes taken at the time of his examination."). The treating physician may not include information obtained from outside sources, nor can the doctor opine on any medical reports or opinions received from other doctors. See Parks v. Blanchette, 144 F. Supp. 3d 282, 298 (D. Conn. 2015).

Friedrich does not fall under the exclusion for non-retained experts. As a threshold matter, Friedrich was retained to provide testimony—he was not an employee of Superpumper at the time of his designation or deposition, he was asked by Defendants' counsel to prepare a rebuttal, and he has an agreement with Defendants for remuneration.[11] But even if Friedrich is not a retained expert by definition, he is not a percipient witness testifying to facts informed by any expertise. Rather, he specifically opines on the conclusions of a qualified expert, not based on any fact or event within his percipient knowledge relating to his work for Superpumper but on purported industry standards he cannot support and valuation techniques on which he is not qualified to opine.

2. Even if Friederich is a Non-Retained Expert, Defendants' Disclosures are Inadequate.

Even if Friederich was not a retained witness providing expert opinions developed in contemplation of the instant litigation, Defendants' disclosures fail to satisfy the non-retained expert requirements of NRCP 16.1. With respect to a non-retained expert, a party must disclose the subject matter on which the witness is expected to present evidence and provide a summary of the facts and opinions to which the witness is expected to testify.

Here, Defendants' Rebuttal Disclosure contains only bare-bones conclusions regarding specific portions of the McGovern Report without explanation, setting forth no facts about which Friederich is expected to testify which are within the scope of his personal knowledge of

[11] Id. at pp. 12:25 – 13:17; 38:2-16.

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Superpumper. The Rebuttal Disclosure fails to afford Plaintiff adequate notice of Friederich's expert testimony.

B. Friederich Should be Excluded Under *Hallmark* Because he Lacks Technical, Scientific, or Specialized Knowledge to Assist this Court in Making its Factual Determinations.

Nevada trial judges assume the role of a gatekeeper in assessing whether experts satisfy certain requirements before they can testify at trial. Higgs v. State, 125 Nev. 1043, 18, 222 P.3d 648, 659 (2010). The District Court has "wide discretion, within the parameters of NRS 50.275, to fulfill [its] gatekeeping duties." Id.; Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) ("This court reviews a district court's decision to allow expert testimony for abuse of discretion."); Johnson v. Egtedar, 112 Nev. 428, 436, 915 P.2d 271, 276 (1996) ("whether a witness will be permitted to testify as an expert witness are within the discretion of the trial court.").

To be admissible under NRS 50.275, an expert must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement). Hallmark, 124 Nev. at 498, 189 P.3d at 650; see also Higgs, 125 Nev. 1043, 222 P.3d 648.

1. Friederich is Not Qualified to Testify as an Expert Witness.

"[B]efore a person may testify as an expert under NRS 50.275, the district court must first determine whether he or she is qualified in an area of scientific, technical, or other specialized knowledge." Hallmark, 124 Nev. at 498, 189 P.3d at 650; see also Gramanz v. T–Shirts and Souvenirs, Inc., 111 Nev. 478, 485, 894 P.2d 342, 347 (1995) (finding an abuse of discretion for an expert to give an opinion on facts beyond his knowledge). In determining whether a person is properly qualified, a district court should consider the following factors: (1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4)

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practical experience and specialized training. Hallmark, 124 Nev. at 499, 189 P.3d at 650. A trial court properly strikes expert testimony if the expert testifies outside of his field of expertise. Griffin v. Rockwell Int'l, Inc., 96 Nev. 910, 911, 620 P.2d 862, 863 (1980). The mere fact that a witness may be qualified as an expert does not automatically qualify the witness to give an opinion based on facts beyond his knowledge, even though the opinion may be within the range of his expertise. Choat v. McDorman, 86 Nev. 332, 335, 468 P.2d 354, 356 (1970). An expert's testimony must be limited to matters within the scope of his specialized knowledge. Hallmark, 124 Nev. at 498, 189 P.3d at 650.

Friederich is patently unqualified to render the conclusions set forth in the Rebuttal Disclosure. He is not a certified public account or financial analyst, and lacks any education or certifications pertaining to business valuation.[12] He is not a member of any professional associations, let alone any that are relevant to his purported area of expertise.[13] Friederich's "expertise" is based on nothing more than past involvement in buying and selling companies, rather than any employment experience or practical experience in conducting business valuations.[14] He has never been designated or qualified as an expert witness.[15] Indeed, Friederich freely admitted that he does not hold himself out to be a valuation expert.[16] Nothing in the Rebuttal Disclosure or Friederich's deposition testimony indicates that he is qualified to render expert opinions in valuation pursuant to Hallmark and its progeny. Therefore, the Court may properly exclude him from testifying at trial.

2. Friederich's Opinions Provide No Assistance to the Trier of Fact.

The Nevada Supreme Court also held that even if a person is qualified to testify as an expert, the court must then determine if the "expected testimony will assist the trier of fact in understanding the evidence or determining a fact in issue." Hallmark, 124 Nev. at 498, 189 P.3d

[12] See Friederich Trans. at pp. 21:20-23; 6:25 – 7:5.

[13] Id. at pp. 21:24 – 22:1.

[14] Id. at pp. 22:19 – 23:2.

[15] Id. at p. 6:5-7.

[16] Id. at p. 22:16-18.

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at 650. The Court then held: "[a]n expert's testimony will assist the trier of fact only when it is relevant and the product of reliable methodology." Id.; see, e.g., Loudermill v. Dow Chem. Co., 863 F.2d 566, 570 (8th Cir. 1988) (concluding that "if an expert opinion is so fundamentally unsupported that it can offer no assistance to the jury, then the testimony should not be admitted").

In addition to his glaring qualification issues, Friederich's proposed "opinions" are so fundamentally unsupported that they cannot to assist the trier of fact as to any material issue. His opinions are not derived from any discernible valuation methodology at all, much less a reliable methodology. Friederich testified not only that he did not rely on any established guidelines in rendering his opinions, including those of the National Association of Certified Valuators and Analysts or the American Institute of CPAs, but that he is not even familiar with such guidelines.[17] He was unable to identify any authority to support his EBITDA opinion, including his representation regarding the "industry standard," beyond his own *ipse dixit* conclusions.[18]

Similarly, Friederich was totally unfamiliar with the standard publications and reports relied on in the McGovern Report, including the KeyValueData National Economic Report of 2010, the Business Valuation Resources Report, the Business Valuation Update, or the published IRS data for gasoline stations with asset range between 10 and 25 million.[19] When asked about basic tenants of the McGovern Report, including industry averages for equipment, cash, and cash equivalents, Friederich conceded that he was unfamiliar with such data.[20] Indeed, Friederich conceded that he did not even read the report he purports to rebut in any detail.[21] As Friederich's conclusions are not based on any reliable methodology or published data, and because he purports to rebut a report he did not thoroughly review, his opinion will not provide any assistance to the trier of fact.

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[17] Friederich Trans. at p. 22:2-5; 22:7-15; 59:9-12.

[18] Id. at p. 63:5-14.

[19] Id. at p. 73:4-16; 74:7-13; 78:3-9.

[20] Id. at p. 79:13-25.

[21] Id. at p. 72:2-5.

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III.

CONCLUSION

Considering the foregoing, Plaintiff respectfully requests that the Court enter an order in limine precluding Defendants from admitting their improperly-disclosed expert witness Friederich at the time of trial. If the Court is disinclined to exclude Friederich from testifying based upon the Rebuttal Disclosure, Plaintiff asks that the Court preclude Friederich from testifying because he is not qualified to render rebuttal expert opinions under Hallmark and its progeny.

Respectfully submitted this 20th day of September, 2018.

GARMAN TURNER GORDON LLP

/s/ Andrew P. Dunning, Esq.
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TERESA M. PILATOWICZ, ESQ.
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650 White Drive, Ste. 100
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Telephone 725-777-3000
Special Counsel for Trustee

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/ Andrew P. Dunning, Esq.
GERALD E. GORDON, ESQ.
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Special Counsel for 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 **MOTION IN LIMINE TO EXCLUDE TESTIMONY OF JAN FRIEDERICH** 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:

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Lindsay L. Liddell, Esq.
ROBISON, SHARP, SULLIVAN & BRUST
71 Washington Street
Reno, NV 89503

DATED this 20th day of September, 2018.

/s/ Kelli Wightman
An Employee of GARMAN TURNER GORDON LLP

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Exhibit 1

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Attorneys for Defendants

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

DEFENDANTS' REBUTTAL EXPERT WITNESS DISCLOSURE

Defendants above named, by and through their attorneys of record, and pursuant to NRCP 16.1(a)(2), by and through their respective counsel of record, hereby disclose the identity of their rebuttal experts who may provide testimony at the trial in this matter. Defendants reserve the right to use expert Michelle Salazar in rebuttal to the report of James L. McGovern, and Jan Frederich as a non-retained expert rebuttal witness to the report of James L. McGovern. As set forth herein and in the attached report, this disclosure will be supplemented as additional necessary discovery is received.

1. MICHELLE SALAZAR, Litigation and Valuation Consultants, Inc., 5488 Reno Corporate Drive, Suite 200, Reno, Nevada 89511, (775) 825-7982

a. Ms. Salazar's qualifications, including her publications, are set forth in her curriculum vitae which was attached to her January 25, 2016 Report as part of Exhibit 1.

b. Prior cases in which Ms. Salazar has testified as an expert at trial or by deposition within the preceding four years was attached to her January 25, 2016 Report as part of Exhibit 1.

c. Ms. Salazar's fee schedule was attached to her January 25, 2016 Report as part of Exhibit 1.

d. Ms. Salazar's rebuttal report is attached hereto as **Exhibit 1**.

2. JAN FRIEDERICH, 9705 Pebble Beach Dr, NE, Albuquerque, NM 87111; Phone 505-269-6190. Mr. Friederich is Defendants' non-retained expert rebuttal witness. He was a consultant hired by Superpumper to assist with the Matrix evaluation. Mr. Friederich liaised with Dennis Vacco and Spencer Cavalier to accomplish the valuation and provide insight as to the Superpumper financials.

a. Mr. Friederich's Resume and education experience is attached as **Exhibit 2**.

b. Mr. Friederich is not being compensated for his testimony, but will have his travel expenses reimbursed to him.

c. Mr. Friederich's opinions are summarized as follows:

i. James McGovern's Market Value analysis is faulty:

a) Fuel Sales should be measured in Gallons and not in dollars, and a reasonable Margin in cents/gallon should be applied to determine an Income stream;

b) A multiple of 5.9 for future expected EBITDA is almost twice as high as the industry standard. Industry standard for leased stores with above Market lease rates are closer to a multiple of 3 times EBITDA;

c) Receivables should not be assumed as collectible and will not be acquired by any buyer without certainty and should not be part of a company's

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Market value solely based on an assumption; and

d) The company's value in 2010 was negatively impacted by the fact that the money Superpumper received upfront from Shell would have to be repaid or amortized over the term of the contract. The unamortized portion is still today $2.5 million.

For the reasons set forth above, Mr. Friederich believes the Matrix Valuation is much closer to a realistic Market price than is McGovern's opinion of value.

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 29th day of February, 2016.

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

BARRY L. BRESLOW, ESQ.
FRANK C. GILMORE, ESQ.
Attorneys for Defendants

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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 **DEFENDANTS' REBUTTAL EXPERT WITNESS DISCLOSURE** 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:

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Mark M. Weisenmiller, Esq.
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___ by Federal Express/UPS or other overnight delivery addressed to:

DATED: This 29th day of February, 2016.

Mary Carroll Carr

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EXHIBIT LIST

EXHIBIT NO.	DESCRIPTION	NO. OF PAGES
1	Michelle Salazar's rebuttal report	6
2	Jan Frederich Resume	1

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EXHIBIT 1

EXHIBIT 1

LVC
Litigation and Valuation
Consultants, Inc.

Michelle L. Salazar
CPA/ABV, CVA, CFE
michelle@lvcreno.com

February 29, 2016

Frank C. Gilmore, Esq.
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, Nevada 89503

Re: William A. Leonard v. Superpumper, Inc., et al.

Dear Mr. Gilmore:

Litigation and Valuation Consultants, Inc. (LVC) has been retained as an expert rebuttal witness to comment on the report prepared by James L. McGovern CPA/CFF, CVA (McGovern), McGovern & Greene LLP, in the litigation case of *William A. Leonard v. Superpumper, Inc., Snowshoe Petroleum, Inc., et al.*, Second Judicial District Court of the State of Nevada, Washoe County; case number CV13-02663.[1] McGovern has been retained by Garman, Turner, Gordon, LLP, on behalf of the Plaintiff. Enclosed herein are a number of comments and issues LVC has with McGovern's conclusions.

Issue #1:

The following table is the summary set forth by McGovern to support his final conclusion of value of $13,050,000 **(Bates #McGOVERN000025)**.

Valuation Approach	Method	Indicated Value	Non-Operating Assets	Total Value of Equity
Income	Discounted Cash Flow	$ 6,550,000	$ 6,500,000	$ 13,050,000
Income	Single Period Capitalization	$ 9,100,000	$ 6,500,000	$ 15,600,000
Market	Guideline Public Companies	$ 9,900,000	$ 6,500,000	$ 16,400,000
Market	Guideline Transactions	$ 4,950,000	$ 6,500,000	$ 11,450,000

The indicated value, under each approach, is increased by $6.5 million for non-operating assets. The non-operating asset is identified by McGovern as excess working capital. McGovern prepared a chart to support his determination of excess working capital **(Bates #McGOVERN000012)**. McGovern begins with current assets as adjusted of $11,533,438 and subtracts the current liabilities of $4,431,765 to arrive at the working capital figure of $7,101,673 **(Bates #McGOVERN000031)**. He then compares this working capital figure to an industry working capital figure of $505,822. The difference between the $7,101,673 and the $505,822 is $6.5 million, McGovern's non-operating asset figure. Included in McGovern's current asset figure of $11,533,438 are amounts due from affiliates of $9,037,504.

[1] McGovern incorrectly cites the incorrect caption as JH, Inc. et al. v. Paul Morabito et al.

Rebuttal #1:

McGovern fails to take into consideration the likelihood of collection of the due from affiliate amount totaling $9,037,504 included in the current asset figure of $11,533,438. If the due from affiliate is removed, the current liabilities exceed the current assets, and therefore, there is no excess working capital.

The question in evaluating McGovern's conclusion becomes whether it is appropriate to remove the amount due from affiliate. It is common for a business valuation expert to make adjustments to a balance sheet provided by a client. Assets are generally adjusted to fair market value and uncollectible amounts are removed. However, it does not appear that McGovern addressed this $9 million asset whatsoever. Instead, he writes, "I have assumed that the advances to affiliates are bona fide loans and are collectible" (**Bates #McGOVERN000009**). This one asset impacts his final value conclusion by $6.5 million and yet, he assumes that they are "bona fide" without doing any real investigation into the status of any of the balance sheet assets.

In order to determine whether the amounts due from affiliate should be removed, LVC requested of Superpumper, and was provided, written promissory notes. All but one of the promissory notes were dated subsequent to McGovern's valuation date of September 30, 2010. Therefore, as of the date of McGovern's valuation, the amounts due from affiliates were not documented, there were no written repayment terms and there was no interest being charged. LVC contacted Stan Bernstein, Superpumper's accountant, who confirmed that there was only one written promissory note in existence, to support the amount due from affiliates, as of the valuation date. The one note that did exist was for $939,000 with Paul Morabito as obligor and Consolidated Western Corporation as beneficiary.

If the due from affiliate's amount is removed, there would be no non-operating asset. Therefore, McGovern's final value conclusion would have been $6,550,000 which is McGovern's indicated value (excluding the non-operating asset) as set forth at **Bates #McGOVERN000025**.

Issue #2:

The audited financial statements of Superpumper, Inc. included the amount due from affiliates as an "other asset". McGovern chose to reclassify the amounts due from affiliates from "other assets" to a "current asset". He supports this adjustment by stating "because the amounts represent advances to related parties and are due on demand" they should be reclassified.

Rebuttal #2:

McGovern's adjustment of the due from affiliates amount from "other assets" to a "current asset" is based upon language he claims is set forth in Note 6 to the Audited Financial Statements, which contains a "due on demand clause". He claims that because of this clause, there is a requirement to reclassify the asset as current. However, it should be noted

that there was no audit performed in September 30, 2010. It appears that the audited financial statements are only prepared as of year-end. Therefore, LVC questions which audited financial statements McGovern is referring to.

The audited financial statements for the subsequent year-end (December 31, 2010) addresses the due from affiliates. Of the total amount due of $8,224,860, there is only one note identified as "due on demand" of $285,580. More importantly, the auditors wrote, "All amounts due from affiliates have been classified as non current in the accompanying balance sheet because repayment is not anticipated during the next year".

On the December 31, 2010 audited financial statements, the auditors wrote:

> "In accordance with your instructions, the scope of our examination did not include an analysis of the valuation of notes receivable from related parties (Note 9) and we have not been able to otherwise satisfy ourselves as to their valuation at that date" **(Bates #Superpumper000334)**.

The promissory notes that were provided to LVC are not demand notes. The amounts due from affiliates as of September 30, 2010, the valuation date utilized by McGovern, consist of four notes for which no formal promissory notes existed as of the valuation date. Subsequent to the valuation date, two of the amounts due from affiliates were documented. One promissory note was dated in April 2011. This note does not indicate that it is "due on demand" and identifies a maturity date of March 1, 2017, which would be considered a non-current asset as of the valuation date. The second note was dated on December 31, 2010 with a maturity date of December 1, 2016, which would be considered a non-current asset as of the valuation date. This note does not indicate that it is "due on demand".

Therefore, McGovern failed to take into consideration the comments of the auditors, and misquotes them as identifying the amounts as "due on demand." Also, it does not appear that McGovern took the actual terms of the written notes that did exist into consideration. McGovern's value conclusion would be $6.5 lower if this adjustment had <u>not</u> been made.

Issue #3:

On Page 17 of McGovern's report, the components of the discount rate of 14.20% utilized by McGovern are summarized **(Bates #McGOVERN000018)** and are set forth in the schedule below as follows:

Risk-Free Rate	3.40%
Equity Risk Premium Adjustment	5.00%
Industry Risk Adjustment	-0.60%
Small Size Risk Premium	6.40%
Discount Rate Per McGovern	**14.20%**

McGovern has utilized the cost of equity capital estimate as calculated by Duff & Phelps using the regression equation method "Buildup 2 COE Estimates". However, this 14.20%

figure does not take into consideration the company specific risk factors associated with Superpumper, which is an important factor to consider when developing an appropriate discount rate.

Rebuttal #3:

Linda Trugman (Trugman), CPA/ABV, MCBA, ASA, MBA, Trugman Valuation Associates, Inc. is a well-respected practitioner and author in the business valuation field. Trugman addressed the general range for company specific risk premiums. She specifically addressed the company specific risk premium if Duff & Phelps' data is utilized. She wrote, "I think for a smaller stable company, 3 to 10 percent is a reasonable range". Therefore, for illustrative purposes, if McGovern had included a company specific risk factor of 5%, in the range described by Trugman, his discount rate would have been 19.2% and his capitalization rate would have been 18.2%, resulting in a value of $5,333,000. This assumes all factors remain the same, as illustrated below in **Exhibit 1**.

EXHIBIT 1
Leonard v. Superpumper, Inc., et al.
Comparison of Value Using Adjusted Capitalization Rate

	Per McGovern (Bates #McGOVERN 000033)	As Adjusted	Difference
Residual Cash Flow	$ 1,047,823	$ 1,047,823	$ -
Discount Rate	14.2%	**19.2%**	-5%
Less: Terminal Growth Rate	1.0%	1.0%	0.0%
Capitalization Rate	13.2%	18.2%	-5.0%
Residual Cash Flow Value	$ 7,938,053	$ 5,757,269	$ 2,180,784
Present Value Factor	0.5687	0.5687	-
Present Value of Residual Cash Flow	4,514,370.76	3,274,159.01	1,240,211.75
Add: Present Value of Cash Flow	2,058,640.00	2,058,640.00	-
100% Interest Value	$ 6,573,010.76	$ 5,332,799.01	$ 1,240,211.75
Rounded	$ 6,550,000	$ 5,333,000	$ 1,217,000

(Remainder of Page Intentionally Left Blank)

Issue #4:

On page 22 of McGovern's report, he includes a section regarding discounts and premiums. McGovern writes, "The values developed above reflect a control (100% ownership) and non-marketable (private-transactions) position of a 100% interest." He also notes, "when valuing a controlling interest, a discount for lack of marketability *may* be appropriate in limited circumstances, according to Shannon Pratt". However, he ultimately does not apply such a discount.

Rebuttal #4:

McGovern references Shannon Pratt's book entitled "The Market Approach to Valuing Businesses" to support his opinion that a discount for lack of marketability should not be applied. McGovern's conclusion is flawed because the Shannon Pratt book relates to the market approach to valuation. On page 23 of McGovern's report he disregards the use of the market approaches and writes the following, "In my opinion, this method appears to have not captured the Company's relative strengths as compared to the industry averages. Therefore, I have not selected this method as the best representation of the Company's fair market value." McGovern also writes, "because the Guideline Public Companies are so much larger and more diversified than the Company, I have not selected this method as the best representation of the Company's fair market value". Therefore, his explanation supporting no discount for lack of marketability is nonsensical. Shannon Pratt's quote was taken out of context and relates to a valuation approach different from the approach selected by McGovern.

The concept of marketability deals with the liquidity of an asset, in other words, how quickly and with what certainty the asset can be converted into cash at the owner's discretion. Investors prefer liquidity. An investment is worth more if it is readily marketable. A privately held company, such as Superpumper, is less liquid than a publicly traded investment. As a result, a discount for lack of marketability is appropriate. Based upon restricted stock studies, IPO studies and tax court cases, a baseline discount for lack of marketability would range between 20% and 40%. If the lower end discount of 20% is applied, McGovern's value would be $5,240,000 and the value, as adjusted would be $4,266,400. See **Exhibit 2** below.

EXHIBIT 2
Leonard v. Superpumper, Inc., et al.
Comparison of Value with Marketability Discount

		Per McGovern (Bates #McGOVERN 000033)	As Adjusted
Rounded Value Before Discounts	**(EXHIBIT 1)**	$ 6,550,000	$ 5,333,000
Less: Discount for Lack of Marketability at 20%		(1,310,000)	(1,066,600)
Value Including Discount for Lack of Marketability		$ 5,240,000	$ 4,266,400

Issue #5:

In the assumptions and limiting conditions section of McGovern's report, he notes that "Company management asserts that in September of 2010, the Company took on additional debt in the form of a term loan of $3,000,000 that was not reflected on the Company's September 30, 2010 balance sheet. To date, we have not been able to confirm the existence of this alleged loan nor investigated the circumstances. Moreover, the potential impact of this alleged loan is not reflected in the conclusion of value stated in this report."

Rebuttal #5:

As evidenced by a letter from BBVA Compass Bank dated September 30, 2010 **(Bates #Superpumper000440)**, the $3 million term loan did in fact exist as of McGovern's valuation date. The term loan was between Superpumper and BBVA Compass Bank and the loan ledgers from BBVA Compass Bank reflect the drawn down on the loan in September 2010. Therefore, if this liability would have been taken into consideration by McGovern, the book value of $8.6 million as reflected on **Bates # McGOVERN000016** would have been reduced by $3 million to $5.6 million. Additionally, if the amounts due from affiliates were removed, the book value would be negative.

LVC is available to discuss the above issues with you in more detail as needed.

Sincerely,

LITIGATION AND VALUATION CONSULTANTS, INC.

Michelle L. Salazar, CPA/ABV, CVA, CFE
President

EXHIBIT 2

EXHIBIT 2

9705 Pebble Beach Dr, NE, Albuquerque, NM 87111 505.269.6190

Jan Friederich

Title Grocery and Convenience Store Consultant

1968	Master Degree Economics, (Certified Economist) University of Hamburg, Hamburg, Germany
1968-72	Retail Consultant to supermarket companies in Germany
1972-79	Regional president of largest German supermarket chain in Munich
1980-99	Chairman-CEO of Furr's Supermarkets in Lubbock, TX (Acquired by the owners of the German company)
1991-99	Part owner of Furr's
1994	Acquired General Distributors, Inc.-wholesale grocery distributor with emphasis on the supply of small grocery and convenience stores
2000-01	Retired/Owner of General Distributors, Inc.
2001-03	Consultant to GMAC (bondholder) for disposition/management of 250 convenience stores in bankruptcy (Convenience USA). During that time I was heavily involved in the valuation of convenience stores on behalf of the bondholders and in negotiations with a diversity of potential buyers . (From single store operators to convenience store chains)
2003	Acquired 200 of Convenience USA's convenience store from the bankruptcy estate Operated the acquired stores , returned them to profitability and
2007	Sold the majority of the stores in Florida , Georgia and Alabama.
2009-13	Consultant to Superpumper, Inc. in Scottsdale, AZ

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CV13-02663
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Jacqueline Bryant
Clerk of the Court
Transaction # 6890398 : japarici

Exhibit 2

IN THE SECOND JUDICIAL DISTRICT COURT

THE STATE OF NEVADA, COUNTY OF WASHOE

WILLIAM A. LEONARD, trustee for the Bankruptcy Estate of Paul Anthony Morabito,	
Plaintiff,	Case No. CV13-02663
vs.	Dept. 1
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.	

DEPOSITION OF JAN FRIEDERICH

LAS VEGAS, NEVADA

MARCH 29, 2016

REPORTED BY: KIMBERLY A. FARKAS, RPR, CCR #741

JOB NO. 296780

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DEPOSITION OF JAN FRIEDERICH taken at 650 White Drive, Las Vegas, Nevada, on Tuesday, March 29, 2016, at 10:20 a.m., before Kimberly A. Farkas, Certified Court Reporter, in and for the State of Nevada.

APPEARANCES:

For the Defendants:

ROBISON, BELAUSTEGUI, SHARP & LOW
BY: FRANK GILMORE, ESQ.
71 Washington Street
Reno Nevada 89503
(775) 329-5151
fgilmore@rbsllaw.com

Special Counsel for the Trustee:
GARMAN TURNER GORDON
BY: GABRIELLE HAMM, ESQ.
650 White Drive
Las Vegas, Nevada 89119
(775) 777-3000
ghamm@gtg.legal

Also Present: Salvatore Morabito

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I N D E X

WITNESS: JAN FRIEDERICH

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LAS VEGAS, NEVADA, TUESDAY, MARCH 29, 2016;
10:20 A.M.
-o0o-
JAN FRIEDERICH,
was called as a witness, and after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. HAMM:

Q. Good morning, Mr. Friederich. Am I pronouncing that right?

A. Yes.

Q. Can you spell that for the record.

A. F-R-I-E-D-E-R-I-C-H.

Q. And your first name is Jan?

A. J-A-N.

Q. And is your current address 9705 Pebble Beach Drive, Northeast, Albuquerque, New Mexico?

A. Yes, ma'am.

Q. My name is is Gabrielle Hamm. I'm going to be taking your deposition today. And Mr. Gilmore would probably like to make his appearance on the record.

MR. GILMORE: Frank Gilmore on behalf of both of the defendants. To my left is Salvatore

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Morabito, my client.

BY MS. HAMM:

Q. Have you been deposed before, Mr. Friederich?

A. Yes.

Q. How many times?

A. A dozen.

Q. Pardon?

A. A dozen or so.

Q. Okay. When was the last time you were deposed?

A. Probably 2008 or '09.

Q. What was the context of that deposition?

A. It was convenient store related.

Q. Were you an expert, designated as an expert in that case?

A. No.

Q. What was your role in that case?

A. Witness.

Q. Have you ever been a party to a lawsuit? Do you understand what I mean by party, plaintiff or defendant?

A. As representative of companies, yes.

Q. Did those lawsuits relate to supermarkets?

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A. No.
Q. What did they relate to?
A. Convenience USA. It's a company that I acquired in 2003, I think.
Q. Have you ever been designated as an expert in a case before?
A. No.
Q. It's been a little while since you've been deposed so I'll give you a brief overview. Do you understand that your testimony today is given under penalty of perjury just like if you were in court?
A. Yes.
Q. You're doing a great job of letting me finish my sentence before you speak. I'm actually the person that has the worst habit of talking over people. I will try to do my best and let you finish your answer before I ask my next question. Please do your best to say yes and no instead of uh-huh and huh-uh so that she can keep a record.
If at any point you'd like a break to walk around, get a drink of water, whatever, just let me know. The only thing I ask is that you answer the question that I have pending.
I understand that you have a master's

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degree in economics from University of Hamburg?
A. That is correct.
Q. Do you have any other advanced degrees?
A. No.
Q. Your resume indicates that you acted as a consultant for Superpumper from 2009 through 2013; is that right?
A. That is correct.
Q. And you did that through a company, your company provided consulting services?
A. Yes.
Q. And what was the name of that company?
A. GDI Consulting.
Q. Are you the sole owner of GDI Consulting?
A. Yes.
Q. And does GDI solely consult companies with respect to convenient stores or gas stations?
A. Yes.
Q. What is the market area of GDI Consulting Services?
A. New Mexico, Arizona, west Texas, and then I did in 2003 consulting work for creditor committees.
Q. Creditors committee in a bankruptcy case?
A. Yes.

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Q. Was that a committee of bondholders?
A. Yes.
Q. And it was for GMAC?
A. Yes.
Q. Now, you were the CEO and chairman of Furr's Supermarkets for some period of time; is that right?
A. Yes. Yes.
Q. When did you step down as chairman and CEO?
A. 1999.
Q. And was that about two years before they filed for Chapter 11?
A. Yes.
Q. Did you have another position in the company before you became CEO?
A. I had started in 1980. I think I was always CEO.
Q. Did Furr's own gas stations?
A. Small convenient stores.
Q. And did those convenient stores sell fuel?
A. I think so.
Q. Were you directly involved in overseeing those convenient stores while at Furr's?

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A. Yes.
Q. Do you recall how many convenient stores Furr's had?
A. A few. It was not a large number.
Q. All right. And after you left Furr's, you were involved in the convenient store business as part of General Distributors, Inc.?
A. That was one part. I owned the company. It's a wholesale company that provides services to small, rural supermarkets and convenient stores.
Q. Is that company still in existence?
A. Yeah. I owned it before 2001. It was, I think, in 1993-'94 when I had acquired it.
Q. Are you still actively involved in that company?
A. Little bit. My son is operating it there.
Q. In connection with the Convenience USA bankruptcy case, your resume indicates that you were a consultant to GMAC, who was a bondholder in that case; is that correct?
A. That's correct.
Q. What type of services did you provide to them as a consultant?
A. I put together a business plan for those

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250 convenient stores. It was highly leveraged, obviously, at the time. And provided analyses and valuations for -- in order to find an exit strategy for the creditors.

Q. Did you ultimately purchase some stores out of that bankruptcy proceeding?

A. Yes.

Q. How many?

A. Two hundred, about two hundred.

Q. Were you the sole owner of the entity that purchased those stores?

A. No. I had a president of the company who I gave 15 percent to. My son had five percent. My daughter had five percent, about. And then I had an investment banking partner who was not an owner, but he participated in the profits at exit.

Q. Did you have to testify in the Convenience USA bankruptcy?

A. I think so.

Q. Where was that pending?

A. Greensboro, North Carolina and in Durham, North Carolina as well.

Q. Do you recall the name of the entity that purchased those stores?

A. ExprezIt, E-X-P-R-E-Z-I-T. And there

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were three different companies because there were three different loan tranches, three different bondholders.

Q. And that purchase was free of liens, claims and encumbrances; right?

A. Yes, it was an exit from bankruptcy.

Q. That's lingo that I know.

A. I, unfortunately, do too.

(Exhibit 1 marked)

BY MS. HAMM:

Q. I'm going to hand you what I've marked as Exhibit 1. Is this a copy of the subpoena that you received in this case?

A. Yes.

Q. And in the subpoena I requested that you produce a number of documents which are pages 5 through 7 of this document.

A. Yes.

Q. What did you do -- well, let me back up. Did you gather documents in response to this subpoena?

A. Yes.

Q. Now, I've received approximately 184 pages, which counsel for the defendants has indicated is the Jan Friederich subpoena documents.

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Does 184 pages sound about right to you?

A. Yes.

Q. Did you maintain or do you maintain a separate file for Superpumper documents?

A. No.

Q. How did you go about obtaining these documents through your records?

A. I looked back through my files.

Q. And when you say your files, do you mean paper files or emails?

A. Both, emails and paper files.

Q. And documents on your computer?

A. Yeah.

Q. Did anyone help you gather documents?

A. No.

Q. I notice that at least for a period of time you used an A OLemail address; is that right?

A. That's correct.

Q. Do you still use that same address?

A. Yes.

Q. Do you believe that there were emails that were responsive to these documents that just no longer exist?

A. It could be.

Q. Have the defendants agreed to pay your

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expenses for attending this deposition?

A. Yes, ma'am.

Q. And what are the terms of that agreement?

A. It's a verbal agreement between myself and the defendant.

Q. It's pardon?

A. It's a verbal agreement between, that all of my expenses will be reimbursed.

Q. So you intend to submit receipts for your hotel and food?

A. Hotel was paid directly by them. And airfare. I think the only expensive is parking and airfare.

Q. And your understanding is that the defendants will reimburse you for any expenses incurred in testifying at trial?

A. Yes.

Q. 'has anyone agreed to pay you for your time spent reviewing Mr. Mc governs report?

A. No.

Q. Has anyone agreed to pay you for time spent giving this deposition?

A. No.

Q. Is Superpumper currently compensating you in any way?

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A. Other than expense reimbursement?
Q. Correct.
A. No. And I don't know if it's actual Superpumper reimburses me for the expenses or the defendant.
Q. Fair enough. Thank you for that clarification.
(Exhibit 2 marked)
BY MS. HAMM:
Q. I'm going to hand you what I've marked as Exhibit 2. Have you seen this document before?
A. Yes.
Q. If you can look at pages 2 and 3.
A. Yes.
Q. Beginning in paragraph 2. From paragraph 2 up until it says Affirmation on the next page, did you draft that language yourself?
A. Yeah, pretty close.
Q. You say "pretty close." Is there any discrepancy that you see?
A. No, no, no, no.
MR. GILMORE: Make sure she finishes before you respond.
BY MS. HAMM:
Q. Now, in paragraph 2 it indicates, "He

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was" -- you were -- "a consultant hired by Superpumper to assist with the Matrix evaluation." Is that correct?
A. Yes.
Q. The Matrix evaluation was completed as of August 30th 2010; correct?
A. I think so.
Q. But you continued on as a consultant for Superpumper well after that; right?
A. Yeah. And I was not just compensated for the opinion here. I had a retainer during that period of time.
Q. Of course. Are you still a consultant for Superpumper today?
A. No. No.
Q. When did you stop being a consultant for Superpumper?
A. 2013, I think.
Q. Was it your choice to stop consulting there?
A. Yes.
Q. Why was that?
A. They had a -- they had a very good management team, and I didn't think that I could contribute anything beyond what they can do.

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Q. And who was that management team as of 2013 when you left?
A. Andrew. I don't know his last name. Andrew was the marketing operating guy. They had, I think Chris was already the CFO in 2013 or in the process of. I was involved with the hiring of Andrew and Chris came as a replacement for the prior CFO. And Danielle. I'm sorry, I only know the first names. Danielle was an office manager in charge of payroll.
Q. Who asked you to become a consultant for Superpumper in 2009?
A. I didn't understand the question.
Q. Who asked you to consult in 2009?
A. It was, I think the first contact I had was from the law firm of Dennis Vacco. And then I spoke briefly with Paul Morabito and then got in touch with Sam Morabito after that.
Q. Did Paul Morabito discuss with you the reason for needing the Matrix valuation?
A. No, it was not -- it had nothing to do with the Matrix valuation at the time.
Q. Okay. Tell me what it was about then?
A. The company had a severe downturn in 2008-2009, and they, the ownership of the company,

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wanted me to find out what the reason is and how it can be fixed if it can be fixed.
Q. Go ahead.
A. It had nothing to do at the outset with this Matrix at all.
Q. How long had you been assisting the company by the time Matrix completed its valuation?
A. Matrix completed the valuation in September 2010.
Q. Approximately, yes?
A. Problem about a year, a little more than that.
Q. So you had familiarity with the financial affairs of the company before Matrix completed its valuation?
A. Yes. I basically became the designated contact person from the company to Matrix.
Q. So in Exhibit 2 it states that, "Mr. Friederich liased with Dennis Vacco and Spencer Cavalier to accomplish the valuation and provide insight into the Superpumper financials." Is that accurate?
A. Yes.
Q. And by "liase," that means you, as you said, you were the point of contact?

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A. Yes.
Q. For Matrix?
A. For Matrix.
Q. And what else did you do as the liaison?
A. As far as -- that's all I did with regard to Matrix.
Q. We might be talking past each other. Did you provide documents to Matrix?
A. I think so.
Q. And you communicated with Spencer and was it Mr. Dooley?
A. I don't remember. I don't remember. But I communicated with Matrix people.
(Exhibit 3 marked)
BY MS. HAMM:
Q. I just marked Exhibit 3. And I recognize that you're not a party to this correspondence, but I'd like you to flip to the first attachment.
A. Yes.
Q. Was this an accurate organizational chart for Superpumper before the October 2010 transaction?
A. I don't know if Paul was still with the company or not, but I know that Mr. Fletcher, Mr. Whitehead and Mr. Locken, Mr. Benbrook and

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Mrs. Lininger, they were in those positions. I'm not sure about the --
Q. I may have gotten ahead of you a little bit when I mentioned the October 2010 transaction. Were you familiar with the transfer of shares of Superpumper on or about October 1st, 2010?
A. Not at the time.
Q. Did you become aware of that at some later point?
A. Yeah.
Q. How so?
A. I don't remember.
Q. In light of that, I'm going to use the Matrix valuation day of the end of August of 2010 sort of as a point of reference. Is that okay?
A. That's okay.
Q. Before that Matrix valuation, what was Sam Morabito's role in Superpumper?
A. He was a person I had most contact with.
Q. I don't see Sam Morabito on the organizational chart that we just looked at. Do you know if he had a title at the company at the time?
A. I don't know.

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Q. What about Edward bay yuk, was he involved on an operational level at the company before the date of the Matrix valuation?
A. Yes, I had conversations with him as well.
Q. What kind of conversations?
A. Just ask about progress reports.
Q. He would ask you for progress?
A. Yeah, he would ask me how the company is doing and that certain decisions had to be made. Basically telephonic contact.
Q. And did Mr. Bay {yum}'s role in the company become more active after the date of the Matrix valuation?
A. Yes.
Q. How so?
A. I think we started to have weekly meetings, telephonic weekly meetings. Sometimes he was in Scottsdale. And there were. We never had a real direct conversation about there was indication that ownership changes took place.
Q. And Sam Morabito's role in the company, did his role stay about the same or did his role become more active after the Matrix valuation date?
A. His role was always pretty active. It

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was not -- I couldn't tell you that there was a certain date that it had become more active.
Q. Before the date of the Matrix valuation, was Paul Morabito actively involved in the company?
A. Before that date, my {kakts} with Paul was more at a strategic level because we were looking for other acquisitions in Chicago and south Texas, for example. So it was less so as we got to the Superpumper activities, although there were questions as well. But most of the time that I remember spending with Paul and contacting Paul and then trying to acquire other companies.
Q. Do you currently have any business interests in common with Paul Morabito?
A. No.
Q. Did he ultimately acquire other companies?
A. I don't know. No -- of the ones that I -- no.
Q. Are you a certified financial analyst?
A. No.
Q. Are you a CPA?
A. No.
Q. Are you a member of any professional associations?

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A. No.
Q. In forming the opinions set out in Exhibit 2 regarding Mr. Mc govern's report, did you rely on any guidelines that are applicable to valuation analysts or CPAs?
A. No.
Q. Are you familiar with the national association of certified val {u} a{tors} and analyst professional standards?
A. No.
Q. Are you familiar with the standards of valuation services set forth by the I think it's called the association of something certified -- I forget the terminology. It's the A I CPA?
A. No.
Q. So you're not holding yourself out as a valuation expert; right?
A. No.
Q. What is the subject matter of your expertise?
A. My expertise resides on the fact that I was involved in buying and selling and advising companies who wanted to buy and sell, especially the {sprez} it scenarios where I was advising and actively involved in buying and selling convenient

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stores, not as a consultant, but as a potential buyer or seller.
Q. Did you do anything to prepare for your deposition today?
A. No, not really.
Q. Did you speak to Mr. Gilmore?
A. Yeah.
Q. This morning?
A. Yeah.
Q. And yesterday?
A. Yes.
Q. How long have you all spoken about your deposition?
A. Maybe a total of half an hour.
Q. Did he talk to you about any of the questions that he anticipated I would ask?
A. No.
Q. Did you review any documents before your deposition today?
A. No, not specifically.
Q. When was the last time -- strike that. You've reviewed the Matrix valuation; right?
A. Yes.
Q. When was the last time you reviewed it?

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A. A week ago.
Q. And you reviewed Michelle {sal} {sar}'s?
A. And yesterday actually because I was at the deposition.
Q. Okay. And you've Michelle {sal} {sar}'s report; right?
A. Briefly.
Q. Did you review her rebuttal report?
A. I read it, but not really reviewed it.
Q. Did you and Mr. Gilmore discuss Mr. Mc governs testimony yesterday?
A. Not with any specificity, just {jonl}.
Q. Generally, what did you all discuss?
A. My stated comments here were, in my mind, confirmed, that there was very little expertise expressed with regard to convenient stores and gasoline business.
Q. Tell me how the convenient store and gasoline business is different from other industries.
A. Other retailers, for example?
Q. Yes, sir.
A. I've been in the super market business for quite a while. And in the super market business gross margins are arrived at applying a

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certain percentage to sales. So if I want to generate in gross profit, I apply 30 percent to the sales of produce or a flower or whatever. That's the same we do in the in-store part of the convenient store.
The fuel sales are different -- are calculated or are -- strike that.
The fuel gross profit is arrived completely differently. It's not a certain percentage of sales. I have not seen anything that refers to cents her gallon in his report, Mc governs report, although that is the most critical, the single critical item in evaluating a company, how many cents her gallon does the market allow to get.
So if I sell it in this case 20 million gallons in Superpumper case and I can get 30 cents per gallon, regardless of the price of the gasoline, then I know that I can make $6 million in gross profit if the market bears 30 cents per gallon. When you say differences in operating results of convenient stores and gasoline stations, it's always the result of how many gallons, how many cents posterior gallon does the market allow me to get. that issue is not addressed at all in

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A. I don't know.
Q. When were you first asked to evaluate Mr. McGovern's report?
A. Couple of weeks ago. I'm not sure. Whendy see the McGovern report first? I'm not sure. But when was he asked to give me comments?
Q. Yes, sir.
A. Probably in connection with the --
Q. This --
A. -- rebuttal.
Q. Thank you. That's Exhibit 2?
A. Yes.
Q. And who asked you to prepare a rebuttal?
A. I think it was the law firm.
Q. Was it Mr. Gilmore?
A. No. I'm not sure. Yeah, I think it was.
Q. Did anyone provide you with any documents other than Mr. McGovern's report to review?
A. Other than the reports I already had?
Q. Correct.
A. I got this report and I got the rebuttal from Michele. I don't know what her last name is.
Q. Salazar?
A. Salazar.
Q. What documents did you review prior to

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formulating your opinions?
A. Just the reports, the appraisals.
Q. And when you say the appraisals, which ones are you referring to?
A. McGover and later on from Michele that I read.
Q. Did GDI Consulting provide consulting services for any companies other than Superpumper from 2009 through today?
A. Only to customers of GDI as a wholesaler, but we do that as a -- for free because they are our customers, our retailers who are buying from us.
Q. So GDI Consulting is affiliated with General Distributors, Inc.?
A. Yeah.
Q. Did you have a written consulting agreement with Superpumper?
A. I have one in 2009.
Q. If you still had that in your records, would you have provided it in response to my request for documents?
A. Yes. I tried to find it, but I couldn't. I couldn't locate it.
Q. Are you familiar with the loan that

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Superpumper obtained in September of 2010?
A. No.
Q. Superpumper didn't seek your advice on obtaining financing?
A. No.
Q. Based on the testimony that Mr. McGovern gave yesterday and any other documents you've reviewed in this case, did you become aware that there was some financing obtained in September 2010?
A. I really didn't pay attention on that. No.
Q. Do you recall the discussion at Mr. McGovern's deposition yesterday about Christian love less reducing the valuation provided by Matrix by about $1.6 million?
A. I heard the discussion, yes.
Q. Did you have an understanding of why that occurred?
A. Why Mr. Is it love less, Christian?
Q. Yes, sir.
A. The rationale behind it?
Q. Yes, sir.
A. Yeah, I agree with it.
Q. Okay. Can you tell me -- tell me in your

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own words what that rationale was.
A. It was the fact that the company specific risks were not adequately addressed in the Matrix calculation. And I pointed some of them out in my testimony. And I agree, and I already said, that I disagree with the multiple that Matrix applied to the EBITDA number.
Q. But those company-specific risk factors, Mr. Love less was applying a 35 percent discount to the valuation to account for those factors; right?
A. I assume that's what he did, yes.
Q. And that was something separate from the $1.6 million that was reduced from the top line valuation; right?
A. I didn't get that.
Q. So you never became aware of any credit or financing obtained by the company in September of 2010?
A. No.
MR. GILMORE: Object to the characterization of financing, it being a term of art. Otherwise, go ahead and answer.
THE WITNESS: No, I didn't know about it.
BY MS. HAMM:
Q. If you assume that the company increased

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A. Yes.
Q. And you were there in 2010?
A. Yes.
Q. Did you ever communicate with the company's auditors in 2009 or '10?
A. No.
Q. Or 2011?
A. No.
Q. Is it customary in the industry for companies of the same cap size as Superpumper to have their financial statements audited?
A. It depends on the covenants of the loans you have or even lease covenants sometimes require that.
Q. Would there be any other reasons for a company of the same cap rate to have their financial statements audited other than loan covenants or lease covenants?
A. If you have absentee owners or they're not involved in the business, they might ask for audited financial statements.
Q. Can we go back to Exhibit 2, exams the rebuttal expert witness disclosure.
A. Yes.
Q. You talked at length earlier about the

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need to measure fuel sales in terms of gallons instead of dollars; right? You recall that we've discussed that today?
A. Yes.
Q. Is there some publication that requires that sort of measurement in the valuation of gas stations, to your knowledge?
A. I don't know that, no.
Q. Are you familiar with publications relating to the valuation of convenient stores or gas stations?
A. No.
Q. Can you tell me if -- strike that.
Have you considered how Mr. McGovern's opinions would change if he had applied the gallons measurement rather than dollars?
A. No. It ended up to be a report that relied completely on an EBITDA line, you know, from {twechb} through 2015 projected something. So he only looked at EBITDA. He did not apply any company-specific risk. If he had applied company-specific risks the way I would have, he would have to turn to the sustainability, for example, of a high gross margin sales per gallon in gasoline. But since he didn't have any, he didn't

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address any company-specific risk, it probably would not have changed his opinion.
Q. Can you quantify the company-specific risk that you believe he should have applied?
A. I go back to the Matrix valuation and the comments from the lawyer. That's basically the company-specific risk that I see. And when you look at the volatility of the gasoline market, one cent per gallon less in gross profit amounts to $200,000. Five cents variation down wards amounts to a million dollars. So a five-cent variation gets you to, in most of these instances, to below zero or a loss.
So if I look at a company and that's my biggest problem with regard to the McGovern am sis, is there's not one word spent on the volatility of the results based on very, very minor changes in the cents per gallon margin in gasoline.
Q. Did the company, to your knowledge, ever drop below 30 cents per gallon from 2010 through the end of your knowledge of the company?
A. I think one year it was 29, but I have to look at those numbers.
Q. Did the company ever operate at a loss during that timeframe?

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A. I think so.
Q. What year was that?
A. You're talking about net profit?
Q. Yes.
A. I think 2012, '13, maybe '11. Was at least very close.
Q. And Matrix didn't apply a 35 percent discount, did they?
A. You know, I can't tell by the methodology they used. They came to a 5.7 or some multiple. If that's what reflects their discount, then they applied it. I still think the multiple is too high.
Q. But it was Christian love less at the lawyer's office that applied a 35 percent discount to the entire valuation; right?
A. I don't know. I have to look if it's 35 percent or what. But, I mean, I agree with the result of his valuation because I don't think that the company at the time, 2010, was what we expected for '11, '12 and '13 or what could have been expected for '11, '12 or '13 with $6 million, $6.5 million. `.
Q. Do you know how Matrix's valuation would have changed had they had the benefit of knowing

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the actual numbers achieved in the remainder of 2010, 2011, 2012 and 2013?

MR. GILMORE: Calls for speculation.

THE WITNESS: If they would have applied the multiple to those numbers, 5.9 times $350,000.

BY MS. HAMM:

Q. Yes, sir.

A. Six times $350,000 is $1.8 million.

Q. If 2014 and 2015 were included in that analysis, do you know how it would have changed?

MR. GILMORE: Same objection. Go ahead.

THE WITNESS: They would get to the number they have posted there as their value unless they would have adjusted the results by the fact that all the increases came from margins that were in the 38 range. That's unheard of. Outliers, those are outlier margins.

BY MS. HAMM:

Q. You're saying 2014 and 2015 actual results were outliers?

A. Yes.

Q. Then how did they achieve those results?

A. The market allowed -- the gasoline market allowed a 38 cent margin. You know, at 1 cent produces $200,000. Six cents produces $1.2

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million, and that's the difference. It comes solely from the gross margin from fuel.

Q. In subparagraph B of C?

A. In 2?

Q. Yeah. You say a multiple of 5.9 for future expected EBITDA is almost twice as high as the industry standard. Industry standard for leased stores with above market leased rates are closer to a multiple of three times EBITDA. So we've talked about that at length. But is there a publication that tells me what the industry standard is?

A. No. That is my experience. That's how I saw it in both stores with leases.

Q. The next item, subpart C, can you read that to yourself?

A. "Receivables should not be assumed as collected and will not be acquired by any buyer without certainty and shall not be part of the company's market value solely based on an assumption."

Q. So it's your view that Mr. McGovern's assumption that the shareholder loans were collectible was unreasonable?

A. It should have been tested. It should

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have been -- if I have a $13 million valuation, half of it comes from a receivable that I have assumptions about is, in my mind, ridiculous.

Q. How should he have tested that?

A. Going to the note holder. Going to the note holder and check it out.

Q. I suspect the note holder is not going to tell me much. What else could he have done to test it?

A. Let me -- if I were a buyer, I would not buy a non operating asset. I can spend the six million or whatever it's worth, six and a half million dollars in better places. Buying a note for 6 and a half million dollars at face value of 6 and a half million dollars, why would I do that. Go to the bank if you need that money.

Q. Would you buy it at a discount?

A. Heavy discount.

Q. What kind of discount?

A. That has nothing to do with the business I'm in. That's completely -- I have to take off my hat as a convenient store operator and say now I'm a speculator.

Q. Do you know what published valuation standards govern valuation of these types of

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receivables?

A. No.

Q. Are you familiar with the Gursey Schneider firm's audit of the 2009 financial statements?

A. No.

Q. So you can't tell me if Mr. McGovern's reliance on Gursey Schneider's audit was reasonable or unreasonable?

A. No, I don't.

Q. Have you purchased small, closely held gas stations in the past?

A. Small, closely held? No. I sold. I bought out a bankruptcy and sold to small operators.

Q. Have you owned a small, closely-held gas station company?

A. No.

Q. Do you have any familiarity with how intercompany or shareholder loans are booked by small, closely-held companies generally?

A. How they are booked or where they came from?

Q. How they're booked.

A. I'm not familiar with it, no.

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A. I think so.
Q. And do you recall when this was prepared?
A. Must have been in after 2015, after the year end 2015. No. Hold it. It's Superpumper budget, so it must have been prepared at the beginning of 2015.
Q. Thank you. That's helpful.
So as a budget, it would have been prepared before what date?
A. Before the beginning of 2015.
Q. Okay.
A. At the end of 2014.
Q. So, in that case, should it reflect the accurate gross profits, fuel profits, total gross income, and other indicators at the time? That was a bad question. Let me back up.
If it was prepared at the end of 2014, are the numbers -- would you expect the numbers for 2013 to be the actual results?
A. No.
Q. Why would you prepare a budget at the end of 2014 that includes inaccurate numbers for 2013?
A. It's just a way to look at how we prepare a budget. It's more a critique of how good was our budgeting.

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Q. If I was preparing a valuation on a certain date, a snapshot date, of August 30, 2010, and I was relying on this budget, do you think these projections are reasonable?
A. These budgets were not -- the 2013 budget was not prepared in 2010. The 2013 budget was prepared at the end of 2012.
Q. So the company never prepared projections for more than a year out?
A. I don't know about "never," but not to this detail.
Q. Okay.
(Exhibit 9 marked)
BY MS. HAMM:
Q. I'm going to hand you --
MR. GILMORE: And I won't need that. I'll just use the one I've got. That's McGovern, I'm guessing?
MS. HAMM: Yes.
BY MS. HAMM:
Q. Is it fair to say that you're fairly familiar with Exhibit 9 since you formulated opinions about it?
A. I'm familiar with the fact that he used a certain approach. And as far as that approach is

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concerned, I'm familiar with it.
Q. Did you ever read this report in detail?
A. Not in detail, no. I wanted to know which approach he took in order to focus on that approach.
Q. Were you familiar with the ownership structure of Superpumper prior to the date of the Matrix valuation?
A. Prior to?
Q. The date of the Matrix valuation, so end of August 2009.
MR. GILMORE: '10.
MS. HAMM: Thank you. '10, I'm sorry.
THE WITNESS: Not really.
BY MS. HAMM:
Q. If you look at page 2 of Mr. McGovern's report -- can you read through 2.1 and then into 2.2 on page 3. Just read it to yourself.
A. Yes.
Do you disagree, having read that, with Mr. McGovern's summary of the company background industry?
A. I think it fairly represents. I'm not familiar with the stock ownership. I can't comment on that.

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Q. But as to 2.1, which is history, and 2.2, operations --
A. I'm talking about 2.3.
Q. You don't disagree with anything in 2.1 or 2.2?
A. Well, I disagree with his conclusion in the Summary of Conclusions.
Q. What are you referring to?
A. You're just referring to 2?
Q. I'm just referring to 2.1 and 2.2. I know that you don't agree with his conclusion.
A. Okay.
Q. Are you familiar with publication Key Value Data a National Economic Report as of September 2010?
A. No.
Q. The first paragraph of Section 3.2 on page 5, if you could take a look at that for me, please.
A. Yes.
Q. Do you disagree with this paragraph?
A. It says here, "The convenient store emerged as an outgrowth of the grocery store industry."
Q. I'm more concerned with the latter part

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1 of the paragraph. "Over the period from 1997 to
2 2002, the number of gas stations with convenient
3 store sites rose by approximately 14 percent."
4 Do you know if that's true?
5 A. I don't know if that's true, but I'd take
6 it.
7 Q. Are you familiar with the publication
8 that that came from, Business Valuation Update?
9 A. No.
10 Q. Have you read the article cited in
11 footnote 3, "special issues to consider when
12 valuating a gas station convenient store"?
13 A. No.
14 Q. Are you familiar with Key Value Data
15 Industry Research Report For Gas Station Mini Mart
16 as of June 30, 2011?
17 A. I'm familiar with, not with the
18 specifics, but I'm familiar with the publication.
19 Q. With that publication, okay.
20 Do you rely on that publication when
21 you're buying a company?
22 A. No.
23 Q. No? Why not?
24 A. I have my own opinion. I have my own.
25 See, they are talking about national trends. And

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1 when I buy stores, it's in a very specific market,
2 so I'm not concerned about national trends. I'm
3 concerned about the specific market.
4 Q. Can you tell me how Arizona, or to be
5 more specific, the Phoenix/Scottsdale area, differs
6 from the national industry market?
7 A. Yeah. It starts -- in Scottsdale, it
8 starts with high income. The demographics are
9 substantially different than the rest of -- most of
10 the country. You have very different -- in this
11 market you have very high real estate prices
12 compared to -- you asked about a comparison to the
13 average in the United States. Higher income,
14 higher real estate prices, more restrictive
15 planning, planning guides and zoning. And in
16 Scottsdale there's substantially fewer gas stations
17 per thousand population.
18 Q. So consumers have less choice?
19 A. Yes.
20 Q. Can you read the first two sentences of
21 Section 2.4. It's on page 6.
22 A. Yes.
23 Q. Are you familiar at all with the
24 company's 2008 and 2009 financial performance?
25 A. No. I mean, to an extent, but not

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1 intimately.
2 Q. So you don't know if its historical
3 performance for those years followed the industry
4 trend?
5 A. I think it was worse than the industry
6 trend.
7 Q. How so?
8 A. Because Scottsdale got impacted by the
9 great recession much more so than other areas in
10 the United States.
11 Q. Do you believe that fuel revenues
12 actually declined more than 6 percent in 2008?
13 A. In Scottsdale or in the company?
14 Q. In the company.
15 A. I can look at it. I don't know.
16 Q. But you don't know as you sit here right
17 now?
18 As you sit here right now, you can't --
19 A. No, I can't.
20 Q. Mr. McGovern said in his report later in
21 that same paragraph, "I expect the level of growth
22 long term not to exceed 1 percent annually."
23 Do you think that was a reasonable
24 expectation on his part?
25 A. Yes. That leaves a lot of room. When

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1 you say "not to exceed 1 percent," it could be
2 minus 5.
3 Q. Do you have any opinion on whether
4 Exhibit 1 to Mr. McGovern's report accurately
5 represents the company's balance sheets from 2007
6 through 2009?
7 A. The balance sheet?
8 Q. Correct.
9 MS. HAMM: Would it be possible for you
10 to read back the question.
11 (Record read as requested.)
12 THE WITNESS: I don't have an opinion.
13 BY MS. HAMM:
14 Q. Now, if you make the assumption -- and I
15 know this is a big assumption, but I ask you to
16 make it anyway. If you make the assumption that
17 the due from affiliates were properly included in
18 the balance sheet, would the accounts receivable
19 have exceeded 2 percent of the company's total
20 assets in September 2010?
21 A. The receivables -- accounts receivable in
22 2010 would be 1.83 percent.
23 Q. Well, I'm actually looking back at page 8
24 of Mr. McGovern's report. And he says, "Accounts
25 receivable represent approximately 2 percent of

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total assets as of September 2010."
A. The attachment says 1.83 percent.
Q. Now, he references in that same paragraph an industry average of 11 percent based on Business Valuation Resources Report, IRS 2010 returns for gasoline stations with asset range between 10 and 25 million.
Are you familiar with that publication?
A. No, not specifically.
Q. Do you know what the industry average in the Phoenix/Scottsdale area was for accounts receivable as a percentage of balance sheet?
A. No.
MR. GILMORE: As a percentage of total assets as reflected on the balance sheet?
MS. HAMM: Yes.
BY MS. HAMM:
Q. Does Mr. Gilmore's clarification change your answer?
A. No.
Q. Are there any publications relating to the convenient store fuel station industry that Mr. McGovern didn't rely on that you think he should have?
A. I'm not sure that he relied on the one

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that I refer to most of the time is the National Association Of Convenient Stores.
Q. Say that again.
A. National Association of Convenient Stores, NACS.
Q. What do you rely on the NACS for in your business?
A. Sales trends by category, by merchandise category, gross margins by category, overall sales trends, and then they always have certain topics, like in-store delis. It's a very -- it's very close to the real business.
Q. Are you familiar with the average inventory value as a percentage of assets on the balance sheet for Phoenix/Scottsdale?
A. No.
Q. Are you familiar with inventory as a percentage of assets as part of the balance sheet nationally?
A. No.
Q. On page 8 of his report, Mr. McGovern references some industry averages as far as equipment, cash and cash equivalents. Are you familiar with the industry averages for those sums?
A. No.

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MR. GILMORE: Gabby, I don't want to knock you off track, but I'm trying to get a sense for what we should do about a lunch break or do we plow through? What's your sense? It is just about to touch one o'clock.
MS. HAMM: I didn't realize it was that late.
MR. GILMORE: I'm flexible. I expect my client is flexible. I haven't asked Jan if he's flexible.
THE WITNESS: I have a 5:15 flight.
MS. HAMM: I don't believe I have more than 20 or 30 minutes of questions.
MR. GILMORE: Can I take two minutes and then we'll work until 1:00 or 2:00 and then we're done.
(Short recess)
(Exhibit 10 marked)
BY MS. HAMM:
Q. I've handed you what I've marked as Exhibit 10, which states at the top that it's a 2015 budget.
A. Yes.
Q. Did you have a hand in preparing this document?

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A. I think so.
Q. Do you recall when it was prepared?
A. The end of '14.
Q. And these handwritten notes at the bottom, is that your handwriting?
A. Yes.
Q. Can you, essentially, tell me what those notes say?
A. Yeah. I tried to get to some kind of break even analysis to see where the company could be. The 14.5 is the sales merchandise. 30 percent is the margin, which gives you $4.4 million in gross profit from merchandise.
Q. Okay.
A. Then I have 20 million gallons times 35 cents is $7.2 million.
Q. Okay. The two together get $11.6 million in other income, which is lottery, propane, ATM revenue of $1.1 million. Gives you a total of $12.7 million.
Q. Okay. And on the right of that?
A. To the right of that is overhead $1.1 million, operating expenses of $9.5 million gets you $10.6 million. And that would lead to $2.1 million EBITDA.

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FURTHER EXAMINATION

BY MS. HAMM:

Q. Mr. Friederich, as a hypothetical buyer as of September 30, 2010, would your treatment of the term loan that Mr. Loveless identified in his email, $1.682 million, would that in any way depend on how those funds were used?

A. No.

Q. No? So if the company obtained a loan in the amount of $1.6 million --

A. If the same amount would have been in cash, cash added into the asset of cash on the balance sheet, that would be a wash.

Q. Then you wouldn't deduct it?

A. Right.

MS. HAMM: That's it. Thank you.

MR. GILMORE: I have nothing further. Do you want to tell him about his opportunity?

MS. HAMM: Mr. Friederich, you're going to have an opportunity to review your deposition transcript and make any changes that you like. If you make changes to something substantive, that will give me the opportunity to, essentially, undermine your credibility at trial. However, you

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can certainly waive the right to review your transcript. And I'm sure that Mr. Gilmore would have a position on whether you should do that. If you want to review your transcript, where would you like that sent?

THE WITNESS: To the address you have on the file, 9705 Pebble Beach Road. My name is misspelled.

MS. HAMM: It's F-R-I --

THE WITNESS: I-E.

MS. HAMM: I would like an E-transcript and exhibits.

MR. GILMORE: Same for me, please.

(Deposition concluded at 1:53 p.m.)

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CERTIFICATE OF DEPONENT

PAGE	LINE	CHANGE	REASON

* * * * *

I, Jan Friederich, deponent herein, do hereby certify and declare the within transcription to be my deposition in said action; that I have read, corrected and do hereby affix my signature to said deposition under penalty of perjury.

_____

Jan Friederich, deponent

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CERTIFICATE OF REPORTER

STATE OF NEVADA)
) SS:
COUNTY OF CLARK)

I, Kimberly A. Farkas, a duly certified Court Reporter, State of Nevada, do hereby certify: That I reported the taking of the deposition of JAN FREDERICH commencing on Tuesday, March 29, 2016 at 10:20 a.m.

That prior to being examined, the witness was duly sworn by me to testify to the truth. That I thereafter transcribed my said shorthand notes into typewriting, and that the typewritten transcript of said deposition is a complete, true and accurate transcription of said shorthand notes.

I further certify that I am not a relative or employee of an attorney or counsel of any of the parties, nor a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand in my office in the County of Clark, State of Nevada, this 19th day of April, 2016.

Kimberly A. Farkas

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Kimberly A. Farkas, CCR 741

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William A. Leonard, Trustee

IN THE SECOND JUDICIAL DISTRICT COURT OF

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

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, vs. SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, and individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	**CASE NO.: CV13-02663** **DEPT. NO.: 4** **OPPOSITION TO DEFENDANTS' MOTIONS IN LIMINE**

Plaintiff William A. Leonard (the "Trustee" or "Plaintiff"), by and through his counsel, the law firm of Garman Turner Gordon LLP, hereby opposes (the "Opposition") the *Motions in Limine* (the "Motion") filed by Defendants SUPERPUMPER, INC., an Arizona corporation ("Superpumper"); EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM

BAYUK LIVING TRUST ("Bayuk"); SALVATORE MORABITO, an individual ("Morabito"); and SNOWSHOE PETROLEUM, INC., a New York corporation ("Snowshoe," along with Superpumper, Bayuk, and Morabito, the "Defendants").

The Opposition is brought pursuant to the provisions of NRCP 16.1; NRCP 26; NRCP 30; and NRCP 37. The Opposition is supported by the attached memorandum of points and authority and the Declaration of Teresa M. Pilatowicz attached hereto as **Exhibit A**, 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 28th day of September, 2018.

GARMAN TURNER GORDON LLP

/s/ Andrew P. Dunning, Esq.
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Through this action, Plaintiff seeks to unwind three separate fraudulent transfers: (1) the exchange of real properties by and between Debtor Paul Morabito ("Debtor") and his then-boyfriend, Bayuk, and their respective trusts; (2) the purported sale of Debtor's equity interests in Baruk Properties, LLC ("Baruk Properties") to Bayuk in exchange for a sham note; and (3) the sale of Debtor's equity interests in Superpumper to Snowshoe and its ultimate equity holders, Bayuk and Debtor's brother, Morabito, for less than reasonably equivalent value, including

through the exchange of a sham note (collectively, the "Transferred Assets"). As NRS 112.210 provides, Plaintiff seeks the return of the fraudulently transferred property or, in the alternative, the value of such property. Plaintiff and Defendants have exchanged expert reports and appraisals related to the value of the properties and equity interests and, most recently, through the *Motion for Partial Summary Judgment*, Plaintiff has made his damage assertions unquestionably clear.

Nonetheless, Defendants filed the Motion in an improper, desperate attempt to exclude any evidence of Plaintiff's damages. In one breath, the Motion is couched as an *in limine* request to limit evidence prior to trial. In another, the Motion seeks evidentiary sanctions due to Plaintiff's purported noncompliance with pretrial disclosure requirements. Elsewhere, the Motion smacks of a request to compel further disclosures regarding Plaintiff's damages calculations on the eve of trial. Finally, upon reaching its conclusion, the Motion unceremoniously reveals itself to be an improper dispositive request as to Plaintiff's damages.

In any event, Defendants are not entitled to any of their requested relief under any legal theory. Not only do Defendants ignore the fact that Plaintiff has previously disclosed evidence of his damages, Defendants' requests, even if valid, are woefully misplaced in a pretrial motion regarding the admissibility of evidence. To be sure, Defendants made no effort during discovery to garner more specificity regarding the extent of Plaintiff's damages, seeking only to raise the issue on the eve of trial in a thinly veiled attempt to prevent this Court from hearing all of the evidence that the parties spent years gathering. The Motion should be denied.

II.

LEGAL ARGUMENT IN OPPOSITION

A. PLAINTIFF DISCLOSED HIS DAMAGES BOTH IN THE INITIAL DISCLOSURES AND THEN REPEATEDLY THROUGHOUT THE YEARS OF DISCOVERY.

1. Plaintiff Complied With His Disclosure Requirements.

Rule 16.1 of the Nevada Rules of Civil Procedure requires parties to include with their initial disclosures "a computation of any category of damages claimed by the disclosing party." NRCP 16.1(a)(1)(C). In early 2016, Plaintiff disclosed as follows: "Plaintiff is entitled to

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recover assets transferred or the value thereof pursuant to Nev. Rev. Stat. §§ 112.210 and 112.220, which Plaintiff believes to be no less than $8,500,000."[1] Thus, Plaintiff clearly delineates that he seeks (1) recovery of the assets transferred or, if that is not available (2) the value thereof. Plaintiff then indicated that his computation of those damages exceeded $8,500,000.[2] Plaintiff readily satisfied his disclosure requirements under NRCP 16.1, and there has been no request to supplement this disclosure at any point over the last approximately two and a half years.[3]

2. Plaintiff Otherwise Disclosed His Claimed Damages to Defendants.

In addition to the disclosure under Rule 16.1, Plaintiff and Defendants have both made repeated disclosures regarding the value of the Transferred Assets, including expert and rebuttal reports.[4] Further, Plaintiff and Defendants conducted depositions of both percipient and expert witnesses on issues of valuation regarding the transfers at-issue.[5] Then, in what could not have left any doubt, Plaintiff filed his *Motion for Partial Summary Judgment* on August 17, 2017,[6] which included twenty-three pages of Plaintiff's Statement of Undisputed Facts and ninety-one exhibits, outlining the damages.[7]

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[1] See Plaintiff's Amended Disclosures Pursuant to NRCP 16.1(A)(1), served February 19, 2016, attached as "Exhibit A-1" at p. 6.

[2] See Exh. A-1.

[3] See Exh. A, at ¶¶ 14-17.

[4] See Plaintiff's Expert Witnesses Disclosures, served January 26, 2016, attached as "Exhibit A-2;" see also Defendants' Expert Witness Disclosures, served January 26, 2016, and February 29, 2016, attached as "Exhibit A-3."

[5] Exh. A at ¶¶ 9-11.

[6] Plaintiff's Motion for Partial Summary Judgment, filed August 17, 2017, is attached as "Exhibit A-4."

[7] Plaintiff's Statement of Undisputed Facts in support of his Motion for Partial Summary Judgment, filed August 17, 2017, is attached as "Exhibit A-5."

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To be clear, and as previously disclosed, Plaintiff seeks to avoid and recover three sets of transfers. Plaintiff acts on behalf of Debtor's creditors, inclusive of the Herbst judgment creditors with a $144 million judgment who were deprived of approximately $14 million in assets as a result of Debtor's fraudulent transfers to Defendants.[8] As a direct result of the fraudulent transfers, the Herbst judgment creditors were prevented from collecting on the Transferred Assets.[9]

The basic overview of the fraudulent transfers, as disclosed to Defendants, follows:

First, Debtor had interests in two Laguna Beach, California (the "Real Property Transfers"), valued at $808,981 and $427,447.[10] Through the Real Property Transfers, Debtor exchanged his interest in the two pieces of Laguna Beach, California real property (75% and 50%, respectively, valued at $1,236,428) for Bayuk's minority interest in a Reno, NV property (30%, valued at approximately $291,341).[11]

Second, Debtor had a 50% interest in Baruk Properties, LLC (the "Baruk Transfer"), valued at $1,654,549.50.[12] Through the Baruk Transfer, Debtor transferred his 50% interest in Baruk Properties, LLC, which held title to four pieces of real property in California and Nevada, in exchange for a $1,617,050 sham promissory note with no value.[13]

Third, Debtor had an 80% interest in Superpumper (the "Superpumper Transfer"), valued at approximately $10,440,000.[14] Through the Superpumper Transfer, Debtor transferred his 80% interest in Superpumper to Defendants in exchange for $542,000 in cash and another sham promissory note with no value.[15]

Plaintiff's *Motion for Partial Summary Judgment* specifically identified these different sets of transfers, identified that Plaintiff sought return of the improperly Transferred Assets, as

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[8] Exh. A-4 at p. 3; see Plaintiff's Amended Complaint, filed May 15, 2015, a copy of which is on file, at ¶ 16. Plaintiff testified regarding his damages and the figures in the Amended Complaint during his March 25, 2016, Deposition, as well. Exh. A at ¶ 1.
[9] Exh. A-4 at p. 3.
[10] Id. at ¶ 69.
[11] Id. at ¶¶ 23-33.
[12] Id. at ¶ 69.
[13] Id. at ¶¶ 34-47.
[14] Id. at ¶ 69.
[15] Id. at ¶¶ 48-67.

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well as Plaintiff's computation of the value of the respective assets before and after the fraudulent transfers took place.[16] Further, Plaintiff provided a table, summarizing Debtor's interests in the assets, the value of those assets, and the amount actually garnered through the transfers at-issue.[17] While Plaintiff acknowledged that the values of the Reno property and Superpumper were factual items left open for trial, any doubt as to value of these assets is removed by the expert reports exchanged in early 2016 specifically addressing these assets.

3. Defendants Rely on Inapplicable Authority That, In Any Event, Supports Plaintiff's Position.

Not only does Defendants' Motion willfully ignore the record before the Court and the evidence provided to Defendants, it relies upon impertinent authority. Specifically, Defendants cite heavily to Pizarro-Ortega v. Cervantes-Lopez, 396 P.3d 783 (Nev. 2017), reh'g denied (Sept. 28, 2017). Pizarro-Ortega stands for the proposition that future medical treatment in a personal injury action is a category of damages which must be disclosed under NRCP 16.1 and therefore is inapplicable to this case. See Pizarro-Ortega, 396 P.3d 783. Further distinguishing the analysis is the fact that, unlike the repeated and detailed disclosure in this case, in Pizarro-Ortega, the plaintiff failed to provide ***any damages computation*** for a future surgery. See id.

Relatedly, Defendants rely on an unpublished Nevada Court of Appeals decision for their argument that Plaintiff afforded Defendants no guidance as to the amount of damages sought. Motion at p. 6, citing Turner v. SBSS Holdings, LLC, No. 67315, 2016 WL 2870743, at *1 (Nev. App. May 9, 2016) (unpublished decision). Not only do Defendants ignore NRAP 36(3), which precludes parties for citing unpublished dispositions issued by the Court of Appeals in any Nevada court for any purpose, Defendants misconstrue the appellate decision altogether. Like in Pizarro-Ortega, Turner concerns circumstances in which a party failed to provide any computation of damages in their initial disclosures. Nonetheless, the Nevada Court of Appeals held that this ***complete failure to provide a computation of damages*** was deemed harmless under NRCP 37(c)(1) because the opposing party was on notice of the amount the claimant

[16] Id. at ¶ 69.
[17] Id.

sought to recover through produced ledgers and other documents which addressed its damages. Thus, like in Turner, even if it could be determined that Plaintiff did not meet his disclosure requirements under NRCP 16 (it cannot), Defendants are well aware of the Transferred Assets and their values, and therefore, the damages sought by Plaintiff at tial. Therefore, at best, any error caused by a lack of particularity in Plaintiff's NRCP 16.1 disclosure is harmless.

Finally, Defendants cite to Frantz v. Johnson for the position that a party seeking damages bears the burden of production to provide an evidentiary basis regarding the amount of damages.[18] Plaintiff agrees, and will present valuation evidence, primarily through experts, at the scheduled trial. But, to be sure, Frantz only addresses the importance of a claimant's ability to substantiate their damages claims, it does not address a purported failure to provide a computation of damages.[19] Frantz does make clear, however, that even at trial (and therefore certainly not in the pre-trial disclosures stage, "damages ***need not be proven with mathematical exactitude***," and that uncertainty as to "the actual amount of damages sustained ***will not preclude recovery***." Frantz, 116 Nev. at 469, 999 P.2d at 360 (emphasis added).

B. DEFENDANTS NEVER REQUESTED FURTHER DISCLOSURES, AND MAY NOT DO SO ON THE EVE OF TRIAL WITHOUT COMPLYING WITH THE DISCOVERY RULES.

Defendants argue that they "are left to guess as to Plaintiff's damages presentation at trial," and that they "had no ability to obtain discovery from a personally[-]knowledgeable accuser."[20] As set forth above, Plaintiff has identified his requested relief and requested damages over and over again in this case. There is no secret as to what Plaintiff seeks. Therefore, Defendants' contentions that Plaintiff's damages calculation is "intentionally vague, and intentionally ambiguous," and that Defendants "do not know the scope of the damages sought" are simply false.[21]

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[18] Motion at p. 7.

[19] The Frantz court reviewed a damages award following a bench trial, concluding that the lower court erred by considering damages outside the period of liability. See Frantz v. Johnson, 116 Nev. 455, 470, 999 P.2d 351, 361 (2000). The court only discussed damages to the extent the district court miscalculated the total damages award, not a defect in initial computation or disclosures. See id.

[20] Motion at p. 5

[21] Id. at p. 7.

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Nonetheless, insofar as Defendants' Motion "in limine" is a thinly-veiled attempt to compel further production and disclosures following the close of discovery, it fails. Rule 37(a)(2)(A) of the Nevada Rules of Civil Procedure empowers a party, in the event any other "party fails to make a disclosure required by Rule 16.1(a) or 16.2(a)," to move the court for an order compelling the disclosure. The procedural rules require that the movant include a certification that they have conferred or attempted to confer with the other party in good faith "in an effort to secure the disclosure without court action." NRCP 37(a)(2)(A).

Defendants made ***no effort*** to confer with Plaintiff regarding any perceived disclosure defect.[22] In fact, Plaintiff had no inkling whatsoever that Defendants contended that they did not understand that Plaintiff was seeking recovery of the Transferred Assets until he received the Motion.[23] This is because Defendants made ***no effort*** during discovery or at any other time to seek further supplementation of Plaintiff's NRCP 16.1 disclosures, which addressed damages as early as 2016, including when counsel for all parties were in court the day before the Motion was filed.[24] Moreover, Defendants' Motion is not accompanied by any indicia, let alone certification, that Defendants raised, sought to discuss, or sought to resolve this apparent disclosure dispute.[25] As a result, Defendants made ***no effort*** to satisfy the necessary prerequisites to obtain relief for purported discovery or disclosure violations. See NRCP 37(a)(3) (requiring movant to first make a good faith effort to obtain disclosure without court action as a precondition to motion to compel or for sanctions).

Because no dispute exists, and because Defendants took no effort to resolve any purported dispute prior to filing the Motion, Defendants' request is unwarranted and unjust. The fact that Defendants' Motion comes after the close of discovery, and at the very last opportunity to submit briefing in this matter or allow for proper due process, confirms that same. The Motion must be denied.

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[22] Exh. A at ¶¶ 14-17.
[23] See id.
[24] See id.
[25] See Motion.

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C. DEFENDANTS' MOTION IS NOT A PERMISSIBLE *IN LIMINE* REQUEST BECAUSE IT SEEKS DISCOVERY SANCTIONS, NOT A RULING ON THE ADMISSIBILITY OF EVIDENCE.

As an initial matter, Defendants' Motion fails to present any permissible request for an order *in limine*. Defendants purport to ask that the Court issue a provisional order precluding Plaintiff from introducing evidence of his damages at the time of trial. However, upon further scrutiny, this request is not an admissibility issue in any sense, and is not proffered to streamline issues for trial. Rather, Defendants' Motion is ultimately a dispositive motion for which, even if proper, the deadline for which long passed.

Defendants' Motion "*in limine*" begins with a citation to the procedural rules governing evidentiary sanctions, NRCP 16.1(e)(3) and 37(c)(1), making clear that it is evidentiary sanctions, not an *in limine* ruling, that Defendants seek.[26] Indeed, Defendants concede as much requesting that "a sanction [that] should be an order striking evidence of damages, and effectively striking Plaintiff's claims for relief."[27] By this concession, the Court should deny Defendants' Motion outright for being an impermissible motion *in limine*.[28]

Moreover, even if the Court considers the Motion as a proper request for evidentiary sanctions, the Motion fails. There are two general sources of authority that empower the district court to impose sanctions: (1) the statutorily-proscribed sanctions, including those permitted under NRCP 37; and (2) the court's inherent common-law equitable powers to impose appropriate sanctions to remedy abusive litigation practices. See Young v. Johnny Ribeiro Bldg., 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). Neither is applicable here.

1. Defendants' Fail to Demonstrate any Entitlement to Statutory Sanctions.

NRCP 37(b)(2) provides for potential sanctions for a party's failure to provide or permit discovery pursuant to a court order. NRCP 37(c)(1) similarly provides that, assuming arguendo that disclosures were not made, sanctions are not available if such failure is harmless. See also

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[26] Id. at pp. 2-3.
[27] Id. at p. 3.
[28] The Court also has the authority to grant an award of fees and costs expended to defend the Motion under NRCP 37(a)(3)(B), and Plaintiff urges the Court to exercise such discretion here where the Motion has no proper purpose.

Pizarro-Ortega v. Cervantes-Lopez, 396 P.3d 783, 787 (Nev. 2017) (reh'g denied Sept. 28, 2017) (clarifying that the preclusive effect of NRCP 37(c)(1) does not apply if there is a "substantial justification" for a failure to disclose under NRCP 16.1, or if the failure is harmless) (emphasis added).

Defendants' invocation of NRCP 37(c)(1) falters for three sperate and distinct reasons. First, there was no court order that Plaintiff failed to comply with, nor was there any failure by Plaintiff to provide discovery. Second, even if NRCP 16.1 can be considered a court rule, as set forth at length herein, Plaintiff complied. Third, and finally, even if there was an initial disclosure deficiency, it was indisputably harmless. Indeed, the Supreme Court of Nevada has held that preclusive sanctions are not appropriate in instances of a harmless failure to supplement NRCP 16.1 disclosures. See Pizarro-Ortega, 396 P.3d at 788 (finding that an opposing party's "substantial rights were not materially affected" by the district court's decision to allow treating physician testimony regarding a future surgery "without having provided a cost computation under NRCP 16.1(a)(1)(C).").[29] Here, even if Plaintiff's initial computation of damages was deficient, Defendants benefitted from ample discovery as to the same after the fact, including Plaintiff's recitation of his damages in his *Motion for Partial Summary Judgment*. NRCP 37(c)(1), the Pizarro-Ortega court, and Defendants' own rationale confirm that any perceived disclosure deficiency is, at worst, harmless.

2. Defendants Fail to Identify any Prejudice Justifying Equitable Sanctions.

In addition to their request for statutory sanctions, Defendants demand equitable relief in the form of an order striking Plaintiff's claims for relief. Specifically, Defendants argue that "case concluding sanctions" are warranted in this instance due to a purported NRCP 16.1 supplementation issue.[30]

While the district court has "inherent equitable powers to dismiss actions or enter default

[29] "Although respondents did not provide appellant with a computation of their future medical expenses before trial, appellant has not shown that she was unable to contest the reasonableness of the amounts requested, and we therefore conclude that appellant's substantial rights were not materially affected so as to warrant a new trial." Pizarro-Ortega, 396 P.3d at 785.

[30] Motion at p. 4.

judgments for . . . abusive litigation practices [. . .] fundamental notions of due process require that the discovery sanctions for discovery abuses be just and that the sanctions relate to the claims which were at issue in the discovery order which is violated." Young, 106 Nev. at 92, 787 P.2d at 779 (citing Wyle v. Reynolds Indus., Inc., 709 F.2d585, 591 (9th Cir. 1983)); see also Young, 106 Nev. at 92, 787 P.2d at 779 (Though the Court may issue an Order imposing sanctions other than those enumerated by statute, those sanctions must both be "just and . . . relate to the claims which [are] at issue."). If a party requests a case-concluding sanction, including dismissal, issuance of a default, or the striking of a pleading, the Court must conduct an evidentiary hearing. See Bahena v. Goodyear Tire & Rubber Co., 126 Nev. 606, 611, 245 P.3d 1182, 1185 (2010) (discussing the district court's obligation to hold an evidentiary hearing prior to issuing case-concluding sanctions). Where the requested sanction is one of dismissal with prejudice, the Nevada Supreme Court holds that a "heightened standard of review" applies. Young, 106 Nev. at 92, 787 P.2d at 779.

Two essential points govern the Court's consideration of case-dispositive sanctions: (1) sanctions for discovery abuses must "be just," and "relate to the claims which were at issue;" and (2) sanctions "should be imposed only after thoughtful consideration of all the factors involved in a particular case." Id. 106 Nev. at 92, 787 P.2d at 780. The factors the Court must consider at an evidentiary hearing regarding case-dispositive sanctions include, without limitation:

> [T]he degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring adjudication on the merits, whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and the need to deter both the parties and future litigants from similar abuses.

Id., at 93, 787 at 780 (emphasis added). Importantly, public policy prefers that a case is tried on the merits rather than the technicalities of discovery disputes. Id.

Here, ignoring the consideration of all of those enumerated factors, Defendants summarily argue that, because they now want further edification regarding Plaintiff's computation of damages, *without ever having previously requested it from Plaintiff*, the Court to

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strike Plaintiff's claims for relief in their entirety, without an evidentiary hearing or trial on the merits. Yet Defendants do not claim any real prejudice. While they feign ignorance on what damages Plaintiff claims, Plaintiff has made it clear at every turn that his request is to unwind the fraudulent transfers and return the Transferred Assets or, if they are not available, to recover their equivalent value, which Plaintiff has repeatedly provided to Defendants during discovery and motion practice.

Therefore, Defendants' request is entirely unsupported by Young and its progeny because Defendants have not met their threshold burden to identify redressable prejudice resulting from a discovery abuse. Moreover, even if Defendants had demonstrated any discovery issue or resultant prejudice, Plaintiff would be entitled to an evidentiary hearing as to the same before the Court could consider issuing dispositive sanctions. Just as Defendants' request for statutory sanctions is unsupported, Defendants' request for equitable sanctions likewise fails.

3. Defendants' Unjustified Request for Case Dispositive Sanctions Yields a Grossly Disproportionate Result.

As discussed herein, an evidentiary order precluding the admission of damages is tantamount to a case-dispositive sanction in a fraudulent transfer action. In context, Defendants' Motion seeks an untenable result: even if Defendants' recitation regarding the procedural history of this dispute and Plaintiff's disclosures was accurate (it is not), and even if Defendants' Motion was supported by applicable authority (again, it is not), Defendants' Motion *still* demands an unjustified result. Indeed, ***regardless*** of the basis for Defendants' request, case-dispositive sanctions are impermissibly disproportionate to any alleged harm.

The Court's authority to issue remedial sanctions is, of course, to remedy a party's failure to comply with a court order, failure to disclose evidence, and the like. NRCP 37(b)(2) authorizes the Court to "make such orders in regard to the failure (to obey a court order) ***as are just***." (emphasis added). Similarly, NRCP 37(c)(1) does not authorize the Court to issue sanction orders if any failure to disclose "***is harmless***." (a mandate reflected in FRCP 37(c)(1)'s language prohibiting sanctions if a "failure [to disclose or supplement] was ***substantially justified*** or ***is harmless***.") (emphasis added). WDCR 21 likewise requires the court to issue

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orders and impose such sanctions "***as are just***." (emphasis added). Even the amended FRCP 37(e)(1) requires a finding of prejudice from ESI preservation before permitting "measures ***no greater than necessary to cure the prejudice***." (emphasis added). Indeed, FRCP 37(e)(2) only allows an adverse inference, rebuttable presumption, or dispositive sanction upon finding that the party acted with the ***intent to deprive another party of the information's use***." (emphasis added).

Nevada caselaw likewise emphasizes prejudice, intent, and proportionality. The Young court held that "due process require[s] that the discovery sanctions for discovery abuses ***be just*** and that the ***sanctions relate to the claims*** [at issue]." Young, 106 Nev. at 92, 787 P.2d at 779 (citation and quotation omitted) (emphasis added). As discussed above, the Young court enumerated a number of factors to consider, including "***degree of willfulness*** of the offending party, the extent to which the non-offending party would be ***prejudiced by a lesser sanction***, the ***severity of the sanction*** of dismissal relative to the ***severity of the discovery abuse*** [and . . . the feasibility and fairness of alternative, ***less severe sanctions***." Id., 106 at 93, 787 P.2d at 780 (emphasis added); see also Bahena, 126 Nev. at 252, 235 P.3d at 598. The Supreme Court of Nevada has also analyzed whether a sanction order is "***manifestly unjust***" considering the circumstances. Bahena, 126 Nev. at 252, 235 P.3d at 598 (citation and quotation omitted) (emphasis added). In sum, Nevada law requires that sanctions for discovery violations be commensurate and just considering the prejudice suffered by the non-offending party.

In this instance, Defendants' Motion "*in limine*" openly mocks any concept of proportionality or equity. Indeed, Defendants ask the Court to disregard Plaintiff's repeated disclosure of his damages, ignore the ample evidentiary record regarding Plaintiff's damages, and endorse Defendants' refusal to seek further clarity regarding Plaintiff's damages during discovery. The requested relief has no bearing on any alleged prejudice, and any order in Defendants' favor would incentivize Defendants' indifference regarding any alleged discovery dispute. Defendants may not bury their heads in the sand throughout years of discovery, only to seek dispositive sanctions at the last minute over Plaintiff's years-old initial disclosures. This result is categorically inconsistent with Nevada law, and any order restricting Plaintiff's damages

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presentation at trial is tantamount to judgment in Defendants' favor. Defendants' Motion must be denied in its entirety.

III.

CONCLUSION

Considering the foregoing, Plaintiff respectfully requests that the Court enter an order denying the Defendants' Motion in total, for an award of fees and costs incurred to defend against the Motion under NRCP 37(a)(3), and such other and further relief as the Court deems just and equitable.

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 28th day of September, 2018.

GARMAN TURNER GORDON LLP

/s/ Andrew P. Dunning, Esq.
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TERESA M. PILATOWICZ, ESQ.
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Special Counsel for Plaintiff, Trustee

INDEX OF EXHIBITS

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[31] Exhibit page counts are exclusive of exhibit slip sheets.

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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 **OPPOSITION TO DEFENDANTS' MOTIONS IN LIMINE** 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:

Frank Gilmore, Esq.
Lindsay L. Liddell, Esq.
ROBISON, SHARP, SULLIVAN & BRUST
71 Washington Street
Reno, NV 89503

DATED this 28th day of September, 2018.

/s/ Kelli Wightman
An Employee of GARMAN TURNER GORDON LLP

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Jacqueline Bryant
Clerk of the Court
Transaction # 6903877 : yviloria

Exhibit A

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GARMAN TURNER GORDON LLP
ERIKA PIKE TURNER, ESQ.
Nevada Bar No. 6454
E-mail: eturner@gtg.legal
TERESA M. PILATOWICZ, ESQ.
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ANDREW P. DUNNING, ESQ.
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E-mail: adunning@gtg.legal
650 White Drive, Ste. 100
Las Vegas, Nevada 89119
Telephone 725-777-3000
Special Counsel to Plaintiff,
William A. Leonard, Trustee

IN THE SECOND JUDICIAL DISTRICT COURT OF

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

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, vs. SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, and individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	**CASE NO.: CV13-02663** **DEPT. NO.: 4** **DECLARATION OF TERESA M. PILATOWICZ, ESQ. IN SUPPORT OF OPPOSITION TO DEFENDANT'S MOTIONS IN LIMINE**

I, Teresa M. Pilatowicz, declare under penalty of perjury as follows:

1. I am an attorney with the law firm of Garman Turner Gordon LLP, counsel for Plaintiff William A. Leonard ("Plaintiff"). I am licensed to practice law in the State of Nevada, and have been since 2005. I make this declaration in support of Plaintiff's *Opposition to the Defendants' Motions in Limine*.

Plaintiff Disclosed his Damages from the Onset of Litigation

2. Plaintiff identified transfers at issue, as well as the approximate values of certain of those transfers, in his May 15, 2015, Amended Complaint; Plaintiff testified regarding the same on March 25, 2016.

3. Plaintiff provided a computation of damages in his February 19, 2016, Amended Disclosures Pursuant to NRCP 16.1(A)(1). A true and correct copy of Plaintiff's Amended Disclosures is attached as "Exhibit A-1."

4. Throughout discovery in this matter, Plaintiff made repeated disclosures regarding the extent of Plaintiff's damages, and the parties engaged in substantial discovery regarding Plaintiff's damages.

The Parties Engaged in Further Discovery Regarding Damages

5. Plaintiff served his Expert Witness Disclosure of James McGovern on January 26, 2016, as well as Mr. McGovern's expert report, which provided a valuation of Superpumper, Inc.. True and correct copies of Plaintiff's Expert Witnesses Disclosures (without exhibits) are attached as "Exhibit A-2."

6. Plaintiff served his Expert Witness Disclosure of William Kimmel on January 26, 2016, as well, which included Mr. Kimmel's expert report and appraisal regarding the Nevada properties.

7. Defendants served their Expert Witness Disclosure on January 26, 2016, as well as the Expert Report of Michelle Salazar, which provided valuation opinions regarding Superpumper, Inc. True and correct copies of Defendants' Expert Witness Disclosures (without exhibits) are attached as "Exhibit A-3."

8. Defendants served their Rebuttal Expert Witnesses Disclosure on February 29, 2016, as well as the Rebuttal Expert Report of Michelle Salazar and information regarding purported rebuttal witness Jan Friederich, which collectively addressed the opinions and conclusions of Plaintiff's valuation expert.

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. . .

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Las Vegas, NV 89119
725-777-3000

9. Plaintiff and Defendants deposed Gary Krausz, the NRCP 30(b)(6) designee for Gursey Schneider, the third-party auditor of Superpumper, Inc., on March 16, 2016, on issues related to the valuation of Superpumper.

10. Defendants deposed Plaintiff's valuation expert James McGovern on March 28, 2016, during which Mr. McGovern testified at length regarding his opinions and the value of Superpumper.

11. Plaintiff and Defendants deposed Stanton Bernstein, the accountant for Superpumper, Inc., on May 17, 2017, on issues related to the valuation of Superpumper.

12. Plaintiff filed his *Motion for Partial Summary Judgment* on August 17, 2017, which included an in-depth analysis of the transfers at-issue, their respective values, and the damages sought. A true and correct copy of Plaintiff's Motion for Partial Summary Judgment is attached as "Exhibit A-4."

13. Plaintiff filed a Statement of Undisputed Facts in support of his Motion for Partial Summary Judgment on August 17, 2017, which provided an additional twenty-three pages of facts and ninety-one exhibits, much of which addressed the transfers at-issue, their respective values, and damages sought. A true and correct copy of Plaintiff's Statement of Undisputed Facts in support of his Motion for Partial Summary Judgment (without exhibits) is attached as "Exhibit A-5."

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Defendants Failed to Identify any Dispute Regarding Damages Until September 12, 2018

14. Prior to receiving Defendants' Motion in Limine, I had no personal knowledge of any dispute regarding disclosure of Plaintiff's computation of damages.

15. Prior to receiving Defendants' Motion in Limine, Defendants made no effort to confer with Plaintiff regarding Plaintiff's computation of damages.

16. Plaintiff's counsel is unaware of any effort by Defendants to obtain further supplementation of Plaintiff's NRCP 16.1 disclosures, during discovery or otherwise.

17. Defendants did not meet and confer with Plaintiff in any sense regarding Plaintiff's disclosures or the extent of Plaintiff's damages prior to filing their Motion in Limine.

Dated this 28th of September, 2018.

/s/ Teresa M. Pilatowicz
TERESA M. PILATOWICZ, Declarant

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 28th day of September 2018.

GARMAN TURNER GORDON LLP

/s/ Teresa M. Pilatowicz, Esq.
ERIKA PIKE TURNER, ESQ.
TERESA M. PILATOWICZ, ESQ.
ANDREW P. DUNNING, ESQ.
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Telephone 725-777-3000
Special Counsel to Plaintiff,
William A. Leonard, Trustee

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EXHIBIT A-1

DISC
GARMAN TURNER GORDON LLP
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Special Counsel to Trustee

IN THE SECOND JUDICIAL DISTRICT COURT OF

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

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, vs. SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, and individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	**CASE NO.: CV13-02663** **DEPT. NO.: 1** **PLAINTIFF'S AMENDED DISCLOSURES PURSUANT TO NRCP 16.1(A)(1)**

TO: ALL PARTIES IN INTEREST

Plaintiff William A. Leonard ("Plaintiff"), by and through his attorneys, Garman Turner Gordon, hereby provides the following N.R.C.P. 16.1 Disclosures:

A. <u>NRCP 16.1(a)(1)(A) WITNESS LIST</u>

The following witnesses have knowledge regarding the facts and circumstances out of which this matter arises:

1. William Leonard, Trustee
   c/o Garman Turner Gordon LLP
   650 White Drive, Suite 100

Las Vegas, Nevada 89119

Mr. Leonard is expected to have knowledge regarding the allegations in the amended complaint, including creditors in Paul Morabito's Chapter 11 case that remain unpaid and the inability to collect against the assets that have been transferred.

2. Sean Higgins
9811 W. Charleston Blvd. Suite 2-379
Las Vegas, NV 89117
(702) 327-0295

Mr. Higgins is expected to have knowledge regarding the allegations in the amended complaint, including the unpaid amounts owed to JH, Inc., Jerry Herbst, and Berry-Hinckley Industries.

3. Timothy Herbst
5195 Las Vegas Blvd. S.
Las Vegas, Nevada 89119

Mr. Herbst is expected to have knowledge regarding the allegations in the amended complaint, including the unpaid amounts owed to JH, Inc., Jerry Herbst, and Berry-Hinckley Industries.

4. Paul Morabito
c/o Frank Gilmore, Esq.
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, Nevada 89503

Mr. Morabito is expected to have knowledge regarding the allegations in the amended complaint, and assertions and defenses in the Answer including, but not limited to, the assets that have been transferred.

5. Edward Bayuk
c/o Frank Gilmore, Esq.
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, Nevada 89503

Mr. Bayuk, individually and in his capacity as Trustee of the Edward William Bayuk Living Trust, is expected to have knowledge regarding the allegations in the amended complaint,

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Las Vegas, NV 89119
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and assertions and defenses in the Answer including, but not limited to, the assets that have been transferred.

6. Salvatore Morabito
c/o Frank Gilmore, Esq.
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, Nevada 89503

Mr. Morabito is expected to have knowledge regarding the allegations in the amended complaint, and assertions and defenses in the Answer including, but not limited to, the assets that have been transferred.

7. Dennis Vacco
Lippes Mathias Wexler Friedman LLP
50 Fountain Plaza, Suite 1700
Buffalo, New York 14202

Mr. Vacco is expected to have knowledge regarding the allegations in the amended complaint, and assertions and defenses in the Answer including, but not limited to, the assets that have been transferred.

8. Person Most Knowledgeable, Gursey Schneider LLP
1888 Century Park E, Suite 900
Los Angeles, California 90067

The Person Most Knowledgeable of Gursey Schneider is expected to have knowledge regarding the allegations in the amended complaint, including, but not limited to, the assets that have been transferred and the assets and liabilities of Superpumper, Inc.

9. Person Most Knowledgeable, Superpumper, Inc.
c/o Frank Gilmore, Esq.
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, Nevada 89503

The Person Most Knowledgeable of Superpumper, Inc. is expected to have knowledge regarding the allegations in the amended complaint, and assertions and defenses in the Answer including, but not limited to, the assets that have been transferred and the assets and liabilities of Superpumper, Inc.

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10. Person Most Knowledgeable, Snowshoe Petroleum, Inc.
c/o Frank Gilmore, Esq.
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, Nevada 89503

The Person Most Knowledgeable of Superpumper, Inc. is expected to have knowledge regarding the allegations in the amended complaint, and assertions and defenses in the Answer including, but not limited to, the assets that have been transferred.

11. Stanton Bernstein
6320 Canoga Ave - Ste 1500
Woodland Hills, CA 91367
(818) 596-2139

Mr. Bernstein is expected to have knowledge regarding the allegations in the amended complaint including, but not limited to, the assets that have been transferred and the assets and liabilities of Superpumper, Inc.

12. Custodian of Records,
Hancock Park Insurance Services
2338 E. Anaheim St., No. 444
Long Beach, California 90804

The Custodian of Records of Hancock Park Insurance Services is expected to have knowledge regarding the allegations in the amended complaint, including, but not limited to, the value of the assets that have been transferred.

B. <u>NRCP 16.1(a)(1)(B) DOCUMENTS, DATA COMPILATION AND TANGIBLE THINGS</u>

1. All Documents disclosed in the bankruptcy case of Paul Morabito, Case No. BK-N-13-51237-GWZ, including but not limited to:

    a. Morabito (341).000001-007104
    b. LMWF000001-LMWF000477, LMWF000500-LMWF001000
    c. RBSL_Morabito 000001-RBSL_Morabito 000364
    d. PAM000001-PAM000006
    e. PW001-PW020

2. Documents disclosed by Lippes Mathias Wexler Friedman LLP in the above-captioned case, LMWF000001-LMWF000180.

3. Deposition of Stanton R. Bernstein dated May 11, 2011, Bates No. WL000001 – WL000256.

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4. Deposition of Paul A. Morabito dated March 3, 2011, Bates No. WL000257 – WL002108.

5. Expert Report of Craig L. Greene, CCPA/CFF, CFE, MCJ, Bates No. WL002109 – WL002187.

6. Settlement Agreement and Mutual Release, Bates No. WL002188 – WL002139.

7. Joint Deposition and 2004 examination of Paul A. Morabito dated July 23, 2014, Bates No. WL002320 – WL002535

8. Transcript from Paul Morabito's 341 Meeting of Creditors dated March 12, 2015, Bates No. WL002536 – WL002726.

9. Paul Morabito's responses to discovery responses related to dismissal motion in Bankruptcy Case, Bates No. WL002727 – WL002743.

10. Documents produced by Peitzman Weg LLP, Bates No. WL002743 – WL002776.

11. Documents related to Settlement Agreement, Loan Agreement, Modification & Release between Paul Morabito and Bank of America, Bates No. WL002777 – WL002801.

12. Paul Morabito's 2013 Tax Return, Bates No. WL002802 – WL002852.

13. Judgment dated August 23, 2011 and entered in Consolidated Nevada Corp. v. JH, Inc., et al, Case No. CV07-02764, Bates Nos.WL002853 – WL002854.

14. Findings of Facts, Conclusions of Law, and Judgment dated October 12, 2010 and entered in Consolidated Nevada Corp. v. JH, Inc., et al, Case No. CV07-02764, Bates Nos.WL002855 – WL002870.

15. Confession of Judgment dated June 18, 2013 and entered in Consolidated Nevada Corp. v. JH, Inc., et al, Case No. CV07-02764, Bates No. WL002871 – WL002895.

16. State of California, Office of Real Estate Appraisers, Decision and Order related to Mark Justmann dated April 26, 2013, Bates Nos. WL002896 – WL002908.

17. All claims filed in in the bankruptcy case of Paul Morabito, Case No. BK-N-13-51237-GWZ, Bates Nos. WL002909 – WL003114.

18. Declarations of Paul Morabito filed in the in the bankruptcy case of Paul Morabito, Case No. BK-N-13-51237-GWZ, including but not limited to ECF Nos. 22, 43, 46, 115. Bates Nos. WL003115 – WL003131.

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19. Schedules and Statements of Financial Affairs filed in the in the bankruptcy case of Paul Morabito, Case No. BK-N-13-51237-GWZ, including but not limited to ECF Nos. 211, 249. Bates Nos. WL003132 – WL003183.

20. All documents identified by any other party to this lawsuit.

C. NRCP 16.1(a)(1)(C) DAMAGES

Plaintiff is entitled to recover assets transferred or the value thereof pursuant to Nev. Rev. Stat. §§ 112.210 and 112.220, which Plaintiff believes to be no less than $8,500,000. Plaintiff will supplement as necessary during discovery.

D. NRCP 16.1(a)(1)(D) INSURANCE AGREEMENT

Plaintiff is unaware of any insurance agreements that are applicable to this matter.

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 19th of February, 2016.

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 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 the attached **PLAINTIFF'S DISCLOSURES PURSUANT TO NRCP 16.1(A)(1)** on the party(s) set forth below by:

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

Certified Mail, Return Receipt Requested

Via Facsimile (Fax)

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)

Hand Delivery

addressed as follows:

Frank Gilmore
Barry L. Breslow
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, NV 89503

DATED this 19th day of February 2016.

/s/ Vicki DiMaio
An Employee of GARMAN TURNER GORDON

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

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EXHIBIT A-2

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Telephone 725-777-3000

Special Counsel to Trustee

IN THE SECOND JUDICIAL DISTRICT COURT OF

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

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

PLAINTIFF'S EXPERT WITNESS DISCLOSURE OF JAMES L. MCGOVERN

TO: ALL PARTIES IN INTEREST

Plaintiff William A. Leonard, Trustee for the Bankruptcy Estate of Paul Anthony Morabito ("Trustee"), by and through counsel, the law firm of Garman Turner Gordon, LLP and pursuant to Nevada Rule 16.1(a)(1), herby discloses as his expert witness whom may be called at the time of trial:

. .

James L. McGovern
McGovern & Greene LLP
2831 St. Rose Parkway, Suite 227
Henderson, Nevada 89052
(702) 818-1168

The opinions expressed by Mr. McGovern are set forth in the attached expert report, *see* Bates Nos. McGovern 000001-000074. Moreover Mr. McGovern's curriculum vitae, fee schedule, publications/presentations and prior court testimony are set forth in McGovern 000044-000052, McGovern 000075-000076, attached hereto.

Trustee reserves the right to supplement this expert witness designation and the opinions of Mr. McGovern.

Dated this 26th day of January, 2016.

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 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 **PLAINTIFF'S EXPERT WITNESS DISCLOSURE OF JAMES L. MCGOVERN** 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)

XXX 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 26th day of January, 2016.

/s/ Jenifer Cannon
An Employee of GARMAN TURNER GORDON LLP

Garman Turner Gordon LLP
Attorneys At Law
650 White Dr., Suite 100
Las Vegas, Nevada 89119
(725) 777-3000

GARMAN TURNER GORDON LLP
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Telephone 725-777-3000

Special Counsel to Trustee

IN THE SECOND JUDICIAL DISTRICT COURT OF

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

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

PLAINTIFF'S EXPERT WITNESS DISCLOSURE OF WILLIAM KIMMEL, MAI, SREA

TO: ALL PARTIES IN INTEREST

Plaintiff William A. Leonard, Trustee for the Bankruptcy Estate of Paul Anthony Morabito ("Trustee"), by and through counsel, the law firm of Garman Turner Gordon, LLP and pursuant to Nevada Rule 16.1(a)(1), herby discloses as his expert witness whom may be called at the time of trial:

William G. Kimmel, MAI, SREA

William G. Kimmel & Associates
1281 Terminal Way, Suite 205
Reno, Nevada 89502
(775) 323-6400

The opinions expressed by Mr. Kimmel are set forth in the attached appraisal, *see* Bates Nos. Kimmel 000001-00073, 00080-00083. Moreover Mr. Kimmel's curriculum vitae, fee schedule, publications/presentations and prior court testimony are set forth in Kimmel 000074-000080 attached hereto.

Trustee reserves the right to supplement this expert witness designation and the opinions of Mr. Kimmel.

Dated this 26th day of January, 2016.

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 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 **PLAINTIFF'S EXPERT WITNESS DISCLOSURE OF WILLIAM KIMMEL, MAI, SREA** 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

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____ Via Facsimile (Fax)

XXX Via E-Mail

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____ 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 26th day of January, 2016.

/s/ Jenifer Cannon
An Employee of GARMAN TURNER GORDON LLP

Garman Turner Gordon LLP
Attorneys At Law
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EXHIBIT A-3

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Attorneys for Defendants

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**

DEFENDANTS' EXPERT WITNESS DISCLOSURE

Defendants above named, by and through their attorneys of record, and pursuant to NRCP 16.1(a)(2), by and through their respective counsel of record, hereby disclose the identity of their expert who may provide testimony at the trial in this matter. Defendants reserve the right to use the following expert as both case-in-chief and rebuttal expert. As set forth herein and in the attached report, this disclosure will be supplemented as additional necessary discovery is received.

///

1. MICHELLE SALAZAR, Litigation and Valuation Consultants, Inc., 5488 Reno Corporate Drive, Suite 200, Reno, Nevada 89511, (775) 825-7982

a. Ms. Salazar's qualifications, including her publications, are set forth in her curriculum vitae which is attached hereto as part of **Exhibit 1**.

b. Prior cases in which Ms. Salazar has testified as an expert at trial or by deposition within the preceding four years are attached hereto as part of **Exhibit 1**.

c. Ms. Salazar's fee schedule is attached hereto as part of **Exhibit 1**.

d. Ms. Salazar report is attached hereto as part of **Exhibit 1**.

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 26th day of January, 2016.

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

BARRY I. BRESLOW, ESQ.
FRANK C. GILMORE, ESQ.
Attorneys for Defendants

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 **EXPERT WITNESS DISCLOSURE** all parties to this action by the method(s) indicated below:

xx 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:

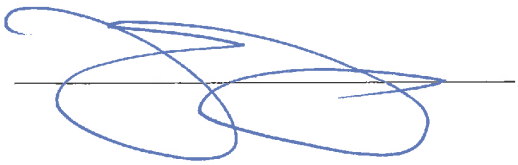
xx by email addressed to:

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 26th day of January, 2016.



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Attorneys for Defendants

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

DEFENDANTS' REBUTTAL EXPERT WITNESS DISCLOSURE

Defendants above named, by and through their attorneys of record, and pursuant to NRCP 16.1(a)(2), by and through their respective counsel of record, hereby disclose the identity of their rebuttal experts who may provide testimony at the trial in this matter. Defendants reserve the right to use expert Michelle Salazar in rebuttal to the report of James L. McGovern, and Jan Frederich as a non-retained expert rebuttal witness to the report of James L. McGovern. As set forth herein and in the attached report, this disclosure will be supplemented as additional necessary discovery is received.

1. MICHELLE SALAZAR, Litigation and Valuation Consultants, Inc., 5488 Reno Corporate Drive, Suite 200, Reno, Nevada 89511, (775) 825-7982

a. Ms. Salazar's qualifications, including her publications, are set forth in her curriculum vitae which was attached to her January 25, 2016 Report as part of Exhibit 1.

b. Prior cases in which Ms. Salazar has testified as an expert at trial or by deposition within the preceding four years was attached to her January 25, 2016 Report as part of Exhibit 1.

c. Ms. Salazar's fee schedule was attached to her January 25, 2016 Report as part of Exhibit 1.

d. Ms. Salazar's rebuttal report is attached hereto as **Exhibit 1**.

2. JAN FRIEDERICH, 9705 Pebble Beach Dr, NE, Albuquerque, NM 87111; Phone 505-269-6190. Mr. Friederich is Defendants' non-retained expert rebuttal witness. He was a consultant hired by Superpumper to assist with the Matrix evaluation. Mr. Friederich liaised with Dennis Vacco and Spencer Cavalier to accomplish the valuation and provide insight as to the Superpumper financials.

a. Mr. Friederich's Resume and education experience is attached as **Exhibit 2**.

b. Mr. Friederich is not being compensated for his testimony, but will have his travel expenses reimbursed to him.

c. Mr. Friederich's opinions are summarized as follows:

i. James McGovern's Market Value analysis is faulty:

a) Fuel Sales should be measured in Gallons and not in dollars, and a reasonable Margin in cents/gallon should be applied to determine an Income stream;

b) A multiple of 5.9 for future expected EBITDA is almost twice as high as the industry standard. Industry standard for leased stores with above Market lease rates are closer to a multiple of 3 times EBITDA;

c) Receivables should not be assumed as collectible and will not be acquired by any buyer without certainty and should not be part of a company's

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Market value solely based on an assumption; and

d) The company's value in 2010 was negatively impacted by the fact that the money Superpumper received upfront from Shell would have to be repaid or amortized over the term of the contract. The unamortized portion is still today $2.5 million.

For the reasons set forth above, Mr. Friederich believes the Matrix Valuation is much closer to a realistic Market price than is McGovern's opinion of value.

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 29th day of February, 2016.

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A Professional Corporation
71 Washington Street
Reno, Nevada 89503

BARRY L. BRESLOW, ESQ.
FRANK C. GILMORE, ESQ.
Attorneys for Defendants

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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 **DEFENDANTS' REBUTTAL EXPERT WITNESS DISCLOSURE** 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
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Attorneys for Plaintiff

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

Gerald Gordon, Esq.
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___ by personal delivery/hand delivery addressed to:

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Gerald Gordon, Esq.
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___ by facsimile (fax) addressed to:

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

DATED: This 29th day of February, 2016.

Mary Carroll Carr

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EXHIBIT LIST

EXHIBIT NO.	DESCRIPTION	NO. OF PAGES
1	Michelle Salazar's rebuttal report	6
2	Jan Frederich Resume	1

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Clerk of the Court
Transaction # 6903877 : yviloria

EXHIBIT A-4

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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
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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

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"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,

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:

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> 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. <u>Morabito Starts to Transfer His Assets to Avoid Collection.</u>

1. <u>The $6,000,000 Sefton Trustees Transfer.</u>

21. On September 15, 2010, just *two days* after the Oral Judgment, Morabito transferred $6 million (the "<u>Off-Shore Funds</u>") to an entity known as Sefton Trustees ("<u>Sefton</u>"). *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. <u>Morabito Exchanges His Majority Interest in the Laguna Properties for Bayuk's Minority Interests in a Reno Property.</u>

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 "<u>El Camino Property</u>"), (2) 370 Los Olivos, Laguna Beach, California (the "<u>Los</u>

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),

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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.

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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. <u>Creditors Are Left with Only One Tangible Asset Against Which They Can Collect After the Transfers.</u>

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 ***<u>only</u>*** 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. <u>See</u> 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. <u>Morabito Continues to Control the Transferred Properties.</u>

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 "<u>Nella Deal</u>"). 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

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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.

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> 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.

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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.

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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. <u>Legal Standard.</u>

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

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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]

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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]

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

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

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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

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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).

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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.

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[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

$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."

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.

GARMAN TURNER GORDON LLP

/s/ Teresa M. Pilatowicz
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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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Special Counsel for Plaintiff

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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Clerk of the Court
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EXHIBIT A-5

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Clerk of the Court
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2200
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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

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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. <u>Morabito Starts to Transfer His Assets to Avoid Collection.</u>

1. <u>The $6,000,000 Sefton Trustees Transfer.</u>

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

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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

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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.

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

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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, 1. 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

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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

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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.

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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. <u>Morabito Continues to Control the Transferred Properties.</u>

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 "<u>Nella Deal</u>"). 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 ("<u>Superpumper Properties</u>"), 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 ("<u>Superpumper</u>") 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.

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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?

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> 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)

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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.

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.

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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.

GARMAN TURNER GORDON LLP

/s/ Teresa M. Pilatowicz
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Special Counsel for Plaintiff

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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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Special Counsel for Plaintiff

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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14	Morabito BMO Bank Statement – September 2010 (Redacted)	3
15	Cited Portions of Morabito 341 Meeting (June 2015) Transcript	5
16	Cited Portions of Morabito 341 Meeting (December 2015) Transcript	25
17	*Purchase and Sale Agreement*	9
18	*First Amendment to Purchase and Sale Agreement*	3
19	Defendants' Appraisal of Reno Property	31
20	Plaintiff's Appraisal of Reno Property and Sparks Property	78
21	Reno Property - 2012 Declaration of Value	2

[8] Exhibit page counts are exclusive of exhibit slip sheets.

22	Reno Property - 2012 closing statement	2
23	Bill of Sale	5
24	Baruk Properties Operating Agreement	11
25	Bayuk Trust – Responses to Interrogatories	11
26	Defendants' Appraisal of 1461 Glenneyre and 520 Glenneyre	51
27	Defendants' Appraisal of Palm Springs Property	30
28	Defendants' Appraisal of Mary Flemming Property	31
29	*Baruk Membership Transfer Agreement*	8
30	Baruk Note	4
31	Baruk Properties/Snowshoe Properties Certificate of Merger	2
32	Articles of Merger	11
33	Cited Portions of Edward Bayuk Deposition Transcript Bayuk Transcript Pg. 87; p. 31-33; P. 110; p. 120, p. 130-133, p. 175, p. 199-200	15
34	Grant Deed from Snowshoe to Bayuk Living Trust	2
35	*General Conveyance* – Woodland Heights	7
36	Defendants' Appraisal of El Camino Property	27
37	Cited Portions of Morabito 341 Meeting (Vol V.) Transcript	3
38	Intentionally omitted	2
39	Bayuk First Ledger	3
40	Amortization Schedule	4
41	Bayuk Second Ledger	4
42	Email chain between Vacco and Morabito dated 11/10/11	4
43	Morabito Personal Financial Statement April 2012	7
44	Cited Portions of Morabito 341 Meeting (March 2015) Transcript	7
45	*Shareholder Interest Purchase Agreement*	6
46	Morabito Personal Financial Statement May 2009	2
47	Email chain between Naz Afshar and Darren Takemoto dated 3/10/10	3
48	Email chain between Paul Morabito and jon@aim13.com dated	2

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	3/10/10	
49	Email chain between Morabito, Vacco and Michael Pace dated 5/20/10	2
50	Morabito Personal Financial Statement May 2010	2
51	Email chain between Morabito and George Garner dated 6/28/10	2
52	Merger Documents – Consolidated Western Corporation and Superpumper	19
53	Intentionally omitted	2
54	BBVA Compass Report December 2010	31
55	Matrix Retention Agreement and Matric Valuation	37
56	Plaintiff's Superpumper Valuation	75
57	LMWF Reductions E-Mail	2
58	*Declaration of Paul A. Morabito in Support of Opposition to Motion of JH, Inc., Jerry Herbst, and Berry-Hinckley Industries for Order Prohibiting Debtor from Using, Acquiring Or Transferring Assets Pursuant to 11 U.S.C. §§ 105 and 303(f) Pending Appointment of Trustee*	5
59	Snowshoe Properties, LLC Formation Documents	2
60	SUPERPUMPER 000001-000010 – Superpumper Note and Successor Note	11
61	Compass Term Loan	9
62	Cited Portions of Salvatore Morabito Deposition Transcript	3
63	Intentionally omitted	2
64	Edward Bayuk's Answers to Plaintiff's First Set of Interrogatories	14
65	Email between Morabito and Stan Bernstein dated 10/12/12	2
66	Intentionally omitted	2
67	Cited Portions of Dennis Vacco (October 2015) Transcript	3
68	April 2011 Nella Oil Documents	8
69	Vacco – July 2017 Depo; P. 74; P. 171-174	7
70	Cited Portions of Dennis Vacco (July 2017) Transcript	3
71	Email chain between Vacco and Morabito dated 8/7/11	2

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72	Email chain between Vacco and Morabito dated 8/24/11	2
73	BofA and Morabito Settlement Agreement	9
74	Intentionally omitted	2
75	Email chain between Morabito, Paul Wells, and Vacco dated 2/10/12	5
76	Email chain between Morabito and Vacco dated 5/8/12	2
77	Email chain between Vacco and Bayuk dated 9/4/12	2
78	Email chain between Morabito and Bayuk dated 9/18/12	5
79	Email chain between Vacco and Morabito dated 10/3/12	3
80	Email chain between Morabito and Vacco dated 3/14/13	2
81	Intentionally Omitted	2
82	Email chain between Vacco and Morabito dated 11/11/11	2
83	Email chain between Vacco, Sam and Morabito dated 11/28/11	3
84-85	Intentionally Omitted	2
86	*Order for Relief*, as Amended	7
87	*Report of Undisputed Election – Appointment of Trustee*	3
88	Amended Stipulation and Order to Substitute a Party Pursuant to NRCP 17(a)	5
89	Membership Purchases, Agreement – Watch My Block	6
90	*Complaint for Fraudulent Transfer and Injunctive Relief*	38
91	*Fifth Amendment & Restatement of Arcadia Living Trust*	40

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