

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

APPELLANT'S APPENDIX, VOLUME 22
(Nos. 3482–3710)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<u>DOCUMENT DESCRIPTION</u>		<u>LOCATION</u>
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Exhibit	Document Description	
1	Supplemental Declaration of Gabrielle A. Hamm, Esq. in Support of Plaintiff's Motion to Reopen Evidence (filed 02/04/2019)	Vol. 47, 8111–8113
1-I	Declaration of Frank C. Gilmore in Support of Robison, Sharp Sullivan & Brust's Opposition to Motion for Order Holding Robison in Contempt; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 259 (Jan. 30, 2019)	Vol. 47, 8114–8128
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Plaintiff's Reply to Defendants' Response to Motion to Reopen Evidence (filed 02/07/2019)		Vol. 47, 8136–8143
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[Defendants' Proposed Amended] Findings of Fact, Conclusions of Law, and Judgment (filed 03/08/2019)		Vol. 47, 8225–8268
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Memorandum of Costs and Disbursements (filed 04/11/2019)		Vol. 48, 8341–8347
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Exhibit	Document Description	
1	Ledger of Costs	Vol. 48, 8348–8370
Application for Attorneys’ Fees and Costs Pursuant to NRCP 68 (filed 04/12/2019)		Vol. 48, 8371–8384
Exhibits to Application for Attorneys’ Fees and Costs Pursuant to NRCP 68		
Exhibit	Document Description	
1	Declaration of Teresa M. Pilatowicz In Support of Plaintiff’s Application for Attorney’s Fees and Costs Pursuant to NRCP 68 (filed 04/12/2019)	Vol. 48, 8385–8390
2	Plaintiff’s Offer of Judgment to Defendants (dated 05/31/2016)	Vol. 48, 8391–8397
3	Defendant’s Rejection of Offer of Judgment by Plaintiff (dated 06/15/2016)	Vol. 48, 8398–8399
4	Log of time entries from June 1, 2016 to March 28, 2019	Vol. 48, 8400–8456

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This SETTLEMENT AGREEMENT AND MUTUAL RELEASE ("Agreement") is made and entered into this 30th day of November, 2011 (the "Effective Date"), by and between CONSOLIDATED NEVADA CORPORATION, a Nevada corporation ("CNC"), and PAUL MORABITO, an individual ("Morabito"), on the one hand, and JH, INC., a Nevada corporation ("JH"), JERRY HERBST, an individual ("Herbst") and BERRY-HINCKLEY INDUSTRIES, a Nevada corporation ("BHI") on the other. CNC and Morabito are collectively referred to herein as the "Morabito Parties." JH and Herbst are collectively referred to herein as the "Herbst Parties." The Morabito Parties, the Herbst Parties and BHI are collectively referred to herein as the "Parties."

RECITALS:

A. JH, and P.A. MORABITO & CO. LTD., a Nevada corporation ("PAMCO") entered into that certain Amended and Restated Stock Purchase Agreement dated June 28, 2007 (the "ARSPA"), whereby JH was to purchase the stock of BHI from PAMCO. Herbst was the guarantor of the JH obligations under the ARSPA, and Morabito guaranteed the obligations of PAMCO. CNC is the successor in interest to PAMCO.

B. The transaction contemplated by the ARSPA closed on July 2, 2007.

C. A dispute developed between the Morabito Parties and the Herbst Parties regarding the sale of the BHI stock to JH and other matters related thereto. Based thereon, the Morabito Parties filed a lawsuit against the Herbst Parties on December 3, 2007. The lawsuit was captioned Consolidated Nevada Corp., et al. v. JH, et al., and was filed in Department 6 of the Second Judicial District Court in and for the County of Washoe (the "Court"), Case No. CV07-02764 (together with all claims and counterclaims, the "Action").

D. The Herbst Parties filed numerous counterclaims in the Action against the Morabito Parties, including, but not limited to, fraud in the inducement, misrepresentation and breach of contract.

E. The matter was tried before the Honorable Judge Brent Adams by way of a bench trial commencing May 10, 2010. At the conclusion of the bench trial, the Court found that the Morabito Parties had breached the ARSPA and committed fraud in the inducement and misrepresentations in relation to numerous aspects of the transaction contemplated by the ARSPA. On October 12, 2010, the Court entered its findings of fact, conclusions of law and judgment that outlined the basis for the Judgment (the "Findings of Fact and Conclusions of Law").

F. In a final judgment entered on August 23, 2011, the Court awarded the Herbst Parties total damages in the amount of One Hundred Forty-Two Million Five Hundred Ninety-Seven Thousand Two Hundred Eighty-Eight and 80/100ths Dollars (\$142,597,288.80), representing both compensatory and punitive damages, as well as an award of attorneys' fees and costs (both such amounts are collectively referred to herein as the "Judgment"). In addition to the Judgment, the Court had previously affirmed the determination of court-appointed independent accountants that, under the terms of the ARSPA, BHI was entitled to a working capital adjustment in the amount of Six Million Eight Hundred Forty-Seven Thousand Four Hundred Eighty-Nine and No/100ths Dollars (\$6,847,489.00) (the "Working Capital Adjustment").

G. The Morabito Parties filed numerous appeals with the Nevada Supreme Court, including appeals related to the Working Capital Adjustment, the Findings of Fact and Conclusions of Law and the Judgment as identified by those certain appeals captioned as Nevada Supreme Court Case Nos. 57943, 57944, 59138 and 54412. The Herbst Parties filed numerous cross-appeals in the subject appeals. The appeals filed by the Morabito Parties and the cross appeals filed therein by the Herbst Parties, are collectively referred to herein as the "Appeal."

H. The Morabito Parties have represented that they are unable to satisfy the monetary Judgment entered against them in full. The Morabito Parties have also demonstrated their commitment to pursue the Appeal to finality in order to seek reversal of the Judgment.

I. The Herbst Parties contend that prior to and after the Court's oral pronouncement of judgment, Morabito undertook numerous fraudulent conveyances in an effort to conceal assets and render himself judgment proof. Morabito denies such allegations. Notwithstanding the denial by Morabito, the Herbst Parties believe they possess valid claims against CNC, Morabito, individually and in his capacity as Trustee of the Arcadia Living Trust, Edward Bayuk, individually and in his capacity as Trustee of the Edward William Bayuk Living Trust, Salvatore Morabito and Trevor Lloyd, for recovery of funds the Herbst Parties believe were transferred in violation of Nevada's Uniform Fraudulent Conveyance Act (each of the foregoing causes of action a "Fraudulent Conveyance Claim"). The Morabito Parties contend the transfers were done for fair value, were not fraudulent and the Fraudulent Conveyance Claims lack merit.

J. The Herbst Parties have agreed to hold the Fraudulent Conveyance Claims in abeyance pending the performance of the obligations contained herein by the Morabito Parties, all on the terms further set forth herein.

K. Based on the foregoing, and subject to the conditions set forth herein, the Parties believe that it is in their mutual interests to finally and fully reach a compromise and settle the claims and counterclaims set forth in the Action and Appeal pursuant to the terms set forth in this Agreement.

NOW THEREFORE, in consideration of the promises set forth in this Agreement, and other good and valuable consideration, each of the Parties hereto agrees as follows:

TERMS OF SETTLEMENT

1. **Recitals:** The foregoing recitals are true and incorporated herein, as though set forth in full.

2. **Settlement:** The Parties agree to settle this dispute on the following terms:

a. **Cash Payments:** In addition to the other payments and assumptions of liabilities outlined in this Agreement, the Morabito Parties agree to pay to the Herbst Parties, cash payments totaling Thirteen Million and No/100ths Dollars (\$13,000,000). The cash payments shall be made in the amounts and at the times as set forth below:

i. Payment of Two Million Five Hundred Thousand and No/100ths Dollars (\$2,500,000) on or before December 1, 2011;

ii. Payment of Two Million Five Hundred Thousand and No/100ths Dollars (\$2,500,000) on or before June 1, 2012;

iii. Payment of Four Million and No/100ths Dollars (\$4,000,000) on or before March 1, 2013; and

iv. Payment of Four Million and No/100ths Dollars (\$4,000,000) on or before December 1, 2013.

All payments to be made under this Section 2 shall be made by way of federal wire transfer of same day funds to the account designated by the Herbst Parties. The initial payment shall be delivered to Escrow Holder (below defined) in connection with the Closing (below defined) pursuant to wire instructions to be provided by Escrow Holder prior to the Closing. All subsequent payments shall be paid directly to the Herbst Parties, pursuant to the wire instructions attached hereto as Exhibit A and incorporated herein by this reference (the "Wire Instructions"). The Herbst Parties may modify the Wire Instructions upon written notice to the Morabito Parties.

b. **425 Maestro Drive Lease.** That certain lease by and between BHI, as tenant, and Spirit Master Funding II, LLC, a Delaware limited liability company, as landlord ("Landlord"), dated effective as of December, 2005, for that certain real property more commonly known as 425 Maestro Drive, Reno, Nevada, is attached hereto and incorporated herein as Exhibit B (the "Lease"). Commencing December 1, 2011, the Morabito Parties hereby assume any and all obligations of BHI as tenant under the Lease. The forgoing assumption

includes both monetary and non-monetary obligations of BHI, including, but in no way limited to, the payment of rent, common area maintenance charges, taxes and any other monetary fee due under the Lease, as well as utilities and insurance. In the event the Morabito Parties are unable to obtain insurance on the Premises or are unable to have the utilities placed directly in their name, the Herbst Parties shall maintain insurance and utilities and forward to the Morabito Parties within five (5) days of receipt, at the address set forth herein for notices, invoices for any such product or service which the Morabito Parties shall cause to be paid directly before the same shall become due. For the avoidance of doubt, the foregoing obligation on the part of the Morabito Parties includes payment of the rent payment due December 1, 2011.

BHI shall, upon sixty (60) days written notice, vacate the premises which is the subject of the Lease (the "Premises"). The Morabito Parties shall utilize best efforts to obtain Landlord consent to an assignment of BHI's interest in the Lease to the Morabito Parties within sixty (60) days of the date of Closing. In the event the Landlord will not agree to allow an assignment, the Morabito Parties shall use best efforts to obtain Landlord consent to a sublease of the Premises from BHI to the Morabito Parties. The Morabito Parties shall use best efforts to ensure that any such assignment or sublease contains a release of BHI and the Herbst Parties from any and all obligations under the Lease, including, but not limited to, the release of the obligations under the personal guaranty of Herbst. In the event the Morabito Parties are able to obtain the Landlord's consent to such assignment or sublease, BHI shall formally assign in writing the Lease to the Morabito Parties, or sublease the Premises to the Morabito Parties, as applicable. For the avoidance of doubt, in the event of an assignment of the Lease or sublease of the Premises, BHI shall have no obligation to pay the Morabito Parties any rent or other consideration during the time BHI remains in the Premises. In the event the Morabito Parties are unable to obtain the Landlord's consent to an assignment of the Lease or sublease of the Premises to the Morabito Parties, BHI shall be and remain the tenant under the Lease for the duration of the term of the Lease, and the Morabito Parties shall continue to assume the monetary and non-monetary obligations of BHI under the Lease.

In the event the Morabito Parties are unable to obtain the consent of the Landlord to an assignment of the Lease as set forth above, the Morabito Parties shall use best efforts to obtain, within sixty (60) days of the date the Landlord denies an assignment of the Lease or sublease of the Premises, a full release in a form reasonably approved by the Herbst Parties, executed by the Landlord, acknowledging the assumption of the obligations under the Lease by the Morabito Parties and agreeing to release BHI and the Herbst Parties from any and all obligations under the Lease, including, but not limited to, the release of the obligations under the personal guaranty of Herbst. In the event, despite their best efforts, the Morabito Parties are unable to obtain the foregoing release from the Landlord, the Morabito Parties nonetheless acknowledge and agree that all obligations under the Lease shall still be timely performed by the Morabito Parties. The Morabito Parties shall provide written evidence reasonably satisfactory to the Herbst Parties that all obligations under the Lease are timely satisfied by the Morabito Parties. Such written

evidence shall be provided within five (5) days of the payment of any amounts owing under the Lease, or performance of any material non-monetary obligations required under the Lease.

The Morabito Parties hereby indemnify and hold harmless BHI and the Herbst Parties on the terms and in the manner set forth below in Section 11 hereof, for any and all claims in any way related to performance of any and all obligations under the Lease accruing on or after December 1, 2011, and continuing through the term of the Lease, as well as any and all claims in any way related to the sublease of the Premises or assignment of the Lease, whether brought or asserted by or on behalf of the Landlord or any third party. Notwithstanding the foregoing, the Morabito Parties shall not be required to indemnify and hold harmless BHI and the Herbst Parties for any such claims which are the direct result of the gross negligence or willful misconduct of BHI or the Herbst Parties occurring while BHI is in possession of the Premises.

The obligations of the Morabito Parties set forth herein shall extend through the expiration of the existing term of the Lease. In the event the Landlord shall approve an assignment of the Lease or a sublease of the Premises, the parties agree that neither BHI nor the Morabito Parties shall exercise any option to extend the existing term of the Lease, absent express mutual written agreement to do so.

Provided there is no additional cost or expense to the BHI or Herbst Parties, the BHI and the Herbst Parties will use best efforts to reasonably cooperate with the Morabito Parties' efforts at obtaining the Landlord's consent to an assignment of the Lease or sublease of the Premises. The Morabito Parties acknowledge and agree that their ability to obtain the Landlord's consent to an assignment of the Lease or a sublease of the Premises shall have no effect on the Morabito Parties' obligations to perform all obligations under the terms of this Agreement, which shall remain in full force and effect regardless of whether the Landlord grants its consent to an assignment of the Lease or sublease of the Premises.

c. Hinckley Promissory Note. That certain promissory note by and between JH, as maker/payor, and Arthur T. Hinckley, as holder/payee ("Hinckley"), guaranteed by Herbst, in the principal amount of Four Million Four Hundred Sixty Seven Thousand Six Hundred Twenty-Seven and 07/100ths Dollars (\$4,467,627.07) and dated effective as of June 29, 2007, is attached hereto and incorporated herein as Exhibit C (the "Hinckley Note"). Commencing December 1, 2011, the Morabito Parties, hereby assume any and all obligations as maker/payor under the Hinckley Note. The forgoing assumption includes both monetary and non-monetary obligations of JH, including, but in no way limited to, the payment of periodic interest payments and the payment of all principal and accrued interest upon the maturity of the Hinckley Note (all as set forth in Sections 1.1 through and including 1.3 of the Hinckley Note).

The Morabito Parties shall use best efforts to obtain, within sixty (60) days of the date of Closing, a full release in a form reasonably approved by the Herbst Parties, executed by Hinckley acknowledging the assignment and assumption of the obligations under the Hinckley

Note to the Morabito Parties, and agreeing to release the Herbst Parties from any all obligations under the Hinckley Note, including, but not limited to, the release of the obligation under the personal guaranty of Herbst. In the event, despite their best efforts, the Morabito Parties are unable to obtain the foregoing release from Hinckley, the Morabito Parties nonetheless acknowledge and agree that all obligations under the Hinckley Note shall still be timely performed by the Morabito Parties. The Morabito Parties shall provide evidence reasonably satisfactory to the Herbst Parties that all obligations under the Hinckley Note are timely satisfied by the Morabito Parties. Such written evidence shall be provided within five (5) days of the payment of any amounts owing under the Hinckley Note, or performance of any material non-monetary obligations required under the Hinckley Note.

Nothing contained herein shall preclude the Morabito Parties from negotiating directly with Hinckley for an extension of the maturity date of the Hinckley Note. In the event the Morabito Parties are able to negotiate an extension of the Hinckley Note maturity date, the Morabito Parties shall provide to the Herbst Parties a fully executed copy of the agreement evidencing such extension, within five (5) days of executing the same.

The Morabito Parties hereby indemnify and hold harmless the Herbst Parties, on the terms and in the manner set forth below in Section 11 hereof, for any and all claims in any way related to performance of any and all obligations under the Hinckley Note accruing on or after December 1, 2011, and continuing until such time as the Hinckley Note is paid in full.

d. Moreno Lawsuit. Desi Moreno, in his capacity as the trustee of the Desi Moreno 2001 Trust has filed a lawsuit against BHI and Herbst alleging damages and seeking injunctive relief as a result of BHI's alleged failure to construct certain improvements on land owned by Desi Moreno in his capacity as trustee of the Desi Moreno 2001 Trust. The lawsuit is captioned Desi Moreno, Trustee of the Desi Moreno 2001 Trust, et al. v. Berry-Hinckley Industries, et al., Case No. CV10-02329 (the "Moreno Lawsuit") and was filed in Department 4 of the Second Judicial District Court in and for the County of Washoe.

The Morabito Parties hereby agree to indemnify and hold harmless BHI and the Herbst Parties for any finding of liability or assessment of damages in the Moreno Lawsuit. The Morabito Parties shall likewise assume the continuing defense of BHI and the Herbst Parties as of the date of this Agreement. The Morabito Parties shall select and retain an attorney to represent BHI and the Herbst Parties in the Moreno Lawsuit at the time of the Closing. All fees and costs associated with the representation of BHI and Herbst in the Moreno Lawsuit, commencing on or after the Closing, shall be paid by the Morabito Parties. The Herbst Parties and BHI hereby agree to cooperate with the Morabito Parties in the defense and resolution of the Moreno Lawsuit by making witnesses under their management reasonably available for preparation and participation with a mediation or trial.

In the event judgment is entered against BHI or the Herbst Parties, the Morabito Parties shall either: (i) satisfy such judgment, in full, within fifteen (15) days of the entry thereof; (ii) file a notice of appeal of such judgment within thirty (30) days and post a bond pending resolution of the appeal to stay execution of such judgment against BHI or the Herbst Parties, or (iii) in the case of an order requiring injunctive relief, take affirmative steps within thirty (30) days to comply with such order. If the event the appeal results in a judgment being affirmed against BHI or the Herbst Parties, the Morabito Parties shall pay any such judgment within fifteen (15) days of affirmance by the Nevada Supreme Court or begin specific performance of any court order granting injunctive relief.

In furtherance of the foregoing, within five (5) days of the Closing and upon approval by the court of a stipulation to file an amended answer, the Morabito Parties shall file an amended answer in the Moreno Lawsuit in the form attached hereto as Exhibit D, which will admit liability to the Herbst Parties in regard to the Moreno Lawsuit pursuant to the indemnification provisions contained in the ARSPA. Specifically, pursuant to Article 9.1(b) of the ARSPA, the Morabito Parties will agree that they are obligated to indemnify BHI and Herbst for any loss that has already been suffered and any loss that may be suffered in the future, as a result of the Moreno Lawsuit. In the event the court with jurisdiction over the Moreno Lawsuit refuses to approve the stipulation to allow the Morabito Parties to file the Amended Answer, the Parties shall meet and determine the best way to reasonably document the obligations of the Morabito Parties related to the Moreno Lawsuit.

e. Real Property Located at 8355 Panorama Drive. Morabito, as Trustee of the Arcadia Living Trust is the owner of that certain residence located at the street address commonly known as 8355 Panorama Drive, Reno, Nevada (the "Real Property"). Morabito, individually and as Trustee of the Arcadia Living Trust, hereby represents and warrants that the Real Property is encumbered by one (1) deed of trust, securing payment of a promissory note with an existing principal balance of One Million Eight Thousand One Hundred Thirty-Four and 11/100ths Dollars (\$1,008,134.11) (the "Deed of Trust"). Morabito hereby represents and warrants that payments under such promissory note, as of the date hereof, are current, and to the best of his personal knowledge, as of the date hereof, there exist no other mortgages or liens on or against the Real Property.

Morabito, individually and as Trustee of the Arcadia Living Trust, shall list the Real Property for sale as soon as possible, on the following terms and conditions:

i. Morabito shall continue to make all payments as and when due under the promissory note secured by the Deed of Trust until such time as the Real Property is sold.

ii. The listing real estate agent shall be licensed in the State of Nevada, with no less than five (5) years experience listing residential real property in Northern Nevada.

iii. The Herbst Parties and the Morabito Parties shall each cause to be prepared an appraisal of the Real Property. The appraiser which each side chooses must be licensed in the State of Nevada, and have no less than five (5) years experience appraising residential real property in Northern Nevada. Each party shall bear the cost of its own appraiser. Each party shall provide to the other a copy of their appraisal.

iv. The foregoing appraisers shall prepare an appraisal of the Real Property within sixty (60) days of Closing. The initial listing price for the Real Property shall be the average of the two appraisals obtained, rounded to the nearest Thousand Dollars (\$1,000). Notwithstanding the foregoing, in no event shall the initial listing price for the Real Property be less than Two Million Five Hundred Thousand and No/100ths Dollars (\$2,500,000).

v. If Morabito has not received an offer on the Real Property for the full asking price within six (6) months of the first listing date, authorized representatives of the Morabito Parties, the Herbst Parties and the listing agent shall meet and confer to determine if any additional actions should be taken to enable the Real Property to be sold. The Herbst Parties may withhold consent to any such proposed action in their sole and absolute discretion. Morabito must obtain the consent of the Herbst Parties prior to accepting any offer for less than the full agreed upon asking price in place at the time the offer is received, which consent may be withheld in the Herbst Parties' sole discretion.

vi. Upon the sale of the Real Property, the Herbst Parties shall be paid the net proceeds of the sale after deducting all usual and customary closing costs, as well as such amount as is necessary to pay off the note secured by the Deed of Trust and obtain a discharge of the Deed of Trust. In the event the Real Property is sold prior to December 1, 2013, and the amount paid to the Herbst Parties as a result of such sale exceeds One Million and No/100ths Dollars (\$1,000,000), the Morabito Parties shall be entitled to deduct any amount paid after the sale of the Real Property to the Herbst Parties over and above One Million and No/100ths Dollars (\$1,000,000) from the Four Million and No/100ths Dollar (\$4,000,000) payment to be made pursuant to Section 2(a)(iv) of this Settlement Agreement.

f. Stipulation to Vacate Appeal. The Herbst Parties and the Morabito Parties have stipulated to dismiss the Appeal, and the Nevada Supreme Court has entered orders of dismissal thereon.

g. Stipulation to Vacate Judgment and Findings of Fact and Conclusions of Law. The Parties shall cause the Stipulation to Vacate Judgment (below defined) to be filed with the Court in the following manner:

i. No later than Wednesday, November 23, 2011, the Morabito Parties and the Herbst Parties shall deliver to the Court for review and approval as to form, a stipulation to withdraw and vacate the Judgment and Findings of Fact and Conclusions of Law in the form

attached hereto as **Exhibit E** (the "Stipulation to Vacate Judgment"), with express instructions to the Court not to file or enter the Stipulation to Vacate Judgment without the further express consent of the Herbst Parties.

ii. On December 1, 2011, upon confirmation from the Escrow Holder that the initial payment from the Morabito Parties in the amount of Two Million Five Hundred Thousand and No/100ths Dollars (\$2,500,000) has been received by Escrow Holder, authorized representatives of the Herbst Parties and Morabito Parties will meet with the Court to execute and authorize the filing and entering of the Stipulation to Vacate Judgment. The parties currently contemplate such meeting at 1:15 p.m., PST, on December 1, 2011. Therefore, all funds must be received and verified by Escrow Holder no later than Noon, PST, on December 1, 2011.

iii. Upon the Court's order entering the Stipulation to Vacate Judgment, and delivery to Escrow Holder of the Stipulation to Vacate Judgment executed by the Court, Escrow Holder shall disburse the Two Million Five Hundred Thousand and No/100ths Dollars (\$2,500,000) as instructed by the Herbst Parties without any further instruction necessary on the part of the Morabito Parties.

The Morabito Parties acknowledge and agree that the vacatur of the Judgment and Findings of Fact and Conclusions of Law is subject to the approval of the Court, and such stipulation may or may not be approved. Should the Court not agree to vacate the Judgment and Findings of Fact and Conclusions of Law, Escrow Agent shall return the Two Million Five Hundred Thousand and No/100ths Dollars (\$2,500,000), minus any Escrow fees, to the Morabito Parties, and this Settlement Agreement shall be deemed of no force or effect.

h. Stipulation to Seal Records. The Herbst Parties have agreed that they will execute a stipulation to seal records in the form attached hereto as **Exhibit F** (the "Stipulation to Seal") in the presence of the Court concurrently with the execution of the Stipulation to Vacate Judgment. However, the Morabito Parties acknowledge and agree that the decision to seal portions of the record involving the Action rests with the Court, and such request may or may not be approved. Should the Court not agree to seal any portion of the record involving the Action, such refusal by the Court shall have no effect on the Morabito Parties' obligations to perform all obligations under the terms of this Agreement, which shall remain in full force and effect regardless of whether the Court grants the requested seal, whether the seal is lifted or if the sealed documents become public by way of a later challenge to any order the records be sealed.

i. Stipulation for Dismissal with Prejudice. Upon the execution and entry of the Stipulation to Vacate Judgment by Court, the Parties shall concurrently execute and submit to the Court a Stipulation for Dismissal with Prejudice, in the form attached hereto as **Exhibit G**. For the avoidance of any doubt, the Morabito Parties hereby expressly agree and acknowledge that the foregoing dismissal with prejudice shall not in any way be construed so as to negate or preclude the right of the Herbst Parties to cause the Confession of Judgment and Stipulation to

Confession of Judgment to be entered with a court of competent jurisdiction upon a Default of the Morabito Parties hereunder.

j. Tolling Agreements. The Morabito Parties shall obtain duly executed tolling agreements, in the form attached hereto as Exhibit H and incorporated herein by this reference (each a "Tolling Agreement") from each of the following: CNC; Morabito, individually and in his capacity as Trustee of the Arcadia Living Trust; Edward Bayuk, individually and in his capacity as Trustee of the Edward William Bayuk Living Trust; Salvatore Morabito and Trevor Lloyd. The Tolling Agreements shall toll the statute of limitations for filing or prosecuting claims against the foregoing related to the alleged transfers described in Recital I, previously set forth in this Agreement, including but not limited to, the Fraudulent Conveyance Claims. Upon receipt of the foregoing Tolling Agreements, the JH Parties agree to hold in abeyance all such claims pending the full and complete performance of each and every of the Morabito Parties' obligations under this Agreement or entry of the Confession of Judgment, whichever is first to occur. The Herbst Parties shall have no obligation to hold in abeyance any claim related to such claims against any of the foregoing individuals or entities which fail to deliver a duly executed Tolling Agreement within sixty (60) days of Closing.

k. Confession of Judgment. Concurrently herewith, CNC and Morabito shall execute and deliver to JH and Herbst a confession of judgment (the "Confession of Judgment") in the amount of Eighty-Five Million and No/100ths Dollars (\$85,000,000) (the "Stipulated Judgment Amount") along with the associated stipulation (the "Stipulation to Confession of Judgment"). The Confession of Judgment is attached hereto as Exhibit I and incorporated herein by this reference. The Stipulation to Confession of Judgment is attached hereto as Exhibit J and incorporated herein by this reference. The Confession of Judgment shall expressly provide that the Stipulated Judgment Amount qualifies as non-dischargeable under 11 U.S.C. Section 523 and the Morabito Parties agree to stipulate to the underlying facts establishing that the Stipulated Judgment Amount qualifies as nondischargeable under 11 U.S.C. Section 523. The Confession of Judgment and Stipulation to Confession of Judgment may be filed, ex parte and with no notice to the Morabito Parties, upon the occurrence of any uncured (provided there exists a right to cure) Default (below defined) under the terms of the Agreement. The Morabito Parties hereby waive any defense to the Confession of Judgment or Stipulation to Confession of Judgment, including but not limited to, any defense based on a theory of laches, statute of limitations or res judicata (or any variation thereof) and further hereby agree that the statute of limitations for claims set forth in the Confession of Judgment are hereby tolled pending the satisfaction of all obligations of the Morabito Parties set forth herein.

3. Closing.

a. Escrow. Payment by the Morabito Parties of the first payment due December 1, 2011, in the amount of Two Million Five Hundred Thousand and No/100ths Dollars (\$2,500,000) (as set forth in Section 2(a)(i) above) as well as the exchange of all documents to be

executed and delivered by either the Morabito Parties or the Herbst Parties pursuant to the terms of this Agreement, shall be administered through an escrow (the "Escrow") by depositing the same with First American Title Company of Nevada, located at 5310 Kietzke Lane, Suite 100, Reno, Nevada 89511; Attention: Margie Roma; (775)823-6200 ("Escrow Holder"). Unless otherwise extended by the Parties in writing, Escrow shall close on or before December 1, 2011 (the "Closing").

b. Morabito Parties Closing Documents. The Morabito Parties shall cause the following to be delivered to the Escrow Holder prior to Closing:

i. Two (2) originals of this Agreement duly executed by the Morabito Parties, which shall be delivered to Escrow within two (2) days of executing the same;

ii. Payment in the amount of Two Million Five Hundred Thousand and No/100ths Dollars (\$2,500,000);

iii. One (1) original Confession of Judgment duly executed by the Morabito Parties;

iv. One (1) original Stipulation to Confession of Judgment duly executed by the Morabito Parties;

v. One (1) original of Tolling Agreement for each of the Morabito Parties and Morabito in his capacity as Trustee of the Arcadia Living Trust, as well as the individuals and entities identified in Section 2(j) of this Agreement, duly executed by such parties.

c. Herbst Parties Closing Documents. The Herbst Parties shall cause to be delivered two (2) originals of this Agreement duly executed by the Herbst Parties, within two (2) days of executing the same.

d. Conditions Precedent to Closing.

i. Herbst Parties' Conditions.

1. The warranties and representations of the Morabito Parties set forth in Section 7 shall be true, correct and accurate in all respects; and

2. The Morabito Parties shall have delivered to Escrow Holder all of the items set forth in Section 3(h), above, or the delivery of any such items shall have been waived by the Herbst Parties.

ii. Morabito Parties' Conditions.

1. The warranties and representations of the Herbst Parties set forth in Section 8 shall be true, correct and accurate in all respects;

2. The Herbst Parties shall have delivered to Escrow Holder all of the items set forth in Section 3(e), above, or the delivery of any such items shall have been waived by the Morabito Parties; and

3. The Stipulation to Vacate Judgment and Findings of Fact and Conclusions of Law shall have been entered and filed by the Court.

4. The Stipulation for Dismissal with Prejudice shall have been entered and filed with the Court.

e. Delivery of Documents by Escrow Holder.

i. Herbst Parties. At Closing, the Escrow Holder shall deliver to the Herbst Parties the following:

1. The Two Million Five Hundred Thousand and No/100ths Dollar (\$2,500,000) payment, disbursed in the manner and to the parties as directed by the Herbst Parties pursuant to separate written escrow instructions;

2. One (1) counterpart original of this Agreement, executed by all Parties;

3. One (1) original Confession of Judgment executed by the Morabito Parties;

4. One (1) original Stipulation to Confession of Judgment executed by the Morabito Parties;

5. One (1) original of each of the Tolling Agreements executed by the Morabito Parties and Morabito in his capacity as Trustee of the Arcadia Living Trust, as well as the individuals and entities listed in Section 2(j) of this Agreement.

ii. Morabito Parties. At Closing, the Escrow Holder shall deliver to the Morabito Parties one (1) counterpart original of this Agreement, executed by all Parties.

4. Resolution of Claims. All claims set forth in the Action and Appeal, whether filed by the Morabito Parties or the Herbst Parties, are hereby deemed completely and finally resolved. All

other claims by and between the Parties, or any of them, not included in the subject matter of the Action or Appeal, shall in no way be compromised or otherwise affected by this Agreement. Upon the completion by the Morabito Parties of each and every obligation set forth herein to be completed by the Morabito Parties, the Herbst Parties, upon request, shall execute and deliver a release of claims related to the Fraudulent Conveyance Claims as well as the claims set forth in the Action and Appeal, to the parties identified in Section 2(i) above. For the avoidance of any doubt, the Morabito Parties hereby expressly agree and acknowledge that the foregoing shall not in any way be construed so as to negate or preclude the right of the Herbst Parties to cause the Confession of Judgment and Stipulation to Confession of Judgment to be entered with the Court upon a Default of the Morabito Parties hereunder.

5. Morabito Parties Joint and Several Liability. The Morabito Parties acknowledge that each of them are and shall remain jointly and severally liable and shall become direct obligors for all obligations set forth in this Agreement as well as the entire Stipulated Judgment Amount in the event of a Default (minus any credits per Section 10, below).

6. Term of Agreement. The term of this Agreement (the "Term") shall commence as of the execution of this Agreement by the Parties and shall continue for a period of ninety-one (91) days after such time as the last obligation of the Morabito Parties set forth herein is fully and completely satisfied. For the avoidance of doubt, the Term shall run for a period of ninety-one (91) days after the last to occur of the following:

i. All cash payments required pursuant to Section 2(a) of this Agreement are made;

ii. The expiration of the Lease, or the final non-appealable resolution of any dispute arising under the Lease for which the Morabito Parties are required to indemnify and hold harmless BHI and the Herbst Parties, and the full and final payment by the Morabito Parties of any judgment entered against BHI and the Herbst Parties thereunder;

iii. Payment in full of all amounts due and owing under the Hinckley Note, or the final non-appealable resolution of any dispute arising under the Hinckley Note for which the Morabito Parties are required to indemnify and hold harmless BHI and the Herbst Parties, and the full and final payment by the Morabito Parties of any judgment entered against BHI and the Herbst Parties thereunder;

iv. The final non-appealable resolution of the Moreno Lawsuit, the full and final performance of any obligation of BHI and the Herbst Parties ordered thereunder, the final payment by the Morabito Parties of any judgment entered against BHI and the Herbst Parties and/or the full performance of any act ordered performed by BHI or the Herbst Parties; or

v. The sale of the Real Property and the payment of any amounts due and owing to the Herbst Parties as a result thereof.

Within fifteen (15) days of the date of expiration of the Term of this Agreement, and upon written demand by the Morabito Parties, the Herbst Parties shall return to the Morabito Parties the original executed Confession of Judgment.

7. Representations and Warranties of Morabito Parties. The Morabito Parties hereby represent and warrant to the Herbst Parties that all of the following statements are true, correct, complete and accurate as of the date of this Agreement, and shall remain true, correct, complete and accurate until each and every of the obligations of the Morabito Parties hereunder are fully and completely satisfied:

i. CNC is a corporation duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation;

ii. Each of the Morabito Parties has full power and authority (including full corporate power and authority) to execute and deliver the Agreement and Exhibits and to perform their obligations thereunder. This Agreement and the Exhibits to which each is a party constitute the valid and legally binding obligations of each of the Morabito Parties, enforceable in accordance with their terms and conditions;

iii. Neither the execution and the delivery of this Agreement nor the Exhibits thereto, nor the consummation of the transactions contemplated therein or thereby, will violate, in any material respect, any constitution, statute, regulation, rule, injunction, judgment, order, decree, ruling, charge, or other restriction of any government, governmental agency, or court to which the Morabito Parties are subject. Neither of the Morabito Parties is required to give any notice to, make any filing with, or obtain any authorization, consent, or approval of any government or governmental agency in order for the Parties to consummate the transactions contemplated by the Agreement and Exhibits thereto.

iv. Until each and every obligation contained in this Agreement to be performed by the Morabito Parties is fully and completely performed and satisfied, the Morabito Parties will not transfer any assets for less than full and adequate consideration with the intent, purpose or design or effect of hindering, delaying or otherwise frustrating the ability of the Herbst Parties to realize payment of their claims, or which would otherwise constitute a fraudulent transfer under state or federal law.

v. The payments required to be made by the Morabito Parties pursuant to the terms of this Agreement are not, and when made, will not be under any circumstance or event (including the passage of time or otherwise) subject to offset, recoupment, rescission, invalidation, declared to be fraudulent or preferential, set aside, voided or otherwise required to

be repaid or returned to the Morabito Parties, their estates, creditors, trustees, receivers or any other person or entity (including under the Bankruptcy Code (below defined) or other state or federal law), or must otherwise be restored by the Herbst Parties, whether as a result of proceedings in bankruptcy or reorganization or otherwise.

8. Representations and Warranties of Herbst Parties. The Herbst Parties hereby represent and warrant to the Morabito Parties that all of the following statements are true, correct, complete and accurate as of the date of this Agreement, and shall remain true, correct, complete and accurate until each and every of the obligations of the Morabito Parties hereunder are fully and completely satisfied:

i. JH is a corporation duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation;

ii. Each of the Herbst Parties has full power and authority (including full corporate power and authority) to execute and deliver the Agreement and Exhibits and to perform their obligations thereunder. This Agreement and the Exhibits to which each is a party constitute the valid and legally binding obligations of each of the Herbst Parties, enforceable in accordance with its terms and conditions;

iii. Neither the execution and the delivery of this Agreement nor the Exhibits thereto, nor the consummation of the transactions contemplated therein or thereby, will violate, in any material respect, any constitution, statute, regulation, rule, injunction, judgment, order, decree, ruling, charge, or other restriction of any government, governmental agency, or court to which the Herbst Parties are subject. Neither of the Herbst Parties is required to give any notice to, make any filing with, or obtain any authorization, consent, or approval of any government or governmental agency in order for the Parties to consummate the transactions contemplated by the Agreement and Exhibits thereto.

iv. As of Closing, BHI is not in default under the Lease.

9. Default. The following shall be deemed defaults under this Agreement (each a "Default").

i. Failure of the Morabito Parties to timely make any payment required pursuant to the terms of this Agreement;

ii. The occurrence of any default under the Lease which is the result of a failure by the Morabito Parties to timely perform any obligation contained in the Lease which the Morabito Parties are obligated to perform pursuant to this Agreement;

iii. The occurrence of any default under the Hinckley Note which is the result of a failure by the Morabito Parties to timely perform any obligation contained in the Hinckley Note which the Morabito Parties are obligated to perform pursuant to this Agreement;

iv. The failure of the Morabito Parties to timely accept the defense of BHI and the Herbst Parties in regard to the Moreno Lawsuit, the failure to timely file the Amended Answer (as allowed by the Court upon stipulation of the Parties) or the failure of the Morabito Parties to timely indemnify BHI and the Herbst Parties for any finding of liability, assessment of damages or court ordered performance in the Moreno Lawsuit, all as required pursuant to this Agreement;

v. The failure of the Morabito Parties to timely comply with the provisions of this Agreement relating to the sale of the Real Property;

vi. The failure of the Morabito Parties to timely and properly accept the defense and indemnification of the Herbst Parties as required pursuant to Section 11 of this Agreement, or to timely pay any costs as and when required thereunder;

vii. The commencement of a case under the Bankruptcy Code by the Morabito Parties, or either of them, or commencement of a case under the Bankruptcy Code against the Morabito Parties, or either of them, by any creditor. In the event of an involuntary bankruptcy, if the Morabito Parties are able to obtain a dismissal thereof, the Confession of Judgment and Stipulation to Confession of Judgment shall be vacated by the Herbst Parties and the Default under this section 9(vii) shall be deemed cured. However, the Herbst Parties shall have the right to again enter the Confession of Judgment and Stipulation to Confession of Judgment in the event of a subsequent Default;

viii. The commencement of any action, motion, application or similar pleading to set aside, rescind or otherwise avoid or void this Agreement or any Exhibit hereto brought by the Morabito Parties, or either of them;

ix. The entering of a final non-appealable judgment in any legal proceeding brought by any person, entity, including any successor in interest to any of the Morabito Parties or governmental entity which sets aside, rescinds, or otherwise avoids or voids this Agreement or any Exhibit hereto;

x. A non-appealable action is concluded in any legal proceeding brought by any person, entity, including any governmental entity, which in effect finds or concludes that any of the payments required to be made by the Morabito Parties hereunder was a fraudulent transfer under any state uniform fraudulent conveyance or uniform fraudulent transfer act (or other laws, including common law, with similar import); or

xi. The warranties and representations of the Morabito Parties set forth in Section 7 are not true and correct and do not continue to remain true and correct.

10. Remedies Upon Default. If the Herbst Parties believe a Default has occurred, the Herbst Parties shall provide written notice to the Morabito Parties and shall provide them fifteen (15) days to cure any noted Default. If the Morabito Parties do not cure the Default to the Herbst Parties reasonable satisfaction within such fifteen (15) day period, the Herbst Parties shall cause the Confession of Judgment to be filed and entered with the Court. The Confession of Judgment may be filed, ex parte and with no notice to the Morabito Parties, upon the occurrence of an uncured Default under the terms of the Agreement. The notice and cure period provided pursuant to this Section 10 shall run concurrently with, and shall not be deemed to be in addition to, any notice and cure period provided in the Lease or Hinckley Note. Notwithstanding anything contained herein to the contrary, in the event of three (3) Defaults during the term of this Agreement, even though cured by the Morabito Parties in a timely fashion, the Morabito Parties hereby shall forfeit any further right to cure subsequent Defaults. Upon the fourth (4th) Default of the Morabito Parties, the Herbst Parties may immediately file and cause to be entered the Confession of Judgment with the Court without the necessity of permitting the Morabito Parties fifteen (15) days to cure such fourth (4th) default. In the event of entry of the Confession of Judgment and commencement of enforcement proceedings related thereto, the Morabito Parties will be credited for any payments (or the equivalent value of any specific performance) made pursuant to this Agreement, including any payments or value of performance of obligations to third parties for assumed liabilities.

11. Indemnification Procedures. If any action, proceeding, litigation, claim, loss or liability shall be brought or asserted against BHI or a Herbst Party (collectively, the "Indemnified Party") for any matter arising out of the Lease or Hinckley Note (each, a "Claim"), the Indemnified Party shall notify the Morabito Parties in writing thereof and the Morabito Parties shall promptly assume the defense thereof, including, without limitation, the employment of counsel (at the Morabito Parties' expense) reasonably acceptable to the Indemnified Party and the negotiation of any settlement or resolution of the Claim. Any failure of the Indemnified Party to notify the Morabito Parties of such matter shall not impair or reduce the obligations of the Morabito Parties hereunder. The Indemnified Party shall have the right, at the sole expense of the Morabito Parties, if the Indemnified Party has reason to believe that its interests are not being adequately represented or diverge from other interests being represented by such counsel, to employ separate counsel in connection with any Claim and to participate in the defense thereof. In the event the Morabito Parties shall fail to discharge or undertake to defend the Indemnified Party against any Claim, the Indemnified Party may, at its sole election, defend or settle such Claim. The liability of the Morabito Parties to the Indemnified Party hereunder for any settlement by an Indemnified Party shall be conclusively established by any settlement entered into by the Indemnified Party in good faith, and such good faith shall be conclusively established if the settlement is made on the advice of independent legal counsel for the Indemnified Party. The amount of the Morabito Parties' liability hereunder shall include the settlement consideration and

all other costs, which shall be paid by the Morabito Parties as hereinafter provided. Costs incurred in connection with a Claim shall be reimbursed by the Morabito Parties without the requirement of waiting for the ultimate outcome of any Claim.

The Morabito Parties shall not, without the prior written consent of the Indemnified Party, settle or compromise any Claim in any manner or consent to the entry of any judgment (i) in which the claimant or plaintiff does not unconditionally release the Indemnified Party from all liability and obligations in respect of such Claim and obtain a dismissal of such Claim with prejudice; or (ii) that may adversely affect the Indemnified Party (as determined in the sole discretion of the Indemnified Party) or obligate the Indemnified Party to pay any sum or perform any obligation. Any release of the Indemnified Party shall be in writing and shall be in form, scope and substance satisfactory to the Indemnified Party.

The Morabito Parties shall pay to the Indemnified Party any and all costs required to be paid by the Morabito Parties pursuant to this Section 11 within ten (10) days after written notice from the Indemnified Party itemizing the amounts thereof incurred to the date of such notice. All costs shall be immediately reimbursable to the Indemnified Party, or, upon the request of the Indemnified Party, paid directly to the party sending a bill or other statement to the Indemnified Party. Any costs not paid within the aforementioned ten (10) day period shall bear interest at ten percent (10%) per annum from the date incurred until the date paid in full.

12. Relief From Automatic Stay. In the event either or both of the Morabito Parties becomes a debtor in a bankruptcy case under the Bankruptcy Code, the Morabito Parties hereby stipulate to relief from the protection of the automatic stay of 11 U.S.C. Section 362 (the "Automatic Stay") with respect to any and all actions taken by BHI or the Herbst Parties, the terms of this Agreement, and the Confession or Judgment, the Complaint and any and all actions by BHI or the Herbst Parties to perfect its rights under this Agreement, including but not limited to waiving the Automatic Stay so that the Herbst Parties may file the Complaint and record and enter the Confession of Judgment in Nevada and as required to domesticate the Confession of Judgment in other states, and, if appropriate, foreign jurisdictions. This Section 12 is an expression of the intent of the Parties that this stipulated relief of the Automatic Stay will be fully respected and enforced, and that such stipulated relief is a material consideration supporting the willingness of BHI and the Herbst Parties to enter into this Agreement.

13. Value. The Parties intend, and hereby affirm, that the performance and payment, by the Morabito Parties, of the amounts set forth in this Agreement are offered in exchange for the consideration set forth in this Agreement and other forbearances made and exchanged pursuant to this Agreement and are for reasonably equivalent and new value. In exchange for the payments under, and performance of the obligations set forth in, this Stipulation by the Morabito Parties, the Morabito Parties affirm and acknowledge that the Herbst Parties have offered and given, pursuant to this Agreement, valuable consideration to the Morabito Parties, including but not limited to stipulating to vacating the Judgment and Findings of Fact and Conclusions of Law

and acceptance of payments in settlement of the Judgment less than the amounts that it has been awarded by the Court, which otherwise, save for the payments and performance of the Morabito Parties described in this Agreement and Exhibits, the Herbst Parties would not have offered or given. The Parties further agree and affirm that the exchanges made pursuant to this Agreement are reasonably equivalent in value, and that such value has been fully negotiated and is documented by the terms of this Agreement.

14. Nondisparagement/Confidentiality. The Parties agree that they will take no actions and make no statements that would disparage the other party or cause the other party to be viewed in a negative light. Moreover, the Parties hereby acknowledge and agree that the terms of this Agreement will be kept confidential by the Parties, and their representatives and agents, except to the extent that the disclosure of the terms and information contained in this Agreement is necessary to representatives of the Parties who need to know such information for the purpose of advising the Parties related to matters contained herein. Notwithstanding the foregoing, either Party may disclose the contents of this Agreement if necessary to enforce such Parties' rights contained herein, or as otherwise is compelled by a government entity or court of competent jurisdiction. In the case of a court or government entity of competent jurisdiction, the Party being compelled to disclose the contents hereof shall, if possible, provide the other Party with reasonable notice to allow the other Party to contest such disclosure.

15. Attorneys' Fees in Preparation of Agreement. The Parties hereby acknowledge and agree to bear their own attorneys' fees and costs in connection with this matter, including this Agreement.

16. Notices. Any notice provided for or permitted to be given hereunder must be in writing and may be given by (i) depositing same in the United States Mail, postage prepaid, registered or certified, with return receipt requested, addressed as set forth in this Section or (ii) delivering the same via nationally-recognized overnight delivery or courier service or hand delivery to the party to be notified. Notice given in accordance herewith shall be effective upon receipt at the address of the addressee, as evidenced by the executed postal receipt or other receipt for delivery. For purposes of notice the addresses of the parties hereto shall, until changed, be as follows (either party may change their address for notices upon five (5) days notice by delivering to the other parties written notice of the new address for such parties at the address listed below, as may be changed from time to time):

Any notice to the Morabito Parties shall be addressed as follows:

Paul A. Morabito
8581 Santa Monica Boulevard
Suite 708
West Hollywood, CA 90069

And:

Consolidated Nevada Corporation
8581 Santa Monica Boulevard
Suite 708
West Hollywood, CA 90069

With a copy to:

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

Any notice to the Herbst Parties shall be addressed as follows:

JH, Inc.
5195 Las Vegas Blvd. South
Las Vegas, NV 89119
Attention: Jerry Herbst

And:

Jerry Herbst
5195 Las Vegas Blvd. South
Las Vegas, NV 89119

And:

Berry-Hinckley Industries
5195 Las Vegas Blvd. South
Las Vegas, NV 89119
Attention: Chris Kemper

With copies to:

Sean T. Higgins, Esq.
Gordon Silver
3960 Howard Hughes Parkway, Ninth Floor
Las Vegas, NV 89169-5978

John P. Desmond, Esq.
Jones Vargas
300 E. Second St., Suite 1510
Reno, NV 89504

In the event any of the Parties refuses to accept delivery of any notice provided for or permitted to be given hereunder, or the courier charged with delivering such notice is unable to locate the party to which the notice is directed at the address given by such party above, delivery of copies of the notices to counsel for such party as noted above shall be construed as delivery upon the party, regardless of whether such party remains actively represented by the counsel noted above.

17. Complete Agreement. The Parties understand and agree that this Agreement sets forth the full and complete agreement of the parties, and that no statement or representation, other than those contained herein, have been made or relied upon by the parties as an inducement for executing this Agreement. No part of this Agreement may be changed except in a writing executed by a duly authorized representative of each party.

18. Representation by Counsel. ALL PARTIES TO THIS AGREEMENT HEREBY REPRESENT AND ACKNOWLEDGE THAT THEY HAVE BEEN REPRESENTED BY COUNSEL REGARDING THE TERMS OF THIS AGREEMENT AND THAT THEIR COUNSEL HAVE FULLY ADVISED THEM WITH RESPECT TO THE CONSEQUENCES ASSOCIATED WITH AGREEING TO ITS TERMS. IN PARTICULAR, AND IN THIS REGARD:

I. THE HERBST PARTIES AND BHI HAVE BEEN REPRESENTED BY JONES VARGAS; AND

II. THE MORABITO PARTIES HAVE BEEN REPRESENTED BY LIPES MATHIAS WEXLER FRIEDMAN LLP AND ROBISON, BELAUSTEGUI, SHARP & LOW.

19. Review by Legal Counsel and Advice by Legal Counsel. EACH OF THE UNDERSIGNED HAS READ THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE (WHICH INCLUDES ALL EXHIBITS AND DOCUMENTS ATTACHED THERETO); HAS REVIEWED WITH ITS/HIS LEGAL COUNSEL THE CONSEQUENCES OF EXECUTING THIS AGREEMENT AND RENDERING PERFORMANCE UNDER IT; HAS HAD SUFFICIENT TIME FOR THAT REVIEW AND CONSULTATION; IS COMPLETELY SATISFIED THAT IT/HE UNDERSTANDS THESE MATTERS WELL ENOUGH TO EXECUTE THIS AGREEMENT AND RENDER PERFORMANCE UNDER IT; IS VOLUNTARILY AND FREELY EXECUTING AND DELIVERING THIS AGREEMENT; AND IS EXECUTING THIS AGREEMENT BECAUSE IT/HE BELIEVES DOING SO IS IN THE UNDERSIGNED'S BEST ECONOMIC INTEREST HAVING FULLY AND FREELY CONSIDERED WITH COUNSEL ITS/HIS ECONOMIC ALTERNATIVES.

20. Miscellaneous:

i. Execution of Additional Documents: Each of the Parties hereto agrees to perform any and all acts and to execute and deliver any and all documents reasonably necessary to carry out the intent and the provisions of this Agreement.

ii. Governing Law: This Agreement is executed and intended to be performed in the State of Nevada, and the laws of Nevada shall govern its interpretation and effect. Any action to enforce this Agreement shall be brought before a court of proper jurisdiction located in Washoe County, Nevada.

iii. Entire Agreement: This Agreement contains the entire agreement of the Parties with respect to the subject matter of this Agreement.

iv. Exhibits. The following exhibits are attached hereto and incorporated herein:

Exhibit A - Wire Instructions
Exhibit B - Lease
Exhibit C - Hinckley Note
Exhibit D - Amended Answer
Exhibit E - Stipulation to Vacate Judgment
Exhibit F - Stipulation to Seal
Exhibit G - Stipulation for Dismissal with Prejudice
Exhibit H - Tolling Agreement
Exhibit I - Confession of Judgment
Exhibit J - Stipulation to Confession Of Judgment

v. No Waiver: No action or lack of action on the part of any party hereto at any time to execute any rights or remedies conferred upon it under this Agreement shall be, or shall be asserted to be, a waiver of any of its rights or remedies hereunder.

vi. Attorney's Fees: In the event of a dispute between the Parties arising out of this Agreement, the prevailing party shall be allowed that Party's reasonable attorney's fees and costs incurred in any negotiations, mediation, arbitration, litigation or any appeal therefrom.

vii. Captions and Pronouns: All pronouns and variations thereof shall be deemed to refer to the masculine, feminine or neuter, and to the singular or plural, as identity of the person may require. Captions or paragraph titles are used in this Agreement for convenience or reference and in no way define, limit, extend or describe the scope or intent of this Agreement or any of its provisions.

viii. Severance: Should any term, part, portion or provision of this Agreement be decided or declared by a court of competent jurisdiction to be, or otherwise found to be, illegal or in conflict with any law of the State of Nevada or the United States, or otherwise be rendered unenforceable or ineffectual, the validity of the remaining parts, terms, portions and provision shall be deemed severable and shall not be affected thereby, providing such remaining parts, terms, portions or provisions can be construed in substance to constitute the agreement that the Parties intended to enter into in the first instance.

ix. Successors and Assigns: This Agreement shall be binding and inure to the benefit of the Parties hereto, their predecessors, parents, subsidiary and affiliated business entities, all officers, directors, shareholders, members, agents, employees, attorneys, assigns, successors, heirs, executors, administrators and legal representatives of whatsoever kind or character in privity therewith.

x. Third Party Beneficiary: This Agreement is for the benefit of the Parties, their successors and assigns only. Other than as expressly provided herein, no other third party beneficiary rights are intended by this Agreement.

xi. Counterparts: This Agreement may be executed in counterparts, one or more of which may be facsimiles, but all of which shall constitute one and the same Agreement. Facsimile signatures of this Agreement shall be accepted by the Parties to this Agreement as valid and binding in lieu of original signatures.

IN WITNESS WHEREOF, this Agreement is executed as of the Effective Date.

JH PARTIES

JH, INC., a Nevada corporation

By: [Signature]

Its: President

[Signature]

JERRY HERBST, an individual

BHI

BERRY-HINCKLEY INDUSTRIES,
a Nevada corporation

By: [Signature]

MORABITO PARTIES

CONSOLIDATED NEVADA
CORPORATION, a Nevada corporation

By: _____

Its: _____

PAUL A. MORABITO, an individual

viii. Severance: Should any term, part, portion or provision of this Agreement be decided or declared by a court of competent jurisdiction to be, or otherwise found to be, illegal or in conflict with any law of the State of Nevada or the United States, or otherwise be rendered unenforceable or ineffectual, the validity of the remaining parts, terms, portions and provision shall be deemed severable and shall not be affected thereby, providing such remaining parts, terms, portions or provisions can be construed in substance to constitute the agreement that the Parties intended to enter into in the first instance.

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IN WITNESS WHEREOF, this Agreement is executed as of the Effective Date.

JH PARTIES

JH, INC., a Nevada corporation

By: [Signature]

Its: President

[Signature]
JERRY HERBST, an individual

BHI

BERRY-HINCKLEY INDUSTRIES,
a Nevada corporation

By: [Signature]

MORABITO PARTIES

CONSOLIDATED NEVADA
CORPORATION, a Nevada corporation

By: _____

Its: _____

PAUL A. MORABITO, an individual

Its: President

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viii. Severance: Should any term, part, portion or provision of this Agreement be decided or declared by a court of competent jurisdiction to be, or otherwise found to be, illegal or in conflict with any law of the State of Nevada or the United States, or otherwise be rendered unenforceable or ineffectual, the validity of the remaining parts, terms, portions and provision shall be deemed severable and shall not be affected thereby, providing such remaining parts, terms, portions or provisions can be construed in substance to constitute the agreement that the Parties intended to enter into in the first instance.

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IN WITNESS WHEREOF, this Agreement is executed as of the Effective Date.

JH PARTIES

JH, INC., a Nevada corporation

By: _____

Its: _____

JERRY HERBST, an individual

BHI

BERRY-HINCKLEY INDUSTRIES,
a Nevada corporation

By: _____

MORABITO PARTIES

CONSOLIDATED NEVADA
CORPORATION, a Nevada corporation

By:  _____

Its: PRBS LORNT _____

 _____
PAULA A. MORABITO, an individual

Its: President

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THE FOREGOING AGREEMENT IS APPROVED AS TO FORM:

JONES VARGAS
300 E. 2nd Street, Suite 1510
Reno, NV 89504

 11/30/11
By: JOHN P. DESMOND

Attorneys for JH, Inc., a Nevada corporation,
Berry-Hinckley Industries, a Nevada corporation,
and Jerry Herbst, an individual

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

By: BARRY L. BRESLOW

Attorneys for Consolidated Nevada Corporation,
a Nevada corporation, and Paul A. Morabito,
an individual

THE FOREGOING AGREEMENT IS APPROVED AS TO FORM:

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300 E. 2nd Street, Suite 1510
Reno, NV 89504

 11/30/11
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ROBISON, BELAUSTEGUI, SHARP & LOW
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ROBISON, BELAUSTEGUI, SHARP & LOW
71 Washington Street
Reno, NV 89503

By: BARRY L. BRESLOW

Attorneys for Consolidated Nevada Corporation,
a Nevada corporation, and Paul A. Morabito,
an individual

EXHIBIT A
WIRE INSTRUCTIONS

(See attached.)

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BANK OF GEORGE
Founded 2002

INCOMING WIRE INSTRUCTIONS

Beneficiary Bank: Bank of George
Beneficiary Bank Short Name: BK OF GEORGE LV NV
Routing Number: [REDACTED] 236-6
Beneficiary Account Number: HERBST FAMILY TRUST
Beneficiary Account Name: [REDACTED] 0349
Originator to Beneficiary Information:

If you have any questions, please contact Bank of George at (702) 851-4200. – Ashley Montrone

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EXHIBIT B
LEASE

(See attached.)

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LEASE AGREEMENT
(425 Maestro Dr., Reno, NV)

THIS LEASE AGREEMENT (this "**Lease**") is made as of ____ day of December, 2005 (the "**Effective Date**"), by and between **SPIRIT MASTER FUNDING II, LLC**, a Delaware limited liability company ("**Lessor**"), whose address is 14631 N. Scottsdale Road, Suite 200, Scottsdale, Arizona 85254-2711, and **BERRY-HINCKLEY INDUSTRIES**, a Nevada corporation ("**Lessee**"), whose address is 425 Maestro Drive, Suite 200, Reno, Nevada 89511.

In consideration of the mutual covenants and agreements herein contained, Lessor and Lessee hereby covenant and agree as follows:

1. **Certain Defined Terms.** Capitalized terms not defined herein shall have the meanings set forth in Exhibit A hereto.

2. **Lease of Property; Use.** In consideration of the Rentals and other Monetary Obligations to be paid by Lessee and of the other terms, covenants and conditions on Lessee's part to be kept and performed, Lessor hereby leases to Lessee, and Lessee hereby takes and hires, the Property, subject to the Permitted Encumbrances, all Legal Requirements (including any existing violation thereof), and the condition of the Property as of the Effective Date; *provided, however*, that the recital of the Permitted Encumbrances herein shall not be construed as a revival of any Permitted Encumbrance which may have expired or been terminated. During the Lease Term, the Property shall be used solely for the operation of a Permitted Facility, and related purposes such as ingress, egress and parking. Lessee shall at all times during the Lease Term occupy the Property and shall diligently operate its business on the Property. Lessee shall not, by itself or through any assignment, sublease or other type of transfer, convert the Property to an alternative use during the Lease Term without Lessor's prior written consent.

3. **Lease Term; Extension.** The initial term of this Lease ("**Initial Term**") shall commence as of the Effective Date and shall expire at midnight on December 31, 2015 ("**Expiration Date**"), unless terminated sooner as provided in this Lease and as may be extended as provided herein. The time period during which this Lease shall actually be in effect, including any Extension Term, is referred to herein as the "**Lease Term**." Unless this Lease has expired or has been sooner terminated, or an Event of Default has occurred and is continuing at the time any extension option is exercised, and provided that all other agreements necessary to the continued operation of Lessee's business at the Property is extended for a period of not less than the applicable extension periods, Lessee shall have the right and option (each, an "**Extension Option**") to extend the Initial Term for two (2) additional successive periods of ten (10) years each (each, an "**Extension Term**"), pursuant to the terms and conditions of this Lease then in effect. Lessee may only exercise the Extension Options by giving written notice thereof to Lessor of its election to do so first, no later than one hundred twenty (120) days prior to the Expiration Date and one hundred twenty (120) days prior to the immediately preceding Extension Term, as the case may be. If written notice of the exercise of any Extension Option is not received by Lessor by the applicable dates described above, then this Lease shall terminate on the last day of the Initial Term or, if applicable, the last day of the Extension Term then in effect. Upon the request of Lessor or Lessee, the parties hereto will, at the expense of Lessee,

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425 Maestro Dr., Reno, NV
File No. 573462-3029

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execute and exchange an instrument in recordable form setting forth the extension of the Lease Term in accordance with this Section 3.

4. **Rental and Other Monetary Obligations.**

A. *Base Monthly Rental.* During the Initial Term, on or before the first day of each calendar month, Lessee shall pay in advance the Base Monthly Rental; *provided, however, if the Effective Date is a date other than the first day of the month, Lessee shall pay to Lessor (or any other party designated by Lessor) on the Effective Date the Base Monthly Rental prorated by multiplying the Base Monthly Rental by a fraction, the numerator of which is the number of days remaining in the month (including the Effective Date) for which Rental is being paid, and the denominator of which is the total number of days in such month.* During the Extension Terms, if any, Lessee shall pay the Rental (including the Base Monthly Rental) in the manner set forth in this Section 4. Unless otherwise specifically stated to the contrary herein, Lessee shall perform all its obligations under this Lease at its sole cost and expense and shall pay all Rental and any other Monetary Obligation due hereunder when due and payable, without notice or demand.

B. *Adjustments.* On the first Adjustment Date and on each Adjustment Date thereafter, the Base Annual Rental shall increase by an amount equal to the Rent Adjustment. The "Rent Adjustment" shall be an amount equal to the lesser of (1) one and one-half percent (1.5%) of the Base Annual Rental in effect immediately prior to the applicable Adjustment Date, or (2) 1.25 times the product of (i) the percentage change between the Price Index (as defined below) for the month two months prior to the Effective Date or the Price Index used for the immediately preceding Adjustment Date, as applicable, and the Price Index for the month two months prior to the applicable Adjustment Date, and (ii) the then current Base Annual Rental. "Price Index" shall mean the Consumer Price Index which is designated for the applicable month of determination as the United States City Average for All Urban Consumers, All Items, Not Seasonally Adjusted, with a base period equaling 100 in 1982 - 1984, as published by the United States Department of Labor's Bureau of Labor Statistics or any successor agency. Notwithstanding any provision contained herein, in no event shall Base Annual Rental be reduced as a result of the application of the Rent Adjustment described in this Section 4.B. In the event that the Price Index ceases to be published, its successor index as published by the same Governmental Authority which published the Price Index shall be substituted and any necessary reasonable adjustments shall be made by Lessor and Lessee in order to carry out the intent of this Section. In the event there is no successor index, Lessor shall reasonably select an alternative price index that will constitute a reasonable substitute for the Price Index.

C. *Additional Rental.* Lessee shall pay and discharge, as additional rental ("Additional Rental"), all sums of money required to be paid by Lessee under this Lease which are not specifically referred to as Rental. Lessee shall pay and discharge any Additional Rental when the same shall become due, provided that amounts which are billed to Lessor or any third party, but not to Lessee, shall be paid within thirty (30) days after Lessor's demand for payment thereof or, if later, when the same are due. In no

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425 West 42nd St., Room 1010
File No. 573402-3029

event shall Lessee be required to pay to Lessor any item of Additional Rental that Lessee is obligated to pay and has paid to any third party pursuant to any provision of this Lease.

D. *Payment of Rental and Other Monetary Obligations.* All Rental and other Monetary Obligations which Lessee is required to pay hereunder shall be the unconditional obligation of Lessee and shall be payable in full when due without any setoff, abatement, deferment, deduction or counterclaim whatsoever, except as set forth herein. Upon execution of this Lease, Lessee shall deliver to Lessor a complete Authorization Agreement - Pre-Arranged Payments to be provided by Lessor, together with a voided check for account verification, establishing arrangements whereby payments of the Base Monthly Rental, any Additional Rental, impound payments (if any), sales tax on real property tax (if any), and any other Monetary Obligations are transferred by Automated Clearing House Debit initiated by Lessor from an account established by Lessee at a United States bank or other financial institution to such account as Lessor may designate. Any delinquent payment shall, in addition to any other remedy of Lessor, incur a late charge of five percent (5%) (which late charge is intended to compensate Lessor for the cost of handling and processing such delinquent payment and should not be considered interest) and bear interest at the Default Rate, such interest to be computed from and including the date such payment was due through and including the date of the payment; *provided, however*, in no event shall Lessee be obligated to pay a sum of late charge and interest higher than the maximum legal rate then in effect.

5. *Representations and Warranties of Lessor.* The representations and warranties of Lessor contained in this Section are being made to induce Lessee to enter into this Lease and Lessee has relied and will continue to rely upon such representations and warranties. Lessor represents and warrants to Lessee as follows:

A. *Organization, Authority and Status of Lessor.* Lessor has been duly organized and is validly existing and in good standing under the laws of the State of Delaware. All necessary corporate action has been taken to authorize the execution, delivery and performance by Lessor of this Lease and of the other documents, instruments and agreements provided for herein. The person who has executed this Lease on behalf of Lessor is duly authorized to do so.

B. *Enforceability.* This Lease constitutes the legal, valid and binding obligation of Lessor, enforceable against Lessor in accordance with its terms.

6. *Representations and Warranties of Lessee.* The representations and warranties of Lessee contained in this Section are being made to induce Lessor to enter into this Lease and Lessor has relied, and will continue to rely, upon such representations and warranties. Lessee represents and warrants to Lessor as follows:

A. *Organization, Authority and Status of Lessee.* Lessee has been duly organized or formed, is validly existing and in good standing under the laws of the State of Nevada and is qualified as a foreign corporation to do business in the State of California. All necessary corporate action has been taken to authorize the execution, delivery and performance by Lessee of this Lease and of the other documents,

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Sphir/BMI
425 McCarr Dr., Reno, NV
File No. 5734/82-6039

instruments and agreements provided for herein. Lessee's United States tax identification number is correctly set forth on the signature page of this Lease. The person who has executed this Lease on behalf of Lessee is duly authorized to do so. The address of Lessee stated in Section 24 is the principal place of business and principal executive office of Lessee, and Lessee will provide Lessor with written notice of any change of location of its principal place of business or principal executive office, or any change in its state of organization, in either case within ten (10) days thereof.

B. *Enforceability.* This Lease constitutes the legal, valid and binding obligation of Lessee, enforceable against Lessee in accordance with its terms.

C. *Litigation.* There are no suits, actions, proceedings or investigations pending, or to its knowledge, threatened against or involving Lessee or the Property before any arbitrator or Governmental Authority which might reasonably result in any material adverse change in the contemplated business, condition, worth or operations of Lessee or the Property.

D. *Absence of Breaches or Defaults.* Lessee is not in default under any document, instrument or agreement to which Lessee is a party or by which Lessee, the Property or any of Lessee's property is subject or bound. The authorization, execution, delivery and performance of this Lease and the documents, instruments and agreements provided for herein will not result in any breach of or default under any document, instrument or agreement to which Lessee is a party or by which Lessee, the Property or any of Lessee's property is subject or bound.

E. *Licenses and Permits.* Lessee has obtained all required licenses and permits, both governmental and private, to use and operate the Property as a Permitted Facility.

F. *Financial Condition; Information Provided to Lessor.* The financial statements, all financial data and all other documents and information heretofore delivered to Lessor by or with respect to Lessee, Guarantor and/or the Property in connection with this Lease and/or relating to Lessee, Guarantor and/or the Property are true, correct and complete in all material respects, there have been no amendments thereto since the date such items were prepared or delivered to Lessor, and no change has occurred to any such financial statements, financial data, documents and other information not disclosed in writing to Lessor, which would result in a Material Adverse Effect.

G. *Compliance with OFAC.* Lessee, and to Lessee's knowledge, each of Lessee's Entities is not currently identified on the OFAC List, and is not a Person with whom a citizen of the United States is prohibited from engaging in transactions by any trade embargo, economic sanction, or other prohibition of United States law, regulation, or executive order of the President of the United States. Lessee has implemented procedures and will consistently apply those procedures throughout the Lease Term, to ensure the foregoing representations and warranties remain true and correct during the Lease Term.

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H. *Solvency.* There is no contemplated, pending or threatened Insolvency Event or similar proceedings, whether voluntary or involuntary, affecting Lessee, or to Lessee's knowledge, its shareholders or Affiliates.

I. *Ownership.* Lessee does not actually or constructively own ten percent (10%) or more of the outstanding capital stock of Lessor or any Affiliate of Lessor and no Affiliate of Lessee that actually or constructively owns ten percent (10%) or more of the outstanding capital stock of Lessee or any Affiliate of Lessee owns, directly or indirectly, (i) ten percent (10%) or more of the total combined voting power of all classes of voting capital stock of Lessor, or (ii) ten percent (10%) or more of the total value of all classes of capital stock of Lessor.

7. *Rentals To Be Net to Lessor.* The Base Annual Rental payable hereunder shall be net to Lessor, so that this Lease shall yield to Lessor the Rentals specified during the Lease Term, and all Costs and obligations of every kind and nature whatsoever relating to the Property shall be performed and paid by Lessee.

8. *Taxes and Assessments.* Lessee shall pay, prior to the earlier of delinquency or the accrual of interest on the unpaid balance, all taxes and assessments of every type or nature assessed against or imposed upon the Property or Lessee during the Lease Term, including without limitation, all taxes or assessments upon the Property or any part thereof and upon any personal property, trade fixtures and improvements located on the Property, whether belonging to Lessor or Lessee, or any tax or charge levied in lieu of such taxes and assessments; all taxes, charges, license fees and or similar fees imposed by reason of the use of the Property by Lessee; and all excise, transaction, privilege, license, sales, use and other taxes upon the Rental or other Monetary Obligations hereunder, the leasehold estate of either party or the activities of either party pursuant to this Lease.

Within thirty (30) days after each tax and assessment payment is required by this Section to be paid, Lessee shall, upon prior written request of Lessor, provide Lessor with evidence reasonably satisfactory to Lessor that such payment was made in a timely fashion. Lessee may, at its own expense, contest or cause to be contested by appropriate legal proceedings conducted in good faith and with due diligence, any above-described item or lien with respect thereto, including, without limitation, the amount or validity or application, in whole or in part, of any such item, provided that (A) neither the Property nor any interest therein would be in any danger of being sold, forfeited or lost by reason of such proceedings, (B) no monetary Event of Default has occurred, and (C) Lessee shall promptly provide Lessor with copies of all notices received or delivered by Lessee and filings made by Lessee in connection with such proceeding.

9. *Utilities.* Lessee shall contract, in its own name, for and pay when due all charges for the connection and use of water, gas, electricity, telephone, garbage collection, sewer use and other utility services supplied to the Property during the Lease Term. Unless caused by the negligence or misconduct of Lessor, its agents, employees or contractors, Lessor shall not be responsible for any interruption of any utility service.

10. **Insurance.** Throughout the Lease Term, Lessee shall maintain, with respect to the Property, at its sole expense, the following types and amounts of insurance, in addition to such other insurance as Lessor may reasonably require from time to time:

A. Insurance against loss or damage to real property under an "all risk" insurance policy, which shall include coverage against all risks of direct physical loss, including loss by fire, lightning, terrorism, ordinance or law, and other risks normally included in the standard ISO special form (which shall include flood insurance if the Property is located within a flood hazard area and which shall include earthquake insurance if the Property is located in an area where earthquake insurance is customarily maintained for similar commercial property). Such insurance shall be in amounts sufficient to prevent Lessor from becoming a co-insurer under the applicable policies, and in any event, after application of deductible, in amounts not less than 100% of the full insurable replacement cost, as determined from time to time at Lessor's request but not more frequently than once in any 12-month period.

B. Comprehensive general liability insurance, including products and completed operation liability, covering Lessor and Lessee against bodily injury liability, property damage liability and personal and advertising injury, liquor liability coverage (to the extent liquor is sold or manufactured at the Property), garagekeepers liability coverage (to the extent the customers cars are left in possession of Lessee for service) including without limitation any liability arising out of the ownership, maintenance, repair, condition or operation of the Property or adjoining ways, streets, parking lots or sidewalks. Such insurance policy or policies shall contain a broad form contractual liability endorsement under which the insurer agrees to insure Lessee's obligations under Section 15 hereof to the extent insurable, and a "severability of interest" clause or endorsement which precludes the insurer from denying the claim of Lessee or Lessor because of the negligence or other acts of the other, shall be in amounts of not less than \$5,000,000 per occurrence for bodily injury and property damage, and \$5,000,000 general aggregate per location and products and completed operation aggregate, \$5,000,000 for liquor liability and \$1,000,000 for garagekeepers liability, or such higher limits as Lessor may reasonably require from time to time, and shall be of form and substance satisfactory to Lessor.

C. Workers' compensation insurance in the statutorily mandated limits covering all persons employed by Lessee on the Property in connection with any work done on or about the Property for which claims for death or bodily injury could be asserted against Lessor, Lessee or the Property.

D. Rental value insurance, equal to 100% of the Base Annual Rental (as may adjusted hereunder) for a period of not less than twelve (12) months; which insurance shall be carved out of Lessee's business interruption coverage for a separate rental value insurance payable to Lessor, or if rental value insurance is included in Lessee's business interruption coverage, the insurer shall provide priority payment to any rent obligations, and such obligations shall be paid directly to Lessor. Such insurance is to follow form of the real property "all risk" coverage and is not to contain a co-insurance clause.

E. Comprehensive Boiler & Machinery Insurance against loss or damage from explosion of any steam or pressure boilers or similar apparatus, if any, located in or about the Property in an amount not less than the actual replacement cost of the Property. Such insurance should be in an amount of the lesser of 25% of the 100% replacement cost or \$5,000,000.00.

F. Such additional and/or other insurance and in such amounts as at the time is customarily carried by prudent owners or tenants with respect to improvements similar in character, location and use and occupancy to the Property.

All insurance policies shall:

(i) Provide (1) for a waiver of subrogation by the insurer as to claims against Lessor, its employees and agents, (2) that the insurer shall not deny a claim and that such insurance cannot be unreasonably cancelled, invalidated or suspended on account of the conduct of Lessee, its officers, directors, employees or agents, or anyone acting for Lessee or any subtenant or other occupant of the Property, and (3) that any losses otherwise payable thereunder shall be payable notwithstanding any act or omission of Lessor or Lessee which might, absent such provision, result in a forfeiture of all or a part of such insurance payment;

(ii) Be primary and provide that any "other insurance" clause in the insurance policy shall exclude any policies of insurance maintained by Lessor and the insurance policy shall not be brought into contribution with insurance maintained by Lessor;

(iii) Contain deductibles not to exceed \$25,000.00;

(iv) Contain a standard non-contributory mortgagee clause or endorsement in favor of any lender designated by Lessor;

(v) Provide that the policy of insurance shall not be terminated, cancelled or amended without at least thirty (30) days' prior written notice to Lessor and to any lender covered by any standard mortgagee clause or endorsement;

(vi) Provide that the insurer shall not have the option to restore the Property if Lessor elects to terminate this Lease in accordance with the terms hereof;

(vii) Be in amounts sufficient at all times to satisfy any coinsurance requirements thereof;

(viii) Except for workers' compensation insurance referred to in Section 10.C above, name Lessor and any Lessor Affiliate or lender requested by Lessor, as an "additional insured" with respect to general liability insurance, and as a "named insured" with respect to real property and "loss payee" with respect to all

real property and rent value insurance, as appropriate and as their interests may appear;

(ix) Be evidenced by delivery to Lessor and any lender designated by Lessor of an Acora Form 28 for property coverage (or any other form requested by Lessor) and an Acora Form 25 for liability, workers' compensation and umbrella coverage (or any other form requested by Lessor); provided that in the event that either such form is no longer available, such evidence of insurance shall be in a form reasonably satisfactory to Lessor and any lender designated by Lessor; and

(x) Be issued by insurance companies licensed to do business in the states where the Property is located and which are rated A:VIII or better by Best's Insurance Guide or are otherwise approved by Lessor.

It is expressly understood and agreed that (I) if any insurance required hereunder, or any part thereof, shall expire, be withdrawn, become void by breach of any condition thereof by Lessee, or become void or in jeopardy by reason of the failure or impairment of the capital of any insurer, Lessee shall immediately obtain new or additional insurance reasonably satisfactory to Lessor and any lender designated by Lessor; (II) the foregoing minimum limits of insurance coverage shall not limit the liability of Lessee for its acts or omissions as provided in this Lease; and (III) Lessee shall procure policies for all insurance for periods of not less than one year and shall provide to Lessor and any servicer or lender of Lessor certificates of insurance or, upon Lessor's request, duplicate originals of insurance policies evidencing that insurance satisfying the requirements of this Lease is in effect at all times.

Lessee shall pay as they become due all premiums for the insurance required by this Section 10. In the event that Lessee fails to comply with any of the foregoing requirements of this Section 10 within ten (10) days of the giving of written notice by Lessor to Lessee, Lessor shall be entitled to procure such insurance. Any sums expended by Lessor in procuring such insurance shall be Additional Rent and shall be repaid by Lessee, together with interest thereon at the Default Rate, from the time of payment by Lessor until fully paid by Lessee immediately upon written demand therefor by Lessor.

Anything in this Section 10 to the contrary notwithstanding, any insurance which Lessee is required to obtain pursuant to this Section 10 may be carried under a "blanket" policy or policies covering other property or liabilities of Lessee provided that such "blanket" policy or policies otherwise comply with the provisions of this Section 10.

11. **Tax and Insurance Impound.** Upon the occurrence of an Event of Default under Section 20(A)(ii), in addition to any other remedies, Lessor may require Lessee to pay to Lessor sums which will provide an impound account (which shall not be deemed a trust fund) for paying up to the next one year of taxes, assessments and/or insurance premiums. Upon such requirement, Lessor will estimate the amounts needed for such purposes and will notify Lessee to pay the same to Lessor in equal monthly installments, as nearly as practicable, in addition to all other Monetary Obligations due under this Lease. Should additional funds be required at any time, Lessee shall pay the same to Lessor on demand. Lessee shall advise Lessor of all taxes and

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insurance bills which are due and shall cooperate fully with Lessor in assuring that the same are paid. Lessor may deposit all impounded funds in accounts insured by any federal or state agency and may commingle such funds with other funds and accounts of Lessor. Interest or other gains from such funds, if any, shall be the sole property of Lessor. In the event of any default by Lessee, Lessor may apply all impounded funds against any sums due from Lessee to Lessor. Lessor shall give to Lessee an annual accounting showing all credits and debits to and from such impounded funds received from Lessee.

12. Compliance With Laws, Restrictions, Covenants and Encumbrances.

A. *Compliance.* Lessee's use and occupation of the Property, and the condition thereof, shall, at Lessee's sole cost and expense, comply fully with all Legal Requirements and all restrictions, covenants and encumbrances of record with respect to the Property, in either event, the failure with which to comply could have a Material Adverse Effect. Upon Lessor's written request from time to time during the Lease Term, Lessee shall certify in writing to Lessor that Lessee's representations, warranties and obligations under Section 6.G and this Section 12.A remain true and correct and have not been breached. Lessee shall immediately notify Lessor in writing if any of the representations, warranties or covenants under Section 6.G and this Section 12.A are no longer true or have been breached or if Lessee has a reasonable basis to believe that they may no longer be true or have been breached. In connection with such an event, Lessee shall comply with all Legal Requirements and directives of Governmental Authorities and, at Lessor's request, provide to Lessor copies of all notices, reports and other communications exchanged with, or received from, Governmental Authorities relating to such an event. Lessee shall also reimburse Lessor for all Costs incurred by Lessor in evaluating the effect of such an event on the Property and this Lease, in obtaining any necessary license from Governmental Authorities as may be necessary for Lessor to enforce its rights under the Transaction Documents, and in complying with all Legal Requirements applicable to Lessor as the result of the existence of such an event and for any penalties or fines imposed upon Lessor as a result thereof.

B. *Acts Resulting in Increased Insurance Rates.* Lessee will use its commercially reasonable efforts to prevent any act or condition to exist on or about the Property which will materially increase any insurance rate thereon, except when such acts are required in the normal course of its business and Lessee shall pay for such increase.

C. *ADA.* Without limiting the generality of the other provisions of this Section, Lessee agrees that it shall be responsible for complying in all respects with the Americans with Disabilities Act of 1990, as such act may be amended from time to time, and all regulations promulgated thereunder (collectively, the "ADA"), as it affects the Property. Lessee agrees that it will defend, indemnify and hold harmless the Indemnified Parties from and against any and all Losses caused by, incurred or resulting from Lessee's failure to comply with its obligations under this Section.

D. *Environmental.*

(i) *Representations and Warranties.* Lessee represents and warrants to Lessor, which representations and warranties shall survive the execution and delivery of this Lease, as follows:

(1) The Property and Lessee are not in violation of or subject to, any pending or, to Lessee's actual knowledge, threatened investigation or inquiry by any Governmental Authority or to any remedial obligations under any Environmental Laws that could have a Material Adverse Effect, nor has Lessee received any written or oral notice or other communication from any Person (including but not limited to a Governmental Authority) with respect to the Property relating to (I) Hazardous Materials, Regulated Substances or USTs, or Remediation thereof; (II) possible liability of any Person pursuant to any Environmental Law; (III) other environmental conditions; or (IV) any actual or potential administrative or judicial proceedings in connection with any of the foregoing that could have a Material Adverse Effect. The foregoing representations and warranties would continue to be true and correct following disclosure to the applicable Governmental Authorities of all relevant facts, conditions and circumstances, if any, pertaining to the Property.

(2) (I) all uses and operations on or of the Property, whether by Lessee or any other Person, have been in compliance with all Environmental Laws and environmental permits issued pursuant thereto; (II) there have been no Releases in, on, under or from the Property, or from other property migrating toward the Property, except in Permitted Amounts; (III) there are no Hazardous Materials, Regulated Substances or USTs in, on, or under the Property, except in Permitted Amounts; (IV) the Property have been kept free and clear of all liens and other encumbrances imposed pursuant to any Environmental Law (the "Environmental Liens"); and (V) Lessee has not allowed any other tenant or other user of the Property to do any act that materially increased the dangers to human health or the environment, posed an unreasonable risk of harm to any Person (whether on or off the Property), impaired the value of the Property in any material respect, is contrary to any requirement set forth in the insurance policies maintained by Lessor, constituted a public or private nuisance, constituted waste, or violated any covenant, condition, agreement or easement applicable to the Property.

(ii) *Covenants.*

(1) Lessee covenants to Lessor during the Lease Term, subject to the limitations of subsection (2) below, as follows:

(I) The Property and Lessee shall not be (a) in violation of any Remediation required by any Governmental Authority or

(b) subject to any Remediation obligations under any Environmental Laws. Lessee shall not be in violation of any investigation or inquiry by any Governmental Authority.

(II) All uses and operations on or of the Property, whether by Lessee or any other Person, shall be in compliance with all Environmental Laws and permits issued pursuant thereto.

(III) There shall be no Releases in, on, under or from the Property, except in Permitted Amounts.

(IV) There shall be no Hazardous Materials, Regulated Substances, UST's in, on or under the Property, except in Permitted Amounts.

(V) Lessee shall keep the Property or cause the Property to be kept free and clear of all Environmental Liens, whether due to any act or omission of Lessee or any other Person.

(VI) Lessee shall not do or allow any other tenant or other user of the Property to do any act that (a) materially increases the dangers to human health or the environment, (b) poses an unreasonable risk of harm to any Person (whether on or off the Property), (c) has a Material Adverse Effect, (d) is contrary to any material requirement set forth in the insurance policies maintained by Lessee, (e) constitutes a public or private nuisance or constitutes waste, or (f) violates any covenant, condition, agreement or easement applicable to the Property.

(VII) Lessee shall, at its sole cost and expense, perform any environmental site assessment or other investigation of environmental conditions in connection with the Property as may be reasonably requested by Lessor (including but not limited to sampling, testing and analysis of soil, water, air, building materials and other materials and substances whether solid, liquid or gas), and share with Lessor the reports and other results thereof, and Lessor and the other Indemnified Parties shall be entitled to rely on such reports and other results thereof.

(VIII) Lessee shall, at its sole cost and expense, fully and expeditiously cooperate in all activities pursuant to Section 12.D, including but not limited to providing all relevant information and making knowledgeable persons available for interviews.

(2) Notwithstanding any provision of this Lease to the contrary, an Event of Default shall not be deemed to have occurred as a result of the failure of Lessee to satisfy any one or more of the covenants

set forth in subsections (I) through (VI) above provided that Lessee shall be in compliance with the requirements of any Governmental Authority with respect to the Remediation of any Release at the Property.

(iii) *Notification Requirements.* Lessee shall immediately notify Lessor in writing upon Lessee obtaining actual knowledge of (1) any Releases or Threatened Releases in, on, under or from the Property other than in Permitted Amounts, or migrating towards the Property; (2) any non-compliance with any Environmental Laws related in any way to the Property; (3) any actual or potential Environmental Lien; (4) any required or proposed Remediation of environmental conditions relating to the Property required by applicable Governmental Authorities; and (5) any written or oral notice or other communication which Lessee becomes aware from any source whatsoever (including but not limited to a Governmental Authority) relating in any way to Hazardous Materials, Regulated Substances or USTs, or Remediation thereof at or on the Property, other than in Permitted Amounts, possible liability of any Person relating to the Property pursuant to any Environmental Law, other environmental conditions in connection with the Property, or any actual or potential administrative or judicial proceedings in connection with anything referred to in this Section. Lessee shall, upon Lessor's written request, deliver to Lessor a certificate stating that Lessee is and has been in full compliance with all of the environmental representations, warranties and covenants in this Lease.

(iv) *Remediation.* Lessee shall, at its sole cost and expense, and without limiting any other provision of this Lease, effectuate any Remediation required by any Governmental Authority of any condition (including, but not limited to, a Release) in, on, under or from the Property and take any other reasonable action deemed necessary by any Governmental Authority for protection of human health or the environment. Should Lessee fail to undertake such Remediation in accordance with the preceding sentence, Lessor, after written notice to Lessee and Lessee's failure to immediately undertake such Remediation, shall be permitted to complete such Remediation, and all reasonable Costs incurred in connection therewith shall be paid by Lessee.

(v) *Indemnification.* Lessee shall, at its sole cost and expense, protect, defend, indemnify, release and hold harmless each of the Indemnified Parties from and against any and all Losses, including, but not limited to, all Costs of Remediation (whether or not performed voluntarily), arising out of or in any way relating to any Environmental Laws, Hazardous Materials, Regulated Substances, USTs, or other environmental matters concerning the Property. It is expressly understood and agreed that Lessee's obligations under this Section shall survive the expiration or earlier termination of this Lease for any reason.

(vi) *Right of Entry.* Lessor and any other person or entity designated by Lessor, any receiver, any representative of a Governmental Authority, and any environmental consultant, shall have the right, but not the obligation, to enter upon the Property at all reasonable times (including, without limitation, in

connection with the exercise of any remedies set forth in this Lease) to assess any and all aspects of the environmental condition of the Property and its use, including but not limited to conducting any environmental assessment or audit (the scope of which shall be determined in Lessor's sole and absolute discretion) and taking samples of soil, groundwater or other water, air, or building materials, and conducting other invasive testing. Lessee shall cooperate with and provide access to Lessor and any other person or entity designated by Lessor. Any such assessment or investigation shall be at Lessee's sole cost and expense.

(vii) *Survival.* The obligations of Lessee and the rights and remedies of Lessor under this Section 12.D shall survive the termination, expiration and/or release of this Lease.

B. *Encumbrances.* Lessee shall comply with and perform all obligations of Lessor under all easements, declarations, covenants, restrictions and other items of record now or hereafter encumbering the Property.

13. *Condition of Property; Maintenance.* Lessee hereby accepts the Property "AS IS" and "WHERE IS" with no representation or warranty of Lessor as to the condition thereof. Lessee shall, at its sole cost and expense, be responsible for (a) keeping all of the building, structures and improvements erected on the Property in good and substantial order and repair, (b) repair or reconstruct damage or destruction to any building, structures or improvements erected on the Property from acts of God or any other catastrophes, and (c) making all structural, exterior and interior repairs and replacements which Lessee may desire or which otherwise may be required to any building, structures or improvements erected on the Property.

14. *Waste; Alterations and Improvements.* Lessee shall not commit actual or constructive waste upon the Property. During the Lease Term, Lessee shall not undertake any alterations or improvements to the Property individually costing more than One Hundred Thousand and 00/100 Dollars (\$100,000.00) without the consent of Lessor; *provided, however,* except for alterations required pursuant to Section 12.D, Lessee may not undertake any alteration or improvement that would be subject to any Environmental Laws (whether during construction or upon completion) without the prior written consent of Lessor. Notwithstanding the foregoing, Lessee may undertake or permit any alteration or improvement, without the prior written consent of Lessor, that does not require landlord approval under the terms and provisions of the Assigned Leases and the build out of Lessee's executive office suite on the ground floor in progress as of the Effective Date. If Lessor's consent is required hereunder and Lessor consents to the making of any such alterations, the same shall be made by Lessee at Lessee's sole expense by a licensed contractor and according to plans and specifications approved by Lessor and subject to such other conditions as Lessor shall require. Any work at any time commenced by Lessee on the Property shall be prosecuted diligently to completion, shall be of good workmanship and materials and shall comply fully with all the terms of this Lease. Upon completion of any alterations, Lessee shall promptly provide Lessor with (A) evidence of full payment to all laborers and materialmen contributing to the alterations, (B) an architect's certificate certifying the alterations to have been completed in conformity with the plans and specifications, (C) a certificate of occupancy (if the alterations are of such a nature as would require the issuance of a certificate of occupancy), and (D) any other documents or information reasonably requested by

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Lessor. Upon the occurrence of any addition to or alteration of the Property, Lessee shall post a notice at the Property identifying Lessee as the responsible party for all work relating to any such additions or alterations. Any addition to or alteration of the Property shall be deemed a part of the Property and belong to Lessor, and Lessee shall execute and deliver to Lessor such instruments as Lessor may require to evidence the ownership by Lessor of such addition or alteration.

15. **Indemnification.** Lessee agrees to use and occupy the Property at its own risk and hereby releases Lessor and Lessor's agents and employees from all claims for any damage or injury to the full extent permitted by law. Lessee agrees that Lessor shall not be responsible or liable to Lessee or Lessee's employees, agents, customers or invitees for bodily injury, personal injury or property damage occasioned by the acts or omissions of any other lessee or such lessee's employees, agents, contractors, customers or invitees. Lessee agrees that any employee or agent to whom the Property or any part thereof shall be entrusted by or on behalf of Lessee shall be acting as Lessee's agent with respect to the Property or any part thereof, and neither Lessor nor Lessor's agents, employees or contractors shall be liable for any loss of or damage to the Property or any part thereof. Lessee shall indemnify, protect, defend and hold harmless each of the Indemnified Parties from and against any and all Losses caused by, incurred or resulting from Lessee's use and occupancy of the Property, whether relating to its original design or construction, latent defects, alteration, maintenance, use by Lessee or any Person thereon, supervision or otherwise, any claim raised by any tenant under the Assigned Leases, regardless of when such claim arose, or from any breach of, default under, or failure to perform, any term or provision of this Lease by Lessee, its officers, employees, agents or other Persons. It is expressly understood and agreed that Lessee's obligations under this Section shall survive the expiration or earlier termination of this Lease for any reason. Lessee hereby agrees to defend, indemnify and hold the Indemnified Parties harmless from and against any and all costs, damages, expenses, claims and/or liabilities (including reasonable attorneys' fees) arising out of or in connection with the Assigned Leases.

16. **Quiet Enjoyment.** So long as Lessee shall pay the Rental and other Monetary Obligations herein provided and shall keep and perform all of the terms, covenants and conditions on its part herein contained, Lessee shall have, subject and subordinate to Lessor's rights herein, the right to the peaceful and quiet occupancy of the Property.

17. **Inspection.** Lessor and its authorized representatives shall have the right, at all reasonable times and upon giving reasonable prior notice (except in the event of an emergency, in which case no prior notice shall be required), to enter the Property or any part thereof and inspect the same. Lessee hereby waives any claim for damages for any injury or inconvenience to or interference with Lessee's business, any loss of occupancy or quiet enjoyment of the Property and any other loss occasioned by such entry, but, subject to Section 37, excluding damages arising as a result of the negligence or intentional misconduct of Lessor.

18. **Condemnation and Casualty.**

A. **Notification.** Lessee shall promptly give Lessor and any mortgagee (if required by the terms of any applicable mortgage or deed of trust and Lessee has received notice thereof) written notice of (i) any Condemnation of the Property, (ii) the

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commencement of any proceedings or negotiations which might result in a Condemnation of the Property, and (iii) any Casualty to the Property or any part thereof. Such notice shall provide a general description of the nature and extent of such Condemnation, proceedings, negotiations or Casualty, and shall include copies of any documents or notices received in connection therewith. Thereafter, Lessee shall promptly send Lessor copies of all notices, correspondence and pleadings relating to any such Condemnation, proceedings, negotiations or Casualty.

B. *Partial Condemnation or Casualty.* Except as otherwise provided in Section 18.C, in the event of a Condemnation which is not a Total Condemnation ("Partial Condemnation"), or a Casualty which is not a Total Casualty (a "Partial Casualty"), all Net Awards shall be paid to Lessor. In the event of a Partial Condemnation or a Partial Casualty, Lessor shall have the option to terminate this Lease by notifying Lessee in writing within thirty (30) days after Lessee gives Lessor notice of such Partial Condemnation or Partial Casualty or that title has vested in the condemning authority, or to continue this Lease in effect, which election shall be evidenced by either a notice from Lessor to Lessee, or Lessor's failure to notify Lessee in writing that Lessor has elected to terminate this Lease within such thirty (30) day period. Lessee shall have a period of sixty (60) days after receipt of Lessor's notice to terminate referenced above during which to elect, despite such Lessor notice of termination, to continue this Lease on the terms herein provided. If Lessee does not elect to continue this Lease or shall fail during such sixty (60) day period to notify Lessor of Lessee's intent to continue this Lease, then this Lease shall terminate as of the last day of the month during which such sixty (60) day period expired. Lessee shall vacate and surrender the Property by such termination date, in accordance with the provisions of this Lease, and all obligations of either party hereunder shall cease as of the date of termination, *provided, however*, Lessee's obligations to the Indemnified Parties under any indemnification provisions of this Lease and Lessee's obligations to pay Rental and all other Monetary Obligations (whether payable to Lessor or a third party) accruing under this Lease prior to the date of termination shall survive such termination). In such event, Lessor may retain all Net Awards related to the Partial Condemnation or Partial Casualty, and Lessee shall immediately pay Lessor an amount equal to the insurance deductible applicable to any Partial Casualty.

If Lessor elects not to terminate this Lease, or if Lessor elects to terminate this Lease (as provided above) but Lessee elects to continue this Lease, then this Lease shall continue in full force and effect on the following terms: all Rental and other Monetary Obligations due under this Lease shall continue unabated, and Lessee shall promptly commence and diligently prosecute restoration of the Property to the same condition, as nearly as practicable, as prior to such Partial Condemnation or Partial Casualty as approved by Lessor. As the restoration of the Property progresses, upon the written request of Lessee (accompanied by evidence reasonably satisfactory to Lessor that such amount has been paid or is due and payable and is properly part of such costs and that Lessee has complied with the terms of Section 14 in connection with the restoration), Lessor shall promptly make available in installments, subject to reasonable conditions for disbursement imposed by Lessor, an amount up to but not exceeding the amount of any

Net Award received by Lessor with respect to such Partial Condemnation or Partial Casualty. Prior to the disbursement of any portion of the Net Award with respect to a Partial Casualty, Lessee shall provide evidence reasonably satisfactory to Lessor of the payment of restoration expenses by Lessee up to the amount of the insurance deductible applicable to such Partial Casualty. Lessee shall be entitled to keep any portion of the Net Award which may be in excess of the cost of restoration, and Lessee shall bear all additional Costs of such restoration in excess of the Net Award.

C. *Total Condemnation and Total Casualty.* In the event of a Condemnation of all or substantially all of the Property or a Partial Condemnation, in either event that results in Lessee making a good faith determination that the restoration and continued use of the remainder of the Property as a Permitted Facility would be uneconomic (collectively, a "Total Condemnation"), or a Casualty of all or substantially all of the Property or a Partial Casualty, in either event that results in Lessee making a good faith determination that the restoration and continued use of the Property as a Permitted Facility would be uneconomic (collectively, a "Total Casualty"), then, in such event:

(i) *Awards.* Lessor shall be entitled to receive the entire Net Award in connection therewith without deduction for any estate vested in Lessee by this Lease, and Lessee hereby expressly assigns to Lessor all of its right, title and interest in and to every such Net Award and agrees that Lessee shall not be entitled to any Net Award or other payment for the value of Lessee's leasehold interest in this Lease. Lessee shall be entitled to claim and receive any award or payment from the condemning authority expressly granted for the taking of the Lessee Personally, any insurance proceeds with respect to the Lessee Personally, the interruption of its business and moving expenses, but only if such claim or award does not adversely affect or interfere with the prosecution of Lessor's claim for the Total Condemnation or Total Casualty or otherwise reduce the amount recoverable by Lessor for the Total Condemnation.

(ii) *Option To Terminate.* Lessee shall have the right to terminate this Lease by notice (the "Termination Notice") given to Lessor not later than thirty (30) days after the Total Condemnation or Total Casualty, as applicable. The Termination Notice must: (1) specify a date on which this Lease shall terminate, which date shall be the last day of a calendar month occurring not earlier than one hundred twenty (120) days and not later than one hundred fifty (150) days after the delivery of such notice (the "Early Termination Date"); (2) contain a certificate executed by an officer of Lessee which (I) describes the Total Condemnation or Total Casualty, and (II) represents and warrants that either all of the Property has been taken, damaged or destroyed, or that substantially all of the Property has been taken, damaged or destroyed, and Lessee has determined in good faith that the restoration and continued use of the remainder of the Property as a Permitted Facility would be uneconomic; and (3) if the Early Termination Date shall occur prior to the commencement of any Extension Options which may be exercised pursuant to Section 3, contain an irrevocable rejectable written offer (the "Rejectable Offer") of Lessee to purchase Lessor's interest in the Property and in the Net Award for such Total Condemnation or Total Casualty, as

applicable, on the Early Termination Date for a purchase price (the "Loss Value") equal to the greater of the fair market value of the Property as of the Early Termination Date, or Lessor's Total Investment.

(iii) *Early Termination Date.* If the Early Termination Date shall occur prior to the commencement of any Extension Options which may be exercised pursuant to Section 3, Lessor shall have sixty (60) days from the delivery of the Termination Notice to deliver to Lessee written notice of its election to accept or reject any Rejectable Offer contained in the Termination Notice. Lessor's failure to deliver such notice within such time period shall be deemed to constitute Lessor's acceptance of the applicable Rejectable Offer.

(iv) *Lessor Acceptance of Rejectable Offer.* If Lessor accepts or is deemed to have accepted the Rejectable Offer, then on the Early Termination Date or such other date as the parties may mutually agree in writing, Lessor shall sell and convey, and Lessee shall purchase for the applicable Loss Value, Lessor's interest in the Property and the Net Award. Lessee's obligations under this Lease shall not be terminated until the applicable Loss Value and all Rental and other Monetary Obligations due and payable under this Lease prior to the Early Termination Date, or such other date as the parties may mutually agree in writing, are paid in full. Upon such payment, (1) Lessor shall convey the Property to Lessee "as-is" by special warranty deed, subject to all matters of record, except for consensual liens, encumbrances or other interests granted by Lessor (other than those granted by Lessor at the request of Lessee), and without representations other than those required by applicable law; and (2) all obligations of either party hereunder shall cease as of the Early Termination Date; *provided, however,* Lessee's obligations to the Indemnified Parties under any indemnification provisions of this Lease and Lessee's obligations to pay any Monetary Obligations (whether payable to Lessor or a third party) accruing under this Lease prior to the Early Termination Date shall survive the termination of this Lease.

(v) *Lessor Rejection of Rejectable Offer.* If Lessor rejects the Rejectable Offer, or if the Early Termination Date shall occur after the commencement of any Extension Options exercised pursuant to Section 3, then (1) the Net Award shall be paid to and belong to Lessor; (2) on the Early Termination Date, Lessee shall pay to Lessor all Rental and other Monetary Obligations then due and payable under this Lease; and (3) all obligations of either party hereunder shall cease as of the Early Termination Date; *provided, however,* Lessee's obligations to the Indemnified Parties under any indemnification provisions of this Lease and Lessee's obligations to pay any sums (whether payable to Lessor or a third party) accruing under this Lease prior to the Early Termination Date shall survive the termination of this Lease.

D. *Payment of Costs.* Lessee shall be solely responsible for the payment of all Costs incurred in connection with the conveyance of the Property to Lessee pursuant to this Section 13, including, without limitation, to the extent applicable, the cost of title

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insurance, survey charges, stamp taxes, mortgage taxes, transfer fees, escrow and recording fees, taxes imposed on Lessor as a result of such conveyance, taxes imposed in connection with the transfer of the Property to Lessee or the termination of this Lease pursuant to the provisions of this Section 18, Lessee's attorneys' fees, and the reasonable attorneys' fees and expenses of counsel to Lessor.

E. *Insurance.* Any loss under any property damage insurance required to be maintained by Lessee shall be adjusted by Lessor. Any award relating to a Total Condemnation or a Partial Condemnation shall be adjusted by Lessor or, at Lessor's election, Lessee. Notwithstanding the foregoing or any other provisions of this Section 18 to the contrary, if at the time of any Condemnation or any Casualty or at any time thereafter an Event of Default shall have occurred and be continuing, Lessor is hereby authorized and empowered but shall not be obligated, in the name and on behalf of Lessee and otherwise, to file and prosecute Lessee's claim, if any, for a Net Award on account of such Condemnation or such Casualty and to collect such Net Award and apply the same to the curing of such Event of Default and any other then existing Event of Default under this Lease and/or to the payment of any amounts owed by Lessee to Lessor under this Lease, in such order, priority and proportions as Lessor in its discretion shall deem proper.

F. *Lessee Obligation in Event of Casualty.* During all periods of time following a Casualty, Lessee shall take reasonable steps to ensure that the Property is secure and does not pose any risk of harm to any adjoining property and Persons (including owners or occupants of such adjoining property).

G. *No Limitations.* Notwithstanding the foregoing, nothing in this Section 18 shall be construed as limiting or otherwise adversely affecting the representations, warranties, covenants and characterizations set forth in Lease.

19. *Fair Market Value.* With respect to the determination of fair market value for any purpose under this Lease, if the parties are unable to agree upon the fair market value, then an independent MAI appraiser shall prepare an appraisal of the fair market value of the Property, including any additions or renovations thereto. In determining the fair market value of the Property, the appraiser shall utilize leased fee income approach (assuming all option periods are exercised) to value, which shall constitute the fair market value of the Property.

20. *Default, Conditional Limitations, Remedies and Measure of Damages.*

A. Each of the following shall be an event of default by Lessee under this Lease (each, an "Event of Default"):

(i) if any representation or warranty of Lessee set forth in this Lease is false in any respect, or if Lessee renders any false statement or account, that results in a Material Adverse Effect; *provided, however*, if any such breach of a representation or warranty does not place any rights or property of Lessor in immediate jeopardy, as determined by Lessor in its reasonable discretion, then such breach shall not constitute an Event of Default hereunder, unless otherwise

expressly provided herein, unless and until Lessor shall have given Lessee notice thereof and a period of thirty (30) days shall have elapsed, during which period Lessee may correct or cure such breach, upon failure of which an Event of Default shall be deemed to have occurred hereunder without further notice or demand of any kind being required. If such breach cannot reasonably be cured within such thirty (30) day period, as determined by Lessor in its reasonable discretion, and Lessee is diligently pursuing a cure of such breach, then Lessee shall have a reasonable period to cure such breach beyond such thirty (30) day period, which shall in no event exceed ninety (90) days after receiving notice of such breach from Lessor, unless otherwise mutually agreed upon in writing. If Lessee shall fail to correct or cure such breach within such ninety (90) day period and said period is not extended by the parties, an Event of Default shall be deemed to have occurred hereunder without further notice or demand of any kind being required;

(ii) if any Rental or other Monetary Obligation due under this Lease is not paid within three (3) Business Days of notice it is past due;

(iii) if Lessee fails to pay, prior to delinquency, any taxes, assessments or other charges the failure of which to pay will result in the imposition of a lien against the Property;

(iv) if there is an Insolvency Event;

(v) if Lessee vacates or abandons the Property;

(vi) if Lessee fails to observe or perform any of the other covenants, conditions or obligations of Lessee in this Lease; *provided, however*, if any such failure does not involve the payment of any Monetary Obligation, does not place any rights or property of Lessor in immediate jeopardy, as determined by Lessor in its reasonable discretion, then such failure shall not constitute an Event of Default hereunder, unless otherwise expressly provided herein, unless and until Lessor shall have given Lessee notice thereof and a period of thirty (30) days shall have elapsed, during which period Lessee may correct or cure such failure, upon failure of which an Event of Default shall be deemed to have occurred hereunder without further notice or demand of any kind being required. If such failure cannot reasonably be cured within such thirty (30) day period, as determined by Lessor in its reasonable discretion, and Lessee is diligently pursuing a cure of such failure, then Lessee shall have a reasonable period to cure such failure beyond such thirty (30) day period, which shall in no event exceed ninety (90) days after receiving notice of such failure from Lessor, unless otherwise mutually agreed upon in writing. If Lessee shall fail to correct or cure such failure within such ninety (90) day period and said period is not extended by the parties, an Event of Default shall be deemed to have occurred hereunder without further notice or demand of any kind being required;

(vii) if a final, nonappealable judgment is rendered by a court against Lessee which has a Material Adverse Effect and is not discharged or provision made for such discharge within ninety (90) days from the date of entry thereof;

(viii) if Lessee shall be liquidated or dissolved or shall begin proceedings towards its liquidation or dissolution;

(ix) if the estate or interest of Lessee in the Property shall be levied upon or attached in any proceeding and such estate or interest is about to be sold or transferred or such process shall not be vacated or discharged within ninety (90) days after it is made; or

(x) if there is an "Event of Default" or other breach or default by Lessee under any of the other Transaction Documents or any Other Agreement, after the passage of all applicable notice and cure or grace periods.

B. Upon the occurrence of an Event of Default, with or without notice or demand, except as otherwise expressly provided herein or such other notice as may be required by statute and cannot be waived by Lessee, Lessor shall be entitled to exercise, at its option, concurrently, successively, or in any combination, all remedies available at law or in equity, including without limitation, any one or more of the following:

(i) To terminate this Lease, whereupon Lessee's right to possession of the Property shall cease and this Lease, except as to Lessee's liability, shall be terminated.

(ii) To the extent not prohibited by applicable law, to reenter and take possession of the Property (or any part thereof), any or all personal property or fixtures of Lessee upon the Property and, to the extent permissible, franchises, licenses, area development agreements, permits and other rights or privileges of Lessee pertaining to the use and operation of the Property, and to expel Lessee and those claiming under or through Lessee, without being deemed guilty in any manner of trespass or becoming liable for any loss or damage resulting therefrom, without resort to legal or judicial process, procedure or action. No notice from Lessor hereunder or under a forcible entry and detainer statute or similar law shall constitute an election by Lessor to terminate this Lease unless such notice specifically so states. If Lessee shall, after default, voluntarily give up possession of the Property to Lessor, deliver to Lessor or its agents the keys to the Property, or both, such actions shall be deemed to be in compliance with Lessor's rights and the acceptance thereof by Lessor or its agents shall not be deemed to constitute a termination of the Lease. Lessor reserves the right following any reentry and/or reletting to exercise its right to terminate this Lease by giving Lessee written notice thereof, in which event this Lease will terminate.

(iii) To bring an action against Lessee for any damages sustained by Lessor or any equitable relief available to Lessor and to the extent not prohibited by applicable law, to seize all personal property or fixtures upon the Property

which Lessee owns or in which it has an interest, in which Lessor shall have a landlord's lien and/or security interest, and to dispose thereof in accordance with the laws prevailing at the time and place of such seizure or to remove all or any portion of such property and cause the same to be stored in a public warehouse or elsewhere at Lessee's sole expense, without becoming liable for any loss or damage resulting therefrom and without resorting to legal or judicial process, procedure or action.

(iv) To relet the Property or any part thereof for such term or terms (including a term which extends beyond the original Lease Term), at such rentals and upon such other terms as Lessor, in its sole discretion, may determine, with all proceeds received from such reletting being applied to the Rental and other Monetary Obligations due from Lessee in such order as Lessor may, in its sole discretion, determine, which other Monetary Obligations include, without limitation, all commercially reasonable repossession costs, brokerage commissions, attorneys' fees and expenses, alteration, remodeling (which remodeling costs shall not exceed \$100,000.00) and repair costs and expenses of preparing for such reletting. Except to the extent required by applicable Law, Lessor shall have no obligation to relet the Property or any part thereof and shall in no event be liable for refusal or failure to relet the Property or any part thereof, or, in the event of any such reletting, for refusal or failure to collect any rent due upon such reletting, and no such refusal or failure shall operate to relieve Lessee of any liability under this Lease or otherwise to affect any such liability. Lessor reserves the right following any reentry and/or reletting to exercise its right to terminate this Lease by giving Lessee written notice thereof, in which event this Lease will terminate as specified in said notice.

(v) To recover from Lessee all Costs paid or incurred by Lessor as a result of such breach, regardless of whether or not legal proceedings are actually commenced.

(vi) To immediately or at any time thereafter, and with or without notice, at Lessor's sole option but without any obligation to do so, correct such breach or default and charge Lessee all Costs incurred by Lessor therein. Any sum or sums so paid by Lessor, together with interest at the Default Rate, shall be deemed to be Additional Rental hereunder and shall be immediately due from Lessee to Lessor. Any such acts by Lessor in correcting Lessee's breaches or defaults hereunder shall not be deemed to cure said breaches or defaults or constitute any waiver of Lessor's right to exercise any or all remedies set forth herein.

(vii) To immediately or at any time thereafter, and with or without notice, except as required herein, set off any money of Lessee held by Lessor under this Lease or any other Transaction Document or any Other Agreement against any sum owing by Lessee hereunder.

(viii) To seek any equitable relief available to Lessor, including, without limitation, the right of specific performance.

All powers and remedies given by this Section to Lessor, subject to applicable Law, shall be cumulative and not exclusive of one another or of any other right or remedy or of any other powers and remedies available to Lessor under this Lease, by judicial proceedings or otherwise, to enforce the performance or observance of the covenants and agreements of Lessee contained in this Lease, and no delay or omission of Lessor to exercise any right or power accruing upon the occurrence of any Event of Default shall impair any other or subsequent Event of Default or impair any rights or remedies consequent thereto. Every power and remedy given by this Section or by Law to Lessor may be exercised from time to time, and as often as may be deemed expedient, by Lessor, subject at all times to Lessor's right in its sole judgment to discontinue any work commenced by Lessor or change any course of action undertaken by Lessor.

21. **Mortgage, Subordination and Attornment.** Lessor's interest in this Lease and/or the Property shall not be subordinate to any liens or encumbrances placed upon the Property by or resulting from any act of Lessee, and nothing herein contained shall be construed to require such subordination by Lessor. Lessee shall keep the Property free from any liens for work performed, materials furnished or obligations incurred by Lessee. NOTICE IS HEREBY GIVEN THAT LESSEE IS NOT AUTHORIZED TO PLACE OR ALLOW TO BE PLACED ANY LIEN, MORTGAGE, DEED OF TRUST, SECURITY INTEREST OR ENCUMBRANCE OF ANY KIND UPON ALL OR ANY PART OF THE PROPERTY OR LESSEE'S LEASEHOLD INTEREST THEREIN, AND ANY SUCH PURPORTED TRANSACTION SHALL BE VOID.

This Lease at all times shall automatically be subordinate to the lien of any and all ground leases, mortgages and trust deeds now or hereafter placed upon the Property by Lessor, provided, that the holder of such interest shall not disturb Lessee's use and enjoyment of Lessee's rights under this Lease so long as Lessee is not in default hereunder. Lessee covenants and agrees to execute and deliver, upon demand, such further instruments subordinating this Lease to the lien of any or all such ground leases, mortgages or trust deeds as shall be desired by Lessor, or any present or proposed mortgagees under trust deeds; provided, that the terms and provisions of any such instrument are commercially reasonable.

If any mortgagee, receiver or other secured party elects to have this Lease and the interest of Lessee hereunder be superior to any such ground lease, mortgage or trust deed and evidences such election by notice given to Lessee, then this Lease and the interest of Lessee hereunder shall be deemed superior to any such ground lease, mortgage or trust deed, whether this Lease was executed before or after such ground lease, mortgage or trust deed and in that event such mortgagee, receiver or other secured party shall have the same rights with respect to this Lease as if it had been executed and delivered prior to the execution and delivery of such ground lease, mortgage or trust deed and had been assigned to such mortgagee, receiver or other secured party.

In the event any purchaser or assignee of any mortgagee at a foreclosure sale acquires title to the Property, or in the event that any mortgagee or any assignee otherwise succeeds to the rights of Lessor as landlord under this Lease, Lessee shall attorn to mortgagee or such purchaser

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or assignee, as the case may be (a "Successor Lessor"), and recognize the Successor Lessor as lessor under this Lease, and, if the Successor Lessor in its sole discretion elects to recognize Lessee's tenancy under this Lease, this Lease shall continue in full force and effect as a direct lease between the Successor Lessor and Lessee, provided that the Successor Lessor shall only be liable for any obligations of Lessor under this Lease which accrue after the date that such Successor Lessor acquires title. The foregoing provision shall be self-operative and effective without the execution of any further instruments.

Lessee shall give written notice to any lender or mortgagee of Lessor of whom Lessee is notified of in writing of any breach or default by Lessor of any of its obligations under this Lease and give such lender or mortgagee the same rights to which Lessor might be entitled to cure such default before Lessee may exercise any remedy with respect thereto. Upon request by Lessor, Lessee shall authorize Lessor to release to any lender or mortgagee Lessee's and/or Guarantor's financial statements delivered to Lessor pursuant to this Lease or any Other Agreement.

22. **Estoppel Certificate.** At any time, and from time to time, each party shall, promptly and in no event later than twenty (20) days after a request from the other execute, acknowledge and deliver to the requesting party, as the case may be, a certificate in the form supplied by the requesting party, certifying: (A) that this Lease is in full force and effect and has not been modified (or if modified, setting forth all modifications), or, if this Lease is not in full force and effect, the certificate shall so specify the reasons therefor; (B) the commencement and expiration dates of the Lease Term; (C) the date to which the Rentals have been paid under this Lease and the amount thereof then payable; (D) whether there are then any existing defaults by Lessee or Lessor in the performance of its obligations under this Lease, and, if there are any such defaults, specifying the nature and extent thereof; (E) that no notice has been received by the certifying party of any default under this Lease which has not been cured, except as to defaults specified in the certificate; (F) the capacity of the person executing such certificate, and that such person is duly authorized to execute the same on behalf of Lessee; and; (G) and any other information reasonably requested by the requesting party.

23. **Assignment.**

A. As a material inducement to Lessor's willingness to complete the transactions contemplated by this Lease (the "Transaction") and the other Transaction Documents, Lessee hereby agrees that Lessor may, from time to time and at any time and without the consent of Lessee, engage in all or any combination of the following, or enter into agreements in connection with any of the following or in accordance with requirements that may be imposed by applicable securities, tax or other Laws: (i) the sale, assignment, grant, conveyance, transfer, financing, re-financing, purchase or reacquisition of the Property, this Lease or any other Transaction Document, Lessor's right, title and interest in this Lease or any other Transaction Document, the servicing rights with respect to any of the foregoing, or participations in any of the foregoing, or (ii) a Securitization and related transactions. Without in any way limiting the foregoing, the parties acknowledge and agree that Lessor, in its sole discretion, may assign this Lease or any interest herein to another Person (including without limitation, a taxable REIT subsidiary) in order to maintain Lessor's or any of its Affiliates' status as a REIT. In the event of any such sale or assignment other than a security assignment, Lessee shall attorn

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to such purchaser or assignee (so long as Lessor and such purchaser or assignee notify Lessee in writing of such transfer and such purchaser or assignee expressly assumes in writing the obligations of Lessor hereunder). At the request of Lessor, Lessee will execute such documents confirming the sale, assignment or other transfer and such other agreements as Lessor may reasonably request, provided that the same do not increase the liabilities and obligations of Lessee hereunder. Lessor shall be relieved, from and after the date of such transfer or conveyance, of liability for the performance of any obligation of Lessor contained herein, except for obligations or liabilities accrued prior to such assignment or sale.

B. Lessee acknowledges that Lessor has relied both on the business experience and creditworthiness of Lessee and upon the particular purposes for which Lessee intends to use the Property in entering into this Lease. Without the prior written consent of Lessor, which consent will not be unreasonably withheld, (i) Lessee shall not assign, transfer, convey, pledge or mortgage this Lease or any interest therein, whether by operation of law or otherwise, (ii) no Change of Control shall occur, and (iii) no interest in Lessee or any Guarantor shall be pledged, encumbered or assigned as collateral. With respect to any requested assignment, Lessor shall consider such matters as the experience and financial strength of any assignee, the assumption by any assignee of all of Lessee's obligations hereunder by undertakings enforceable by Lessor, and the transfer to or procurement of all necessary licenses and franchises to an assignee in order to continue operating the Property for the purposes herein provided. At the time of any assignment of this Lease which is approved by Lessor, the assignee shall assume all of the obligations of Lessee under this Lease pursuant to Lessor's standard form of assumption agreement. Such assignment of the Property shall relieve Lessee of its obligations respecting this Lease except for those obligations arising prior to such assignment. Any assignment, transfer, conveyance, pledge or mortgage in violation of this Section 23 shall be voidable at the sole option of Lessor. Any consent to an assignment given by Lessor hereunder shall not be deemed a consent to any subsequent assignment.

C. Lessee shall not sublet any or all of the Property without the prior written consent of Lessor, which consent shall not be unreasonably withheld, provided that the rental rate for the sublease is at a current market rate and the aggregate amount of the Property subleased to a party other than Winner's Gaming, Inc. or an Affiliate of Lessee shall not exceed 10,000 square feet. Notwithstanding the foregoing, Lessor acknowledges and agrees that Lessee may sublease the Property pursuant to the Assigned Leases and any extensions thereof.

24. Notices. All notices, demands, designations, certificates, requests, offers, consents, approvals, appointments and other instruments given pursuant to this Lease (collectively called "Notices") shall be in writing and given by any one of the following: (A) hand delivery, (B) express overnight delivery service, (C) certified or registered mail, return receipt requested or (D) electronic mail message, provided that a copy of such electronic mail message is also sent via certified or registered mail, return receipt requested, within one Business Day of the transmission of such electronic mail message, and shall be deemed to have been delivered upon (i) receipt, if hand delivered, (ii) the next Business Day, if delivered by a reputable express overnight delivery service, (iii) the third Business Day following the day of

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deposit of such notice with the United States Postal Service, if sent by certified or registered mail, return receipt requested, or (iv) transmission, if delivered by electronic mail pursuant to the requirements of Section 24(D) above. Notices shall be provided to the parties and addressees (or electronic mail addresses) specified below:

If to Lessee: Berry-Hinckley Industries
425 Maestro Drive, Suite 200
Reno, Nevada 89511
Attn: Paul Morabito
Telephone: () _____
Telecopy: () _____
E-mail: pmorabito@biffus.com

With a copy to: Hodgson Russ LLP
One M&T Plaza, Suite 2000
Buffalo, New York 14023
Attn: Sujata Yalamanchili
Telephone: (716) 848-1657
Telecopy: (716) 849-0349
E-mail: syalaman@hodgsonruss.com

If to Lessor: Spirit Master Funding II, LLC
14631 N. Scottsdale Road, Suite 200
Scottsdale, Arizona 85254-2711
Attention: Michael T. Bennett
SVP, Operations
Telephone: (480) 606-6608
Telecopy: (480) 606-0826
E-Mail: mbennett@spiritfinance.com

With a copy to: Kutak Rock LLP
1801 California Street, Suite 3100
Denver, Colorado 80202
Attention: Peggy A. Richter, Esq.
Telephone: (303) 297-2400
Telecopy: (303) 292-7799
E-Mail: peggy.richter@kutakrock.com

or to such other address or such other person as either party may from time to time hereafter specify to the other party in a notice delivered in the manner provided above.

25. **Holdover.** If Lessee remains in possession of the Property after the expiration of the term hereof, Lessee, at Lessor's option and within Lessor's sole discretion, may be deemed a tenant on a month-to-month basis and shall continue to pay Rentals and other Monetary Obligations in the amounts herein provided, except that the Base Monthly Rental shall be automatically increased to one hundred fifty percent (150%) of the last Base Monthly Rent

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payable under this Lease and Lessee shall comply with all the terms of this Lease; provided that nothing herein nor the acceptance of Rental by Lessor shall be deemed a consent to such holding over. Lessee shall defend, indemnify, protect and hold the Indemnified Parties harmless from and against any and all Losses resulting from Lessee's failure to surrender possession upon the expiration of the Lease Term, including, without limitation, any claims made by any succeeding lessee.

26. **Intentionally Deleted.**

27. **Removal of Personality.** At the expiration of the Lease Term, and if Lessee is not then in breach hereof, Lessee may remove from the Property all personal property belonging to Lessee. Lessee shall repair any damage caused by such removal and shall leave all of the Property broom clean and in good and working condition and repair inside and out. Any property of Lessee left on the Property on the tenth day following the expiration of the Lease Term shall automatically and immediately become the property of Lessor.

28. **Financial Statements; Compliance Certificate.** Within forty five (45) days after the end of each fiscal quarter and within one hundred twenty (120) days after the end of each fiscal year of Lessee, Lessee shall deliver to Lessor (A) complete financial statements of Lessee and Guarantor, or more frequently upon request by Lessor including a balance sheet, profit and loss statement, statement of changes in financial condition and all other related schedules for the fiscal period then ended; and (B) income statements for the business at the Property. All such financial statements shall be prepared in accordance with generally accepted accounting principles, consistently applied from period to period, and shall be certified to be accurate and complete by an officer or director of Lessee and Guarantor, respectively. Lessee understands that Lessor will rely upon such financial statements and Lessee represents that such reliance is reasonable. In the event that Lessee's property and business at the Property is ordinarily consolidated with other business for financial statements purposes, such financial statements shall be prepared on a consolidated basis showing separately the sales, profits and losses, assets and liabilities pertaining to the Property with the basis for allocation of overhead of other charges being clearly set forth. The financial statements delivered to Lessor need not be audited, but Lessee shall deliver to Lessor copies of any audited financial statements of Lessee and Guarantor which may be prepared, as soon as they are available. Within thirty (30) days after the end of each fiscal year of Lessee, and upon prior written request by Lessor, Lessee shall deliver such compliance certificate to Lessor as Lessor may reasonably require in order to establish that Lessee is in compliance with all of its obligations, duties and covenants under this Lease.

29. **Force Majeure.** Any prevention, delay or stoppage due to strikes, lockouts, acts of God, enemy or hostile governmental action, civil commotion, fire or other casualty beyond the control of the party obligated to perform (each, a "Force Majeure Event") shall excuse the performance by such party for a period equal to any such prevention, delay or stoppage, expressly excluding, however, the obligations imposed upon Lessee with respect to Rental and other Monetary Obligations to be paid hereunder.

30. **No Merger.** There shall be no merger of this Lease nor of the leasehold estate created by this Lease with the fee estate in or ownership of the Property by reason of the fact that

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the same person, corporation, firm or other entity may acquire or hold or own, directly or indirectly, (A) this Lease or the leasehold estate created by this Lease or any interest in this Lease or in such leasehold estate, and (B) the fee estate or ownership of the Property or any interest in such fee estate or ownership. No such merger shall occur unless and until all persons, corporations, firms and other entities having any interest in (i) this Lease or the leasehold estate created by this Lease, and (ii) the fee estate in or ownership of the Property or any part thereof sought to be merged shall join in a written instrument effecting such merger and shall duly record the same.

31. Characterization.

A. Lessor and Lessee acknowledge and warrant to each other that each has been represented by independent counsel and has executed this Lease after being fully advised by said counsel as to its effect and significance. This Lease shall be interpreted and construed in a fair and impartial manner without regard to such factors as the party which prepared the instrument, the relative bargaining powers of the parties or the domicile of any party. Whenever in this Lease any words of obligation or duty are used, such words or expressions shall have the same force and effect as though made in the form of a covenant.

B. The following expressions of intent, representations, warranties, covenants, agreements, stipulations and waivers are a material inducement to Lessor entering into this Lease:

(i) It is the intent of the parties hereto, and the parties acknowledge and agree that they have executed and delivered this Lease with the understanding that (1) this Lease is a "true lease," is not a financing lease, capital lease, mortgage, equitable mortgage, deed of trust, trust agreement, security agreement or other financing or trust arrangement, and the economic realities of this Lease are those of a true lease; and (2) the business relationship created by this Lease and any related documents is solely that of a long-term commercial lease between Lessor and Lessee, the Lease has been entered into by both parties in reliance upon the economic and legal bargains contained herein, and none of the agreements contained herein is intended, nor shall the same be deemed or construed, to create a partnership between Lessor and Lessee, to make them joint venturers, to make Lessee an agent, legal representative, partner, subsidiary or employee of Lessor, nor to make Lessor in any way responsible for the debts, obligations or losses of Lessee.

(ii) Each of the parties hereto covenants and agrees to the following: (1) each will treat this Lease (i) as an operating lease pursuant to Statement of Financial Accounting Standards No. 13, as amended; and (ii) as a true lease for state law reporting purposes and for federal income tax purposes. For federal income tax purposes, each party shall report this Lease as a true lease with Lessor as the owner of the Property and Lessee as the lessee of the Property including: (a) treating Lessor as the owner of the Property eligible to claim depreciation deductions under Section 167 or 168 of the Code with respect to the Property;

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(b) Lessee reporting its Rental payments as rent expense under Section 162 of the Code; and (c) Lessor reporting the Rental payments as rental income under Section 61 of the Code; (2) each party will not, nor will it permit any Affiliate to, at any time, take any action or fail to take any action with respect to the preparation or filing of any statement or disclosure to Governmental Authority, including without limitation, any income tax return (including an amended income tax return), to the extent that such action or such failure to take action would be inconsistent with the intention of the parties expressed in this Section 31.B; (3) the Lease Term (including any Extension Term) is less than eighty percent (80%) of the estimated remaining economic life of the Property; and (4) the Base Annual Rental is the fair market value for the use of the Property and was agreed to by Lessor and Lessee on that basis, and the execution and delivery of, and the performance by Lessee of its obligations under, this Lease do not constitute a transfer of all or any part of the Property.

(iii) Lessee waives any claim or defense based upon the characterization of this Lease as anything other than a true lease of the Property. Lessee stipulates and agrees (1) not to challenge the validity, enforceability or characterization of the lease of the Property as a true lease, and (2) not to assert or take or omit to take any action inconsistent with the agreements and understandings set forth in this Section 31.B.

(iv) The parties agree that, notwithstanding any provision contained in this Lease, any party (and each employee, representative or other agent of any party) may disclose to any and all persons, without limitation of any kind, any matter required under the Securities Act of 1933, as amended (the "Securities Act"), or the Securities Exchange Act of 1934, as amended (the "Exchange Act").

32. **Easements.** During the Lease Term, Lessor shall have the right to grant easements on, over, under and above the Property without the prior consent of Lessee, provided that such easements will not unreasonably or materially interfere with Lessee's use of the Property.

33. **Bankruptcy.** As a material inducement to Lessor executing this Lease, Lessee acknowledges and agrees that Lessor is relying upon (A) the financial condition and specific operating experience of Lessee and Lessee's obligation to use the Property as a Permitted Facility and (B) Lessee's timely performance of all of its obligations under this Lease notwithstanding the entry of an order for relief under the Bankruptcy Code for Lessee. Accordingly, in consideration of the mutual covenants contained in this Lease and for other good and valuable consideration, Lessee hereby agrees that: (i) all obligations that accrue under this Lease (including the obligation to pay Rentals), from and after an Insolvency Event shall be timely performed exactly as provided in this Lease and any failure to so perform shall be harmful and prejudicial to Lessor; (ii) to the extent permitted by law, any and all Rentals that accrue from and after the filing for bankruptcy and that are not paid as required by this Lease shall, in the amount of such Rentals, constitute administrative expense claims allowable under the Bankruptcy Code with priority of payment at least equal to that of any other actual and necessary expenses incurred after the filing for bankruptcy; (iii) any extension of the time period within

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which Lessee may assume or reject this Lease without an obligation to cause all enforceable obligations under this Lease to be performed as and when required under this Lease shall be harmful and prejudicial to Lessor; (iv) any time period designated as the period within which Lessee must cure all enforceable defaults and compensate Lessor for all pecuniary losses which extends beyond the date of assumption of this Lease shall be harmful and prejudicial to Lessor; (v) any assignment of this Lease must result in all terms and conditions of this Lease being assumed by the assignee without alteration or amendment, and any assignment which results in an amendment or alteration of the terms and conditions of this Lease without the express written consent of Lessor shall be harmful and prejudicial to Lessor; (vi) any proposed assignment of this Lease shall be harmful and prejudicial to Lessor if made to an assignee: (1) that does not possess financial condition adequate to operate a Permitted Facility upon the Property or operating performance and experience characteristics satisfactory to Lessor equal to or better than the financial condition, operating performance and experience of Lessee as of the Effective Date, or (2) that does not provide guarantors of the lease obligations with financial condition equal to or better than the financial condition of the Guarantor as of the Effective Date; and (vii) the rejection (or deemed rejection) of this Lease for any reason whatsoever shall constitute cause for immediate relief from the automatic stay provisions of the Bankruptcy Code, and Lessee stipulates that such automatic stay shall be lifted immediately and possession of the Property will be delivered to Lessor immediately without the necessity of any further action by Lessor. No provision of this Lease shall be deemed a waiver of Lessor's rights or remedies under the Bankruptcy Code or applicable Law to oppose any assumption and/or assignment of this Lease, to require timely performance of Lessee's obligations under this Lease, or to regain possession of the Property as a result of the failure of Lessee to comply with the terms and conditions of this Lease or the Bankruptcy Code. Notwithstanding anything in this Lease to the contrary, all amounts payable by Lessee to or on behalf of Lessor under this Lease, whether or not expressly denominated as such, shall constitute "rent" for the purposes of the Bankruptcy Code. For purposes of this Section addressing the rights and obligations of Lessor and Lessee upon an Insolvency Event, the term "Lessee" shall include Lessee's successor in bankruptcy, whether a trustee, Lessee as debtor in possession or other responsible person.

34. **Attorneys' Fees.** In the event of any judicial or other adversarial proceeding concerning this Lease, to the extent permitted by Law, Lessor the prevailing party be entitled to recover all of its reasonable attorneys' fees and other Costs in addition to any other relief to which it may be entitled. In addition, the prevailing party shall, upon demand, be entitled to all attorneys' fees and all other Costs incurred in the preparation and service of any notice or demand hereunder, whether or not a legal action is subsequently commenced.

35. **Memorandum of Lease.** Concurrently with the execution of this Lease, Lessor and Lessee are executing Lessor's standard form memorandum of lease in recordable form, indicating the names and addresses of Lessor and Lessee, a description of the Property, the Lease Term, but omitting Rentals and such other terms of this Lease as Lessor may not desire to disclose to the public. Further, upon Lessor's request, Lessee agrees to execute and acknowledge a termination of lease and/or quit claim deed in recordable form to be held by Lessor until the expiration or sooner termination of the Lease Term.

36. **No Brokerage.** Lessor and Lessee represent and warrant to each other that they have had no conversation or negotiations with any broker concerning the leasing of the Property.

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Each of Lessor and Lessee agrees to protect, indemnify, save and keep harmless the other, against and from all liabilities, claims, losses, Costs, damages and expenses, including attorneys' fees, arising out of, resulting from or in connection with their breach of the foregoing warranty and representation.

37. **Waiver of Jury Trial and Punitive, Consequential, Special and Indirect Damages.** Lessor and Lessee hereby knowingly, voluntarily and intentionally waive the right either may have to a trial by jury with respect to any and all issues presented in any action, proceeding, claim or counterclaim brought by either of the parties hereto against the other or its successors with respect to any matter arising out of or in connection with this Lease, the relationship of Lessor and Lessee, Lessee's use or occupancy of the Property, and/or any claim for injury or damage, or any emergency or statutory remedy. This waiver by the parties hereto of any right either may have to a trial by jury has been negotiated and is an essential aspect of their bargain. Furthermore, Lessee hereby knowingly, voluntarily and intentionally waives the right it may have to seek punitive, consequential, special and indirect damages from Lessor and any of the Affiliates, officers, directors, members, managers or employees of Lessor or any of their successors with respect to any and all issues presented in any action, proceeding, claim or counterclaim brought with respect to any matter arising out of or in connection with this Lease or any document contemplated herein or related hereto. The waiver by Lessee of any right it may have to seek punitive, consequential, special and indirect damages has been negotiated by the parties hereto and is an essential aspect of their bargain.

38. **Securitizations and Other Transactions.** As a material inducement to Lessor's willingness to complete the Transactions contemplated by this Lease and the other Transaction Documents, Lessee hereby acknowledges and agrees that Lessor may, from time to time and at any time (A) upon receipt of Lessee's consent, which consent shall not be unreasonably withheld or delayed, advertise, issue press releases, send direct mail or otherwise disclose information regarding the Transaction for marketing purposes; and (B) (i) act or permit another Person to act as sponsor, settler, transferor or depositor of, or a holder of interests in, one or more Persons or other arrangements formed pursuant to a trust agreement, indenture, pooling agreement, participation agreement, sale and servicing agreement, limited liability company agreement, partnership agreement, articles of incorporation or similar agreement or document; and (ii) permit one or more of such Persons or arrangements to offer and sell stock, certificates, bonds, notes, other evidences of indebtedness or securities that are directly or indirectly secured, collateralized or otherwise backed by or represent a direct or indirect interest in whole or in part in any of the assets, rights or property described in Section 23.A of this Lease, in one or more Persons or arrangements holding such assets, rights or property, or any of them (collectively, the "Securities"), whether any such Securities are privately or publicly offered and sold, or rated or unrated (any combination of which actions and transactions described in both clauses (i) and (ii) in this paragraph, whether proposed or completed, are referred to in this Lease as a "Securitization"). Lessee shall cooperate fully with Lessor and any Affected Party with respect to all reasonable requests and due diligence procedures and to use reasonable efforts to facilitate such Securitization, including without limitation, providing for inclusion in any prospectus or other Securities offering material such documents, financial and other data, and other information and materials which would customarily be required with respect to Lessee by a

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purchaser, transferee, assignee, servicer, participant, investor or rating agency involved with respect to such Securitization, and Lessee shall indemnify and hold harmless Lessor for any and all liabilities, losses and expenses arising under the Securities Act, or the Exchange Act, in connection with any material misstatement (or alleged misstatement) contained in such information provided in writing (including, without limitation, electronically) by Lessee or its officers, managers, members, employees, or agents, or any omission (or alleged omission) of a material fact by Lessee or its officers, managers, members, employees, or agents, the inclusion of which was necessary to make such written information not misleading, unless such material misstatement or alleged misstatement or omission or alleged omission is caused by Lessor or its directors, officers, managers, members, shareholders, employees, or agents. Lessee shall deliver to Lessor, any Affected Party and to any Person designated by Lessor, such statements and audit letters of reputable, independent certified public accountants pertaining to the written information provided by Lessee pursuant to this Section as shall be requested by Lessor or such Affected Party, as the case may be. Lessee also shall deliver to Lessor, any Affected Party and to any Person designated by Lessor or any Affected Party, such opinions of counsel (including without limitation, local counsel opinions), appraisals, environmental reports and zoning letters, or updates of any of the foregoing, as are customarily delivered in connection with Securitizations or as may be required by any rating agency in connection with any Securitization.

39. **Intentionally Deleted.**

40. **Performance at Lessee's Expense.** Lessee acknowledges and confirms that Lessor, upon notice to Lessee, may impose certain reasonable, administrative, processing or servicing fees, and collect its attorneys' fees, costs and expenses in connection with (a) any extension, renewal, modification, amendment and termination of this Lease, (b) the procurement of certain consents, waivers and approvals with respect to the Property or any matter related to this Lease, (c) the review of any assignment or sublease or proposed assignment or sublease or the preparation or review of any subordination, non-disturbance agreement, (d) the collection, maintenance and/or disbursement of reserves created under this Lease or the other Transaction Documents, and (e) inspections required to make certain determinations under this Lease or the other Transaction Documents. Lessee hereby acknowledges and agrees to pay, immediately upon demand, all such fees (as the same may be increased or decreased from time to time), and any additional fees of a similar type or nature which may reasonably be imposed or incurred by Lessor from time to time.

41. **Miscellaneous.**

A. **Time Is of the Essence.** Time is of the essence with respect to each and every provision of this Lease.

B. **Waiver and Amendment.** No provision of this Lease shall be deemed waived or amended except by a written instrument unambiguously setting forth the matter waived or amended and signed by the party against which enforcement of such waiver or amendment is sought. Waiver of any matter shall not be deemed a waiver of the same or any other matter on any future occasion. No acceptance by Lessor of an amount less than the Rental and other Monetary Obligations stipulated to be due under this Lease shall be deemed to be other than a payment on account of the earliest such

Rental or other Monetary Obligations then due or in arrears nor shall any endorsement or statement on any check or letter accompanying any such payment be deemed a waiver of Lessor's right to collect any unpaid amounts or an accord and satisfaction.

C. *Successors Bound.* Except as otherwise specifically provided herein, the terms, covenants and conditions contained in this Lease shall bind and inure to the benefit of the respective heirs, successors, executors, administrators and assigns of each of the parties hereto.

D. *Captions.* Captions are used throughout this Lease for convenience of reference only and shall not be considered in any manner in the construction or interpretation hereof.

E. *Severability.* The provisions of this Lease shall be deemed severable. If any part of this Lease shall be held unenforceable by any court of competent jurisdiction, the remainder shall remain in full force and effect, and such unenforceable provision shall be reformed by such court so as to give maximum legal effect to the intention of the parties as expressed therein.

F. *Other Documents.* Each of the parties agrees to sign such other and further documents as may be necessary or appropriate to carry out the intentions expressed in this Lease; provided such documents are reasonably acceptable to each parties' counsel.

G. *Entire Agreement.* This Lease and any other instruments or agreements referred to herein, constitute the entire agreement between the parties with respect to the subject matter hereof, and there are no other representations, warranties or agreements except as herein provided.

H. *Forum Selection; Jurisdiction; Venue; Choice of Law.* For purposes of any action or proceeding arising out of this Lease, the parties hereto expressly submit to the jurisdiction of all federal and state courts located in the State of Nevada. Lessee consents that it may be served with any process or paper by registered mail or by personal service within or without the State of Arizona in accordance with applicable law. Furthermore, Lessee waives and agrees not to assert in any such action, suit or proceeding that it is not personally subject to the jurisdiction of such courts, that the action, suit or proceeding is brought in an inconvenient forum or that venue of the action, suit or proceeding is improper. Nothing contained in this Section shall limit or restrict the right of Lessor to commence any proceeding in the federal or state courts located in the state where the Property is located to the extent Lessor deems such proceeding necessary or advisable to exercise remedies available under this Lease. This Lease shall be governed by the laws of the state in which the Property is located.

I. *Counterparts.* This Lease may be executed in one or more counterparts, each of which shall be deemed an original.

42. **Guaranty.** On or before the execution of this Lease, Lessee shall cause Guarantor to execute and deliver to Lessor the Guaranty.

43. **Intentionally Deleted.**

44. **Option to Purchase.** Lessee shall have the option to give Lessor notice at least thirty (30) days prior to the 10th, 20th and 30th anniversaries of the Effective Date, to the extent this Lease remains in effect, of Lessee's election to purchase the Property (the "Option Notice") for the greater of (i) their fair market value (which fair market value shall be determined in accordance with Section 19 above) or (ii) one hundred twenty-five percent (125%) of Lessor's Total Investment. The closing for such purchase must occur within ninety (90) days following Lessor's receipt of the Option Notice if the required appraisal has been received and, if not, a day for day extension will be allowed until the appraisal is received.

Upon exercise of this option, Lessor and Lessee shall open a new escrow account with a recognized title insurance company selected by mutual agreement of the parties. Such escrow shall be subject to the standard escrow instructions of the escrow agent, to the extent they are not inconsistent herewith. At or before the close of escrow, Lessor shall deliver to the escrow agent its limited warranty deed conveying to Lessee all of Lessor's right, title and interest in the Property free and clear of all liens and encumbrances except liens for taxes and assessments and easements, covenants and restrictions of record which were attached to the Property as of the date hereof, attached during the term of the Lease through Lessee's action or inaction, as the case may be, have been granted by Lessor in lieu of a taking by the power of eminent domain or the like, or have been approved by Lessee. In the event Lessor is unable to convey title as required, Lessee shall have the right to accept such title as Lessor can convey or elect not to consummate its exercise of the option. Both Lessor and Lessee agree to execute a purchase agreement, escrow instructions and such other instruments as may be necessary or appropriate to consummate the sale of the Property in the manner herein provided. All Costs incurred in connection with Lessee's exercise of the option, including, but not limited to, escrow fees, title insurance fees, recording costs or fees, reasonable attorneys' fees (including those of the Lessor), appraisal fees, stamp taxes and transfer fees shall be borne by Lessee. Lessee shall continue to pay and perform all of its obligations under this Lease until the close of escrow. The purchase price paid by Lessee in exercising this option shall be paid to Lessor or to such person or entity as Lessor may direct at closing in immediately available funds. The closing date may be extended for a reasonable period of time to permit Lessor to cure title defects or to permit either party to cure any other defects or defaults provided each party is diligently seeking to cure such defect or default and Lessee continues to perform its obligations hereunder. In the case of any mortgage or other monetary lien arising by, through or under Lessor (but not arising by, through or under Lessee), the escrow agent shall first apply the purchase price to the payment of such mortgage or monetary lien, and the balance shall be paid over to Lessor at closing.

Lessee shall not have the right to exercise this option or consummate the exercise thereof if at the time of exercise or consummation an Event of Default exists or is continuing.

Lessee may not sell, assign, transfer, hypothecate or otherwise dispose of the option granted herein or any interest therein, except in conjunction with a permitted assignment of Lessee's entire interest herein and then only to the assignee thereof. Any attempted assignment

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of this option which is contrary to the terms of this Section shall be deemed to be an Event of Default under this Lease and the option granted herein shall be void. Notwithstanding the foregoing, upon the exercise of this option, Lessee may assign to an Affiliate its right to purchase the subject Property in accordance with this section, provided that Lessee shall remain fully obligated to complete the purchase of the subject Property.

Notwithstanding the foregoing, the purchase option described in this Section shall be null and void in the event that Lessor determines, in its sole and absolute discretion, that the sale of the Property would cause Lessor to recognize income or gain from a "prohibited transaction" as defined under Section 857(b)(6) of the Internal Revenue Code of 1986, as amended.]

45. **Right of First Refusal/Third Party Offer.**

A. **Offer.** Subject to the terms and conditions set forth in this Section 45 (including, without limitation, the condition set forth in Section 45.C(i)(5) below), any time after the fourth anniversary of the Effective Date, if Lessor desires to sell the Property and receives a bona fide written offer from a third party which offer is in all respects acceptable to Lessor, Lessor shall deliver a complete copy of such bona fide third party offer to Lessee ("Third Party Offer"). Upon Lessee's receipt of such Third Party Offer from Lessor, and a written statement of Lessor's desire to sell the Property in accordance with such Third Party Offer, Lessee shall have the right, within fourteen (14) business days of receipt of notice from Lessor, to deliver a rejectable offer to Lessor (each, a "Rejectable Purchase Offer") to purchase Lessor's interest in the Property for the amount of the bona fide third party offer to purchase the Property (the "Subject Purchase Price"). Lessor shall have sixty (60) days from the delivery of the Rejectable Purchase Offer notice to deliver to Lessee written notice of its election to either accept or reject the Rejectable Purchase Offer. Lessor's failure to deliver such notice within such time period shall be deemed to constitute Lessor's acceptance of the Rejectable Purchase Offer. If Lessor accepts the Rejectable Purchase Offer or is deemed to have accepted the Rejectable Purchase Offer, then Lessee shall complete such purchase, subject to the satisfaction of each of the terms and conditions set forth in Section 45.C below. If Lessor rejects any Rejectable Purchase Offer, this Lease shall remain in full force and effect.

C. **Conditions Precedent.**

(i) The purchase of Lessor's interest in the Property pursuant to Section 45.A shall be subject to the fulfillment of all of the following terms and conditions: (1) no Event of Default shall have occurred and be continuing under this Lease or other Transaction Documents; (2) Lessee or, at Lessee's discretion, the third party offeror shall have paid to Lessor the Subject Purchase Price, together with all Rental and other Monetary Obligations then due and payable under this Lease as of the date of the closing of such purchase; (3) in addition to payment of the Subject Purchase Price, Lessee shall have satisfied its obligations under Section 45.D below; (4) Lessee shall not have the right to deliver Rejectable Purchase Offers until after the fourth anniversary of the Effective

Date; and (5) the date of the closing of such purchase shall occur on the next scheduled Base Monthly Rental payment date following Lessor's acceptance (or deemed acceptance) of the Rejectable Purchase Offer.

(ii) On the date of the closing of the purchase of the Property pursuant to this Section (the "Rejectable Purchase Closing Date"), subject to satisfaction of the foregoing conditions: (1) this Lease shall be deemed terminated; *provided, however*, such termination shall not limit Lessee's obligations to Lessor with respect to the Property under any indemnification provisions of this Lease (including, without limitation, Sections 12.D(v) and 15 of this Lease) and Lessee's obligations to pay any Monetary Obligations (whether payable to Lessor or a third party) accruing under this Lease prior to the Rejectable Purchase Closing Date shall survive the termination of this Lease; and (2) Lessor shall convey the Property to Lessee "as is" by special warranty deed, subject to all matters of record (except for any consensual liens granted by Lessor other than those granted by Lessor at the request of Lessee), and without representation or warranty.

D. *Costs.* Lessee shall be solely responsible for the payment of all Costs resulting from any proposed purchase pursuant to this Section 45, regardless of whether the purchase is consummated, including, without limitation, to the extent applicable, the cost of title insurance and endorsements, including, survey charges, stamp taxes, mortgage taxes, transfer taxes and fees, escrow and recording fees, taxes imposed on Lessor as a result of such purchase, the attorneys' fees of Lessee and the reasonable attorneys' fees and expenses of counsel to Lessor.

E. *Termination of Right.* NOTWITHSTANDING ANYTHING TO THE CONTRARY, LESSEE'S RIGHTS UNDER THIS SECTION 45 SHALL TERMINATE AND BE NULL AND VOID AND OF NO FURTHER FORCE AND EFFECT IF (i) LESSEE FAILS TO EXERCISE THE RIGHT GRANTED PURSUANT TO THIS SECTION 45, AND THE SALE TO THE THIRD PARTY PURCHASER IS CONSUMMATED; (ii) THIS LEASE TERMINATES OR THE LEASE TERM EXPIRES; (iii) THE PROPERTY IS SOLD OR TRANSFERRED PURSUANT TO THE EXERCISE OF A PRIVATE POWER OF SALE OR JUDICIAL FORECLOSURE OR ACCEPTANCE OF A DEED IN LIEU THEREOF; OR (iv) LESSEE SHALL BE IN DEFAULT OF ANY OF THE TERMS AND CONDITIONS OF THIS LEASE OR IF ANY CONDITION SHALL EXIST WHICH UPON THE GIVING OF NOTICE OR THE PASSAGE OF TIME, OR BOTH, WOULD CONSTITUTE A DEFAULT BY LESSEE UNDER THIS LEASE. IN ANY SUCH EVENT, LESSEE SHALL EXECUTE A QUITCLAIM DEED AND SUCH OTHER DOCUMENTS AS LESSOR SHALL REASONABLY REQUEST EVIDENCING THE TERMINATION OF ITS RIGHT UNDER THIS SECTION 45.

F. *Attornment.* If Lessee does not deliver its Rejectable Purchase Offer to purchase the Property and the Property is transferred to a third party purchaser, Lessee will attorn to any third party purchaser as Lessor so long as such third party purchaser and Lessor notify Lessee in writing of such transfer. At the request of Lessor, Lessee will

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execute such documents confirming the agreement referred to above and such other agreements as Lessor may reasonably request, provided that such agreements do not increase the liabilities and obligations of Lessee hereunder.

G. *Exclusions.* The provisions of this Section 45 shall not apply to or prohibit (i) any mortgages or other hypothecation of Lessor's interest in the Property; (ii) any sale of the Property pursuant to a private power of sale under or judicial foreclosure of any mortgage or other security instrument or device to which Lessor's interest in the Property is now or hereafter subject; (iii) any transfer of Lessor's interest in the Property to a mortgagee or other holder of a security interest therein or their designees by deed in lieu of foreclosure; (iv) any transfer of the Property to any governmental or quasi governmental agency with power of Condemnation; (v) any transfer of the Property to any Affiliate of Lessor; (vi) any transfers of interests in Lessor by any member, shareholder, partner or other owner to any other member, shareholder, partner or other owner; (vii) any transfers to any Person to whom Lessor sells all or substantially all of its assets; (viii) any transfers to any Person in connection with the transactions described in Section 23 of this Lease; or (ix) any transfer of the Property to any of the successors or assigns of any of the Persons referred to in this Section 45.G.

46. *Assignment Of Leases.* Lessor hereby conditionally assigns to Lessee (i) those certain leases described on Exhibit C attached hereto and incorporation herein by this reference (the "Assigned Leases"), together with any and all extensions and renewals thereof; (ii) the immediate and continuing right to collect and receive all of the rents, income, receipts, revenues, issues and profits now due or which may become due or which may now or hereafter become due from or out of the Assigned Leases or any part thereof, including, but not limited to, security deposits, minimum rents, additional rents, parking rents, deficiency rents and liquidated damages following default, any premium payable by any tenant upon the exercise of a cancellation privilege contained in its Lease; all proceeds payable under any policy of insurance covering loss of rents resulting from untenantability caused by destruction or damage to the Leased Premises; any and all rights and claims of any kind which Lessor has or hereafter may have against the tenants under the Assigned Leases; any award granted Lessor after the date hereof in any court proceeding involving any tenant in any bankruptcy, insolvency or reorganization proceedings in any state or federal court and any and all payments made by any tenant in lieu of rent (any and all such moneys, rights and claims identified in this paragraph are herein sometimes referred to as the "Rents" and sometimes as the "Rent"); and (iii) all of the rights, powers and privileges of Lessor (A) to accept prepayment of more than one (1) monthly installment of the Rent thereunder, and (B) (I) to cancel, terminate or accept the surrender of any Assigned Lease, and (II) to amend, modify or abridge any of the terms, covenants or conditions of any Assigned Lease. The assignment contained in this section and Lessee's interest in the Assigned Leases shall become void and of no further force or effect upon the expiration or early termination of this Lease and upon such event, Lessor shall be the sole party with any interest as a landlord or lessor in the Assigned Leases. Furthermore, Lessee shall have no right to collect any amounts under the Assigned Leases upon the occurrence and continuance of an Event of Default and all such amounts shall be paid to Lessor during any such period. Notwithstanding any provision contained herein, without the prior written consent of Lessor, Lessee shall not transfer, convey,

assign or encumber its interest in any Assigned Lease, nor take any action or omit to take any action that would affect the rights and obligations of any party under any Assigned Lease.

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IN WITNESS WHEREOF, Lessor and Lessee have entered into this Lease as of the date first above written.

LESSOR:

SPIRIT MASTER FUNDING II, LLC, a
Delaware limited liability company

By: *Jeffrey M. Fleischer*
Printed Name: Jeffrey M. Fleischer
Title: Senior Vice President
Tax Identification No. 8350

LESSEE:

BERRY-HINCKLEY INDUSTRIES, a Nevada
corporation

By: _____
Printed Name: _____
Title: _____
Tax Identification No. _____

IN WITNESS WHEREOF, Lessor and Lessee have entered into this Lease as of the date first above written.

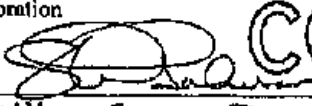
LESSOR:

SPIRIT MASTER FUNDING II, LLC, a
Delaware limited liability company

By: _____
Printed Name: _____
Title: _____
Tax Identification No. [REDACTED] 3350

LESSEE:

BERRY-HINCKLEY INDUSTRIES, a Nevada
corporation

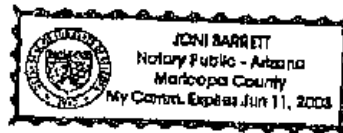
By:  **COPY**
Printed Name: Steve Johnson
Title: President
Tax Identification No. _____

STATE OF ARIZONA)
COUNTY OF MARICOPA) ss

The foregoing instrument was acknowledged before me on December 14, 2005 by Jeffrey M. Fleischer, as Senior Vice President of SPIRIT MASTER FUNDING II, LLC, a Delaware limited liability company, on behalf of the company.

My Commission Expires: 6/11/08

Notary Public



STATE OF _____)
COUNTY OF _____) ss

The foregoing instrument was acknowledged before me on _____, 2005 by _____, as _____ of BERRY-HINCKLEY INDUSTRIES, a Nevada corporation, on behalf of the corporation.

Notary Public

My Commission Expires: _____

4816-5283-6352.4
Spirit/WHI
425 Macmillan Dr., Reno, NV
File No. 3724/01-3029

STATE OF _____)
COUNTY OF _____) ss

The foregoing instrument was acknowledged before me on _____, 2005 by
_____ as _____ of SPIRIT MASTER
FUNDING II, LLC, a Delaware limited liability company, on behalf of the company.

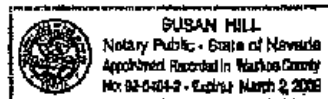
My Commission Expires: _____
Notary Public

STATE OF Nevada)
COUNTY OF Washoe) ss

COPY

The foregoing instrument was acknowledged before me on Dec 14, 2005 by
STEVE J. JOHNSON, as PRESIDENT of BERRY-HINCKLEY INDUSTRIES, a Nevada
corporation, on behalf of the corporation.

My Commission Expires: Mar 2, 2008
Notary Public Susan Hill



4810-5283-6152.4
Sp10/01/07
413 Main St., Reno, NV
FID No. 377402-9029

EXHIBIT A
DEFINED TERMS

The following terms shall have the following meanings for all purposes of this Lease:

"ADA" has the meaning set forth in Section 12.C.

"Additional Rental" has the meaning set forth in Section 4.C.

"Adjustment Date" means January 1, 2007, and every anniversary thereafter during the Lease Term (including any Extension Term).

"Affected Party" means each direct or indirect participant or investor in a proposed or completed Securitization, including, without limitation, any prospective owner, any rating agency or any party to any agreement executed in connection with the Securitization.

"Affiliate" means any Person which directly or indirectly controls, is under common control with or is controlled by any other Person. For purposes of this definition, "controls", "under common control with", and "controlled by" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities or otherwise.

"Bankruptcy Code" means the United States Bankruptcy Code, 11 U.S.C. Sec. 101 et seq., as amended.

"Base Annual Rental" means \$712,350.00.

"Base Monthly Rental" means an amount equal to 1/12 of the applicable Base Annual Rental.

"Business Day" means a day on which banks located in Scottsdale, Arizona are not required or authorized to remain closed.

"Casualty" means any loss of or damage to any property included within or related to the Property or arising from an adjoining property caused by fire, flood or other casualty.

"Change of Control" shall be deemed to have taken place upon the occurrence of any of the following events: (i) any person, entity or affiliated group acquiring 50% or more of the then outstanding voting shares of Lessee or PAMCO, respectively; (ii) the consummation of any merger or consolidation of Lessee or PAMCO into another company, such that the holders of the voting shares of Lessee or PAMCO, respectively, immediately prior to such merger or consolidation own less than 50% of the combined voting power of the securities of the surviving company or the parent of such surviving company; (iii) the complete liquidation of Lessee or PAMCO or the sale or disposition of all or substantially all of the assets of Lessee or PAMCO, respectively, such that after the transaction, the holders of the voting shares of Lessee or PAMCO, respectively, immediately prior to the transaction own less than 50% of the voting

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securities of the acquirer or the parent of the acquirer, or (iv) a majority of the members of the Board of Lessee or PAMCO votes in favor of any event described in items (i), (ii) or (iii) above.

"*Code*" means the Internal Revenue Code of 1986, as the same may be amended from time to time.

"*Condemnation*" means a Taking and/or a Requisition.

"*Costs*" means all reasonable costs and expenses incurred by a Person, including without limitation, reasonable attorneys' fees and expenses, court costs, expert witness fees, costs of tests and analyses, travel and accommodation expenses, deposition and trial transcripts, copies and other similar costs and fees, brokerage fees, escrow fees, title insurance premiums, appraisal fees, stamp taxes, recording fees and transfer taxes or fees, as the circumstances require.

"*Default Rate*" means 18% per annum or the highest rate permitted by law, whichever is less.

"*Early Termination Date*" has the meaning set forth in Section 18.C(ii)(1).

"*Effective Date*" has the meaning set forth in the introductory paragraph of this Lease.

"*Environmental Laws*" means federal, state and local laws, ordinances, common law requirements and regulations and standards, rules, policies and other governmental requirements, administrative rulings and court judgments and decrees having the effect of law in effect now or in the future and including all amendments, that relate to Hazardous Materials, Regulated Substances, USTs, and/or the protection of human health or the environment, or relating to liability for or Costs of Remediation or prevention of Releases, and apply to Lessee and/or the Property.

"*Environmental Liens*" has the meaning set forth in Section 12.D(i)(2).

"*Event of Default*" has the meaning set forth in Section 20.A.

"*Exchange Act*" has the meaning set forth in Section 31.B(iv).

"*Expiration Date*" has the meaning set forth in Section 3.

"*Extension Option*" has the meaning set forth in Section 3.

"*Extension Term*" has the meaning set forth in Section 3.

"*Force Majeure Event*" has the meaning set forth in Section 29.

"*Governmental Authority*" means any governmental authority, agency, department, commission, bureau, board, instrumentality, court or quasi-governmental authority of the United States, any state or any political subdivision thereof with authority to adopt, modify, amend, interpret, give effect to or enforce any federal, state and local laws, statutes, ordinances, rules or regulations, including common law, or to issue court orders.

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Spide/DH
425 Mountain Dr., Reno, NV
File No. 373-002-5029

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"*Guarantor*" means PAMCO or any other additional or replacement guarantor approved by Lessor in its sole and absolute discretion.

"*Guaranty*" means that certain Unconditional Guaranty of Payment and Performance dated as of the date hereof between Guarantor and Lessor.

"*Hazardous Materials*" includes: (a) oil, petroleum products, flammable substances, explosives, radioactive materials, hazardous wastes or substances, toxic wastes or substances or any other materials, contaminants or pollutants which pose a hazard to the Property or to Persons on or about the Property, cause the Property to be in violation of any local, state or federal law or regulation, (including without limitation, any Environmental Law), or are defined as or included in the definition of "hazardous substances", "hazardous wastes", "hazardous materials", "toxic substances", "contaminants", "pollutants", or words of similar import under any applicable local, state or federal law or under the regulations adopted, orders issued, or publications promulgated pursuant thereto, including, but not limited to: (i) the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §9601, *et seq.*; (ii) the Hazardous Materials Transportation Act, as amended, 49 U.S.C. §1801, *et seq.*; (iii) the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §6901, *et seq.*; and (iv) regulations adopted and publications promulgated pursuant to the aforesaid laws; (b) asbestos in any form which is or could become friable, urea formaldehyde foam insulation, transformers or other equipment which contain dielectric fluid containing levels of polychlorinated biphenyls in excess of fifty (50) parts per million; (c) underground storage tanks; and (d) any other chemical, material or substance, exposure to which is prohibited, limited or regulated by any governmental authority or which may or could pose a hazard to the health and safety of the occupants of the Property or the owners and/or occupants of any adjoining property.

"*Indemnified Parties*" means Lessor, and its members, managers, officers, directors, shareholders, partners, employees, agents, servants, representatives, contractors, subcontractors, affiliates, subsidiaries, participants, successors and assigns, including, but not limited to, any successors by merger, consolidation or acquisition of all or a substantial portion of the assets and business of Lessor.

"*Initial Term*" has the meaning set forth in Section 3.

"*Insolvency Event*" means (a) Lessee's (i) failure to generally pay its debts as such debts become due; (ii) admitting in writing its inability to pay its debts generally; or (iii) making a general assignment for the benefit of creditors; (b) any proceeding being instituted by or against Lessee (i) seeking to adjudicate it a bankrupt or insolvent; (ii) seeking liquidation, winding up, reorganization, arrangement, adjustment, protection, relief, or composition of it or its debts under any law relating to bankruptcy, insolvency, or reorganization or relief of debtors; or (iii) seeking the entry of an order for relief or the appointment of a receiver, trustee, or other similar official for it or for any substantial part of its property, and in the case of any such proceeding instituted against Lessee, either such proceeding shall remain undismissed for a period of one hundred twenty (120) days or any of the actions sought in such proceeding shall occur; or (c) Lessee taking any corporate action to authorize any of the actions set forth above in this definition.

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"*Law(s)*" means any constitution, statute, rule of law, code, ordinance, order, judgment, decree, injunction, rule, regulation, policy, requirement or administrative or judicial determination, even if unforeseen or extraordinary, of every duly constituted Governmental Authority, court or agency, now or hereafter enacted or in effect.

"*Lease Term*" shall have the meaning described in Section 3.

"*Legal Requirements*" means the requirements of all present and future Laws (including without limitation, Environmental Laws and Laws relating to accessibility to, usability by, and discrimination against, disabled individuals), all judicial and administrative interpretations thereof, including any judicial order, consent, decree or judgment, and all covenants, restrictions and conditions now or hereafter of record which may be applicable to Lessee or to the Property, or to the use, manner of use, occupancy, possession, operation, maintenance, alteration, repair or restoration of the Property, even if compliance therewith necessitates structural changes or improvements or results in interference with the use or enjoyment of the Property.

"*Lessee Entities*" means, collectively, Lessee and all Affiliates of Lessee.

"*Lessor Entities*" means, collectively, Lessor and all Affiliates of Lessor.

"*Lessor's Total Investment*" means the sum of (a) the gross purchase prices paid for the Property by Lessor (or Lessor's predecessor-in-interest) (including, without limitation, any mortgage debt incurred or assumed in connection therewith), plus (b) the closing costs and expenses incurred by Lessor (or Lessor's predecessor-in-interest) with respect to the purchase of the Property.

"*Loss Value*" has the meaning set forth in Section 18.C(ii)(3).

"*Losses*" means any and all claims, suits, liabilities (including, without limitation, strict liabilities), actions, proceedings, obligations, debts, damages, losses, Costs, diminutions in value, fines, penalties, interest, charges, fees, judgments, awards, amounts paid in settlement and damages of whatever kind or nature, inclusive of bodily injury and property damage to third parties (including, without limitation, attorneys' fees and other Costs of defense).

"*Material Adverse Effect*" means a material adverse effect on (i) the Property, including, without limitation, the operation of the Property as a Permitted Facility and/or the value of the Property, (ii) Lessee's ability to perform its obligations under this Lease, or (iii) Lessor's interests in the Property, this Lease or the other Transaction Documents.

"*Monetary Obligations*" means all Rental and all other sums payable or reimbursable by Lessee under this Lease to Lessor, to any third party on behalf of Lessor, or to any Indemnified Party.

"*Net Award*" means (a) the entire award payable by reason of a Condemnation whether pursuant to a judgment or by agreement or otherwise, or (b) the entire proceeds of any insurance required under Section 10 payable with respect to the Property, as the case may be, and in either case, less any Costs incurred by Lessor in collecting such award or proceeds.

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Spint/BHT
425 Meadows Dr., Reno, NV
File No. 1734/02-5029

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"*Notices*" has the meaning set forth in Section 24.

"*OFAC List*" means the list of specially designated nationals and blocked persons subject to financial sanctions that is maintained by the U.S. Treasury Department, Office of Foreign Assets Control and any other similar list maintained by the U.S. Treasury Department, Office of Foreign Assets Control pursuant to any Legal Requirements, including, without limitation, trade embargo, economic sanctions, or other prohibitions imposed by Executive Order of the President of the United States. The OFAC List currently is accessible through the internet website www.treas.gov/ofac/t11sda.pdf.

"*Option Notice*" has the meaning set forth in Section 46.

"*Other Agreements*" means, collectively, all agreements and instruments now or hereafter entered into between, among or by (1) any of the Lessee Entities, and, or for the benefit of, (2) any of the Lessor Entities, including, without limitation, leases, promissory notes and guaranties, but excluding this Lease and all other Transaction Documents. "Other Agreements" shall include (i) any Lease Agreement hereafter entered into by and between Lessor and Lessee with respect to the real property at 900 W. 4th Street, Reno, Nevada, (ii) that certain Master Lease Agreement of even date herewith by and between Lessor and Lessee with multiple parcels of real property located in the State of Nevada, (iii) that certain Lease Agreement of even date herewith by and between Lessor and Lessee with respect to the real property at 3245 W. Potato Road Frontage, Winnemucca, Nevada, and (iv) that certain Lease Agreement of even date herewith by and between Lessor and Lessee with respect to the real property at Route 1 Exit #48, Fernley, Nevada.

"*PAMCO*" means Paul A. Morabito & Co., Limited, a Nevada corporation.

"*Partial Casualty*" has the meaning set forth in Section 18.B.

"*Partial Condemnation*" has the meaning set forth in Section 18.B.

"*Permitted Amounts*" shall mean, with respect to any given level of Hazardous Materials or Regulated Substances, that level or quantity of Hazardous Materials or Regulated Substances in any form or combination of forms which does not constitute a violation of any Environmental Laws and is customarily employed in, or associated with, similar businesses located in the states where the Property is located.

"*Permitted Encumbrances*" shall mean those covenants, restrictions, reservations, liens, conditions, encroachments, easements and other matters of title that affect the Property as of the date of Lessor's acquisition thereof and those items which hereafter affect title as permitted under this Lease.

"*Permitted Facility*" means an office building and incidental uses.

"*Person*" means any individual, partnership, corporation, limited liability company, trust, unincorporated organization, Governmental Authority or any other form of entity.

"*Personalty*" has the meaning set forth in Section 26.

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425 Meador Dr., Reno, NV
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"*Price Index*" has the meaning set forth in Section 4.B.

"*Property*" means, that parcel of real estate legally described on Exhibit B attached hereto, all rights, privileges, and appurtenances associated therewith, all buildings, fixtures and other improvements now or hereafter located on such real estate (whether or not affixed to such real estate).

"*Purchase and Sale Agreement*" means that certain Purchase and Sale Agreement dated as of the date hereof between Lessor and Seller with respect to the Property.

"*Regulated Substances*" means "petroleum" and "petroleum-based substances" or any similar terms described or defined in any of the Environmental Laws and any applicable federal, state, county or local laws applicable to or regulating USTs.

"*REIT*" means a real estate investment trust as defined under Section 856 of the Code.

"*Rejectable Offer*" has the meaning set forth in Section 18.C(ii)(3).

"*Rejectable Purchase Closing Date*" has the meaning set forth in Section 45.C(ii).

"*Rejectable Purchase Offer*" has the meaning set forth in Section 45.A.

"*Release*" means any presence, release, deposit, discharge, emission, leaking, spilling, seeping, migrating, injecting, pumping, pouring, emptying, escaping, dumping, disposing or other movement of Hazardous Materials, Regulated Substances or USTs.

"*Remediation*" means any response, remedial, removal, or corrective action, any activity to cleanup, detoxify, decontaminate, contain or otherwise remediate any Hazardous Materials, Regulated Substances or USTs, any actions to prevent, cure or mitigate any Release, any action to comply with any Environmental Laws or with any permits issued pursuant thereto, any inspection, investigation, study, monitoring, assessment, audit, sampling and testing, laboratory or other analysis, or any evaluation relating to any Hazardous Materials, Regulated Substances or USTs.

"*Rental*" means, collectively, the Base Annual Rental and the Additional Rental.

"*Rent Adjustment*" has the meaning set forth in Section 4.B.

"*Requisition*" means any temporary requisition or confiscation of the use or occupancy of the Property by any Governmental Authority, civil or military, whether pursuant to an agreement with such Governmental Authority in settlement of or under threat of any such requisition or confiscation, or otherwise.

"*Securities*" has the meaning set forth in Section 38.

"*Securities Act*" has the meaning set forth in Section 31.B(iv).

"*Securitization*" has the meaning set forth in Section 38.A.

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423 Macarso Dr., Reno, NV
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"*Seller*" means the Seller of the Property, as identified in the Purchase and Sale Agreement.

"*Subject Purchase Price*" has the meaning set forth in Section 45.A.

"*Successor Lessor*" has the meaning set forth in Section 21.

"*Taking*" means (a) any taking or damaging of all or a portion of the Property (i) in or by condemnation or other eminent domain proceedings pursuant to any Law, general or special, or (ii) by reason of any agreement with any condemnor in settlement of or under threat of any such condemnation or other eminent domain proceeding, or (iii) by any other means, or (b) any de facto condemnation. The Taking shall be considered to have taken place as of the later of the date actual physical possession is taken by the condemnor, or the date on which the right to compensation and damages accrues under the law applicable to the Property.

"*Termination Notice*" has the meaning set forth in Section 18.C(ii).

"*Third Party Offer*" has the meaning set forth in Section 45.A.

"*Threatened Release*" means a substantial likelihood of a Release which requires action to prevent or mitigate damage to the soil, surface waters, groundwaters, land, stream sediments, surface or subsurface strata, ambient air or any other environmental medium comprising or surrounding the Property which may result from such Release.

"*Total Casualty*" has the meaning set forth in Section 18.C.

"*Total Condemnation*" has the meaning set forth in Section 18.C.

"*Transaction*" has the meaning set forth in Section 23.A.

"*Transaction Documents*" means this Lease, the Purchase and Sale Agreement, the Guaranty and all documents related thereto.

"*USTs*" means any one or combination of tanks and associated product piping systems used in connection with storage, dispensing and general use of Regulated Substances.

EXHIBIT B

LEGAL DESCRIPTION OF PROPERTY

Parcel 1 of Parcel Map No. 4115, for TC SIERRA CORPORATE CENTER, INC.,
recorded as File No. 2957508 in the Official Records of Washoe County, Nevada, on November
21, 2003.

4810-5283-6312.4
Sprint/PRIME
4935 Mecum Dr., Reno, NV
File No. 5734/02-5039

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EXHIBIT C
ASSIGNED LEASES

Name of Lease	Original Lessor	Original Lessee	Date	Suite Number at the Property	Miscellaneous
Lease Agreement	Dry Creek Partners, LLC	Dennis Banks Construction Co.	October 7, 2004	102	6,236 square feet
Lease Agreement	Dry Creek Partners, LLC	McGinley & Associates, Inc.	October 7, 2004	202	3,058 square feet
Lease Agreement	Dry Creek Partners, LLC	Winners Gaming Inc.	October 7, 2004	100	4,630 square feet

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Spiriv/DHJ
425 Maestro Dr., Reno, NV
File No. 5734/02-3029

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EXHIBIT C
HINCKLEY NOTE

(See attached.)

FINAL EXECUTION VERSION
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The indebtedness evidenced by this instrument is subordinated to the prior payment in cash in full of all Bank Debt (as defined in the Payment Subordination Agreement, dated as of June 28, 2007) pursuant to, and to the extent provided in, the Payment Subordination Agreement by the maker hereof and payee named herein in favor of the Lender therein named and its successors and assigns.

PROMISSORY NOTE

\$4,467,627.07

June 28, 2007

FOR VALUE RECEIVED, JH, Inc., a Nevada corporation ("Maker"), promises to pay to the order of Arthur T. Hinckley ("Payee"), selling parties' representative pursuant to Section 12.14 of the Stock and Asset Purchase and Sale Agreement and Escrow Instructions dated July 27, 2005 (the "Prior Stock Agreement") between Paul A. Morabito & Co., Limited ("PAMCo"), a Nevada corporation, as buyer, and Barry-Hinckley Industries ("BHI"), Nevada Corporation, et. al., as seller in lawful mosaic of the United States of America, the principal sum of four million four hundred sixty-seven thousand six hundred twenty-seven dollars and 07/100 (\$4,467,627.07) together with interest accrued thereon as provided below. Notwithstanding any other provision of this Note, Maker shall have no obligation to make any payment or otherwise under this Note to any person or entity other than Arthur T. Hinckley, or the successor to Arthur T. Hinckley as selling parties' representative under the Prior Stock Purchase Agreement, including any other parties to the Prior Stock Agreement and any of the Prior Payees (as defined below).

This Note has been executed and delivered pursuant to and in accordance with the terms and conditions of the Amended and Restated Stock Purchase Agreement, made as of June 28, 2007, by and among PAMCo, as seller, Paul A. Morabito, Edward Bayuk, Salvatore Morabito and Trevor Lloyd, as the shareholders of PAMCo, Maker, as buyer, and Jerry Horbat, as guarantor (the "Agreement"). Capitalized terms used in this Note without definition shall have the respective meanings set forth in the Agreement, except that "Credit Agreement" shall have the meaning set forth in the Payment Subordination Agreement, dated as of the date hereof, between Payee and Maker's lender with regard to this Note. Two Promissory Notes, in the respective amounts of \$3,837,400.00 dated September 30, 2005 (the "First Note") and \$5,000,000 dated October 13, 2005 (the "Second Note"; collectively, with the First Note, the "Prior Notes") made by PAMCo, BHI and Tibarom Inc. (collectively, the "Prior Makers") to BHE, LLC, a Nevada limited liability company; Langley Center Partners, L.L.C., a Nevada limited liability company; Hinckley-Smith, L.L.C., a Nevada limited liability company; 2060 Hinckley Community Trust; MJB-EBD, L.L.C., a Nevada limited liability company; Gregory J. Berry; Michael J. Berry; Arthur T. Hinckley; Carol Hinckley Smith, Trustees of the Carol Hinckley Trust; Ward W. Hinckley; and Steven S. Johnson, Trustees of the Steven S. Johnson Trust (collectively, the "Prior Payees") were made and delivered pursuant to the Prior Stock Agreement. The First Note was previously replaced and substituted with a new note such that the Prior Makers were discharged and released fully from any obligation under such First Note, except for certain accrued interest thereunder for which the Prior Makers remained liable. This Note is given in full replacement and substitution for

such accrued interest under the First Note and for the Second Note in whole. By acceptance of this Note, Payee, on behalf of the Prior Payees, releases the Prior Makers fully from all obligations of any sort or kind under the Prior Notes.

1. PAYMENTS

1.1 PRINCIPAL AND INTEREST

This Note will accrue interest on the principal balance outstanding from time to time at the rate of eight (8%) percent per annum, and all accrued and unpaid interest shall be payable in arrears on the first day of each April, July, October, and January, beginning July 1, 2007; provided, however, that at any such interest payment date for which the Adjusted Cash Flow Coverage Ratio (as defined below) of Maker for the latest four fiscal quarters for which the Adjusted Cash Flow Coverage Ratio has been determined under the Credit Agreement is less than 1.35:1, Maker shall only be required to pay in cash 30% of the interest payment then due and the balance shall be accrued and added to principal balance of this Note and such accrued interest added to principal shall accrue interest at the rate applicable under this Note. Interest shall be calculated on the principal balance of this Note on the basis of a year of 365 or 366 days, as applicable, and charged for the actual number of days elapsed. This Note will mature and the principal balance of this Note and all accrued and unpaid interest shall be due and payable in full on December 31, 2012. During the existence and continuance of an Event of Default, this Note shall bear interest at the rate of 12% per annum. As used in this paragraph, "Adjusted Cash Flow Coverage Ratio" shall have the meaning set forth in the Credit Agreement (as in effect on the date hereof and as set forth, together with related definitions from the Credit Agreement, on Annex A hereto), determined as of the latest fiscal quarter for which financial statements and a compliance certificate have been delivered under Section 5.08(a) of the Credit Agreement.

1.2 MANNER OF PAYMENT

All payments of principal and interest on this Note shall be made by wire transfer of immediately available funds to the following account: Wells Fargo Bank, 5340 Kietzke Lane, Suite 100, Reno, Nevada 89511, Account of Berry-Hinckley Liquidation Trust, Routing Number: 121000248, Account Number: 3032045589, or at such other place in the United States of America as Payee shall designate to Maker in writing. If any payment of principal or interest on this Note is due on a day that is not a Business Day, such payment shall be due on the next succeeding Business Day, and such extension of time shall be taken into account in calculating the amount of interest payable under this Note. "Business Day" means any day other than a Saturday, Sunday or legal holiday in the State of Nevada.

1.3 PREPAYMENT

Maker may, without premium or penalty, at any time and from time to time, prepay all or any portion of the outstanding principal balance due under this Note, provided that each such prepayment is accompanied by accrued interest on the amount of principal prepaid calculated to the date of such prepayment. Any partial prepayments shall be applied to installments of principal in inverse order of their maturity. In the

event of a sale of all or substantially all of the assets of Berry-Hinckley Industries to a party un-affiliated with Maker, Maker shall be required to, without premium or penalty, prepay all of the outstanding principal balance due under this Note plus all accrued interest calculated to the date of such prepayment.

2. DEFAULTS

2.1 EVENT OF DEFAULT

At the option of Payee, this Note shall become immediately due and payable without notice or demand upon the occurrence at any time of any of the following events of default (each, an "Event of Default"): (1) default of any liability, obligation, covenant or undertaking of Maker to Payee hereunder, including, without limitation, failure to pay in full any installment of principal or interest when due and the continuation of such failure for a period of ten (10) days; (2) default of any material liability, obligation or undertaking of Maker under the Credit Agreement, as defined in the Payment Subordination Agreement, dated as of the date hereof, between Payee and First National Bank of Nevada with regard to this Note; (3) default of any material liability, obligation or undertaking of Guarantor (as hereinafter defined) under the Guaranty Agreement executed as of the date hereof in favor of Payee and the continuation of such default for a period of ten (10) days after notice thereof has been given by Maker to Guarantor; (4) if Maker, any endorser or any guarantor hereof is a corporation, trust, partnership or limited liability company, the liquidation, termination, dissolution or sale of all or any portion of any such organization (other than a sale to an affiliate of such Maker, endorser or guarantor), or the merger or consolidation of such organization into another entity (other than a merger or consolidation with an affiliate of such Maker, endorser or guarantor), or its ceasing to carry on actively its present business or the appointment of a receiver for its property; (5) the death of the Maker, any endorser or any guarantor hereof unless in the case of the death of a Guarantor, a guaranty from a substitute individual or individuals acceptable to Payee in its discretion is provided within fifteen days of the death of any Guarantor; (6) the institution by or against Maker, any endorser or any guarantor hereof of any proceedings under the Bankruptcy Code 11 USC §101 *et seq.* or any other law in which Maker, any endorser or any guarantor hereof is alleged to be insolvent or unable to pay its debts as they mature, or the making by Maker, any endorser or any guarantor hereof of an assignment for the benefit of creditors or the granting by Maker, any endorser or any guarantor hereof of a trust mortgage for the benefit of creditors; (6) the service upon Payee of a writ in which a receiver is named as trustee of Maker, any endorser or any guarantor hereof; or (7) a judgment or judgments for the payment of money in excess of \$100,000.00 shall be rendered against Maker, any endorser or any guarantor hereof, and any such judgment shall remain unsatisfied and in effect for any period of thirty (30) consecutive days without a stay of execution; or (8) the termination or revocation of any guaranty hereof.

2.2 REMEDIES

Upon the occurrence of an Event of Default hereunder, Payee may, at his option, (i) by written notice to Maker, declare the entire unpaid principal balance of this Note, together with all accrued interest thereon, immediately due and payable regardless of any prior forbearance and (ii) exercise any and all rights and remedies available to him

under applicable law, including, without limitation, the right to collect from Maker all sums due under this Note. Maker shall pay all costs and expenses incurred by or on behalf of Payee in connection with Payee's exercise of any or all of his rights and remedies under this Note, including, without limitation, reasonable attorneys' fees.

3. MISCELLANEOUS

3.1 WAIVER

The rights and remedies of Payee under this Note shall be cumulative and not alternative. No waiver by Payee of any right or remedy under this Note shall be effective unless in writing signed by Payee. Neither the failure nor any delay in exercising any right, power or privilege under this Note will operate as a waiver of such right, power or privilege, and no single or partial exercise of any such right, power or privilege by Payee will preclude any other or further exercise of such right, power or privilege or the exercise of any other right, power or privilege. To the maximum extent permitted by applicable law, (a) no claim or right of Payee arising out of this Note can be discharged by Payee, in whole or in part, by a waiver or renunciation of the claim or right unless in a writing signed by Payee; (b) no waiver that may be given by Payee will be applicable except in the specific instance for which it is given; and (c) no notice to or demand on Maker will be deemed to be a waiver of any obligation of Maker or of the right of Payee to take further action without notice or demand as provided in this Note. Maker hereby waives presentment, demand, protest and notice of dishonor and protest.

3.2 NOTICES

Any notice required or permitted to be given hereunder shall be given (a) if to Payee, at 65 Hidden Lake Drive, Reno NV 89521 and (b) if to Maker, at 5195 Las Vegas Boulevard, Las Vegas, Nevada 89119.

3.3 SEVERABILITY

If any provision in this Note is held invalid or unenforceable by any court of competent jurisdiction, the other provisions of this Note will remain in full force and effect. Any provision of this Note held invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held invalid or unenforceable.

3.4 GOVERNING LAW

This Note will be governed by and construed under the laws of the State of Nevada without regard to conflicts-of-law principles that would require the application of any other law.

3.5 PARTIES IN INTEREST

The interest of Payee in this Note may be sold, encumbered, assigned or transferred by Payee without the need for any consent or approval of Maker, including the transfer of any interest of Payee to a successor selling parties' representative under the Prior Stock Agreement without Maker's consent. This Note will be binding in all respects upon Maker and inure to the benefit of Payee and his successors, assigns and

estate. Payee may designate, in writing, and by notice to Maker, an agent to give notices and to prosecute remedies hereunder, on behalf of Payee.

3.6 SECTION HEADINGS; CONSTRUCTION

The headings of Sections in this Note are provided for convenience only and will not affect its construction or interpretation. All references to "Section" or "Sections" refer to the corresponding Section or Sections of this Note unless otherwise specified. All words used in this Note will be construed to be of such gender or number as the circumstances require. Unless otherwise expressly provided, the words "hereof" and "hereunder" and similar references refer to this Note in its entirety and not to any specific section or subsection hereof, the words "including" or "includes" do limit the preceding words or terms and the word "or" is used in the inclusive sense.

3.7 GUARANTEES

The obligations of Maker hereunder are unconditionally guaranteed by Jerry Herbst ("Guarantor"), as more particularly set forth in a Guaranty Agreement executed as of the date hereof.

[signature page follows]

IN WITNESS WHEREOF, Maker has executed and delivered this Note as of the date first stated above.

MAKER:


IH, Inc.

By: 

Name: Jerry Herbst

Title: President

PAYEE:


Arthur T. Hinkley

[Signature Page to Promissory Note]

WL002278
JHERBST000091

IN WITNESS WHEREOF, Maker has executed and delivered this Note as of the date first stated above.

MAKER:

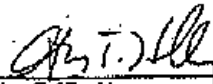
PH, Inc.

By: _____

Name: Jerry Herbst

Title: President

PAYEE:



Arthur T. Hinckley

[Signature Page to Promissory Note]

WL002279
JHERBST000092

ANNEX A

DEFINITIONS FROM THE CREDIT AGREEMENT AND USED TO DEFINE
ADJUSTED CASH FLOW COVERAGE RATIO FOR PURPOSES OF THE
ATTACHED PROMISSORY NOTE

"Adjusted Cash Flow" shall mean with reference to the Borrower Consolidation for any fiscal period under review, Annualized EBITDA for such period, plus (i) Make Well Contributions, less (ii) Distributions, less (iii) the aggregate amount of Non-Financed Capital Expenditures, in each case of (i) through (iii) above (other than as otherwise provided in the definition of Make Well Contributions), determined for a fiscal period consisting of the Fiscal Quarter under review together with the most recently ended three preceding Fiscal Quarters.

"Adjusted Cash Flow Coverage Ratio" as of the end of any Fiscal Quarter shall mean, with reference to the Borrower Consolidation, (a) Adjusted Cash Flow divided by (b) the sum of: (i) the aggregate amount of interest expense (expensed and capitalized), including, without limitation, cash interest payments on subordinated debt, plus (ii) the aggregate of scheduled reduction payments of the revolving credit facility under the Credit Agreement, plus (iii) the aggregate amount of scheduled payments of the term loan facility under the Credit Agreement and principal amortization required to be made on all other indebtedness, plus (iv) the aggregate amount of principal amortization required to be made on all capitalized lease liabilities, in each case of (i) through (iv) determined for a fiscal period consisting of the Fiscal Quarter under review together with the most recently ended three (3) preceding Fiscal Quarters.

"Annualized EBITDA" shall mean with reference to the Borrower Consolidation (including WGI after its acquisition), as of the last day of each Fiscal Quarter, the sum of (a) EBITDA for the fiscal period consisting of that Fiscal Quarter and the three (3) immediately preceding Fiscal Quarters, and (b) with respect to any Fiscal Quarter during which the Opening Date of any BHI Development Project or the WGI acquisition occurs, if the Borrower Consolidation has operated such BHI Development Project for at least thirty (30) days during such Fiscal Quarter or the WGI acquisition occurs at least thirty (30) days during such Fiscal Quarter, the EBITDA realized by the BHI Development Project or by WGI, as applicable, during such Fiscal Quarter shall be divided by the actual number of days of operation and the quotient multiplied by three hundred sixty-five (365) to reflect the annualization of EBITDA realized by the BHI Development Project or by WGI, as applicable, during such Fiscal Quarter, and (c) with respect to any such fiscal period in which the Borrower Consolidation has operated any BHI Development Project or WGI has been a member of the Borrower Consolidation for at least one (1) full Fiscal Quarter but less than four (4) full Fiscal Quarters, such amount as is necessary to reflect the annualization of EBITDA realized by the BHI Development Project or by WGI, as applicable, using the following calculations:

- (i) If the Borrower Consolidation has operated the BHI Development Project for one (1) full Fiscal Quarter, the EBITDA attributable to such BHI Development Project for that Fiscal Quarter shall be multiplied by four (4);

(ii) if the Borrower Consolidation has operated the BHI Development Project for two (2) full Fiscal Quarters, the EBITDA attributable to such BHI Development Project for those Fiscal Quarters shall be multiplied by two (2);

(iii) if the Borrower Consolidation has operated the BHI Development Project, as applicable, for three (3) full Fiscal Quarters, the EBITDA attributable to such BHI Development Project for those Fiscal Quarters shall be multiplied by four-thirds (4/3);

(iv) if the Borrower Consolidation has operated WGI for one (1) full Fiscal Quarter, the EBITDA attributable to WGI for that Fiscal Quarter shall be multiplied by four (4);

(v) if the Borrower Consolidation has operated WGI for two (2) full Fiscal Quarters, the EBITDA attributable to WGI for those Fiscal Quarters shall be multiplied by two (2); and

(vi) if the Borrower Consolidation has operated WGI, as applicable, for three (3) full Fiscal Quarters, the EBITDA attributable to WGI for those Fiscal Quarters shall be multiplied by four-thirds (4/3).

"BHI" shall mean Barry-Hinckley Industries, a Nevada corporation.

"BHI Development Project" shall mean individual reference and BHI Development Projects" shall mean collective reference to the convenience stores to be developed, constructed and completed on by BHI at the ten (10) BHI leaseholds upon which the BHI Development Projects are to be developed and constructed, which BHI Development Leaseholds are described on a schedule to the Credit Agreement.

"Borrower Consolidation" shall mean collective reference to Borrowers on a consolidated basis, without regard to any other subsidiaries or affiliates.

"Borrowers" shall mean JH, Inc., a Nevada corporation, the Herbst Gaming Trust created by Agreement dated March 19, 2003, BHI, and (from and after its acquisition) WGI.

"Distributions" shall mean and collectively refer to any and all cash dividends and other distributions on stock and/or membership interests made by any member of the Borrower Consolidation to any person that is not a member of the Borrower Consolidation, loans to any member of the Herbst Family Group, payments on Related Party Debt or other advances to any member of the Herbst Family Group, or any Related Entity, of any kind or character whatsoever; but shall not include (i) consideration paid for tangible and intangible assets in an arms length exchange for fair market value, trade payments made and other payments for liabilities incurred in the ordinary course of business, (ii) salary and other compensation to officers, directors and employees of the Borrower Consolidation in the ordinary course of business, or (iii) interest payments on subordinated debt.

"EBITDA" shall mean with reference to any person, for any fiscal period under review, the sum of (i) Net Income for that period, less (ii) any one-time non-cash gain reflected in such Net Income, plus (iii) any losses on sales of assets and other extraordinary losses and one-time non-cash charges, plus (iv) Interest Expense (expensed and capitalized) for that period, plus (v) the aggregate amount of federal and state taxes on or measured by income for that period (whether or not payable during that period), plus (vi) depreciation, amortization and all other non-cash expenses for that period, plus (vii) prepaying expenses for that period, in each case determined in accordance with GAAP and, in the case of items (ii), (iv), (v), (vi) and (vii), only to the extent deducted in the determination of Net Income for that period.

"Equity Contribution" shall mean collective reference to the voluntary contribution of cash into the Borrower Consolidation in exchange for additional membership interests so long as such contribution is not subject to any return of such capital, except to the extent permitted with respect to Distributions as provided in Section 6.06 of the Credit Agreement.

"Fiscal Quarter" shall mean the consecutive three (3) month periods during each Fiscal Year beginning on January 1, April 1, July 1 and October 1 and ending on March 31, June 30, September 30 and December 31, respectively.

"Fiscal Year" shall mean the fiscal year period beginning January 1 of each calendar year and ending on the following December 31.

"GAAP" means generally accepted accounting principles set forth in the opinions and pronouncements of the Accounting Principles Board and the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board, or in such other statements by such other entity as may be in general use by significant segments of the accounting profession, which are applicable to the circumstances as of the date of determination.

"Herbst Family Group" shall mean collective reference to Jerry B. Herbst, Edward J. Herbst, Timothy P. Herbst, Tracy D. Herbst, their respective spouses, children, and grandchildren and their respective executors, administrators, heirs, legatees and beneficiaries.

"Make Well Contributions" shall mean Equity Contributions received by the Borrower Consolidation which shall be added to Adjusted Cash Flow as of any Fiscal Quarter end so long as such Equity Contributions are: (i) received by the Borrower Consolidation in cash, and (ii) received by the Borrower Consolidation no later than the earlier to occur of (x) the forty-fifth (45th) day following the applicable Fiscal Quarter end, or (y) the date upon which the compliance certificate submitted by the Borrower Consolidation for such Fiscal Quarter is delivered to the Lender under the Credit Agreement. In no event shall any Make Well Contribution be added to Adjusted Cash Flow in connection with the Adjusted Fixed Charge Coverage Ratio calculation for more than four (4) consecutive Fiscal Quarter ends.

"Net Income" shall mean with respect to any person for any fiscal period, the net income of such person during such fiscal period determined in accordance with GAAP, consistently applied.

"Non-Financed Capital Expenditures" shall mean capital expenditures which are paid by the Borrower Consolidation from its assets and not from the Credit Agreement or through any other loan, credit arrangement, lease or financing from any source.

"Related Entity" shall mean individual reference to and "Related Entities" shall mean collective reference to the Herbst Family Group and all shareholders, affiliates and subsidiaries of any Borrower or of any member of the Herbst Family Group.

"Related Party Debt" shall mean indebtedness owing to any member of the Borrower Consolidation by any Related Entity.

"WGI" shall mean Winner's Gaming, Inc., a Nevada corporation

GUARANTY AGREEMENT

On this 29 day of June, 2007, for consideration of Art Hinckley, selling parties' representative pursuant to Section 12.14 of the Stock and Asset Purchase and Sale Agreement and Escrow Instructions dated July 27, 2005 between Paul A. Morabito & Co., Limited, a Nevada corporation, as buyer, and Berry-Hinckley Industries, a Nevada Corporation, et. al., as seller, (including any successor selling parties' representative under said Stock and Asset Purchase and Sale Agreement and Escrow Instructions, "Creditor") agreeing to extend credit to JH, Inc., a Nevada corporation having its chief executive office at 5195 Las Vegas Boulevard, Las Vegas, Nevada 89119, ("Debtor") and for other valuable consideration, the receipt of which is acknowledged, the undersigned, Jetry Harbert, an individual with a business address at 5195 Las Vegas Boulevard, Las Vegas, Nevada 89119, ("Guarantor") agrees with Creditor as follows:

1. **DEFINITIONS.** In this Guaranty Agreement (this "Agreement"):

a. "Claim" means any claim, however asserted and whether now existing or hereafter arising, for the recovery of any money heretofore or hereafter received, applied or retained by Creditor in payment or satisfaction of any of the Obligations (including, but not limited to, any such claim involving any allegation that any money constituted trust funds or that the receipt, application or retention of any money constituted a preference or fraudulent conveyance or transfer).

b. "Obligations" means collectively all obligations for the payment of money pursuant to a certain Promissory Note dated June 29, 2007 in the original principal amount of \$4,467,627.07 that are now or hereafter owing to Creditor by Debtor.

c. "Person" means (i) any individual, corporation, partnership, trust, unincorporated association, government or political subdivision, (ii) any court, agency or other governmental body or (iii) any other entity, organization or group.

2. **GUARANTY.** Guarantor guarantees, without any setoff or other deduction, the payment when due, whether by acceleration or lapse of time or otherwise, of the Obligations, without any limitation as to amount. Such guaranty is a continuing, absolute and unconditional guaranty and a guaranty of payment rather than collection.

3. **INDEMNIFICATION.** Guarantor shall indemnify Creditor on demand, without any limitation as to amount, against each liability, cost and expense (including, but not limited to, if Creditor retains counsel for advice, litigation or any other purpose, reasonable attorneys' fees and disbursements) heretofore or hereafter incurred by Creditor as a result of any Claim.

4. **EXPENSES.** Guarantor shall pay to Creditor on demand each cost and expense (including, but not limited to, if Creditor retains counsel for advice, litigation or any other purpose, reasonable attorneys' fees and disbursements) heretofore incurred by Creditor in endeavoring to enforce any obligation of Guarantor pursuant to this Agreement or preserve or

exercise any right or remedy against Guarantor pursuant to this Agreement or arising as a result of this Agreement.

5. **FURNISHING OF INFORMATION.** Promptly upon the request of Creditor, Guarantor shall furnish to Creditor a letter from Guarantor's accounting firm setting forth the net worth of Guarantor as of the end of the prior calendar year.

6. **REINSTATEMENT OF OBLIGATIONS.** Each portion of the Obligations heretofore or hereafter paid or satisfied by any money that has been heretofore or is hereafter received, applied or retained by Creditor and is later recovered from Creditor as a result of any Claim shall be reinstated as part of the Obligations for purposes of this Agreement as of the date it originally arose or accrued.

7. **TERMINATION.** This Agreement shall remain in full force and effect until, and shall terminate only upon, the final and irrevocable payment of (i) each of the Obligations, (ii) each liability, cost and expense that Guarantor is obligated to pay pursuant to Section 3 of this Agreement with respect to any Claim theretofore or thereafter arising with respect to any of the Obligations and (iii) each cost and expense that Guarantor is obligated to pay pursuant to Section 4 of this Agreement, whether theretofore or thereafter arising.

8. **WAIVER OF RIGHT OF SUBROGATION AND SIMILAR RIGHTS.** Guarantor irrevocably waives, without any notice, each right of subrogation, indemnification, reimbursement or contribution, and each similar right, against Debtor heretofore or hereafter arising in connection with this Agreement or any of the Obligations until Creditor receives full and final payment of the Obligations.

9. **CERTAIN CONSENTS AND WAIVERS.**

a. Except to the extent expressly provided in this Agreement, this Agreement shall not be modified or terminated, no obligation of Guarantor pursuant to this Agreement and no right or remedy of Creditor pursuant to this Agreement or arising as a result of this Agreement shall be impaired or otherwise adversely affected, and no such right or remedy shall be waived, by any act, omission or other thing, whether heretofore occurred or hereafter occurring. Guarantor irrevocably consents, without any notice, to each act, omission and other thing, whether heretofore occurred or hereafter occurring, that would or might, but for such consent, modify or terminate this Agreement, impair or otherwise adversely affect any such obligation, right or remedy or operate as a waiver of any such right or remedy. Without limiting the generality of the preceding two sentences, this Agreement shall not be modified or terminated by, no such obligation, right or remedy shall be impaired or otherwise adversely affected by, no such right or remedy shall be waived by, and such consent shall apply to, whether heretofore occurred or hereafter occurring, (i) any extension, renewal, refinancing or other modification or replacement, assignment, compromise, cancellation, discharge, invalidity, impairment, unenforceability or change in any term or condition of, any defense with respect to, or any grant of any participation in, any of the Obligations or any obligation of Debtor or any

other Person, (ii) any acceptance of any other Person, (iii) any exercise or waiver of, any failure or delaying to exercise, any forbearance from exercising, or any notice prior to exercising, any right or remedy of Creditor or any other Person relating to any of the Obligations or against Debtor, Guarantor or any other Person, (iv) any case or other proceeding pursuant to any bankruptcy, insolvency or similar statute with respect to Debtor, Guarantor or any other Person, (v) any failure of Creditor or any other Person to make, prove or vote any claim relating to any of the Obligations, or any failure of any such claim to be allowed, in any case or other proceeding pursuant to any bankruptcy, insolvency or similar statute, (vi) the Obligations being at any time or from time to time paid in full or reduced and then increased or exceeding any amount, (vii) any refusal or other failure of Creditor or any other Person to grant any or any additional credit or other financial accommodation to Debtor, Guarantor or any other Person or provide to Guarantor any or complete and accurate information relating to Debtor or any other Person or the business, operations, assets, affairs or condition (financial or other) of Debtor or any other Person, (viii) any notice to Creditor or any other Person from Guarantor or any other Person not to grant any or any additional credit or other financial accommodation to Debtor or to take or not to take any other action, (ix) the acceptance by Creditor or any other Person of any writing intended by Debtor or any other Person to create an accord and satisfaction with respect to any of the Obligations or any obligation of Debtor, Guarantor or any other Person, (x) the manner or order of application of any money applied in payment of any of the Obligations, (xi) any change in the ownership, membership, location, business, name, identity or structure of Debtor or any other Person or (xii) the execution and delivery to Creditor by Guarantor of any agreement of guaranty other than this Agreement.

b. Guarantor irrevocably waives, without any notice, each act and other thing upon which, but for such waiver, any obligation of Guarantor pursuant to this Agreement or any right or remedy of Creditor pursuant to this Agreement or arising as a result of this Agreement would or might be conditioned. Without limiting the generality of the preceding sentence, no such obligation, right or remedy shall be conditioned upon, and such waiver shall apply to, (i) the acceptance of this Agreement by Creditor, (ii) any demand upon or presentment or protest to Debtor, Guarantor or any other Person, (iii) any exercise of any right or remedy of Creditor or any other Person relating to any of the Obligations or against Debtor, Guarantor or any other Person or (iv) any notice to Debtor, Guarantor or any other Person of the acceptance of this Agreement by Creditor, any incurring or nonpayment of any of the Obligations, any event or condition of default relating to any of the Obligations, any exercise of any right or remedy of Creditor or any other Person relating to any of the Obligations or against Debtor, Guarantor or any other Person, any action taken or not taken by Creditor or any other Person or any other matter.

c. Upon an Event of Default by Debtor in respect to any of the Obligations, a separate action or actions may be brought or prosecuted against Guarantor irrespective whether action is brought against Debtor or whether Debtor be joined in any such action or actions.

10. MISCELLANEOUS:

a. The execution, delivery to Creditor and performance of this Agreement by Guarantor shall not modify or terminate any other agreement or instrument (including, but not limited to, any agreement of guaranty) by which Debtor, Guarantor or any other Person is bound or impair or otherwise adversely affect any obligation of Debtor, Guarantor or any other Person pursuant to any such other agreement or instrument.

b. Any notice required or permitted to be given under this Agreement shall be given (i) if to Guarantor, at the address set forth in the introductory paragraph of this Agreement and (ii) if to Creditor, at 65 Hidden Lake Drive, Reno NV 89521.

c. This Agreement shall be binding upon Guarantor and each legal representative, successor and assigns of Guarantor, and shall inure to the benefit of and be enforceable by Creditor and each successor and assignee of Creditor.

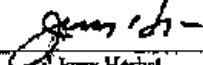
d. This Agreement contains the entire agreement between Creditor and Guarantor with respect to the subject matter of this Agreement, and supercedes each action heretofore taken or not taken, each course of conduct heretofore pursued, accepted or acquiesced in, and each oral or written agreement and representation heretofore made, by or on behalf of Creditor with respect thereto. No action heretofore or hereafter taken or not taken, no course of conduct heretofore or hereafter pursued, accepted or acquiesced in, no oral or written agreement or representation heretofore made, and no oral agreement or representation hereafter made, by or on behalf of Creditor shall modify or terminate this Agreement, impair or otherwise adversely affect any obligation of Guarantor pursuant to this Agreement or any right or remedy of Creditor pursuant to this Agreement or arising as a result of this Agreement or operate as a waiver of any such right or remedy. No modification of this Agreement or waiver of any such right or remedy shall be effective unless made in writing duly executed by Creditor and specifically referring to such modification or waiver.

e. All rights and remedies of Creditor pursuant to this Agreement or arising as a result of this Agreement shall be cumulative, and no such right or remedy shall be exclusive of any other such right or remedy.

f. Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law. If, however, any such provision shall be prohibited by or invalid under such law, it shall be deemed modified to conform to the minimum requirements of such law, or, if for any reason it is not deemed so modified, it shall be prohibited or invalid only to the extent of such prohibition or invalidity without the remainder thereof or any other such provision being prohibited or invalid.

g. This Agreement shall be governed by and construed, interpreted and enforced in accordance with the internal law of the State of Nevada, without regard to principles of conflict of laws.

b. Guarantor hereby consents to submit himself to the personal jurisdiction of the applicable courts of the State of Nevada located within Washoe County in the Nevada District. Any claim, demand, action, suit, litigation or dispute arising out of or relating to this Agreement shall be litigated in those courts.



Jerry Herbst

**EXHIBITS
D through G**

FILED UNDER SEAL

**EXHIBITS
D through G**

WL002289
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EXHIBIT H
TOLLING AGREEMENT

(See attached.)

FINAL EXECUTION VERSION
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TOLLING AGREEMENT

This TOLLING AGREEMENT is entered into by and between JH, Inc. ("JH"), JERRY HERBST ("Herbst") and THE EDWARD W. BAYUK LIVING TRUST ("The Bayuk Trust"). JH and Herbst are collectively referred to herein as the "Herbst Parties." The Bayuk Trust and the Herbst Parties are collectively referred to herein as the "Parties."

RECITALS:

A. JH, and P.A. MORABITO & CO. LTD., a Nevada corporation ("PAMCO") entered into that certain Amended and Restated Stock Purchase Agreement dated June 28, 2007 (the "ARSPA"), whereby JH was to purchase the stock of BERRY-HINCKLEY INDUSTRIES, a Nevada corporation ("BHI") from PAMCO. Herbst was the guarantor of the JH obligations under the ARSPA, and Paul A. Morabito ("Morabito") guaranteed the obligations of PAMCO. CNC is the successor in interest to PAMCO. The transaction contemplated by the ARSPA closed on July 2, 2007.

B. A dispute developed between the Morabito Parties (as that term is defined in the Settlement Agreement to mean CNC and Paul A. Morabito) and the Herbst Parties regarding the sale of the BHI stock to JH. Based thereon, the Morabito Parties filed a lawsuit against the Herbst Parties on December 3, 2007. The lawsuit was captioned Consolidated Nevada Corp., et al. v. JH, et al., and was filed in Department 6 of the Second Judicial District Court in and for the County of Washoe (the "Court"), Case No. CV07-02764 (together with all claims and counterclaims, the "Action").

C. The Herbst Parties filed numerous counterclaims in the Action against the Morabito Parties, including, but not limited to, fraud in the inducement, misrepresentation and breach of contract.

D. The matter was tried before the Honorable Judge Brent Adams by way of a bench trial commencing May 10, 2010 that lasted for several weeks. At the conclusion of the bench trial, the Court found that the Morabito Parties had breached the ARSPA and committed fraud in the inducement and misrepresentation in relation to numerous aspects of the transaction contemplated by the ARSPA. The Court ultimately awarded the Herbst Parties total damages in the amount of One Hundred Forty-Two Million, Five Hundred Ninety-Seven Thousand, Two Hundred Eighty-Eight and 80/100ths Dollars (\$142,597,288.80), representing both compensatory and punitive damages (the "Judgment"). The Judgment was entered by the Court on August 23, 2011. There was also a Determination that the Morabito Parties owed the Herbst Parties \$6.7 million for the working capital of BHI pursuant to the ARSPA.

E. On October 12, 2010, the Court entered its findings of fact and conclusions of law related to the Judgment (the "Findings of Fact and Conclusions of Law"). The Findings of Fact and Conclusions of Law outlined the factual and legal basis for the Judgment.

F. The Herbst Parties contend that prior to and after the Court's oral pronouncement of judgment, Morabito undertook numerous fraudulent transfers and conveyances in an effort to conceal assets and render himself judgment proof. Morabito denies such allegations. Notwithstanding the denial by Morabito, the Herbst Parties believe they possess valid claims against CNC, Morabito, individually and in his capacity as Trustee of the Arcadia Living Trust,

G. The Herbst Parties and the Morabito Parties agreed to settle the Action, and, on November 30, 2011 executed the Settlement Agreement and Mutual Release ("Settlement Agreement"). As part of the Settlement, CNC and Morabito executed a Confession of Judgment, to be filed in the event that the Morabito Parties default under the Settlement Agreement and such default is not cured by the Morabito Parties.

1. The above Recitals A through G above, are hereby incorporated by reference entirely herein and expressly agreed to by the Parties.

3. In exchange, the Herbst Parties hold in abeyance all claims against The Bayuk Trust related to the alleged transfers referred to in Recital F, including but not limited to, the Fraudulent Conveyance Claims, pending the full and complete performance of each and every of the Morabito Parties' obligations under the Settlement Agreement or entry of the Confession of Judgment, whichever is first to occur.

[illegible]

4. The Herbst Parties shall have no obligation to hold in abeyance any claim related to the Action against any of the foregoing individuals or entities that fail to deliver a duly executed Tolling Agreement within sixty (60) days of Closing.

THE EDWARD W. BAYUK LIVING TRUST

By: _____

Its: _____

SUBSCRIBED and SWORN to before me

this ____ day of _____, 2011,

by EDWARD W. BAYUK

Notary Public

JH, INC., a Nevada corporation

By: _____

Its: _____

SUBSCRIBED and SWORN to before me

this ____ day of _____, 2011,

by JERRY HERBST.

Notary Public

WL002293
JHERBST000106

JERRY HERBST, an individual

SUBSCRIBED and SWORN to before me

this ____ day of _____, 2011,

by JERRY HERBST,

Notary Public

WL002294
JHERBST000107

1 GORDON SILVER
JOHN P. DESMOND
2 Nevada Bar No. 5618
Email: jdesmond@gordonsilver.com
3 BRIAN R. IRVINE
Nevada Bar No. 7758
4 Email: birvine@gordonsilver.com
100 West Liberty Street
5 Suite 940
Reno, NV 89501
6 Tel: (775) 343-7500
Fax: (775) 786-0131

7 *Attorneys for Defendants/Counter-Claimants*

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

11 CONSOLIDATED NEVADA CORP., et al.,)	CASE NO. CV07-02764
12 Plaintiffs,)	
13 vs.)	DEPT. NO. 6
14 JH, INC., et al.,)	
15 Defendants.)	
<hr/>		
16 JH, INC., et al.,)	
17 Counter-Claimants,)	
18 vs.)	
19 CONSOLIDATED NEVADA CORP., et al.,)	
20 Counter-Defendants.)	
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21
22 **CONFESSION OF JUDGMENT**

23 Defendants/Counter-Claimants JH, INC., JERRY HERBST, and BERRY-HINCKLEY
24 INDUSTRIES, by and through their counsel of record, Gordon Silver, file the attached
25 Confession of Judgment, Exhibit 1 hereto, against Plaintiff/Counter-Defendants,
26 CONSOLIDATED NEVADA CORPORATION, and PAUL A. MORABITO.

27 ///

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 18th day of June, 2013.

GORDON SILVER

/s/ John P. Desmond
JOHN P. DESMOND
Nevada Bar No. 5618
Email: jdesmond@gordonsilver.com
BRIAN R. IRVINE
Nevada Bar No. 7758
Email: birvine@gordonsilver.com
100 West Liberty Street
Suite 940
Reno, NV 89501
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Attorneys for Defendants/Counter-Claimants

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EXHIBIT TABLE

Exhibit	Description	Pages¹
1	Confession of Judgment	20

¹ Exhibit page count is exclusive of exhibit slip sheet.

CERTIFICATE OF SERVICE

I certify that I am an employee of GORDON SILVER, and that on this date, pursuant to NRCP 5(b), I am serving the attached **CONFESSION OF JUDGMENT** on the party set forth below by:

<input checked="" type="checkbox"/>	Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail at Reno, Nevada, postage prepaid, following ordinary business practices
<input type="checkbox"/>	Certified Mail, Return Receipt Requested
<input type="checkbox"/>	Via Facsimile (Fax)
<input type="checkbox"/>	Placing an original or true copy thereof in a sealed envelope and causing the same to be personally Hand-Delivered
<input type="checkbox"/>	Federal Express (or other overnight delivery)
<input type="checkbox"/>	Hand Delivery
<input checked="" type="checkbox"/>	Via E-Mail

addressed as follows:

Barry L. Breslow
Robison, Belaustegui, Sharp and Low
71 Washington Street
Reno, NV 89503
BBreslow@rbsllaw.com

Dennis C. Vacco
Lippes Mathias Wexler Friedman LLP
665 Main Street, Suite 300
Buffalo, New York 14203
dvacco@lippes.com

DATED this 18th day of June, 2013.

/s/ Cindy S. Grinstead
An Employee of GORDON SILVER

FILED
Electronically
06-18-2013:02:03:46 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 3796507

EXHIBIT 1

EXHIBIT 1

WL002299
JHERBST000112

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7 *Attorneys for JH, Inc., Jerry Herbst,*
8 *And Berry-Hinckley Industries*

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

11 JH, INC., a Nevada corporation; JERRY HERBST, CASE NO.:
12 an individual; and BERRY-HINCKLEY
INDUSTRIES, a Nevada corporation, DEPT. NO.:

13 Plaintiffs,

14 vs.

15 CONSOLIDATED NEVADA CORPORATION, a
Nevada corporation; PAUL A. MORABITO, an
16 individual,

17 Defendants.
18

19 CONFESSION OF JUDGMENT

20 RECITALS:

21 A. JH, and P.A. MORABITO & CO. LTD., a Nevada corporation ("PAMCO") entered
22 into that certain Amended and Restated Stock Purchase Agreement dated June 28, 2007 (the
23 "ARSPA"), whereby JH was to purchase the stock of BHI from PAMCO. Herbst was the guarantor
24 of the JH obligations under the ARSPA, and Morabito guaranteed the obligations of PAMCO.
25 CNC is the successor in interest to PAMCO. The transaction contemplated by the ARSPA closed
26 on July 2, 2007.
27
28

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1 B. A dispute developed between the Morabito Parties and the Herbst Parties regarding
2 the sale of the BHI stock to JH. Based thereon, the Morabito Parties filed a lawsuit against the
3 Herbst Parties on December 3, 2007. The lawsuit was captioned Consolidated Nevada Corp., et al.
4 v. JH, et al., and was filed in Department 6 of the Second Judicial District Court in and for the
5 County of Washoe (the "Court"), Case No. CV07-02764 (together with all claims and
6 counterclaims, the "Action").

7
8 C. The Herbst Parties filed numerous counterclaims in the Action against the Morabito
9 Parties, including, but not limited to, fraud in the inducement, misrepresentation and breach of
10 contract.

11
12 D. The matter was tried before the Honorable Judge Brent Adams by way of a bench
13 trial commencing May 10, 2010 that lasted for several weeks. At the conclusion of the bench trial,
14 the Court found that the Morabito Parties had breached the ARSPA and committed fraud in the
15 inducement and misrepresentation in relation to numerous aspects of the transaction contemplated
16 by the ARSPA. The Court ultimately awarded the Herbst Parties total damages in the amount of
17 One Hundred Forty-Nine Million Four Hundred Forty-Four Thousand Seven Hundred Seventy-
18 Seven and 80/100ths Dollars (\$149,444,777.80), representing both compensatory and punitive
19 damages (the "Judgment"). The Judgment was entered by the Court on August 23, 2011.

20
21 E. On October 12, 2010, the Court entered its findings of fact and conclusions or law
22 related to the Judgment (the "Findings of Fact and Conclusions of Law"). The Findings of Fact and
23 Conclusions of Law outlined the factual and legal basis for the Judgment.

24
25 F. The Morabito Parties appealed the Findings of Fact and Conclusions of Law as well
26 as the Judgment to the Nevada Supreme Court as identified by those certain appeals captioned
27 Nevada Supreme Court Case Nos. 54412 and 57943. The Herbst Parties filed numerous cross-
28

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1 appeals in the subject appeals. The appeals filed by the Morabito Parties and the cross appeals filed
2 therein by the Herbst Parties, are collectively referred to herein as the "Appeal."

3 G. The Morabito Parties have represented that they are unable to satisfy the monetary
4 Judgment entered against them in full.

5 H. The Parties agreed to settle the Action, and, on November 30, 2011 executed the
6 Settlement Agreement and Mutual Release ("Settlement").

7 I. As part of the Settlement, the Parties agreed that the Appeals would be vacated as
8 well as the Judgment and the Findings of Fact and Conclusions of Law.

9 J. As part of the Settlement, Consolidated Nevada Corporation ("CNC") and Morabito
10 agree to make the following cash payments to JH, Inc. in addition to other cash payments and
11 assumption of liabilities as referenced in the Settlement.

- 12 o December 1, 2011 - \$2.5 million
- 13 o June 1, 2012 - \$2.5 million
- 14 o March 1, 2013 - \$4 million
- 15 o December 1, 2013 - \$4 million

16 K. As part of the Settlement, beginning on December 1, 2011, CNC and Paul Morabito
17 agreed to assume any and all obligations of the tenant under the lease for 425 Maestro Drive, Reno,
18 Nevada, including but not limited to all rental payments, CAM charges, taxes, etc. CNC and Paul
19 Morabito agreed to provide proof of each payment under the lease for 425 Maestro Drive, Reno,
20 Nevada (and performance of any and all other non-monetary obligations) to JH, Inc. within five (5)
21 days of each payment. CNC and Paul Morabito will indemnify and hold harmless JH, Inc. and Jerry
22 Herbst for any and all claims related to obligations owed under the lease for 425 Maestro Drive,
23 Reno, Nevada beginning on December 1, 2011 until the conclusion of the lease term.

24 L. As part of the Settlement, beginning on December 1, 2011, CNC and Paul Morabito
25 agreed to assume any and all obligations of the Maker/Payor under the June 29, 2007 Note between
26

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1 JH, Inc. as Maker and Payor and Arthur T. Hinckley, as Payee, including but not limited to those
2 obligations set forth in Sections 1.1 through 1.3 of the Note, periodic interest payments and payment
3 of the principal and accrued interest upon maturation. CNC and Paul Morabito agreed to provide
4 proof of each payment under the Note between JH and Mr. Hinckley (and performance of any and
5 all other non-monetary obligations) to JH, Inc. and Jerry Herbst for any and all claims related to the
6 June 29, 2007 Note between JH, Inc. as Maker and Payor and Jerry Herbst as guarantor and Arthur
7 T. Hinckley, as Payee.

9 M. As part of the Settlement, beginning on December 1, 2011, CNC and Paul Morabito
10 agreed to indemnify and defend Berry-Hinckley Industries and Jerry Herbst in the lawsuit captioned
11 as Desi Moreno, Trustee of the Desi Moreno 2001 Trust, et al. v. Berry-Hinckley Industries, et al.,
12 Case No. CV10-02329 in Department 4 of the Second Judicial District Court in and for the County
13 of Washoe. CNC and Paul Morabito expressly agreed to indemnify Berry-Hinckley Industries and
14 Jerry Herbst from any finding of liability or assessment of damages in that action. To facilitate the
15 assumption of the duty to defend and indemnify in the context of the aforementioned case, CNC and
16 Paul Morabito agreed to amend the Answer previously filed. It was agreed that the Amended
17 Answer would admit liability to JH, Inc. pursuant to the indemnification provisions of the Amended
18 and Restated Stock Purchase Agreement. Specifically, pursuant to Article 9.1(d) of the ARSPA,
19 CNC and Paul Morabito agreed to admit that they were obligated to indemnify Berry-Hinckley
20 Industries and Jerry Herbst for any loss that has already been suffered and any loss that may be
21 suffered in the future as a result of the lawsuit filed by the Moreno Plaintiffs. It was agreed that
22 failure to timely indemnify Berry-Hinckley Industries and Jerry Herbst from a findings of liability or
23 damages would constitute a default under the settlement agreement. It was also agreed that in the
24 event a judgment is entered against Berry-Hinckley Industries and/or Jerry Herbst, Paul Morabito
25 and CNC agreed to either (1) satisfy said judgment within fifteen days; or (2) file a notice of appeal
26 and CNC agreed to either (1) satisfy said judgment within fifteen days; or (2) file a notice of appeal
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1 of said judgment within thirty days and post a bond pending appeal to stay execution against Berry-
2 Hinckley Industries and/or Jerry Herbst. In the event of an appeal, if the decision is affirmed, Paul
3 Morabito and CNC agreed to pay any judgment within fifteen days of an order of affirmance from
4 the Nevada Supreme Court.

5
6 N. Paul Morabito, individually and as trustee of the Arcadia Living Trust, agreed that
7 the real property located at 8355 Panorama Drive in Reno, Nevada currently held in the name of the
8 Arcadia Living Trust would be listed for sale as soon as possible. The initial listing price was to be
9 set as follows:

10 • JH, Inc. and Jerry Herbst, on the one hand, and CNC and Paul Morabito, on
11 the other hand, would each commission an appraiser of their choice that is licensed in the
12 State of Nevada with at least five (5) years experience appraising residential real property in
13 Northern Nevada.

14 • Each appraiser would prepare a sale appraisal of the Panorama Drive
15 property. The party requesting the appraisal would bear the expense of the same.

16 • The initial listing price would be the mid-point, to the nearest thousand
17 dollars, between the two appraisals. The listing price must be a minimum of \$2.5 million.
18 Paul Morabito, individually and as trustee of the Arcadia Living Trust, represented and
19 warranted that there is an existing mortgage on the real property located at 8355 Panorama
20 Drive with a remaining pay-off amount of approximately \$1 million. Mr. Morabito
21 represented and warranted, to the best of his personal knowledge, that there are no other
22 mortgages or liens on the Panorama Drive property.

23 • Paul Morabito, individually and as trustee of the Arcadia Living Trust, agreed
24 that, upon the sale of the real property located at 8355 Panorama Drive, JH, Inc. and Jerry
25 Herbst would receive the net proceeds of that sale, after closing costs and the existing \$1
26
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1 million mortgage are paid. Should JH, Inc. and Jerry Herbst receive more than \$1 million in
2 net proceeds from that sale, CNC and Paul Morabito would be entitled to deduct any amount
3 received by JH, Inc. and Jerry Herbst in excess of \$1 million from the \$4 million payment
4 scheduled to be made under this settlement agreement on December 1, 2013.

5
6 • If the real property located at 8355 Panorama Drive, Reno, Nevada did not
7 sell within six (6) months of the first listing date, representatives of each of the parties
8 agreed to meet with the listing agent to determine if any actions should be taken to enable
9 the property to be sold.

10 O. As part of the Settlement, CNC and Morabito agreed to execute this Confession of
11 Judgment and stipulate that it is non-dischargeable in any bankruptcy proceeding filed by either
12 CNC or Paul Morabito, in the amount of \$85 million. The Confession of Judgment may be filed, ex
13 parte and with no notice to CNC or Paul Morabito, should CNC or Paul Morabito fail to perform or
14 default on any of their obligations under the Settlement, and said failure to perform is not cured
15 within fifteen (15) days. In the event all payments are made and obligations performed under the
16 Settlement by CNC and Paul Morabito, this Confession of Judgment will be returned to CNC and
17 Paul Morabito once all payments have been made and obligations performed.
18

19 P. In the event this Confession of Judgment is filed following an event of default which
20 is not cured within fifteen (15) days, CNC and Paul Morabito agree not to defend or contest the
21 filing of the Confession of Judgment.
22

23 NOW THEREFORE, CONSOLIDATED NEVADA CORPORATION, a Nevada
24 corporation ("CNC"), and PAUL MORABITO, individually ("Morabito") hereby consent, stipulate
25 and agree to the entry of judgment as follows:
26

27 1. The above Recitals A through P above, are hereby incorporated by reference entirely
28 herein and expressly consented, stipulated and agreed to by CNC and Morabito.

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2. Berry-Hinckley Industries ("BHI") began operations in 1928 when Wayne Hinckley and Lawrence Semenza assumed the lease of the Flying A Service Station on Second and West Streets in Reno, Nevada.

3. In the late 1970s, Art Hinckley, Ward Hinckley's son, joined the business supervising the administrative staff of three employees.

4. BHI was very successful for generations.

5. The Stock of BHI was purchased on October 14, 2005, by P.A. Morabito & Co. ("PAMCO"), a company owned by Mr. Morabito, for approximately \$95 million

6. Paul Morabito, the controlling owner of PAMCO, was appointed president and CEO.

7. All real properties owned by BHI, and by related entities as operated by BHI, were separately sold to PAMCO, which properties were then sold to third parties.

8. As part of these sales, new leases were entered into with BHI as the lessee and the leases were at above-market rates.

9. JH, owned by Jerry Herbst, was formed for the purpose of acquiring BHI.

10. JH is a related party to Terrible Herbst, Inc. and to the Herbst family, who have decades of experience operating gas stations and convenience stores and, in recent years, some experience in the gaming industry.

11. By no later than December 31, 2008, BHI had zero value.

12. The ARSPA consists of two components.

13. First, the transaction consisted of the Development Sites. The Development Sites are ten parcels of real property that were partially improved or would be improved to create convenience stores and gas stations.

14. The primary assets in the second category were the operating convenience stores and gas stations.

15. Section 2.8(c) of the ARSPA obligates the seller to enter into a construction management agreement with the buyer and that agreement is attached as Exhibit E to the ARSPA.

16. The Construction Management Agreement ("CMA") provides that, in consideration for the purchase of the Development Sites by owner, the construction manager, which is Washoe

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1 Construction Management Services, LLC ("WCM"), a company created and owned by Mr.
2 Morabito, has agreed to act as the construction manager for the project.

3 17. Mr. Morabito's company agreed to act as construction manager for this project in
4 consideration for the purchase of the Development Sites by JH.

5 18. A few pertinent provisions of the CMA are as follows:

6 a. Article 1 provides, "[t]he Construction Manager will assist the Owner with
7 the management of the Project, including monitoring Project costs, endeavoring to keep costs within
8 the fixed sum contracts entered into by and between Owner and Dennis Banks Construction (the
9 "Contractor") for certain of the Development Sites and within the budgets developed by Owner and
10 the Construction Manager for the balance of the Development Sites for which the Owner will have
11 entered into Cost, Plus Contracts with the Contractor, . . . and working with the Contractor to
12 schedule the work of the Project efficiently so that the Project will be ready for occupancy on the
13 dates set forth in the Construction Contracts."

14 b. Article 2.1 provides, "[t]he Construction Manager will review all plans and
15 specifications and advise on systems and materials, construction feasibility, time requirements for
16 procurement, installation and construction, relative costs, and provide recommendations for
17 economies as appropriate. The Construction Manager is hereby authorized to act as the Owner's
18 agent in dealing with the Architect, the Construction Contracts, subcontractors and their respective
19 employees and agents."

20 c. Paragraph 2.3 provides, in part, "[t]he Construction Manager will work with
21 the Contractor to assure completion of the Project within the time periods set forth in the
22 Construction Contracts.. In the event any change order or other adjustment is requested by Owner
23 to be made to any Construction Contract, Construction manager will work with the Contractor to
24 assure proper inclusion of such change order or other adjustment into the Project. "

25 19. Pursuant to paragraph 3.2, the relevant terms and conditions of the ARSPA are
26 incorporated in the CMA.

27 20. The role of the construction manager is to be the owner's representative to ensure that
28 both the schedule of the construction project and its costs adhere to the budget and timeline for

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1 construction. The construction manager asks questions and looks at the long-term items of a
2 contract. The construction manager works directly with subcontractors, taking bids, evaluating the
3 costs of various components of the construction, creating a construction timeline, and making, at a
4 minimum, monthly reports to the owner so the owner is advised consistently of the milestones of
5 construction. A good construction manager facilitates the process and ensures proper and
6 responsible accounting of the owner's money on the project.

7 21. The construction manager is usually involved in the construction on a daily basis and
8 frequently visits the construction site. A construction manager should review the construction
9 schedule with the contractor and meet with the contractor on a weekly basis.

10 22. WCM and Mr. Morabito performed none of the services contemplated by the CMA.

11 23. Mr. Morabito made it absolutely plain that in his view, the only purpose of the CMA
12 was for him to get paid. Mr. Morabito actually said, "What does the management of the
13 construction sites mean? I have no idea what that means."

14 24. Garrett Gordon is an attorney with the law firm of Lewis and Roca in Reno, Nevada.
15 Mr. Gordon made it extremely plain that he does not have any competence in construction
16 supervision. Mr. Gordon testified that he was called every day by Mr. Morabito, who wanted to
17 know the status of the building permits so that Mr. Morabito could get his money. Mr. Gordon's job
18 was to secure Mr. Morabito's money by getting building permits or certificates of occupancy.

19 25. Phillip Tripoli has no capacity to, or did not in any significant way, supervise this
20 project. Mr. Tripoli did not communicate at all with the owner of the project.

21 26. Mr. Morabito was not managing the construction project, he was managing his
22 money.

23 27. The ARSPA required PAMCO to provide a working capital estimate prior to closing,
24 which it did. There was no basis whatsoever for the contents of the working capital estimate. Mr.
25 Morabito decided to simply create it.

26 28. There is not one piece of paper that can be produced to support the exaggerated value
27 of the company as set forth in the working capital estimate.

28

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1 29. The major difference between Mr. Morabito's estimate and the actual working capital
2 is accounts payable. This fact is significant.

3 30. Mr. Morabito did not prepare the monthly financial statements.

4 31. There is no evidence that the monthly financial statements were inaccurate.

5 32. Mr. Morabito did not have access to the accounting system of the company.

6 33. Paula Meyer, then CFO of BHI, gave Mr. Morabito evidence to understand that the
7 leases were not being flipped as was being represented to JH.

8 34. In the course of events leading to the closing of this transaction, there was a point
9 where Mr. Morabito only wanted Ms. Meyer to communicate with him and not the lawyers or BCC
10 Capital who was representing Mr. Morabito and CNC in the transaction. This is a complex
11 transaction involving tens of millions of dollars. As the CFO, Ms. Meyer had access to the financial
12 statements of the company while the CEO of the company, Mr. Morabito, did not have access.
13 Nevertheless, Ms. Meyer was told to only communicate with Mr. Morabito.

14 35. Ms. Meyer constantly had disagreements with Mr. Morabito about the amount of
15 accounts payable.

16 36. The accounts payable were in the range of at least five to six million, but Mr.
17 Morabito represented to JH that the accounts payable amount was much lower than that.

18 37. Stan Bernstein, Mr. Morabito's personal accountant, agreed with Ms. Meyer
19 regarding accounts payable.

20 38. Karen Scarborough, BHI Controller, also agreed with Ms. Meyer.

21 39. On or about March 8, 2007, the accounts payable totaled \$7,405,342.33.

22 40. Ms. Meyer told Mr. Morabito on the telephone many times that she knew the
23 payables represented in the working capital estimate were way too low.

24 41. The estimate Mr. Morabito gave had, not only no basis in reality, but it was contrary
25 to what he knew firsthand to be the truth.

26 42. A claim for breach of contract requires the Herbst parties to prove each of the
27 following elements: (1) the parties entered into a valid and enforceable contract; (2) the Herbst
28 parties performed all obligations required under the contract or were excused from performance; (3)

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1 the Morabito parties breached their obligations under the contract; and (4) the Herbst parties
2 suffered damages as a result. *Nev. Contract Servs., Inc. v. Squirrel Companies, Inc.*, 119 Nev. 157,
3 161, 68 P.3d 896, 899 (2003).

4 43. The CMA and the ARSPA are valid and enforceable contracts.

5 44. The obligations undertaken in the CMA were in consideration for the purchase of the
6 Development Sites.

7 45. Every one of the obligations of the CMA were breached by WCM and Mr. Morabito.

8 46. As a result of WCM and Mr. Morabito's breach, there was a total failure of
9 consideration.

10 47. As a result of WCM and Mr. Morabito's breach of the CMA and ARSPA, JH was
11 damaged.

12 48. To establish fraud in the inducement under Nevada law, the following elements must
13 be proven: (1) a false representation made by WCM and Mr. Morabito; (2) WCM and Mr.
14 Morabito's knowledge or belief that the representation was false (or knowledge that it had an
15 insufficient basis for making the representation); (3) WCM and Mr. Morabito's intention to
16 therewith induce the Herbst parties to consent to the contract's formation; (4) the Herbst parties'
17 justifiable reliance upon the misrepresentation; and (5) damages resulting from such reliance. *J.A.*
18 *Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 290, 89 P.3d 1009, 1018 (2004).

19 49. Mr. Morabito never for a single second had any intention to perform the services of
20 construction manager.

21 50. Mr. Morabito's representations under the CMA were intentionally false.

22 51. Mr. Morabito's representations were made for the purpose of inducing the purchase
23 of the Development Sites by JH.

24 52. JH reasonably relied on those representations.

25 53. It is established that Morabito fraudulently induced JH to purchase the Development
26 Sites.

27 54. As a result, JH was damaged.

28 55. CNC and Morabito have no claims under the CMA and the ARSPA.

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- 1 56. There were a number of GAAP violations in the BHI accounting.
- 2 57. The leases were mischaracterized and, therefore, violated the ARSPA because they
- 3 were not accounted for in accordance with GAAP.
- 4 58. The inclusion of rent in construction in progress constitutes a violation of GAAP.
- 5 59. The recording of construction in progress for non-BHI companies constitutes a
- 6 violation of GAAP.
- 7 60. The recording of landlord deposits as a reduction to construction in progress is a
- 8 violation of GAAP.
- 9 61. Finally, the inclusion of Nella assets in BHI's financial statements constitutes a
- 10 violation of GAAP.
- 11 62. There was no basis whatsoever for the contents of the working capital estimate other
- 12 than Mr. Morabito's decision to create it.
- 13 63. The estimate was prepared by the Mr. Morabito, the owner of the company.
- 14 64. The estimate was significantly and materially inconsistent with the information he
- 15 was given firsthand by his chief financial officer and by his personal accountant.
- 16 65. No one else reviewed the estimate that was prepared by Mr. Morabito.
- 17 66. The working capital report that was prepared by Mr. Morabito was intentionally
- 18 false, was done for the purpose of JH relying on it, and that JH did reasonably rely on it.
- 19 67. There is no data in the company to support the working capital estimate.
- 20 68. Mr. Morabito knew firsthand from his own employees and from his own accountant
- 21 that it was incorrect.
- 22 69. The working capital estimate was materially inflated and falsely inflated the value of
- 23 the company, and that became apparent quickly.
- 24 70. Had JH known the false statements in the working capital estimate, they would not
- 25 have bought the company.
- 26 71. The value of Berry-Hinckley Industries was materially misstated by Mr. Morabito.
- 27 72. A company does not get many hundreds of thousands of dollars worse in the first
- 28 thirty days.

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1 73. In December of 2006, CNC and Morabito told JH that BHI was losing about
2 \$600,000 a year. The company was losing approximately \$1 million a month.

3 74. These material misrepresentations were made to fraudulently induce JH to purchase
4 BHI.

5 75. It is established that Morabito fraudulently induced JH to purchase BHI.

6 76. All obligations of the Seller under the ARSPA are personally guaranteed by Paul
7 Morabito.

8 77. Morabito, on behalf of CNC, stipulates and confesses to judgment being entered
9 against CNC in the amount of \$85,000,000.

10 78. Morabito, on behalf of himself individually, stipulates and confesses to judgment
11 being entered against him individually in the amount of \$85,000,000.

12 79. Morabito, on behalf of himself individually and on behalf of CNC, stipulate and
13 agree that this Judgment in the amount of \$85,000,000 qualifies as a non-dischargeable debt under
14 11 U.S.C. Section 523.

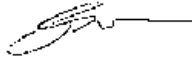
15 80. Morabito, on behalf of himself individually and on behalf of CNC, stipulate and
16 agree that the facts outlined above establishing the debts and obligations of Morabito and CNC
17 qualifies as a Section 523 non-dischargeable debt.
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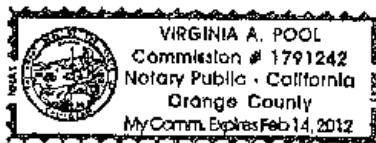
VERIFICATION

I, PAUL MORABITO, a duly authorized representative of CONSOLIDATED NEVADA CORPORATION, a Nevada corporation, hereby assert that the contents of this Confession of Judgment are true and accurate to the best of my knowledge and authorize entry of judgment in this matter for the sum of Eighty-Five Million Dollars (\$85,000,000.00) against CONSOLIDATED NEVADA CORPORATION.


By: PAUL MORABITO
for CONSOLIDATED NEVADA CORPORATION

SUBSCRIBED and SWORN to before me
this 30th day of November, 2011,
by PAUL MORABITO.

Virginia A. Pool
Notary Public



JONES VARGAS
300 East Grand Street, Suite 1510
P.O. Box 281
Reno, NV 89504-0281
Tel: (775) 786-5000 Fax: (775) 786-1171

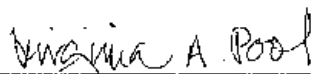
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VERIFICATION

I, PAUL MORABITO, hereby assert that the contents of this Confession of Judgment are true and accurate to the best of my knowledge and authorize entry of judgment in this matter for the sum of Eighty-Five Million Dollars (\$85,000,000.00) against me, PAUL MORABITO, individually.


By: PAUL MORABITO, Individually

SUBSCRIBED and SWORN to before me
this 30th day of November, 2011,
by PAUL MORABITO.


Notary Public

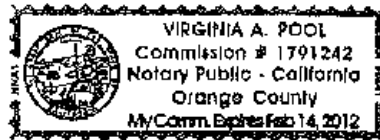


EXHIBIT J
STIPULATION TO CONFESSION OF JUDGMENT

(See attached.)

FINAL EXECUTION VERSION
21751500_6.doc

WL002315
JHERBST000128

JONES VARGAS
300 East Second Street, Suite 1510 - P.O. Box 281
Reno, NV 89504-0281
Tel: (775) 786-5000 Fax: (775) 786-1177

1 JOHN P. DESMOND, ESQ.
Nevada State Bar No. 5618

2 BRIAN R. IRVINE ESQ.
Nevada State Bar No. 7758

3 JONES VARGAS
300 E. Second Street
Suite 1510

4 P.O. Box 281
5 Reno, Nevada 89504-0281
6 Telephone: (775) 786-5000
Facsimile: (775) 786-1177

7 Attorneys for JH, Inc., Jerry Herbst,
8 And Berry-Hinckley Industries

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

11 JH, INC., a Nevada corporation; JERRY HERBST, CASE NO.:
12 an individual; and BERRY-HINCKLEY
13 INDUSTRIES, a Nevada corporation, DEPT. NO.:

14 Plaintiffs,
15 vs.

16 CONSOLIDATED NEVADA CORPORATION, a
Nevada corporation; PAUL A. MORABITO, an
individual,

17 Defendants.
18

19 STIPULATION

20 JH, INC., a Nevada corporation ("JH"), JERRY HERBST, an individual ("Herbst") and
21 BERRY-HINCKLEY INDUSTRIES, a Nevada corporation ("BHI"), on the one hand, and
22 CONSOLIDATED NEVADA CORPORATION, a Nevada corporation ("CNC"), and PAUL
23 MORABITO, an individual ("Morabito"), on the other hand, hereby consent, stipulate and agree
24 as follows:
25
26
27
28

JONES VARGAS
300 East Second Street, Suite 1510 - P.O. Box 281
Reno, NV 89504-0281
Tel: (775) 786-5000 Fax: (775) 786-1177

1. CNC and Morabito consented, stipulated and agreed that Judgment in the amount of \$85,000,000 be taken against them in the event of a default under the Settlement Agreement as provided for in the attached Confession of Judgment ("Judgment").

2. The parties stipulate and agree that the Judgment qualifies as a non-dischargeable debt under 11 U.S.C. Section 523.

3. The parties stipulate and agree that the facts underlying and outlined in the Judgment establishing the debt qualify it as a Section 523 non-dischargeable debt.

DATED this 30th day of November, 2011.

JONES VARGAS



JOHN P. DESMOND, ESQ.
BRIAN R. IRVINE, ESQ.
300 E. Second Street
Suite 1510
Reno, NV 89501

Attorneys for JH, Inc., Jerry Herbst, an individual, and Berry-Hinckley Industries, a Nevada corporation

DATED this ____ day of November, 2011.

ROBISON, BELAUSTEGUI,
SHARP & LOW

BARRY L. BRESLOW
71 Washington Street
Reno, NV 89503

Attorneys for Consolidated Nevada Corporation and Paul A. Morabito, an individual

DATED this ____ day of November, 2011.

PAUL A. MORABITO, Individually

DATED this ____ day of November, 2011.

PAUL A. MORABITO
Authorized Representative for
Consolidated Nevada Corporation

JONES VARGAS
308 East Second Street, Suite 1510 - P.O. Box 281
Reno, NV 89504-0281
Tel: (775) 786-5000 Fax: (775) 786-1177

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2. The parties stipulate and agree that the Judgment qualifies as a non-dischargeable debt under 11 U.S.C. Section 523.

3. The parties stipulate and agree that the facts underlying and outlined in the Judgment establishing the debt qualify it as a Section 523 non-dischargeable debt.

DATED this ____ day of November, 2011.

JONES VARGAS

DATED this 30 day of November, 2011.

ROBISON, BELAUSTEGUI,
SHARP & LOW

JOHN P. DESMOND, ESQ.
BRIAN R. IRVINE, ESQ.
300 E. Second Street
Suite 1510
Reno, NV 89501

BARRY L. BRESLOW
71 Washington Street
Reno, NV 89503

Attorneys for JH, Inc., Jerry Herbst, an individual, and Berry-Hinckley Industries, a Nevada corporation

Attorneys for Consolidated Nevada Corporation and Paul A. Morabito, an individual

DATED this ____ day of November, 2011.

PAUL A. MORABITO, Individually

DATED this ____ day of November, 2011.

PAUL A. MORABITO
Authorized Representative for
Consolidated Nevada Corporation

JONES VARGAS
300 East Second Street, Suite 1510 - P.O. Box 281
Reno, NV 89504-0281
Tel: (775) 786-5030 Fax: (775) 786-1177

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2 of \$85,000,000 be taken against them in the event of a default under the Settlement Agreement as
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7 Judgment establishing the debt qualify it as a Section 523 non-dischargeable debt.

8 DATED this ____ day of November, 2011.

DATED this ____ day of November, 2011.

9 JONES VARGAS

ROBISON, BELAUSTEGUI,
SHARP & LOW

11
12 JOHN P. DESMOND, ESQ.
13 BRIAN R. IRVINE, ESQ.
14 300 E. Second Street
15 Suite 1510
16 Reno, NV 89501


BARRY L. BRESLOW
71 Washington Street
Reno, NV 89503


17 *Attorneys for JH, Inc., Jerry Herbst, an
18 individual, and Berry-Hinckley Industries, a
19 Nevada corporation*

*Attorneys for Consolidated Nevada
Corporation and Paul A. Morabito, an
individual*

20 DATED this 30 day of November, 2011.

DATED this 30 day of November, 2011.

21 
22 PAUL A. MORABITO, Individually

23 
24 PAUL A. MORABITO
25 Authorized Representative for
26 Consolidated Nevada Corporation
27
28

FORBEARANCE AGREEMENT

THIS FORBEARANCE AGREEMENT (this "Agreement") by and among CONSOLIDATED NEVADA CORPORATION, a Nevada corporation ("CNC"), and PAUL MORABITO, an individual (together the "CNC Parties"), on the one hand, and IH, INC., a Nevada corporation ("IH"), JERRY HERBST, an individual (together the "Herbst Parties"), and BERRY-HINCKLEY INDUSTRIES, a Nevada corporation ("BHI"), on the other, is agreed to be effective as of March 1, 2013 (the "Effective Date").

RECITALS

A. The Parties entered into that certain Settlement Agreement and Mutual Release dated November 30, 2011 (the "Settlement Agreement"). Capitalized terms utilized herein and not otherwise defined shall have the meaning ascribed to such terms in the Settlement Agreement.

B. The CNC Parties are in Default under the terms of the Settlement Agreement by reason of the following:

(i) Pursuant to the Paragraph 2 (d) of the Settlement Agreement, the CNC Parties are required to indemnify Herbst and BHI in regard to the Moreno Lawsuit. While the CNC Parties are not presently in default of this provision of the Settlement Agreement, the CNC Parties have failed to timely comply with the terms of a separate settlement agreement entered into with Desi Moreno, (the "Moreno Settlement Agreement Default");

(ii) Failure on the part of the CNC Parties to timely pay amounts due and owing pursuant to the Lease for 425 Maestro resulting in a default under the Lease (the "Lease Default");

(iii) Failure on the part of the CNC Parties to timely pay amounts due and owing pursuant to the Hinckley Note resulting in a default under the Hinckley Note (the "Hinckley Note Default"); and

(iv) Failure on the part of the CNC Parties to pay to the Herbst Parties the cash payment of Four Million and No/100ths Dollars (\$4,000,000.00) due on or before March 1, 2013 (the "Cash Payment Default").

C. The CNC Parties have represented that they are unable to cure the Moreno Settlement Agreement Default, the Cash Payment Default and the Hinckley Note Default which have occurred and are continuing. The Moreno Settlement Agreement Default, Cash Payment Default and Hinckley Note Default are referred to herein as the "Continuing Defaults."

D. The CNC Parties have requested that BHI and the Herbst Parties forbear from exercising their rights and remedies under the Settlement Agreement with respect to the Continuing Defaults until December 1, 2013 (subject to termination as set forth herein, the

"Forbearance Period") as set forth herein and BHI and the Herbst Parties have agreed, subject to and in accordance with the terms and conditions set forth in this Agreement.

AGREEMENT

1. Recitals. In order to induce BHI and the Herbst Parties to enter into this Agreement, each of the CNC Parties hereby represent and warrant that the information set forth in the foregoing recitals is a true, complete and accurate description of the status of the CNC Parties' obligations under the Settlement Agreement as of the Effective Date.

2. Reaffirmation of Obligations Contained in Settlement Agreement. Each of the CNC Parties hereby ratifies and reaffirms each and all of such Party's obligations, duties, covenants and liabilities to BHI and the Herbst Parties under the terms and conditions of the Settlement Agreement, after giving effect to the terms of this Agreement, including, but not limited to, the obligation to take all required actions and pay all amounts which are or become due and owing under the Settlement Agreement. Each of the CNC Parties further acknowledges that BHI and the Herbst Parties have performed all of their obligations under the Settlement Agreement (if any). In addition, each of the CNC Parties acknowledges and agrees that (i) the Settlement Agreement is valid, binding and enforceable in accordance with its terms and shall remain in full force and effect; and (ii) there are no claims, demands, offsets or defenses at law or in equity that would defeat or diminish BHI's and the Herbst Parties' present and unconditional right to proceed to enforce the rights and remedies available to the Herbst Parties as provided in the Settlement Agreement or by law, including, but not limited to, causing the Confession of Judgment and Stipulation to Confession of Judgment to be filed as a result of the Continuing Defaults.

3. Continuing Defaults. The CNC Parties hereby acknowledge and agree that (i) the Continuing Defaults have occurred and are continuing; (ii) the CNC Parties are unable to cure the Cash Payment Default; (iii) the CNC Parties are unable to cure the Hinckley Note Default; (iv) pursuant to the terms of the Settlement Agreement, as a result of the occurrence of the Continuing Defaults, BHI and the Herbst Parties currently have the right to immediately exercise any one or more of the rights and remedies under the Settlement Agreement, at law or in equity, as they, in their sole discretion, deem necessary or desirable; and (v) the CNC Parties do not have any defenses, legal or equitable, to the Continuing Defaults, and/or any other events of Default that may exist under the Settlement Agreement or the exercise by BHI and the Herbst Parties of any one or more of their rights and remedies under the Settlement Agreement. With this knowledge, the CNC Parties have agreed that it is in their best interests to enter into this Agreement and to comply with the covenants and conditions required hereunder.

4. Forbearance.

(a) So long as the CNC Parties do not default under the terms of this Forbearance Agreement or the Settlement Agreement, other than the Continuing Defaults, and

otherwise subject to the terms and conditions set forth herein, BHI and the Herbst Parties agree to forbear from exercising any of their rights or remedies under the Settlement Agreement with respect to the Continuing Defaults during the Forbearance Period.

(b) Notwithstanding the preceding grant of forbearance, the CNC Parties understand, acknowledge and agree that BHI and the Herbst Parties have not waived the Continuing Defaults. The CNC Parties will remain in default throughout the Forbearance Period, and the Forbearance Period will expire automatically and without notice immediately upon the occurrence of any default of this Agreement or Event of Default under the Settlement Agreement on the part of the CNC Parties, other than the Continuing Defaults, or upon the expiration of the Forbearance Period.

5. Representations and Warranties. As a material inducement for BHI and the Herbst Parties to enter into this Agreement, each of the CNC Parties hereby represents and warrants to BHI and the Herbst Parties that:

(a) Such Party has full power and authority (and all necessary action has been taken) to execute, deliver and perform its obligations under this Agreement, and that this Agreement is binding upon and enforceable against such Party in accordance with its terms.

(b) The representations and warranties made by such Party in the Settlement Agreement are true, correct and complete as of the Effective Date in all material respects.

(c) Such Party does not have as of the Effective Date any claims against BHI or the Herbst Parties or any employee or attorney of BHI or the Herbst Parties in connection with the Settlement Agreement.

(d) Such Party is fully aware of the terms contained in this Agreement and has voluntarily and without coercion or duress of any kind entered into this Agreement and any other documents executed in connection herewith.

6. CNC Parties' Obligations. In consideration of the covenants and agreements contained in this Agreement, including BHI's and the Herbst Parties' agreement to grant the forbearance, the CNC Parties hereby agree to the following conditions:

a. 425 Maestro Drive Lease. The CNC Parties shall pay directly to Spirit Master Funding II, LLC, by way of wire transfer no later than March 15, 2013, all amounts due and owing to the landlord under the Lease as of February 28, 2013 including, but not limited to, rent, additional rent, CAM fees, property taxes, taxes, other fees and penalties. The CNC Parties shall provide evidence of such payment to the Herbst Parties upon execution of this Agreement. In addition, the CNC Parties shall pay directly to BHI by way of wire transfer directly to BHI all other amounts due and owing as of February 28, 2013, related to the Lease and 425 Maestro Drive, including, but in no way limited to, all insurance, utilities, and all other costs, fees or penalties related to the same. If service from any utility is shut off prior to payment by the CNC Parties, the CNC Parties shall promptly pay any reconnection or deposit fee necessary for the

WL003105

Herbst Parties to reestablish such service upon demand from BHI. The CNC Parties shall also bear responsibility for any losses or damages caused by the shut off of any utility service. In the event the CNC Parties fail to make such payments within five (5) days of receipt of demand thereof from BHI and/or the Herbst Parties, BHI and/or the Herbst Parties may deem this Agreement null and void ab initio, and may proceed to enforce any rights or remedies available to BHI and the Herbst Parties in the Settlement Agreement or by law. Upon making all of the 425 Maestro related payments owed as of February 28, 2013, as identified herein and providing sufficient written evidence thereof to the Herbst Parties, the CNC Parties shall be relieved of any and all obligations under the Settlement Agreement related to the 425 Maestro Lease, including but not limited to, rent, additional rent, CAM fees, property taxes, other fees and penalties and all insurance, utilities, and all other costs, fees or penalties related to the Lease arising on or after March 1, 2013.

b. Moreno Lawsuit. As an express condition to the effectiveness of this Agreement, the CNC Parties shall provide the Herbst Parties no later than April 15, 2013, a fully executed forbearance agreement between the CNC Parties and the Plaintiff in the Moreno Lawsuit (the "Moreno Forbearance Agreement"), along with written confirmation from counsel for the plaintiff in the Moreno Lawsuit that such forbearance agreement is in full force and effect, and that any and all obligations due and owing under such forbearance agreement at the time of such written confirmation have been fully satisfied. In the event the CNC Parties fail to timely provide such written documentation to the Herbst Parties, the CNC Parties shall indemnify BHI and/or the Herbst Parties pursuant to Paragraph 2 (d) of the Settlement Agreement. In the event of the failure of the CNC Parties to indemnify BHI and/or the Herbst Parties pursuant to the Settlement Agreement, BHI and/or the Herbst Parties may deem this Agreement null and void ab initio, and may proceed to enforce any rights or remedies available to BHI and the Herbst Parties in the Settlement Agreement or by law.

c. Hinckley Note. As an express condition to the effectiveness of this Agreement, the CNC Parties shall provide the Herbst Parties no later than April 15, 2013, a fully executed forbearance agreement between the CNC Parties and the holders of the Hinckley Note (the "Hinckley Forbearance Agreement"), along with written confirmation from counsel for the holders of the Hinckley Note that such forbearance agreement is in full force and effect, and that any and all obligations due and owing under such forbearance agreement at the time of such written confirmation have been fully satisfied. In the event the CNC Parties fail to timely provide such written documentation, BHI and/or the Herbst Parties may deem this Agreement null and void ab initio, and may proceed to enforce any rights or remedies available to BHI and the Herbst Parties in the Settlement Agreement or by law. Any default by the CNC Parties of any term of the Hinckley Forbearance Agreement shall be deemed a default under the terms of this Agreement and the Settlement Agreement.

d. Deferral of Principal Payment Due March 1, 2013. The Herbst Parties will agree to defer the Four Million and No/100ths Dollars (\$4,000,000.00) principal payment

(the "Deferred Amount") due March 1, 2013, until December 1, 2013. Commencing March 1, 2013, the Deferred Amount shall accrue interest at the rate of twelve percent (12%) per annum, which shall compound and accrue monthly.

e. Payments on Deferred Amount. The CNC Parties shall make the following payments to the Herbst Parties by way of wire transfer to be credited towards the principal and interest on the Deferred Amount as follows:

April 30, 2013	\$62,500.00
May 15, 2013	\$62,500.00
June 15, 2013	\$125,000.00
July 15, 2013	\$125,000.00
August 15, 2013	\$125,000.00
September 15, 2013	\$125,000.00
October 15, 2013	\$125,000.00
November 15, 2013	\$125,000.00

The foregoing payments shall be applied first to any accrued and unpaid interest on the Deferred Amount, with the balance, if any, applied to the principal. The entire balance of unpaid principal and interest of the Deferred Amount shall be paid in full on or before December 1, 2013.

f. Real Property Located at 8355 Panorama Drive. Pursuant to Section 2(e) (vi) of the Settlement Agreement, the CNC Parties were to receive a credit based on the net proceeds of the sale of the Real Property which exceeded One Million Dollars (\$1,000,000). Any net proceeds in excess of \$1,000,000 were to be deducted from the final principal payment of Four Million and No/100ths Dollars (\$4,000,000.00) due on or before December 1, 2013. On or about December 28, 2012 the Herbst Parties received \$1,358,861.07 from the net proceeds of the sale of the Real Property. The CNC Parties shall be deemed to have waived such credit for the amount of \$358,861.07 and shall be precluded from deducting the amount of the Real Property credit from the foregoing principal payment, or any other payment due pursuant to the Settlement Agreement.

g. Additional Settlement Payments. Commencing March 21, 2013, and continuing on the 21st day of each month thereafter through and including December 21, 2015, the CNC Parties shall pay to the Herbst Parties, by way of wire transfer, the payments as set forth in the attached Exhibit A. Such amounts represent additional settlement payments to the Herbst Parties but as described in Paragraph 6 (a), said additional payments shall replace and supersede

WL003107

all obligations of the CNC Parties pursuant to the Settlement Agreement regarding any and all payments in relation to the 425 Maestro Lease. With the exception to the provisions of the Settlement Agreement pertaining to the 425 Maestro Lease, these additional payments shall not be deducted from any other amounts due by the CNC Parties pursuant to the terms of the Settlement Agreement. The CNC Parties acknowledge and agree that the foregoing additional settlement payment obligations are unconditional and absolute and are in no way contingent on or otherwise related to the continuing effectiveness of the Lease for 425 Maestro. The CNC Parties shall continue to make the foregoing additional settlement payments regardless of the status of the Lease, including, but not limited to, whether the Lease is terminated, amended, rejected or limited in bankruptcy, assigned or subject to sublease.

h. Attorneys' Fees. On or before March 4, 2013, the CNC Parties shall pay to the law firm of Gordon Silver, by way of wire transfer, an amount equal to Forty Thousand and No/100ths Dollars (\$40,000.00). Such amount represents payment of attorneys' fees incurred by the Herbst Parties, and shall not be deducted from any other amounts due by the CNC Parties pursuant to the terms of the Settlement Agreement.

7. Events of Default. In addition to all other matters constituting a default under this Agreement or a Default under the Settlement Agreement, other than the Continuing Defaults, the failure to timely pay all amounts due and owing hereunder, the default by the CNC Parties of any term or covenant contained herein or the inaccuracy of any representation or warranty contained herein, shall also be deemed a default hereunder as well as a default of the Settlement Agreement.

8. Remedies. Upon the occurrence of a default under the terms of this Agreement or a Default under the Settlement Agreement, other than the Continuing Defaults, at the sole option of BHI and the Herbst Parties, BHI and the Herbst Parties may immediately, and without expiration of any notice and cure period, exercise and enforce their rights and remedies under the Settlement Agreement or at law. The CNC Parties hereby unconditionally waive any additional notice and cure period to which they may otherwise be entitled under the terms of the Settlement Agreement relating to the Continuing Defaults.

9. Waiver of Certain Protections. As a material inducement for BHI and the Herbst Parties to enter into this Agreement, the CNC Parties agree that, in the event that any of the CNC Parties (a) files with any bankruptcy court of competent jurisdiction or is the subject of any petition under Title 7 or 11 of the U.S. Code, as amended, (b) is the subject of any order of relief under such Title 7 or 11 of the U.S. Code, as amended, (c) files or is the subject of any petition, order, judgment or decree petition seeking, or relating to, any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future federal or state act or law relating to bankruptcy, insolvency, or other relief for debtors, or (d) seeks, consents or agrees to, the appointment of any trustee, receiver, conservator, or liquidator, then in such event BHI and the Herbst Parties shall be entitled to relief from any automatic stay imposed by Section 362 of Title 11 of the U.S. Code, as amended, or otherwise, on or against the exercise of its rights and remedies under the Settlement Agreement or as otherwise provided by law or in equity. The CNC Parties hereby irrevocably waive any benefits or protections that may

be afforded by relief similar to such automatic stay under Section 105 of Title 11 of the U.S. Code, as amended, or otherwise.

10. No Waiver. The CNC Parties expressly acknowledge and agree that the execution of this Agreement shall not constitute a waiver of, and shall not preclude the exercise of, any right, power or remedy granted to BHI and/or the Herbst Parties in the Settlement Agreement, or as provided by law, except to the extent expressly provided herein. No modification, extension, or compromise entered into with respect to any of the obligations of the CNC Parties shall constitute a course of dealing or be inferred or construed as constituting an express or implied understanding to enter into any future modification, extension or compromise. No delay on the part of BHI and/or the Herbst Parties in exercising any right, power or remedy shall operate as a waiver thereof or otherwise prejudice BHI's and/or the Herbst Parties' rights, powers or remedies. Except as expressly set forth herein, none of the remaining obligations of the CNC Parties provided for in the Settlement Agreement are in any way modified or waived, including, but not limited to, the obligation of the CNC Parties to timely make the final cash payment of Four Million and No/100ths Dollars (\$4,000,000.00) identified in Section 2(a)(iv) of the Settlement Agreement on December 1, 2013, in addition to the balance of the Deferred Amount.

11. Entire Agreement: Amendment. The Settlement Agreement and this Agreement, contain the entire agreement of the Parties with respect to the matters contemplated therein, and supersede all prior negotiations. This Agreement shall not be modified except by written instrument executed by all Parties hereto.

12. Notices. All communications, notices and demands of any kind which any Party hereto may be required or may desire to serve upon any other Party shall be in writing and shall be given in the manner, and shall be deemed received, as provided for in the Settlement Agreement, except that, in addition to the recipients identified in the Settlement Agreement, copies of any communications, notices and demands shall also be sent as follows:

If to the Herbst Parties, a copy to:

Gordon Silver
100 West Liberty St., Ste. 940
Reno, Nevada 89501
Attn: John P. Desmond, Esq.
Facsimile No.: (775) 786-0131
Telephone No.: (775) 343-7500

13. Governing Law: Jurisdiction. This Agreement has been executed and delivered in, and shall be governed by and construed in accordance with, the laws of the State of Nevada. Any litigation arising out of or related to this Agreement shall be instituted and prosecuted only in the appropriate state or federal court situated in Washoe County, Nevada. Each Party hereto hereby submits to the exclusive jurisdiction and venue of such courts for purposes of any such action and the enforcement of any judgment or order arising therefrom. Each Party hereto hereby waives any right to a change of venue and any and all objections to the jurisdiction of the state and federal courts located in Washoe County, Nevada.

WL003109

14. Time of Essence. Time is of the essence with respect to each provision of this Agreement.

15. Severability. If any provision of this Agreement or any provision of the Settlement Agreement shall be determined by a court of competent jurisdiction to be invalid, illegal or unenforceable, that portion shall be deemed severed therefrom, and the remaining parts shall remain in full force as though the invalid, illegal or unenforceable portion had never been a part thereof.

16. Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the Parties, their heirs, executors, administrators, successors and assigns.

17. Construction of Agreement. This Agreement has been freely negotiated by the Parties each of which has been represented by their own legal counsel, and the principle of construction against draftsmen shall have no application in the interpretation of this Agreement.



18. Attorneys' Fees. In the event any legal action is undertaken in order to enforce or interpret any provision of this Agreement, the prevailing Party in such legal action, as determined by the court, shall be entitled to receive from the other Party the prevailing Party's reasonable attorneys' fees, expenses and court costs, including all such fees, expenses and costs incurred in any post-judgment proceedings to collect or enforce any judgment.

19. No Third Party Beneficiaries. No person other than the Parties hereto and their respective successors and assigns shall have any rights hereunder or be entitled to rely on this Agreement, and all other third-party beneficiary rights are hereby expressly disclaimed.

20. Counterparts: Facsimile Signatures. This Agreement may be executed in counterparts, each of which shall be considered an original instrument, but all of which together shall be considered one and the same agreement. Facsimile copies of the signature page hereof shall be deemed originals and shall be binding for all purposes.



HERBST PARTIES

JH, INC., a Nevada corporation

By: 
Its: JERRY HERBST
PRESIDENT

JERRY HERBST, an individual

CNC PARTIES

CONSOLIDATED NEVADA
CORPORATION, a Nevada corporation

By: 
Its: PAUL MORABITO
PRESIDENT

PAUL MORABITO, an individual

WL003110

BHI

BERRY-HINCKLEY INDUSTRIES,
a Nevada corporation

By: 
Its:  JERRY HINKLEY
PRESIDENT

WL003111

The court will not, and would not if requested, award any recovery pursuant to 11 U.S.C. 303(i).

Gregg W. Zive
Honorable Gregg W. Zive
United States Bankruptcy Judge



Entered on Docket
December 17, 2013

GORDON SILVER
GERALD M. GORDON, ESQ.
Nevada Bar No. 229
E-mail: ggordon@gordonsilver.com
BRIAN R. IRVINE, ESQ.
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E-mail: ghamm@gordonsilver.com
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
Telephone (702) 796-5555
Facsimile (702) 369-2666
Attorneys for Petitioning Creditors JH, Inc, Jerry Herbst,
and Berry-Hinckley Industries

I certify that this is a true copy:

Attest: *Michelle D. Barry*
Deputy Clerk, Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA

In re:
PAUL A. MORABITO, an individual,

Alleged Debtor.

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

Hearing Date: October 22, 2013
Hearing Time: 10:00 a.m.

ORDER DENYING MOTION TO DISMISS INVOLUNTARY CHAPTER 7 PETITION
AND SUSPENDING PROCEEDINGS PURSUANT TO 11 U.S.C §305(a)(1)

These matters came before the Court on October 22, 2013 at 10:00 a.m. on Alleged Debtor PAUL A. MORABITO's *Motion to Dismiss Involuntary Chapter 7 Petitions* (Dkt. #42) (the "Motion"). Counsel for the Petitioning Creditors, Brian Irvine and John Desmond, appeared, and Frank Gilmore and Jeff Hartman appeared as counsel for Paul A. Morabito.

The Motion and hearing having been properly noticed; and the Court having considered

Gordon Silver
Attorneys At Law
Suite 940
102 W. Liberty Street
Reno, NV 89501
775.943.7500

(18405-001)

1 the pleadings and papers on file herein and the arguments of counsel and having stated its
2 findings of fact and conclusions of law on the record in open court pursuant to Federal Rule of
3 Civil Procedure 52, made applicable by Federal Rules of Bankruptcy Procedure 7052 and good
4 cause appearing, hereby denies the Motion upon the subsequent conditions:

5 1. The Involuntary Petition alleges that the Petitioning Creditors are eligible to file
6 the Involuntary Petitions pursuant to 11 U.S.C. § 303(b). (Dkt. #1 at 1).

7 2. The Involuntary Petition alleges that the Alleged Debtor is a person against whom
8 an order for relief may be entered under title 11 of the United States Code. *See id.*

9 3. The Involuntary Petition avers that the Alleged Debtor is not generally paying his
10 respective debts as they become due. *See id.*

11 4. The Involuntary Petition alleges that the Petitioning Creditors' claims are for
12 \$77,000,000. *See id.*

13 5. The Court finds that, pursuant to Fed. R. Civ. P. 12, made applicable by
14 Bankruptcy Rule 1011, the Involuntary Petition filed by the Petitioning Creditors sets forth
15 sufficient grounds to overcome a challenge to the Petition under Fed. R. Civ. P. 12.

16 6. However, the Court has not been presented evidence that the Alleged Debtor has
17 any significant creditors other than the Petitioning Creditors, and that this is essentially a two-
18 party collection action.

19 7. This Court is not the proper forum for the Petitioning Creditors to seek to collect
20 on their judgment against the Alleged Debtor, and the Bankruptcy Code was not intended for
21 such purposes.

22 8. Accordingly, the Court finds that the best interests of creditors and the debtor
23 would be better served by suspension of this case, and the Court will at this time abstain from
24 hearing this case pursuant to 11 U.S.C. §305(a)(1).

25 **IT IS HEREBY ORDERED** and notice is hereby given that the *Motion to Dismiss*
26 *Involuntary Chapter 7 Petitions* is denied, without prejudice.

27 **IT IS HEREBY FURTHER ORDERED** that all proceedings in this case are suspended
28 pursuant to 11 U.S.C. §305(a)(1). The parties shall appear before this Court for a status

conference on May 6, 2014 at 10:00 a.m.

IT IS HEREBY FURTHER ORDERED that the Automatic Stay pursuant to 11 U.S.C. 362 is hereby lifted until further order of the Court.

IT IS SO ORDERED.

In accordance with LR 9021, counsel submitting this document certifies as follows (check one):

1. ☐ The Court has waived the requirement of approval under LR 9021.

2. ☒ This is a Chapter 7 or 13 case, and either with the motion, or at the hearing, I have delivered a copy of this proposed order to all counsel who appeared at the hearing, any unrepresented parties who appeared at the hearing, and any trustee appointed in this case, and each has approved or disapproved the order, or failed to respond, as indicated below.

3. ☐ This is a Chapter 9, 11, or 15 case, and I have delivered a copy of this proposed order to all counsel who appeared at the hearing, any unrepresented parties who appeared at the hearing, and any trustee appointed in this case, and each has approved or disapproved the order, or failed to respond, as indicated below.

4. ☐ I certify that I have served a copy of this order with the motion, and no parties appeared or filed written objections.

APPROVED/DISAPPROVED/FAILED TO RESPOND

ROBISON, BELAUSTEGUI, SHARP & LOW

By: /s/ Frank C. Gilmore
Frank C. Gilmore
Attorneys for Paul A. Morabito

PREPARED AND SUBMITTED:

GORDON SILVER

By: /s/ Brian R. Irvine
GERALD M. GORDON, ESQ.
BRIAN R. IRVINE, ESQ.
GABRIELLE A. HAMM, ESQ.
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
Attorneys for Petitioning Creditors JH, Inc.,
Jerry Herbst, and Berry-Hinckley Industries

NICHOLAS STROZZA, ASSISTANT U.S. TRUSTEE

State Bar #CA 117234

WILLIAM B. COSSITT, #3484

Office of the United States trustee

300 Booth Street, Room 3009

Reno NV 89509

Telephone: (775) 784-5335

Fax: (775) 784-5531

Attorneys for United States Trustee

Tracy Hope Davis

I certify that this is a true copy:

Attest: 
Deputy Clerk, Bankruptcy Court

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re

Case No. 13-51237-GWZ

PAUL A. MORABITO,

Debtor.

REPORT OF UNDISPUTED ELECTION

(11 U.S.C. § 702)

Tracy Hope Davis, the United States Trustee for Region 17 ("the United States Trustee"), hereby submits her report of an undisputed election held under 11 U.S.C. § 702 and Fed. R. Bankr. P. 2003(d)(1).

Meeting called. On January 22, 2015, at approximately 11:30 a.m., the United States Trustee, through the undersigned counsel, called the meeting of creditors in the above-captioned case. The following appearances were made: William M. Noall, Esq., and Brian R. Irvine, Esq., Counsel for JH, Inc., Jerry Herbst, and Berry-Hinckley Industries.

Request for Election. JH, Inc., Jerry Herbst, and Berry-Hinckley Industries, through counsel, requested that an election be held. There was no objection to the request by JH, Inc., Jerry Herbst, and Berry-Hinckley Industries. The following documents were acknowledged and

incorporated into the record: the filing of a proof of claim by JH, Inc., Jerry Herbst, and Berry-Hinckley Industries in the amount of \$77,000,000 (Claim 2-1) and the furnishing of a Special Power of Attorney by Counsel for JH, Inc., Jerry Herbst, and Berry-Hinckley Industries. The Debtor listed a total of \$77,668,710.00 in Schedule F ("Creditors Holding Unsecured Nonpriority Claims"). See PACER Doc. No. 211, pg. 15.

Votes Cast. JH, Inc., Jerry Herbst, and Berry-Hinckley Industries cast the sole ballot in the election in the amount of its claim of \$77 million for nominee William A. Leonard, Jr. No other party cast a vote in the election. No party objected to the eligibility of JH, Inc., Jerry Herbst, and Berry-Hinckley Industries to vote. There was no dispute about the outcome of the election. Therefore, William A. Leonard, Jr., received the majority in amount of the votes cast.

Name and Address of Elected Trustee. There being no dispute to the eligibility of the requestor, its claim, or the election, the duly elected trustee is:

William A. Leonard, Jr.
6625 Valley View, Bldg. B #224
Las Vegas, NV 89118

Qualification of Trustee. The trustee qualifies if before seven days of selection, and before beginning official duties, the elected trustee has complied with 11 U.S.C. § 322.

Amount of Bond. The United States Trustee has set the amount of bond at \$67,263,634.

Meeting of Creditors. As stated on the record, the meeting was adjourned to February 27, 2015, at 10:00 a.m. and is subject to being adjourned again should the elected trustee qualify in accordance with 11 U.S.C. § 322.

Dated: January 23, 2015

Tracy Hope Davis,
United States Trustee

By: /s/ Nicholas Strozza
Assistant United States Trustee

3980
JOHN P. DESMOND
Nevada Bar No. 5618
Email: jdesmond@gordonsilver.com
BRIAN R. IRVINE
Nevada Bar No. 7758
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Fax: (775) 786-0131

Attorneys for Plaintiffs

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

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

Plaintiffs,

vs.

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

Defendants.

CASE NO.: CV13-02663

DEPT. NO.: 1

STIPULATION AND ORDER TO SUBSTITUTE A PARTY
PURSUANT TO NRCP 17(a)

Plaintiffs JH, Inc., Jerry Herbst, and Berry-Hinckley Industries (collectively, the "Herbst Entities"), by and through their attorneys of record, Gordon Silver, and Defendants Paul Morabito, individually and as Trustee of the Arcadia Living Trust; Superpumper, Inc.; Edward Bayuk, individually and as Trustee of the Edward William Bayuk Living Trust; Snowshoe Petroleum, Inc.; and Salvatore Morabito (collectively, "Defendants"), by and through their

1 attorneys of record, Robison, Belaustegui, Sharp and Low, hereby jointly agree and stipulate as
2 follows:

- 3 1. To remove the Herbst Entities as plaintiffs to this action;
4 2. To substitute William A. Leonard, Jr., the Trustee for the Bankruptcy Estate of Paul A.
5 Morabito, as the plaintiff to this action under NRCP 17(a); and
6 3. To remove Paul Morabito as a Defendant to this action, both individually and as
7 Trustee of the Arcadia Living Trust.

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 13th day of May, 2015.

14 GORDON SILVER

15 ROBISON, BELEAUSTEGUI, SHARP AND
16 LOW

17 By: 
18 JOHN P. DESMOND
19 Nevada Bar No. 5618
20 Email: jdesmond@gordonsilver.com
21 BRIAN R. IRVINE
22 Nevada Bar No. 7758
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28 Fax: (775) 786-0131

Attorneys for Plaintiffs

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Attorneys for Defendants

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ORDER TO SUBSTITUTE A PARTY PURSUANT TO NRCP 17(a)

Pursuant to the foregoing Stipulation, IT IS SO ORDERED.

DATED this 14th day of May, 2015.


DISTRICT COURT JUDGE

1 CERTIFICATE OF SERVICE

2 I certify that I am an employee of GORDON SILVER, and that on this date, pursuant to
3 NRCP 5(b), I am serving a true and correct copy of the attached STIPULATION AND
4 [PROPOSED] ORDER TO SUBSTITUTE A PARTY PURSUANT TO NRCP 17(a) on the
5 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

9 ☐ Certified Mail, Return Receipt Requested

10 ☐ Via Facsimile (Fax)

11 ☐ Via E-Mail

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

14 ☐ Federal Express (or other overnight delivery)

15 ☐ Via CM/ECF

16 addressed as follows:

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

22 DATED this 14th day of May, 2015.

23 
24 An Employee of GORDON SILVER

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE:

OCT 17 2018

JACQUELINE BRYANT, Clerk of the Second Judicial District Court, in and for the County of Washoe, State of Nevada

By

Deputy


Honorable Gregg W. Zive
United States Bankruptcy Judge



Entered on Docket
April 30, 2018

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

PAUL A. MORABITO,

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

Debtor.

JH, INC., JERRY HERBST, and BERRY
HINKLEY - INDUSTRIES,

Adv. No. 15-05019-GWZ

Plaintiffs,

I certify that this is a true copy:

Attest: 
Deputy Clerk, Bankruptcy Court

vs.

PAUL A. MORABITO,
Debtor,

JUDGMENT ON THE
FIRST AND SECOND
CAUSES OF ACTION

Defendant.

IT IS HEREBY ADJUDGED, consistent with the Court's Memorandum
Decision filed April 30, 2018 and it's Amended Findings of Fact and Conclusions of
Law also filed April 30, 2018, which are hereby incorporated by reference as though

set forth in full, as follows:

Plaintiffs have satisfied their burden of proof and proven all the necessary requirements to obtain a nondischargeable judgment under 11 U.S.C. § 523(a)(2), and the \$85,000,000.00 less the value of any payments made by Defendant, owed to the Plaintiffs by Defendant, is a nondischargeable debt. The Court finds in favor of Plaintiffs on the First and Second causes of action.


Honorable Gregg W. Zive
United States Bankruptcy Judge



Entered on Docket
April 30, 2018

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

PAUL A. MORABITO,

Debtor.

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

JIL INC., JERRY HERBST, and BERRY HINKLEY -
INDUSTRIES,

Plaintiffs.

(Certify that this is a true copy)

Attest: 
Deputy Clerk, Bankruptcy Court

PAUL A. MORABITO,

Debtor.

Adversary No.: 15-05019-GWZ

Defendant.

**MEMORANDUM DECISION REGARDING MORABITO'S MOTION FOR
REVISION OF INTERLOCUTORY ORDER GRANTING PARTIAL
SUMMARY JUDGMENT PURSUANT TO RULE 54(B) OF THE FEDERAL
RULE OF CIVIL PROCEDURE AND DENIAL OF PLAINTIFFS' FOURTH
CAUSE OF ACTION**

INTRODUCTION

The purpose of this Memorandum Decision is to determine Morabito's Motion for
Revision of Interlocutory Order Granting Partial Summary Judgment Pursuant to Rule 54(b) of
the Federal Rule of Civil Procedure [ECF No. 66] (the "Motion") and to enter a decision after

trial of Plaintiffs' Fourth Cause of Action. There will be two separate judgments entered. There will be an Amended Findings of Fact and Conclusions of Law entered and a final judgment that will replace and supercede the Court's earlier *Order Granting in Part and Denying in Part Motion for Summary Judgment* [ECF No. 60] (the "Order"). The relief granted in the Order will not be changed except it will no longer be a determination made pursuant to FRBP 7056 but there will now be a final judgment based upon this Memorandum Decision, all the pleadings pertaining to Plaintiffs' *Motion for Partial Summary Judgment* [ECF No. 33] (the "Motion for Partial Summary Judgment"), the Court's consideration of the arguments of counsel, the evidence proffered and the credibility of the witnesses at the September 13-14, 2016 trial (the "Trial") and the December 17, 2016 hearing. The evidence and testimony at the Trial reinforced the Court's fraud findings for the Order and provided an additional basis for nondischargeability pursuant to Section 523(a)(2)(A) for entering a final judgment finding in favor of the Plaintiffs' on their First and Second causes of action as set forth in the Amended Findings of Fact and Conclusions of Law. As to Plaintiffs' Fourth Cause of Action, it was not considered when determining the Motion for Partial Summary Judgment. The judgment regarding Plaintiffs' Fourth Cause of Action is hereby predicated upon this Memorandum Decision and is a final judgment entered after the Trial hearings and argument of counsel.

PLEADINGS

The Court read and considered the following pleadings in deciding the Motion, the Amended Findings of Fact and Conclusions of Law, the Memorandum Decision and the two final judgments: Defendant Paul A. Morabito ("Morabito"),² by and through his counsel, the law firms

¹ All reference to "Plaintiff," "Herbst Parties," or "Petitioning Creditors" herein shall identify the Plaintiff.

² All references to "Defendant," "Deblon," or "Murdolo" herein shall identify the Defendant.

1 of Robinson, Belausiegn, Sharp & Low and Robins Kaplan LLP, filed his Motion on October 17,
 2 2016. The Court reviewed the Motion, and the *Opposition to Motion for Revision of Interlocutory*
 3 *Order Granting Partial Summary Judgment Pursuant to Rule 54(b) of the Federal Rules of Civil*
 4 *Procedure* [ECF No. 72] (the "Opposition"), filed on November 10, 2016 by Plaintiffs JH Inc.
 5 ("JH"), Jerry Herbst ("Herbst"), and Berry-Hinckley Industries ("BHI," and together with JH and
 6 Herbst, the "Herbst Parties"), by and through their counsel, the law firm of Gammal Turner
 7 Gordon LLP, along with Morabito's *Reply in Support of Motion for Revision of Interlocutory*
 8 *Order Granting Partial Summary Judgment Pursuant to Rule 54(b) of the Federal Rules of Civil*
 9 *Procedure* [ECF No. 76] (the "Reply") and other pleadings, declarations, and documents noted on
 10 the record at the hearing on the Motion for Partial Summary Judgment held August 4, 2016 and at
 11 the Trial and the hearing held on December 7, 2016, on the Motion and final arguments regarding
 12 the Motion for Partial Summary Judgment.

13 The Court reviewed and considered the following pleadings filed by the parties regarding
 14 the Trial and evidentiary hearings and arguments pertaining to the Herbst Parties' Fourth Cause of
 15 Action. The Herbst Parties' *Amended Complaint Objecting to Debtor's Discharge Pursuant to*
 16 *Sections 523(a)(2)(A) and 523(a)(2)(B) and 28 U.S.C. § 2201* [ECF No. 8] (the "Amended
 17 Complaint") which added a Fourth Cause of Action as alternative relief to the First and Second
 18 causes of action. The Court reviewed the Complaint, the Amended Complaint, Morabito's
 19 *Answer to Adversary Complaint* [ECF No. 7], Morabito's *Answer to Amended Complaint*
 20 *Objecting to Discharge* [ECF No. 10] (the "Amended Answer"), the *Joint Trial Statement* [ECF
 21 No. 53], the *Amended Joint Trial Statement* [ECF No. 55], the evidence proffered at the Trial,
 22 Morabito's *Memorandum of Points and Authorities in Support of Debtor's Findings of Fact and*
 23 *Conclusions of Law Regarding the Fourth Cause of Action* [ECF No. 73], the Herbst Parties'

Memorandum of Law in Support of Judgment for the Herbst Parties on Their Fourth Cause of Action [ECF No. 74], the evidence and arguments at the December 7, 2016 hearing, the Herbst Parties' Motion to Reopen Evidence [ECF No. 78] ("Motion to Reopen Evidence RE the Fourth Cause of Action"), the Declaration of Mark M. Weissenmiller, Esq. In Support of Motion to Reopen Evidence [ECF No. 79], Morabão's Response of Debtor to Plaintiff's Motion to Reopen Evidence [ECF No. 87] ("Evidentiary Response"), the Declaration of Frank C. Gilmore in Support of Response of Debtor to Plaintiffs' Motion to Reopen Evidence [ECF No. 88], the Herbst Parties' Reply to Response to Motion to Reopen Evidence [ECF No. 91], the hearing held January 18, 2017, on the Herbst Parties' Motion to Reopen Evidence, the Court's Order Granting Motion to Reopen Evidence and Setting Hearing [ECF No. 100] ("Order Granting Motion to Reopen Evidence"), the evidentiary hearing held March 23, 2017, regarding the Herbst Parties' Motion to Reopen Evidence RE the Fourth Cause of Action, and finally, the Herbst Parties' Supplemental Memorandum of Law and Findings of Fact and Conclusions of Law in Support of Judgment for the Herbst Parties on their Fourth Cause of Action [ECF No. 105].

The following Memorandum Decision is being made pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, applicable in bankruptcy adversary proceedings pursuant to FRBP 7052.

The Court is going to take judicial notice of all relevant pleadings regarding the Motion and the Trial, the evidentiary hearings and arguments of counsel (the "Hearings") regarding the Fourth Cause of Action.

IT IS HEREBY FOUND AND DETERMINED by the Court (together with the Amended Findings of Fact and Conclusions of Law in Support of Judgment Regarding Plaintiff's First and Second Causes of Action (to replace ECF No. 39) ("Amended Findings of Fact and Conclusions of Law"), and all findings entered on the record made at the Trial upon which the

September 22, 2016 Order was predicated and which are hereby incorporated by reference) as follows:

1. The Court has jurisdiction over the matters raised in the adversary proceeding and Motion as core proceedings pursuant to 28 U.S.C. §§ 157 and 1334.
2. Determining whether a revision of an interlocutory order is warranted under Section 54(b) is a core proceeding in which the Court may enter a decision in accordance with 28 U.S.C. § 157(b)(2)(i).
3. Venue of the adversary proceeding in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
4. Good, sufficient and timely notice of the Motion, the Trial and the Hearings has been given to those to whom notice is required to be given in accordance with the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules. Notice of all proceedings regarding or relating to the Motion, the Trial and the Hearings was adequate under the circumstances and materially complied with applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules.

ANALYSIS

5. FRCP 54(b), applicable in adversary proceedings under FRBP 7054, provides in pertinent part that:
 - (b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or Third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time

before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.¹

6. "Under Rule 54(b), district courts have complete power over non-final orders and may revise them at any time, if doing so would be consonant with equity." Gerrin Ins. Co. V. N. Am. Capacity Ins. Co., No. 3:14-CV-00121-LRH, 2015 WL 3891423, at *2 (D. Nev. June 18, 2015). "Rule 54(b), however, does not expressly...prescribe any standards or bases for revisions of prior decisions." Holls v. Dump Cable, Inc., No. 1:13-CV-01077-IDB-EGB, 2014 WL 12526725, at *2 (W.D. Tenn. Aug. 12, 2014) (citing Lumpkin v. Farmers Grp., Inc., No. 05-2868 Ma-V, 2007 WL 699677, at *3 (W.D. Tenn. July 6, 2007)).
7. Courts have traditionally revised interlocutory orders "only 'whe[re] there is (1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice.'" See Holls, 2014 WL 12526725, at *2 (citing Louisville/Jefferson Cnty. Metro Gov't v. Hotels.com L.P., 590 F.3d 381, 389 (6th Cir. 2009)). A motion to revise under FRCP 54(b) clearly "may not be used to relitigate old matters." Id.
8. The Court finds and concludes that revision of the Order pursuant to Morabito's request is not appropriate under Rule 54(b). Since the issuance of this Court's Order on the Herbs Parties' First and Second causes of action, there has not been "an intervening change of controlling law" and there is no "need to correct a clear error or prevent manifest injustice." Id. However, revision by the Court as permitted by Rule 54(b) following the Trial is appropriate regarding the Fourth Cause of Action. The evidence proffered at the

¹ Morabito misstates FRCP 54(b) in the First argument of his Motion. "THE COURT MUST REVISE THE INTERLOCUTORY ORDER IF THE INTERLOCUTORY ORDER IS CONTRADICTED BY FACTS PROVEN AT TRIAL." (Rule 54(b) is permissive, not mandatory, as the rule clearly states "may be revised.")

1 Trial further supports the Court's Order holding that Morabito made intentional
 2 misrepresentations that were justifiably relied upon by the Herbst Parties and that the
 3 \$85,000,000 Confessed Judgment is nondischargeable. The Court finds that neither the
 4 Motion, the evidence presented at the Trial, nor the final arguments at the December 7,
 5 2016 hearing presented new evidence that was not available to Morabito prior to the
 6 Motion that would adequately support the relief Morabito was seeking in his Motion.
 7 Additionally, neither the Motion nor the Trial brought to light any genuine issues of
 8 material fact as to the Herbst Parties' First or Second causes of action that would provide a
 9 basis for the relief sought by Morabito in his Motion. If Morabito wanted to proffer
 10 further evidence to the Court, he should have taken that up with his counsel and that
 11 evidence should have been addressed in the appropriate pleadings and at the appropriate
 12 trials or hearings. "Justice does not require this Court to expend scarce judicial resources
 13 to accommodate counsel's negligence." See Holls, 2014 WL 12526725, at *2 (citing
 14 Lumpkin, 2007 WL 699677, at *3).

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 18 9. Additionally, Rule 7054 is not recognized as a basis to obtain post-judgment relief. In an
 19 attempt to give Morabito the benefit of the doubt, however, the Court will assess the
 20 Motion under applicable standards for motions for reconsideration.

21 10. The Federal Rules of Civil Procedure "do not recognize a motion for reconsideration."
 22 Captain Blythers, Inc. v. Thompson, 311 B.R. 530, 539 (9th Cir. BAP 2004). Instead, the
 23 rules recognize two types of motions to obtain post-judgment relief: a motion to alter or
 24 amend judgment, FED. R. CIV. P. 59(e), and a motion for relief from judgment, FED. R.
 25 CIV. P. 60. These rules are made applicable to bankruptcy adversary proceedings by
 26 Federal Rules of Bankruptcy Procedure 9023 and 9024, respectively.
 27
 28

1 11. Morabito's Motion does not refer to either Rule 9023 or Rule 9024.

2 12. If a motion for reconsideration is filed within ten days after the entry of judgment, the
3 court may construe it as a motion for relief from judgment under Rule 9023, incorporating
4 FED. R. CIV. P. 59(e). Am. Ironworks & Erectors, Inc. v. N. Am. Constr. Corp., 248 F.3d
5 892, 898-99 (9th Cir. 2001). After noting that "reconsideration of a judgment after its
6 entry is an extraordinary remedy which should be used sparingly," Wright, Miller and
7 Kang set forth four grounds upon which such a motion may be granted:
8

9 First, the movant may demonstrate that the
10 motion is necessary to correct manifest errors
11 of law or fact upon which the judgment is
12 based. Second, the motion may be granted so
13 that the moving party may present newly
14 discovered or previously unavailable evidence.
15 Third, the motion will be granted if necessary
16 to prevent manifest injustice. Fourth, a
17 Rule 59(e) motion may be justified by an
18 intervening change in controlling law.⁴

19 13. Morabito did not file the Motion within ten (10) days of the applicable court order, so it
20 cannot be construed as a request under Rule 9023. The Order was entered on September
21 22, 2016 and the Motion was filed on October 17, 2016, seventeen (17) business days
22 later.

23 14. A motion for relief from a judgment under FRBP 9024, which incorporates Rule 60(b) of
24 the Federal Rules of Civil Procedure, may also be construed as a motion for
25 reconsideration. Rule 60(b) permits a court to grant relief from a final order on a showing
26 of mistake, surprise, or excusable neglect, Rule 60(b)(1), newly discovered evidence, Rule

27 ⁴ (1) CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND
28 PROCEDURE: CIVIL 2D § 2810.6 (1995). See School Dist. No. 1 v. AcandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).
(2) JAMES W.M. MOORE, ET. AL., MOORE'S FEDERAL PRACTICE: CIVIL § 59.30[1][1] (3D ed. 2005).

60(b)(2); fraud, Rule 60(b)(3); a void judgment, Rule 60(b)(4); a satisfied or discharged judgment, Rule 60(b)(5); or other circumstances justifying relief, Rule 60(b)(6).

15. Because the Court's Order granting in part the Herbst Parties' Motion for Summary Judgment was not a final order, but rather an interlocutory one, it may not be vacated pursuant to Rule 60(b). See *Hollis*, 2014 WL 12526725, at * 1.

16. The Motion for Revision primarily rests upon the argument that the allegations included in the Amended Complaint are judicial admissions. Morabito, in his Answer to the Original Complaint, conceded that his verification of the facts in the Confessed Judgment were false. The Herbst Parties referred to Morabito's Answer in the allegations in the Fourth Cause of Action. Morabito contends that results in the Herbst Parties acknowledging Morabito's concession which constitutes an admission that the stipulated facts and Confession of Judgment cannot be a basis for a nondischargeability judgment. This turns the analysis on its head.

17. Initially, the allegations in the Amended Complaint were a result of Morabito's Answer and not as a result of any disavowment by Morabito of his affirmation of the stipulated facts. Morabito did not raise this contention in opposition to the Herbst Parties Motion for Partial Summary Judgment. It was only at the Trial on the Fourth Cause of Action that this issue was raised even though the allegations had existed in the Amended Complaint since July 7, 2015. This is not new evidence or an issue that could not have been argued earlier.

18. The Herbst Parties filed the Amended Complaint, adding the Fourth Cause of Action, as an alternative remedy if there was a determination that the Confessed Judgment was not a nondischargeable debt because the facts stipulated to by Morabito were false and could

1 not provide a basis for a 523(a)(2) judgment. In that event, the Herbst Parties sought to
2 have the Settlement Agreement set aside on the ground they never would have settled and
3 agreed to reduce the \$149,000,000.00 Judgment to \$85,000,000.00, (or to vacate the
4 Judgment and the FF & CL if they knew in 2011 that Morabito was engaging in deceptive
5 conduct and entering into false stipulations. The Herbst Parties' allegations in the
6 Amended Complaint acknowledge that, "113. In his Answer, Defendants contend
7 'Defendant executed the Confession of Judgment knowing the facts contained therein
8 were not only misleading but demonstrably false...' but those allegations do not
9 constitute admissions that the Herbst parties knew or believed Morabito's affirmation of
10 the stipulated facts were untrue when the Settlement Agreement and Confessed Judgment
11 were executed or when the Confessed Judgment was entered as a final Judgment.

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14 19. Morabito induced the Herbst Parties to settle with him by executing the Confessed
15 Judgment and verifying the facts contained therein. Without his execution of the
16 Confessed Judgment and verification, he never would have obtained the consideration he
17 was seeking; the vacatur. Morabito should not realize a benefit from his own duplicitous
18 conduct. The agreed upon \$85,000,000.00 obligation becomes nondischargeable due to
19 his intentional misrepresentation regarding the truthfulness of the facts contained in the
20 Confessed Judgment that he had to know that Plaintiffs were relying upon when they
21 entered into the Settlement Agreement. Moreover, that reliance is further justifiable
22 based upon the discovery done by the Herbst Parties during the punitive damage stage of
23 the state court action, which is consistent with Morabito's own belief that he would be
24 able to perform in accord with the Settlement Agreement and the subsequent Forbearance
25 Agreement.
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20. Morabito has not established that he qualifies for relief under Rule 54(b), Rule 59(e) or Rule 60(b)(1)-(5), or demonstrated the type of unusual or extraordinary circumstances that might justify relief under Rule 60(b)(6).

21. While there is insufficient basis to either revise or reconsider the Order as sought by Morabito, there is an adequate basis to revise by the Court as elaborated in the Amended Findings of Fact and Conclusions of Law.

22. Section 523(a) provides in pertinent part that:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition,

(B) use of a statement in writing--

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such

money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive.

11 U.S.C. § 523(a)(2)

23. To prove fraud under Section 523(a)(2)(A), five elements must be established in the

Ninth Circuit: "(1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct." See *In re Shyman*, 234 F.3d 1081, 1085 (9th Cir. 2000) (citing to *American Express Travel Related Servs. Co. v. Hashemi*, 104 F.3d 1122, 1125 (9th Cir. 1996); *Chabank (South Dakota), N.A. v. Eashai*, 87 F.3d 1082, 1086 (9th Cir. 1996)).

1 "Intent to deceive can be inferred from surrounding circumstances." *In re Kennedy*, 108
2 F.3d 1015, 1018 (9th Cir. 1997).

3
4 24. The type of reliance that must be shown to prevail on a Section 523(a)(2)(A) claim is
5 different than that required for a Section 523(a)(2)(B) claim. To prevail on a claim under
6 Section 523(a)(2)(A), the plaintiff must have justifiably relied upon the defendant's
7 misrepresentation. See *Field v. Mans*, 516 U.S. 59, 74-75, 116 S.Ct. 437 (1995). Unlike
8 the objective, reasonable reliance standard required under Section 523(a)(2)(B),
9 justifiable reliance is subjective, based upon the qualities and characteristics of the
10 particular plaintiff, as well as the circumstances of each particular case, rather than the
11 application of a community standard of conduct applicable to all cases. See *id.* at 71.

12
13 25. At the Trial, Morabito testified that notwithstanding his admissions in the Confessed
14 Judgment, entered into based upon his desire to have the state court judgment vacated, he
15 does not believe those facts he affirmed to be true. Morabito's trial testimony is the
16 equivalent of an admission that satisfied each of the elements for entry of a judgment of
17 nondischargeability under § 523(a)(2)(A) and § 523(a)(2)(B). His testimony only
18 reiterates his assertion in his Amended Answer that, "Defendant executed the Confessed
19 Judgment knowing that the facts contained therein were not only misleading but were
20 demonstrably false..." [ECF No. 10 at 51-55]. Simply because Morabito never
21 disavowed his affirmation and verification of the facts before now, in an attempt to
22 reduce his debt even further, does not create a situation where there is new evidence
23 available to support a revision of the Court's Order as sought by Morabito.
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26. The Court gave issue preclusive effect to the prepetition Confessed Judgment entered in state court as part of a settlement. The Court found that the Confessed Judgment deemed admitted the facts alleged in the state court complaint and found by the state court judge. As a result, Morabito admitted to each of the elements for a fraud-based judgment to be entered against Morabito under § 523(a)(2)(A), as detailed in its Amended Findings of Fact and Conclusions of Law.

27. Morabito made intentional misrepresentations regarding material facts, intending for the Herbst Parties to rely upon them. The Herbst Parties, as detailed herein, did not know when they entered into the Settlement Agreement and accepted the Confessed Judgment with the facts affirmed by Morabito, that Morabito would later attempt to disavow those facts. Morabito partially performed his obligations of the Settlement Agreement and also executed a subsequent Forbearance Agreement without attempting to rescind the facts had earlier affirmed. The Herbst Parties' reliance on Morabito's affirmed facts and the Confession of Judgment was subjectively justifiable and reasonable.

28. The Court finds that its analysis of the instant case parallels the reasoning of the Ninth Circuit Bankruptcy Appellate Panel's ("BAP") in *In re Johnson v. W3 Inv. Partners, LP*, (*In re Johnson*), No. SC-17-1194-LBF, 2018 WL 1803002 (9th Cir. BAP Apr. 16, 2018).¹ The parties in *Johnson* settled a prepetition state court action that had been litigated for nearly two and a half years, and that had sought recovery on numerous causes of action including fraud based upon intentional misrepresentation, concealment and false promise. *Id.* at 1-2. As part of the settlement, the defendants agreed to pay the plaintiff \$625,000.00 and further, if the settlement agreement was breached, a Stipulated

¹ *In re Johnson* was not published. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 3024-1.

Judgment would be entered against the defendants. Id. at 2-3. The Stipulated Judgment provided that the obligations arising from the settlement agreement would be nondischargeable in bankruptcy. Id. at 2. More importantly, defendants agreed that entry of the Stipulated Judgment deemed all allegations, statements and facts contained in the first amended complaint to be true and accurate and that the Stipulated Judgment was directly related to, and arose solely out of, their fraudulent conduct. Id. at 3.

29. After the defendants in Johnson defaulted on the settlement agreement and the plaintiff caused the Stipulated Judgment to be entered, defendants filed a chapter 7 petition. The plaintiff filed an adversary proceeding seeking to except from discharge the amount due under the Stipulated Judgment and filed a motion seeking summary judgment on its § 523(a)(2)(A) and § 523(a)(4) causes of action only based on the issue preclusive effect of the Stipulated Judgment. The defendants⁸ filed declarations stating that neither of them had engaged in the conduct alleged in the complaint, notwithstanding their admissions to the contrary in the Stipulated Judgment. The defendants further stated that they felt bullied by the settlement judge into settling the lawsuit because he told them that they had no chance of winning and they had no money to keep fighting. Id.

30. The bankruptcy court in Johnson denied the plaintiff's motion as to the § 523(a)(4) cause of action but granted it as to the § 523(a)(2)(A) cause of action, finding that issue preclusion applied to the facts stipulated to by the defendants and that those facts supported a finding of nondischargeability under § 523(a)(2)(A). The defendants appealed, asserting that the bankruptcy court erred in granting summary judgment by

⁸ The defendants were also the debtors.

1 giving issue preclusive effect to the state court judgment as to the § 523(a)(2)(A) claim.

2 Id. at 4.

3
4 31. The BAP affirmed the bankruptcy court's decision to grant the motion for summary
5 judgment on the § 523(a)(2)(A) nondischargeability claim. Id. at 9. The BAP explained
6 that the bankruptcy court correctly disregarded the general nondischargeability language
7 and also correctly found that a party may stipulate to facts that a bankruptcy court can
8 apply in a nondischargeability action and that the debtors' deemed admission of the facts
9 establishing fraud liability was entitled to preclusive effect. Id. at 5-6; see Hayhoe v.
10 Cole (In re Cole), 226 B.R. 647, 655 (9th Cir. BAP 1994) (citing Kingman v. Levinson,
11 831 F.2d 1292, 1296 n.3 (7th Cir. 1987)). Although the defendants contended that their
12 case was analogous to In re Wank, 505 B.R. 878 (9th Cir. BAP 2014), the BAP
13 distinguished the case from Wank, explaining that the facts of Johnson did not mirror
14 those in Wank, and that the salient question was whether the circumstances surrounding
15 the settlement or the judgment itself evidence the parties' intent for the Stipulated
16 Judgment to have preclusive effect. Id. at 7-8. The BAP found evidence that the parties
17 intended for the state court judgment to have preclusive effect. Id. at 8. The BAP based
18 its findings on a declaration from plaintiff's counsel that stated that the parties
19 specifically negotiated language with the intent that if defendants breached the settlement
20 agreement, the Stipulated Judgment entered against them would clearly set forth a finding
21 of fraud and breach of fiduciary duty and the admission of fraudulent conduct would
22 render the judgment nondischargeable. Furthermore, the defendants provided no
23 evidence to refute the testimony and the BAP did not find the debtors' statements in their
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1 declarations that they felt pressured to settle, overcame the plaintiff's counsel's
2 testimony. Id.

3
4 32. The facts verified by Morabito in the Confessed Judgment constitute an admission by him
5 that he committed fraud, similar to the Settlement Judgment in Johnson. Morabito
6 testified that he was advised by his counsel that he was bound to sign the Confessed
7 Judgment but that it would not be binding. [EFC No. 65 at :257:12-16; at 216: 7-8]
8 Morabito testified that he thought the decision by Judge Adams was ridiculous, but
9 nevertheless the facts that he admitted tracked Judge Adams' decision. [EFC No. 65 at
10 :168:24-25; 1169: 1-9]. Similarly, in Johnson, the defendants, in their postpetition
11 declarations, attempted to void the Settlement Judgment by stating that they felt bullied
12 by the settlement judge into settling.

14 33. If Morabito truly thought the facts in the Confessed Judgment were ridiculous or without
15 substance, counsel should not have advised him to sign, and Morabito should not have
16 affirmed the facts supporting the Confessed Judgment. Furthermore, Morabito never
17 spoke to the Herbst Parties or their counsel about his hesitation or reluctance to affirm the
18 facts. There is no evidence that the Herbst Parties were aware of Morabito's counsel's
19 advice or that Morabito's affirmation was not true at the time they entered into the
20 Confessed Judgment.

22 34. By signing and verifying the Confessed Judgment, Morabito intentionally misrepresented
23 his belief that the facts that he verified were true and correct. This is the case even
24 though he had contested the assertions made by the Herbst Parties in the state court action
25 and had sought to appeal Judge Adams' decision and his findings of fact. While
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1 Morabito may have believed that there was no consequence for affirming the existence of
2 those facts, he was wrong.

3 35. Unlike the facts in In re Wank, but similar to those in In re Johnson, Morabito was not
4 compelled or urged to sign and affirm facts by the Herbst Parties. Morabito testified that
5 during the October 2011 settlement conference in San Francisco, he never talked to the
6 Herbst Parties, nor their counsel. [ECF No. 65 at 168: 9-16]. Pursuant to Morabito's
7 testimony, the only person who told him that he was bound to sign the Confessed
8 Judgment was his own attorney. As a result, Morabito intentionally misrepresented that
9 he was affirming the facts in the Confessed Judgment.
10

11 36. In sum, Morabito did what the BAP in the Johnson case stated a party may do- stipulated
12 to facts that a bankruptcy court may apply in a nondischargeability action- and that is
13 what this Court is doing. In re Johnson, 2018 WL1803002, at *6.
14

15 37. There was justifiable reliance by the Herbst Parties because they had no reason to know
16 Morabito's subjective thoughts and that he was misrepresenting his verification of those
17 facts that established his misrepresentations. The Herbst Parties had obtained a judgment
18 supported by the findings of fact entered by Judge Adams, which were then incorporated
19 into the Confessed Judgment and affirmed by Morabito. Morabito never told the Herbst
20 Parties that he did not consider the factual statements that he verified not to be binding
21 upon him or that they would not have any force or effect. [ECF 65 at 122: 12-21].
22 Additionally, Morabito abandoned his appeal and ultimately received the benefit he so
23 greatly desired - the vacatur of the state court judgment.
24

25 38. It is certainly reasonable that Herbst Parties justifiably relied on Morabito's affirmation of
26 the facts that established he had committed fraud that resulted in a nondischargeable debt,
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1 because it was that verification and those facts that supported the Settlement Agreement
2 and the Confessed Judgment. Morabito signed the Settlement Agreement and the
3 Confessed Judgment with the intent to obtain vacatur of the \$149,000,000.00 state court
4 judgment. The circumstances surrounding the verified facts and the Confessed Judgment,
5 coupled with Morabito's obtaining the benefit of the Settlement Agreement, evidence the
6 parties' intent for the verified facts and Confessed Judgment to have preclusive effect.
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8 39. Morabito appears to claim that the Herbst parties knew that he would not have sufficient
9 funds to satisfy the \$85,000,000.00 Confessed Judgment if he defaulted on the Settlement
10 Agreement. However, Morabito testified that while he did not have sufficient liquid
11 assets at the time he signed the Settlement Agreement, he accepted Judge Adams'
12 findings that the Confessed Judgment would provide the Herbst Parties protection in the
13 event that Morabito did not perform his obligation under the Settlement Agreement;
14 therefore, the Plaintiffs' reliance was justifiable.
15

16 40. This is further reinforced by the Forbearance Agreement Morabito and the Herbst Parties
17 entered into on March 1, 2013, after Morabito defaulted on the Settlement Agreement.
18 The Forbearance Agreement was entered into after the Settlement Agreement and the
19 Confessed Judgment and therefore is a further ratification of the facts that Morabito
20 affirmed. At the Trial, Morabito testified that at the time he entered into the Forbearance
21 Agreement he believed he could satisfy the terms of that agreement, which extended the
22 deadlines to satisfy his Settlement Agreement obligations. Morabito did not attempt to
23 avoid or retract his verification of the affirmed facts or the Confessed Judgment. There is
24 no evidence the Herbst Parties knew at the time that Morabito affirmed the facts that had
25 been found by the state court judge, and not created by the Herbst Parties, that he would
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later attempt to denounce his affirmation and the truth of the facts after he had received the benefit from intentionally misleading the Herbst Parties.

41. The Herbst Parties would not have agreed to the Settlement Agreement, a reduction of their \$149,000,000.00 judgment to \$85,000,000.00, and the Confessed Judgment, without Morabito's affirmation of the facts.

FOURTH CAUSE OF ACTION

42. The Court is granting a final judgment in favor of the Herbst Parties on the First and Second causes of action which provides them with their bargained for relief, the \$85,000,000.00 Confessed Judgment, and that the debt is nondischargeable as a consequence of Morabito's fraud. Therefore, the alternative relief sought by the Herbst Parties in the Fourth Cause of Action is not necessary.

43. As a final matter, on December 16, 2016, the Herbst Parties filed their Motion to Reopen Evidence RE the Fourth Cause of Action. The Court held a hearing on January 18, 2017 on the Herbst Parties' Motion to Reopen Evidence RE the Fourth Cause of Action and on February 6, 2017 the Court entered its Order Granting Motion to Reopen Evidence. The Court held an evidentiary hearing on March 23, 2017, regarding the admissibility of the new evidence where the Herbst Parties proffered approximately thirteen (13) new emails and Morabito was given an opportunity to testify about and explain those emails. While denying relief on the Fourth Cause of Action, the Court is satisfied that the Herbst Parties met their burden imposed by the valuable collection remedies defense, if applicable, and proved that Morabito had assets in excess of \$85,000,000.00 at all relevant times.

1 **CONCLUSION**

2 44. Morabito filed the Motion for Revision in an attempt to urge the Court to reconsider or
3 change its Order. The Court is unpersuaded by Morabito's arguments and is not
4 going to allow Morabito to further reduce his debt from that of the already reduced
5 \$85,000,000.00 judgment, less the value of any payments Morabito has made previously,
6 and finds that debt to be nondischargeable pursuant to Section 523(a)(2). Only after
7 reading and considering all pleadings filed in support of and in opposition to the various
8 motions, weighing the credibility of the witnesses, considering arguments of counsel
9 and good cause appearing therefore, the Court will enter judgment finding in favor of the
10 Herbst Parties on the First and Second causes of action and denying relief on the Fourth
11 Cause of Action.
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Honorable Gregg W. Zive
United States Bankruptcy Judge



Entered on Docket:
April 30, 2018

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

PAUL A. MORABITO,

Debtor.

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

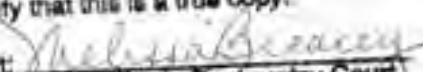
JH, INC., JERRY HERBST, and BERRY HINKLEY -
INDUSTRIES,

Plaintiffs.

PAUL A. MORABITO,
Debtor.

Defendant.

I certify that this is a true copy.

Attest: 
Deputy Clerk, Bankruptcy Court
Adversary No.: 15-05019-GWZ

**AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN
SUPPORT OF JUDGMENT REGARDING PLAINTIFFS' FIRST
AND SECOND CAUSES OF ACTION**

The purpose of these Amended Findings of Fact and Conclusions of Law is to supersede and replace the Court's initial *Findings of Fact and Conclusions of Law in Support of Order Granting in Part and Denying in Part Motion for Partial Summary Judgment* [ECF No. 59] ("Findings of Fact for Partial Summary Judgment") entered on September 22, 2016. The Court entered its *Order Granting in Part and Denying in Part Motion for Partial Summary Judgment*

[ECF No. 60] (the "Order for Partial Summary Judgment") on September 22, 2016, granting in part and denying in part the Plaintiffs'¹ *Motion for Partial Summary Judgment* [ECF No. 33] ("MSJ"). In its Order, the Court granted the MSJ on the Plaintiffs' First and Second causes of action and denied it on the Third Cause of Action. The Third Cause of Action was subsequently dismissed. Predicated on the Memorandum Decision, filed separately, and these Amended Findings of Fact and Conclusions of Law, the Court will enter a final judgment after trial as to the Plaintiffs' First and Second causes of action that will replace the Order for Partial Summary Judgment. As to the Fourth Cause of Action, a separate judgment will be entered consistent with the Memorandum Decision filed herewith.

PLEADINGS

The Court reviewed and considered the following pleadings filed by the parties pertaining to the Herbst Parties' First and Second causes of action:

Plaintiffs JH Inc. ("JH"), Jerry Herbst ("Herbst"), and Berry-Hickley Industries ("BHI," and together with JH and Herbst, the "Herbst Parties"), by and through their counsel, the law firm of Gannan Turner Gordon LLP, filed their Motion for Partial Summary Judgment on August 4, 2016. The Court reviewed the Motion for Partial Summary Judgment, the Herbst Parties' *Separate Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment* [ECF No. 34] (the "SSOF"), the *Declaration of Timothy P. Herbst in Support of the Herbst Parties' Separate Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment* [ECF No. 35] (the "Herbst Declaration"), and the *Debtor's Opposition to Plaintiffs' Motion for Partial Summary Judgment* [ECF No. 42] (the "Opposition"), filed by Paul A.

¹ All references to "Plaintiffs," "Herbst Parties," or "Petitioning Creditors" herein shall identify the Plaintiffs.

1 Morabito ("Morabito"),² by and through his counsel, the law firms of Robison, Belustegia, Sharp
 2 & Law and Robins Kaplan LLP, along with *Morabito's Evidentiary Objections to Declaration of*
 3 *Timothy P. Herbst Filed in Support of JH, Inc., Jerry Herbst, and Berry-Hinckley Industries'*
 4 *Motion for Partial Summary Judgment* [ECF No. 43] (the "Evidentiary Objection to Declaration
 5 of Timothy Herbst"), the *Defendants' Response to Plaintiffs' Statement of Disputed Facts in*
 6 *Support of Motion for Partial Summary Judgment (Fed. R. Civ. P. 36: LR 7056(c))* [ECF No. 44]
 7 (the "Response to Plaintiffs' Statement of Disputed Facts"), the *Defendant's Statement of Disputed*
 8 *Fact in Support of Opposition to Plaintiffs' Motion for Partial Summary Judgment* [ECF No.
 9 45] (the "Defendant's Statement of Disputed Fact"), the *Declaration of Paul A. Morabito in*
 10 *Support of Defendant's Statement of Disputed Fact in Support of Opposition to Plaintiff's Motion*
 11 *for Partial Summary Judgment* [ECF No. 46] (the "Morabito Declaration"), as well as the *Herbst*
 12 *Parties' Reply to Opposition to Motion for Partial Summary Judgment* [ECF No. 50] (the
 13 "Reply") and *Response to Evidentiary Objections to Declaration of Timothy P. Herbst Filed in*
 14 *Support of JH, Inc., Jerry Herbst, and Berry-Hinckley Industries' Motion for Partial Summary*
 15 *Judgment* [ECF No. 51] (the "Response to Evidentiary Objection") and the other pleadings,
 16 declarations, and documents noted on the record at the hearing on the Motion held August 4,
 17 2016, the trial conducted September 13-14, 2016 (the "Trial"), and the hearing and final
 18 arguments made on December 7, 2016.

19
 20 Following the trial and hearings and after due deliberation and sufficient cause appearing
 21 in accordance with FRCP 52, as incorporated pursuant to Bankruptcy Rule 7052, the Court
 22 presents this Amended Findings of Fact and Conclusion of Law and orders the entry of a final
 23 judgment for the reasons set forth below and as explained in the Memorandum Decision filed
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28 ² All references to "Defendant," "Debtor," or "Morabito" herein shall identify the Defendant.

herewith).

IT IS HEREBY FOUND AND DETERMINED by the Court (together with the findings of fact and conclusions of law made on the record at the Trial and hearings and the Memorandum Decision filed herewith) as follows:

1. The Court has jurisdiction over the matters raised in the adversary proceeding and the MSJ as core proceedings pursuant to 28 U.S.C. §§ 157 and 1334.

2. Determining whether a judgment is warranted under Section 523 is a core proceeding in which the Court may enter a final order in accordance with 28 U.S.C. § 157(b)(2)(I).

3. Venue of the adversary proceeding is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

4. Good, sufficient and timely notice of the MSJ, the Trial and hearings has been given to those to whom notice is required to be given in accordance with the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules. Notice of all proceedings regarding or relating to the MSJ, the Trial and hearings was adequate under the circumstances and materially complied with applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules.

5. Morabito and the Herbst Parties entered into an *Amended and Restated Stock Purchase Agreement* ("ARSPA"), dated June 28, 2007.

6. A dispute developed between Morabito and the Herbst Parties regarding the ARSPA and Morabito filed a lawsuit in the Second Judicial Court of the State of Nevada against the Herbst Parties on December 3, 2007. The lawsuit was captioned Consolidated Nevada Corp., et al. V. JH, et al., Case No. CV07-02764. The Honorable Judge Brent Adams presided at a bench trial commencing May 10, 2010. At the conclusion of the trial, Judge

Adams found that Morabito had breached the ARSPA, had committed fraud in the inducement and misrepresentation in relation to numerous aspects of the ARSPA. Judge Adams ultimately awarded the Herbst Parties total damages in the amount of \$149,444,777.80, representing both compensatory and punitive damages (the "Judgment"), which Judgment was entered on August 23, 2011.

On October 12, 2010, Judge Adams entered his *Findings of Fact and Conclusions of Law* related to the Judgment (the "FF&CL").

Morabito appealed the FF&CL and the Judgment to the Nevada Supreme Court and the Herbst Parties filed numerous cross-appeals (referred to collectively as the "Appeals").

During the Appeals, Morabito represented to the Herbst Parties that he was unable to satisfy the Judgment in full.

With the advice of counsel, Morabito and the Herbst Parties agreed to settle the state court action and the Appeals through the execution of the *Settlement Agreement and Mutual Release* ("Settlement Agreement"), executed on November 30, 2011. Pursuant to the Settlement Agreement, the Appeals were vacated, and the Judgment and the FF&CL were vacated.

As part of the Settlement Agreement, Morabito agreed to execute a *Confession of Judgment* in the amount of \$85,000,000.00 and to stipulate that it would be nondischargeable in a bankruptcy proceeding and affirmed the facts that establish that the debt satisfied the requirements of Section 523(a)(2)(A) as a nondischargeable debt. The Settlement Agreement further provided the Confession of Judgment could be filed, *ex parte* and with no notice to Morabito, should Morabito fail to perform or default on any of his obligations under the Settlement Agreement, and the failure to perform was not cured

1 within fifteen (15) days.

2
3 12. Morabito defaulted under the terms of the Settlement Agreement as a result of his failure
4 to timely comply with many of the terms.

5 13. Morabito then requested that the Herbst Parties forbear from exercising their rights and
6 remedies under the Settlement Agreement until December 1, 2013. Accordingly,
7 Morabito and the Herbst Parties, again with the advice of counsel, entered into the
8 *Forbearance Agreement*, dated March 1, 2013.

9 14. Morabito also failed to comply with the Forbearance Agreement. In accordance with the
10 terms of the Settlement Agreement, the Herbst Parties, on June 18, 2013, filed with the
11 Clerk of the State Court the Confession of Judgment and Stipulation. The Confession of
12 Judgment and Stipulation ("Confessed Judgment") was entered onto the judgment roll.
13
14 15. Each of Morabito's admissions within the Confessed Judgment were derived from, and
15 consistent with, the FF&CL and Judgment.

16
17 16. On June 20, 2013, the Herbst Parties filed an involuntary petition for relief under Chapter
18 7 of the Bankruptcy Code [ECF No. 1 in BK-N-13-51237-GWZ] (the "Involuntary
19 Petition"), commencing a Chapter 7 (the "Involuntary Proceeding") against Morabito.

20
21 17. On December 22, 2014, the Court entered its *Amended Order for Relief Under Chapter 7*
22 [ECF No. 168] in BK-N-13-51237-GWZ.

23
24 18. On March 20, 2015, the Herbst Parties commenced the above-captioned adversary
25 proceeding (the "Adversary Proceeding") by timely filing their *Complaint Objecting to*
26 *Debtor's Discharge Pursuant to 11 U.S.C. § 523 and Bankruptcy Rule 4007* [ECF No. 1]
27 (the "Complaint"). The Complaint contained a First, Second, and Third Cause of Action
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19. On April 23, 2015, Morabito filed an *Answer to Adversary Complaint* [ECF No. 7] ("Answer").

20. On May 7, 2015, the Herbst Parties filed their *Amended Complaint Objecting to Debtors' Discharge Pursuant to Sections 523(a)(2)(A) and 523(a)(2)(B) and 28 U.S.C. § 2201* [ECF No. 8] (the "Amended Complaint"), after Morabito disclosed in his Answer he was now claiming that the facts he affirmed in 2011, four years earlier, were misleading and false. The Herbst Parties added a Fourth Cause of Action as alternative relief to their Amended Complaint premised upon Morabito's allegations in his Answer.

21. On May 22, 2015, Morabito filed his *Answer to Amended Complaint Objecting to Discharge* [ECF No. 10] (the "Amended Answer").

22. On June 22, 2016, the Herbst Parties filed the *Motion for Partial Summary Judgment* [ECF No. 33]; the *Herbst Parties Separate Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment* [ECF No. 34]; and the *Declaration of Timothy P. Herbst* [ECF No. 35].

23. On July 21, 2016, Morabito filed his *Opposition*, his *Evidentiary Objection to the Declaration of Timothy Herbst*; the *Defendant's Statement of Disputed Fact*, and the *Morabito Declaration*.

24. On July 28, 2016, the Herbst Parties filed their *Reply* and their *Response to Evidentiary Objection to the Declaration of Timothy Herbst*.

25. On August 4, 2016, the Court conducted a hearing on the Herbst Parties' Motion for Partial Summary Judgment and Morabito's Evidentiary Objection to the Declaration of

1 Timothy Herbst.

2
3 26. On August 18, 2016, the Herbst Parties filed a *Joint Trial Statement* [ECF No. 53].

4 27. On August 23, 2016, the Herbst Parties filed an *Amended Joint Trial Statement* [ECF No.
5 55].

6
7 28. On September 13-14, 2016, the Court held the Trial on the Herbst Parties' Fourth Cause of
8 Action which was seeking alternative relief.

9
10 29. On September 22, 2016, the Court entered its Findings of Fact for Partial Summary
11 Judgment and its Order for Partial Summary Judgment. The effect of the Order for Partial
12 Summary Judgment was to grant the Herbst Parties' Motion for Partial Summary
13 Judgment for the Herbst Parties' First and Second causes of action and to deny it in for the
14 Third Cause of Action.

15
16 30. On October 17, 2016, seeking revision of the Court's Order for Partial Summary
17 Judgment, Morabito filed his *Motion for Revision of Interlocutory Order Granting Partial*
18 *Summary Judgment Pursuant to Rule 54(b) of the Federal Rule of Civil Procedure* [ECF
19 No. 66] ("Motion for Revision").

20
21 31. On October 31, 2016, the Court entered its *Judgment as to Plaintiffs' Third Cause of*
22 *Action* [ECF No. 71].

23
24 32. On November 10, 2016, the Herbst Parties filed their *Opposition to the Motion for*
25 *Revision*.

33. On November 18, 2016, Morabito filed his *Memorandum of Points and Authorities in Support of Debtor's Findings of Fact and Conclusions of Law Regarding the Fourth Cause of Action* [ECF No. 73] and the Herbst Parties filed their *Memorandum of Law in Support of Judgment for the Herbst Parties on Their Fourth Cause of Action* [ECF No. 74].

34. On November 29, 2016, Morabito filed his *Reply to the Herbst Parties' Opposition to the Motion for Revision*.

35. The Court held a hearing on December 7, 2016 on the Motion for Revision and final arguments were heard on the Fourth Cause of Action.

36. With respect to his Evidentiary Objection to the Declaration of Timothy Herbst, Morabito argued that the Court could not consider and rely on the FF&CL or Judgment for any purpose, because the FF&CL and Judgment were subsequently vacated by the state court. However, Morabito misses the point. The Herbst Parties have not requested that the FF&CL or Judgment be given preclusive effect, nor has the Court given them preclusive effect. Instead, the Herbst Parties requested that the FF&CL and Judgment be considered as further evidence that the issues of fraud in the inducement in the Confessed Judgment were "actually litigated and necessarily litigated" for purposes of the Court's issue preclusion analysis. Although it is correct that the vacated FF&CL and Judgment do not have preclusive effect, that does not mean that a trial was not held, that Judge Adams did not make certain findings of fraud and conclusions of law, and that a judgment was not actually entered at one point. That is the reality and those are facts that Morabito admits to in the Morabito Declaration. The Court is authorized to take judicial notice of these facts.

under Federal Rule of Evidence 201. Thus, the Court overrules the Evidentiary Objection to the Declaration of Timothy Herbst.

37. With respect to the MSJ, the Herbst Parties moved for partial summary judgment with respect to their First, Second, and Third causes of action pursuant to Sections 523(a)(2)(A) and 523(a)(2)(B) and 28 U.S.C. § 2201, respectively.

38. Section 523(i) provides in pertinent part that:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing--

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive.

11 U.S.C. § 523(a)(2).

39. The Court finds and concludes that entry of a final judgment is appropriate because there is no genuine dispute as to any material fact and the Herbst Parties are entitled to judgment as a matter of law on their First and Second causes of action under Section 523(a)(2)(A) and 523(a)(2)(B) under claim preclusion and issue preclusion and the evidence presented at the Trial established that Morabito engaged in conduct that satisfies

the factual and legal basis for finding the debt to be nondischargeable pursuant to Section 523(a)(2). See Memorandum Decision for a full analysis of this additional basis for judgment in favor of the Herbst Parties on the First and Second causes of action.

40. A fact is "material" if it might affect the outcome of the suit under the governing substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." See id.

41. Here, it is undisputed that there was a trial in the state court, that FF&CL and a Judgment were entered by Judge Adams and then vacated, and the Stipulation in support of the Confessed Judgment mirrors the FF&CL.

42. The facts that Morabito agreed to and affirmed in the Stipulation in support of the Confessed Judgment meet each of the elements of fraudulent inducement under Nevada law and nondischargeability under Sections 523(a)(2)(A) and 523(a)(2)(B), which mirror one another.

43. The Bankruptcy Appellate Panel of the Ninth Circuit found in In re Morabito, No. BAP NV-14-1593-FBD, 2016WL 3267406, *1 (9th Cir. BAP June 6, 2016) that in the Confessed Judgment, Morabito admitted that he acted in bad faith and committed fraud, including fraudulently inducing the Herbst Parties. The Morabito Declaration appears to contradict the stipulated facts in the Confessed Judgment, even though Morabito affirmed each of the facts in support of the Confessed Judgment.

44. While the Court found that no trial was necessary on the Herbst Parties' First and Second

causes of action because the only differing versions of the truth that had been presented to the Court were in the Morabito Declaration and Morabito's verified stipulation of facts in support of the Confessed Judgment, the Trial regarding the Fourth Cause of Action was conducted and the evidence provided additional facts establishing that Morabito engaged in fraud, supporting a judgment of nondischargeability on the First and Second causes of action.

45. The admitted and verified stipulation of facts in support of the Confessed Judgment demonstrates beyond any doubt that no genuine dispute exists as to whether Morabito's conduct satisfies all the elements of nondischargeability under Section 523(a)(2).

46. Although Morabito filed the Morabito Declaration in support of his Opposition, the Court finds that the Morabito Declaration is a sham intended to create disputed facts with his own inconsistent statements to defeat partial summary judgment. See Kennedy v. Albedin Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991) (a party cannot create an issue of fact by an affidavit contradicting his prior testimony if the affidavit is a sham produced merely to avoid summary judgment).

47. The Morabito Declaration is simply a rehash of what happened at the state court trial, and its contents are substantially all hearsay or not based upon Morabito's personal knowledge.

48. The disputes between the parties were previously litigated to judgment in the state court as evidenced by the FF&CL Judgment, and Confessed Judgment. The Court will not conduct an evidentiary hearing to relitigate what has been previously litigated.

49. Morabito's trial testimony provides further evidence that his declaration was a sham.

50. Morabito was adequately represented by counsel when he executed the Confessed Judgment. There has been no allegation made or evidence presented to the Court that Morabito was under undue duress when he executed the Confessed Judgment. Morabito simply did not want the Judgment of record. The allegations that Morabito was advised by his counsel that the Confessed Judgment would neither be enforceable nor entitled to preclusive effect in bankruptcy, do not entitle him to disavow facts that he verified. As confirmed by his testimony at the Trial, Morabito never discussed the affirmed stipulation of facts with the Herbst Parties or their counsel. He only discussed them with his counsel who advised him to affirm the facts and execute the Confessed Judgment.

51. The Confessed Judgment was part of the Settlement Agreement and the Confessed Judgment existed when Morabito breached the Settlement Agreement and the subsequent Forbearance Agreement. The Herbst Parties moved to enforce the Confessed Judgment and had it entered onto the judgment roll. It was only after those events and the commencement of this bankruptcy case that Morabito sought to disavow the facts he stipulated to and affirmed. The Court finds that to be unacceptable and a sham.

52. To determine the preclusive effect of a state court decision in bankruptcy court, the bankruptcy court must apply the law of the state rendering the allegedly preclusive judgment. See *In re Cantrell*, 329 F.3d 1119, 1123 (9th Cir. 2003); *Gayden v. Nourbakhsh* (*In re Nourbakhsh*), 67 F.3d 798, 800 (9th Cir. 1995).

53. In Nevada, four elements must be established for issue preclusion to apply: (i) the issue decided in the prior litigation must be identical to the issue presented in the current action; (ii) the initial ruling must have been on the merits and have become final; (iii) the party

1 against whom the judgment is asserted must have been a party or in privity with a party to
 2 the prior litigation, and (iv) the issue was actually and necessarily litigated. See Five Star
 3 Capital Corp. v. Ruby, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008).

4
 5 54. Here, the Court is not being asked to give preclusive effect to the Judgment and the Court
 6 is not relying upon the findings in the FF&CL for preclusive effect. Rather, the Herbst
 7 Parties are asking the Court to give preclusive effect to the Confessed Judgment and the
 8 Stipulation of facts in support of the Confessed Judgment.

9
 10 55. The FF&CL and Judgment were vacated, however Morabito affirmed the facts contained
 11 in the FF&CL and the Judgment to be true when he entered into the Stipulation of facts in
 12 support of the Confessed Judgment. This is so because the facts contained in the
 13 Stipulation of facts directly parallel Judge Adam's findings. Unlike the FF&CL and the
 14 Judgment, the verified Stipulation of facts has not been vacated.

15
 16 56. Thus, the Court is relying upon Morabito's verified Stipulation of facts in support of the
 17 Confessed Judgment. The Court is not relying upon Judge Adam's FF&CL; the Court is
 18 simply observing (because the Court cannot ignore) that the Stipulation of facts is
 19 consistent Judge Adam's FF&CL, they were not made out of whole-cloth or dictated to
 20 Morabito by the Herbst Parties, and there is no reason for the Court to view the Stipulation
 21 of facts with skepticism like the panel in In re Wank, 505 B.R. 878 (9th Cir. BAP 2014).

22
 23
 24 57. The parties to the Confessed Judgment Action and the Adversary Proceeding are the same.
 25 The Confessed Judgment is a final valid judgment on the merits. The Herbst Parties' state
 26 court fraud in the inducement claim is the same claim the Herbst Parties are litigating in
 27 the Adversary Proceeding.
 28

58. It is undisputed that there was a trial in the State Court, that FF&CL were entered by Judge Adams, and the Stipulation in support of the Confessed Judgment mirrors the FF&CL. In fact, Morabito had significant and substantial participation in every event that led him to sign the stipulated facts in support of the Confessed Judgment.

59. No Nevada case cited by the parties had facts similar to what is before the Court. While Willerton v. Bassham, by Welfare Div., State, Dep't of Human Res., 111 Nev. 10, 889 P.2d 823 (1995) gives the Court pause, Willerton is distinguishable. The Nevada Supreme Court in Willerton generally stated in *dicta* that stipulation-based judgments entered into prior to a trial are not entitled to issue preclusive effect. However, unlike in Willerton, Morabito stipulated to facts after (not prior to) a trial and that existed when the Confessed Judgment was executed. So here we have a post-trial stipulated judgment, which, as discussed below, the Court believes falls within Cole³ and Levinson,⁴ and are consistent with the Ninth Circuit BAP's rationale in the unpublished opinion of In re Johnson.⁵

60. Willerton did not hold that issue preclusive effect could not be given to a Confessed Judgment, particularly where there has been significant and substantial participation and a two week trial after which findings of fact and conclusions of law were entered and an appeal was filed before the parties settled.

(i) The Court concludes that there is no case directly on point. In none of the cases cited in the

³ In re Cole, 226 B.R. 647 (9th Cir. BAP 1998).

⁴ Klingman v. Levinson, 801 F.2d 1292, 1296 n.3 (7th Cir. 1987).

⁵ In re Johnson v. W.L. Inv. Partners, L.P. (In re Johnson), No. SC-17-1194-LHO, 2018 WL 080002 (9th Cir. BAP Apr. 16, 2018). In re Johnson was not published. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8024-1.

1 Opposition had there been a trial where facts were established and set forth in findings of
2 fact and conclusions of law and a judgment, which were then vacated pursuant to a
3 settlement of the parties. In no case cited by the parties was there a Confessed Judgment or
4 stipulated judgment entered after a trial.
5

6 62. Here the facts in the Confessed Judgment had been established by Judge Adams after a
7 trial that last several weeks and were established at the time of execution of the Confessed
8 Judgment and were stipulated to and affirmed by Morabito.
9

10 63. In most cases refusing to give issue preclusive effect to a Confessed Judgment, the
11 Confessed Judgment was executed at the time of the original transaction, not after a trial
12 and findings of fact and conclusions of law and a judgment. Thus, the general policy that
13 courts have relied upon in denying issue preclusive effect to Confessed Judgments is not at
14 issue here.
15

16 64. Morabito argues that the BAP decision in In re Wank, 505 B.R. 878 (9th Cir. BAP 2014)
17 permits Morabito to contradict his stipulations in support of the Confessed Judgment. The
18 Court concludes that Wank is not on point and distinguishable for several reasons. And,
19 of course, the Court has now weighed Morabito's credibility and testimony during the
20 Trial.
21
22

23 65. In Wank, the first declaration did not provide that the debtor knew the statements were
24 false or that the creditor justifiably relied. Here, in support of the Confessed Judgment,
25 Morabito acknowledged and verified that he knew his statements and representations were
26 false at the time he made them and that the Herbst Parties justifiably relied upon his
27 verification of the facts. There is no evidence that Morabito or his attorney had any
28

1 communication with the Herbst Parties or their counsel about Morabito believing the facts
2 that he verified in the Confession of Judgment to be false. That Morabito and his counsel
3 never told the Herbst Parties or their counsel that Morabito's affirmation of the stipulated
4 facts was false was finally established by his own testimony at the Trial.
5

6 66. In describing the circumstances giving rise to the first declaration in Wank, the debtor
7 stated that he was under undue duress and on medication for anxiety when he executed the
8 first declaration and that he objected to the falsity of the statements at the time he executed
9 the declaration.
10

11 67. Moreover, the second declaration in Wank presented the debtor's version of the truth had
12 he had the opportunity to defend against the creditor's claims, unlike Morabito's select bits
13 and pieces from a trial in which he had a full opportunity to litigate his version of the truth.
14

15 68. Unlike in Wank, the Morabito Declaration is a sham.
16

17 69. Further, the first declaration in Wank could only be used in a future bankruptcy proceeding
18 and was not included in the stipulated judgment. However, the Confessed Judgment here,
19 which contains all of the findings of fact that were agreed to and verified by Morabito, was
20 not intended to be filed in a future bankruptcy proceeding, but rather was specifically
21 intended to be filed in the state court and, in fact, was filed in the state court on June 18,
22 2013, and entered onto the judgement roll.
23

24 70. In Wank, the BAP panel relied upon In re Cole, which was cited with approval by the
25 Ninth Circuit in In re Huang, 275 F.3d 1173 (9th Cir. 2002), for the proposition that
26 bankruptcy courts should not enforce a stipulated judgment. However, the stipulated
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28

1 judgment in Cole was executed prior to any trial on the issues set forth in the stipulated
2 judgment. Thus, the BAP panel in Cole held it would not enforce a prospective waiver of
3 the discharge.
4

5 71. Here, the stipulation of facts in the Confessed Judgment was not prospective because the
6 judgment, with all the necessary elements of Section 523(a)(2) nondischargeability,
7 existed at the time of execution. When Morabito executed the Confessed Judgment, there
8 existed a final judgment, which made all the findings that are mirrored in the Confessed
9 judgment, that were actually litigated and that were all necessarily decided in the former
10 proceeding with the same parties.
11

12 72. Further, unlike in Cole, the facts stipulated to and verified by Morabito did not relate to
13 some future bankruptcy case, but involved issues that were actually and necessarily
14 litigated in front of Judge Adams and were in existence at the time the Confessed
15 Judgment was executed. The Confessed Judgment had everything to do with the merits of
16 the state court action unlike in Cole.
17
18

19 73. In distinguishing Cole's holding that, "if the parties stipulated to the underlying facts that
20 support a finding of nondischargeability, the Stipulated Judgment would then be entitled to
21 collateral estoppel application," the Wank panel wrote that the debtor's admissions in the
22 first declaration were not stipulated, nor were they referenced in the stipulated judgment.
23 Instead, the first declaration in Wank was a stand-alone document, executed only by the
24 debtor, not submitted for consideration by the state court, then sealed, to be used by the
25 creditor only in a future bankruptcy proceeding. Of course, the facts in the instant
26 proceeding are totally inapposite.
27
28

1 74. The Herbst Parties have asked the Court to give the stipulated facts collateral estoppel
2 application as recognized in Wank and Cole and the Court concludes that the stipulated
3 facts are entitled to collateral estoppel effect because the facts at issue here are akin to
4 those in Cole, not Wank. Here, the facts underlying Morabito's fraud were stipulated to,
5 admitted, verified, and included in the Confessed Judgment that was filed in the state court
6 and subsequently entered upon the judgment roll.

7
8
9 75. Furthermore, unlike in Wank, there is no reason to question the Herbst Parties' motivation
10 in requesting that Morabito execute the Confessed Judgment. The creditor in Wank had
11 not gone through trial or had facts determined by a court that could establish Section
12 523(a)(2) nondischargeability. Unlike Wank, the Herbst Parties received no benefit from
13 the stipulation of facts and verification that they did not already have from the FF&CL and
14 Judgment entered by Judge Adams.

15
16 76. With respect to the Stipulation of Nondischargeability, which Morabito suggests taints the
17 Confessed Judgment, the Court again concludes that this case is more similar to Cole than
18 Wank. In Cole, the BAP panel recognized that it could sever the pre-petition waiver of the
19 discharge, and give effect to the remaining provisions of the stipulated judgment.

20
21 77. Although the Court finds that the Stipulation of Nondischargeability is unenforceable as
22 against public policy, as in Cole, the Court will sever the Stipulation of
23 Nondischargeability and give force and effect to the other provisions of the Confessed
24 Judgment including the stipulated facts underlying Morabito's fraud.

25
26 78. The Court finds that its analysis of the facts in this proceeding parallel the reasoning of the
27 BAP panel in In re Johnson. The parties in Johnson settled a prepetition state court action
28

1 that had been litigated for nearly two and a half years, and that had sought recovery on
 2 numerous causes of action including fraud based upon intentional misrepresentation,
 3 concealment and false promise. *Id.* at 1-2. As part of the settlement, the defendants
 4 agreed to pay the plaintiff \$625,000.00 and further, if the settlement agreement was
 5 breached, a Stipulated Judgment would be entered against the defendants. *Id.* at 2-3. The
 6 Stipulated Judgment provided that the obligations arising from the settlement agreement
 7 would be nondischargeable in bankruptcy. *Id.* at 2. More importantly, the defendants
 8 agreed that entry of the Stipulated Judgment deemed all allegations, statements and facts
 9 contained in the first amended complaint to be true and accurate and that the Stipulated
 10 Judgment was directly related to, and arose solely out of, their fraudulent conduct. *Id.* at 3.

11
 12
 13 79. After the defendants in *Johnson* defaulted on the settlement agreement and the plaintiff
 14 caused the Stipulated Judgment to be entered, defendants filed a chapter 7 petition. The
 15 plaintiff filed an adversary proceeding seeking to except from discharge the amount due
 16 under the Stipulated Judgment and the plaintiff filed a motion seeking summary judgment
 17 on its § 523(a)(2)(A) and § 523(a)(4) causes of action only based on the issue preclusive
 18 effect of the Stipulated Judgment. The defendants filed declarations stating that neither of
 19 them had engaged in the conduct alleged in the complaint, notwithstanding their
 20 admissions to the contrary in the Stipulated Judgment. The defendants further stated that
 21 they felt bullied by the settlement judge into settling the lawsuit because he told them that
 22 they had no chance of winning and they had no money to keep litigating. *Id.*

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 24
 25
 26 80. The bankruptcy court in *Johnson* denied the plaintiff's motion as to the § 523(a)(4) cause
 27 of action but granted it as to the § 523(a)(2)(A) cause of action, finding that issue
 28 preclusion applied to the facts stipulated to by the defendants and that those facts

supported a finding of nondischargeability under § 523(a)(2)(A). The defendants
 appealed, asserting that the bankruptcy court erred in granting summary judgment by
 giving issue preclusive effect to the state court judgment as to the § 523(a)(2)(A) claim. *Id.*
 at 4.

(8). The BAP affirmed the bankruptcy court's grant of motion for summary judgment on the §
 523(a)(2)(A) nondischargeability claim. *Id.* at 9. The BAP explained that the bankruptcy
 court correctly disregarded the general nondischargeability language and also correctly
 found that a party may stipulate to facts that a bankruptcy court can apply in a
 nondischargeability action and that the debtors' deemed admission of the facts establishing
 fraud liability was entitled to preclusive effect. *Id.* at 5-6; see *Hayhoe v. Cole (In re Cole)*,
 226 B.R. 647, 655 (9th Cir. BAP 1994) (citing *Klingman v. Levinson*, 831 F.2d 1292,
 1296 n.3 (7th Cir. 1987)). Although the defendants contended that their case was
 analogous to *In re Wank*, the BAP distinguished the case from *Wank*, explaining that the
 facts of *Johnson* did not mirror those in *Wank*, and that the salient question was whether
 the circumstances surrounding the settlement or the judgment itself evidence the parties'
 intent for the Stipulated Judgment to have preclusive effect. *Id.* at 7-8. The BAP found
 evidence that the parties intended for the state court judgment to have preclusive effect.
Id. at 8. The BAP based its findings on a declaration from plaintiff's counsel that stated
 that the parties specifically negotiated language with the intent that if defendants breached
 the settlement agreement, the Stipulated Judgment entered against them would clearly set
 forth a finding of fraud and breach of fiduciary duty and the admission of fraudulent
 conduct would render the judgment nondischargeable. Furthermore, the defendants
 provided no evidence to refute the testimony and the BAP did not find the debtors'

statements in their declarations that they felt pressured to settle, overcome the plaintiff's counsel's testimony. Id.

82. The facts verified by Morabito in the Confessed Judgment constitute an admission by him that he committed fraud, similar to the Settlement Judgment in Johnson. Morabito testified that he was advised by his counsel that he was bound to sign the Confessed Judgment but that it would not be binding. [EFC No. 65 at 257:12-16; at 216: 7-8]. Morabito testified that he thought the decision by Judge Adams was ridiculous, but nevertheless the facts that he admitted tracked Judge Adams' decision. [EFC No. 65 at 168: 24-25; 1169: 1-9]. Similarly, in Johnson, the defendants, in their postpetition declarations, attempted to void the Settlement Judgment by stating that they felt bullied by the settlement judge into settling.

83. There is no evidence that the Herbst Parties were aware of Morabito's counsel's advice or that Morabito's affirmation was not true at the time they entered into the Confessed Judgment.

84. By signing and verifying the Confessed Judgment, Morabito intentionally misrepresented his belief that the facts that he verified were true and correct. This is the case even though he had contested the assertions made by the Herbst Parties in the state court action and had sought to appeal the Judgment and FF&CL.

85. Unlike the facts in In re Wank, but similar to those in In re Johnson, Morabito was not compelled or urged to sign and verify facts by the Herbst Parties. The facts Morabito verified were facts originally found by the state court judge and not created by the Herbst Parties. Morabito testified that during the October 2011 settlement conference in San

1 Francisco, he never talked to the Herbst Parties, nor their counsel. (ECF No. 65 at 168: 9-
2 16]. Pursuant to Morabito's testimony, the only person who told him that he was bound to
3 sign the Confessed Judgment was his own attorney. As a result, Morabito intentionally
4 misrepresented that he was affirming the facts in the Confessed Judgment.
5

6 86. Morabito did what the BAP in the Johnson case stated a party may do--stipulated to facts
7 that a bankruptcy court may apply in a nondischargeability action--and that is what this
8 Court is doing. In re Johnson, 2018 WL1803002, at * 6.
9

10 87. Therefore, the Confessed Judgment is entitled to issue preclusive effect:
11

12 88. Under Nevada law, claim preclusion should apply whenever: "(1) the parties or their
13 privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based
14 on the same claims or any part of them that were or could have been brought in the first
15 case." See Five Star, 124 Nev. at 1054, 194 P.3d at 713.
16

17 89. Unlike issue preclusion, claim preclusion does not require actual litigation.
18

19 90. Under Nevada law, the elements of fraud are: (1) A false representation made by the
20 defendant; (2) Defendant's knowledge or belief that the representation is false (or
21 insufficient basis for making the representation); (3) Defendant's intention to induce the
22 plaintiff to act or to refrain from acting in reliance upon the misrepresentation; (4)
23 Plaintiff's justifiable reliance upon the misrepresentation; and (5) Damage to the plaintiff
24 resulting from such reliance. Bullman, Inc. v. Nevada Bell, 108 Nev. 105, 825 P.2d 588,
25 592 (1992) (citing Lubbe v. Barba, 91 Nev. 596, 540 P.2d 115, 117 (1975)). In addition,
26 the plaintiff must prove each element of the fraud claim by clear and convincing evidence.
27
28

Bulman, 825 P.2d at 392.

91. Here, the parties to the Confessed Judgment Action and this Adversary Proceeding are the same. The Confessed Judgment is a final valid judgment on the merits. The Herbst Parties' state court fraud in the inducement claim is the same claim the Herbst Parties are litigating in the Adversary Proceeding.

92. Moreover, the elements of fraud in the inducement under Nevada law and nondischargeability under Section 523(a)(2) mirror one another.

93. As a result, the Herbst Parties are also entitled to judgment on their First and Second causes of action under claim preclusion.

94. The Court also finds and concludes that the Confessed Judgment is not an unenforceable penalty under Nevada law. Damages resulting from a breach of the Settlement Agreement were difficult to ascertain because of the non-monetary obligations. The Confessed Judgment was a reasonable attempt to ascertain damages under the Settlement Agreement as the \$85,000,000 was tied to the \$85,000,000 compensatory award of the State Court. The Settlement Agreement was not a penalty; it was a benefit to Morabito, particularly in light of the Forbearance Agreement, which provided Morabito more time to perform under the terms of the Settlement Agreement.

95. The Court is also not persuaded by Morabito's argument that the Confessed Judgment does not evidence that the \$85,000,000 was proximately caused by Morabito's fraud. The Court reads the Confessed Judgment to mean that the \$85,000,000 was sustained due to Morabito's fraud.

1 96. A final judgment will be entered in favor of the Herbst Parties on their First and Second
2 causes of action that the \$85,000,000.00 Confessed Judgment debt reduced by the value of
3 payments made by Morabito, is nondischargeable pursuant to Section 523(a)(2).
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From: Yalamanchili, Sujata [SYalaman@hodgsonruss.com]
Sent: Wednesday, September 15, 2010 9:32 PM
To: Dennis Vacco; Paul Morabito
CC: Graber, Garry
Subject: RE: Follow Up Thoughts
Attachment(s): "Archived"

Dennis: I will call you after you land tomorrow. Have a safe trip.

Paul: Are you able to wire the retainer we discussed? That will allow me to involve Garry and others, if needed, to get going on this.

Sujata

From: Dennis Vacco [mailto:dvacco@lippes.com]
Sent: Wednesday, September 15, 2010 10:03 PM
To: Yalamanchili, Sujata; Paul Morabito
Cc: Graber, Garry
Subject: RE: Follow Up Thoughts

Sujata,

I leave in the morning at 8:00 and arrive at noon, 3:00PM eastern. It would be of great assistance if you would consider a transaction whereby PAM sells his interest in CoWestco to Edward and Sam as you proposed. Paul will sell his interest in exchange for a promissory note. I would be interested in your and Garry's suggestions concerning the terms of this note. Paul would like the note to take into account the amount owed by him to Superpumer. In other words there would be an offset made by the company against the promissory note payments in order to defray the amount owed to the company.

Thanks.

Dennis

From: Yalamanchili, Sujata [mailto:SYalaman@hodgsonruss.com]
Sent: Wednesday, September 15, 2010 4:40 PM
To: Paul Morabito; Dennis Vacco
Cc: Graber, Garry
Subject: Follow Up Thoughts

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

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

Let me know if/when you want to talk.

Sujata

Sujata Yalamanchili, Esq.
Hodgson Russ LLP
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, NY 14202-4040
(716) 848-1657
(716) 849-0349 (fax)
syalaman@hodgsonruss.com



LMWF SUPP 082393

3680

Secretary: Tammy Smith (tsmith@hodgsonruss.com); 716-848-1276

Sujata Yalamanchili
Partner
Hodgson Russ LLP
tel: 716.848.1657 | fax: 716.819.4620
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The Guaranty Building, 140 Pearl Street, Suite 100, Buffalo, New York 14202

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LMWF SUPP 082394

3681

From: Paul Morabito [pmorabito@cowestco.com]
Sent: Saturday, September 18, 2010 11:26 AM
To: Dennis Vacco; Mlehmanesq@aol.com
Subject: attorney client privileged communication

This is what is exempt in **Nevada**:

Appliances, household goods, furniture, electronics, clothing, home & yard equipment owned by debtor or dependent of debtor to \$12,000 total

[Nev. Rev. Stat. Ann. § 21.090 \(1\)\(b\)](#)

Books, works of art, musical instruments and jewelry to \$5,000

As part of my fair value exchange, I should take the excess water rights (\$100,000), theatre equipment (\$300,000) and appliances (\$25,000) at the Reno house, in exchange for Edward getting the Reno furniture & electronics (\$150,000), Laguna furniture & electronics (\$100,000), Palm Springs furniture & electronics (\$75,000), appliances at the houses (\$25,000) and books, art and jewelry (\$100,000) at all the houses.

I have no clothes in Nevada. I should declare my residence with Edward in Laguna Beach asap - I don't care about the \$550,000 Nevada homestead exemption. I want to protect my household assets.

My Nevada house has a \$1.1 million mortgage and I am going to offer Bank of America a \$2 million second for my line of credit.

New Federal Residency Requirement

Under the new bankruptcy law, you must be have lived in the state for at least 40 months (three years and four months) before you can claim any homestead protection greater than \$125,000. (If your states offers less than this amount, the law is irrelevant to you.) The law is poorly worded but seems to say that if you move from one home to another in the same state, you can claim that state's homestead protection.

[If you are moving to another state, OR you moved to Nevada within in the last two years, click here.](#)

NV Exemptions

Must record homestead declaration before filing for bankruptcy

[Nev. Rev. Stat. Ann. § 115.020](#)

Real property or mobile home to \$550,000 (husband & wife may not double)

[Nev. Rev. Stat. Ann. § 115.010](#)

[Nev. Rev. Stat. Ann. § 21.090 \(1\)\(m\)](#)

In re Lennox, 58 B.R. 104 (D. Nev. 1986)

[Nev. Rev. Stat. Ann. § 115.020](#)

[Nev. Rev. Stat. Ann. § 115.005](#)

Property Exempt From Enforcement

<http://www.kinseylaw.com/clientserv2/civillitigation/civ/enforcement/enforcejudgment.html>

The California Constitution mandates that the Legislature protect "a certain portion" of debtors' property from forced sale (Ca Const. Art. XX, § 1.5). The broad purpose is to protect enough property from enforcement to enable judgment debtors to support themselves and their families, and to help shift the cost of social welfare for debtors from the community to judgment creditors (see 16 Cal. L.Rev. Comm'n Rep. 1079 (1982)). Exemption laws are liberally construed in the debtor's favor.

The EJT exemptions may be claimed only by natural person judgment debtors--i.e., not by partnerships, corporations or other entities. [Ca Civ Pro § 703.020(a)]

Generally, an exemption must be claimed by the judgment debtor within the time and in the manner prescribed by the EJT. If not timely claimed, the exemption is waived, and all of the property is subject to enforcement of a money judgment. [Ca Civ Pro § 703.030(a)] Exception: Property that is described by an exemption statute as "exempt without making a claim" cannot be reached by any procedure for enforcement of a money judgment. [Ca Civ Pro § 703.030(b)]

Unless otherwise required by law, to oppose a claim of exemption, within 10 days after service of the notice of claim of exemption (or, ordinarily within 15 days if the levying officer served the notice by mail, see Ca Civ Pro § 684.120), the judgment creditor must:

- File with the court a Notice of Opposition to the Claim of Exemption (Judicial Council Form EJ-170), Notice of Motion for an Order Determining the Claim of Exemption, and Notice of Hearing on Claim of Exemption (Judicial Council Form EJ-175); and
- File with the levying officer (preferably by personal delivery or certified mail, return receipt requested) copies of each of these documents. (The levying officer will file the judgment debtor's claim of exemption and any attached financial statement with the court.) [See Ca Civ Pro § 703.550]

The EIL exemptions may be claimed by the judgment debtor or person acting on the debtor's behalf-- e.g., a garnishee, the judgment debtor's agent or a public or private retirement plan. [Ca Civ Pro § 703.020(b)(1)] An exemption for community property may be claimed by either the judgment debtor or his or her spouse . . . whether or not the spouse is also a debtor under the judgment. [Ca Civ Pro § 703.020(b)(2)]

To claim an exemption, the judgment debtor (or spouse or other person, where applicable) must file an original and one copy of a Claim of Exemption with the levying officer. [Ca Civ Pro § 703.520(a)] The claim is deemed filed when actually received by the levying officer. [Ca Civ Pro § 681.040]

After being served with the claim of exemption and notice (above), the judgment creditor must decide whether to oppose the claim. If the creditor files an opposition, a court hearing must be held to determine whether the exemption should be allowed. If opposition is not timely filed, the property will be released whether or not the exemption claim is valid. [Ca Civ Pro § 703.550] The hearing on the exemption claim must be held no later than 20 days from the date the notice of motion (above) is filed with the court, unless the court continues the hearing for good cause. [Ca Civ Pro § 703.570(a)]

Below are the EIL exemptions and the most commonly claimed federal law exemptions. For a complete list of all the state and federal exemptions, see the Judicial Council list of exemptions (EJ-155) The Judicial Council publishes a list of the current Ca Civ Pro § 704.010 et seq. exemption dollar amounts (as well as the § 703.140(b) exemption dollar amounts, along with the effective date. [Ca Civ Pro § 703.150(d)]

The following property is exempt only if a timely exemption claim is filed:

Motor vehicles: Any combination of the following is exempt in the amount of \$2,300:

- The aggregate equity in motor vehicles;
- The proceeds of an execution sale of a motor vehicle; and
- The proceeds of insurance or other indemnification for the loss, damage or destruction of a motor vehicle. [Ca Civ Pro § 704.010(a)]

Household furnishings and personal effects: There is no specific dollar exemption for household furnishings, appliances, provisions, wearing apparel and other personal effects. Furnishings and personal effects located at the judgment debtor's residence are exempt if they are a) "Ordinarily and reasonably necessary to" the judgment debtor and members of the judgment debtor's family at the judgment debtor's principal place of residence; and, b) Personally used, or procured for use, by the judgment debtor and family at the debtor's principal residence. [Ca Civ Pro § 704.020(a)(1)]

Jewelry, heirlooms and works of art: Jewelry, heirlooms and works of art are exempt to the extent their aggregate equity does not exceed \$6,075. [Ca Civ Pro § 704.040]

Message

From: Dennis Vacco (dvacco@lapes.com)
Sent: 9/20/2010 5:12:17 PM
To: Paul Morabito (pmorabito@cowestco.com); SYalamian@hodgsonruss.com
Subject: RE: Spirit

I recommend that the letter *not* be from you.



From: Paul Morabito [mailto:pmorabito@cowestco.com]
Sent: Monday, September 20, 2010 4:47 PM
To: SYalamian@hodgsonruss.com; Dennis Vacco
Subject: Spirit

I spoke to Sean Hufford. I advised him that for personal reasons, I made up my mind to sell Superpumper, Inc. to Sam and Edward. I advised that they had been employees since I bought the company, run the company every day, and that the purchase would be backed by an appraisal from Hopkins Appraisers, and not create any obligations not already in the company. In fact I may owe the company money. Also that we would speak to SOPUS and transfer all oil agreements - he said he was fine with everything. He said that any letter should be addressed to him, sent airt, and he would approve and process it within a week tops.

Paul Morabito
mobile: (775) 223-3585 ext: (480) 223-1062
email: paulmorabito1964@gmail.com

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HR0000317

Message

From: Yalamanchili, Sujata (SYalaman@hodgsonruss.com)
Sent: 9/20/2010 11:38:28 AM
To: Crotty, Eileen (ECrotty@hodgsonruss.com)
Subject: RE: Morabito - Wire

yes and no. Paul recently lost a significant court case on a fraud claim. This is very bad news, although he plans to appeal. He may be facing bankruptcy. I agreed to help him with some of the asset protection strategies he will need, if he paid us this \$20k retainer to cover those fees.

Paul has been waiting for resolution of this court case before making arrangements to pay us. With this very unfavorable ruling, I am not sure how this will all play out. The "good news" is he may now be motivated to get us paid, since if he doesn't the money will be taken by his judgment creditor. The "bad news" is he may be motivated to move assets around to keep them away from the creditor. I have discussed this with Paul and he hasn't committed either way what he intends to do.

Garry Graber is aware of our outstanding invoices and is giving some advice to Paul.

This situation is changing daily. I will keep you posted.

Sujata

From: Crotty, Eileen
Sent: Monday, September 20, 2010 11:26 AM
To: Yalamanchili, Sujata
Subject: FW: Morabito - Wire

Hi Sujata,

I saw this wire come in - good news, Paul has been in contact. Any news on the old invoices?

Thanks,

Eileen

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HR0000218

3685

From: Pulli, Sandy
Sent: Monday, September 20, 2010 10:08 AM
To: Crotty, Eileen
Subject: FW: Morabito - Wire

From: Yalamanchili, Sujata
Sent: Monday, September 20, 2010 9:04 AM
To: Pulli, Sandy; Smith, Tammy
Subject: RE: Morabito - Wire

Yes. This is a retainer for some work Garry Graber and I are doing for Paul.

Tammy is out today but I believe there is a file already open for this. I will ask her to send you the number tomorrow.

Sujata

From: Pulli, Sandy
Sent: Monday, September 20, 2010 8:45 AM
To: Smith, Tammy; Yalamanchili, Sujata
Subject: Morabito - Wire

We received a wire transfer for \$20,000 from Arcadia Living Trust with the ref: Morabito. Do you have any information regarding this wire?

Thanks

Sandy

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HR0000219

3686

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HR0000220
3687

Message

From: Yalamanchili, Sujata [SYalaman@hodgsonruss.com]
Sent: 9/20/2010 9:48:56 PM
To: Graber, Garry [GGraber@hodgsonruss.com]
Subject: FW: attorney client privileged communication

Not sure if we should respond to this. I will send you another email chain, FYI.

From: Paul Morabito [mailto:pmorabito@cowestco.com]
Sent: Monday, September 20, 2010 9:47 PM
To: dvacco@lippes.com; Yalamanchili, Sujata
Subject: attorney client privileged communication

Dennis & Sujata

Garry asked what my rationale was to do this -- and that I would be asked.

Judge Adams specifically exonerated Edward and Sam. I hold assets with them, and they had long standing options to own a majority of Superpumper, Inc.

We agreed amongst ourselves that I was best standing alone with my assets, and on advice of Counsel we sought independent, third party appraisers to do just that.

I have no doubt it will be challenged in court -- and they may try and come up with their own appraisals. But in the end, the underlying "selling for value" will be allowed.

Snowshoe Petroleum Inc. will be an Erie County, New York company. Edward is going to be a resident of Los Angeles and Orange County, California.

The Herbsts no longer have home court, good old boy advantage.



CONFIDENTIAL

HR0000376

3688

Paul Morabito

59 Damonle Ranch Parkway, Suite B-336, Reno, Nevada 89521-1907

tel. (775) 682-3910 • fax: (480) 222-1062 • mobile: (775) 223-3585 • e-mail: pmorabito@gowestco.com

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HR0000377

3689

From: Paul Morabito [pmorabito@cowestco.com]
Sent: Tuesday, September 21, 2010 11:53 PM
To: Dennis Vacco; Kevin Cross
CC: Mark Frederick
Subject: Attorney Client Privileged Communication
Attachment(s): "Archived"

Last week, I met with Kevin Cross, the President of Cerberus California LLC, and explained that I would no longer be actively seeking to accumulate assets in companies that I am a shareholder in, and instead would be acting as an advisor to amongst other entities, Snowshoe Petroleum LLC, a company to be owned and operated by my brother, Sam; Edward Bayuk, and Dennis Vacco. He reiterated Cerberus' intention to do business with me, and appreciated the opportunity to now work with Snowshoe with me in an advisory capacity.

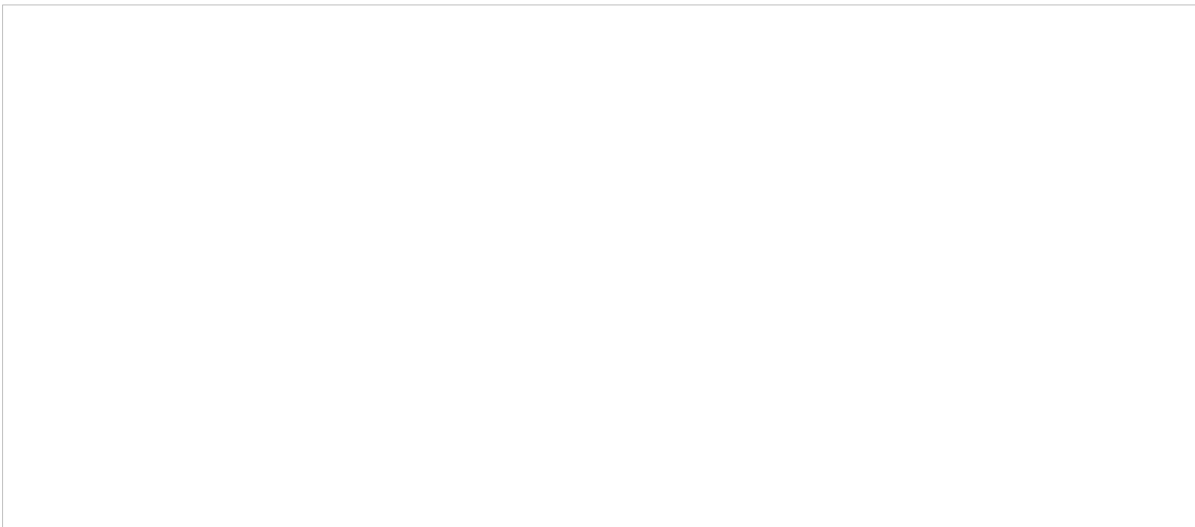
This evening, I had a conversation with Joe Petrowski, the CEO of Cumberland Gulf. Their board of directors, advisors and key shareholders just completed a three day retreat, during which they determined that the 575 store Cumberland c-store chain needs a capital infusion of a few hundred million dollars to upgrade the stores. They own and operate Gulf Oil, an 800 million gallon \$2.5 billion revenue wholesale company that nets \$110 million annually. The company owns 350 dealer sites which they lease to independent dealers, and own and operate a terminal in Boston. www.gulfoil.com
www.cumberlandgulf.com www.greatislandenergy.com

Petrowski feels that the Board would be receptive to an offer from a company affiliated with me, in the range of \$750 million. I am going to speak with Kevin Shea from Getty Realty (NYSE:GTY) about buying the 350 dealer sites for \$385 million, and the terminal for \$50 million, and leasing it back to the acquiring entity. Petrowski and the existing leadership team at Gulf would remain.

I spoke with Kevin Cross, and he is comfortable making an equity commitment of \$150 million to facilitate this acquisition. I advised him that a company, to be headed by me but owned by a combination of Edward Bayuk, Sam Morabito, Jon Richmond as well as Petrowski and his management team, would be created to make this offer. We are putting together a term sheet for Cerberus, and presenting it to them tomorrow. Once we have reached agreement on the terms (attached summary from prior meetings, along with Cerberus' term sheet on AMODCO's then acquisition of Florida assets from ExxonMobil), I will instruct Dennis Vacco and his team to assist Jon Richmond in crafting a Letter of Intent that I can present to the Chairman and Board of Directors of Gulf Oil next week in Boston. It would be my intention to have letters from Cerberus and Getty backing the purchase price, in my possession.

Ray Whiteman, Managing Director at the Carlyle Group in Washington, DC, has advised that he will match and exceed any offer from Cerberus on this and future transactions. I am speaking with Kevin Shea, Executive VP at Getty Oil, at 11:30 EST tomorrow; and Whiteman shortly thereafter. We are meeting with Cross at Cerberus in the afternoon.

NOTE that I had a conversation yesterday with Walt Dwelle, the CEO of Nella Petroleum. They cashflow \$30 million on \$1.5 billion in sales, and operate a terminal in Reno (which they bought from BHI), as well as 200 cardlocks, 100 gas stations and a large wholesale operation in northern Nevada and California. They are interested in selling the company, and Dwelle is having a meeting with his brothers regarding a satisfactory sale price. I estimate that it will be around \$150 million. Both Carlyle and Cerberus has advised that they are interested in this acquisition as well.



Gulf distribution system.gif



Paul Morabito

59 Damonte Ranch Parkway, Suite B-335, Reno, Nevada 89521-1907

tel.: (775) 682-3910 • fax: (480) 222-1062 • mobile: (775) 223-3585 • e-mail: pmorabito@cowestco.com

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From: Graber, Garry [GGraber@hodgsonruss.com]
Sent: Thursday, September 23, 2010 3:10 PM
To: 'Paul Morabito'
CC: Yalamanchili, Sujata; Dennis Vacco
Subject: RE:

Hi Paul,

I don't think you should change your State of residence without first comparing the exemption statutes. Also, what about the CA tax residency lawsuit ?

Do the furnishings have any material value especially in the present economy in view of the fact that they are used ? And doesn't Edward already own some of the furnishings ? If not exempt and if there is value, It may make more sense for Edward to use his money to buy the stuff back at the auction the creditor would have to hold instead of giving you money that the creditor will just take from you.

As we discussed yesterday, used clothing rarely has much resale value - even if originally very expensive. And much of it, if not all of it, could be exempt. Unless you are talking about furs or something for which there is a market, I wouldn't worry about it as I don't think that the creditor will try to take it.

I am not sure that the Amex points are transferable. That needs to be checked. If so, you want to start using redeeming them for flights, entertainment, household goods and the like.

Garry M. Graber
Partner
Hodgson Russ LLP
tel: 716.848.1273 | fax: 716.819.4666
mobile: 716.440.1777
ggraber@hodgsonruss.com
vCard | Biography | hodgsonruss.com



60 East 42nd Street, 37th Floor New York, NY 10165-0150
The Guaranty Building, 140 Pearl Street, Suite 100, Buffalo, New York 14202

From: Paul Morabito [mailto:pmorabito@cowestco.com]
Sent: Thursday, September 23, 2010 10:47 AM
To: Graber, Garry
Subject:

Garry

I have a few questions.

Edward and I plan on changing our primary residence from Reno to Laguna Beach.

Change DMV, voter registration, cancel Nevada club memberships, burial plot, resign from State Boards etc

Should Edward buy our household furniture etc from me for the Reno and Palm Springs houses that are not primary ? We have receipts from 2006 for everything worth around \$225,000 new.

Also, what about my clothes ? I was in the hospital for 5 months last year and came out 200 pounds lighter. I spent \$200,000 on a new wardrobe since November.

LMWF_SUPP_098309
3693

Finally, are my 2 million American Express airline miles something I can do something with or is that an asset, too ?

Paul Morabito

mobile: (775) 223-3585 efax: (480) 222-1062

email: paulmorabito1964@gmail.com

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Message

From: Yalamanchili, Sujata [SYalaman@hodgsonruss.com]
Sent: 9/23/2010 2:21:21 PM
To: Graber, Garry [GGraber@hodgsonruss.com]
Subject: RE:

I spoke to him late last night for about an hour. I understand he spoke to Dennis earlier, but I don't know what was decided.

When I spoke to him, he was still determined to sell Superpumper and was still in a "fighting" mood. I need to circle back with Dennis to compare notes.

Sujata

From: Graber, Garry
Sent: Thursday, September 23, 2010 2:17 PM
To: Yalamanchili, Sujata
Subject: FW:

fyi. Did you all talk yesterday ?

From: Paul Morabito [mailto:pmorabito@cowestco.com]
Sent: Thursday, September 23, 2010 10:47 AM
To: Graber, Garry
Subject:

Garry

I have a few questions.

Edward and I plan on changing our primary residence from Reno to Laguna Beach.

Change DMV, voter registration, cancel Nevada club memberships, burial plot, resign from State Boards etc

Should Edward buy our household furniture etc from me for the Reno and Palm Springs houses that are not primary ? We have receipts from 2006 for everything worth around \$225,000 new.

Also, what about my clothes ? I was in the hospital for 5 months last year and came out 200 pounds lighter. I spent \$200,000 on a new wardrobe since November.

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HR0000837

3695

Finally, are my 2 million American Express airline miles something I can do something with or is that an asset, too ?

Paul Morabito

mobile: (775) 223-3585 cfax: (480) 222-1062

email: paulmorabito1964@gmail.com

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HR0000838

3696

From: Paul Morabito [pmorabito@cowestco.com]
Sent: Friday, September 24, 2010 4:46 PM
To: Dennis Vacco
Subject: Fw: Superpumper, Inc.

Paul Morabito
mobile: (775) 223-3585 efax: (480) 222-1062
email: PAGM88@gmail.com

From: Hollenbach, Shawn <Shawn.Hollenbach@bbvacompass.com>
To: Paul Morabito
Sent: Fri Sep 24 14:35:22 2010
Subject: Re: Superpumper, Inc.

You are correct, that is our intention. Thanks Paul.

Shawn R. Hollenbach
Vice President
BBVA Compass
Commercial Banking
2850 E. Camelback Rd., Ste. 140
Phoenix, AZ 85016
(602) 522-6890 - office
(602) 327-6837 - cell
(205) 524-9631 - fax

From: Paul Morabito [mailto:pmorabito@cowestco.com]
Sent: Friday, September 24, 2010 04:30 PM
To: Hollenbach, Shawn
Subject: Superpumper, Inc.

Shawn

This is to confirm our conversation wherein I advised you that we are in default of several of our loan covenants, including but not limited to those on liquidity, judgments, collateral impairment and lawsuits. We have advised that it is the intention of myself and my fellow Shareholders of Superpumper, Inc., to cure these defaults, and BBVA Compass has advised that they will work with us in good faith towards affecting those cures and putting the loans back into compliance.

Please confirm.

Paul Morabito
Consultant

668 North Pacific Coast Highway, Suite 517, Laguna Beach, California 92651
tel.: (949) 573-0648 • fax: (480) 222-1062 • e-mail: PAGM88@gmail.com

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From: Dennis Vacco
Sent: Sunday, September 26, 2010 11:28 AM
To: 'Paul Morabito'
Subject: RE:

Once entered by the court, the judgment will be a fixed debt.

From: Paul Morabito [mailto:pmorabito@cowestco.com]
Sent: Saturday, September 25, 2010 1:58 AM
To: Dennis Vacco
Subject:

D. Is the Judgment for a Fixed Debt?

An Australian court will only enforce a foreign judgment for a fixed debt, or for a debt which is readily calculable. If the foreign judgment is contingent upon unascertained amounts, it will generally not be enforceable.

Paul Morabito
Consultant

668 North Pacific Coast Highway, Suite 517, Laguna Beach, California 92651
tel.: (949) 573-0648 • fax: (480) 222-1062 • e-mail: PAGM88@gmail.com

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From: Paul Morabito [pmorabito@cowestco.com]
Sent: Monday, September 27, 2010 3:03 PM
To: Dennis Vacco
Subject: Fw: Sierra Towers
Attachment(s): "First Amendment to Residential Lease executed 9-27-10.pdf"

Paul Morabito
cell: (949) 573-0648
efax: (480) 222-1062
email: PAGM88@gmail.com

From: Mlehmanesq@aol.com <Mlehmanesq@aol.com>
To: johnandrob@me.com <johnandrob@me.com>; Paul Morabito; Edward Bayuk
Sent: Mon Sep 27 12:58:23 2010
Subject: Sierra Towers

John, Rob, Paul and Edward:

For your files attached is the First Amendment signed by all parties.

Mark

Mark E. Lehman
Law Offices of Mark E. Lehman
9200 Sunset Blvd., PH 2
West Hollywood, CA 90069
Phone: (310) 276-2670
Fax: (310) 276-2513
E-mail: MLehmanEsq@aol.com

FIRST AMENDMENT TO RESIDENTIAL LEASE

This **FIRST AMENDMENT TO RESIDENTIAL LEASE** (this "Amendment"), is made and entered into effective as of September 23, 2010 (the "Effective Date"), by and between **JOHN McDONALD REVOCABLE TRUST** and **ROBERT WRIGHT REVOCABLE TRUST** (collectively "Landlord") and **PAUL A. MORABITO** and **EDWARD W. BAYUK** (collectively "Tenant"). Each of Landlord and Tenant are sometimes referred to individually as a "Party" and collectively as "Parties" to this Amendment.

RECITALS

A. **JOHN McDONALD REVOCABLE TRUST** and **ROBERT WRIGHT REVOCABLE TRUST** as Landlord and **PAUL A. MORABITO** as Tenant are parties to that certain Residential Lease Or Month-to-Month Rental Agreement dated July 31, 2010 concerning the Premises located at 9255 Doheny Road, #2906, West Hollywood, CA 90069 and all addenda thereto (collectively the "Residential Lease").

B. The Parties now desire to amend the Residential Lease to add Edward W. Bayuk as a Tenant. Capitalized terms used herein and not herein defined shall have the meanings given to such terms in the Residential Lease.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and conditions contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby specifically acknowledged, the Parties agree to the following:

1. Addition of Edward W. Bayuk as Tenant. The introductory section, Section 1 (B) and all other relevant portions of the Residential Lease are hereby amended to add Edward W. Bayuk as a Tenant, with the understanding that pursuant to Section 22 of the Residential Lease, Paul A. Morabito and Edward W. Bayuk shall be jointly and severally liable and completely responsible for the performance of all obligations of Tenant under the Residential Lease.
4. Miscellaneous. This Amendment amends the Residential Lease. Except as amended by this Amendment the Residential Lease shall otherwise remain in full force and effect. In the event of a conflict between this Amendment and the Residential Lease, this Amendment shall take precedence and control. A signature on this Amendment sent via e-mail or facsimile shall be deemed an original signature for the purposes of enforcement. This Amendment may be executed in any number of counterparts, each of which shall be deemed to be an original as against any party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Amendment shall become binding when one or more counterparts hercof, individually or taken together, shall bear the signatures of all of the parties reflected hereon as the signatories.

(Signatures on the following page)

IN WITNESS WHEREOF, the undersigned have executed this Amendment as of the date indicated.


LANDLORD:

JOHN McDONALD REVOCABLE TRUST

By: 
John McDonald, Trustee

Dated: September 25, 2010

ROBERT WRIGHT REVOCABLE TRUST


By: 
Robert Wright, Trustee

Dated: September 25, 2010

TENANT:


Paul A. Morabito

Dated: 9/27, 2010


Edward W. Bayuk

Dated: 9/27, 2010

From: Paul Morabito [morabito.pa@gmail.com]
Sent: Wednesday, November 07, 2012 5:40 PM
To: Roy H. Cunningham
CC: Dennis Vacco; Christian Lovelace
Subject: Re: ATTORNEY CLIENT PRIVILEGED COMMUNICATION

Follow Up Flag: Follow up
Flag Status: Completed

OYE. HF Irrevocable Trust.

On Wed, Nov 7, 2012 at 2:38 PM, Roy H. Cunningham <rcunningham@lippes.com> wrote:
Or the whatever trust. Using initials is not a good idea. Any name completely unrelated to all parties would be best.

Sent from my iPhone

On Nov 7, 2012, at 5:36 PM, "dvacco@lippes.com" <dvacco@lippes.com> wrote:

> Any name that seems associated with you will be a red flag. If you are deposed you don't want to say that you sold to the PAMRAW trust. I recommend just using RAW or HF Trust.
> Sent from my Verizon Wireless BlackBerry

>

> -----Original Message-----

> From: Paul Morabito <morabito.pa@gmail.com>

> Date: Wed, 7 Nov 2012 11:35:47

> To: dvacco@lippes.com <dvacco@lippes.com>

> Cc: Roy H. Cunningham <rcunningham@lippes.com>; Christian Lovelace <clovelace@lippes.com>

> Subject: Re: ATTORNEY CLIENT PRIVILEGED COMMUNICATION

>

> Drop the cohabitation altogether.

>

> Name the trust the

> "PAMRAW Irrevocable Trust"

>

> Paul Morabito

> Executive Vice President

> US HF Cellular Communications LLC

> tel/text: (310) 339-0475

> email: paul.morabito@ushfcc.com

>

> On Nov 7, 2012, at 11:10 AM, dvacco@lippes.com wrote:

>

> I recommend different name. Desmond knows Snowshoe is you. This is RW's trust. Name should be more generic and less connected to you. Alternate beneficiary needs to be better defined than who you are cohabiting with.

> -----Original Message-----

> From: Paul Morabito

> To: DCV Vacco

> Cc: Roy H. Cunningham

> Subject: ATTORNEY CLIENT PRIVILEGED COMMUNICATION

> Sent: Nov 7, 2012 3:09 AM

>

> Snowshoe Irrevocable Trust

>

> Dr. Anna Kobylecky as Trust Protector and James Ravenscroft as Trustee.
>
> If anything were to happen to Anna, Cathleen Sodos would replace her.
>
> Beneficiary to be me and anyone I may be cohabitating with - Karl Davidowski at this time -
and/or Edward Bayuk.
>
> Then upon my demise Edward Bayuk and my brother, Sam. If they predecease me, the funds
are to go to establish as well as support strictly observant "no kill policy" animal shelters
primarily for dogs and cats in California, Nevada and/or Ontario.
>
>
> Sent from my Verizon Wireless BlackBerry

--

--

Paul Morabito

USA cell/text: 310.339.0475 - efax: 480.222.1062 - UK cell: 0.777.0.385385

e-mail: morabito.pa@gmail.com

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Your branch address:

10TH FLOOR
1 FIRST CANADIAN PLACE
TORONTO, ON
M5X1A3

BMO Account TrackerSM

Your investment and banking report

September 1 to September 30, 2010

Your BMO Account Tracker
reference number
3213-3021-506

Your branch
BMO HARRIS PRIVATE BANKING
Transit number: 3213

Your contact at the branch
MR DOUCET
(416) 363-4695

For BMO Direct Banking
customer support call
1-800-363-9992

Visit our web site at
www.bmo.com

BMACT41000_1199086_004 E U 3213 01227
MR PAUL A. MORABITO
59 DAMONTE RANCH PKWY SUITE B 335
RENO NV 89521
UNITED STATES

Summary of your portfolio

Change in the value of your accounts

Canadian \$ accounts	Opening value	Value on September 30, 2010
Everyday Banking accounts		
Chequing	\$578.17	\$578.17
Total	\$578.17	\$578.17
US \$ accounts		
Everyday Banking accounts		
Chequing	48.53	48.53
Savings	\$6,127,321.08	197,151.30
Total	\$6,127,369.61	\$197,199.83

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15531E R (04/2008)

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MORABITO (341).005349

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Summary of your portfolio (continued)

Here's a breakdown of your accounts

Canadian \$ accounts	Value on September 30, 2010	Details start on
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Everyday Banking accounts

Primary Chequing Account # 3213 3021-506	578.17	Page 3
Total	\$578.17	

US \$ accounts

Everyday Banking accounts

US\$ Primary Chequing Account # 3213 4513-392	48.53	Page 3
US\$ Premium Rate Savings # 3213 4513-982	197,151.30	Page 4
Total	\$197,199.83	

Everyday Banking accounts

Summary of your accounts

Account	Opening balance	Total amounts added	Total amounts withdrawn	Closing balance on Sep 30, 2010
Primary Chequing Account # 3213 3021-506	\$578.17	\$0.00	\$0.00	\$578.17
US\$ Primary Chequing Account # 3213 4513-392	\$48.53	\$0.00	\$0.00	(US)\$48.53
US\$ Premium Rate Savings # 3213 4513-982	\$6,127,341.08	\$1,774,764.69	\$1,774,594.91	(US)\$197,151.30

Phishing is a common scam that uses an unsolicited email to deceive you into disclosing confidential personal information.

BMO Bank of Montreal[®] will never request your personal or financial data by unsolicited emails.

If you suspect you have received a phishing email, forward it to online.fraud@bmo.com


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BMO Account TrackerSM


Your investment and banking report
MR PAUL A. MORABITO - September 1 to September 30, 2010

Here's what happened in your accounts



Date	Description	Amounts deducted from your account (\$)	Amounts added to your account (\$)	Balance (\$)
	 Primary Chequing Account # 3213 3021-506			
	Plan type: Platinum Banking			
	Owner: MR PAUL A. MORABITO			
	Opening balance			578.17
Sep 30	Closing totals	\$0.00	\$0.00	\$578.17

Number of cheques or related items enclosed with your statement.....0

	 US\$ Primary Chequing Account # 3213 4513-392			
	Plan type: Platinum Banking			
	Owner: MR PAUL A. MORABITO			
	Opening balance			48.53
Sep 30	Closing totals	\$0.00	\$0.00	(US)\$48.53

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BMO Account TrackerSM

Here's what happened in your accounts (continued)

Date	Description	Amounts deducted from your account (\$)	Amounts added to your account (\$)	Balance (\$)
 US\$ Premium Rate Savings # 3213 4513-982 Plan type: Platinum Banking Owner: MR PAUL A. MORABITO				
	Opening balance			6,127,321.08
Sep 14	Incoming Wire Payment, US, CONSOLIDATED WESTERN		933,331.70	7,060,652.78
Sep 14	Wire Payment Fee, HANDLING CHG 042532000	14.00		7,060,638.78
Sep 15	Outgoing Wire Payment, WIRE PMT 3213 321336997	6,000,000.00		1,060,638.78
Sep 15	Outgoing Wire Handling Fee	125.00		1,060,513.78
Sep 15	Outgoing Wire Comm. Fee	10.00		1,060,503.78
Sep 21	Debit Memo, TO SALVATORE MORABITO	420,250.00		640,253.78
Sep 21	Credit, ERROR CORRECTION		420,250.00	1,060,503.78
Sep 21	Debit Memo, TO SALVATORE MORABITO	365,000.00		705,503.78
Sep 22	Outgoing Wire Payment, WIRE PMT 3213 321337591	420,250.00		285,253.78
Sep 22	Outgoing Wire Handling Fee	125.00		285,128.78
Sep 22	Outgoing Wire Comm. Fee	10.00		285,118.78
Sep 23	Credit, RETURN WIRE 321337591		420,230.00	705,348.78
Sep 23	Outgoing Wire Payment, WIRE PMT 3213 321337806	420,250.00		285,098.78
Sep 23	Outgoing Wire Handling Fee	125.00		284,973.78
Sep 23	Outgoing Wire Comm. Fee	10.00		284,963.78
Sep 23	Direct Deposit, BNL WIRE HANDLING CHG		125.00	285,088.78
Sep 28	Outgoing Wire Payment, WIRE PMT 3213 321338167	72,418.69		212,670.09
Sep 28	Outgoing Wire Handling Fee	125.00		212,545.09
Sep 28	Outgoing Wire Comm. Fee	10.00		212,535.09
Sep 29	Outgoing Wire Payment, WIRE PMT 3213 321338392	16,000.00		196,535.09
Sep 29	Outgoing Wire Handling Fee	32.00		196,503.09
Sep 29	Outgoing Wire Comm. Fee	10.00		196,493.09
Sep 30	Interest Earned		658.21	197,151.30
Sep 30	Closing totals	\$7,704,764.69	\$1,774,594.91	(US)\$197,151.30

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Your investment and banking report

MIR PAUL A. MORABITO - September 1 to September 30, 2010



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Important information about your accounts

How to reach us

For more information regarding one of your accounts, please contact JOE DOUCET, or call or visit us at:

- BMO Term Investments 1-877-225-5266 www.bmo.com/gic
- BMO Mutual Funds 1-800-665-7700 www.bmo.com/mutualfunds
- Everyday Banking www.bmo.com/banking

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Your investment and banking report

MR PAUL A. MORABITO - September 1 to September 30, 2010

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