

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondent.

Case No. 79355

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

APPELLANTS' APPENDIX, VOLUME 20
(Nos. 3206–3334)

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INDEX TO APPELLANTS' APPENDIX

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Complaint (filed 12/17/2013)		Vol. 1, 1–17
Declaration of Salvatore Morabito in Support of Snowshoe Capital's Motion to Dismiss for Lack of Personal Jurisdiction (filed 05/12/2014)		Vol. 1, 18–21
Defendant Snowshoe Petroleum, Inc.'s Motion to Dismiss Complaint for Lack of Personal Jurisdiction NRCP 12(b)(2) (filed 05/12/2014)		Vol. 1, 22–30
JH, Inc., Jerry Herbst, and Berry Hinckley Industries Opposition to Motion to Dismiss (filed 05/29/2014)		Vol. 1, 31–43
Exhibits to Opposition to Motion to Dismiss		
Exhibit	Document Description	
1	Affidavit of John P. Desmond (filed 05/29/2014)	Vol. 1, 44–48
2	Fifth Amendment and Restatement of the Trust Agreement for the Arcadia Living Trust (dated 09/30/2010)	Vol. 1, 49–88
3	Unanimous Written Consent of the Directors and Shareholders of CWC (dated 09/28/2010)	Vol. 1, 89–92
4	Unanimous Written Consent of the Board of Directors and Sole Shareholder of Superpumper (dated 09/28/2010)	Vol. 1, 93–102
5	Plan of Merger of Consolidated Western Corporation with and into Superpumper, Inc. (dated 09/28/2010)	Vol. 1, 103–107

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
6	Articles of Merger of Consolidated Western Corporation with and into Superpumper, Inc. (dated 09/29/2010)	Vol. 1, 108–110
7	2009 Federal Income Tax Return for P. Morabito	Vol. 1, 111–153
8	May 21, 2014 printout from New York Secretary of State	Vol. 1, 154–156
9	May 9, 2008 Letter from Garrett Gordon to John Desmond	Vol. 1, 157–158
10	Shareholder Interest Purchase Agreement (dated 09/30/2010)	Vol. 1, 159–164
11	Relevant portions of the January 22, 2010 Deposition of Edward Bayuk	Vol. 1, 165–176
13	Relevant portions of the January 11, 2010 Deposition of Salvatore Morabito	Vol. 1, 177–180
14	October 1, 2010 Grant, Bargain and Sale Deed	Vol. 1, 181–187
15	Order admitting Dennis Vacco (filed 02/16/2011)	Vol. 1, 188–190
JH, Inc., Jerry Herbst, and Berry Hinckley Industries, Errata to Opposition to Motion to Dismiss (filed 05/30/2014)		Vol. 2, 191–194
Exhibit to Errata to Opposition to Motion to Dismiss		
Exhibit	Document Description	
12	Grant, Bargain and Sale Deed for APN: 040-620-09, dated November 10, 2005	Vol. 2, 195–198
Answer to Complaint of P. Morabito, individually and as trustee of the Arcadia Living Trust (filed 06/02/2014)		Vol. 2, 199–208

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Defendant, Snowshow Petroleum, Inc.'s Reply in Support of Motion to Dismiss Complaint for Lack of Personal Jurisdiction NRCP 12(b)(2) (filed 06/06/2014)		Vol. 2, 209–216
Exhibit to Reply in Support of Motion to Dismiss Complaint for Lack of Personal Jurisdiction NRCP 12(b)(2)		
Exhibit	Document Description	
1	Declaration of Salvatore Morabito in Support of Snowshow Petroleum, Inc.'s Reply in Support of Motion to Dismiss Complaint for Lack of Personal Jurisdiction (filed 06/06/2014)	Vol. 2, 217–219
Defendant, Superpumper, Inc.'s Motion to Dismiss Complaint for Lack of Personal Jurisdiction NRCP 12(b)(2) (filed 06/19/2014)		Vol. 2, 220–231
Exhibit to Motion to Dismiss Complaint for Lack of Personal Jurisdiction NRCP 12(b)(2)		
Exhibit	Document Description	
1	Declaration of Salvatore Morabito in Support of Superpumper, Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction (filed 06/19/2014)	Vol. 2, 232–234
JH, Inc., Jerry Herbst, and Berry Hinckley Industries, Opposition to Motion to Dismiss (filed 07/07/2014)		Vol. 2, 235–247
Exhibits to Opposition to Motion to Dismiss		
Exhibit	Document Description	
1	Affidavit of Brian R. Irvine (filed 07/07/2014)	Vol. 2, 248–252

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
2	Fifth Amendment and Restatement of the Trust Agreement for the Arcadia Living Trust (dated 09/30/2010)	Vol. 2, 253–292
3	BHI Electronic Funds Transfers, January 1, 2006 to December 31, 2006	Vol. 2, 293–294
4	Legal and accounting fees paid by BHI on behalf of Superpumper; JH78636-JH78639; JH78653-JH78662; JH78703-JH78719	Vol. 2, 295–328
5	Unanimous Written Consent of the Directors and Shareholders of CWC (dated 09/28/2010)	Vol. 2, 329–332
6	Unanimous Written Consent of the Board of Directors and Sole Shareholders of Superpumper (dated 09/28/2010)	Vol. 2, 333–336
7	Plan of Merger of Consolidated Western Corporation with and into Superpumper, Inc. (dated 09/28/2010)	Vol. 2, 337–341
8	Articles of Merger of Consolidated Western Corporation with and into Superpumper, Inc. (dated 09/29/2010)	Vol. 2, 342–344
9	2009 Federal Income Tax Return for P. Morabito	Vol. 2, 345–388
10	Relevant portions of the January 22, 2010 Deposition of Edward Bayuk	Vol. 2, 389–400
11	Grant, Bargain and Sale Deed for APN: 040-620-09, dated November 10, 2005	Vol. 2, 401–404
12	Relevant portions of the January 11, 2010 Deposition of Salvatore Morabito	Vol. 2, 405–408

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
13	Printout of Arizona Corporation Commission corporate listing for Superpumper, Inc.	Vol. 2, 409–414
Defendant, Superpumper, Inc.’s Reply in Support of Motion to Dismiss Complaint for Lack of Personal Jurisdiction NRCP 12(b)(2) (filed 07/15/2014)		Vol. 3, 415–421
Order Denying Motion to Dismiss as to Snowshoe Petroleum, Inc.’s (filed 07/17/2014)		Vol. 3, 422–431
Notice of Entry of Order Denying Motion to Dismiss as to Snowshoe Petroleum, Inc.’s (filed 07/17/2014)		Vol. 3, 432–435
Exhibit to Notice of Entry of Order Denying Motion to Dismiss as to Snowshoe Petroleum, Inc.’s		
Exhibit	Document Description	
1	Order Denying Motion to Dismiss as to Snowshoe Petroleum, Inc.’s	Vol. 3, 436–446
Order Denying Superpumper, Inc.’s Motion to Dismiss Complaint for Lack of Personal Jurisdiction NRCP 12(b)(2) (filed 07/22/2014)		Vol. 3, 447–457
Notice of Entry of Order Denying Superpumper, Inc.’s Motion to Dismiss Complaint for Lack of Personal Jurisdiction NRCP 12(b)(2) (filed 07/22/2014)		Vol. 3, 458–461
Exhibit to Notice of Entry of Order Denying Superpumper, Inc.’s Motion to Dismiss Complaint		
Exhibit	Document Description	
1	Order Denying Superpumper, Inc.’s Motion to Dismiss Complaint for Lack of Personal Jurisdiction NRCP 12(b)(2) (filed 07/22/2014)	Vol. 3, 462–473

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Answer to Complaint of Superpumper, Inc., and Snowshoe Petroleum, Inc. (filed 07/28/2014)		Vol. 3, 474–483
Answer to Complaint of Defendants, Edward Bayuk, individually and as trustee of the Edward William Bayuk Living Trust, and Salvatore Morabito (filed 09/29/2014)		Vol. 3, 484–494
Notice of Bankruptcy of Consolidated Nevada Corporation and P. Morabito (filed 2/11/2015)		Vol. 3, 495–498
Supplemental Notice of Bankruptcy of Consolidated Nevada Corporation and P. Morabito (filed 02/17/2015)		Vol. 3, 499–502
Exhibits to Supplemental Notice of Bankruptcy of Consolidated Nevada Corporation and P. Morabito		
Exhibit	Document Description	
1	Involuntary Petition; Case No. BK-N-13-51236 (filed 06/20/2013)	Vol. 3, 503–534
2	Involuntary Petition; Case No. BK-N-13-51237 (06/20/2013)	Vol. 3, 535–566
3	Order for Relief Under Chapter 7; Case No. BK-N-13-51236 (filed 12/17/2014)	Vol. 3, 567–570
4	Order for Relief Under Chapter 7; Case No. BK-N-13-51237 (filed 12/17/2014)	Vol. 3, 571–574
Stipulation and Order to File Amended Complaint (filed 05/15/2015)		Vol. 4, 575–579
Exhibit to Stipulation and Order to File Amended Complaint		
Exhibit	Document Description	

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
1	First Amended Complaint	Vol. 4, 580–593
William A. Leonard, Trustee for the Bankruptcy Estate of P. Morabito, First Amended Complaint (filed 05/15/2015)		Vol. 4, 594–607
Stipulation and Order to Substitute a Party Pursuant to NRCP 17(a) (filed 05/15/2015)		Vol. 4, 608–611
Substitution of Counsel (filed 05/26/2015)		Vol. 4, 612–615
Defendants’ Answer to First Amended Complaint (filed 06/02/2015)		Vol. 4, 616–623
Amended Stipulation and Order to Substitute a Party Pursuant to NRCP 17(a) (filed 06/16/2015)		Vol. 4, 624–627
Motion to Partially Quash, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery Protected by the Attorney-Client Privilege (filed 03/10/2016)		Vol. 4, 628–635
Exhibits to Motion to Partially Quash, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery Protected by the Attorney-Client Privilege		
Exhibit	Document Description	
1	March 9, 2016 Letter from Lippes	Vol. 4, 636–638
2	Affidavit of Frank C. Gilmore, Esq., (dated 03/10/2016)	Vol. 4, 639–641
3	Notice of Issuance of Subpoena to Dennis Vacco (dated 01/29/2015)	Vol. 4, 642–656
4	March 10, 2016 email chain	Vol. 4, 657–659

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Minutes of February 24, 2016 Pre-trial Conference (filed 03/17/2016)		Vol. 4, 660–661
Transcript of February 24, 2016 Pre-trial Conference		Vol. 4, 662–725
Plaintiff's (Leonard) Opposition to Defendants' Motion to Partially Quash, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery Protected by the Attorney-Client Privilege (filed 03/25/2016)		Vol. 5, 726–746
Exhibits to Opposition to Motion to Partially Quash or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery Protected by the Attorney-Client Privilege		
Exhibit	Document Description	
1	Declaration of Teresa M. Pilatowicz in Support of Plaintiff's Opposition to Defendants' Motion to Partially Quash (filed 03/25/2016)	Vol. 5, 747–750
2	Application for Commission to take Deposition of Dennis Vacco (filed 09/17/2015)	Vol. 5, 751–759
3	Commission to take Deposition of Dennis Vacco (filed 09/21/2015)	Vol. 5, 760–763
4	Subpoena/Subpoena Duces Tecum to Dennis Vacco (09/29/2015)	Vol. 5, 764–776
5	Notice of Issuance of Subpoena to Dennis Vacco (dated 09/29/2015)	Vol. 5, 777–791
6	Dennis C. Vacco and Lippes Mathias Wexler Friedman LLP, Response to Subpoena (dated 10/15/2015)	Vol. 5, 792–801

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
7	Condensed Transcript of October 21, 2015 Deposition of Dennis Vacco	Vol. 5, 802–851
8	Transcript of the Bankruptcy Court’s December 22, 2015, oral ruling; Case No. BK-N-13-51237	Vol. 5, 852–897
9	Order Granting Motion to Compel Responses to Deposition Questions; Case No. BK-N-13-51237 (filed 02/03/2016)	Vol. 5, 898–903
10	Notice of Continued Deposition of Dennis Vacco (filed 02/18/2016)	Vol. 5, 904–907
11	Debtor’s Objection to Proposed Order Granting Motion to Compel Responses to Deposition Questions; Case No. BK-N-13-51237 (filed 01/22/2016)	Vol. 5, 908–925
Reply in Support of Motion to Modify Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery Protected by the Attorney-Client Privilege (filed 04/06/2016)		Vol. 6, 926–932
Plaintiff’s Motion to Compel Production of Documents (filed 04/08/2016)		Vol. 6, 933–944
Exhibits to Plaintiff’s Motion to Compel Production of Documents		
Exhibit	Document Description	
1	Declaration of Teresa M. Pilatowicz in Support of Plaintiff’s Motion to Compel (filed 04/08/2016)	Vol. 6, 945–948
2	Bill of Sale – 1254 Mary Fleming Circle (dated 10/01/2010)	Vol. 6, 949–953

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
3	Bill of Sale – 371 El Camino Del Mar (dated 10/01/2010)	Vol. 6, 954–958
4	Bill of Sale – 370 Los Olivos (dated 10/01/2010)	Vol. 6, 959–963
5	Personal financial statement of P. Morabito as of May 5, 2009	Vol. 6, 964–965
6	Plaintiff’s First Set of Requests for Production of Documents to Edward Bayuk (dated 08/14/2015)	Vol. 6, 966–977
7	Edward Bayuk’s Responses to Plaintiff’s First Set of Requests for Production (dated 09/23/2014)	Vol. 6, 978–987
8	Plaintiff’s First Set of Requests for Production of Documents to Edward Bayuk, as trustee of the Edward William Bayuk Living Trust (dated 08/14/2015)	Vol. 6, 988–997
9	Edward Bayuk, as trustee of the Edward William Bayuk Living Trust’s Responses to Plaintiff’s First Set of Requests for Production (dated 09/23/2014)	Vol. 6, 998–1007
10	Plaintiff’s Second Set of Requests for Production of Documents to Edward Bayuk (dated 01/29/2016)	Vol. 6, 1008–1015
11	Edward Bayuk’s Responses to Plaintiff’s Second Set of Requests for Production (dated 03/08/2016)	Vol. 6, 1016–1020

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
12	Plaintiff's Second Set of Requests for Production of Documents to Edward Bayuk, as trustee of the Edward William Bayuk Living Trust (dated 01/29/2016)	Vol. 6, 1021–1028
13	Edward Bayuk, as trustee of the Edward William Bayuk Living Trust's Responses to Plaintiff's Second Set of Requests for Production (dated 03/08/2016)	Vol. 6, 1029–1033
14	Correspondences between Teresa M. Pilatowicz, Esq., and Frank Gilmore, Esq. (dated 03/25/2016)	Vol. 6, 1034–1037
Opposition to Plaintiff's Motion to Compel Production of Documents (filed 04/25/2016)		Vol. 7, 1038–1044
Reply in Support of Plaintiff's Motion to Compel Production of Documents (filed 05/09/2016)		Vol. 7, 1045–1057
Exhibits to Reply in Support of Plaintiff's Motion to Compel Production of Documents		
Exhibit	Document Description	
1	Declaration of Gabrielle A. Hamm, Esq., in Support of Reply in Support of Plaintiff's Motion to Compel (filed 05/09/2016)	Vol. 7, 1058–1060
2	Amended Findings, of Fact and Conclusion of Law in Support of Order Granting Motion for Summary Judgment; Case No. BK-N-13-51237 (filed 12/22/2014)	Vol. 7, 1061–1070

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
3	Order Compelling Deposition of P. Morabito dated March 13, 2014, in <i>Consolidated Nevada Corp., et al v. JH. et al.</i> ; Case No. CV07-02764 (filed 03/13/2014)	Vol. 7, 1071–1074
4	Emergency Motion Under NRCP 27(e); Petition for Writ of Prohibition, <i>P. Morabito v. The Second Judicial District Court of the State of Nevada in and for the County of Washoe</i> ; Case No. 65319 (filed 04/01/2014)	Vol. 7, 1075–1104
5	Order Denying Petition for Writ of Prohibition; Case No. 65319 (filed 04/18/2014)	Vol. 7, 1105–1108
6	Order Granting Summary Judgment; Case No. BK-N-13-51237 (filed 12/17/2014)	Vol. 7, 1109–1112
Recommendation for Order RE: <i>Defendants’ Motion to Partially Quash</i> , filed on March 10, 2016 (filed 06/13/2016)		Vol. 7, 1113–1124
Confirming Recommendation Order from June 13, 2016 (filed 07/06/2016)		Vol. 7, 1125–1126
Recommendation for Order RE: <i>Plaintiff’s Motion to Compel Production of Documents</i> , filed on April 8, 2016 (filed 09/01/2016)		Vol. 7, 1127–1133
Confirming Recommendation Order from September 1, 2016 (filed 09/16/2016)		Vol. 7, 1134–1135
Plaintiff’s Application for Order to Show Cause Why Defendant, Edward Bayuk Should Not Be Held in Contempt of Court Order (filed 11/21/2016)		Vol. 8, 1136–1145

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Exhibits to Plaintiff's Application for Order to Show Cause Why Defendant, Edward Bayuk Should Not Be Held in Contempt of Court Order		
Exhibit	Document Description	
1	Order to Show Cause Why Defendant, Edward Bayuk Should Not Be Held in Contempt of Court Order (filed 11/21/2016)	Vol. 8, 1146–1148
2	Confirming Recommendation Order from September 1, 2016 (filed 09/16/2016)	Vol. 8, 1149–1151
3	Recommendation for Order RE: <i>Plaintiff's Motion to Compel Production of Documents</i> , filed on April 8, 2016 (filed 09/01/2016)	Vol. 8, 1152–1159
4	Plaintiff's Motion to Compel Production of Documents (filed 04/08/2016)	Vol. 8, 1160–1265
5	Opposition to Plaintiff's Motion to Compel Production of Documents (filed 04/25/2016)	Vol. 8, 1266–1273
6	Reply in Support of Plaintiff's Motion to Compel Production of Documents (filed 05/09/2016)	Vol. 8, 1274–1342
7	Correspondences between Teresa M. Pilatowicz, Esq., and Frank Gilmore, Esq. (dated 09/22/2016)	Vol. 8, 1343–1346
8	Edward Bayuk's Supplemental Responses to Plaintiff's Second Set of Requests for Production (dated 10/25/2016)	Vol. 8, 1347–1352

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Opposition to Plaintiff's Application for Order to Show Cause Why Defendant Should Not Be Held in Contempt of Court Order (filed 12/19/2016)		Vol. 9, 1353–1363
Exhibits to Opposition to Plaintiff's Application for Order to Show Cause Why Defendant Should Not Be Held in Contempt of Court Order		
Exhibit	Document Description	
1	Declaration of Edward Bayuk in Support of Opposition to Plaintiff's Application for Order to Show Cause (filed 12/19/2016)	Vol. 9, 1364–1367
2	Declaration of Frank C. Gilmore, Esq., in Support of Opposition to Plaintiff's Application for Order to Show Cause (filed 12/19/2016)	Vol. 9, 1368–1370
3	Redacted copy of the September 6, 2016, correspondence of Frank C. Gilmore, Esq.	Vol. 9, 1371–1372
Order to Show Cause Why Defendant, Edward Bayuk Should Not Be Held in Contempt of Court Order (filed 12/23/2016)		Vol. 9, 1373–1375
Response: (1) to Opposition to Application for Order to Show Cause Why Defendant Should Not Be Held in Contempt of Court Order and (2) in Support of Order to Show Cause (filed 12/30/2016)		Vol. 9, 1376–1387
Minutes of January 19, 2017 Deposition of Edward Bayuk in RE: insurance policies (filed 01/19/2017)		Vol. 9, 1388
Minutes of January 19, 2017 hearing on Order to Show Cause (filed 01/30/2017)		Vol. 9, 1389

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP (filed 07/18/2017)		Vol. 9, 1390–1404
Exhibits to Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP		
Exhibit	Document Description	
1	Correspondence between Teresa M. Pilatowicz, Esq., and Frank Gilmore, Esq., dated March 8, 2016	Vol. 9, 1405–1406
2	Correspondence between Teresa M. Pilatowicz, Esq., and Frank Gilmore, Esq., dated March 8, 2016, with attached redlined discovery extension stipulation	Vol. 9, 1407–1414
3	Jan. 3 – Jan. 4, 2017, email chain from Teresa M. Pilatowicz, Esq., and Frank Gilmore, Esq.	Vol. 9, 1415–1416
4	Declaration of Frank C. Gilmore, Esq., in Support of Motion to Quash (filed 07/18/2017)	Vol. 9, 1417–1420
5	January 24, 2017 email from Teresa M. Pilatowicz, Esq.,	Vol. 9, 1421–1422
6	Jones Vargas letter to HR and P. Morabito, dated August 16, 2010	Vol. 9, 1423–1425
7	Excerpted Transcript of July 26, 2011 Deposition of Sujata Yalamanchili, Esq.	Vol. 9, 1426–1431
8	Letter dated June 17, 2011, from Hodgson Russ (“HR”) to John Desmond and Brian Irvine on Morabito related issues	Vol. 9, 1432–1434

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
9	August 9, 2013, transmitted letter to HR	Vol. 9, 1435–1436
10	Excerpted Transcript of July 23, 2014 Deposition of P. Morabito	Vol. 9, 1437–1441
11	Lippes Mathias Wexler Friedman LLP, April 3, 2015 letter	Vol. 9, 1442–1444
12	Lippes Mathias Wexler Friedman LLP, October 20, 2010 letter RE: Balance forward as of bill dated 09/19/2010 and 09/16/2010	Vol. 9, 1445–1454
13	Excerpted Transcript of June 25, 2015 Deposition of 341 Meeting of Creditors	Vol. 9, 1455–1460
(1) Opposition to Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP; and (2) Countermotion for Sanctions and to Compel Resetting of 30(b)(3) Deposition of Hodgson Russ LLP (filed 07/24/2017)		Vol. 10, 1461–1485
Exhibits to (1) Opposition to Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP; and (2) Countermotion for Sanctions and to Compel Resetting of 30(b)(3) Deposition of Hodgson Russ LLP		

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
Exhibit	Document Description	
A	Declaration of Teresa M. Pilatowicz, Esq., in Support of (1) Opposition to Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP (filed 07/24/2017)	Vol. 10, 1486–1494
A-1	Defendants’ NRCP Disclosure of Witnesses and Documents (dated 12/01/2014)	Vol. 10, 1495–1598
A-2	Order Granting Motion to Compel Responses to Deposition Questions; Case No. BK-N-13-51237 (filed 02/03/2016)	Vol. 10, 1599–1604
A-3	Recommendation for Order RE: <i>Defendants’ Motion to Partially Quash</i> , filed on March 10, 2016 (filed 06/13/2016)	Vol. 10, 1605–1617
A-4	Confirming Recommendation Order from September 1, 2016 (filed 09/16/2016)	Vol. 10, 1618–1620
A-5	Subpoena – Civil (dated 01/03/2017)	Vol. 10, 1621–1634
A-6	Notice of Deposition of Person Most Knowledgeable of Hodgson Russ LLP (filed 01/03/2017)	Vol. 10, 1635–1639
A-7	January 25, 2017 Letter to Hodgson Russ LLP	Vol. 10, 1640–1649
A-8	Stipulation Regarding Continued Discovery Dates (Sixth Request) (filed 01/30/2017)	Vol. 10, 1650–1659
A-9	Stipulation Regarding Continued Discovery Dates (Seventh Request) (filed 05/25/2017)	Vol. 10, 1660–1669

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
70	November 10, 2011 email chain between Vacco and P. Morabito RE: Baruk Properties, LLC/Paul Morabito/Bank of America, N.A.	Vol. 24, 3983–3985
71	Bayuk First Ledger	Vol. 24, 3986–3987
72	Amortization Schedule	Vol. 24, 3988–3990
73	Bayuk Second Ledger	Vol. 24, 3991–3993
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

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
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
105	Superpumper Successor Note in the amount of \$939,000 (dated 02/01/2011)	Vol. 25, 4196–4197

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
106	Superpumper Stock Power transfers to S. Morabito and Bayuk (dated 01/01/2011)	Vol. 25, 4198–4199
107	<i>Declaration of P. Morabito in Support of Opposition to Motion of JH, Inc., Jerry Herbst, and Berry- Hinckley Industries for Order Prohibiting Debtor from Using, Acquiring or Transferring Assets Pursuant to 11 U.S.C. §§ 105 and 303(f) Pending Appointment of Trustee, Case 13-51237, ECF No. 22 (filed 07/01/2013)</i>	Vol. 25, 4200–4203
108	October 12, 2012 email between P. Morabito and Bernstein RE: 2011 Return	Vol. 25, 4204–4204
109	Compass Term Loan (dated 12/21/2016)	Vol. 25, 4205–4213
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
112	Consent Agreement (dated 12/28/2010)	Vol. 25, 4245–4249
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
116	Superpumper Inc. Audit Conclusions Memo (dated 12/31/2010)	Vol. 25, 4279–4284

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
117	Superpumper 2010 YTD Income Statement and Balance Sheets	Vol. 25, 4285–4299
118	March 12, 2010 Management Letter	Vol. 25, 4300–4302
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
127	January 6, 2012 email from Bayuk to Lovelace RE: Letter of Credit	Vol. 26, 4333–4335
128	January 6, 2012 email from Vacco to Bernstein	Vol. 26, 4336–4338
129	January 7, 2012 email from Bernstein to Lovelace	Vol. 26, 4339–4343
130	March 18, 2012 email from P. Morabito to Vacco	Vol. 26, 4344–4344
131	April 21, 2011 Proposed Acquisition of Nella Oil	Vol. 26, 4345–4351
132	April 15, 2011 email chain between P. Morabito and Vacco	Vol. 26, 4352

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
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
144	April 24, 2012 email from P. Morabito to Vacco RE: SPI Loan Detail	Vol. 26, 4377–4378

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
145	September 4, 2012 email chain between Vacco and Bayuk RE: Second Deed of Trust documents	Vol. 26, 4379–4418
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
151	October 3, 2012 email chain between Vacco and P. Morabito RE: Snowshoe Properties, LLC	Vol. 26, 4433–4434
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

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
159	September 14, 2012 email from Vacco to P. Morabito	Vol. 27, 4656–4657
160	October 1, 2012 email from P. Morabito to Vacco RE: Monday work for Dennis and Christian	Vol. 27, 4658
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
175	Order Granting Motion to Compel Responses to Deposition Questions ECF No. 502; Case No. 13-51237-gwz (filed 02/03/2016)	Vol. 27, 4671–4675
179	Gursey Schneider LLP Subpoena	Vol. 28, 4676–4697
180	Summary Appraisal of 570 Glenneyre	Vol. 28, 4698–4728
181	Appraisal of 1461 Glenneyre Street	Vol. 28, 4729–4777
182	Appraisal of 370 Los Olivos	Vol. 28, 4778–4804
183	Appraisal of 371 El Camino Del Mar	Vol. 28, 4805–4830
184	Appraisal of 1254 Mary Fleming Circle	Vol. 28, 4831–4859

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
185	Mortgage – Panorama	Vol. 28, 4860–4860
186	Mortgage – El Camino	Vol. 28, 4861
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

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
222	Kimmel – January 21, 2016, Comment on Alves Appraisal	Vol. 28, 4880–4883
223	September 20, 2010 email from Yalamanchili to Morabito	Vol. 28, 4884
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

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
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

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
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

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
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 Comparisons for 8355 Panorama Drive, Reno, NV	Vol. 32, 5401–5437
278	December 3, 2007 Case Docket for CV07-02764	Vol. 32, 5438–5564
280	May 25, 2011 Stipulation Regarding the Imposition of Punitive Damages; Case No. CV07-02764 (filed 05/25/2011)	Vol. 33, 5565–5570
281	Work File for September 24, 2010 Appraisal of 8355 Panorama Drive, Reno, NV	Vol. 33, 5571–5628
283	January 25, 2016 Expert Witness Report Leonard v. Superpumper Snowshoe	Vol. 33, 5629–5652
284	February 29, 2016 Defendants' Rebuttal Expert Witness Disclosure	Vol. 33, 5653–5666
294	October 5, 2010 Lippes, Mathias Wexler Friedman, LLP, Invoices to P. Morabito	Vol. 33, 5667–5680
295	P. Morabito 2010 Tax Return (dated 10/16/2011)	Vol. 33, 5681–5739
296	December 31, 2010 Superpumper Inc. Note to Financial Statements	Vol. 33, 5740–5743
297	December 31, 2010 Superpumper Consultations	Vol. 33, 5744

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
300	September 20, 2010 email chain between Yalmanchili and Graber RE: Attorney Client Privileged Communication	Vol. 33, 5745–5748
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
Transcript of October 29, 2018, Non-Jury Trial, Day 1		Vol. 35, 6042–6045

<u>DOCUMENT DESCRIPTION</u>	<u>LOCATION</u>
Minutes of October 30, 2018, Non-Jury Trial, Day 2 (filed 11/08/2018)	Vol. 36, 6046–6283
Transcript of October 30, 2018, Non-Jury Trial, Day 2	Vol. 36, 6284–6286
Minutes of October 31, 2018, Non-Jury Trial, Day 3 (filed 11/08/2018)	Vol. 37, 6287–6548
Transcript of October 31, 2018, Non-Jury Trial, Day 3	Vol. 37, 6549–6552
Minutes of November 1, 2018, Non-Jury Trial, Day 4 (filed 11/08/2018)	Vol. 38, 6553–6814
Transcript of November 1, 2018, Non-Jury Trial, Day 4	Vol. 38, 6815–6817
Minutes of November 2, 2018, Non-Jury Trial, Day 5 (filed 11/08/2018)	Vol. 39, 6818–7007
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
Transcript of November 6, 2018, Non-Jury Trial, Day 7	Vol. 41, 7270–7272 Vol. 42, 7273–7474
Minutes of November 7, 2018, Non-Jury Trial, Day 8 (filed 11/08/2018)	Vol. 43, 7475–7476
Transcript of November 7, 2018, Non-Jury Trial, Day 8	Vol. 43, 7477–7615

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CASE NO.: CV13-02663

DEPT. NO.: 4

16 Plaintiffs,

17 vs.

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

24 Defendants. /

25 **DEFENDANTS' REPLY IN SUPPORT OF MOTIONS IN LIMINE**

26 Defendants SUPERPUMPER, INC., EDWARD BAYUK, individually and as Trustee of
27 the EDWARD WILLIAM BAYUK LIVING TRUST, SALVATORE MORABITO, and
28 SNOWSHOE PETROLEUM, INC. (collectively, "Defendants") hereby Reply in support of their
Motion in Limine filed in anticipation of the trial set to commence on October 29, 2018. This
Reply 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 IN REPLY

I. INTRODUCTION

Plaintiff cannot deny that he failed to disclose "[a] computation of any category of

1 damages” as required under NRCP 16.1(a)(1)(C). Thus, the Motion in Limine was neither
2 “improper” nor “desperate,” as Plaintiff contends in his opposition. There is no question that
3 Plaintiff failed to comport with the Rule. Plaintiff’s disclosure states only that he is “entitled to
4 recover assets transferred or the value thereof pursuant to Nev. Rev. Stat. §§ 112.210 and 112.220,
5 which Plaintiff believes to be no less than \$8,500,000.” This disclosure does not meet the spirit or
6 the letter of the Rule. Accordingly, the only questions left to be decided by this Court are, (1)
7 whether Plaintiff has established good cause for his failure to comply with the Rule, (2) whether
8 Defendants are prejudiced by this failure, and (3) the appropriate sanction to be applied under
9 NRCP 37.

10 **II. ARGUMENT**

11 **A. Plaintiff Has Not Established Good Cause for His Failure to Comply With the** 12 **Rule.**

13 Plaintiff failed to comply with the Rule. Plaintiff then admits that even if he did fail to
14 comply with the Rule, it was Defendants’ fault for doing nothing about it. He contends that
15 “Defendants made no effort during discovery to garner more specificity regarding the extent of
16 Plaintiff’s damages.” (Opposition, p. 3:17). This is not only a patently false assertion of fact, it
17 underscores Plaintiff’s failure to comprehend his own *affirmative* disclosure duty as set forth in the
18 Rules. Defendants served Interrogatories which Plaintiff never supplemented. Moreover,
19 disclosure of the computation of damages is Plaintiff’s solitary affirmative obligation, not
20 Defendants’.

21 **1. *Plaintiff’s 16.1(a)(1)(C) Disclosures Were Clearly Deficient.***

22 Plaintiff suggests, albeit not very convincingly, that he has complied with the disclosure
23 requirements. He suggests that his disclosure that “he seeks (1) recovery of the assets transferred
24 [or] (2) the value thereof “believe[d] to be no less than \$8,500,000” complies with the Rule.
25 (Opposition, p. 4:3-6). This disclosure provides neither a computation nor a categorization. As the
26 cases explain, “[T]he purpose of providing a computation of damages is not necessarily to pinpoint
27 an exact dollar figure but to ‘enable the defendants to understand the contours of their potential
28 exposure and make informed decisions regarding settlement and discovery’” *Pizarro-Ortega v.*

1 *Cervantes-Lopez*, 396 P.3d 783, 787 (Nev. 2017). This disclosure achieves none of the purposes
2 for the Rule and is clearly deficient.

3 **2. *Defendants Served Interrogatories Requesting Plaintiff's Computation and***
4 ***Categorization of Damages, To Which Plaintiff First Objected, Then Never***
5 ***Answered Adequately, and Then Never Supplemented.***

6 Plaintiff repeatedly argues that that Defendants made "no effort" to ascertain the Plaintiff's
7 measure of damages. This is a false statement. On May 28, 2015, Plaintiff responded to
8 Defendants' First Set of Interrogatories. Plaintiff's present counsel prepared and served the
9 responses. Request #3 sought the following:

10 In your first claim for relief, you allege that
11 Superpumper/Snowshoe/ Salvatore/Bayuk is liable to you for conduct
12 which violates NRS 112.140. As to this claim, please identify and describe
13 the following:

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

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

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

23 (d) The identity, location and custodian of all documents or other
24 tangible things you maintain support your responses to interrogatory parts
25 3(a), (b) and (c).

26 Plaintiff responded with:

27 Objection. The Trustee incorporates by this reference each applicable
28 General Objection set forth above as though fully stated herein. The
Trustee further objects to the request in that the Trustee was only
substituted in as plaintiff in this matter on May 15, 2015 and is still in the
process of conducting his investigation. The Trustee further objects that
the interrogatory seeks information already in the possession and control
of Debtor or Defendants and/or Debtor's or Defendants' counsel. The
Trustee further objects to this interrogatory as vague, overly broad, and
unduly burdensome as it seeks "All facts and evidence." Finally, as the
Trustee continues to investigate the claims, reserves his right to amend or
supplement the responses herein.

See **EXHIBIT 1**, pp. 6-7.

Notwithstanding the myriad and meritless objections, Plaintiff then explained that "The Trustee

1 has information that *at least* the following transfers occurred,” (emphasis in original) and identified
2 16 paragraphs of alleged transfers which Plaintiff contended support his claims for relief under
3 Nevada’s Uniform Fraudulent Transfers Act. In response to the subpart (b) of the request seeking
4 how Plaintiff has calculated his damages, Plaintiff explains merely:

5 (b) The Trustee has been damaged in at least the amount of the total
6 fraudulent transfers in an amount to be determined at trial, which were
7 ultimately done to avoid obligations due creditors, including the
8 Petitioning Creditors with regard to the unpaid confession of judgment
9 executed by Debtor and Consolidated Nevada Corporation
(\$85,000,000), plus attorneys’ fees and costs incurred in pursuing
Defendants for the recovery of the fraudulent transfers is an amount to
be determined at trial.

10 **EXHIBIT 1, p. 10:7-11.**

11 In other words, the Interrogatory responses served more than 40 months ago failed to give
12 the calculations of damages other than “\$85 million” and “to be determined at trial.” There was no
13 computation nor category of damages. As Plaintiff explained in the same response, he reserved the
14 right to “amend or supplement” the response throughout the discovery process. No supplement or
15 amendment was ever provided, during the more than 47 months that discovery in this case was
16 open.

17 These Interrogatories were served after the initial interrogatories were objected to by
18 Plaintiff’s first counsel, as set forth in the Motion. Plaintiff’s contention that “Defendants made no
19 effort” to obtain Plaintiff’s computation of damages is plainly and demonstrably false. However,
20 even if the statement were true, it is irrelevant, because Plaintiff cannot shift its obligations to
21 Defendants.

22 **3. *Defendants Have No Obligation to Perform Plaintiff’s Affirmative***
23 ***Disclosure Obligations.***

24 The primary theme of Plaintiff’s opposition memorandum is that somehow Defendants are
25 responsible for Plaintiff’s failure to make disclosures because Defendants (1) failed to address the
26 issue during discovery and (2) gave Plaintiff “no inkling whatsoever” that Defendants’ did not
27 understand Plaintiff’s damages computation. These excuses do not establish good cause for
28 Plaintiff’s failure.

1 First, Defendants have no affirmative obligation to seek any discovery from Plaintiff prior
2 to trial. Indeed, Plaintiff has failed to cite a single rule or case (because there are none) which place
3 a burden on a party to specifically seek or request anything, including damages computations, from
4 their opponents. Such a requirement would be absurd and makes little sense in practicality.
5 Defendants are perfectly entitled to provide their mandatory disclosures as required by Rule 16.1,
6 and then simply await trial, without requesting any discovery from the Plaintiff. Defendants have
7 no burden to “make an effort” to obtain discovery regarding Plaintiff’s damages.

8 Moreover, Defendants have no obligation to bring Plaintiff’s incomplete discovery
9 responses to Plaintiff’s attention, because Rule 26(e) explicitly requires Plaintiff to supplement
10 incomplete responses when that information is obtained.

11 “A party who has made a disclosure under Rule 16.1 or 16.2 or
12 responded to a request for discovery with a disclosure or response is under a
13 duty to supplement or correct the disclosure or response to include
14 information thereafter acquired . . . in the following circumstances: (2) A
15 party is under a duty 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.”

16 Second, Plaintiff does not need to possess an “inkling” that Defendants lack an appropriate
17 computation of damages in order to trigger the duty to disclose. Plaintiff’s subjective belief as to
18 what Defendants do or do not know is entirely irrelevant to the question. The Rule is explicit: “a
19 party must, **without awaiting a discovery request**, provide to other parties: (C) A computation of
20 any category of damages.” NRCP 16.1(a)(1)(C) (emphasis added). This Rule conclusively
21 establishes that it is Plaintiff’s affirmative duty to disclose its damages, irrespective of what
22 Defendants are expected to know or understand. The Rule has no qualifier which states that
23 disclosure is mandatory “unless you believe that the opposing party already knows that
24 information.” Blaming Defendants for Plaintiff’s failures to comply with the Rule is wrong and
25 disingenuous.

26 **B. Defendants Were Prejudiced By The Failure to Disclose the Computation of**
27 **Damages.**

28 In the Opposition to the Motion in Limine, Plaintiff, for the first time, clearly explained the

1 full extent of the transfers he seeks to avoid and recover at trial. In response to Defendants'
2 contention that Plaintiff has not set forth a computation of any category of damages, Plaintiff
3 explained that "To be clear, and as previously disclosed, Plaintiff seeks to avoid and recover three
4 sets of transfers." (Opposition, p. 5:1) (emphasis added). Plaintiff contends that through these three
5 transfers he is entitled to "approximately \$14 million in assets as a result of Debtor's fraudulent
6 transfers to Defendants." Plaintiff claims that throughout this case he has made his damages
7 calculations clear to Defendants. Yet, this computation (now approximately \$14mm instead of
8 "believe[d] to be no less than \$8,500,000" as contained in the disclosures), was not included in the
9 16.1 disclosures, even though it could have been.

10 Plaintiff breaks down the three sets of transfers and contends that these three transfers were
11 included in his Motion for Summary Judgment, and were calculated in the table provided on page
12 18 of the motion. The three transfers are summarized in the Opposition as the Laguna Beach Real
13 Property Transfers, the Baruk Properties, LLC Transfers, and the Superpumper Transfer. No other
14 transfers are included in the Opposition.

15 Plaintiff concedes, then, in his opposition to the Motion in Limine, that "to be clear," there
16 are only three sets of transfers upon which Plaintiff is seeking damages. This concession makes
17 this Court's resolution of this Motion much easier. For those transfers which were the subject of an
18 expert's report with clear and unambiguous assessments of value, Defendants concede that they
19 will not be ambushed at trial when Plaintiff's experts appear and testify in support of their value
20 opinions. Those expert valuation opinions are contained in the Motion for Summary Judgment,
21 ¶69, evidencing a "Total Value" of over \$14mm. The Motion in Limine primarily addresses any
22 other claims which Plaintiff may attempt to bring to trial.

23 Although the Opposition does not address this, even the Motion for Summary Judgment
24 appears to contend that additional undisclosed damages may be sought. It is these other, less clear,
25 claims of damages that precipitated the Motion in Limine. For example, Plaintiff alleges that Paul
26 Morabito made a \$6 million transfer to Sefton Trustees. (Motion for Summary Judgment, ¶21-22).
27 Yet, there are no accusations in the Motion (or the Amended Complaint, for that matter), that
28 Defendants were *in any way* involved in that alleged transfer, or that Defendants received any

1 portion of those funds. Defendants are entitled to know in Plaintiff's 16.1 disclosures whether they
2 will be defending accusations surrounding this \$6 million. Plaintiff made several other accusations
3 in the Amended Complaint related to various other activities of Paul Morabito. Defendants are
4 entitled to know if any of those other allegations are included in Plaintiff's computation of
5 damages. No other evidence of damages was offered in the Opposition, and none were provided in
6 the 16.1 disclosures.

7 Because Plaintiff has not contended in its Opposition that – aside from “the three sets of
8 transfers” – he is entitled to damages resulting from any other transfers, he has simultaneously (a)
9 made a binding judicial admission that “to be clear” only the “three sets of transfers” are included
10 in the damages computation, and (b) waived his right to contend otherwise at trial and (c) conceded
11 that with respect to any other alleged category of damages, Defendants' Motion is meritorious
12 pursuant to DCR 13(3). With respect to any transfers other than the “three sets,” Defendants are
13 ambushed at trial and severely prejudiced.

14 **C. A Motion in Limine is the Appropriate Mechanism to Address Evidentiary**
15 **Issues.**

16 A Motion in Limine is made for the purpose of admitting or excluding evidence. WDCR
17 5(2). Defendants' Motion seeks an Order excluding evidence of damages which were undisclosed
18 under NRCP 16.1. The Motion in Limine seeks that exclusion pursuant to NRCP 37, under the
19 authorities provided in the Motion which will not be restated here. In addition to the sanctions
20 available to the Court directly related to the admissibility of evidence, this Court has inherent
21 authority to issue sanctions to address or deter discovery abuses.

22 “The district court's decision to impose discovery sanctions is committed to its discretion.
23 *GNLV Corp. v. Serv. Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995). This Court has
24 authority to impose sanctions through NRCP 37 “and its inherent equitable powers, including
25 ‘sanctions for discovery and other litigation abuses not specifically proscribed by statute.’”
26 *Hawkins v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 407 P.3d 766, 769 (Nev. 2017)
27 (citing *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).

28 Plaintiff's arguments that the Motion in Limine is the improper mechanism to seek

discovery sanctions in the form of excluded evidence completely ignores Rule 37 and the authorities on the sanction for failure to provide a damages computations under 16.1.

D. Sanctions Under NRCP 37 Are Warranted.

The Motion in Limine sought exclusion of any damages evidence which was not included the 16.1 damages computation. This is the appropriate remedy for failure to comply with the Rule.

In *Darba Enterprises, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 72403, 2018 WL 1448240, at *2 (Nev. App. Mar. 22, 2018), the Court of Appeals affirmed a district court's order granting summary judgment to the defendant as a result of the failure to provide a computation of damages, citing Rule 37(c) ("providing that a party who fails to disclose information required by NRCP 16.1 without substantial justification is precluded from introducing such information as evidence at trial").

In *Freemon v. Fischer*, 281 P.3d 1173 (Nev. 2009), the district court excluded all damages evidence as a sanction under NRCP 37(c)(1), due to the plaintiff's failure to provide his initial damages calculation as required by NRCP 16.1(a)(1)(C). The Supreme Court upheld the sanction, explaining that excluded damages evidence was the appropriate sanction for NRCP 16.1 and 26 violations. The Supreme Court explained that the sanction was imposed under NRCP 37(c)(1).

Here, the appropriate sanction is to exclude evidence of all damages which were not clearly and plainly disclosed to Defendants. Defendants can accept that the valuation opinions provided by the Plaintiff's experts were provided to Defendants. But those value opinions and computations would include only the "three sets" of transfers Plaintiff addressed in the Opposition. Although Plaintiff still should have made a computation disclosure containing all damages, the prejudice to Defendants is lessened by the fact that those "three sets" are supported by disclosed expert opinions of value.

However, as to all other allegations against Defendants, which were not disclosed under NRCP 16.1, which were not addressed in the Motion for Summary Judgment, and were not raised in the Opposition to the Motion in Limine, evidence of damages must be excluded for failure to make the disclosures. Defendants are entitled to know, pursuant to 16.1 disclosures and supplements thereto, how Plaintiff calculates the total amount and category of damages he seeks.

1 With the exception of the “three sets,” Plaintiff has severely prejudiced Defendants by not making
2 the required disclosures, and Plaintiff should be prevented from attempting to offer any evidence of
3 damages in support of any other claims.

4 **III. CONCLUSION**

5 For the reasons stated above, Defendants request that the Court enter its order in limine,
6 excluding any evidence of damages as a result of Plaintiff’s failure to comply with Rule
7 16.1(a)(1)(C).

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

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

12 DATED this 8th day of October, 2018.

13 ROBISON, SHARP, SULLIVAN & BRUST
14 71 Washington Street
Reno, Nevada 89503

15 /s/ Frank C. Gilmore
16 FRANK C. GILMORE, ESQ.
17 LINDSAY L. LIDDELL, ESQ.
18 Attorneys for Defendants
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20
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Robison, Sharp, Sullivan &
3 Brust, and that on this date I caused to be served a true copy of the **DEFENDANTS' REPLY**
4 **IN SUPPORT OF MOTIONS IN LIMINE** all parties to this action by the method(s) indicated
5 below:

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

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

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

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

23 _____ by personal delivery/hand delivery addressed to:

24 _____ by email addressed to:

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

_____ by facsimile (fax) addressed to:

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

25 DATED: This 8th day of October, 2018.

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LIST OF EXHIBITS

EXHIBIT NO.	DESCRIPTION	NO. OF PAGES
1	Plaintiff's Responses to Defendants' First Set of Interrogatories	18

EXHIBIT 1

EXHIBIT 1

1 GARMAN TURNER GORDON LLP
GERALD M. GORDON, ESQ.
Nevada Bar No. 229
2 E-mail: ggordon@gtg.legal
ERIKA PIKE TURNER, ESQ.
3 Nevada Bar No. 6454
E-mail: eturner@gtg.legal
4 TERESA M. PILATOWICZ, ESQ.
Nevada Bar No. 9605
E-mail: tpilatowicz@gtg.legal
5 650 White Drive, Ste. 100
Las Vegas, Nevada 89119
6 Telephone 725-777-3000

7 *Proposed Attorneys for the Trustee*

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

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

12 Plaintiff,

13 vs.

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

17 Defendants.
18

CASE NO.: CV13-02663

DEPT. NO.: 7

19 **CHAPTER 7 TRUSTEE WILLIAM A. LEONARD'S RESPONSES TO DEFENDANTS'**
FIRST SET OF INTERROGATORIES

20 The Chapter 7 Trustee William A. Leonard (the "Trustee") , by and through his attorneys
21 of record, Garman Turner Gordon LLP, and pursuant to Rule 33 of the Nevada Rules of Civil

1 Procedure, responds to the following requests, each containing the same six interrogatories in
2 certain variations:

- 3 1. *Defendant Snowshoe Petroleum, Inc. 's First Set of Interrogatories to Berry Hinkley Industries;*
- 4 2. *Defendant Snowshoe Petroleum, Inc. 's First Set of Interrogatories to Jerry Herbst;*
- 5 3. *Defendant Snowshoe Petroleum, Inc. 's First Set of Interrogatories to JH, Inc.;*
- 6 4. *Defendant Superpumper, Inc. 's First Set of Interrogatories to Berry Hinkley Industries;*
- 7 5. *Defendant Superpumper, Inc. 's First Set of Interrogatories to Jerry Herbst;*
- 8 6. *Defendant Superpumper, Inc. 's First Set of Interrogatories to JH, Inc.;*
- 9 7. *Defendant Salvatore Morabito's First Set of Request for Production of Documents to Berry Hinkley Industries;*
- 10 8. *Defendant Salvatore Morabito's First Set of Interrogatories to Jerry Herbst;*
- 11 9. *Defendant Salvatore Morabito's First Set of Interrogatories to JH, Inc.;*
- 12 10. *Defendant Edward Bayuk's First Set of Request for Production of Documents to Berry Hinkley Industries;*
- 13 11. *Defendant Edward Bayuk's First Set of Interrogatories to Jerry Herbst;*
- 14 12. *Defendant Edward Bayuk's First Set of Interrogatories to JH, Inc.;*
- 15 13. *Defendant Edward Bayuk as Trustee of the Edward William Bayuk Living Trust's First Set of Request for Production of Documents to Berry Hinkley Industries;*
- 16 14. *Defendant Edward Bayuk as Trustee of the Edward William Bayuk Living Trust's First Set of Interrogatories to Jerry Herbst;*
- 17 15. *Defendant Edward Bayuk as Trustee of the Edward William Bayuk Living Trust's First Set of Interrogatories to JH, Inc.*

18 The requests were propounded by each individual defendant (each a "Defendant," and
19 collectively, the "Defendants") to each individual plaintiff that existed in the above-captioned case
20 prior to the Trustee's substitution therein and filing the *First Amended Complaint*. As there is now
21 only one the Trustee, and the Trustee intends on relying on similar information for each individual

1 defendant, the Trustee submits this joint response for the 15 sets interrogatories propounded by
2 the five separate defendants. To be clear, the same seven interrogatories were propounded by the
3 various defendants on the Petitioning Creditors as the plaintiffs in the *Complaint* in different orders
4 and amounts over the 15 sets of interrogatories. The Trustee responds to each of the seven requests
herein.

5 GENERAL RESPONSES AND OBJECTIONS

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

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

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

12 4. The Trustee objects to the extent that where the information requested by the
13 interrogatories is not in the Trustee's control, possession, or custody, such discovery is overbroad
14 and would impose an undue burden and expense on the Trustee. The Trustee further objects to
15 any interrogatory to the extent that the information requested is already in the control, possession,
or custody of Debtor and/or Defendants.

16 5. The Trustee objects to the interrogatories to the extent the discovery sought is
17 publicly available.

18 6. The Trustee objects to the interrogatories to the extent that they are vague,
ambiguous, or indefinite.

19 7. The Trustee objects to the interrogatories to the extent that discovery in this matter
20 is ongoing and pertinent information necessary to fully and accurately respond to these
interrogatories may not yet be available to the Trustee. The Trustee reserves the right to further
21

1 supplement these responses.

2 8. The Trustee does not concede that any of the information and/or documents
3 produced herein are, or will be, admissible into evidence. The Trustee does not intend to waive,
4 but rather intends to preserve, each and every available objection to the use and admissibility of
the information and documents that may be disclosed in response to the Requests.

5 9. "Debtor" refers to Paul A. Morabito and all entities in which he maintained a legal
6 or equitable interest which would be property of his bankruptcy estate as provided for in 11 U.S.C.
§ 541.

7 10. "State Court Case" means that certain case previously pending in the above-
8 captioned court as case number CV07-02764.

9 11. "Bankruptcy Court Case" means that certain bankruptcy case in which Paul A.
10 Morabito is the debtor pending before the United States Bankruptcy Court for the District of
Nevada as case number 13-51237-gwz.

11 12. "Petitioning Creditors" refer to Jerry Herbst, JH, Inc., and Berry-Hinckley
12 Industries, the petitioning creditors in the Bankruptcy Case.

13 13. The Trustee's responses to Defendants' interrogatories are made subject to and
14 without waiver of any stated or unstated applicable objections. The Trustee specifically
incorporates each of the above-recited General Objections into his responses to Defendants'
interrogatories.

15 14. The Trustee will meet and confer in good faith as to this response and these
16 objections. In the event any dispute cannot be resolved, the Trustee expressly reserves his right to
17 seek a protective order and/or any alternate redress.

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1:

18
19 In your sixth claim for relief, you allege that
20 Superpumper/Snowshoe/Salvatore/Bayuk/Bayuk Trust aided and abetted fraudulent
21 misrepresentation. As to this allegation, please identify the following:

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

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

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

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

10 **RESPONSE TO INTERROGATORY NO. 1:**

11 Objection. The Trustee incorporates by this reference each applicable General Objection
12 set forth above as though fully stated herein.

13 Subject to and without waiving the foregoing objections, the Trustee responds as follows:
14 The Trustee did not include the sixth claim for relief from the *Complaint* in his *First Amended*
15 *Complaint* and therefore, no response to this Interrogatory is necessary as it is not likely to lead to
16 the discovery of admissible evidence.

17 **INTERROGATORY NO. 2:**

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

21 (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);

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

3 **RESPONSE TO INTERROGATORY NO. 2:**

4 Objection. The Trustee incorporates by this reference each applicable General Objection
5 set forth above as though fully stated herein.

6 Subject to and without waiving the foregoing objections, the Trustee responds as follows:
7 The Trustee did not include the fifth claim for relief from the *Complaint* in his *First Amended*
8 *Complaint* and therefore, no response to this Interrogatory is necessary as it is not likely to lead to
9 the discovery of admissible evidence.

10 **INTERROGATORY NO. 3:**

11 In your first claim for relief, you allege that
12 Superpumper/Snowshoe/Salvatore/Bayuk/Bayuk is liable to you for conduct which violates NRS
13 112.140. As to this claim, please identify and describe the following:

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

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

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

21 (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. The Trustee incorporates by this reference each applicable General Objection
set forth above as though fully stated herein. The Trustee further objects to the request in that the
Trustee was only substituted in as plaintiff in this matter on May 15, 2015 and is still in the process
of conducting his investigation. The Trustee further objects that the interrogatory seeks

1 information already in the possession and control of Debtor or Defendants and/or Debtor's or
2 Defendants' counsel. The Trustee further objects to this interrogatory as vague, overly broad, and
3 unduly burdensome as it seeks "All facts and evidence." Finally, as the Trustee continues to
investigate the claims, reserves his right to amend or supplement the responses herein.

4 Subject to and without waiving the foregoing objections, the Trustee responds as follows:

5 (a) The Trustee has information that *at least* the following transfers occurred:

- 6 1. On or about September 15, 2010, a mere two days after this Court issued its oral
7 findings of fact and conclusions of law, Debtor transferred \$6,000,000 out of his
8 account with Bank of Montreal in Canada to an entity identified as Sefton Trustees in
9 New Zealand.
- 10 2. Sefton Trustees is an entity that specializes in offshore trusts.
- 11 3. Although Debtor claimed this \$6,000,000 transfer was made as a settlement relating to
12 his obligation on a guaranty, no documentation supporting said guaranty obligation was
13 ever provided to Jerry Herbst, JH, Inc., or Berry-Hinkley Enterprises, Inc. (collectively,
14 the "Herbst Entities") and Debtor subsequently denied under oath that the transfer was
15 made to satisfy an obligation under a guaranty.
- 16 4. On September 21, 2010, Debtor next transferred \$355,000 to Salvatore Morabito,
17 Debtor's brother, and \$420,250 to Edward Bayuk ("Bayuk").
- 18 5. Prior to September 28, 2010, Debtor resided at 8355 Panorama Drive in Reno, Nevada
19 (the "Reno Property"). Debtor owned a two-thirds interest in the Property and Bayuk
20 owned the remaining one-third of the Reno Property.
- 21 6. On October 1, 2010, Debtor and Bayuk transferred the Reno Property to Debtor as
Trustee of the Arcadia Living Trust for \$981,341. It was later discovered that the
appraised value of the Reno Property was \$4,300,000 with a corresponding mortgage
of \$1,021,000.
7. The beneficiaries of the Arcadia Living Trust are Bayuk, who holds a 70% beneficial
interest, and Salvatore Morabito, who holds a 30% beneficial interest.

- 1 8. Up until September 28, 2010, Debtor was the 80% owner of Consolidated Western
2 Corporation ("CWC"). Salvatore Morabito and Bayuk each also held a 10% interest
3 in CWC. At the time, CWC held an interest in Superpumper.
4 9. On September 28, 2010, CWC was merged into Superpumper. At the time, Debtor's
5 2009 personal income tax return showed his stock basis in the company was
6 \$5,588,661.
7 10. On September 30, 2010, despite Debtor's 2009 \$5,588,661 stock basis, Debtor sold his
8 interest in Superpumper to Snowshoe Petroleum for approximately \$2,500,000.
9 Snowshoe Petroleum was incorporated on September 29, 2010 for the sole purpose of
10 receiving the transfer from Debtor.
11 11. Prior to October 1, 2010, the Arcadia Living Trust and Bayuk held a joint interest in
12 Baruk Properties. On October 1, 2010, Debtor transferred the Arcadia Living Trust's
13 50% interest in Baruk Properties to Bayuk as Trustee of the Edward William Bayuk
14 Living Trust for a promissory note with a principal amount of \$1,617,050, which was
15 then assigned to the principals of Woodland Heights Ltd. for a 20% interest in a joint
16 venture.
17 12. The appraised value of Baruk Properties at the time of the transfer was \$9,266,600 less
18 a mortgage of \$1,440,000, for a net equity value of \$7,826,600, making Debtor's 50%
19 worth \$3,913,000, exceeding the value of the promissory note received in exchange by
20 \$2,295,950.
21 13. In or around September 2010, Debtor as Trustee of the Arcadia Living Trust, and
Bayuk, held joint ownership of a property located at 1254 Mary Flemming Circle in
Palm Springs, California (the "Palm Springs Property").
14. The Palm Springs Property was subsequently transferred to Bayuk as Trustee of the
Edward William Bayuk Living Trust. No documentation has ever been provided
demonstrating that this transfer was made for any form of consideration.

1 15. Debtor and Bayuk also transferred real property consisting of a personal residence
2 located at 371 El Camino Del Mar, Laguna Beach, California (Parcel No. 644-032-01)
3 (the "Laguna Beach Property") to Debtor as Trustee for the Arcadia Living Trust, and
4 Bayuk as trustee for Edward William Bayuk Living Trust, on or around August 20,
5 2009. Ownership of the California Property was subsequently transferred in whole to
6 the Edward William Bayuk Living Trust, despite the fact that Debtor admitted that he
7 did not know if it was for consideration.

8 16. At some point subsequent to this Court's oral judgment, Debtor executed a promissory
9 note in favor of Bayuk in the amount of \$600,000. Debtor has refused to produce any
10 evidence relating to the underlying obligation to Bayuk or payments made on said
11 obligation and Bayuk claims that the note is in good standing despite the fact that
12 Debtor purportedly failed to make any payments on the note to Bayuk.

13 Debtor's conduct violated *both* NRS 112.140 and NRS 112.180 and is recoverable pursuant
14 to both NRS 112.210 and NRS 112.220 by and with regard to the following:

- 15 1. Debtor making the above referenced transfers, and other to be identified transfers, with
16 actual intent to hinder, delay, or defraud creditors;
- 17 2. Defendants assisting in the above referenced transfers, and other to be identified
18 transfers with actual intent to hinder, delay, or defraud creditors;
- 19 3. Debtor and Defendants concealing information relating to the above referenced
20 transfers, and other to be identified transfers with actual intent to hinder, delay, or
21 defraud creditors;
4. Defendants receiving the above referenced transfers, and other to be identified
transfers with actual intent to hinder, delay, or defraud creditors;
5. Debtor making the above referenced transfers, and other to be identified transfers,
without receiving reasonably equivalent value;
6. Defendants receiving the above referenced transfers, and other to be identified transfers
without providing reasonably equivalent value.

1 Additionally, said transfers were made when Debtor: (1) was engaged or was about to
2 engage in a business or a transaction for which the remaining assets of the Debtor were
3 unreasonably small in relation to the business or transaction; or (2) intended to incur, or believed
4 or reasonably should have believed that the Debtor would incur, debts beyond his ability to pay as
5 they became due.

6 The Trustee intends to identify an expert to further identify the above-referenced transfers,
7 and other improper transfers that occurred, and specifically reserves his right to amend or
8 supplement this response based on consultation with his expert.

9 (b) The Trustee has been damaged in at least the amount of the total fraudulent transfers
10 in an amount to be determined at trial, which were ultimately done to avoid obligations due
11 creditors, including the Petitioning Creditors with regard to the unpaid confession of judgment
12 executed by Debtor and Consolidated Nevada Corporation (\$85,000,000), plus attorneys' fees and
13 costs incurred in pursuing Defendants for the recovery of the fraudulent transfers is an amount to
14 be determined at trial.

15 (c) The following persons are believed to have information about the foregoing:

16 Paul Morabito	Person Most Knowledgeable of Snowshoe
17 c/o Barry L. Breslow	Petroleum, Inc..
18 c/o Frank C. Gilmore	c/o Barry L. Breslow
19 ROBISON, BELAUSTEGUI, SHARP &	c/o Frank C. Gilmore
20 LOW	ROBISON, BELAUSTEGUI, SHARP &
21 71 Washington Street	LOW
22 Reno, NV 89503	71 Washington Street
	Reno, NV 89503
23 Edward Bayuk, individually and as Trustee of	Salvatore Morabito
24 the Edward William Bayuk Living Trust	c/o Barry L. Breslow
25 c/o Barry L. Breslow	c/o Frank C. Gilmore
26 c/o Frank C. Gilmore	ROBISON, BELAUSTEGUI, SHARP &
27 ROBISON, BELAUSTEGUI, SHARP &	LOW
28 LOW	71 Washington Street
29 71 Washington Street	Reno, NV 89503
30 Reno, NV 89503	

1 Person Most Knowledgeable of Superpumper,
Inc.

2 c/o Barry L. Breslow
3 c/o Frank C. Gilmore
4 ROBISON, BELAUSTEGUI, SHARP &
5 LOW
6 71 Washington Street
7 Reno, NV 89503

8 Person Most Knowledgeable of Snowshoe
9 Petroleum, Inc.

10 c/o Barry L. Breslow
11 c/o Frank C. Gilmore
12 ROBISON, BELAUSTEGUI, SHARP &
13 LOW
14 71 Washington Street
15 Reno, NV 89503

16 Frank C. Gilmore, Esq.
17 ROBISON, BELAUSTEGUI, SHARP &
18 LOW
19 71 Washington Street
20 Reno, NV 89503

21 Person Most Knowledgeable, Sefton Trustees
Address Unknown

Person Most Knowledgeable of Consolidated
Nevada Corporation.

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

Craig Greene
McGovern & Greene LLP
2831 St. Rose Parkway, Suite 227
Henderson, Nevada 89052

Dennis C. Vacco , Esq.
Lippes Mathias Wexler Friedman
665 Main Street, Suite 300
Buffalo, NY 14203

Each of the persons listed are believed to have information regarding the allegations made
in the First Cause of Action of the *Complaint*, the *First Amended Complaint*, and the answer to the
Complaint.

(d) See documents identified in response to Defendants' First Set of Requests for
Production of Documents, which response is provided concurrently herewith.

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;

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

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

5 (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).

6 **RESPONSE TO INTERROGATORY NO. 4:**

7 Objection. The Trustee incorporates by this reference each applicable General Objection
8 set forth above as though fully stated herein. The Trustee further objects to the request in that the
Trustee was only substituted in as plaintiff in this matter on May 15, 2015 and is still in the process
9 of conducting his investigation. The Trustee further objects that the interrogatory seeks
10 information already in the possession and control of Debtor, Defendants and/or Debtor's or
11 Defendants' counsel. The Trustee further objects to this interrogatory as vague, overly broad, and
unduly burdensome as it seeks "All facts and evidence." Finally, as the Trustee continues to
12 investigate the claims, the Trustee reserves his right to amend or supplement the responses herein.

13 Subject to and without waiving the foregoing objections, the Trustee responds as follows:
14 The discovery request references paragraph 34 of the *Complaint*, which the Trustee understands
to be paragraph 30 of the *First Amended Complaint*. Based on this assumption:

15 (a) The Trustee continues to conduct his investigation but believes there are additional
16 fraudulent transfers. The Trustee will supplement this response as necessary. The Trustee intends
17 to identify an expert to further identify the above-referenced transfers, and other improper transfers
that occurred, and specifically reserves his right to amend or supplement this response based on
18 consultation with his expert.

19 (b) The Trustee has been damaged in at least the amount of the total fraudulent transfers
20 in an amount to be determined at trial, which were ultimately done to avoid obligations due
Debtor's creditors, including the unpaid confession of judgment executed by Debtor and
21

1 Consolidated Nevada Corporation (\$85,000,000) in favor of the Petitioning Creditors, plus
2 attorneys' fees and costs incurred in pursuing Defendants for the recovery of the fraudulent
3 transfers is an amount to be determined at trial.

4 (c) The following persons are believed to have information about the foregoing:

5 Paul Morabito	Person Most Knowledgeable of Snowshoe
6 c/o Barry L. Breslow	Petroleum, Inc...
7 c/o Frank C. Gilmore	c/o Barry L. Breslow
8 ROBISON, BELAUSTEGUI, SHARP &	c/o Frank C. Gilmore
9 LOW	ROBISON, BELAUSTEGUI, SHARP &
10 71 Washington Street	LOW
11 Reno, NV 89503	71 Washington Street
	Reno, NV 89503

12 Edward Bayuk, individually and as Trustee of	Salvatore Morabito
13 the Edward William Bayuk Living Trust	c/o Barry L. Breslow
14 c/o Barry L. Breslow	c/o Frank C. Gilmore
15 c/o Frank C. Gilmore	ROBISON, BELAUSTEGUI, SHARP &
16 ROBISON, BELAUSTEGUI, SHARP &	LOW
17 LOW	71 Washington Street
18 71 Washington Street	Reno, NV 89503
19 Reno, NV 89503	

20 Person Most Knowledgeable of Superpumper,	Person Most Knowledgeable of Consolidated
21 Inc.	Nevada Corporation.
22 c/o Barry L. Breslow	c/o Barry L. Breslow
23 c/o Frank C. Gilmore	c/o Frank C. Gilmore
24 ROBISON, BELAUSTEGUI, SHARP &	ROBISON, BELAUSTEGUI, SHARP &
25 LOW	LOW
26 71 Washington Street	71 Washington Street
27 Reno, NV 89503	Reno, NV 89503

28 Person Most Knowledgeable of Snowshoe	Barry L. Breslow, Esq.
29 Petroleum, Inc.	ROBISON, BELAUSTEGUI, SHARP &
30 c/o Barry L. Breslow	LOW
31 c/o Frank C. Gilmore	71 Washington Street
32 ROBISON, BELAUSTEGUI, SHARP &	Reno, NV 89503
33 LOW	
34 71 Washington Street	
35 Reno, NV 89503	

1 Frank C. Gilmore, Esq.
2 ROBISON, BELAUSTEGUI, SHARP &
3 LOW
4 71 Washington Street
5 Reno, NV 89503

Craig Greene
McGovern & Greene LLP
2831 St. Rose Parkway, Suite 227
Henderson, Nevada 89052

6 Person Most Knowledgeable, Sefton Trustees
7 Address Unknown

Dennis C. Vacco, Esq.
Lippes Mathias Wexler Friedman
665 Main Street, Suite 300
Buffalo, NY 14203

8 Each of the persons listed are believed to have information regarding the allegations made
9 in the Amended Complaint, and the answers thereto.

10 (c) See documents identified in response to Defendants' First Set of Requests for
11 Production of Documents, which response is provided concurrently herewith.

12 **INTERROGATORY NO. 5:**

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

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

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

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

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

RESPONSE TO INTERROGATORY NO. 5:

Objection. The Trustee incorporates by this reference each applicable General Objection
set forth above as though fully stated herein. The Trustee further objects to the request as the
Trustee is a panel chapter 7 trustee and cases in which he has been named a party is not likely to
lead to the discovery of admissible evidence in the above-captioned case.

INTERROGATORY NO. 6:

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

- 1 (a) All facts and evidence you maintain support your response;
- 2 (b) All documents or tangible things you maintain support your response including
their location and custodian.
- 3 (c) The name, contact information and a summary of their knowledge, of all persons
4 you maintain have information in support of this interrogatory.

5 **RESPONSE TO INTERROGATORY NO. 6:**

6 Objection. The Trustee incorporates by this reference each applicable General Objection
7 set forth above as though fully stated herein. The Trustee further objects to the request in that the
8 Trustee was only substituted in as plaintiff in this matter on May 15, 2015 and is still in the process
9 of conducting his investigation. The Trustee further objects that the interrogatory seeks
10 information already in the possession and control of Debtor, Defendants and/or Debtor's or
11 Defendants' counsel. The Trustee further objects to this interrogatory as vague, overly broad, and
unduly burdensome as it seeks "All facts and evidence." Finally, as the Trustee continues to
investigate the claims, the Trustee reserves his right to amend or supplement the responses herein.

12 (a) The Trustee is pursuing this State Court Case and the Bankruptcy Case, in an effort
to undo and/or recover the fraudulent transfers for the benefit of Debtor's creditors.

13 (b) See documents identified in response to Defendant's First Set of Requests for
14 Production of Documents, which response is provided concurrently herewith. See also, First
Amended Complaint, filed in the State Court Case.

15 (c) William A. Leonard
16 c/o Teresa M. Pilatowicz, Esq.
Garman Turner Gordon LLP
17 650 White Drive, Suite 100
Las Vegas, Nevada 89119

18 -or-

19 c/o John Murtha, Esq.
Woodburn and Wedge
20 Sierra Plaza
6100 Neil Road, Suite 500
21 Reno, Nevada 89511-1149

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Mr. Leonard has knowledge regarding the attempts made in the State Court Case and Bankruptcy Case to undo and/or recover the fraudulent transfers for the benefit of Debtor's creditor.

INTERROGATORY NO. 7:

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. 7:

Objection. The Trustee incorporates by this reference each applicable General Objection set forth above as though fully stated herein and further objects and responds as follows:

The answers to these interrogatories were generated with information known to the Trustee from documents provided to the Trustee by the Debtor and Defendants during the Bankruptcy Case and in previous state court litigation, and further identified in response to Defendants' First Set of Requests for Production of Documents, which response is provided concurrently herewith, as well as from Petitioning Creditors, who obtained the information and documents from Debtor and Defendants during the Bankruptcy Case and in previous state court litigation.

...

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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 28th day of May, 2015.

GORDON SILVER

By: /s/ Teresa Pilatowicz

GERALD M. GORDON, ESQ.
Nevada Bar No. 229

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650 White Drive, Ste. 100

Las Vegas, Nevada 89119

Telephone 725-777-3000

Proposed Attorneys for the Trustee

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of GARMAN TURNER GORDON LLP, and that on this
3 date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **CHAPTER 7**
4 **TRUSTEE WILLIAM A. LEONARD'S RESPONSES TO DEFENDANTS' FIRST SET OF**
5 **INTERROGATORIES** on the parties as set forth below:

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

8 ☐ Certified Mail, Return Receipt Requested

9 ☐ Via Facsimile (Fax)

10 ☒ Via E-Mail

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

12 ☐ Federal Express (or other overnight delivery)

13 addressed as follows:

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

19 DATED this 28th day of May, 2015.

20 /s/ Vicki DiMaio
21 An Employee of GARMAN TURNER GORDON LLP

2645
FRANK C. GILMORE, ESQ. - NSB #10052
fgilmore@rbsllaw.com
LINDSAY L. LIDDELL, ESQ. - NSB #14079
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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

CASE NO.: CV13-02663

DEPT. NO.: 4

Plaintiffs,

vs.

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

Defendants. /

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTIONS IN LIMINE TO EXCLUDE
THE TESTIMONY OF JAN FRIEDERICH**

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 oppose the Plaintiff's
Motion in Limine to Exclude the Testimony of Jan Friederich. This Opposition is made and
supported by the following Memorandum of Points and Authorities, the attached exhibits, the
attached Declaration of Frank C. Gilmore, Esq., and the pleadings and papers on file herein.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 A significant dispute in this case involves the “reasonably equivalent value” paid by
4 Defendants Edward Bayuk and Salvatore “Sam” Morabito in acquiring 80% of the outstanding
5 stock of Superpumper, Inc., from a company controlled by Paul Morabito.

6 Prior to 2010, Bayuk and Sam¹ each owned 10% of the outstanding stock of Consolidated
7 Western Corporation, a Nevada corporation (“CWC”) that held all the stock of Superpumper, Inc.,
8 an Arizona corporation that owned and operated gas stations/convenience stores in Scottsdale,
9 Arizona. Paul Morabito owned 80% of CWC.

10 Starting in September 2010, CWC (the parent company) was merged into Superpumper (the
11 subsidiary), and Bayuk and Sam purchased Paul’s 80% interest in Superpumper for fair market
12 value. One of Plaintiff’s central contentions in this case is that Bayuk and Sam acquired
13 Superpumper for less than “reasonably equivalent value in exchange” under NRS 112.180.

14 Prior to finalizing the September 2010 purchase, Dennis Vacco, New York counsel for the
15 Defendants, retained Matrix Capital Markets Group, Inc., to value the equity of Superpumper.
16 After a comprehensive appraisal, Matrix opined that the fair market value of 100% of the common
17 equity of Superpumper on a “controlling, marketable basis as of August 31, 2010 is \$6,484,514.”
18 See Excerpt of Matrix Report, attached hereto as **EXHIBIT 1**.

19 During discovery in this action, Plaintiff disclosed the expert report of James McGovern,
20 who rendered an opinion challenging the Matrix conclusion, opining that the “fair market value of
21 100% of equity ownership” of Superpumper was \$13,050,000. Thus, although Plaintiff has not
22 formally disclosed a damages model on this particular asset, it appears that Plaintiff’s expert
23 contends the fair market value (“FMV”) of Superpumper at the date of the purchase was
24 \$5,479,514 more than Defendants’ contemporaneous appraisal. At a difference of more than \$5
25 million, this dispute represents the single largest asset in dispute in this case. Plaintiff seeks to
26 recover that \$5 million from the Defendants.

27
28 ¹ Salvatore “Sam” Morabito will be referred to as “Sam” to avoid confusion with his brother Paul Morabito.

1 In response to McGovern's report, Defendants disclosed Jan Friederich as a non-retained
2 expert rebuttal witness to McGovern. Jan Friederich holds a master's degree in economics, and has
3 more than 50 years' experience as a CEO, consultant, operator, and buyer/seller of gas stations and
4 convenience stores in Germany, Texas, and the Southwest. Friederich's rebuttal opinions targeted
5 McGovern's obvious lack of specialty (or, more precisely, zero specialty) in the gas station and
6 convenience store industries, and he addressed McGovern's failure to address any market-specific
7 inputs applicable to Superpumper in Scottsdale, Arizona. Friederich's opinions were contained in
8 the Rebuttal Disclosures, which are attached hereto as **EXHIBIT 2**.

9 Plaintiff's Motion in Limine is meritless. Plaintiff misunderstands the non-retained expert
10 Rules, blatantly mis-states Jan Friederich's personal knowledge of the operations and valuations of
11 Superpumper, and ignores Friederich's half-century of expertise which will be essential to the
12 Court's understanding of how gas station/convenience stores actually derive their value. He cannot
13 be excluded.

14 **II. LAW**

15 **A. The Non-Retained Expert.**

16 NRCP 16.1(a)(2)(B) requires a witness who is "retained or specially employed to provide
17 expert testimony" to provide a report of his/her opinions along with a number of other disclosures.
18 Where a witness is not required to provide a written report, the disclosure must only:

19 state the subject matter on which the witness is expected to present
20 evidence under NRS 50.275, 50.285 and 50.305; a summary of the facts
21 and opinions to which the witness is expected to testify; the qualifications
22 of that witness to present evidence under NRS 50.275, 50.285 and 50.305,
which may be satisfied by the production of a resume or curriculum vitae;
and the compensation of the witness for providing testimony at deposition
and trial, which is satisfied by production of a fee schedule.

23 Plaintiff concedes, as he must, that "designation of a witness as a non-retained expert
24 permits fact witnesses whose observations are necessarily informed by their expertise to testify
25 regarding their observations without the burdens of producing an expert report." (Emphasis added).

26 The cases discussing the non-retained expert all rely on one singular factor that
27 differentiates a retained expert from a non-retained expert: personal observation of the facts at
28 issue. See, for example, *Ford Motor Co. v. Trejo*, 402 P.3d 649, 657 (Nev. 2017)(coroner relying

1 on observations performed during an autopsy); *Khoury v. Seastrand*, 132 Nev. Adv. Op. 52, 377
2 P.3d 81, 90 (2016)(“opinions [that] were formed during the course of treatment” were admissible,
3 but “Where a treating physician's testimony exceeds that scope,” he is subject to the report
4 requirement).

5 **B. Hallmark and NRS 50.275.**

6 This Court has “wide discretion, within the parameters of NRS 50.275, to fulfill its
7 gatekeeping duties.” *Higgs v. State*, 125 Nev. 1043, 18, 222 P.3d 648, 659 (2010)(citing *Hallmark*
8 *v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008)). To offer admissible opinions, an expert
9 must show that: (1) he or she must be qualified in an area of “scientific, technical or other
10 specialized knowledge”; (2) his or her specialized knowledge must “assist the trier of fact to
11 understand the evidence or to determine a fact in issue”; and (3) his or her testimony must be
12 limited “to matters within the scope of [his or her specialized] knowledge.” *Hallmark*, 124 Nev. at
13 498.

14 **III. ARGUMENT**

15 **A. Friederich Is a Fact Witness Whose Observations Are Informed By His**
16 **Expertise.**

17 Friederich is the quintessential non-retained expert witness. It is undisputed that his
18 company GDI Consulting was hired as a consultant to Superpumper in November 2009, nearly a
19 year before the oral pronouncement of the Herbst Judgment. See **EXHIBIT 3**. His retention had
20 nothing to do with this lawsuit. It is undisputed that he was retained to “supervise and direct the
21 operations” of Superpumper, and that he remained at that job until 2013. It is undisputed that all
22 Superpumper operations staff and management reported directly to Friederich. *Id.* Friederich was
23 retained to address, as he put it, “a severe downturn in 2008-2009, and they . . . wanted me to find
24 out what the reason is and how it can be fixed.” See Friederich Deposition Transcript, pp. 16-17,
25 attached hereto as **EXHIBIT 4**. In performing his duties, he became intimately familiar with
26 Superpumper operations, and the business plan’s strengths and weaknesses. When Vacco retained
27 Matrix to perform the appraisal, Friederich was the company liaison to Matrix from Superpumper.
28 *Id.* at p. 17.

1 Contrary to Plaintiff's unsupported contention, Friederich was not "retained to provide
2 testimony." (Motion, p. 7:10). Friederich is not being paid for his testimony. **Exhibit 2.** Instead,
3 he is merely being reimbursed his expenses associated with his testimony. Friederich was asked by
4 Superpumper to testify as a *fact* witness – due to his extensive knowledge of the operations of the
5 company – and was disclosed by counsel as a non-retained expert witness because his personal
6 knowledge is informed by his considerable expertise, giving rise to opinions which are critical to
7 the trier of fact in this case. Friederich agreed to testify. He is not "retained" and never has been.
8 Unlike McGovern, who has zero personal knowledge of any of the facts, and is being paid \$325 an
9 hour to opine, Friederich is an industry insider with deep familiarity with Superpumper, its
10 operations, and its market, and is testifying based on his own personal knowledge and experience.

11 Similarly, Plaintiff's contention that Friederich "is not a percipient witness testifying to
12 facts informed by any expertise" is absurd. In his deposition, he spent considerable time explaining
13 his close involvement with Superpumper's operations. Indeed, when Plaintiff's counsel asked
14 about "contracts that Superpumper had with Shell in detail" that gave rise to his conclusion that
15 McGovern had not accurately accounted for a liability of Superpumper in his valuation, Friederich
16 gave a 2-page response explaining his intricate personal knowledge of the contracts Superpumper
17 had with Shell Oil, and the nuances with these types of contracts. McGovern has no such expertise
18 nor personal knowledge. The explanation Friederich gave is integral to the Superpumper
19 operations, how it derives value, and what risks it maintains that impact valuation. He explained:

20 One is a wholesale agreement that not every retailer of gasoline is
21 a wholesaler at the same time. Most of the retailers or many of the
22 retailers, the smaller retailers, buy their gasoline through wholesalers.
23 Superpumper has the benefit of being a wholesaler themselves. So the
24 wholesale contract established them as a Shell wholesaler and determines
ways of pricing the fuel, what's it cost and how many gallons are expected
to be sold and what's the maximum and minimum. That's
the wholesale contract.

25 Then Superpumper entered into facility improvement arrangements
26 where Superpumper – where Shell was providing resources to improve or
27 to make it a Shell station, the signs, dispensers and all of that. That money
28 that they spent on every store is going to become a contingent liability for
the retailer because they wouldn't do it unless they have a long-term
contract. So in Superpumper's case, I think it's a 14-year, something like
that, contract. If Superpumper does not live up to the 20 years or 14 years,
they would have to pay -- repay the unamortized portion of the money

1 Shell spent on the improvement of the gasoline stations.

2 And when certain requirements, legal requirements, came up with
3 regard to the models of the credit card readers, that was another
4 investment necessary, so-called tipping arrangement with the contract with
5 Shell. There was another amount of money spent and that was added to
6 the amount that needed to be amortized over a period of time, and I think
7 the contract at the time expended a little more.

8 Those are the three contracts. What I forgot to mention was that
9 Shell has a rebate program where Superpumper received in the first four or
10 five years 2 cents or 2.5 cents per gallon as rebate. That becomes part of
11 what needs to be amortized as well. So every store has a certain amount
12 that has to be amortized over a certain period of time. The amortization
13 does not start until five years after -- to the best of my recollection, five
14 years after the money was spent.

15 As a result of that, Superpumper has a contingent liability as of
16 November of last year of \$2.6 million that amortizes as the contract goes
17 through the term.

18 **Exhibit 4** at pp. 27-28. The entire response was cited herein to establish the sheer depth of his
19 personal knowledge, and the vastness of his expertise. These concepts -- amortization of petroleum
20 wholesaler agreements -- is at issue in this case. The parties have a \$5-million dispute directly tied
21 to these issues. McGovern's report makes no mention of Shell's contingent liability. He fails to
22 address any industry-specific knowledge, and further evidences his mis-understanding of how gas
23 stations operate and derive their value. Friederich has intimate personal knowledge of
24 Superpumper's business that no witness in this case possesses.

25 McGovern's report does not attempt to address specific industry factors that impact
26 valuation of operations like Superpumper. Friederich has personal knowledge of the market forces
27 that impact Superpumper's business, and the nuances of assessing value. When asked how price
28 volatility affects Superpumper, he explained:

When a price -- when the retail price for gasoline, as it happened to be
during that period of time, gets close to \$4 a gallon, one effect is that you
have more price sensitive customers. I'll get to that later. But the first,
immediate impact on the bottom line of the company is the credit card fee
per gallon is 2 percent; on \$4 would be 8 cents. We are now in the \$2
range. It's 4 cents. And 2 cents or 4 cents difference in the price of
gasoline, in the gross profit of gasoline makes in this case is \$800,000.
That's part of the volatility. When a price -- when a margin can be
achieved at the 30-cent range, as Scottsdale market allows, it's much easier
to get the 30 cents as a consumer. As long as you get a gallon below \$2,
you are much less price sensitive than when you inch up against a \$3. So
it's much harder to maintain the 30-cent margin when you cross the line
from \$2 to \$3 or \$3 to \$4 because of price sensitivity of the customers.

1 And you probably see in those numbers from Superpumper that the
2 gallons went down over a period of time. I'm able to go to 2005 from
3 2007 from 28 million to now 19 million.

4 *Id.* at pp. 32-33. This testimony is based on Friederich's personal knowledge and involvement in
5 the gas station business. Friederich's personal knowledge of Superpumper is informed by his
6 considerable expertise in this business. He is the quintessential non-retained expert. Plaintiff
7 wishes to exclude him because Plaintiff knows Friederich's personal knowledge and expertise
8 evidences McGovern's dearth of gas station expertise or knowledge. Friederich was properly
9 noticed as a non-retained expert.

10 **B. Friederich's Specialized Knowledge Will Assist the Court in Understanding the**
11 **Failings of McGovern's Report.**

12 Friederich does not hold himself out as a certified business evaluator, and he does not
13 intend to testify as an expert appraiser. Indeed, Defendants did not disclose him as an expert in
14 valuation methodology. Rather, he was disclosed to address four specific issues identified in
15 McGovern's report, upon which Friederich is keenly qualified to opine on. Friederich intends to
16 opine that:

- 17 a) Fuel Sales should be measured in Gallons and not in dollars, and a
18 reasonable Margin in cents/gallon should be applied to determine an Income
19 stream;
- 20 b) A multiple of 5.9 for future expected EBITDA is almost twice as high as the
21 industry standard. Industry standard for leased stores with above market
22 lease rates are closer to a multiple of 3 times EBITDA;
- 23 c) Receivables should not be assumed as collectible and will not be acquired by
24 any buyer without certainty and should not be part of a company's Market
25 value solely based on an assumption; and
- 26 d) The company's value in 2010 was negatively impacted by the fact that the
27 money Superpumper received upfront from Shell would have to be repaid or
28 amortized over the term of the contract. The unamortized portion is still [as

1 of Feb. 2016] \$2.5 million.

2 These disclosures satisfy both the subject matter and summary of opinion requirements of
3 NRC 16.1(a)(2)(B). The subject matter is specific and limited. It has to do with Superpumper's
4 industry and market-specific factors that bear on any potential arm's length transaction between a
5 buyer and a seller. The summaries are clear and understandable in their scope and breadth. The
6 disclosures met the requirements of the Rule.

7 **1. *Friederich is Sufficiently Qualified to Render Expert Opinions.***

8 Plaintiff's contention that Friederich lacks requisite qualifications to render opinions on
9 these four categories is laughable. Friederich has an advanced economics degree; he was the CEO
10 of a supermarket chain which owned gas stations; he owned a wholesale company that provided
11 services to supermarkets and convenience stores; he served as a consultant to a creditors'
12 committee in a bankruptcy that involved 250 highly-leveraged convenience stores. **Exhibit 4**, pp.
13 7-11. As he explained it, "[m]y expertise resides on the fact that I was involved in buying and
14 selling and advising companies who wanted to buy and sell, especially the {spretz} it scenarios
15 where I was advising and actively involved in buying and selling convenience stores, not as a
16 consultant, but as a potential buyer or seller." *Id.* at pp. 22-23. Indeed, he testified that he
17 ultimately purchased and operated approximately 200 convenience stores from the Convenience
18 USA bankruptcy estate. *Id.* at pp. 9-10. Friederich has considerable experience in the practical
19 world of marketing, buying, and selling convenience stores and gas stations. His expertise is in
20 real-world, arm's length commercial operations and exchanges.

21 Friederich's opinions are not offered to rebut McGovern's *methodologies*. Rather,
22 Friederich offers opinions that challenge the *inputs and assumptions* McGovern utilizes in reaching
23 his conclusions, particularly as those inputs pertain to real-world assessments of value in this niche
24 industry, and from the buyer's perspective. This type of expertise is just as important -- if not more
25 so -- to the determination of fair market value as is the merely academic exercise McGovern
26 undertakes. After all, for purposes of this case, "reasonably equivalent value" is synonymous with
27 "fair market value." McGovern defines this term correctly as the price with which the property
28 would change hands between a willing seller and willing buyer without compulsion to sell, and

1 with both parties having reasonable knowledge of the relevant facts. Defendants agree with this
2 definition. So do the Nevada authorities. “‘Fair market value’ is defined as ‘[t]he price that a seller
3 is willing to accept and a buyer is willing to pay on the open market and in an arm's-length
4 transaction; the point at which supply and demand intersect.’” *Gohar v. State*, No. 73872, 2018
5 WL 3351984, at *4 (Nev. App. June 22, 2018) (citing *Value*, Black's Law Dictionary (10th ed.
6 2014)). Friederich is unquestionably qualified to render opinions as to those industry-specific
7 inputs that real-world gas stations evaluate in acquisitions made between willing sellers and willing
8 buyers.

9 **2. *Friederich’s Opinions Are Critical to an Accurate Understanding of These***
10 ***Facts.***

11 Valuing a small number of gas stations within a very specifically defined suburban area of
12 Scottsdale, Arizona, is not simply an academic exercise with plug-and-play assumptions and inputs.
13 Friederich knows this better than any other witness in this case (even the owners), and certainly
14 better than McGovern. For example, McGovern’s valuation analysis assesses Superpumper’s gross
15 margins as a certain percentage of sales. In other words, a customary retailer might apply 30
16 percent to sales to determine a gross margin. However, as Friederich explains, *fuel* gross profit
17 does not work the way routine retail does.

18 The fuel gross profit is arrived completely differently. It's not a certain
19 percentage of sales. I have not seen anything that refers to cents per
20 gallon in his report, McGovern’s report, although that is the most critical,
21 the single critical item in evaluating a company, how many cents per
22 gallon does the market allow to get. So if I sell it in this case 20 million
23 gallons in Superpumper case and I can get 30 cents per gallon, regardless
24 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 s[ee]
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 the McGovern report.

25 **Exhibit 4**, at pp. 24-26 (emphasis added). It is absolutely critical that the Court understand how
26 gas stations are valued in the real world by industry experts who do this for a living. This
27 technical, specialized expertise will provide insight to the issue that no other disclosed witness can
28 offer. McGovern does not, and cannot, do this. Without Friederich, these specialized concepts will

1 be unexplainable.

2 Friederich's opinions related to certain assumptions McGovern made about the
3 collectability of certain receivables on Superpumper's books are helpful to an understanding of the
4 facts. His opinions surely go a long way to explain how the parties are more than \$5 million apart
5 on their respective valuations. Friederich's opinions are derived from years and years of gas station
6 and convenience store acquisitions in the real world. Friederich criticizes McGovern's untested
7 assumption that of the \$13 million in total appraised value, approximately half of that value is
8 derived from \$6 million in related-party loans carried on the books of Superpumper, which
9 McGovern contends is collectible debt. Friederich explained, "It should have been tested. It
10 should have been -- if I have a \$13 million valuation, half of it comes from a receivable that I have
11 assumptions about is, in my mind, ridiculous." *Id.* at pp. 63-64. He further explained that it makes
12 no sense for a buyer to acquire the assets of a gas station, half the value of which includes non-
13 performing notes payable made by the seller's principles. "If I were a buyer, I would not buy a
14 non-operating asset. I can spend the six million or whatever it's worth, six and a half million
15 dollars in better places. Buying a note [from the seller] for 6 and a half million dollars at face value
16 of 6 and a half million dollars, why would I do that. Go to the bank if you need that money." *Id.* at
17 6.

18 Friederich explains why McGovern's reliance on national trade publications for his industry
19 research is not Superpumper specific. Friederich was asked, "Do you rely on that [Key Value Data
20 Industry Research Report] when you're buying a company?" to which he replied, "No. . . . See, they
21 are talking about national trends. And when I buy stores, it's in a very specific market, so I'm not
22 concerned about national trends. I'm concerned about the specific market." *Id.* at pp. 74-75.

23 Q. Can you tell me how Arizona, or to be more specific, the
24 Phoenix/Scottsdale area, differs from the national industry
25 market?

26 A. Yeah. It starts -- in Scottsdale, it starts with high income. The
27 demographics are substantially different than the rest of -- most
28 of the country. You have very different -- in this market you

1 have very high real estate prices compared to -- you asked about
2 a comparison to the average in the United States. Higher
3 income, higher real estate prices, more restrictive planning,
4 planning guides and zoning. And in Scottsdale there's
5 substantially fewer gas stations per thousand population.

6 Q. So consumers have less choice?

7 A. Yes.

8 *Id.* at 75. This testimony is unquestionably based on his own personal experience with
9 Superpumper, and informed by his considerable expertise. It is highly specialized and technical,
10 and without it the Court cannot obtain a clear and full understanding of the facts at issue. As
11 shown by the four categories of opinions he has identified, his testimony will be limited to those
12 matters squarely within his scope of knowledge and expertise.

13 **IV. CONCLUSION**

14 A key issue presented in this case is the fair market value of Superpumper's equity.
15 Plaintiff seeks judgment against Defendants of more than \$5.4 million on this asset alone. Jan
16 Friederich is the only real industry expert in this case who has actual arm's length, transactional,
17 market experience in Superpumper's industry. He is properly identified as a non-retained expert,
18 and he meets all the qualification requirements of the *Hallmark* case. He must be permitted to
19 testify.

20 **AFFIRMATION (Pursuant to NRS 239B.030)** The undersigned does hereby affirm that
21 this document does not contain the social security number of any person.

22 DATED this 8th day of October, 2018.

23 ROBISON, SHARP, SULLIVAN & BRUST
24 71 Washington Street
Reno, Nevada 89503

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

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1. I am an attorney licensed to practice law in all courts in the State of Nevada, and am counsel of record for the Defendants in this action. I am a shareholder in the law firm of Robison, Sharp, Sullivan & Brust, and have been licensed to practice law in this State since 2006.

12 3. Attached to the Opposition as Exhibit 3 is a true and accurate copy of an email
13 dated November 9, 2009 regarding Jan Friederich as a consultant.

FRANK C. GILMORE

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Robison, Sharp, Sullivan &
3 Brust, and that on this date I caused to be served a true copy of the **DEFENDANTS'**
4 **OPPOSITION TO PLAINTIFF'S MOTIONS IN LIMINE TO EXCLUDE THE**
5 **TESTIMONY OF JAN FRIEDERICH** all parties to this action by the method(s) indicated
6 below:

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

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

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

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

24 _____ by personal delivery/hand delivery addressed to:

25 _____ by email addressed to:

26 Gerald Gordon, Esq.
27 Email: ggordon@Gtg.legal
28 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:

26 DATED: This 8th day of October, 2018.

27 
28

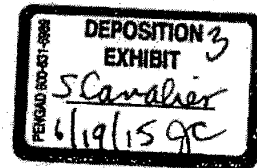
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LIST OF EXHIBITS

<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>	<u>NO. OF PAGES</u>
1	Excerpt of Matrix Report	4
2	Rebuttal Disclosures	14
3	11/9/2009 Email	1
4	Portions of Friederich Deposition Transcript	23

EXHIBIT 1

EXHIBIT 1



SUPERPUMPER, INC.

**VALUATION OF 100 PERCENT OF THE COMMON EQUITY IN
SUPERPUMPER, INC. ON A CONTROLLING, MARKETABLE BASIS
As of August 31, 2010**

Prepared for:

Superpumper, Inc.
c/o Dennis Vacco, Esquire
Lippes Mathias Wexler Friedman, LLP
665 Main Street, Suite 300
Buffalo, NY 14203

Prepared by:

Spencer P. Cavalier, CFA, ASA
Sean P. Dooley
Matrix Capital Markets Group, Inc.
100 S. Charles Street, Suite 1350
Baltimore, MD 21201

The information contained herein is of a confidential nature and is intended for the exclusive use of the persons or firm for whom it was prepared. Reproduction, publication or dissemination of all or portions hereof may not be made without prior approval from Matrix Capital Markets Group, Inc.

October 13, 2010

PERSONAL AND CONFIDENTIAL

Superpumper, Inc.
c/o Dennis Vacco, Esquire
Lippes Mathias Wexler Friedman, LLP
665 Main Street, Suite 300
Buffalo, NY 14203

RE: Superpumper, Inc.

Dear Mr. Vacco:

At your request, we have performed a valuation engagement to determine the fair market value of 100 percent of the common equity (Subject Interest) in Superpumper, Inc. (Superpumper or the Company), on a controlling, marketable basis, as of August 31, 2010 (the Valuation Date).

Fair market value is based in large part upon the expectation of future benefits to be received by the prospective purchaser and to be given up by the prospective seller, which are directly attributable to the asset being transferred.

Fair market value is defined in Section 25.2512-1 of the U.S. Treasury regulations as:

"The price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of relevant facts."

The objective of a valuation is to express an unambiguous opinion as to the value of the business, business ownership interest, or security, which is supported by all procedures that the valuator deems to be relevant to the valuation.

A valuation has the following qualities:

1. Its conclusion of value is expressed as either a single dollar amount or a range.

Superpumper, Inc.
c/o Dennis Vacco, Esquire
October 13, 2010
Page 2

2. It considers all relevant information as of the valuation date available to the valuator at the time of the performance of the valuation.
3. The valuator conducts appropriate procedures to collect and analyze all information expected to be relevant to the valuation.
4. The valuation is based upon consideration of all conceptual approaches deemed to be relevant by the valuator.

For our valuation, we used standard valuation approaches and methodologies. The financial information in this valuation, including the accompanying exhibits, is presented solely to assist in the development of our conclusion of value, and it should not be used for any other purpose. Because of the limited purpose of this information, it may contain departures from generally accepted accounting principles. The conclusion of value given is based on information provided in part by the management of Superpumper.

This report is a restricted-use report and is an abridged version of the information that would be provided in a detailed valuation report and therefore does not contain the same level of detail as a detailed report. This restricted-use report is restricted for use by the shareholders of Superpumper for corporate planning purposes only. No other third parties should rely on the information contained in this report without seeking professional advice. We have no obligation to update this report or our conclusion of value for information that comes to our attention after the date of this report.


Based on our analysis as described in this valuation report, it is our estimate that the fair market value of 100 percent of the common equity in Superpumper, Inc., on a controlling, marketable basis, as of August 31, 2010 is \$6,484,514.

This conclusion or opinion of value is subject to the Statement of Valuation Assumptions and Limiting Conditions included in the report on pages 5 through 7. Neither Matrix Capital Markets Group, Inc. nor the individuals involved in preparing this valuation has any present or contemplated future interest in Superpumper, Inc. or any other interests that might tend to prevent making a fair and unbiased valuation. The details of the valuation and the basis for conclusions are summarized in this report and the details of

Superpumper, Inc.
c/o Dennis Vacco, Esquire
October 13, 2010
Page 3

our conclusions are included in our workpaper files. This restricted-use report is to be used solely by you for corporate planning purposes and should not be used for any other purpose. If you have any questions, please contact Spencer P. Cavalier or Sean P. Dooley, the report preparers.

Matrix Capital Markets Group
MATRIX CAPITAL MARKETS GROUP


Spencer P. Cavalier, CFA, ASA
Report Preparer



Sean P. Dooley
Report Preparer

EXHIBIT 2

EXHIBIT 2

1700
BARRY L. BRESLOW, ESQ. – NSB #3023
bbreslow@rbsllaw.com
FRANK C. GILMORE, ESQ. - NSB #10052
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Robison, Belaustegui, Sharp & Low
A Professional Corporation
71 Washington Street
Reno, Nevada 89503
Telephone: (775) 329-3151
Facsimile: (775) 329-7169

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

CASE NO.: CV13-02663

DEPT. NO.: B1

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.

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

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

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

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

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

11 2. JAN FRIEDERICH, 9705 Pebble Beach Dr, NE, Albuquerque, NM 87111; Phone
12 505-269-6190. Mr. Friederich is Defendants' non-retained expert rebuttal witness. He was a
13 consultant hired by Superpumper to assist with the Matrix evaluation. Mr. Friederich liaised with
14 Dennis Vacco and Spencer Cavalier to accomplish the valuation and provide insight as to the
15 Superpumper financials.

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

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

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

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

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

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

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

1 Market value solely based on an assumption; and

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

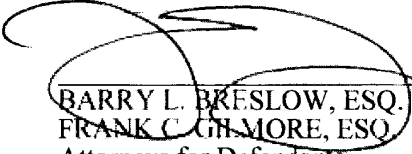
6 For the reasons set forth above, Mr. Friederich believes the Matrix Valuation is much
7 closer to a realistic Market price than is McGovern's opinion of value.

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

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

12 DATED this 29th day of February, 2016.

13 ROBISON, BELAUSTEGUI, SHARP & LOW
14 A Professional Corporation
15 71 Washington Street
16 Reno, Nevada 89503

17 
18 BARRY L. BRESLOW, ESQ.
FRANK C. GILMORE, ESQ.
Attorneys for Defendants

19 J:\WPData\BLB\14359.001 Snowshoe adv. Herbst P-Rebuttal Expert Witness Disclosure.2-19-16.doc

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:

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 29th day of February, 2016.



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EXHIBIT LIST

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

EXHIBIT 1

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**).

<u>Valuation</u> <u>Approach</u>	<u>Method</u>	<u>Indicated</u> <u>Value</u>	<u>Non-</u> <u>Operating</u> <u>Assets</u>	<u>Total Value of</u> <u>Equity</u>
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 not 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	<u>14.20%</u>

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			
	<u>Per McGovern</u> <u>(Bates</u> <u>#McGOVERN</u> <u>000033)</u>		
		<u>As Adjusted</u>	<u>Difference</u>
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	<u>\$ 6,573,010.76</u>	<u>\$ 5,332,799.01</u>	<u>\$ 1,240,211.75</u>
Rounded	<u>\$ 6,550,000</u>	<u>\$ 5,333,000</u>	<u>\$ 1,217,000</u>

(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			
		<u>Per McGovern</u> <u>(Bates</u> <u>#McGOVERN</u> <u>000033)</u>	<u>As Adjusted</u>
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		<u>\$ 5,240,000</u>	<u>\$ 4,266,400</u>

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

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 |

EXHIBIT 3

EXHIBIT 3

Rebecca Post

From: Paul Morabito <pmorabito@cowestco.com>
Sent: Monday, November 9, 2009 4:30 PM
To: Daniel Fletcher; Jim Benbrook; Don Whitehead; Sam Morabito; janfriede@aol.com; stan@bernstein-cpabiz.com; SYalaman@hodgsonruss.com
Subject: Consultant

Jan Friederich/GDi has entered into a consulting agreement with Superpumper Inc. to supervise and direct the operations of the company. Effective immediately all operations management and staff other than finance will report directly to Jan. Sam and I should be copied on all directives and communications.

Paul Morabito
Chairman
Cowesto Investment LLC
US: (775) 682-3910
CDN: (416) 915-4160
UK: 0-777-0 385385
fax: (480) 222-1062
pmorabito@cowestco.com

Sent wirelessly from my BlackBerry device on the Verizon network.
Envoyé sans fil par mon terminal mobile BlackBerry sur le réseau de Verizon.

EXHIBIT 4

EXHIBIT 4

1 IN THE SECOND JUDICIAL DISTRICT COURT

2 THE STATE OF NEVADA, COUNTY OF WASHOE

4 WILLIAM A. LEONARD, trustee for)
the Bankruptcy Estate of Paul)
5 Anthony Morabito,)
Plaintiff,) Case No.
6) CV13-02663
7 vs.)
8 SUPERPUMPER, INC., an Arizona)
corporation; EDWARD BAYUK,)
9 individually and as Trustee of)
the EDWARD WILLIAM BAYUK LIVING)
0 TRUST; SALVATORE MORABITO, an)
individual; and SNOWSHOE)
1 PETROLEUM, INC., a New York)
corporation,)
2)
Defendants.)
3)

6 DEPOSITION OF JAN FRIEDERICH
7 LAS VEGAS, NEVADA
8 MARCH 29, 2016

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

JOB NO. 296780

1 A. No.

2 Q. What did they relate to?

3 A. Convenience USA. It's a company that I
4 acquired in 2003, I think.

5 Q. Have you ever been designated as an
6 expert in a case before?

7 A. No.

8 Q. It's been a little while since you've
9 been deposed so I'll give you a brief overview. Do
10 you understand that your testimony today is given
11 under penalty of perjury just like if you were in
12 court?

13 A. Yes.

14 Q. You're doing a great job of letting me
15 finish my sentence before you speak. I'm actually
16 the person that has the worst habit of talking over
17 people. I will try to do my best and let you
18 finish your answer before I ask my next question.
19 Please do your best to say yes and no instead of
20 uh-huh and huh-uh so that she can keep a record.

21 If at any point you'd like a break to
22 walk around, get a drink of water, whatever, just
23 let me know. The only thing I ask is that you
24 answer the question that I have pending.

25 I understand that you have a master's

1 degree in economics from University of Hamburg?

2 A. That is correct.

3 Q. Do you have any other advanced degrees?

4 A. No.

5 Q. Your resume indicates that you acted as a
6 consultant for Superpumper from 2009 through 2013;
7 is that right?

8 A. That is correct.

9 Q. And you did that through a company, your
10 company provided consulting services?

11 A. Yes.

12 Q. And what was the name of that company?

13 A. GDI Consulting.

14 Q. Are you the sole owner of GDI Consulting?

15 A. Yes.

16 Q. And does GDI solely consult companies
17 with respect to convenient stores or gas stations?

18 A. Yes.

19 Q. What is the market area of GDI Consulting
20 Services?

21 A. New Mexico, Arizona, west Texas, and then
22 I did in 2003 consulting work for creditor
23 committees.

24 Q. Creditors committee in a bankruptcy case?

25 A. Yes.

1 Q. Was that a committee of bondholders?

2 A. Yes.

3 Q. And it was for GMAC?

4 A. Yes.

5 Q. Now, you were the CEO and chairman of
6 Furr's Supermarkets for some period of time; is
7 that right?

8 A. Yes. Yes.

9 Q. When did you step down as chairman and
10 CEO?

11 A. 1999.

12 Q. And was that about two years before they
13 filed for Chapter 11?

14 A. Yes.

15 Q. Did you have another position in the
16 company before you became CEO?

17 A. I had started in 1980. I think I was
18 always CEO.

19 Q. Did Furr's own gas stations?

20 A. Small convenient stores.

21 Q. And did those convenient stores sell
22 fuel?

23 A. I think so.

24 Q. Were you directly involved in overseeing
25 those convenient stores while at Furr's?

1 A. Yes.

2 Q. Do you recall how many convenient stores
3 Furr's had?

4 A. A few. It was not a large number.

5 Q. All right. And after you left Furr's,
6 you were involved in the convenient store business
7 as part of General Distributors, Inc.?

8 A. That was one part. I owned the company.
9 It's a wholesale company that provides services to
10 small, rural supermarkets and convenient stores.

11 Q. Is that company still in existence?

12 A. Yeah. I owned it before 2001. It was, I
13 think, in 1993-'94 when I had acquired it.

14 Q. Are you still actively involved in that
15 company?

16 A. Little bit. My son is operating it
17 there.

18 Q. In connection with the Convenience USA
19 bankruptcy case, your resume indicates that you
20 were a consultant to GMAC, who was a bondholder in
21 that case; is that correct?

22 A. That's correct.

23 Q. What type of services did you provide to
24 them as a consultant?

25 A. I put together a business plan for those

1 250 convenient stores. It was highly leveraged,
2 obviously, at the time. And provided analyses and
3 valuations for -- in order to find an exit strategy
4 for the creditors.

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

7 A. Yes.

8 Q. How many?

9 A. Two hundred, about two hundred.

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

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

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

19 A. I think so.

20 Q. Where was that pending?

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

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

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

1 were three different companies because there were
2 three different loan tranches, three different
3 bondholders.

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

6 A. Yes, it was an exit from bankruptcy.

7 Q. That's lingo that I know.

8 A. I, unfortunately, do too.

9 (Exhibit 1 marked)

10 BY MS. HAMM:

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

14 A. Yes.

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

18 A. Yes.

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

22 A. Yes.

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

1 **Q. And who was that management team as of**
2 **2013 when you left?**

3 A. Andrew. I don't know his last name.
4 Andrew was the marketing operating guy. They had,
5 I think Chris was already the CFO in 2013 or in the
6 process of. I was involved with the hiring of
7 Andrew and Chris came as a replacement for the
8 prior CFO. And Danielle. I'm sorry, I only know
9 the first names. Danielle was an office manager in
10 charge of payroll.

11 **Q. Who asked you to become a consultant for**
12 **Superpumper in 2009?**

13 A. I didn't understand the question.

14 **Q. Who asked you to consult in 2009?**

15 A. It was, I think the first contact I had
16 was from the law firm of Dennis Vacco. And then I
17 spoke briefly with Paul Morabito and then got in
18 touch with Sam Morabito after that.

19 **Q. Did Paul Morabito discuss with you the**
20 **reason for needing the Matrix valuation?**

21 A. No, it was not -- it had nothing to do
22 with the Matrix valuation at the time.

23 **Q. Okay. Tell me what it was about then?**

24 A. The company had a severe downturn in
25 2008-2009, and they, the ownership of the company,

1 wanted me to find out what the reason is and how it
2 can be fixed if it can be fixed.

3 Q. Go ahead.

4 A. It had nothing to do at the outset with
5 this Matrix at all.

6 Q. How long had you been assisting the
7 company by the time Matrix completed its valuation?

8 A. Matrix completed the valuation in
9 September 2010.

10 Q. Approximately, yes?

11 A. Problem about a year, a little more than
12 that.

13 Q. So you had familiarity with the financial
14 affairs of the company before Matrix completed its
15 valuation?

16 A. Yes. I basically became the designated
17 contact person from the company to Matrix.

18 Q. So in Exhibit 2 it states that,
19 "Mr. Friederich liased with Dennis Vacco and
20 Spencer Cavalier to accomplish the valuation and
21 provide insight into the Superpumper financials."

22 Is that accurate?

23 A. Yes.

24 Q. And by "liase," that means you, as you
25 said, you were the point of contact?

1 A. No.

2 Q. In forming the opinions set out in
3 Exhibit 2 regarding Mr. McGovern's report, did you
4 rely on any guidelines that are applicable to
5 valuation analysts or CPAs?

6 A. No.

7 Q. Are you familiar with the national
8 association of certified val {u} a{tors} and
9 analyst professional standards?

10 A. No.

11 Q. Are you familiar with the standards of
12 valuation services set forth by the I think it's
13 called the association of something certified -- I
14 forget the terminology. It's the A I CPA?

15 A. No.

16 Q. So you're not holding yourself out as a
17 valuation expert; right?

18 A. No.

19 Q. What is the subject matter of your
20 expertise?

21 A. My expertise resides on the fact that I
22 was involved in buying and selling and advising
23 companies who wanted to buy and sell, especially
24 the {sprez} it scenarios where I was advising and
25 actively involved in buying and selling convenient

1 stores, not as a consultant, but as a potential
2 buyer or seller.

3 Q. Did you do anything to prepare for your
4 deposition today?

5 A. No, not really.

6 Q. Did you speak to Mr. Gilmore?

7 A. Yeah.

8 Q. This morning?

9 A. Yeah.

10 Q. And yesterday?

11 A. Yes.

12 Q. How long have you all spoken about your
13 deposition?

14 A. Maybe a total of half an hour.

15 Q. Did he talk to you about any of the
16 questions that he anticipated I would ask?

17 A. No.

18 Q. Did you review any documents before your
19 deposition today?

20 A. No, not specifically.

21 Q. When was the last time -- strike that.
22 You've reviewed the Matrix valuation;
23 right?

24 A. Yes.

25 Q. When was the last time you reviewed it?

1 A. A week ago.

2 Q. And you reviewed Michelle {sal} {sar}'s?

3 A. And yesterday actually because I was at
4 the deposition.

5 Q. Okay. And you've Michelle {sal} {sar}'s
6 report; right?

7 A. Briefly.

8 Q. Did you review her rebuttal report?

9 A. I read it, but not really reviewed it.

10 Q. Did you and Mr. Gilmore discuss Mr. Mc
11 governs testimony yesterday?

12 A. Not with any specificity, just {jonl}.

13 Q. Generally, what did you all discuss?

14 A. My stated comments here were, in my mind,
15 confirmed, that there was very little expertise
16 expressed with regard to convenient stores and
17 gasoline business.

18 Q. Tell me how the convenient store and
19 gasoline business is different from other
20 industries.

21 A. Other retailers, for example?

22 Q. Yes, sir.

23 A. I've been in the super market business
24 for quite a while. And in the super market
25 business gross margins are arrived at applying a

1 certain percentage to sales. So if I want to
2 generate in gross profit, I apply 30 percent to the
3 sales of produce or a flower or whatever. That's
4 the same we do in the in-store part of the
5 convenient store.

6 The fuel sales are different -- are
7 calculated or are -- strike that.

8 The fuel gross profit is arrived
9 completely differently. It's not a certain
10 percentage of sales. I have not seen anything that
11 refers to cents per gallon in his report, Mc
12 governs report, although that is the most critical,
13 the single critical item in evaluating a company,
14 how many cents per gallon does the market allow to
15 get.

16 So if I sell it in this case 20 million
17 gallons in Superpumper case and I can get 30 cents
18 per gallon, regardless of the price of the
19 gasoline, then I know that I can make \$6 million in
20 gross profit if the market bears 30 cents per
21 gallon. When you say differences in operating
22 results of convenient stores and gasoline stations,
23 it's always the result of how many gallons, how
24 many cents per gallon does the market allow
25 me to get. that issue is not addressed at all in

1 the Mc govern report.

2 Q. Let me ask this. In Superpumper's
3 audited financial statements gross fuel profits are
4 identified; correct?

5 A. That is correct.

6 Q. And when any gas station or convenient
7 store company provides financial statements to, for
8 example, a lender, would those financial statements
9 include gross profit on fuel?

10 A. The profit and loss statements of most of
11 those companies will always have an indicator of
12 how the gross profit is derived. So it will always
13 show cents per gallon.

14 Q. But at the end of the day, cents per
15 gallon converts into dollars; right?

16 A. Yes, into gross profit dollars.

17 Q. I'm going to ask you later about these
18 contracts that Superpumper had with Shell in
19 detail. Are you aware of agreements that
20 Superpumper had with Shell?

21 A. Yes.

22 Q. And can you educate me, give me a brief
23 description of what type of agreement that is?

24 A. Yes. There's more than one agreement.

25 Q. Okay.

1 A. One is a wholesale agreement that not
2 every retailer of gasoline is a wholesaler at the
3 same time. Most of the retailers or many of the
4 retailers, the smaller retailers, buy their
5 gasoline through wholesalers. Superpumper has the
6 benefit of being a wholesaler themselves. So the
7 wholesale contract established them as a Shell
8 wholesaler and determines ways of pricing the fuel,
9 what's it cost and how many gallons are expected to
10 be sold and what's the maximum and minimum. That's
11 the wholesale contract.

12 Then Superpumper entered into facility
13 improvement arrangements where Superpumper -- where
14 Shell was providing resources to improve or to make
15 it a Shell station, the signs, dispensers and all
16 of that. That money that they spent on every store
17 is going to become a contingent liability for the
18 retailer because they wouldn't do it unless they
19 have a long-term contract. So in Superpumper's
20 case, I think it's a 14-year, something like that,
21 contract. If Superpumper does not live up to the
22 20 years or 14 years, they would have to pay --
23 repay the unamortized portion of the money Shell
24 spent on the improvement of the gasoline stations.

25 And when certain requirements, legal

1 requirements, came up with regard to the models of
2 the credit card readers, that was another
3 investment necessary, so-called tipping arrangement
4 with the contract with Shell. There was another
5 amount of money spent and that was added to the
6 amount that needed to be amortized over a period of
7 time, and I think the contract at the time expended
8 a little more.

9 Those are the three contracts. What I
10 forgot to mention was that Shell has a rebate
11 program where Superpumper received in the first
12 four or five years 2 cents or 2.5 cents per gallon
13 as rebate. That becomes part of what needs to be
14 amortized as well. So every store has a certain
15 amount that has to be amortized over a certain
16 period of time. The amortization does not start
17 until five years after -- to the best of my
18 recollection, five years after the money was spent.

19 As a result of of that, Superpumper has a
20 contingent liability as of November of last year of
21 \$2.6 million that amortizes as the contract goes
22 through the term.

23 BY MS. HAMM:

24 **Q. Does Superpumper have to write a check to**
25 **Shell for that obligation?**

1 A. 2015 is higher. But I would not have
2 known that in 2010.

3 Q. So basically you're saying he
4 accidentally ended up with the right numbers?

5 A. I would say coincidentally he ended up
6 with the same number that the Matrix had.

7 Q. How is the volatility in fuel prices
8 affect a company like Superpumper?

9 A. When a price -- when the retail price for
10 gasoline, as it happened to be during that period
11 of time, gets close to \$4 a gallon, one effect is
12 that you have more price sensitive customers. I'll
13 get to that later. But the first, immediate impact
14 on the bottom line of the company is the credit
15 card fee per gallon is 2 percent on \$4 would be 8
16 cents. We are now in the \$2 range. It's 4 cents.
17 And 2 cents or 4 cents difference in the price of
18 gasoline, in the gross profit of gasoline makes in
19 this case is \$800,000. That's part of the
20 volatility. When a price -- when a margin can be
21 achieved at the 30-cent range, as Scottsdale market
22 allows, it's much easier to get the 30 cents as a
23 consumer. As long as you get a gallon below \$2,
24 you are much less price sensitive than when you
25 inch up against a \$3. So it's much harder to

1 maintain the 30-cent margin when you cross the line
2 from \$2 to \$3 or \$3 to \$4 because of price
3 sensitivity of the customers.

4 And you probably see in those numbers
5 from Superpumper that the gallons went down over a
6 period of time. I'm able to go to 2005 from 2007
7 from 28 million to now 19 million.

8 MS. HAMM: Can we go off the record for
9 just a minute.

10 MR. GILMORE: Sure.

11 (Short recess)

12 BY MS. HAMM:

13 Q. So you've told me about two significant
14 criticisms. I'd call them significant criticisms
15 of Mr. McGovern's testimony that you discussed with
16 Mr. Gilmore; right?

17 A. I'm not sure that I discussed it with
18 him, but, yeah. But let me answer that if I can.

19 Q. Please.

20 A. My criticism with regard to the cents per
21 gallon is more, you know, if you evaluate gasoline
22 stations and never mention the cents per gallon
23 issue tells me that that is not an experienced
24 gasoline station appraiser. More importantly, my
25 criticism, more importantly, though is he just

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

3 Q. In subparagraph B of C?

4 A. In 2?

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

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

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

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

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

25 A. It should have been tested. It should

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

4 **Q. How should he have tested that?**

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

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

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

17 **Q. Would you buy it at a discount?**

18 A. Heavy discount.

19 **Q. What kind of discount?**

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

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

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

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

1 CERTIFICATE OF REPORTER

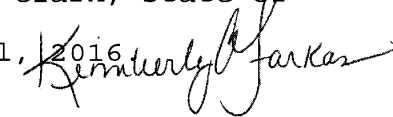
2 STATE OF NEVADA)
3) SS:
4 COUNTY OF CLARK)

5 I, Kimberly A. Farkas, a duly certified Court
6 Reporter, State of Nevada, do hereby certify: That
7 I reported the taking of the deposition of JAN
8 FREDERICH commencing on Tuesday, March 29, 2016 at
9 10:20 a.m.

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

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

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

24 
25 _____
Kimberly A. Farkas, CCR 741

FRANK C. GILMORE, ESQ. - NSB #10052

fgilmore@rbsllaw.com

LINDSAY L. LIDDELL, ESQ. - NSB #14079

lliddell@rssblaw.com

Robison, Sharp, Sullivan & Brust

71 Washington Street

Reno, Nevada 89503

Telephone: (775) 329-3151

Facsimile: (775) 329-7169

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

CASE NO.: CV13-02663

DEPT. NO.: 4

Plaintiffs,

vs.

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

Defendants. /

DEFENDANTS' OBJECTIONS TO PLAINTIFF'S PRETRIAL DISCLOSURES

Defendants above-named, by and through their attorneys of record and pursuant to NRCP
16.1(a)(3)(C), hereby object to Plaintiff's pre-trial disclosures as follows:

A. Plaintiff Has Identified Documents Which Are Inadmissible Hearsay.

NRCP 16.1(a)(3)(C) requires each party to make pre-trial disclosures which contain, among
other things, "An appropriate identification of each document or other exhibit, including summaries
of other evidence, separately identifying those which the party expects to offer and those which the
party may offer if the need arises." Plaintiff's Pre-Trial Disclosures, served September 28, 2018,
identify well in excess of 786,824 bates stamped pages of documents, which, ostensibly at least,
Plaintiff "expects to offer" at trial. Most of these documents are emails between non-parties, and

1 therefore contain inadmissible hearsay statements for which no applicable exception exists.

2 Accordingly, pursuant to NRCP 16.1(a)(3)(C), Defendants object to any attempt by the
3 Plaintiff to offer exhibits which contain inadmissible hearsay statements.

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

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

8 DATED this 12th day of October, 2018.

9
10 ROBISON, SHARP, SULLIVAN & BRUST
71 Washington Street
Reno, Nevada 89503

11 /s/ Frank C. Gilmore
12 FRANK C. GILMORE, ESQ.
13 LINDSAY L. LIDDELL, ESQ.
Attorneys for Defendants
14
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CERTIFICATE OF SERVICE

Pursuant to NRCp 5(b), I certify that I am an employee of Robison, Sharp, Sullivan & Brust, and that on this date I caused to be served a true copy of the **DEFENDANTS' OBJECTIONS TO PLAINTIFF'S PRETRIAL DISCLOSURES** 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:

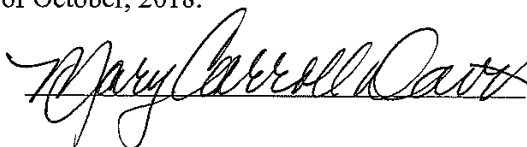
_____ by email addressed to:

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 October, 2018.



GARMAN TURNER GORDON LLP
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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

**OBJECTIONS TO DEFENDANTS' PRE-
TRIAL DISCLOSURES**

Plaintiff William A. Leonard (the "Trustee" or "Plaintiff"), by and through his counsel,
the law firm of Garman Turner Gordon LLP, hereby files his Objection (the "Objection") to the
Pretrial Disclosures submitted by Defendants SUPERPUMPER, INC., an Arizona corporation
(the "Superpumper"); EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM

1 BAYUK LIVING TRUST (“Bayuk”); SALVATORE MORABITO, an individual (“Morabito”);
2 and SNOWSHOE PETROLEUM, INC., a New York corporation (“Snowshoe,” along with
3 Superpumper, Bayuk, and Morabito, the “Defendants”) on September 29, 2018.

4 **A. WITNESSES DEFENDANTS EXPECT TO PRESENT OR MAY PRESENT AT**
5 **TRIAL AND DEFENDANTS’ DESIGNATION OF DEPOSITION TESTIMONY**
6 **FOR TRIAL.**

7 The Court held a pre-trial conference (the “Conference”) in this matter on September 11,
8 2018. At the Conference, the Court scheduled October 5, 2018 as the deadline to exchange
9 designations of deposition testimony. Defendants identified Dennis Vacco and Christian
10 Lovelace as witnesses that would testify live at trial. After the deadline to provide designations,
11 and after Plaintiff had filed his designations, including the designations for Messrs. Vacco and
12 Lovelace, Defendants advised Plaintiff that the two witnesses would not appear and sought to
13 disclose their deposition designations untimely and did so on October 8, 2018.

14 Plaintiff objects to Defendants’ untimely designation of Messrs. Vacco and Lovelace’s
15 deposition testimony and the use of such designations during trial as being prejudicial to Plaintiff
16 given their untimely disclosure.

17 At the Conference, Plaintiff and Defendants agreed that objections to the admissibility of
18 specific portions of deposition testimony would be raised at trial during the Court’s receipt of
19 deposition testimony pursuant to NRCp 32(b). Accordingly, Plaintiff reserves the right to object
20 to the admissibility of the testimony designated by Plaintiff when offered by Defendants at the
21 time of trial.

22 **B. DEFENDANTS’ EXHIBITS THAT DEFENDANTS EXPECT TO OFFER AT**
23 **TRIAL.**

24 In their *Pretrial Disclosures*, Defendants identified all documents previously disclosed
25 through their Initial Disclosures and supplements thereto as potential exhibits for use as trial and,
26 as a result, Defendants have not identified those exhibits they intend to introduce at trial. Subject
27 to further identification of the proposed exhibits, Plaintiff objects as the documents contain
28 inadmissible hearsay (NRS 51.035; 51.065; 51.075 *et. seq.*) and have not been properly

1 authenticated (NRS 52.015). Plaintiff makes this objection expressly for the purposes of not
2 waiving the same pursuant to NRCP 16.1(a)(3) and reserves all rights with respect to objections
3 to admissibility of the exhibits when they are properly identified.

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

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

8 Dated this 12th day of October, 2018.

9 GARMAN TURNER GORDON LLP

10
11 /s/ Teresa M. Pilatowicz, Esq.
12 ERIKA PIKE TURNER, ESQ.
13 TERESA M. PILATOWICZ, ESQ.
14 GABREILLE HAMM, ESQ.
15 650 White Drive, Ste. 100
16 Las Vegas, Nevada 89119
17 Telephone 725-777-3000
18 *Special Counsel for Plaintiff, Trustee*
19
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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 **OBJECTION TO DEFENDANTS' PRETRIAL DISCLOSURES** 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)

XX 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 12th day of October, 2018.

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

3790
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*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

REPLY TO DEFENDANTS' OPPOSITION
TO PLAINTIFF'S MOTION IN LIMINE TO
EXCLUDE THE 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 files his reply (the "Reply") to *Defendants'*
Opposition to Plaintiff's Motion in Limine to Exclude the Testimony of Jan Friederich (the
"Opposition") filed by Defendants SUPERPUMPER, INC., an Arizona corporation
("Superpumper"); EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM

1 BAYUK LIVING TRUST; SALVATORE MORABITO, an individual; and SNOWSHOE
2 PETROLEUM, INC., a New York corporation (collectively the “Defendants”).

3 The Reply is supported by the attached memorandum of points and authority and the
4 other papers and pleadings on file herein, of which Plaintiff requests this Court take judicial
5 notice, and any oral argument the Court may permit at the hearing of this matter.

6 Dated this 12th day of October, 2018.

7 GARMAN TURNER GORDON LLP

8 By: /s/ Andrew P. Dunning
9 ERIKA PIKE TURNER, ESQ.
10 TERESA M. PILATOWICZ, ESQ.
11 ANDREW P. DUNNING, ESQ.
12 650 White Drive, Ste. 100
13 Las Vegas, Nevada 89119
14 Telephone 725-777-3000
15 *Special Counsel to Plaintiff,*
16 *William A. Leonard, Trustee*

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I.**

19 **INTRODUCTION**

20 Jan Friederich (“Friederich”) did not prepare an opinion of value in the course of his
21 duties unrelated to the pending litigation. Therefore, he is not a percipient witness that may
22 testify as a non-retained expert witness on valuation issues related to Superpumper. Instead,
23 Defendants provided Friederich with McGovern’s report and analysis and requested a rebuttal.
24 Thus, Friederich, to the extent qualified at all, was required to issue a written rebuttal report in
25 compliance with NRC 16.1. He did not do so and therefore, should not be permitted to testify.

26 In their Opposition, Defendants emphasize Friederich’s deficiencies. **First**, Defendants
27 confirm that Friederich’s prospective testimony is well beyond the scope of his percipient
28 knowledge of the facts at issue in this case, and well beyond this bullet point opinions contained

1 in the rebuttal expert disclosure. Defendants themselves note that Friederich will opine on
2 “Superpumper’s industry” and “market-specific factors that bear on any potential arm’s length
3 transaction between a buyer and a seller,” which areas go well beyond his first-hand knowledge
4 of the specific facts of this case, and are beyond the contents of Defendants’ Rebuttal Expert
5 Witness Disclosure. Opp. at p.7. **Second**, Defendants acknowledge that Friederich’s opinions
6 are intended to rebut Plaintiff’s expert James L. McGovern’s valuation opinions. Confusingly,
7 however, Defendants then claim that Friederich “does not intend to testify as an expert
8 appraiser,” and that they did not disclose Friederich “as an expert in valuation methodology.” Id.
9 at. p.7. Defendants cannot have it both ways. McGovern is a valuation expert. Defendants
10 cannot rely on Friederich to challenge McGovern’s analysis and conclusions while
11 simultaneously arguing that Friederich is not a valuation expert.

12 II.

13 LEGAL ARGUMENT

14 A. **Defendants’ Own Representations Confirm that Friederich’s Opinions 15 Extend Beyond his Percipient Knowledge and Those Disclosed in the 16 Rebuttal Disclosures.**

17 NRCP 16.1(a)(2)(B) requires expert witnesses to provide a written report which contains
18 “a complete statement of all opinions to be expressed and the basis therefor; the data or other
19 information considered by the witness in forming the opinions;” and other pertinent information.
20 In limited circumstances, non-retained expert witnesses, *who serve as percipient witnesses in a
21 given dispute*, bear more liberal disclosure requirements limiting the disclosure to identifying the
22 subject matter of the expert’s testimony, a summary of the facts and opinions about which the
23 expert will testify, the expert’s qualifications, and compensation. See NRCP 16.1(a)(2)(B).

24 Distilled, the distinction between retained experts who must provide expert reports, and
25 non-retained experts who do not, is whether the prospective witness will provide expert rather
26 than percipient testimony. See NRCP 16.1, 2012 Drafter’s Note (discussing non-retained expert
27 witnesses in the context of treating physicians); see also FCH1, LLC v. Rodriguez, 130 Nev.
28 425, 335 P.3d 183 (2014); Cabrera v. Clark Cty. Det. Ctr., 2015 WL 1815426, at *2; see also

1 Moshi v. State Farm Mut. Auto. Ins. Co., 2013 WL 9600669, at *2 (D. Nev. May 30, 2013); see
2 also Gonzalez v. Executive Airlines, Inc., 236 F.R.D. 73, 78–79 (D.P.R. 2006); see also Musser
3 v. Gentiva Health Servs., 356 F.3d 751, 756–57 (7th Cir. 2004); see also McCloughan v. City of
4 Springfield, 208 F.R.D. 236, 242 (C.D. Ill. 2002); see also Davoll v. Webb, 194 F.3d 1116 (10th
5 Cir. 1999).

6 Plaintiff notes in the Motion that Friederich was not disclosed to provide percipient
7 testimony at trial, but was retained for the purpose of rebutting the McGovern Report and
8 assisting Defendants in the instant litigation. Friederich did not prepare any sort of valuation
9 during his period of time consulting for Superpumper and is not now an employee of any of the
10 Defendants. Defendants now seek an opinion from Friederich for the sole purpose of rebutting
11 Plaintiff's valuation expert's report. Therefore, Friederich was required to prepare and produce
12 an expert report regarding his opinions, the underlying facts upon which his opinions are based,
13 and the methodology by which he reached his opinions.

14 In Opposition, Defendants validate Plaintiff's concerns by confirming that the scope of
15 Friederich's prospective testimony is beyond his firsthand knowledge of the underlying facts of
16 this dispute and beyond those disclosed in the four bullet-points contained in the rebuttal
17 disclosures. In particular, Defendants forecast testimony regarding:

- 18 • The "market forces that impact Superpumper's business, and the nuances of
19 assessing value." Opp. at p.6.
- 20 • The "industry and market-specific factors that bear on any potential arm's length
21 transaction between a buyer and a seller." Id. at p. 8.
- 22 • The "industry-specific inputs that real-world gas stations evaluate in acquisitions
23 made between willing sellers and willing buyers." Id. at p.9.
- 24 • "[H]ow gas stations are valued in the real world by industry experts." Id.

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1 Defendants' effort to characterize Friederich's expert opinions as percipient knowledge
2 as to the underlying facts of this dispute is misplaced. "Industry and market-specific factors,"
3 "market forces," "industry-specific inputs," and valuation methodologies relied upon by industry
4 experts are matters of methodology and application which do not derive from Friederich's
5 percipient knowledge regarding the facts of this dispute. Friederich is not opining on facts
6 relevant *to this dispute* and does not offer first-hand, percipient fact testimony regarding *the*
7 *underlying facts of this case*. That Superpumper retained Friederich as a consultant in a limited
8 capacity nearly a decade ago does not render Friederich a fact witness as to the transfers at issue
9 or their relative value. Moreover, that Friederich agreed to testify in this matter regardless of his
10 remuneration agreement with Defendants does not change the fact that Friederich was
11 specifically retained by Defendants to rebut the McGovern Report and was required to provide a
12 report.

13 If anything, Friederich is a retained expert witness who was required to author and
14 produce an expert report pursuant to NRC 16.1(a)(2)(B). Friederich failed to do so and,
15 consequently, Plaintiff would be prejudiced if he is permitted to offer purported expert opinions
16 at the time of trial.

17 **B. Defendants Concede that Friederich Is Being Utilized Solely Related to**
18 **McGovern's Methodology and Conclusions, Which Defendants Concede He**
is Not Qualified To Do.

19 Defendants concede that Friederich is neither a valuation expert or a professional
20 appraiser, yet argue at length that he should be permitted to rebut McGovern's valuation analysis
21 and conclusions. But as discussed in Plaintiff's Motion, a witness testifying as an expert under
22 NRS 50.275 must: (1) be qualified in an area of "scientific, technical or other specialized
23 knowledge"; (2) "assist the trier of fact to understand the evidence or to determine a fact in
24 issue"; and (3) limit his or her testimony "to matters within the scope of [his or her specialized]
25 knowledge" Hallmark, 124 Nev. at 498, 189 P.3d at 650; see also Higgs v. State, 125 Nev. 1043,
26 18, 222 P.3d 648, 659 (2010). Under Hallmark, "the district court must first determine whether
27 [a witness] is qualified in an area of scientific, technical, or other specialized knowledge" before
28 he or she may testify as an expert under NRS 50.275, and his testimony must be limited to

1 matters within the scope of his specialized knowledge. 124 Nev. at 498, 189 P.3d at 650
2 (discussing factors to consider in determining a witness’s qualifications as an expert); see
3 Gramanz v. T-Shirts and Souvenirs, Inc., 111 Nev. 478, 485, 894 P.2d 342, 347 (1995). A trial
4 court properly strikes expert testimony if the expert testifies outside of his field of expertise.
5 Griffin v. Rockwell Int’l, Inc., 96 Nev. 910, 911, 620 P.2d 862, 863 (1980).

6 Here, Defendants argue *with emphasis* that “Friederich’s opinions are not offered to
7 rebut McGovern’s *methodologies*.” Opp. at p.8 (emphasis in original). The substance of
8 Defendants’ Opposition, however, shows otherwise. Indeed, Defendants note that Friederich
9 will testify as to “how gas stations are valued in the real world by industry experts who do this
10 for a living.” Id. at p. 9. Defendants stress Friederich’s position that McGovern improperly
11 relied on national trade publications in rendering his opinions. Id. at p. 10. Defendants further
12 argue that Friederich may challenge McGovern’s valuation of Superpumper’s gross margins by
13 substituting his own methodology specific to “*fuel* gross profit.” Id. at p. 9 (emphasis in
14 original). Further still, Friederich purports to challenge McGovern’s reliance on informed
15 assumptions in reaching his valuation conclusion. Id. While Defendants insist to the Court that
16 they are *not* offering Friederich to rebut methodology, this is exactly what they are purporting to
17 do. Id.

18 As such, Friederich must be qualified and must assist the trier of fact. But Friederich
19 conceded his lack of expertise as an accountant, analyst, or valuation expert, and Defendants
20 concede the same in their Opposition. Friederich’s rebuttal opinions are not based upon any
21 specialized training, testable methodology, or established industry guidelines. His lack of
22 expertise under Hallmark and its progeny, and his consequent inability to assist the trier of fact in
23 this dispute, precludes Friederich from providing expert testimony to rebut McGovern. 124 Nev.
24 492, 189 P.3d 646 (2008). The Court must preclude Friederich from testifying at the time of
25 trial.

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1 III.

2 CONCLUSION

3 Friederich is not qualified to testify as an expert because he lacks the required expertise
4 to rebut a valuation. Further, *even if he was qualified*, Friederich was required to produce a
5 proper rebuttal report as mandated by NRCP 16 because his opinions go beyond his first-hand
6 knowledge of the facts of the case. Each reason, on its own, justifies an order *in limine*
7 precluding Defendants from admitting his testimony at trial.

8 AFFIRMATION
9 Pursuant to NRS 239B.030

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

12 Dated this 12th day of October, 2018.

13 GARMAN TURNER GORDON LLP

14
15 By: /s/ Andrew P. Dunning
16 ERIKA PIKE TURNER, ESQ.
17 TERESA M. PILATOWICZ, ESQ.
18 ANDREW P. DUNNING, ESQ.
19 650 White Drive, Ste. 100
20 Las Vegas, Nevada 89119
21 Telephone 725-777-3000
22 *Special Counsel to Plaintiff,*
23 *William A. Leonard, Trustee*
24
25
26
27
28

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of GARMAN TURNER GORDON LLP, and that on this
3 date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **REPLY TO**
4 **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE**
5 **THE TESTIMONY OF JAN FRIEDERICH** on the parties as set forth below:

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

9 addressed as follows:

10 Frank Gilmore, Esq.
11 Lindsay L. Liddell, Esq.
12 ROBISON, SHARP, SULLIVAN & BRUST
13 71 Washington Street
Reno, NV 89503

14 _____ Certified Mail, Return Receipt Requested

15 _____ Via Facsimile (Fax)

16 _____ Via E-Mail

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

18 _____ Federal Express (or other overnight delivery)

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

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

22 Lindsay L. Liddell, Esq.
23 E-mail: lliddell@rssblaw.com

24 DATED this 12th day of October, 2018.

25
26 /s/ Kelli Wightman
27 An Employee of GARMAN TURNER
28 GORDON LLP

CASE NO. CV13-02663

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

**DATE, JUDGE
OFFICERS OF**

COURT PRESENT

APPEARANCES-HEARING

CONT'D TO

9/11/18

PRE-TRIAL CONFERENCE

HONORABLE

Teresa Pilatowicz, Esq., represented the Plaintiff. Frank Gilmore, Esq.,
represented the Defendants.

**10/25/18
1:30 p.m.**

CONNIE

STEINHEIMER

Respective counsel confirmed the trial date of October 29, 2018 and advised
the Court that there would be 10 live witnesses and 6 deposition/video
witnesses. Respective counsel believe that the trial will take 10 days. Further,
there is an open dialogue amongst counsel regarding the order of witnesses.

**Exhibit
Marking**

DEPT. NO.4

M. Stone

(Clerk)

Not Reported

Court directed counsel to submit Findings of Fact and Conclusions of Law to
the Court no later than October 22, 2018, as well as an order of witnesses. Trial
Statements are not necessary.

**10/29/18
9:00 a.m.**

**Non-Jury
Trial**

Based on the need for 10 days of trial, **COURT ENTERED ORDER** moving the
trial start time to October 29, 2018 at 9:00 a.m. opposed to 10:00 a.m. Court
further reviewed the schedule for each day of trial.

(10 days)

Should any request be made for technology during trial, the equipment set-up
and review must be done at the time of exhibit marking.

Court further directed counsel to have a certified copy of all depositions
available during the trial for impeachment purposes.

Discussion ensued regarding deposition testimony and redactions. **COURT
ORDERED** counsel to designate deposition testimony no later than October 5,
2018 and counter-designate no later than October 12, 2018. Respective
counsel are to provide a complete set of the designations to the Court no later
than October 19, 2018.

Any additional Motions in Limine and/or Motions in Limine regarding Expert
Witnesses must be submitted to the Court no later than October 12, 2018.

Exhibit marking set.

Court adjourned.

1 **4050**

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16 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

17 **IN AND FOR THE COUNTY OF WASHOE**

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

21 Plaintiff,

22 vs.

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

Defendants.

CASE NO.: CV13-02663

DEPT. NO. 4

STIPULATED FACTS

Plaintiff WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito ("Plaintiff"), by and through counsel, Erika Pike Turner, Teresa Pilatowicz, and Gabrielle Hamm of the law firm of Garman Turner Gordon LLP. Defendants, SUPERPUMPER, INC., an Arizona corporation ("Superpumper"); EDWARD BAYUK ("Bayuk"), individually and as

1 Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST (the “Bayuk Trust”);
2 SALVATORE MORABITO, an individual (“Salvatore”); and SNOWSHOE PETROLEUM,
3 INC., a New York corporation (“Snowshoe,” and together with Superpumper, Bayuk, the Bayuk
4 Trust, and Salvatore, the “Defendants,” and together with Plaintiff, the “Parties”), by and through
5 counsel, Frank C. Gilmore of the law firm of Robison, Sharp, Sullivan & Brust, hereby stipulate
6 to the following facts:

7 **A. The Judgment Against Morabito.**

8 1. On December 3, 2007, Morabito and CNC filed a lawsuit against the Herbst Parties
9 captioned *Consolidated Nevada Corp., et al. v. JH, et al.* in the Second Judicial District Court (the
10 “State Court”), Case No. CV07-02764, Department 6 (presiding, the Honorable Brent Adams)
11 (together with all claims and counterclaims, the “Herbst Litigation”). The Herbst Parties filed
12 counterclaims in the Herbst Litigation against Morabito and CNC.

13 2. On September 13, 2010, the State Court entered its oral ruling against Morabito and
14 CNC in favor of the Herbst Parties on the liability and actual damages portion of the trial, awarding
15 the Herbst Parties \$85,871,364.75 (the “Oral Ruling”). Bayuk and Salvatore had knowledge of
16 the Oral Ruling.

17 3. On October 12, 2010, the State Court entered its *Findings of Fact and Conclusions*
18 *of Law* (the “State Court FF&CL”).

19 4. On August 23, 2011, the State Court entered a final judgment awarding the Herbst
20 Parties total damages in the amount of \$149,444,777.80 for actual fraud, representing both
21 compensatory and punitive damages, as well as an award of attorneys’ fees and costs (the “Final
22 Judgment”).

23 5. After entry of the Final Judgment, Morabito and CNC filed appeals with the Nevada
24 Supreme Court, denominated as Supreme Court Case Nos. 57943, 57944, 59138, and 54412
25 (together with cross-appeals filed by the Herbst Parties, the “Appeals”).

26 6. The Herbst Parties and Morabito and CNC agreed to settle the Herbst Litigation
27 and the Appeals and, on November 30, 2011, executed the Settlement Agreement and Mutual
28

1 Release (the “Settlement Agreement”). Pursuant to the Settlement Agreement, the Appeals were
2 voluntarily dismissed.

3 7. Pursuant to the Settlement Agreement, the Court withdrew and vacated its
4 Memorandum and Order: Findings of Fact, Conclusions of Law, and Judgment dated October 12,
5 2010, *nunc pro tunc* to October 12, 2010, and withdrew and vacated its Judgment dated August
6 23, 2011, *nunc pro tunc* to August 23, 2011.

7 8. Morabito and CNC defaulted under the terms of the Settlement Agreement.

8 9. The Herbst Parties and Morabito and CNC entered into a Forbearance Agreement
9 dated March 1, 2013.

10 10. Morabito and CNC defaulted under the terms of the Forbearance Agreement.

11 11. The Herbst Parties filed with the Clerk of the State Court the Confession of
12 Judgment and the Stipulation of Nondischargeability on June 18, 2013 (the “Confessed
13 Judgment”). The Confessed Judgment was entered onto the judgment roll by the Clerk of the State
14 Court.

15 **B. The Bankruptcy.**

16 12. On June 20, 2013 (the “Petition Date”), the Herbst Parties commenced an
17 involuntary bankruptcy petition against each of Morabito and CNC under chapter 7 of the title 11
18 of the United States Code on in the United States Bankruptcy Court for the District of Nevada (the
19 “Bankruptcy Court”).

20 13. On December 17, 2014, the Bankruptcy Court entered its *Findings of Fact and*
21 *Conclusions of Law in Support of Order Granting Summary Judgment and Judgment* and the
22 *Order for Relief Under Chapter 7* against Morabito on summary judgment, adjudicating him a
23 chapter 7 debtor. On December 22, 2014, the Bankruptcy Court entered the *Amended Findings of*
24 *Fact and Conclusions of Law in Support of Order Granting Summary Judgment and Judgment*
25 (the “Amended Findings”) and the *Amended Order for Relief Under Chapter 7* (the “Order for
26 Relief”).

27 14. On April 30, 2018, the Bankruptcy Court entered a judgment in favor of the Herbst
28 Parties determining that the Confessed Judgment was a nondischargeable judgment under 11

1 U.S.C. § 523(a)(2). Morabito has appealed the judgment of nondischargeability, which appeal
2 remains pending.

3 **C. The Parties/Claims.**

4 15. On December 17, 2013, the Herbst Parties commenced this action against
5 Morabito, individually and as Trustee of the Arcadia Living Trust, Superpumper, Bayuk,
6 individually and as a trustee if the Edward William Bayuk Trust, Salvatore, and Snowshoe.

7 16. Prior to the transactions that are the subject of the Trustee's Complaint, Morabito
8 was the Chairman and Chief Executive Officer of Superpumper, Consolidated Western
9 Corporation, Inc. ("CWC"), and CNC.

10 17. CWC, a Nevada corporation, was the sole shareholder of Superpumper through
11 September 28, 2010.

12 18. Salvatore is Morabito's brother. After the merger of CWC into Superpumper on or
13 about September 28, 2010, Salvatore was a director and officer of Superpumper. Salvatore also
14 became a director and officer of Snowshoe upon its formation.

15 19. Bayuk was Morabito's long-time companion and business partner. After the
16 merger of CWC into Superpumper on or about September 28, 2010, Bayuk was a director and
17 officer of Superpumper. Bayuk also became a director and officer of Snowshoe upon its formation.

18 20. Snowshoe was formed in September of 2010. Bayuk and Salvatore each own 50%
19 of the equity Snowshoe.

20 21. On January 22, 2015, the Bankruptcy Court appointed Leonard as the trustee for
21 the bankruptcy estates of Morabito and CNC.

22 22. On May 15, 2015, Leonard was substituted as Plaintiff in place of the Herbst Parties
23 in this case, and Morabito was dismissed from the action.

24 **D. The Assets Transferred.**

25 **1. Morabito's Equity in the Real Properties.**

26 23. Immediately prior to the Oral Ruling, Morabito and Bayuk, through their respective
27
28

1 trusts,¹ owned three real properties as tenants in common:

- 2 a. 371 El Camino del Mar, Laguna Beach, California (the “El Camino Property”).
3 Morabito owned 75% of the El Camino Property, while Bayuk owned 25%.
- 4 b. 370 Los Olivos, Laguna Beach, California (the “Los Olivos Property,” and
5 together with the El Camino Property, the “Laguna Properties”). Morabito and
6 Bayuk each owned 50% of the Los Olivos Property.
- 7 c. 8355 Panorama Drive, Reno, Nevada (the “Panorama Property,” and together
8 with the Laguna Properties, the “Real Properties”). 70% of the Panorama
9 Property was owned by Morabito and 30% was owned by Bayuk.

10 24. On September 27, 2010, Morabito and Bayuk executed a *Purchase and Sale*
11 *Agreement*, which was later amended on September 29, 2010 (as amended, the “PSA”), for the
12 transfer of their interests in the El Camino and Los Olivos Properties (the “Laguna Properties”)
13 and the Panorama Property. Pursuant to the PSA, Morabito sold his interests in the Laguna
14 Properties to Bayuk in exchange for Bayuk’s interest in the Panorama Property.

15 25. According to Morabito and Bayuk, the equity in the Laguna Properties at the time
16 of the transfers was \$1,933,595. Specifically, the equity in the Los Olivos Property was valued at
17 \$854,954 and the El Camino Property was valued at \$1,078,641. According to Morabito and
18 Bayuk, Morabito’s interest in the Laguna Properties therefore had an aggregate value of
19 approximately \$1,236,457.75, and Bayuk’s interest had an aggregate value of approximately
20 \$697,137.25. The Trustee does not dispute these valuations.

21 26. The transfers of Morabito’s and Bayuk’s interests occurred on or about October 1,
22 2010.

23 **2. Morabito’s 50% Equity Interest in Baruk Properties, LLC.**

24 27. Immediately prior to the Oral Ruling, Morabito and Bayuk each owned a 50%
25 interest in Baruk Properties, LLC, a Nevada limited liability company (“Baruk LLC”). Baruk LLC
26

27 ¹ Morabito owned his interests in the Laguna Properties through his self-settled trust, the Arcadia Living
28 Trust, and Bayuk owned his interests in the Laguna Properties through the Bayuk Trust.

1 owned four real properties (the “Baruk Properties”):

- 2 a. 1461 Glenneyre, Laguna Beach, CA (“1461 Glenneyre”), a commercial
3 property with an appraised value of approximately \$1,400,000 as of September
4 30, 2010;
- 5 b. 570 Glenneyre, Laguna Beach, CA (“570 Glenneyre”), a commercial property
6 with an appraised value of approximately \$2,500,000 as of September 30, 2010,
7 and a net value of \$1,129,021 after accounting for debt on the property;
- 8 c. 1254 Mary Fleming, Palm Springs, CA (the “Palm Springs Property”), with an
9 appraised value of approximately \$1,050,000 as of September 30, 2010, or
10 \$705,079, net of debt; and
- 11 d. 49 Clayton, Sparks, NV (the “Sparks Property”), a vacant property with an
12 appraised value of approximately \$75,000 as of September 30, 2010.

13 28. The Trustee does not dispute these valuations.

14 29. Prior to the Baruk Transfer, Morabito and Bayuk each held equal 50% interest in
15 Baruk LLC and were its sole members.

16 30. On October 1, 2010, Morabito transferred his 50% membership interest in Baruk
17 LLC to Bayuk through the *Membership Interest Transfer Agreement* (the “Baruk Transfer”).

18 31. On October 4, 2010, Baruk LLC, a Nevada entity, was merged into Snowshoe
19 Properties, LLC, a California limited liability company (“Snowshoe Properties”), transferring the
20 Baruk Properties to Snowshoe Properties.

21 32. Snowshoe Properties is solely owned by the Bayuk Trust.

22 33. On or about November 1, 2010, Bayuk transferred the Palm Springs Property from
23 Snowshoe Properties to the Bayuk Trust.

24 34. Following this series of transfers, Snowshoe Properties owned 100% of 1461
25 Glenneyre, 570 Glenneyre, and the Sparks Property, and the Bayuk Trust owned 100% of the Palm
26 Springs Property.

27 35. The *Membership Interest Transfer Agreement* required that Bayuk deliver a
28 promissory note in the principal amount of \$1,617,050 to Morabito (the “Baruk Note”). The terms

1 of the Baruk Note required principal and interest payments in equal monthly installments of
2 \$7,720.04 over 360 months, accruing interest at 4.0%.

3 **3. Morabito's 80% Interest in Superpumper, Inc.**

4 36. Superpumper is an Arizona corporation which operates gas stations and
5 convenience stores in Scottsdale, Arizona. Immediately prior to the Oral Ruling, CWC, a Nevada
6 corporation, held all the outstanding stock of Superpumper. Morabito owned an 80% interest in
7 CWC. Bayuk and Salvatore each held a 10% interest in CWC.

8 37. Prior to the Oral Ruling, Morabito, was a director and officer of both CWC and
9 Superpumper.

10 38. On or about August 13, 2010, Superpumper entered into a loan agreement with
11 BVAA Compass in the amount of \$3,000,000 (the "Compass Term Loan"), which was funded on
12 or after September 13, 2010. The proceeds of the Compass Term Loan were paid to Morabito,
13 Bayuk, and Salvatore, each of whom received \$939,000 (the "Compass Loan Distributions").

14 39. On September 28, 2010, CWC was merged into Superpumper.

15 40. On or about September 28, 2010, Dennis Vacco, Esq. formed Snowshoe, a New
16 York corporation. Bayuk and Salvatore were the sole shareholders of Snowshoe, each owning
17 50% of the Snowshoe's shares.

18 41. On or about September 30, 2010, Morabito sold his 80% equity interest in
19 Superpumper to Snowshoe pursuant to a *Shareholder Interest Purchase Agreement* (the
20 "Superpumper Agreement," and the transfer of Morabito's interest, the "Superpumper Transfer").

21 42. On January 1, 2011, Bayuk and Salvatore transferred their respective 10% interests
22 in Superpumper to Snowshoe. As a result of this series of transactions, Salvatore and Bayuk each
23 owned 50% of Snowshoe, which held all the outstanding stock of Superpumper.

24 43. In exchange for Morabito's 80% interest in CWC, pursuant to the Superpumper
25 Agreement, Snowshoe, agreed to pay Morabito \$1,035,094 in cash and deliver a \$1,462,213 note
26 from Snowshoe to Morabito (the "Superpumper Note"), dated November 1, 2010.

27 44. The Superpumper Note required monthly payments in the amount of \$19,986.71
28 for 84 months commencing on December 1, 2010, with interest accruing at 4.0% per annum.

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 28 day of October, 2018.

GARMAN TURNER GORDON LLP

ROBISON SHARP SULLIVAN & BRUST

/s/ Teresa Pilatowicz
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/s/ Frank Gilmore
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LINDSAY L. LIDDELL, EEQ.
71 Washington Street
Reno, NV 89503 Telephone 775-329-3151
Attorneys for Defendants

1 **CERTIFICATE OF SERVICE**

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

5
6 XXX Placing an original or true copy thereof in a sealed envelope placed for collection
7 and mailing in the United States Mail, Reno, Nevada, postage prepaid, following
ordinary business practices

8 addressed as follows:

9 Frank Gilmore, Esq.
10 Lindsay L. Liddell, Esq.
11 ROBISON, SHARP, SULLIVAN & BRUST
12 71 Washington Street
13 Reno, NV 89503

14 ☐ Certified Mail, Return Receipt Requested

15 ☐ Via Facsimile (Fax)

16 ☐ Via E-Mail

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

19 ☐ Federal Express (or other overnight delivery)

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

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

23 Lindsay L. Liddell, Esq.
24 E-mail: lliddell@rssblaw.com

25 DATED this 29th day of October, 2018.

26 /s/ Kelli Wightman

27 An Employee of GARMAN TURNER
28 GORDON LLP

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8 Attorneys for Defendants

9
10 **IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA**
11 **IN AND FOR THE COUNTY OF WASHOE**

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

CASE NO.: CV13-02663

DEPT. NO.: 4

14 Plaintiffs,

15 vs.

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

22 Defendants.
23 _____/

24 **DEFENDANTS' POINTS AND AUTHORITIES RE: OBJECTION TO ADMISSION OF**
25 **DOCUMENTS IN CONJUNCTION WITH THE DEPOSITIONS OF PAUL MORABITO**
26 **AND DENNIS VACCO**

27 Defendants submit this memorandum of points and authorities in supplemental objection to
28 the admission of emails and other correspondence in which the author (declarant) is not available
to testify at trial, and where the declarant was never examined under oath as to the specific emails.

I. BACKGROUND

Plaintiffs offer several emails into evidence written by witnesses who are not available for
trial. These exhibits include various and wide-ranging emails, including opinions of value,
proposed transactions, and other matters. Defendants object to the admission of these exhibits
because they lack foundation, cannot be authenticated, and are prejudicial, as set forth below.

1 **II. ARGUMENT**

2 Dennis Vacco was deposed three times and Paul Morabito was deposed once. The
3 objectionable documents at issue were produced by Plaintiff well after the respective author's
4 deposition. Therefore, the documents were not shown to the witnesses at their depositions, and
5 they could not and did not provide *any* testimony about them.

6 Because the documents were not available at the depositions, no foundation whatsoever
7 has been established, including authenticity. See *Mishler v. McNally*, 102 Nev. 625, 628, 730 P.2d
8 432, 435 (1986) (finding inadmissible for lack of foundation as to authenticity and identity a
9 memo prepared by an unavailable witness regarding the defendant's reputation where the
10 document was "an unsigned typewritten photocopy").

11 The emails in question contain stateents concerning opinions of value, business
12 information, and observations or opinions, but no foundation has been or can be established
13 regarding the sources of the information, how it was compiled, why it was compiled, or how it is
14 to be interpreted. Thus, no foundation can properly be laid. See *Mishler*, 102 Nev. at 628, 730
15 P.2d at 435 (concluding that even a "recital of authorship on the face of [a] writing was
16 insufficient proof of authenticity to secure its admission for unlimited purposes" when the author
17 was unavailable to testify). In the complete absence of the circumstances surrounding the creation
18 of the documents there is no foundation, and it would be unfairly prejudicial to admit these
19 documents without adequate foundation and the ability to cross-examine a live witness as to the
20 context and background of the emails. See *id.* (deeming opinions of an unavailable witness
21 inadmissible when the declarant was not available to testify about the basis of his opinion).

22 Moreover, some of these documents include statements or opinions of value. There is no
23 foundation laid as to the declarant's expertise or competence to make these conclusions, nor is
24 there any evidence of the methodology of the appraisals that took place. See, e.g., *Frias v. Valle*,
25 101 Nev. 219, 221, 698 P.2d 875, 876 (1985) (concluding that a report called a thermogram was
26 inadmissible because there was no evidence demonstrating "how or when the thermograms were
27 taken, how they could be identified," and "[n]o one with personal knowledge testified as to how,
28 when and in what manner the thermograms were taken"). NRS 50.275 requires that opinions as

1 to "scientific, technical or other specialized knowledge" must be offered by a qualified expert.
2 There is no foundation that the declarant has such expertise.

3 Further, because the documents were not available at the depositions, Defendants have had
4 no opportunity to cross examine Mr. Morabito or Mr. Vacco about them, and they both currently
5 live out of state and are unavailable for trial. It would be unfairly prejudicial to allow a one-sided
6 interpretation of documents with no opportunity for Defendants to cross-examine the author to
7 further explain them, and it would be unfairly prejudicial to admit these documents with no
8 foundation and then permit the Plaintiff to characterize the emails as he sees fit. Moreover, it
9 would confuse the facts of this case to admit documents that purport to show the value of property
10 without having the ability to show weaknesses in the documents or the credibility of the author
11 delivering the opinions. See *Mishler*, 102 Nev. at 629, 730 P.2d at 435 (holding that it would
12 confuse the jury and prejudice the opposing party to admit opinions of an unavailable witness for
13 the truth of the matter asserted where the opinion was admitted for unlimited purposes); *Chowdhry*
14 *v. NLVH, Inc.*, 109 Nev. 478, 485, 851 P.2d 459, 463 (1993) ("where evidence is marginally
15 relevant and could inject collateral issues which would divert the jury from the real issues in the
16 case, exclusion is proper.") (internal quotation marks omitted).

17 Finally, a federal court confronting almost this identical issue excluded hearsay statements
18 like the ones in question here. See *Adams v. United States*, No. CIV. 03-0049-E-BLW, 2009 WL
19 2207690 (D. Idaho July 15, 2009). In *Adams*, the witness testified in his deposition that he had
20 reviewed "inspection reports" prior to giving his deposition. *Id.* at *1. However, those inspection
21 reports, like the documents in this case, were neither identified nor marked as an exhibit during the
22 deposition. At trial, the party who took the deposition tried to introduce the four inspection reports
23 through the deponent who, like Mr. Morabito and Mr. Vacco, was unavailable. *Id.* The court first
24 determined that there was no foundation to admit the documents because the exhibits were not
25 shown to the deponent or opposing counsel during the deposition, even though the party claimed
26 the deponent authored the reports. *Id.* Next, the court explained that even if the exhibits could
27 overcome the issues concerning foundation, the exhibits may be barred as hearsay. *Id.* Finally, the
28 court determined that "another party's inability to cross-examine a witness about a particular

1 document is not only potentially unfair, but also may very well contribute to jury confusion
2 under FRE 403¹ without the benefit of a complete exchange of contextual questions, independent
3 of the exhibits' separate admission." *Id.*

4 Although only persuasive authority, *Adams* has an almost identical fact pattern to this case,
5 and Defendants respectfully request that this Court use the persuasive reasoning in *Adams* to
6 interpret NRS 48.035 and conclude that the admission of these documents would be more
7 prejudicial than probative. *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872,
8 876 (2002) ("Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive
9 authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal
10 counterparts.") (internal quotation marks omitted). Defendants further request that this Court
11 apply the binding authority in *Mischler* to exclude the exhibits that Plaintiff is attempting to admit
12 through unavailable witnesses without the proper the foundation for these documents.

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

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

17 DATED this 29th day of October, 2018.

18 ROBISON, SHARP, SULLIVAN, & BRUST
19 A Professional Corporation
20 71 Washington Street
21 Reno, Nevada 89503

22 /s/ Frank C. Gilmore
23 FRANK C. GILMORE, ESQ.
24 Attorneys for Defendants

25
26
27 ¹FRE 403 is the federal version of NRS 48.035, which provides that "[a]lthough relevant, evidence
28 is not admissible if its probative value is substantially outweighed by the danger of unfair
prejudice, of confusion of the issues or of misleading the jury."

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

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

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

22 Plaintiff,

23 vs.

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

Defendants.

CASE NO.: CV13-02663

DEPT. NO.: 4

PLAINTIFF'S POINTS AND AUTHORITIES REGARDING
AUTHENTICITY AND HEARSAY ISSUES

Plaintiff WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, submits these points and authorities in response to Defendants' Points and Authorities Re: Objection to Admission of Documents in Conjunction with the Depositions of Paul Morabito

1 and Dennis Vacco (“Defendants’ Trial Brief”), submitted by Defendants SUPERPUMPER, INC.
2 (“Superpumper”); EDWARD BAYUK (“Bayuk”), individually and as Trustee of the EDWARD
3 WILLIAM BAYUK LIVING TRUST (the “Bayuk Trust”); SALVATORE MORABITO
4 (“Salvatore”); and SNOWSHOE PETROLEUM, INC., together with trial objections made by
5 Defendants’ counsel.

6 **A. Summary.**

7 Defendants’ Trial Brief misconstrues the requirements of authentication and the
8 exclusions and exceptions from hearsay. Plaintiff is not required to question the author of each
9 and every document to meet the requirements of NRS 52.015, nor must Plaintiff cross-examine a
10 witness about each statement for it to be admissible. Rather, that is the point of a hearsay
11 exclusion or exception – an *out-of-court* statement is admissible if it is not offered for the truth
12 of the statement, is a statement by a party or its agent, or falls within any other of the exclusions
13 set forth in NRS 51.035 or exceptions set forth in NRS 51.075 through 51.305 or 51.315 through
14 51.355. Defendants are free to call their agents to testify, because Defendants, rather than
15 Plaintiff, have the power to bring Messrs. Vacco, Lovelace, Morabito, and Bernstein to testify.

16 Defendants’ Trial Brief is also premised on a factual predicate which is misleading, at
17 best. Specifically, Defendants argue that *Plaintiff* withheld documents from Lippes Mathias
18 Wexler Friedman (“LMWF”) until after the depositions of Paul Morabito and Dennis Vacco.
19 However, Defendants, not Plaintiffs, had the power to obtain their attorneys’ and their
20 accountants’ files at any time, and should have done so. Instead, Defendants obstructed the
21 production of documents by LMWF, requiring Plaintiff to seek to compel discovery in both the
22 Bankruptcy Court and this Court. Ultimately, the bulk of the documents produced by LMWF,
23 consisting of over 100,000 pages of documents, were not produced by LMWF until late 2016—
24 more than six months after the deposition of Paul Morabito, more than a year after the first
25 deposition of Vacco, and many months after the original discovery cut-off.

26 **B. The Documents Produced by LMWF.**

27 Plaintiff fought for the production of documents by LMWF for more than a year.
28 Plaintiff filed his *Application for Commission to Take Deposition* of Vacco on September 17,

1 2015, and following issuance of the *Commission to Take Deposition* by the Clerk of this Court
2 on September 21, 2015, served the subpoena upon Vacco on **September 29, 2015** pursuant to the
3 Interstate Uniform Discovery Act (the “Subpoena”).¹

4 Vacco served his *Response to Subpoena* (the “Response”) upon Plaintiff’s counsel on
5 October 15, 2015, asserting boilerplate privilege objections but failing to identify the purportedly
6 privileged documents or provide a privilege log.² Vacco and LMWF produced only
7 approximately 180 pages of documents in connection with Vacco’s October 2015 deposition and
8 referred Plaintiff to Paul Morabito’s document production in connection with his examination
9 under 11 U.S.C. § 341(a). Defendants did not seek to quash the Subpoena or object to the
10 Subpoena at that time.

11 Vacco testified in his deposition that he did not believe any documents were withheld on
12 the basis of attorney-client privilege.³

13 During the deposition of Vacco, Mr. Gilmore instructed Vacco not to testify regarding
14 communications between the Debtor and Vacco, asserting Paul Morabito’s attorney-client
15 privilege. Because these objections were made on behalf of Paul Morabito, counsel for the
16 Trustee filed the *Motion to Compel Responses to Deposition Questions* (the “Privilege Motion”) in the Bankruptcy Court, which sought a determination regarding the existence and scope of the
17 Debtor’s privilege for communications occurring prior to the commencement of the Debtor’s
18 bankruptcy case. See Case No. 13-51237-GWZ, ECF No. 452.

19 The Bankruptcy Court held that the attorney-client privilege did not protect Paul
20 Morabito’s communications with Vacco and LMWF (including with respect to the transfers
21 complained of in this action) under the crime-fraud exception or, even if it did apply, LMWF’s
22 files became the property of the bankruptcy estate and therefore the property of Plaintiff, who
23
24

25 ¹ See Plaintiff’s *Opposition to Defendants’ Motion to Partially Quash, or, in the Alternative, for a Protective Order*
26 *Precluding Trustee from Seeking Discovery Protected by the Attorney-Client Privilege* (Mar. 25, 2016), on file
herein (the “Opposition”), and Exhibits 2, 3, and 4 thereto.

27 ² Id. at ¶ 9, Ex. 6.

28 ³ See id. at Ex. 7 (transcript of Oct. 21, 2015 deposition of Dennis Vacco, at 13:14 – 13:24).

1 waived the privilege.⁴

2 Defendants then filed the *Motion to Partially Quash, or, in the Alternative, for a*
3 *Protective Order Precluding Trustee from Seeking Discovery Protected by the Attorney-Client*
4 *Privilege* (the “Motion to Quash”) in the above-captioned case on March 10, 2016, asserting that
5 while Paul Morabito’s privilege may have been waived, the Defendants’ privileges, including as
6 joint clients, were not.

7 The Recommendation and Order denying Defendants’ Motion to Quash was entered on
8 June 13, 2016, and the Confirming Order was entered on July 6, 2016. LMWF began producing
9 documents responsive to the Subpoena only after the Confirming Order, and the vast majority of
10 the documents (over 100,000 pages marked with the prefix “LMWF_SUPP_”) were produced by
11 LMWF to Plaintiff’s counsel on October 13, 2016 and on or about December 8, 2016, well after
12 the vast majority of the depositions in this case, including the March 21, 2016 deposition of Paul
13 Morabito.

14 Defendants do not allege that Plaintiff failed to promptly disclose the LMWF documents
15 under NRCp 16.1. Nor do Defendants suggest that they could not have obtained their own files
16 from their counsel at any time or that they are unable to question their own counsel regarding the
17 contents of the communications.

18 **C. Authentication.**

19 While Defendants’ counsel contended during trial that Defendants are not challenging
20 authenticity, Defendants’ Trial Brief expressly raises the issue of authenticity (without
21 identifying those exhibits whose authenticity is challenged).

22 Direct or cross-examination of a witness with personal knowledge of the creation of a
23 document is certainly one method of authenticating a document. While Defendants appear to
24 believe that it is the only method, Plaintiff can authenticate a document by any showing
25 sufficient to support a finding that the matter in question is what the proponent claims. See NRS
26 52.015.

27 ⁴ See Opposition at Ex. 8 (transcript of Bankruptcy Court’s oral ruling) and Ex. 9 (Feb. 3, 2016 *Order Granting*
28 *Motion to Compel Responses to Deposition Questions* (the “Privilege Order”))

1 Documents and communications may be authenticated in a multitude of ways, including
2 by contextual clues. For example, federal courts have held that emails may be authenticated as
3 being from the purported author “based on an affidavit of the recipient; the e-mail address from
4 which it originated; comparison of the content to other evidence; and/or statements or other
5 communications from the purported author acknowledging the e-mail communication that is
6 being authenticated.” Fenje v. Feld, 301 F. Supp. 2d 781, 809 (N.D. Ill. 2003), aff’d, 398 F.3d
7 620 (7th Cir. 2005) (collecting cases); Fed. Trade Comm’n v. AMG Services, Inc.,
8 212CV00536GMNVCF, 2017 WL 1704411, at *5 (D. Nev. May 1, 2017) (citing Fed. R. Evid.
9 902(9) (“Commercial paper, signatures thereon, and documents relating thereto to the extent
10 provided by general commercial law” are self-authenticating); Fed. R. Evid. 901(b)(4)
11 (documents can be authenticated by their “appearance, contents, substance, internal patterns, or
12 other distinctive characteristics, taken in conjunction with the circumstances”)); see also 52.055
13 (writing can be authenticated by “[a]pppearance, contents, substance, internal patterns or other
14 distinctive characteristics are sufficient for authentication when taken in conjunction with
15 circumstances.”).

16 Defendants cite Mishler v. McNally, a medical malpractice action in which the Court
17 found that a typewritten copy of a memo without a signature or any indication of the date
18 received was inadmissible due to a lack of foundation regarding its authenticity. 102 Nev. 625,
19 628, 730 P.2d 432, 435 (1986). The memo was purportedly prepared by a non-party chairperson
20 of the hospital’s credentials committee which recited the opinion of another unidentified non-
21 party that “I wouldn’t let him treat my dog.” Id. Defendants further cite Frias v. Valle, in which
22 the Nevada Supreme Court held that a specialist in neurological and orthopedic surgery could not
23 authenticate thermograms, which were alleged to portray visual images of soft tissue injuries, as
24 there was no evidence of how or when they were taken and the only reason he believed they
25 were taken of the plaintiff was the fact that plaintiff’s name was on them. Frias v. Valle, 101
26 Nev. 219, 221–22, 698 P.2d 875, 876–77 (1985).

27 Plaintiff is not offering an unexecuted, undated memo from an unknown source, nor is
28 Plaintiff offering an unidentified, undated x-ray or similar image with no reason to believe it was

1 taken of the relevant party. Mishler and Frias therefore are not on point. Instead, Plaintiff is
2 offering documents and communications by Defendants or their agents, produced by Defendants'
3 own counsel directly to Plaintiff's counsel in this case pursuant to a Subpoena and court orders.
4 In many cases, metadata contained in the document or communication identifies its author or
5 sender, its recipient, and the date of the document or communication.

6 Plaintiff will offer evidence regarding how, when, and from whom the LMWF documents
7 were obtained, allowing the Court to reasonably conclude that the documents are a true and
8 authentic copy of LMWF's relevant files and thereby satisfying his burden to show that the
9 documents are what Plaintiff claims they are. See In re Int'l Mgmt. Associates, LLC, 781 F.3d
10 1262, 1267 (11th Cir. 2015) (authentication of debtor records by bankruptcy trustee who was
11 court-appointed receiver);⁵ see also Sec. Inv' Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC,
12 09-11893, 2018 WL 3617813, at *7 (Bankr. S.D.N.Y. July 27, 2018) (trustee properly
13 authenticated debtor's business records, noting that "the Court is not required to hear the
14 testimony of the document's author to demonstrate its authenticity" and that authenticity may be
15 established by the "[a]pppearance, contents, substance, internal patterns, or other distinctive
16 characteristics, taken in conjunction with circumstances.") (citing U.S. Bank Nat'l Ass'n v. PHL
17 Variable Life Ins. Co., 112 F.Supp.3d 122, 144 (S.D.N.Y. 2015), reconsideration denied, Nos. 12
18 Civ. 6811, 13 Civ. 1580 (CM), 2015 WL 4610894 (S.D.N.Y. July 30, 2015); Arista Records
19 LLC v. Lime Grp. LLC, 784 F.Supp.2d 398, 419 (S.D.N.Y. 2011)).

20 However, even without that evidence, there is ample circumstantial evidence that the
21 subject documents and communications are authentic, including their context, the identities of
22 the senders and recipients, knowledge of matters familiar to the Defendants and their agents, and
23 Mr. Bayuk's willingness to confirm the source and contents of those documents and
24 communications Defendants perceive to be favorable to them. As such, Stinson v. State is more
25 relevant than Mishler and Frias. In Stinson, the Nevada Supreme Court held that while the
26 district court erred in admitting photographs of text messages before they were authenticated, the

27
28 ⁵ Likewise, Plaintiff, as the court-appointed trustee, is the custodian of the client files of Paul Morabito and as such, can satisfy the business records exception to hearsay. See id. at 1267-68.

1 error was harmless and the text messages were admissible because they “contained factual
2 information and references unique to the parties involved.” 128 Nev. 937, 381 P.3d 666 (2012)
3 (quoting Commonwealth v. Koch, 39 A.3d 996, 1004 (Pa. Super. Ct. 2011)). Such information
4 and references provided “sufficient evidence to establish the identity of the author [supporting]
5 their authenticity.” Id. (citing State v. Thompson, 777 N.W.2d 617, 625–26 (N.D. 2010); see
6 also Koch, 39 A.3d at 1004 (finding that it is “uniformly recognized” that a document may be
7 authenticated by circumstantial evidence, including by containing contents known only to the
8 sender and recipient or by indicating knowledge of matters familiar to both the defendant and the
9 witness) (citations omitted).

10 **D. Hearsay Issues.**

11 Defendants’ real complaint appears to be the inferences the Court may draw from the
12 documents and communications, as Defendants argue that it would be “unfairly prejudicial to
13 allow a one-sided interpretation of documents with no opportunity for Defendants to cross-
14 examine the author.” But Defendants have largely objected to communications by their own
15 agents, including Paul Morabito, when he was acting on behalf of one or more of the Defendants,
16 or their attorneys, LMWF, including Dennis Vacco and Christian Lovelace. For this reason
17 alone, the documents and communications are admissible under NRS 51.035(3) as statements of
18 a party opponent, and Adams v. United States is not on point. CIV. 03-0049-E-BLW, 2009 WL
19 2207690, at *2 (D. Idaho July 15, 2009). Nothing in that unpublished decision indicates that the
20 producing party was an agent of the party against whom the exhibits were offered. Defendants
21 are free to deny the statements or call their agents to explain them. They have declined to do so.

22 In addition to the business records exception, other hearsay exclusions or exceptions
23 apply to the documents and communications at issue. Certain communications offered are
24 statements by Paul Morabito which are contrary to the narrative carefully-constructed among the
25 same parties that the transfers at issue were nothing more than a separation of Paul Morabito’s
26 “stuff” from Edward Bayuk’s “stuff” and were supported by fair value, and are therefore
27 excepted from hearsay under NRS 51.345(1) because Mr. Morabito is unavailable. In other
28 cases, the communication is not hearsay at all under NRS 51.035 because Plaintiff is not offering

1 the communication for its truth; indeed, Plaintiff has no doubt that many of Paul Morabito's
2 statements are untruthful. Rather, Plaintiff offers the communications because the very fact of
3 the communications is probative of a fact in issue, such as Paul Morabito's continued use or
4 control of the transferred assets. With respect to other documents and communications, the
5 offered exhibit reflects the intent, plan, motive, or design of Paul Morabito or the Defendants and
6 is therefore admissible NRS 51.105(1). In *none* of these circumstances does the statute require
7 Plaintiff to cross-examine the declarant.

8 **E. Unfair Prejudice and Representations of Value.**

9 Finally, Defendants fail to explain how NRS 48.035 applies, particularly as to statements
10 regarding valuations. NRS 48.035 provides that even relevant evidence is not admissible if its
11 probative value is substantially outweighed by the danger of unfair prejudice, confusion of the
12 issues and misleading the jury. There is no jury in this case. The Court is amply capable of
13 assessing the reliability and credibility of the evidence and will not be "confused" by the
14 evidence.

15 **AFFIRMATION**

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

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

19 Dated this 31st day of October, 2018.

20 GARMAN TURNER GORDON LLP

21 /s/ Gabrielle A. Hamm
22 ERIKA PIKE TURNER, ESQ.
23 GABRIELLE A. HAMM, ESQ.
24 TERESA M. PILATOWICZ, ESQ.
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26 Las Vegas, Nevada 89119
27 Telephone 725-777-3000
28 *Special Counsel to Plaintiff,*
William A. Leonard, Trustee

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of GARMAN TURNER GORDON LLP, and that on this
3 date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **PLAINTIFF'S**
4 **POINTS AND AUTHORITIES REGARDING AUTHENTICITY AND HEARSAY**
5 **ISSUES** on the parties as set forth below:

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

8 addressed as follows:

9 Frank Gilmore, Esq.
10 Lindsay L. Liddell, Esq.
11 ROBISON, SHARP, SULLIVAN & BRUST
12 71 Washington Street
13 Reno, NV 89503

13 ☐ Certified Mail, Return Receipt Requested

14 ☐ Via Facsimile (Fax)

15 ☒ Via E-Mail

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

18 ☐ Federal Express (or other overnight delivery)

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

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

22 Lindsay L. Liddell, Esq.
23 E-mail: lliddell@rssblaw.com

24 DATED this 30th day of October, 2018.

25 /s/ Gabrielle A. Hamm

26 An Employee of GARMAN TURNER
27 GORDON LLP

28 4832-8021-8233, v. 1