

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondent.

Case No. 79355

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

APPELLANTS' APPENDIX, VOLUME 39
(Nos. 6818–7011)

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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

CASE NO. CV13-02663

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

DATE, JUDGE
OFFICERS OF
COURT PRESENT

PAGE ONE

APPEARANCES-HEARING

CONT'D TO

11/2/18 **NON-JURY TRIAL – DAY FIVE**
HONORABLE Plaintiff William A. Leonard, Trustee for the Bankruptcy Estate of Paul Anthony
CONNIE Morabito, present with counsel, Teresa Pilatowicz, Esq., Erika Turner, Esq., and
STEINHEIMER Gabrielle Hamm, Esq. Defendant Edward Bayuk present, individually and as
DEPT. NO.4 representative for Edward William Bayuk Living Trust, Superpumper, Inc., and
M. Stone Snowshoe Petroleum, Inc., and Defendant Salvatore Morabito present,
(Clerk) individually and as representative for Superpumper, Inc., and Snowshoe
J. Schonlau Petroleum, Inc., with counsel, Frank Gilmore, Esq.
(Reporter) Chris Kemper, Esq., counsel for the Herbst Family present in the gallery.
10:17 a.m. Court convened.

William Kimmel called by counsel Hamm, sworn and testified.

***Witness qualified to testify as to his opinion regarding real estate valuation.

Witness Kimmel further direct examined.

EXHIBIT 276 offered by counsel Hamm; stipulated by counsel Gilmore; ordered
admitted into evidence.

Witness Kimmel further direct examined.

EXHIBIT 262 ordered admitted into evidence based on stipulation of respective
counsel.

EXHIBIT 260 offered by counsel Hamm; no objection by counsel Gilmore;
ordered admitted into evidence.

Witness Kimmel further direct examined.

Counsel Gilmore presented objection to the hypothetical testimony by this
Witness regarding Exhibit 262 and supplementing his expert report. **COURT
ENTERED ORDER** overruling the objection and allowed for the testimony.

Witness Kimmel further direct examined.

***Respective counsel stipulated to Mr. Kimmel's value of the Clayton Place
Property.

Witness Kimmel cross-examined by counsel Gilmore.

11:55 p.m. Court recessed until 2:00 p.m.

**DATE, JUDGE
OFFICERS OF
COURT PRESENT**

PAGE TWO

APPEARANCES-HEARING

CONT'D TO

11/2/18

NON-JURY TRIAL – DAY FIVE

J. Schonlau
(Reporter)

2:06 p.m. Court reconvened with respective counsel and parties present.

Witness Kimmel further cross-examined; redirect examined.

2:28 p.m. Salvatore Morabito excused for the remainder of the day due to a personal emergency.

Witness Kimmel further redirect examined; recross-examined; excused.

William Leonard called by counsel Turner, sworn and testified.

EXHIBIT 19 offered by counsel Turner; no objection by counsel Gilmore; ordered admitted into evidence.

Witness Leonard further examined by counsel Turner.

***Court took judicial notice of the Order contained in Exhibit 175.

EXHIBIT 175 offered by counsel Turner; objection by counsel Gilmore; ordered admitted into evidence over objection after having taken judicial notice of such document.

Witness Leonard further examined by counsel Turner.

Counsel Gilmore objected to testimony from this Witness regarding Paul Morabito's reputation. **COURT ENTERED ORDER** overruling objection and allowed for the testimony.

Witness Leonard further examined by counsel Turner.

EXHIBIT 37 offered by counsel Turner; no objection by counsel Gilmore; ordered admitted into evidence.

EXHIBIT 233, 252 and 255 offered by counsel Gilmore; no objection by counsel Turner; ordered admitted into evidence.

Witness Leonard further examined by counsel Turner.

EXHIBITS 25, 29, 30 and 79, having been provisionally admitted previously,

**DATE, JUDGE
OFFICERS OF
COURT PRESENT**

PAGE THREE

APPEARANCES-HEARING

CONT'D TO

11/2/18

NON-JURY TRIAL – DAY FIVE

J. Schonlau
(Reporter)

ordered admitted into evidence over counsel Gilmore's previous objection.
EXHIBITS 26, 31, 34, 68, 70, 78, 135, 138, 139, 141, 144, 159, 161 and 162
offered by counsel Turner; objection by counsel Gilmore; ordered admitted into
evidence over objection.
EXHIBITS 28, 33, 134, 137 and 143, although offered at this time, Court noted
their prior admission by either stipulation or no objection.

Witness Leonard further examined by counsel Turner.

Counsel Turner requested that the Court take judicial notice of the Bankruptcy
docket for case number 13-51237 as to claims filed. Counsel Gilmore advised
the Court that the Defendants in this action have not filed claims in the
Bankruptcy case.

Witness Leonard examined by counsel Gilmore.

***Deposition of William Leonard taken March 25, 2016 opened and published.

Witness Leonard further examined counsel Gilmore.

Discussion ensued regarding the trial schedule for the remainder of the day.
Counsel Turner advised the Court that the Plaintiff will no longer be calling
Dennis Vacco, Stanton Bernstein and Christian Lovelace.

3:45 p.m. Court recessed.

4:02 p.m. Court reconvened with respective counsel and parties present, except
for Salvatore Morabito.

Witness Leonard, heretofore sworn, resumed stand and was further examined
by counsel Gilmore; excused.

EXHIBIT 303 (Bankruptcy docket for case number 13-51237) marked and
offered by counsel Turner; objection by counsel Gilmore; ordered admitted into
evidence over objection.

Mr. Loretz, heretofore sworn, resumed stand for the continued reading of
depositions.

CASE NO. CV13-02663

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

**DATE, JUDGE
OFFICERS OF
COURT PRESENT**

PAGE FOUR

APPEARANCES-HEARING

CONT'D TO

11/2/18

NON-JURY TRIAL – DAY FIVE

J. Schonlau
(Reporter)

***Deposition of Gary Krausz dated March 16, 2016 designated portions continued. Respective counsel advised the Court of the number of the trial exhibit that correlates with the deposition exhibits.

EXHIBIT 304 marked and ordered admitted into evidence based on stipulation of respective counsel.

Plaintiff rested.

Discussion ensued regarding the trial schedule for the following week. Counsel Gilmore advised the Court that he would review the deposition designations of Dennis Vacco, Stanton Bernstein and Christian Lovelace to determine whether or not the Defendants would be calling them as witnesses. Further, counsel Gilmore advised the Court that the Defendants would no longer be calling Mark Justmann.

5:10 p.m. Court recessed until 1:00 p.m. on November 5, 2018.

**11/5/18
1:00 p.m.
Ongoing
Non-Jury
Trial – Day
Six**

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JUDITH ANN SCHONLAU

CCR #18

75 COURT STREET

RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BEFORE THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

-o0o-

WILLIAM A. LEONARD, JR.)	
TRUSTEE OF THE ESTATE OF PAUL)	
A. MORABITO,)	
)	
Plaintiff,)	CASE NO. CV13-02663
)	DEPARTMENT NO. 4
vs.)	
)	
SUPERPUMPER, INC., ET AL,)	
)	
Defendants.)	

TRANSCRIPT OF PROCEEDINGS

TRIAL

FRIDAY, NOVEMBER 2, 2018, 10:15 A.M.

Reno, Nevada

Reported By: JUDITH ANN SCHONLAU, CCR #18
NEVADA-CALIFORNIA CERTIFIED; REGISTERED PROFESSIONAL REPORTER
Computer-aided Transcription

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A P P E A R A N C E S

FOR THE PLAINTIFF: GARMAN TURNER GORDON

BY: ERIKA PIKE TURNER, ESQ.

TERESA M. PILATOWICZ, ESQ.

GABRIELLE A. HAMM, ESQ.

650 WHITE DRIVE, SUITE 100

LAS VEGAS, NEVADA 89119

FOR The DEFENDANT: ROBISON SHARP SULLIVAN & BRUST

BY: FRANK GILMORE, ESQ.

71 WASHINGTON

RENO, NEVADA 89503

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I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
WILLIAM G. KIMMEL	6	36	80	84
WILLIAM LEONARD	85	116		
GARY KRAUSZ	135	144	183	

1			Admitted
2	<u>EXHIBITS:</u>	<u>Marked for</u> <u>Identification</u>	<u>into</u> <u>Evidence</u>
3	19		87
4	25		111
5	26		111
6	28		111
7	29		111
8	30		111
9	31		111
10	33		111
11	34		111
12	37		106
13	68		111
14	70		111
15	78		111
16	134		111
17	135		111
18	137		111
19	138		111
20	139		111
21	141		111
22	143		111
23	144		111
24	159		111

1	161		111
2	162		111
3	175		101
4	233		106
5	252		106
6	255		106
7	260		33
8	262		32
9	276		28
10	297		135
11	303		134
12	304	185	185
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1 RENO, NEVADA; FRIDAY, NOVEMBER 2, 2018; 10:15 A.M.

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4 THE COURT: Good morning. Please be seated. Welcome
5 back. Quick turn around. So we are here with live testimony
6 now, is that correct?

7 MS. HAMM: Your Honor, we are going to call Bill
8 Kimmel this morning, and I suspect that will take all the
9 time by this morning, and when we come back this afternoon,
10 we'll finish the reading of Gary Krausz and call
11 William Leonard.

12 THE COURT: Go ahead and call Mr. Kimmel.

13

14 WILLIAM G. KIMMEL

15 called as a witness, having been first duly sworn,
16 took the witness stand and testified as follows:

17

18 DIRECT EXAMINATION

19 BY MS. HAMM:

20 Q Good morning, Mr. Kimmel?

21 A Morning.

22 Q Can you spell your name for the record?

23 A Sure. It is William G. Kimmel, W-I-L-L-I-A-M. G.
24 K-I-M-M-E-L.

1 Q Can you tell the Court how you are currently
2 employed?

3 A I am self-employed as a real estate appraiser and
4 consultant.

5 Q And are you MAI designated?

6 A Yes, I am.

7 Q Do you have any other designations?

8 A Not as a designation. Well, I also have an SREA,
9 Senior Real Estate Analyst. I am a certified general
10 appraiser in the State of Nevada. I wouldn't call that a
11 designation as such.

12 Q All right. What is a Senior Real Estate Analyst?

13 A Well, it used to be a little step above. There used
14 to be two appraisal organizations, the Society of Real Estate
15 Appraisers had that designation which calls for more
16 analytical ability. Then the two organizations merged. They
17 did away with that. So they -- You don't lose it, but now
18 they call you an SREA which is Senior Residential Appraiser.
19 We just, it is a goofy thing after merger.

20 Q Can you give the Court a brief overview of your
21 educational background?

22 A I have a degree in economics, and then I have taken
23 a large number of appraisal classes and been an independent
24 appraiser in the Reno area since 1968.

1 Q You were licensed as a real estate broker at one
2 point in time; is that right?

3 A For a long time, from about 1958 till, gosh, I don't
4 know, seven or eight years, and originally I sold real estate,
5 but then I found out that I didn't like it. In fact, I am a
6 lousy salesperson. So I got involved in appraising, and it
7 was a conflict of interest. And I don't think I sold anything
8 for 30, 40 years. And quite honestly, I got tired of taking
9 the classes for continuing education, because they wouldn't
10 give me the same credits, so I just didn't renew my license.

11 Q Have you been qualified as an expert in real estate
12 appraisal in this court, the Second Judicial District Court
13 before?

14 A Yes, and I think before Judge Steinheimer, too.

15 Q Have you been qualified in other courts?

16 A Most of the courts in Washoe County. Oh, boy.
17 District Courts. Elko County, Pershing County, Lyon County,
18 Douglas County, Clark County, Lander County.

19 Q All the counties?

20 A Well, the two I don't think I have testified in are
21 White Pine County and I don't think I have ever testified in
22 Esmeralda County or in Eurkea County, but I have testified in
23 every other county in Nevada. I am sorry, I haven't testified
24 in Lincoln County. I testified in Federal District Court in

1 both the Las Vegas area and in Reno. I have testified in
2 Federal Tax Court, and I have testified in courts in other
3 states and even a place I never heard of was the U.S. Court of
4 Claims. I had no idea what that was until I showed up there.

5 Q Has any court ever declined to qualify you as an
6 expert?

7 A No.

8 Q Is the bulk of your appraisal work done in the Reno
9 area?

10 A I would say so, yes.

11 Q Aside from the property at Panorama Drive we are
12 going to talk about today, have you appraised residential
13 properties in the Reno area before?

14 A Yes.

15 Q Could you give an estimate how many say in the last
16 ten years?

17 A Boy, I couldn't. I don't do a lot of residential
18 individually, but I do it -- by that I mean just for that one
19 purpose. But I do a fair amount of estate work.
20 Unfortunately, I got dragged into divorce, different kinds of
21 litigation and many times, in addition to commercial property,
22 there are residential properties. I probably, throughout the
23 State, probably end up doing 20 a year just strictly
24 residential properties.

1 Q And have any of those been high-end custom homes?

2 A I am sorry?

3 Q Have any of them been high-end custom homes?

4 A Oh, yes.

5 MS. HAMM: Your Honor, I would offer Mr. Kimmel as an
6 expert real estate appraiser. Since we don't do that anymore,
7 I ask the Court to deem him qualified to testify as to real
8 estate valuation.

9 THE COURT: Any objection?

10 MR. GILMORE: No.

11 THE COURT: That will be the Court's decision.

12 MS. HAMM: Thank you.

13 BY MS. HAMM:

14 Q All right. You were retained by my client in this
15 matter, right?

16 A Correct.

17 Q What exactly were you retained to do?

18 A I was retained actually to appraise two different
19 properties. One was a vacant parcel at the -- in Sparks off
20 Pyramid Highway.

21 Q The 49 Clayton Place property?

22 A Yeah, on Clayton Place. And I was also asked to
23 appraise the residence at 8365 Panorama Drive, and both of
24 them were to be as of October 1, 2010.

1 Q And did you conduct those appraisals?

2 A Yes.

3 Q And you produced a report?

4 A Yes.

5 MS. HAMM: Your Honor, Mr. Kimmel's report is
6 Exhibit 53 in the books. It is stipulated to admission of
7 Exhibit 53.

8 MR. GILMORE: Agreed.

9 THE COURT: Exhibit 53 has already been admitted.

10 BY MS. HAMM:

11 Q Mr. Kimmel, if I could ask you to pull exhibit, the
12 binder that contains Exhibit 53?

13 A 58, I am sorry?

14 Q 53?

15 A 53.

16 Q I believe it is, yeah.

17 A Yes.

18 Q Do you have Exhibit 53 in front of you?

19 A 58.

20 Q 53?

21 A Oh, 53. I peg your pardon. I have 53 in front of
22 me. I am sorry.

23 Q I am talking a little soft. I am going to try to
24 speak up. Mr. Kimmel, just for the benefit of the Court, I

1 want you to walk through the structure of the appraisal where
2 the appraisal of the Clayton Place property begins and the
3 Panorama property begins. Would you do that for me?

4 A Yeah. The thing that, I guess, the thing I would
5 have preferred, I didn't get the luxury, was to inspect the
6 site. I'm actually familiar with the property, but as of the
7 date of value, October 1, 2010, I was not able to. My date of
8 the appraisal was really in January of 2016. So what I did, I
9 obviously pulled up the Washoe County Assessor's records about
10 the property.

11 Q Let me stop you for just a second. Which property
12 are you referring to?

13 A I am sorry. Panorama Drive. Did I goof?

14 Q No. No. I wanted to get there, but that is fine.
15 Can you tell the Court where in your appraisal the Panorama
16 Drive property discussion begins?

17 A Yes. It would be, well, my page 39 which is Bate,
18 well, summary I guess on 42, Bate stamp 42.

19 Q Back to what you were saying, your appraisal was as
20 of what date?

21 A Well, the date of the value was October 1, 2010.
22 The date of my report was January 2016.

23 Q And you called that a retrospective appraisal?

24 A I call that a retrospective appraisal, yes.

1 Q In your experience, does conducting an appraisal
2 retrospectively decrease its reliability?

3 A I don't know -- If I would use the word liability, I
4 think of getting sued, but --

5 THE COURT: I think she meant the word reliability.

6 THE WITNESS: Okay. My wife tells me I have got to
7 get a hearing aid. This might be it, really. Yeah, it is less
8 reliable if you haven't seen something as of the actual date
9 or close to the actual date of the value, that's correct.

10 BY MS. HAMM:

11 Q Okay. When you conducted the appraisal of the
12 Panorama Drive property, did you say late 2015 early 2016?

13 A It was either December of 2015 or January of 2016.
14 Actually, it would have been December of 2015, but the report
15 was January 5, 2016.

16 Q All right. Did you go to the property?

17 A I went to the property. I did not gain entrance. I
18 did attempt to go inside to look at it, but I wasn't able to.

19 Q What did you do? Did you do anything with respect
20 to the exterior of the property?

21 A You say the exterior. I was able to get through the
22 gate into the driveway. I didn't drive around in back. I
23 looked at the photographs. I went on Google, and you can bring
24 the little man down and get an at-grade look. I also talked

1 to the purchaser of the property.

2 Q Who did you speak to?

3 A Well, I call him Skip, it is Raymond Avansino. He's
4 a local recovering attorney.

5 Q Now, you indicated that doing an appraisal
6 retrospectively decreased its reliability?

7 A Yes.

8 Q You did one in this case with respect to the
9 Panorama property. Can you tell me why?

10 A Well, I had no other choice, because at the time I
11 was retained, which was I believe in September of 2015, it was
12 obviously after the date of the value, and it is not unusual
13 to do retrospective reports. It is a little more unusual if
14 we have to go back that far. For example, in estates, you
15 rarely -- you wouldn't do it as of the date of the death,
16 typically. So you are doing it retrospective. Sometimes
17 there may be things like a fire or eminent domain action that
18 you have to go back, and if there is litigation involved as
19 there is here. There is nothing else I could do.

20 Q You have indicated in your certification to your
21 appraisal that you didn't inspect the property. Can you
22 explain that?

23 A Yeah. I inspected it, but I didn't inspect the
24 interior.

1 Q Can you describe the property at Panorama Drive
2 generally for the Court?

3 A Well, it is a southwest suburban rural area,
4 typically two and a half acres or more home sites. Most, not
5 all, have irrigated pasture land. A few actually have alfalfa,
6 and they will cut hay. It is a high-quality rural residential
7 neighborhood that has close proximity to downtown Reno.
8 Panorama comes off Holcomb Lane which easterly connects to
9 South Virginia Street and westerly connects to Lakeside Drive.
10 So it is a good quality. You know, there is a few older
11 buildings out there. Mainly, they are all fairly expensive
12 homes, good quality excellent overall amenities.

13 Q What approach, valuation approach, did you use to
14 appraise the Panorama property?

15 A Comparable sales approach.

16 Q And I know the Court knows this, she's seen this
17 before, but just so we are all on the same page, can you
18 briefly describe the sales comparison approach?

19 A Yeah. In theory, you try to find sales that are as
20 similar as possible in all respects close to the date of the
21 value as the subject and make a comparison. It is a lot easier
22 if you are in a tract-type neighborhood and you have got all
23 the same, the Aspen model and some minor upgrades, but it is
24 more difficult in the custom homes, because you are not going

1 to find two identical properties. But that is really the only
2 preferable methodology in my opinion. You have to use
3 judgment. It is not a two plus two equals four type of
4 quantification, but that is the methodology most appraisers
5 utilize and the most accepted.

6 Q Now what are the other approaches?

7 A There is an income approach to value. Typically,
8 you would not use that on a single family residence. It would
9 certainly apply more to commercial properties, industrial
10 buildings, multiple residential, retail, that type of thing.
11 And the third approach is a cost approach.

12 Q Can you briefly describe how the cost approach works
13 for the Court?

14 A Right. What you do primarily is you estimate what it
15 would cost to replace that improvement. And we make a
16 distinction between replacement and reproduction.
17 Reproduction would be exactly the same materials. Like way,
18 way back when I was a kid, a two by four was two inches by
19 four. They are not two by four's anymore. There is a lot of
20 things you can't do material wise. We use the word
21 replacement which means with similar utility. So you have to
22 estimate the cost to replace the improvement. You estimate
23 the value of the land, and then you deduct depreciation from
24 all causes. Not what you are allowed to maybe take for the IRS

1 for tax purposes, but depreciation. And depreciation really
2 is made up of three factors: One is physical depreciation
3 which is wear and tear, new roof, all those kinds of things.
4 And many of those can be cured. The other type of depreciation
5 would be functional. Is it a good layout. If you have a five
6 bedroom, one bath home, you have a functional problem. Those
7 functional items, sometimes you can cure them and sometimes
8 you can't. The third type of depreciation, as I am very old,
9 I like the words economic obsolescence, today they call it
10 externalities. But you have to keep it simple. Economic
11 factors can be anything from the town could be suffering. For
12 example if you are out in Gabbs, Nevada, there is a lot of,
13 you know, economic problems. It could be more global or more
14 regional. For example, in 2010 we were in a significant
15 depression or recession. That is way outside the economic
16 factor that is a depreciation to the improvement. That has to
17 be deducted from cost new, because depreciation is a loss in
18 value from all causes. The problem with that approach is how
19 do you estimate it. And the best way to estimate it, according
20 to the book anyway, is what is your cost brand new, from a
21 cost approach. What are your comparable sales. And in
22 theory, the differential is the amount of depreciation.

23 Now with custom homes, it is very difficult, because
24 they are all different. But depreciation is a factor that has

1 to be included in a cost estimate. It is extraordinarily rare
2 you would ever have cost new without depreciation.

3 Q Do you recall when the Panorama property was built
4 originally?

5 A I have to look. Excuse me. You know, I really
6 goofed. I didn't put it in the report. It seems to me, I may
7 be really in error, I should have had it in here, I think it
8 was 2000 or 2001, somewhere in there.

9 Q Possibly 2002?

10 A That is easily applicable.

11 Q All right. Let me step back. Why didn't you do a
12 cost approach in your appraisal of the Panorama property?

13 A Well, the primary reason is how the heck do you
14 estimate depreciation? I hate to say it, but appraisers back
15 into it. They look at comparable sales. They'll say here is
16 my sales, here is my cost new, so I am going to throw in X
17 percentage. There is no easy way. A good methodology for
18 example would be when we had the big economic downturn, well,
19 it began in 2008 but really hit us in 2009, would be to look
20 at a house that hadn't changed and see what they sold for
21 previously and now what they are selling for or what they were
22 selling for two years later. That would be an indication of
23 sale and resale of the same home with no difference otherwise
24 than an outside influence. That would give an indication of

1 depreciation. But depreciation is so difficult. I would say
2 I can't think of a case where I used a cost approach on a
3 house that had any consideration for depreciation. It is a
4 guess. Where do you get depreciation unless you believe there
5 is no depreciation? And somebody may believe there is no
6 depreciation.

7 Q So if the property was constructed in 2001 or 2002
8 and you assume significant upgrades were made a few years
9 later, would you take physical depreciation?

10 A Yes. Well, physical depreciation probably not
11 unless something had happened during the time frame that would
12 have caused the physical depreciation. But more than likely
13 not.

14 Q Let's talk about the sale comparison method briefly
15 that you used in this case. You indicated that you visited the
16 property and you spoke to the subsequent purchaser of the
17 property, right?

18 A Correct.

19 Q What did Mr. Avansino tell you about the property?

20 A Well, the unfortunate thing is when he bought it
21 which was in 2012, that would be a couple years after the date
22 of the valuation, and when he bought it, I wasn't there. I am
23 telling you -- You asked what he told me.

24 Q Of course?

1 A He said it was a mess. There was what you call a
2 maid's quarters or something like that south of the garage.
3 He had to tear the whole thing out because of dry rot. He said
4 the swimming pool was not usable. It had to be torn out. He
5 just had a significant amount of repair items. Of course, he
6 did things for his own taste which is a little different.

7 At the time, apparently the water rights had been
8 taken off the property to the extent that all of the fields
9 were no longer growing. He had to replace everything. It took
10 him a couple years. So my dumb question probably was why did
11 you buy it? And he said, well, of course, I grew up on the
12 Avansino ranch right nextdoor. I wanted to do it. Frankly,
13 he has a lot of money, so it was something he wanted, and he
14 spent a lot of money fixing it up. So at that particular
15 time, in his judgment, it was in poor condition.

16 Q If it had not been in poor condition at that time,
17 would that change your opinion of value?

18 A Well, the thing I said in my appraisal report was I
19 can't consider the way it was when Mr. Avansino bought it for
20 two reasons: One, I didn't see it. And two, from the date of
21 the value in late 2010 to the date Mr. Avansino bought it it
22 could very well have gone to hell in a hand basket. As far
23 the interior, like he said, things were ripped off the walls.
24 It was just a mess. So I understood that. But I have to

1 indicate that some things worry me. Like if in fact there was
2 dry rot, that could happen within two years. Was it there? To
3 the best of my knowledge, I assumed, I tried to assume that it
4 was in good condition, not anywhere near, but it may have had
5 some problems. But I tried to put that out of my analysis,
6 because I don't know is the bottom line.

7 Q How did you go about selecting the comparables that
8 you used in your report?

9 A Well, this is a high quality neighborhood. I was
10 aware that the property was purchased in November of 2005
11 before the downturn at \$2,650,000. I was also aware it had
12 been upgraded substantially. I tried to stay within the
13 subject neighborhood as much as possible with larger rural
14 residential sites, and I tried to stay close to the date of
15 the valuation as best as I could, because that would then
16 reflect more current conditions. I didn't really include
17 listings for the simple reason that listings are not actual
18 sales. They are hoped-for prices. You know, you could buy it
19 for that. But I had four sales, two of which were before the
20 date of the value and two shortly after, within four or five
21 months. So I felt that was a close enough timeframe. And I
22 was very concerned, because in 2010 -- As I stated, 2009 our
23 market just went off the wall. 2010 we were in a lot of
24 problem. Most homes, quite frankly, lost forty, fifty percent

1 of value. 2010 it was hard to get financing. 2011 we started
2 to come back a little. 2012 we were coming back more. But we
3 didn't really start to get a big bump again until basically
4 2015 or so when things started to come back. Tesla had a major
5 impact in the area. That was 2016. So I tried to stay as
6 close as possible with larger custom-type homes on larger size
7 lots.

8 Q So if this property sold in December of 2012 to
9 Mr. Avansino, right?

10 A Correct.

11 Q Okay. Do you know what the sale price was?

12 A Yes. He paid \$2,584,000.

13 Q How do you know that?

14 A Well, it was verified by Mr. Avansino as well as
15 from the County records.

16 Q Them, Mr. Kimmel, if you don't mind, could you point
17 the Court to your table of comparable sales that you relied on
18 in your report?

19 A Yes. Bate stamp page 58. My page 56.

20 Q That is Exhibit 53?

21 A Yes.

22 Q Now I am going to try and move this a long. I am not
23 going to walk you through all of those. What was your ultimate
24 conclusion as to the value of the property as of October 1st

1 of 2010?

2 A Two million dollars.

3 Q The basis of valuation, was that fair market value?

4 A Yes.

5 Q What is your definition of fair market value?

6 A Well, in this particular case, and I will try and
7 answer the best I can. I utilized the definition utilized by
8 the Internal Revenue Service which is on my page 3 Bate 5, and
9 I believe that is what is used in Bankruptcy Court also. But
10 very simply it is -- it is a price that would be sold on the
11 open market arms length with either buyer or seller not under
12 any undue influence to buy or sell, each having typical or
13 normal knowledge of all the use and purposes to which the
14 property would be put. Arms length is necessary. It can't
15 be -- I mean you could have a sale, for example a bankruptcy
16 sale or something that might be at market value. That is
17 always suspect. So, basically, arms length between buyer and
18 seller.

19 Q Have you reviewed the appraisal report prepared by
20 Paul Alves and Associates, Darryl Noble as of September 21st
21 of 2010?

22 A Yes.

23 Q And do you know what his conclusion of value was at
24 that time?

1 A As I recall, it was around four million.

2 Q In one of the last binders, I am going to ask you to
3 look at Exhibit 276.

4 A Is that in this same one?

5 THE COURT: No. It is a different binder. It is
6 the one closest to you in the book case. Maybe not.

7 THE WITNESS: Are you going back to this one?

8 MS. HAMM: Yes, unfortunately.

9 THE CLERK: Can you tell me the number?

10 THE COURT: 276.

11 THE CLERK: Here you are.

12 THE WITNESS: Okay. Yes.

13 BY MS. HAMM:

14 Q Do you recognize that as Mr. Noble's report?

15 A Yes, and I indicated, I said four million. I
16 believe his valuation was 4.3 million. Excuse me. Let me
17 make sure I haven't goofed. I am going off the top of my head.
18 Yes, 4.3 million.

19 Q So there is a really large delta between two million
20 and 4.3 million?

21 A Yes.

22 Q Can you tell me why your valuation of 2.3 million is
23 less than Mr. Noble's valuation?

24 A Well, we obviously have a difference of opinion. In

1 my judgment, it is two fold: Number one, they used a cost
2 approach without any depreciation at all. Yet I know in his
3 report he referred to poor market conditions. So my difference
4 of opinion would be I can't believe there is no depreciation
5 factor. Not necessarily physical. Functionally. It could be
6 an over improvement. You can spend a lot of money on
7 something that doesn't bring you value. The best example I can
8 give, and I was involved in the appraisal with Bill
9 Pennington, Circus Circus. His house off Manzanita cost
10 twenty-five million dollars. It sold for eight million
11 dollars. And just a lot of specialty items people just aren't
12 going to pay for. So that is a functional problem. Very
13 importantly is economic, like obsolescence factors. Because
14 in 2010 we were at the very bottom of the recession. So I
15 would have a difference of opinion in that there was
16 absolutely no depreciation of any kind taken.

17 The second area related to sales data. And if I
18 recall correctly, his sale -- well on a couple of them, and I
19 think it was the one up at Juniper Hill, and if I remember
20 correctly, let me just look at that a second. That was not the
21 price-- that was the price paid, but it included 300 something
22 thousand dollars of personal property. And so that would have
23 been overstated at that price. And a couple of others the
24 square footage is wrong from the Assessor's records for a

1 couple of reasons. One, and I think it is the Lakeside Drive
2 property, it might have been number four, that there is a
3 second floor that wasn't included. And in a couple of them
4 there are basement areas. Basements never bring the same
5 dollar contribution as a first or second floor, but if they
6 are a nice finished basement, they have some contribution.
7 And if I recall, that wasn't given consideration. Basically,
8 the difference of opinion comes down to some mistakes on the
9 sales data, but in my judgment, he just relied on the cost
10 approach without any depreciation factors. In my report, if I
11 may refer back to it.

12 Q Of course. Exhibit 53?

13 A Yes. I can grab this quicker. I showed a couple of
14 them what the previous sale was and which showed the
15 significant -- some of the differences on sale one. It sold
16 in March 2010 at \$2,500,000. In 2007 it had sold for
17 \$2,875,000. Sale two, it sold in July of 2010 for \$1,150,000
18 and in 2008 it sold for a \$1,825. That shows the decline that
19 was occurring from the top of the market to the 2010 time
20 frame. So the bottom line is number one, in my judgment, he
21 relied essentially all on the cost approach without
22 considering whether the improvements, not the physical
23 deterioration, but would have had a lot of things buyers
24 wouldn't pay for, certain types of upgrades and over

1 improvements. And, secondly, no consideration of economic
2 factors. You can have a difference of opinion as to how much
3 depreciation, I understand. But to say there is none to me is
4 the biggest reason for my difference of opinion.

5 Q So there is a lot to unpack there. You didn't --
6 You didn't believe the data underlying some of his comparables
7 was accurate?

8 A I know it is not accurate.

9 Q Okay. And you know that how?

10 A Pardon me?

11 Q How do you know that?

12 A Well, by checking the Assessor's records, and then
13 the one that sold for -- I verified that with the seller,
14 Mr. Blake Smith, who had sold that to Mathison. I had verified
15 that one before, and that one the Assessor's records were
16 wrong. The other reason I know is that you had provided me
17 with certain exhibits and the MLS showed it correctly, and
18 that was in the Ellis appraisal file I guess, yet they didn't
19 use that figure. They used the higher figure. So that was
20 incorrect.

21 Then on the sizes, one was completely -- they
22 neglected apparently the second floor. And the rest would be
23 a difference of opinions whether you like this location or
24 not.

1 Q So staying on Exhibit 276 for a moment, Mr. Noble's
2 appraisal?

3 THE COURT: Did you all intend to admit that?

4 MS. HAMM: Pardon?

5 THE COURT: Did you intend to admit that one? That
6 one has not been admitted.

7 MS. HAMM: Honestly, Mr. Kimmel is discussing his
8 review of that appraisal, and so I think it is fair to submit
9 for admission.

10 MR. GILMORE: Agreed.

11 THE COURT: Exhibit 276 is admitted.

12 (Exhibit 276 admitted in evidence.)

13 THE WITNESS: Which one? Are we back to my
14 appraisal report?

15 BY MS. HAMM:

16 Q No, sir, the Paul Alves appraisal?

17 A I forgot that is page -- I am on it right now yeah.
18 I am sorry.

19 THE COURT: 276.

20 THE WITNESS: Right. Right.

21 BY MS. HAMM:

22 Q What I wanted to point to you was page 18 of his
23 report?

24 A Yes, ma'am.

1 Q In the last paragraph, the last sentence, do you see
2 that?

3 A Yes.

4 Q Depreciation, all forms of obsolescence were
5 estimated?

6 A Yes.

7 Q So he indicated that he did consider depreciation.
8 Do you disagree with that?

9 A Well, if he considered it -- Well, I can't tell you
10 whether he considered it, but I can tell you if he did, it
11 didn't show up in his appraisal report. And on page 17 of his
12 report, he stated well in the market condition, the major slow
13 down, little sign of improvement, economic crisis, further
14 decline to at least 2012. So if he considered it, well one of
15 two things: Either, if he considered it, then I assume then
16 he felt in spite of all this there was no depreciation from
17 any type. I mean I can't obviously speak to his mind, but that
18 would be a logical conclusion I would have. I disagree with
19 that, however.

20 Q The market that existed in 2010, were there
21 multi-million-dollar homes on the market?

22 A There weren't a lot. And the other thing I would
23 suggest is through 2010 we never had a sale over three million
24 dollars in the Reno-Sparks area. Lake Tahoe, yes. And there

1 had been some sales possibly out in Washoe Valley. But in the
2 Truckee Meadows, there never had been a sale the size of three
3 million dollars through 2010. There have been today. Well,
4 Pennington's house, no one ever sold one that expensive, eight
5 million dollars. We have had some sales above three but to
6 that time frame to my knowledge, never.

7 Q When was that Pennington sale?

8 A It was sold about two years ago to Roger Norman who
9 developed that Reno Industrial Center. The doors were \$1,000
10 a piece for closet doors.

11 Q That leads me to my next question, Mr. Kimmel. If
12 you could look for me at Exhibit 262.

13 A 262.

14 Q Correct?

15 A Yes, ma'am.

16 Q Have you seen these photographs before?

17 A Yes, I have.

18 Q And how did you come to see them?

19 A Well, you gave them to me, and they certainly show
20 that it is highly ornate.

21 Q My question is: Do you know who took these
22 photographs?

23 A Do I have what?

24 Q Do you know who took these photographs?

1 A I don't specifically. I do not.

2 Q And do you know when they were taken?

3 A No, I do not.

4 Q I am only going to ask you about these in a
5 hypothetical sense, because you don't, but if you could
6 take --

7 THE COURT: Do you think these are admitted?

8 MR. GILMORE: They have not yet been.

9 MS. HAMM: No.

10 MR. GILMORE: I was going to, but I have not yet, no.
11 Now might be the time to do it.

12 THE COURT: I don't know.

13 MS. HAMM: No.

14 THE COURT: You do have a witness on the stand.

15 MS. HAMM: Your Honor, I am not going to admit them,
16 because we don't know when these photographs were taken or by
17 whom but --

18 THE COURT: If you want to use them as the basis of
19 a hypothetical question, that means I have to look at them. I
20 can't look at them if they aren't admitted.

21 MS. HAMM: I would stipulate to admission for the
22 limited purpose of Mr. Kimmel's appraisal as to authenticity.
23 If these were actual photos of the property at any given point
24 in time --

1 MS. TURNER: Ms. Hamm, I will interrupt you. You
2 are out of the cross-examination when these were discussed
3 with Mr. Bayuk. He did establish the authenticity. I will
4 stipulate to them.

5 THE COURT: I know I saw them.

6 MS. TURNER: You saw them. I think it was
7 unintentional that Mr. Gilmore, I am speaking for him now,
8 didn't offer them. Frankly, I assumed they were in. You
9 probably did as well.

10 MR. GILMORE: I have a number. She's exactly
11 correct, I have a number of exhibits identified I will offer
12 in my case in chief.

13 THE COURT: I saw these exhibits while the testimony
14 was going on. That is why I was double checking.

15 MS. HAMM: Fair enough.

16 THE COURT: At this time, they are admitted, 262.

17 (Exhibit 262 admitted in evidence.)

18 MS. HAMM: By the way, by the same token I may refer
19 Mr. Kimmel to 260.

20 THE COURT: All right. I heard a lot of testimony
21 with regard to work that was done, but I don't know if I
22 heard -- if I saw 260.

23 MR. GILMORE: You did, but by same token as to 262,
24 it was not admitted.

1 MS. TURNER: No objection, Your Honor.

2 THE COURT: 260 is admitted.

3 (Exhibit 260 admitted in evidence.)

4 BY MS. HAMM:

5 Q Mr. Kimmel, looking at these photographs, you
6 indicated a lot of high-end work was done on this property,
7 correct?

8 A Yes.

9 Q And though you don't know when these photographs
10 were taken, I would like you to assume they were taken as of
11 October 1, 2010 for the purpose of my question?

12 A Okay.

13 Q If these photographs are an accurate depiction of
14 the property as of October 1st of 2010, would that change your
15 conclusion of value?

16 A No.

17 MR. GILMORE: I am sorry, Your Honor, we have an
18 expert report that was provided as of a specific date. That
19 report has not been amended or supplemented. I think the
20 intent of these question is going toward supplementing the
21 opinion already contained in the written reports which are
22 admitted in evidence. I would object. This is an effort to
23 elicit subsequent opinions of value that were not contained in
24 the report. He has not testified he saw these when he

1 considered his opinion. Now he's being asked to reconsider
2 his opinion which is prejudicial in light of the fact we have
3 expert disclosures.

4 MS. HAMM: Your Honor, I am not asking Mr. Kimmel to
5 reconsider his opinion. I am asking him to take into account
6 the facts that I believe Mr. Gilmore has attempted to elicit
7 in this trial in order to determine the fair market value of
8 the property is as Plaintiff alleges, \$2,000,000 as of October
9 1st of 2010.

10 THE COURT: Now we have kind of gone back and forth
11 in terms this would be rebuttal actually to Mr. Gilmore's case
12 which he put on already with his direct examination of
13 Mr. Bayuk.

14 MS. HAMM: It is also in connection with a review of
15 an appraisal where the appraiser was not designated as an
16 expert in this case, but a fact witness because the appraisal
17 was conducted several years ago.

18 MR. GILMORE: There's two issues with that. Number
19 one, Mr. Kimmel was never disclosed as a rebuttal witness to
20 anybody. That is the first issue. So it is a disclosure
21 issue.

22 The second issue is these photos, Mr. Alves' report,
23 all of those were available. As Mr. Kimmel testified, he had
24 the Alves report available when he delivered his initial

1 opinion of value. He had the opportunity to include in his
2 report everything he wanted to disclose or discuss with
3 respect to the basis of his opinions. Now he's being asked to
4 review material subsequent to the issuance of his report to
5 explain away his report. That is prejudicial.

6 THE COURT: Objection overruled. I find the
7 question is appropriate based on the defense case. You can
8 ask the question.

9 MS. HAMM: I have forgotten the question, Your
10 Honor.

11 THE COURT: Hypothetically would that have changed
12 his conclusion of value

13 THE COURT REPORTER: He answered it.

14 THE COURT: He answered it.

15 THE COURT REPORTER: He answered no.

16 BY MS. HAMM:

17 Q Mr. Kimmel, you also conducted an appraisal of the
18 Sparks property. Excuse me. You know what, that is not a fair
19 question. You conducted an appraisal of the property on
20 Clayton Place, right?

21 A Yes.

22 Q I have called that the Sparks property. If I say the
23 Sparks property, you will know that I mean the Clayton Place
24 property?

1 A Correct.

2 Q Can you briefly describe that property for the
3 Court?

4 A Yes. I have got so many exhibits here I can't
5 remember where mine was.

6 MS. GILMORE: I am sorry. Plaintiff's counsel and I
7 have stipulated the valuation opinion Mr. Kimmel has provided
8 in his report is acceptable to the Defendants. There will be
9 no opposition or objection to that valuation.

10 THE COURT: Okay. What was that valuation?

11 MS. TURNER: \$75,000, Your Honor.

12 MS. HAMM: Will the Court indulge me for just one
13 minute?

14 THE COURT: Yes.

15 MS. HAMM: With that stipulation, Your Honor, I have
16 no further questions on direct for Mr. Kimmel?

17 THE COURT: Okay. Cross-examination.

18

19 CROSS-EXAMINATION

20 BY MR. GILMORE:

21 Q Good morning, Mr. Kimmel?

22 A Good morning.

23 Q How are you?

24 A Good.

1 Q You testified in direct examination that this is a
2 retrospective appraisal, true?

3 A Correct.

4 Q You were asked to go back in time and try to
5 pinpoint a valuation date based on the scope of your
6 assignment, right?

7 A Yes.

8 Q Now you would agree with me the appraisal
9 authorities and literature give guidance as to what is
10 appropriate for retrospective appraisals and what is not,
11 would you agree?

12 A I agree.

13 Q Can you think of any authorities, guidelines,
14 opinions, appendices that speak to what the appraiser should
15 consider when performing a retrospective appraisal? Can you
16 give me some of the names of these publications where we might
17 find this guidance?

18 A I don't know I ever read that. I mean we have the
19 Appraisal of Real Estate published by the Appraisal Institute.
20 I can't recall whether that gets into it that much. The
21 Uniform Standards of Professional Appraisal Practice which the
22 State of Nevada has adopted. I don't recall whether they give
23 you a guideline, specifically.

24 Q Sitting there today you can't point me in any

1 direction where I might find written authorities that
2 appraisers could look to obtain guidance on retrospective
3 appraisals?

4 A I can't point. I am sure there may be something out
5 there, but I am not able to point you in that direction.

6 Q Have you ever heard of or read a treatise on
7 residential real estate appraising by the authors Fishman,
8 Pratt and Morrison?

9 A No.

10 Q You are not familiar with them?

11 A No.

12 Q I would like to make a couple of statements, and I
13 want you to tell me whether or not you agree with them, okay?

14 A Okay.

15 Q One comes from this Fishman Pratt and Morrison
16 writing on appraisal standards. We'll take it one sentence at
17 a time. "Since valuation is as of a particular point in time,
18 practitioners are required to reach their conclusion based on
19 information that is known or knowable (or reasonably
20 foreseeable) at the valuation date." Do you agree with that?

21 A Yes.

22 Q The concept being, if you are doing valuation on
23 November 2nd of 2018, you wouldn't insert considerations that
24 might occur in January 2020, right?

1 A No. It is perceived to maybe occur.

2 Q There is a slight exception to that and that has to
3 do with where, a situation a buyer or seller at a particular
4 time might have some insight to things like market trends,
5 that type of thing. It is appropriate to put yourself in the
6 place of the buyer or the seller at that particular time as to
7 what they might have known related to trend, right? That's
8 fair?

9 A Correct.

10 Q But certainly, if the valuation date were today,
11 there is no way you would know what a particular house would
12 sell for, the sales price, January 1, 2020, right?

13 A Not for sure. I might have -- I have a pretty good
14 idea unless some surprise happened all of a sudden.

15 Q We don't know what could happen in 24 months in the
16 world or in the market or politics. We just don't know, do
17 we?

18 A Correct.

19 Q So you agree with that first sentence. Let me ask
20 you if you agree with this one: "Typically in a retroactive
21 valuation post valuation data information"-- sorry. I read
22 that wrong. "Typically in a retroactive valuation, post
23 valuation date information may be available." That's true
24 isn't it?

1 A Yes.

2 Q In fact, in your appraisal, you relied on post
3 valuation information, didn't you?

4 A Two of my sales were after the date of value,
5 correct.

6 Q And your opinion is informed by a conversation that
7 you had with Skip Avansino in 2015 or '16, right?

8 A Correct.

9 Q And your opinion is informed by descriptions of the
10 condition of the property that Skip Avansino gave you in 2015
11 or 2016?

12 A I was informed of that, yes.

13 Q Correct. Two more sentences. I will read them
14 together, then I will ask: "Subsequent events that were
15 foreseeable at the valuation date may be considered in
16 valuation. However, if an event was completely unforeseen at
17 the time of valuation, it is generally not considered." Do you
18 agree with that statement?

19 A Yes.

20 Q Are you aware of -- strike that. If I use the
21 acronym AICPA, would you know what that means?

22 A No.

23 Q How about if I said it was the American Institute of
24 Certified Public Accountants or something to that effect?

1 A I certainly know who the CPAs are.

2 Q There you go. Are you aware the AICPA put out
3 standards for valuation in writing to help inform their
4 members?

5 A A little bit of it, but not a lot of it.

6 Q I will represent to you that I am reading from the
7 AICPA Statement of Standards for Valuation Services,
8 particularly Chapter 43 which is entitled Subsequent Events. I
9 will read a sentence and I want you to tell me if you agree
10 with this or not: "Generally, the valuation analyst should
11 consider only circumstances existing at the valuation date and
12 events occurring up to the valuation date." Do you agree or
13 disagree with that?

14 A Partially. May I explain?

15 Q Please do?

16 A I have certainly been in a courtroom where judges
17 have said you cannot consider anything that happened a day
18 after our date of the value. And judges can certainly take
19 that position. As a practical matter, we use sales prior to a
20 date of the value and give any consideration if there is any
21 differences. I think it is appropriate to use sales after the
22 date of the value as long as you consider whether there is any
23 distinctions in the time frame and you are not too far afield.
24 Because when you are into custom homes, you don't have a lot

1 of good sales data. So I would disagree to the extent
2 appraisers do it all the time, they have used a few sales, two
3 sales after the date of the value, not substantially so, maybe
4 five, six months tops. And I believe that is appropriate as
5 long as you give any consideration to whether there has been a
6 significant economic or other changes from the date of the
7 value to the date of the those post sales. So I understand
8 what they are saying, but I think there are times when you can
9 definitely do it unless you have got some judicial or legal
10 parameter that says you cannot consider something one day
11 afterwards.

12 Q Would you agree with me it depends entirely on the
13 scope of the assignment, right?

14 A I don't know if I-- I guess I don't like that word.
15 I guess normally an appraiser is going to use property sales
16 before and after the date of value. That is typical.
17 Understanding we have to make adjustments. I would say it
18 would be either a judicial, and to me judicial, with all due
19 respect, is not lawyers, judges, some type of law that
20 precludes you, and I guess or administrative procedures
21 preclude you from using something after the date of value. I
22 don't think that is part of the scope of the assignment.

23 Now there are times where the client's attorney will
24 tell me you can't use anything here, and that would fall under

1 scope. So I am kind of wishy washy to the extent I think in
2 most cases you can use things afterward, but you have to be
3 careful with it.

4 Q When you said scope, I think you answered my
5 question. The person who is requesting your services could
6 say for purposes of the scope of this assignment, I don't want
7 you to consider a single factor that you could not have known
8 or was not knowable after valuation date. You are certainly
9 aware that scope could be given?

10 A Absolutely, and it has been given to me.

11 Q And you would concede in this case you were not
12 given that instruction, true?

13 A Correct.

14 Q And do you know, maybe you won't, maybe you will, I
15 don't know, but do you know the purpose for which your
16 valuation may or may not be used in this Court on this
17 particular trial?

18 A Very generally. I think it started as a bankruptcy
19 proceedings with certain individuals and beyond that I don't
20 want to guess.

21 Q So you don't really know to what extent your opinion
22 of value might be used between the lawyers and the Judge in
23 this case, do you?

24 A Yeah. You may disagree with everything I am saying.

1 I understand that. But no, I really don't know.

2 Q A better way to ask it: You don't really know the
3 purpose for your valuation opinion as it relates to the other
4 facts in this trial, do you?

5 A No. All I know, I believe I am correct in saying it
6 had something to do with the Morabito bankruptcy. Beyond that,
7 I am more ignorant than I look.

8 Q Fair enough. Do you have an understanding as to what
9 the, let me use the term inventory, if I use the word
10 inventory, what do you understand me to mean in your business?

11 A Well, that's good question. Some people would refer
12 to it globally as all the property, for example assets of
13 somebody's ownership. You could call that inventory. When I do
14 for example hotel-casinos, to me the inventory for the most
15 part is the tangible personal property.

16 Q Let me ask a more focused question. I appreciate
17 your answer. I think you're right. For purposes of this
18 examination, let me focus it. There are certain data kept in
19 Washoe County that identifies all properties that are
20 publically available for sale, right?

21 A Not in the Assessor's office, and I don't know, but
22 the brokers have the Multiple Listing service, Loopnet, a
23 bunch of services.

24 Q I didn't mean through the official County records.

1 What I meant is somebody in Washoe County, there are data
2 available. You could find out all the houses for sale in
3 Washoe County, right?

4 A Probably.

5 Q Now if I used those houses that are available for
6 sale, all the available inventory of residential property in
7 Washoe County, would that definition make sense to you?

8 A Yes.

9 Q If I use inventory?

10 A Yes.

11 Q Yes?

12 A Yes.

13 Q Using that definition of inventory, do you know what
14 inventory of houses were available in October 2010 for
15 properties that were listed over two million dollars were?

16 A No, I don't know.

17 Q And, of course, Washoe County includes the Nevada
18 side of the Lake Tahoe properties, right?

19 A All the way up to Gerlach.

20 Q Incline Village is Washoe County?

21 A Correct.

22 Q Now would you agree with me that the more
23 expensive -- that is a bad way to ask it -- the higher the
24 asking price for a residential property, the longer the seller

1 could anticipate it would be on the market place?

2 A Appraisers may be a little more than accountants,
3 but not much. I think that-- I'm a little hesitant to say
4 that, because in certain neighborhoods, boy, they're selling
5 fast. But I think with possible some exceptions, I think
6 you're correct in that question. I might get tripped up on
7 that, but I think that is correct.

8 Q There are a lot more buyers in Washoe County looking
9 for \$300,000 price range houses than there are for the four
10 million dollar price range house?

11 A That's correct. The only thing I am a little
12 concerned about is I really want to come back and say take a
13 look at the average time on the market before sale. If you
14 have got a lot of money, you can be very picky and you buy
15 what you want to buy, obviously. And the seller may be so high
16 it takes longer to sell. Sometimes it can be an attractive
17 house and sell quickly. So I don't know I agree or disagree.
18 It is definitely true there are more buyers for \$300,000 homes
19 than two million plus homes, but I don't know if I am able to
20 answer they're longer on the market or not.

21 Q Now you discussed your definition of fair market
22 value as it relates to your opinion, right?

23 A Correct.

24 Q Which is, I'm going to paraphrase for simplicity, a

1 willing seller and willing buyer who want to do an exchange
2 under no compulsion to buy or sell; is that true?

3 A As long as you define the word "exchange,"
4 not a 1031 exchange necessarily. It is some kind of monetary
5 exchange, correct.

6 Q As you said an arms-length sale?

7 A Correct.

8 Q So that bears into the opinion you just gave,
9 somebody who owns a ten million dollar home on the lake that
10 wants to sell it, they might recognize they're going to have
11 to wait a couple of years perhaps to find somebody who wants
12 that particular house and is willing to pay that particular
13 price. You would agree with that, wouldn't you?

14 A Correct.

15 Q That is different than the person who lives in the
16 tract home in Damonte Ranch where there are all kinds of
17 buyers who might be interested in buying that tract home or
18 several like it in Damonte Ranch, true?

19 A Yeah. The reason I was waffling with you a little
20 bit on time frame, is if there is a lot more homes available
21 so you have greater supply of homes. Today you don't have a
22 lot at \$300,000, but say \$300,000 to \$500,000 bracket, there
23 is a lot more homes for sale. I think the only answer, to
24 correct the answer to your question would be for me to

1 actually do a study and see the typical, let's say the typical
2 home over two million, how long is that on the market before
3 it sold compared to the typical home in the \$300,000 to
4 \$500,00 bracket, recognizing in both cases you don't have that
5 many homes for sale in the over two million but also don't
6 have that many buyers. And you have a lot more homes for sale
7 in the \$300,000 to \$500,000, but you have a lot more buyers. I
8 don't know the true answer as to whether it takes longer or
9 not. I'd have to look at that study.

10 Q You didn't endeavor to do that examination to inform
11 your opinions for this property valuation, did you?

12 A Correct, I did not.

13 MR. GILMORE: Your HONor, can we turn the TVs on so
14 I can show the witness something on the screen?

15 THE COURT: You have it on HHMI. Do you want it on
16 HHMI?

17 MR. GILMORE: HHMI.

18 BY MR. GILMORE:

19 Q You could probably tell us, Mr. Kimmel, whether
20 technology has made this easier or not?

21 A I remember court reporters doing it by hand.

22 THE COURT: By hand?

23 THE WITNESS: Yes. Well there were a couple who
24 actually took things down in a special shorthand.

1 BY MR. GILMORE:

2 Q Okay. Mr. Kimmel, you don't have to look at this
3 but it helps the rest of us. You can look at the page on your
4 report if you would like. This is Exhibit 53, so probably a
5 good idea to have your report in front of you while we finish
6 this up.

7 A You have a whole bunch people that don't know what
8 shorthand is.

9 Q We have an assistant who can do shorthand. It is
10 awesome.

11 A Yes, I am there.

12 Q You testified in direct examination that you became
13 aware that this property was sold subsequent to the valuation
14 date on December 31, 2012 as reflected on your report page 49
15 which is Kimmel Bate stamp 51. Do you remember that testimony?

16 A Yes. I just want to dig it out. I don't mean that
17 you are lying to me, but I want to make sure I am correct.
18 Yes, sir.

19 Q Okay. And you actually spoke to Mr. Avansino
20 related to circumstances surrounding this particular sale,
21 right?

22 A Yes.

23 Q Now you don't identify in your report particularly
24 any relevance that you associate to that valuation as it

1 pertained to the date of the value, true?

2 A True. For two reasons: Number one, he indicated it
3 was in terrible condition. I don't know that it was that way
4 in 2010. And I mean that would have been the primary reason.

5 Q Did Mr. Avansino tell you what the circumstances of
6 that 2.5 million dollar transaction with Mr. Morabito was?

7 A No. I don't know how he put it together.

8 Q So you don't know today whether that was an
9 arms-length transaction or a forced sale, do you?

10 A I don't.

11 Q So then you don't know today that this property was
12 sold pursuant to an agreement between Mr. Morabito's lawyers
13 and Mr. Herbst's lawyers. You don't know that, do you?

14 A I do not know that.

15 Q Now you would agree with me people who sell their
16 property under compulsion don't do so willingly?

17 A That is the definition of under compulsion.

18 Q You would agree if the buyer or seller were under
19 compulsion, the price at which the property exchanges hands
20 wouldn't qualify under your definition of fair market value?

21 A That's correct. It may be or may not be market
22 price. But I don't like those kinds of sales, because there
23 is that compulsion factor outside of my definition or accepted
24 definition.

1 Q That is because compulsion changes the dynamic
2 entirely?

3 A It does for either buyer or seller.

4 Q You still might get it at the right price. It
5 cannot be -- when it is not an arms-length transaction, it
6 simply is not a good indicator of fair market value for
7 comparable sale value?

8 A Unless you have information otherwise, I agree a
9 hundred percent. I don't mean you, personally.

10 Q I understand entirely. Now in your report you
11 indicate that Mr. Avanzino -- sorry, I said Avanzino because I
12 have a client by that name--Avansino

13 A They are all Italian.

14 Q In your report you explain that Mr. Avansino told
15 you it was his belief the property had been vacant for
16 approximately four to five years, true?

17 A Correct.

18 Q You don't have any personal knowledge whether that
19 was true or not true?

20 A I do not have.

21 Q So if the testimony in this case from Mr. Bayuk was
22 that he vacated the property around about October 1, 2010, you
23 wouldn't know anything about that, would you?

24 A I would not.

1 Q But that would make, if that fact were established
2 that Mr. Bayuk lived in the house October, October 1, 2010,
3 that would make the statement by Mr. Avansino inaccurate,
4 right?

5 A Correct.

6 Q That would also make certain statements in your
7 report inaccurate, right?

8 A Well, I have to ask you what statements.

9 Q You, in your report you refer to Mr. Avansino's
10 statement that the property had been vacant for four or five
11 years?

12 A Oh, yeah. I am sorry. It wasn't something I made
13 up. I was reporting what he said. That is what I meant by
14 whether it is accurate or not. I make my own goofs, believe
15 me. What he told me could have well been inaccurate.

16 Q I'm not impugning you at all. You're simply
17 restating what Mr. Avansino told you?

18 A Correct.

19 Q If he is wrong, it is his problem, not yours, right?

20 A Well, if he's wrong, he's wrong if it wasn't vacant
21 that many years prior.

22 Q Had you known that it was not vacant four or five
23 years but had only been vacant maybe a couple of days as of
24 valuation date, would that have an impact on your final

1 conclusion of value?

2 A No, because I didn't consider it. But it is weird,
3 because when Mr. Avansino told me the place had been ripped
4 apart, they tore things off the walls, the ceiling, from what
5 he indicated, it was in terrible condition. It doesn't seem
6 logical it would happen in a couple of days, but it's
7 possible. I don't know.

8 THE COURT: I am going to stop you. Are you saying
9 you did not consider Mr. Avansino's comments at all in your
10 valuation.

11 THE WITNESS: I did not consider them in my
12 valuation, that's correct.

13 BY MR. GILMORE:

14 Q When you say you didn't consider Mr. Avansino's
15 comments, are you referring to any of his comments or his
16 comment with respect to how long it had been vacant?

17 A I guess I probably answered the Judge. I was a
18 little concerned with his representation that there was mold
19 and he had to tear out the one, I will call it maid's
20 quarters, and that bothered me a little bit. I mean mold can
21 happen quickly, I understand that. It bothered me a little
22 bit he indicated the swimming pool was in terrible shape, and
23 that, in his opinion, the meadow land had not been watered.
24 That bothered me a little bit. As far as things ripped up and

1 torn apart, that I gave no consideration to.

2 Q The only information you have provided us in your
3 report as to the condition of the property was your
4 conversation with Skip Avansino, right?

5 A Correct.

6 Q You didn't have any other input that informed your
7 opinion of value except what Skip Avansino told you, true?

8 A Correct.

9 Q Now you don't know whether Skip Avansino and
10 Mr. Bayuk were angry with each, do you?

11 A I don't know if they knew each other. I don't know
12 if they were mad. I don't know if they were close friends. I
13 don't know anything.

14 Q You don't know if Skip Avansino asked Mr. Bayuk to
15 assist him in decorating the house after Mr. Avansino bought
16 it?

17 A I don't know.

18 Q You don't know if Mr. Bayuk accepted or refused?

19 A I do not know that.

20 Q You don't know Mr. Avansino's response to
21 Mr. Bayuk's refusal to assist him in decorating the house, do
22 you?

23 A I don't know anything.

24 Q You don't know if Skip Avansino had a bone to pick

1 with Mr. Bayuk?

2 A I do not know that.

3 Q Let's go to what you say about the condition of the
4 property from what Skip Avansino told you. First of all, Skip
5 Avansino told you the house was vacant for four or five years,
6 right?

7 A Correct.

8 Q You don't know if that is true. You're taking
9 Skip's word for it?

10 A Correct.

11 Q Mr. Skip Avansino told you it was not in good
12 condition, true?

13 A Correct.

14 Q You don't know yourself. You're taking his word for
15 it?

16 A That's correct. I'd have to have been on the
17 property as of that date.

18 Q You then say from your discussion, when he purchased
19 the property, there were two bedrooms and one low-end unit by
20 the garage that had mold. What did you understand what he
21 meant by one low-end unit?

22 A I don't know what I meant by that.

23 Q Did you know if there were any out buildings on the
24 property at the time of the date of the valuation?

1 A I don't, and I don't know what I meant when I said
2 one low-end unit. Unless I meant that it wasn't of the same
3 quality of construction as the rest of the house. Certainly
4 that would be true if it is a maid-type quarters. Other than
5 that, I don't know.

6 Q You can't give me anymore description of what you
7 meant?

8 A No. I may have goofed the way I put it down.

9 Q Skip Avansino told you this low-end unit had mold?

10 A Correct.

11 Q Skip Avansino didn't know, even if that was true, he
12 didn't know when that mold might have started?

13 A Correct. It can occur quickly or could be over
14 years.

15 Q Then Skip Avansino told you that this structure was
16 demolished and a guest suite and bathroom were added. Were
17 you referring to this low-end unit?

18 A Yes.

19 Q Then Skip Avansino told you most of the ceiling
20 fixtures had been removed?

21 A Yes.

22 Q Did he tell you what he meant by ceiling fixtures?

23 A He told me things were just ripped off the walls and
24 ceiling. I assumed he meant chandeliers. Whether there was

1 any wood taken off, I don't know. Lighting fixtures, that is
2 what my assumption was.

3 Q You assumed that based on the way he described it,
4 yes?

5 A Correct.

6 Q And then did he tell you most of the heating and air
7 conditioning equipment had been removed prior to his purchase?

8 A I don't remember whether he said it had been removed
9 or whether he had to replace it, because it wasn't-- either he
10 wanted it or it wasn't up to par. I don't remember that part.

11 Q Again, he wouldn't have known the condition of the
12 HVAC system in October 2010, right?

13 A Unless he had an inspection done, that's correct.

14 Q Well, he bought the property more than two years
15 later, right?

16 A Oh, I'm sorry. Yes. Yes. Yes.

17 Q He didn't tell you he had ever been inside the
18 house, correct?

19 A I don't know whether he had been or not.

20 Q So it is reasonable to assume, based on your
21 conversation of Mr. Avansino, that the soonest he saw this
22 house would have been in his investigation prior to purchasing
23 it in 2012, right?

24 A Correct.

1 Q Then Mr. Avansino told you the pool was in very poor
2 condition, true?

3 A Correct.

4 Q He told you he removed it?

5 A And put a new pool in.

6 Q As to the fact Mr. Avansino took the pool out and
7 put in a new one, how did that factor into your opinion of
8 value?

9 A It didn't really, but it bothered me a little bit.
10 I was a little concerned. He said it was in poor condition
11 and they had to replace it. But sometimes people who have
12 money, don't like something and put something for their
13 personal taste. But it raised a little bit of a red flag in
14 that why, with the pool, why was it necessary to replace it.
15 I don't know.

16 Q But that didn't factor into your opinion of value?

17 A Not specifically, no.

18 Q Some people want a round pool, some people want a
19 square pool?

20 A I am not sure. It is usually do I like the size of
21 the pool. Is it leaking, cracked. Do I like where it is
22 located kind of stuff.

23 Q Then he says, I am going to flip from the bottom of
24 page 51, keep that on 52, he mentioned a new swimming pool

1 along with new trees, gardens, HVAC units, new wallpaper, wood
2 floors, concrete beams and light fixtures. This indicates the
3 home was not in good condition at the time it was purchased.
4 So are you telling -- back up. You're suggesting that,
5 because Mr. Avansino had to put all of these things in, that
6 it is informing your conclusion that house was not in good
7 condition?

8 A At the time he purchased it.

9 Q Okay. Which was two years and two months after,
10 actually two years and three months after date of valuation?

11 A Correct.

12 Q Okay. And then you indicate that Mr. Avansino spent
13 well over a million dollars remodeling and upgrading, right?

14 A Correct.

15 Q Did the fact he spent a million factor in in any way
16 into your conclusion of value?

17 A No.

18 Q And then you mentioned the fact he told you the
19 pasture area had been abandoned, right?

20 A Correct.

21 Q You didn't know that for yourself?

22 A Correct.

23 Q He said it took two years to get the pasture back in
24 production. Did that factor into your opinion?

1 A No.

2 Q So here is your assumptions as to the condition of
3 the property from your report based on what Mr. Skip Avansino
4 told you, true? Right here: "I, therefore, have assumed that
5 as of the date of value October 1, 2010 the property was not
6 in typical condition for the custom homes in the area."
7 That's your opinion, right?

8 A Correct.

9 Q And that opinion informed your conclusion of value
10 didn't it?

11 A Correct.

12 Q In fact, isn't it true one of the primary factors to
13 determining how sales compare to each other in the market
14 approach is the condition of the house?

15 A No.

16 Q It is not?

17 A No, it is not. It was a factor, but you said
18 primary factor.

19 Q We'll talk about the factors later. You would agree
20 it is a factor, true?

21 A It was a factor, but it wasn't a primary factor.

22 Q Fair enough. And then you mention at the bottom of
23 page 52 of your report: "Since my inspection was in late 2015
24 and not of the date of value, again I have assumed it was in

1 substandard condition at the time of purchase."

2 A Correct.

3 Q That was your conclusion, right?

4 A Yes.

5 Q Okay. But then the last page of your report you do
6 concede that, well, it is possible that it was not in as bad a
7 condition at the date of value as it was perhaps when Skip
8 Avansino first told you he saw it?

9 A Yes. I used the word "reasonable." It seemed
10 reasonable it would not have been in as bad a condition as
11 when it was purchased by Mr. Avansino.

12 Q Nevertheless, you assumed its condition was not
13 typical?

14 A Correct.

15 Q When you say not typical, what you mean is houses in
16 that neighborhood tend to be pretty high quality, right?

17 A Yes. There are a few older homes but they are all
18 pretty good quality, correct.

19 Q This is an upscale neighborhood, isn't it?

20 A Correct.

21 Q A lot of seven figure homes in those neighborhoods
22 in 2010 and even today, right?

23 A Correct. Well, I don't know if there were a lot in
24 2010. Certainly if you consider seven over a million dollars,

1 yes.

2 Q So Skip Avansino didn't tell when he bought the
3 property, there was a big barn on the property, did he?

4 A I don't recall that he did.

5 Q He didn't tell you there was an extended garage that
6 had a generator that could operate the entire energy
7 capability of the house, did he?

8 A I don't recall he said that, that's correct.

9 Q You never indicated in your report, and you didn't
10 testify in your direct examination that you were aware, when
11 Mr. Morabito bought the house in approximately 2005 that he
12 entirely gutted it and renovated it. You did not testify to
13 that?

14 A I did not.

15 Q Were you aware, when Mr. Morabito and Mr. Bayuk
16 bought it in 2005, they spent approximately eighteen months
17 renovating it?

18 A I was aware they spent considerable money renovating
19 the home and remodeling, yes.

20 Q You never spoke to Dennis Banks?

21 A I know Dennis Banks. I didn't know he was the one
22 that had done it until just recently.

23 Q You know who Dennis Banks is?

24 A Oh, yeah. I had dinner at his place last night.

1 Q He will be here on Tuesday. You never spoke to Mark
2 Paul, the interior decorator that did the house?

3 A No.

4 Q You never spoke to Mr. Bayuk?

5 A No.

6 Q You never spoke to Mr. Morabito, did you?

7 A No.

8 Q Now I am going to try to get you out of here for my
9 purposes before lunch?

10 A Thank you.

11 Q I have only got a little bit more for you?

12 THE COURT: He might have to come back. You might
13 have to come back.

14 THE COURT: I blame the judge.

15 BY MR. GILMORE:

16 Q We might have you out of here by lunch. Would you
17 turn to Mr. Noble's report, which I hope that other binder is
18 still in front of you?

19 A I do. I just can't --

20 Q 276 in that bigger binder.

21 A Yes, sir.

22 Q Are you with me?

23 A Yes.

24 Q Now you're aware-- Let my back up. You testified

1 that Mr. Noble had considered a cost basis methodology of
2 valuation, right?

3 A Yes, and he also considered the comparable sales
4 approach.

5 Q He did both, didn't he?

6 A Yes, he did.

7 Q So if you look at his report, on page 18 of his
8 report, you will see that he considered the cost approach,
9 right?

10 A Yes.

11 Q And then he attempted to, on the next page which is
12 page 19, he attempted to apply the factors he considered
13 important to arriving at valuation based on a cost approach,
14 right?

15 A Yes.

16 Q And his ultimate indicator of value for the cost
17 approach, my version, it's not very clear, but yours is
18 probably much clearer, was \$4,360,000, right?

19 A Correct.

20 Q Then on the very next page that is when he applies
21 his market approach using sale comparison, right?

22 A Correct.

23 Q Under that approach he determines that, on page 21,
24 using the market approach, he giving it a value of 4.3

1 million. Do you see that?

2 A Correct.

3 Q His ultimate conclusion of value, although he did
4 the cost approach, came from the market approach assessment,
5 right?

6 A I would say so. Well, I don't know. Let me waffle
7 a little bit on that. I don't know. His final conclusion was
8 the same as his market approach.

9 Q Okay. Fair enough. I will accept that. And then
10 just above that I think it gives us further indication. He
11 says: 6,331 square feet multiplied by square footage he
12 assessed to the property to reach a value of 4.3 million
13 dollars. That is consistent with your testimony you just gave,
14 right, that his ultimate conclusion of value was the same
15 number as his market approach conclusion, true?

16 A Correct.

17 Q Okay. Now you testified that your understanding
18 was -- strike that. Did Skip Avansino tell you anything that
19 had to do with the water rights associated with this property?

20 A He told me that the water rights did not go with it,
21 and he had to purchase them separately.

22 Q I direct your attention to Exhibit 263 which is
23 admitted in evidence. It is in the same binder.

24 A Yes, I have seen that.

1 Q I am showing you a water rights Deed that was
2 executed on the 22nd day of December 2012. Do you see that?

3 A Yes.

4 Q And it was recorded on the last day of the year
5 2012?

6 A Correct.

7 Q That was -- this Deed was recorded the same day as
8 the Grant Deed to Mr. Avansino wasn't it, for the property?

9 A Correct.

10 Q This purports to be a water rights Deed. I will
11 direct your attention to this line down here in the middle
12 where it gives the description of the assets that is
13 exchanging hands, 7.91 acre feet per annum are being
14 transferred by way of water rights Deed on the same date of
15 the year the house is exchanging hands?

16 A Correct.

17 Q You were not aware of that prior to today, were you?

18 A No, I was. I had seen that Deed before. It is
19 confusing to me, quite frankly. All you legal minds in here
20 can certainly tell me if I am goofy, but my understanding is
21 water rights go with a property unless they are either
22 specifically excluded or unless they have been transferred
23 prior. Water rights are weird. They can be sold and moved
24 like personal property, yet, my understanding is they are

1 basically part. So what confused me, I don't have an answer to
2 it, is if they had been part of the property, why did he have
3 to buy them separately? Why wouldn't that have been part of
4 the transfer when he bought the land? It tells me, maybe I'm
5 completely wrong, for some reason they had been separated at
6 some point in time. Because I don't know why you would have
7 to have a separate Deed for the water rights since they are
8 appurtenant to the property, unless they're specifically
9 excluded or have been transferred separately. So I am confused
10 about the water rights thing.

11 THE COURT: We are going to stop there.

12 MR. GILMORE: Oh, okay.

13 THE COURT: I think you're right. We'll be back
14 from lunch at 2:00 o'clock. I will see you then. Court's in
15 recess.

16 (Whereupon the Court adjourned for the noon recess.)

17 THE COURT: Counsel, you may continue your inquiry.
18 Sir, your still under oath.

19 MR. GILMORE: Thank you, Your Honor.

20 BY MR. GILMORE:

21 Q Mr. Kimmel, before the break I was remiss to ask you
22 when you testified that you had dinner with Dennis Banks last
23 night --

24 A Not with him. At his facility. Sorry if I misled

1 you. I had dinner last night at Napa Sonoma which he owns. I
2 am sorry. I didn't mean I had it with him.

3 Q I thought I heard you testify --

4 A If I did, I was goofy.

5 Q Because it didn't occur to me at the time, but it
6 did over the lunch, if you had dinner with him, I would have
7 asked you if you had discussed anything about the case.

8 A Correct. Duly noted. I gave him money.

9 Q So let's go back to where we were before the break.
10 And we were talking about the water rights Deed, right?

11 A Correct.

12 Q So you testified in your direct examination that
13 Skip Avansino told you that he had to acquire the water rights
14 in a separate transaction from the transaction when he
15 purchased the property from Morabito, right?

16 A Correct.

17 Q So we were in the process just before lunch of me
18 showing you this Deed which is admitted in evidence recorded
19 December 31, 2012. We established that, right?

20 A Correct.

21 Q And it is your understanding that the Deed transfer
22 of the real Estate and improvements was also recorded on the
23 31st of December 2012, wasn't it?

24 A Correct.

1 Q So you can't explain today why there was a separate
2 Deed for the real estate transfer and a separate Deed for the
3 water rights Deed?

4 A No. I assumed that the water rights were with the
5 property as of the date of value, October 1, 2010. And as I
6 indicated in my testimony, I don't know what the heck went on.
7 It is confusing to me from my knowledge of water rights.

8 Q Your knowledge of water rights are that they can be
9 held appurtenant to real property, right?

10 A Well, let me say this from a layman's standpoint,
11 that they are appurtenant to real property, even though they
12 can be removed and sold essentially as personal property. It
13 is a weird part of law. It is my understanding they are
14 appurtenant to the real estate unless they are specifically
15 excluded in a sale or unless they have been removed,
16 transferred previous.

17 Q Right. So you understand the concept that someone
18 could sever their water rights from their real property,
19 right?

20 A Yes.

21 Q And the word lawyers would use for that is
22 severance. Have you heard that before?

23 A Yes.

24 Q Once the water rights are severed from real

1 property, they're held in gross. Have you ever heard that?

2 A No. I wasn't aware.

3 Q I will tell you that is the word water rights
4 lawyers use because I use it. If I give those definitions,
5 you have to take my word for it. You didn't have any
6 understanding as to why or whether the water rights associated
7 with this property were appurtenant or whether they had been
8 severed or held in gross?

9 A I just assumed they were part of the property as of
10 October 2010.

11 Q You wouldn't know -- If the testimony had been
12 elicited in the few days that preceded today were that these
13 water rights were "excess water rights." You wouldn't know
14 anything about that, would you?

15 A That's correct, I wouldn't.

16 Q But we can all agree that the water rights Deed was
17 recorded the same day as the real property transfer, right?

18 A Correct.

19 Q Do you intend to testify in this trial that you have
20 an opinion as to the fair market value of the 7.91 acre feet
21 of water rights that were transferred on December 31st?

22 A No, I'm not going to.

23 Q Not for me or for them, right?

24 A As far as I know. I haven't done anything on it.

1 Q Do you consider yourself competent to testify as to
2 the fair market value of water rights as of October 1, 2010?

3 A No.

4 Q Now before the lunch break I asked you a question
5 about one of the factors that entered into your ultimate
6 conclusion of value, and we discussed one which is condition
7 of the property, right?

8 A Correct.

9 Q Now there are a couple other factors that an
10 appraiser might consider in determining their ultimate
11 conclusion of value, right?

12 A Yes.

13 Q One of those might be the location of the property,
14 right?

15 A Correct.

16 Q The beach front property on Lake Tahoe, generally
17 speaking, would command a higher value than would a tract home
18 in the Damonte Ranch neighborhood, right?

19 A Correct.

20 Q And another factor that is associated with the
21 ultimate conclusion of value would be the size of the property
22 and the improvements, right?

23 A Correct.

24 Q What are some of the other factors that you would

1 consider in determining your ultimate conclusion of value?

2 A Topography. Are you talking just land or
3 improvements?

4 Q I am talking about in appraising, generally
5 speaking, residential appraisals?

6 A Okay. And the size of the improvement. Number of
7 bedrooms, bathrooms, whether it fits the neighborhood. General
8 functionality. Those are the main factors.

9 Q Okay. Are there any, I used the word primary, maybe
10 that was not the right word for your business, are there any
11 other main factors that we might-- that you might consider in
12 determining your ultimate conclusion of value?

13 A I don't think so. Well, a lot of people say I have
14 to have four bedrooms. We can't get by with three. Or we
15 want five, something of that nature. That is kind of a
16 governing factor. Or we may want a separate formal dining
17 room. You will get that type of thing. But I have covered it
18 in a general sense.

19 Q Okay. So now let's go from your report to your
20 sales comparables. Do you know where these are located in
21 your report?

22 A I'm sorry, my comparable sales?

23 Q Yes?

24 A Yes.

1 Q I will put it up on the screen so that we can talk
2 about the same thing. Your report is 53. You're looking at
3 Exhibit 53, correct?

4 A I guess I should do that. I was actually looking at
5 my copy, but I should go to the official copy.

6 Q I suspect, Mr. Kimmel, they're identical, so I don't
7 question your veracity in that regard.

8 Now you only considered two other property sales as
9 part of your comparables when you were doing your market
10 approach, correct?

11 A No. I considered four sales.

12 Q Okay. Let me back up. You considered two which
13 pre-dated the valuation date and you considered two which
14 occurred after valuation date, right?

15 A Correct.

16 Q Now you would agree with me that the property buyer
17 or seller on the valuation date could not have known what the
18 ultimate sales price would have been for comparable sales
19 three and four, right?

20 A Correct.

21 Q So you totally agree with that. You agree with me
22 that properties three and four were sales that occurred after
23 valuation date?

24 A Correct.

1 Q Another way to say it in your business, subsequent
2 sales?

3 A Correct.

4 Q So let's focus on the two comparables that you
5 evaluated that occurred prior to valuation date. Would you
6 say, in your experience, Mr. Kimmel, that in appraising
7 multi-million-dollar residential properties you would use
8 typically more than two comparable sales to the subject
9 property?

10 A And I did.

11 Q Okay. Is it your experience typically you would
12 consider four or more, or is four sort of your sweet spot?

13 A I would suggest to you that there is no specific
14 number. Obviously, as I indicated earlier I think in direct
15 that you try and find sales that are as similar as possible in
16 time, location, land size, size of the building, quality, that
17 type of thing. And if you had twenty of them, it would be
18 great. If you don't, they are more difficult to appraise.
19 You can get certainly a wider variance of appraiser opinions
20 compared to say a tract housing. So I selected those I
21 thought were the closest in time. I didn't use listings and,
22 for the most part they were in the same general area, had many
23 of the same amenities.

24 Q It is a true statement the more custom the home, the

1 more difficult it is to find a true comparable?

2 A I have to think about that a second. I guess. I
3 know I am not supposed to ask you a question, but what do you
4 mean by the more custom? To me a custom home is not a tract
5 home. It is built to the owner's specifications. And I don't
6 know that I really understand the "more custom," other than a
7 custom home is not built on a specific plan that is similar to
8 the neighborhood for the most part. You can get very expensive
9 that are "tract" homes, but they are specific for that owner
10 or builder's desires. So I'm not quite tuned to the "more
11 custom " aspect.

12 Q You answered the question. But I think custom --
13 would you agree with me custom can be more expansive than what
14 you defined? Custom could be custom in relation to its
15 proximity to a particular location or a particular city,
16 right? Do you agree or disagree?

17 A It's a concept I haven't heard the way you are
18 asking it. So I guess I would say I guess I'm not following
19 your question.

20 Q Let me focus on then your answer. Custom in the
21 sense that the specifications about the way in which the
22 property is developed is made to the specifications of the
23 particular owner's desires?

24 A Correct.

1 Q That isn't typically the case in a subdivided plot;
2 is it?

3 A Correct.

4 Q Typically --

5 THE COURT: He said correct.

6 MR. GILMORE: This is a follow-up question.

7 THE COURT: I don't really think we need it. I know
8 the difference.

9 MR. GILMORE: Good.

10 BY MR. GILMORE:

11 Q Now your land sales for the two properties that were
12 sold before the valuation date, did you endeavor to find more
13 than two that you thought were comparable in your judgment?

14 A Did I misunderstand? I thought you said land sales.

15 Q Well the property transactions?

16 A I did endeavor, and I didn't really find anything
17 that I felt was comparable in 2009, and I didn't want to go
18 any further than May of 2011. And the other major concern
19 that I had was the economy at the time, because we started, as
20 I indicated, whether you call it depression or recession, it
21 began early -- very late 2008, early 2009 and it kept getting
22 worse, and this continued into 2010. So I purposely tried to
23 stick, if I could, with 2010 dates of value. And by the same
24 token in 2011, I attempted to stay within the first part,

1 because as you got into say 2012, we were getting some
2 recovery. So that was a factor in my analysis as to dates.
3 And also I, quite frankly, looked at every sale that occurred
4 over a million bucks in that general time frame out in the
5 larger size parcels.

6 Q It was difficult to find good comparables for this
7 subject property, wasn't it.

8 A It is always difficult to find good comparables for
9 high-end custom homes, and it was particularly difficult
10 during this time frame, because I didn't want to take forced
11 sales or bankruptcy type sales or foreclosure sales.

12 Q Let's briefly look at subject one and discuss it. I
13 will call this comparable sale one which is the 8000 Lakeside
14 Drive property?

15 A Correct.

16 Q You testified in your direct examination you
17 believed this was a good comparable to the subject property,
18 true?

19 A Yes.

20 Q Let's give some treatment to what you said in your
21 report about it. Particularly, I am on the middle top third of
22 page 57 where you say: "This house was built in 2005, and
23 from outside inspection appears to me in better condition than
24 the subject as of the date of this report in October 2010 as

1 it did not require substantial upgrading." See that?

2 A Yes.

3 Q One of the factors in determining the Lakeside Drive
4 comparable sale was more favorable to the subject property had
5 to do with its condition, right?

6 A Correct. And I indicated that the two elements of
7 condition that I was concerned about was the mold problem and
8 the swimming pool. If they were not present, then there is
9 probably, other than esthetics, probably not a big difference
10 in condition. One had a swimming pool and they had a pond.

11 Q So aside from what you have given in this paragraph
12 here, that is the some and substance of your opinion as to why
13 a sale of comparable one was more favorable than the subject
14 property, right?

15 A Correct. Plus it had a pond. The hard thing in the
16 Reno-Sparks area are swimming pools. If we were in Las Vegas
17 or Scottsdale, Arizona it is almost a must. It is really hard
18 in this area to determine how much extra a pool can add to a
19 property. Many have ponds, though, particularly out in this
20 area. People love their ponds. They get ducks and the geese.

21 Q So to confirm -- I appreciate the answer. I'm not
22 sure it was entirely complete for the purpose of that
23 question. That is, everything you want the reader to know
24 about your opinion related to sale one is contained in this

1 paragraph, true?

2 A Correct.

3 Q Let's go very briefly to sale two. You mention that
4 sale two is larger and it is older, but it was judged in good
5 condition. Sale two.

6 A I stated -- that's correct. That's correct.

7 Q That's right. And that's all that you have given us
8 to help us understand your opinion with respect to why sale
9 two you believe was favorable to the subject property, right?

10 A Well, I felt it was inferior to the subject property
11 overall, but it was one of the other few sales in the area.

12 Q Got it. And then sale three you judged it to be in
13 superior condition to the subject property, right?

14 A Correct.

15 Q Okay.

16 A But not as good locationally.

17 Q Correct.

18 Q Okay. Then the last few questions, Mr. Kimmel, page
19 59, I am sorry, 58 of your report, this is just before you
20 give your ultimate conclusion of value, you give us a summary
21 at the top where you say of all the sales comparable, you
22 considered sale one was the most helpful, and it was in better
23 condition at the time of the sale than what you understood the
24 condition of the subject property, right?

1 A Correct.

2 Q Okay. Then you give some commentary about what Skip
3 Avansino believed?

4 A Correct.

5 Q He felt he overpaid for the property in December 31,
6 2012, right?

7 A That was his opinion.

8 Q Why does Skip Avansino's opinion what he paid for
9 the property at the end of 2012 have any bearing on the fair
10 market value?

11 A It doesn't. I am simply reporting what I learned.

12 Q Okay.

13 MR. GILMORE: Thank you. That is all I have for
14 you. Thank you very much for your time.

15 THE WITNESS: Thank you.

16 THE COURT: Further inquiry?

17 MS. HAMM: Very briefly, Your Honor.

18

19 REDIRECT EXAMINATION

20 BY MS. HAMM:

21 Q Mr. Kimmel, when Mr. Gilmore was asking you
22 questions, you mentioned two different -- you mentioned
23 condition and functionality as factors. Do you recall that?

24 A Yes.

1 Q Are those two separate things to you?

2 A Yes. Condition is really physical, a physical
3 factor. That is what kind of shape is it in, those kinds of
4 items. Functionality is a combination of design layout, what
5 is in the property, is it an under improvement, over
6 improvement.

7 Q What do you mean by over improvement?

8 A You can have a personal taste. I mean like you want
9 all real gold fixtures in the bathrooms. You can afford it.
10 But a typical buyer isn't going to pay that extra for that. Or
11 even in the case of granite counter tops. Somebody can come
12 in, it could be a year old, a new buyer will look at it and
13 say these are really nice, but I want something different. So
14 sometimes you can spend a lot on ornateness for example that a
15 typical buyer -- that the person that did it might really like
16 it, but the buyer may not pay extra for it because it is not
17 something that is to their taste. So the difficulty is,
18 because you can afford it, you can do things in a home that
19 for you give a lot of comfort and value and that type thing,
20 but to a buyer they're not going to pay extra for it.

21 Q You have told us about the sale to Skip Avansino in
22 December of 2012. And you indicated earlier that did not
23 impact your conclusion. Am I remembering that correctly?

24 A Correct.

1 Q If it didn't, then why did you discuss it in your
2 report?

3 A Well, I have an obligation to discuss any of the
4 information that I obtain. I guess that is my best answer is
5 that I think I should discuss that, because it was a
6 subsequent sale, and because I had not seen the property as of
7 the date of value. I was hoping to get some insight. But
8 from his opinion, it was, you know, in pretty poor condition.
9 So that led me down-- I have a tough problem, because he felt
10 this, but it is two years later, so I have no idea when this
11 occurred.

12 Q What elements of condition -- Let me ask it a
13 different way. What Mr. Avansino told you, what of that is
14 condition versus functionality?

15 A I would say as far as his condition, I would
16 probably say not functional. I would say physical, because I
17 stated both in direct and maybe cross that I tried to throw
18 out everything, but the two elements that bothered me was the
19 condition of the swimming pool and the mold.

20 Q What about ceiling fixtures being taken down, did
21 that have an impact on your valuation as of October 1, 2010?

22 A No.

23 Q Did you assume that the ceiling fixtures had been
24 taken out as of October 1, 2010?

1 A No.

2 Q The recession that was -- that we lived through in
3 2010 was a factor. That was known on October 1, 2010?

4 A Absolutely.

5 Q Was financing readily available at that point in
6 time?

7 A No. I am sorry.

8 MR. GILMORE: Objection. Goes beyond the scope of
9 this witness' expertise.

10 MS. HAMM: Your Honor I disagree. Mr. Kimmel already
11 testified available financing is a factor or economics
12 obsolescence goes to real estate valuations.

13 MR. GILMORE: There was no foundation laid seeking to
14 have him identified as an expert witness that spoke anything
15 to those factors.

16 THE COURT: Objection overruled. I think it is
17 pertinent to his expertise.

18 THE WITNESS: I think I interrupted you and I'm
19 sorry. No. It was well known. In fact, we have to consider
20 it in our appraisal valuations because there are people that
21 pay cash. But, generally, even in the higher-end,
22 availability of financing is important, and it was very
23 difficult in 2010.

24 ///

1 BY MS. HAMM:

2 Q Was that known on September 30th or, excuse me,
3 October 1st of 2010?

4 A Yes, it was.

5 Q What was your primary consideration in reaching your
6 conclusion of value of two million dollars on October 1st, of
7 2010?

8 A I did a comparable sale analysis.

9 Q If the property was the most extravagant property
10 imaginable, let's say it was spectacular on October 1st of
11 2010 and had such things as shatter proof windows and imported
12 doors, is it your opinion that it would have sold for two
13 million dollars?

14 A Yes.

15 MS. HAMM: Thank you.

16 MR. GILMORE: I only have one question. May I ask
17 it?

18 THE COURT: Certainly.

19

20 RECROSS-EXAMINATION

21 BY MR. GILMORE:

22 Q Mr. Kimmel, nowhere in your report do you give any
23 treatment to the functionality analysis as one of the factors
24 in comparing these sales to the subject property, true?

1 A That's correct.

2 MR. GILMORE: Thank you.

3 THE COURT: Anything further?

4 MR. GILMORE: No, Your Honor.

5 MS. HAMM: No, Your Honor.

6 THE COURT: May this witness be excused? Thank you,
7 sir, you may step down. You are excused.

8 THE WITNESS: Thank you, Your Honor.

9 (Witness excused.)

10 THE COURT: Go ahead and call your next witness.

11 MS. TURNER: William Leonard.

12 THE COURT: You may proceed.

13

14 WILLIAM LEONARD

15 called as a witness, having been first duly sworn,
16 took the witness stand and testified as follows:

17

18 DIRECT EXAMINATION

19 BY MS. TURNER:

20 Q Please introduce yourself to the Court stating your
21 full name for the record.

22 A William Leonard, spelled L-E-O-N-A-R-D. I also go
23 by Biff Leonard.

24 Q You are here today in the capacity as Trustee of the

1 bankruptcy Estate of Paul A. Morabito; is that correct?

2 A Yes, ma'am.

3 Q Explain generally how you came to be in that
4 capacity?

5 A At the time, I was a member of the Panel of
6 Bankruptcy Trustees for the District of Nevada, and
7 Mr. Morabito was in involuntary bankruptcy, Chapter 7. That
8 is a liquidation. The creditors to that Estate had an
9 election. When a Trustee is appointed, until the end of the
10 first 341 meeting, he's an interim Trustee. At the beginning
11 of the 341 meeting of creditors, the creditors can vote to
12 elect another person as Trustee. If they do so, and they did
13 that in my case, then I became the permanent Trustee of that
14 Estate, and I continue the 341 meeting and continue from
15 there. So I became the permanent Trustee of the Paul A.
16 Morabito bankruptcy. I think that was probably March of 2012
17 or was it '13 or '15? 2015, I think.

18 Q Why don't we go to Exhibit 19.

19 A I am there.

20 Q All right. Now Exhibit 19 is a certified copy of a
21 bankruptcy record.

22 MS. TURNER: And, Your Honor, I would move for its
23 admission.

24 THE COURT: Any objection?

1 MR. GILMORE: I suppose I have no objection to its
2 admission, although I believe it is a stipulated fact.

3 THE COURT: Exhibit 19?

4 MS. TURNER: Yes, Your Honor.

5 THE COURT: Exhibit 19 is admitted.

6 (Exhibit 19 admitted in evidence.)

7 THE WITNESS: And it was 2015.

8 BY MS. TURNER:

9 Q When in 2015?

10 A January 22nd.

11 Q All right. Now if you look in the same document
12 there is a reference of the votes cast. Do you see that?

13 A Yes.

14 Q And who casts the ballot in the election to appoint
15 a Trustee?

16 A The votes cast were JH, Inc., Jerry Herbst and
17 Berry-Hinckley.

18 Q What was the total amount of those creditors claims?

19 A Seventy-seven million dollars.

20 Q Okay. Now what do you do on behalf of the creditors
21 who appointed you as the Trustee?

22 A Well, I don't do it on behalf the creditors that
23 appointed me a Trustee. A bankruptcy Trustee is the champion
24 of the unsecured creditors. As the Trustee, I will call a 341

1 meeting or notice of meeting of creditors and conduct a
2 meeting of creditors with the debtor. I will also request
3 certain documents that the debtor provides, and then start my
4 review of that particular debtor's estate. This is a lengthy
5 review looking at everything from tax returns to bank
6 statements to bank card statements to income and source of
7 income, and seeing how they match up with the other documents.
8 The debtor also provides a source of income and expenses.
9 Those incomes and expenses, I verify those against the actual
10 expenses that are being paid and determine if there is an
11 indication of maybe the debtor is not telling the truth. At
12 that point there, I will conduct a meeting of creditors. We
13 call it to order, swear the debtor in and ask him a series of
14 questions. At that point there, if I need additional
15 documents, I will request additional documents be delivered to
16 me. I do that under the Bankruptcy Code Section 541542(e).
17 So everything I get, I can get from the debtor and I continue
18 my review of the case.

19 Q Did you do all of those things you just described in
20 the case of Paul Morabito?

21 A Yes, I did.

22 Q Now before we go back to this particular case, if
23 you could describe for the Court how long have you served in
24 the capacity as a Trustee at the direction of the Bankruptcy

1 Court?

2 A I was first appointed as a Trustee back in 1994, and
3 then as a Chapter 11 in 1995. That was Grand Airways. Chapter
4 11 into a Chapter 7. Americus K., which was in 1997. Then
5 October of 1997 I was asked to be on the Panel of Trustees,
6 and that is an appointment by the Department of Justice. I
7 accepted that appointment, and I served on that as a regular
8 panel member of the Panel of Trustees for the District of
9 Nevada from October of 1997 to about I would say March or
10 April of 2018 when I resigned from the panel. I am no longer
11 getting additional cases. I am working through the cases that
12 I have.

13 Q And have you been appointed as a receiver
14 previously?

15 A Many times. Let me go back to the last answer.
16 During that 20 year period of time, I was appointed a Trustee
17 in over 37,000 cases. In those 37,000 cases, since many of
18 them are married, I probably swore in over 67,000 individuals
19 and conducted due diligence in my investigation of those
20 67,000 individuals. That's a lot of people.

21 You asked about receiver. I have been appointed
22 receiver many times as a State court receiver, as an equity
23 receiver, as a limited purpose receiver where I just vote, as
24 a Special Master where I actually make recommendations to the

1 arbitrator or the judge involved. And as a receiver, I do
2 things -- I work for the Court, work for the judge to try and
3 maintain status quo of the business while the warring parties
4 try to resolve their -- I got ahead of myself.

5 Q Have you been qualified as an expert in Nevada
6 courts?

7 A Yes, ma'am. I have been qualified as an expert in
8 Bankruptcy Court as a financial expert and as a Trustee, as a
9 Chapter 11 plan expert to determine if a plan is a viable
10 plan.

11 Q And you indicated that you have been a Trustee in
12 thousands of cases?

13 A Yes, ma'am.

14 Q And as a Trustee here on behalf of Mr. Morabito, how
15 are you paid? Let's talk about specifically the case where
16 you are a Trustee for the Estate of Paul Morabito?

17 MR. GILMORE: Objection as to relevance.

18 THE COURT: What is the relevance?

19 MS TURNER: Frankly, I thought he was going to get
20 into it. I will strike the question.

21 THE COURT: Okay.

22 BY MS. TURNER:

23 Q Mr. Leonard, what is your educational background?

24 MR. GILMORE: Objection, relevance.

1 THE COURT: I am going to overrule the objection. I
2 will hear briefly his educational background.

3 BY MS. TURNER:

4 Q Just a thumbnail sketch.

5 A I have a B.S. in electrical engineering from the
6 United States Navel Academy. I have an MBA with an emphasis on
7 finance and accounting from Anderson Business School at UCLA.
8 I have a law degree from Thomas Jefferson University. I have
9 a number of -- taken some courses at Harvard law in
10 negotiation and mediation.

11 Q And, Mr. Leonard, does your education and background
12 assist you in serving as a Trustee on behalf of Paul Morabito?

13 A Yes. Absolutely.

14 Q Now ultimately you were substituted in as the party
15 Plaintiff in this case, and that same day, Paul Morabito was
16 removed. And I believe you just described how you are able to
17 pursue documents.

18 Can you explain what your relationship is with the
19 debtor, Paul Morabito, and how you can then be the real party
20 in interest?

21 A Well, as a Trustee, I stand in the shoes of the
22 debtor. And I can -- and I own the debtor's records from his
23 accountants to his attorneys. I own them, and any other
24 profession he's dealt with up until the day he filed

1 bankruptcy. In this case, I was substituted in as a party in
2 interest in this lawsuit, because I felt, when I looked at
3 everything, that this particular lawsuit had a lot of
4 potential for recovery for the general unsecured creditors.

5 Q Do you go through and anal -- do you go through an
6 anal-- there is too many. Do you analyze the complaint before
7 you determine whether you are going to be substituted in as
8 the Plaintiff or are you required to step into the shoes of
9 the Plaintiff?

10 A I do a very thoroughly analysis. I do a very
11 thorough analysis. I do not have to step into the shoes of the
12 debtor. I could very easily have just decided not to deal with
13 this particular asset and just abandon this asset back to the
14 debtor. But I decided that this particular asset --

15 MR. GILMORE: Your Honor, could I ask as to the
16 relevance? His personnel opinions as to the merit of these
17 claims has no bearing on whether or not the facts alleged in
18 case are true or not true. Classic case of relevance.

19 THE COURT: Thank you, Mr. Gilmore.

20 MS. TURNER: Your Honor, this witness is describing
21 his standing and how he came to have standing. It is not a
22 mandatory real party in interest. It is discretionary. That
23 discretionary aspect is relevant that there was an analysis
24 done whether or not to pursue these claims or not to. I think

1 it is relevant to the Court's understanding of the facts and
2 circumstances. In addition, this particular witness, as a
3 Trustee, is a lay witness with an opinion that is developed or
4 he can describe -- I would even say it is an expert opinion.
5 It is a percipient knowledge opinion of what he sees here.
6 And he's not going to opine whether or not there was a
7 fraudulent transfer. That is not his role. But he can
8 certainly describe what he observed as the Trustee and how
9 there has been, I will proffer, a pattern of behavior that is
10 relevant here in determining whether or not Paul Morabito had
11 the intent to transfer his assets, to hinder, delay or prevent
12 recovery to the Herbsts.

13 THE COURT: Yes?

14 MR. GILMORE: If he doesn't have percipient
15 knowledge of the facts which bear on the claims and defense in
16 this case, he's not competent to testify under Nevada statute.

17 THE COURT: I am going to allow some inquiry in this
18 regard. I think the objection rather than pure relevance goes
19 to the weight that will be attributed to the witness'
20 testimony, and it may not have any bearing on the Court's
21 determination, but I will allow you limited inquiry.

22 MS. TURNER: Understood, Your Honor.

23 BY MS. TURNER:

24 Q Now, you have testified about a 341 examination?

1 A Yes, ma'am.

2 Q Do you request information from the debtor at the
3 341 examination?

4 A I request information prior to the 341 exam and also
5 at the 341 exam.

6 Q And did you do that here with respect to
7 Mr. Morabito?

8 A Yes, I did.

9 Q And were documents provided to you?

10 A Some documents were provided. We had to request the
11 debtor to provide additional documents.

12 Q And you indicated that you own the debtor's files.
13 Does that include counsel files?

14 A Yes, ma'am, it does.

15 Q And in this case, did you, as the Trustee, request
16 the files of Paul Morabito's counsel?

17 A Yes, I did.

18 Q And did you receive those files?

19 A I did not. We had to request them again, file a
20 motion with the Court to get those.

21 MR. GILMORE: Objection, relevance.

22 THE COURT: Overruled. Just finish your answer.

23 THE WITNESS: I had to request those. We subpoenaed
24 those, and there was an order from Judge Zive for them to

1 produce those documents.

2 BY MS. TURNER:

3 Q And Judge Zive is the bankruptcy Judge here. I
4 think this Judge knows that, but for the record?

5 A Yes, ma'am.

6 Q And so you obtained documents pursuant to Judge
7 Zive's order?

8 A Yes, I did.

9 Q And how were those documents delivered to you?

10 A Some of the documents at the 341 meeting of
11 creditors were delivered in person. I turned those over to
12 State counsel John Murtha, and he Bate stamped them, started
13 an inventory and index of those files. The other ones that
14 were delivered later were sent over to Mr. Murtha, and those
15 were Bate stamped by Mr. Murtha and put into a file. Those
16 other ones we required we had to subpoena, we finally got
17 those documents. They came on a disk or a thumb drive or
18 electronic media. Those were Bate stamped electronically and
19 kept at the files there at Gordon Sil-- and Turner.

20 Q It used to be Gordon and Silver.

21 A Yes. I corrected myself.

22 Q Now all documents that you have pertaining to Paul
23 Morabito, were they all produced pursuant to a court order or
24 a subpoena?

1 A A court order or subpoena or my direct request at a
2 341.

3 Q There was no instance where you went into a building
4 and picked up a piece of paper that wasn't produced by a
5 custodian --

6 MR. GILMORE: Objection. Leading.

7 MS. TURNER: It is. It is.

8 THE WITNESS: No.

9 MS. TURNER: That is a fair objection. Pardon me.

10 BY MS. TURNER:

11 Q Other than pursuant to court order, subpoena our
12 request in conjunction with the 341 exam, did you receive any
13 documents pertaining to Paul Morabito otherwise?

14 A I did not.

15 Q And when documents were received, I will just stick
16 to Paul Morabitos records produced pursuant to 341 exam and
17 request for counsel files, were those maintained in the
18 ordinary course of business through your agent, counsel John
19 Murtha, or special counsel Garman Turner Gordon?

20 A They would be retained by John Murtha or special
21 counsel, one or the other, so I could review them any time I
22 wanted to get any information I needed.

23 Q And is Garman Turner Gordon, special counsel who
24 represents you, Mr. Leonard, as the Trustee of Paul Morabito,

1 generally on all other such matters?

2 A John Murtha up here in Reno represents me as the
3 Estate counsel.

4 Q Now you own the attorney files and the documents
5 provided by Paul Morabito. Do you also own the privileges
6 that may be asserted with respect to those files by the
7 debtor?

8 A Yes, ma'am. And I waived that privilege.

9 Q Were there any court orders from Judge Zive related
10 to those waivers?

11 A Yes. Judge Zive even opined on that.

12 MR. GILMORE: Objection. What is the relevance of
13 this line of questioning as it relates to the facts in this
14 case?

15 THE COURT: I don't know. What is the relevance,
16 and why do I want to hear it?

17 MS. TURNER: Because the bankruptcy-- well, I hate
18 proffering, but --

19 THE COURT: It is kind of hard. Once you proffer, I
20 know what the evidence is.

21 MS. TURNER: Exactly. I really don't like doing
22 that, but certainly the reason for a waiver other than just
23 statutory, if there was, hypothetically, a waiver as a result
24 of crime, fraud, that is relevant because we are talking about

1 the intent of the debtor here. One of the badges of fraud is
2 concealment.

3 THE COURT: So the objection was to him telling me
4 what Judge Zive ruled with regard to privilege.

5 MR. GILMORE: He can't testify -- He was testifying
6 as to his opinion as to Judge Zive's consideration of factors
7 that have no bearing on this case.

8 THE COURT: I don't think that is what he said. He
9 started to say that Judge Zive said, and you objected.

10 MR. GILMORE: It is irrelevant. My other objection
11 would be, even if it is relevant, the probative weight -- its
12 prejudicial effect substantially outweighs any probative value
13 that type of evidence has. It is clear they are trying to
14 backdoor in Judge Zive's personal opinions, Mr. Leonard's
15 personal opinions as to Mr. Morabito or anything he's done.
16 Mr. Morabito is not the defendant here.

17 THE COURT: Were you going to tell me something
18 Judge Zive told me in private or in a record somewhere?

19 THE WITNESS: In a record.

20 THE COURT: I am going to overrule the objection. I
21 think the record of the Bankruptcy Court is fair.

22 MS. TURNER: Your Honor, is it proper to have the
23 order, it is a matter of a judicial order or to have
24 testimony?

1 THE COURT: It is probably, based on the objection,
2 better to have the order.

3 MS. TURNER: I have it here. And actually, Your
4 Honor, the February 3rd, 2016 Bankruptcy Court Order was
5 incorporated into this Court's order, it might have been Judge
6 Berry of July 6, 2016.

7 THE COURT: It wasn't me.

8 MS. TURNER: So it is part of this Court's record,
9 though.

10 THE COURT: For purposes of today's trial, the Court
11 has already reviewed, not me, but the previous judge in this
12 matter has reviewed the document, and it was filed with her
13 Summary Judgment. Is that what happened in July?

14 MS. TURNER: It was in conjunction with a Motion to
15 Compel, it was incorporated into this court, Judge Berry's
16 Order of July 6, 2016, approving a report and recommendation
17 of June 13, 2016.

18 THE COURT: From the Discovery Commissioner?

19 MS. TURNER: Yes.

20 THE COURT: All right. So that document is part of
21 the file?

22 MS. TURNER: Yes.

23 THE COURT: And the Court will take judicial notice
24 of it, and it is appropriate with this witness talking about

1 it.

2 MR. GILMORE: The objection would be the best
3 evidence rule which is it is not appropriate for a witness to
4 come in here and characterize his personal belief what Judge
5 Zive said or didn't say. The best evidence has been admitted.
6 I would object to his commentary what Zive said as irrelevant
7 and prejudicial.

8 THE COURT: I will have to see if it is commentary
9 or not.

10 THE CLERK: Ms. Turner, if you have a word you want
11 me to search on the computer, just let me know what you think
12 it is called.

13 MS. TURNER: I don't believe it is in our record.

14 MS. HAMM: Excuse me, it is.

15 MS. TURNER: What is the name?

16 MS. HAMM: Order granting -- Exhibit 175.

17 MS. TURNER: Exhibit 175. Thank you.

18 MS. HAMM: This Court's recommendation and order.

19 MS. TURNER: I apologize for the Court's indulgence.
20 They were bankruptcy counsel.

21 THE CLERK: 175 is February 3rd, 2016 Motion to
22 Compel Response to Deposition Questions.

23 MS. TURNER: That's it.

24 THE CLERK: And it is not admitted yet.

1 THE COURT: The Court is admitting it now.

2 MR. GILMORE: Will the record note my objection?

3 THE COURT: I'm sure it will.

4 MR. GILMORE: Thank you.

5 THE COURT: It is there. And so I am admitting it

6 because, it is the Court's judicial notice of what is already

7 in the Court record in this case.

8 (Exhibit 175 admitted in evidence.)

9 THE COURT: Then we'll go forward. If the witness

10 has something he wants to talk about this document, if it is

11 appropriate you can ask a question and see if Mr. Gilmore

12 objects. Otherwise, you can use it for argument.

13 BY MS. TURNER:

14 Q I don't want to belabor the point, but, Mr. Leonard,

15 have you as Trustee been frustrated with the -- strike that.

16 Have you seen indicia of the debtor hiding information from

17 you?

18 MR. GILMORE: Objection. Relevance, probative

19 weight.

20 MS. TURNER: Goes to a badge of fraud.

21 THE COURT: Overruled.

22 MR. GILMORE: Your Honor, may I make for the record,

23 this Trustee was appointed, as he testified, in 2015. All the

24 claims at issue in this case were, according to Plaintiff,

1 conducted in 2010. I simply cannot see any relevance to
2 anything he has any personal knowledge of that occurred after
3 2015 that bears on any facts in this case. That time frame
4 2015 has never been uttered by a fact witness in this case
5 that had any bearing on the claims or defense. This is
6 clearly an attempt to get Mr. Leonard's personal opinion to
7 smear the debtor, Paul Morabito.

8 MS. TURNER: Your Honor, when our job is to prove
9 intent by circumstantial evidence, it is rare, if not never
10 the case, that there is one isolated incident where somebody
11 did something for the purpose of avoiding collection. It is a
12 pattern of behavior that shows the intent and motive of Paul
13 Morabito to avoid his obligations to the Herbsts. And this
14 evidence is probative of this continued conduct for the
15 purpose of avoiding disclosure, a badge of fraud, as well as
16 making misrepresentations, another badge of fraud.

17 THE COURT: As I understand it, Mr. Morabito's, Paul
18 Morabito's testimony has been submitted and so his reputation
19 for veracity is also at play in this case. For those reasons
20 and the argument you just presented, the objection is
21 overruled.

22 MS. TURNER: Thank you, Your Honor.

23 THE WITNESS: Would you ask your question again,
24 please?

1 BY MS. TURNER:

2 Q Something similar. So, Mr. Leonard, have you had
3 issues with the debtor concealing or failing to disclose
4 information to the Trustee?

5 A Yes. I said initially I was frustrated. I was very
6 frustrated having to deal with Mr. Morabito. Every question I
7 asked was answered in a roundabout circuitous manner that had
8 no indicia of truth to it. I would ask him questions about
9 income, and I'd here stories about somebody owed me some
10 money. I don't know where it came from, and people just keep
11 giving me money. That is not how we conduct our hearings in
12 341 in bankruptcy. I questioned everything he said. I still
13 question everything he said.

14 Q And when you asked for documents in advance of the
15 341 exam, was the debtor forthcoming?

16 MR. GILMORE: Same objection.

17 THE COURT: Overruled.

18 THE WITNESS: No, he was not. He came with some
19 documents. We had to request additional documents. In fact,
20 we had to continue the 341 meeting of creditors because he was
21 not prepared to turn over all those documents we needed.

22 BY MR. GILMORE:

23 Q How many -- Well, how long does a 341 exam generally
24 take?

1 A In a typical bankruptcy, I could conduct a 341
2 examination in ten minutes. But that would require a couple
3 hours of reviewing documents before that time. So, but the
4 physical 341 meeting would take ten minutes. This particular
5 case, after four or five attempts, I have still not concluded
6 the 341 meeting of creditors.

7 THE COURT: I'm sorry, you still have not or you
8 had?

9 THE WITNESS: I still have not concluded the meeting
10 of creditors.

11 BY MS. TURNER:

12 Q Why is that?

13 A Because either Mr. Morabito couldn't be there or I
14 mis-calendared a date or Mr. Morabito was too ill to talk or
15 was under medication and couldn't testify or something like
16 that. We requested documents. He didn't have the documents.
17 We continued it to get the documents. So I am holding that
18 date open until we have all the documents and we can request
19 and have the final 341. It should be a very short 341 at that
20 time.

21 Q You indicated that you felt that Mr. Morabito had
22 provided false information to you; is that accurate?

23 A Yes.

24 Q As a Trustee, do you do anything with that

1 information --

2 MR. GILMORE: Objection.

3 BY MS. TURNER:

4 Q -- or not?

5 THE COURT: Rephrase the question.

6 MS. TURNER: That's fair.

7 BY MS. TURNER:

8 Q Does it matter to you one way or the other whether a
9 Trustee, I mean whether a debtor is honest with you or not?

10 A Yes. As the Trustee, we're the guardian of the
11 bankruptcy process. And if I sense that a debtor has committed
12 bankruptcy fraud, tax fraud, bank fraud or any fraud like
13 that, I have a duty and obligation to report that to the U.S.
14 Trustee through or to the Department of Justice through the
15 United States Trustee's office. And I have done that in this
16 case. I have forwarded my recommendation for review by the
17 Department of Justice for bankruptcy fraud and tax fraud on
18 Mr. Morabito.

19 Q Now back to the documents.

20 MS. TURNER: Your Honor, I have discussed with
21 Mr. Gilmore our intention to offer the remaining documents
22 that haven't come in through other sources or that were
23 conditional to come in through Mr. Leonard, and Mr. Gilmore
24 has the same objection that he has previously indicated, so we

1 talked about these in categorizes so that we don't waste time.
2 I will offer the categories, then we can get to the individual
3 Bates numbers. That is to save time, do we agree?

4 MR. GILMORE: Agree generally, yes.

5 BY MS. TURNER:

6 Q If we go to Exhibit 37. If you look at the bottom of
7 Exhibit 37, just the Bates number, do you see where it says
8 341?

9 A Yes, ma'am.

10 Q Does that give an indication to you where this
11 document came from?

12 A This was produced for the 341 meeting of creditors.

13 MS. TURNER: Your Honor, I believe that is the only
14 one that we are seeking to admit that didn't come through
15 other sources and was not conditional that came in through the
16 341 exam, and I move for admission of Exhibit 37.

17 THE COURT: Mr. Gilmore.

18 MR GILMORE: My response would be that for the same
19 basis upon which this document is moved for admission, I would
20 move for admission of Exhibits 233, 252, and 255. With all of
21 those documents being admitted on the same basis, I will not
22 object. In the sense they all are 341 stamped documents.

23 MS. TURNER: No objection.

24 THE COURT: Okay. Exhibits 37, 233, 252 and 255 are

1 admitted.

2 (Exhibits 37, 233, 252, and 255 admitted in evidence.)

3 BY MS. TURNER:

4 Q Okay. The second category, if we go to Exhibit 25,
5 I believe that is the first one in the record, this one was
6 previously admitted as conditional on Mr. Leonard. Do you see
7 the Bates number?

8 A Yes, I do.

9 Q Bottom LMWF Supp.?

10 A Yes.

11 Q Does LMWF Supp, have any -- Do you know how you came
12 to have those documents?

13 A These documents would have been provided to us
14 electronically and you Bate stamp them electronically. That
15 is where the number came from.

16 Q When you say they were produced electronically, in
17 the same manner that you previously described pursuant to
18 subpoena or court order?

19 A Yes, ma'am. Subpoena and court order provided
20 electronically either on a disk drive or something like that.

21 Q Do you know of any document that didn't -- that was
22 left off of the Bates numbering and production of electronic
23 information that came in? If the documents were produced to
24 you, they were all Bate stamped page by page electronically?

1 A I know of none that would not have been Bates
2 stamped.

3 Q Did the Trustee create any new documents that were
4 included with the Bates numbering of LMWF Supp.?

5 A No.

6 MS. TURNER: Move for the admission of documents
7 with the Bates number LMFW Supp. And I can give those specific
8 exhibit numbers.

9 THE COURT: Please.

10 MS. TURNER: 25, 29 and 30 were conditionally
11 admitted previously. 26, 28, 31, 33, 34, 70, 78, 79, 134,
12 135. I left off 68, 137.

13 THE COURT: What was 68. Was that conditionally?

14 MS. TURNER: No.

15 THE CLERK: I am sorry, you said 137?

16 MS. TURNER: 137, 68, 34 if I didn't state before,
17 sorry, 138, 139, 141, 143, 144, 159, 161 and 162. Before I
18 offer those --

19 THE COURT: I show 79 was one that was conditionally
20 admitted.

21 MS. TURNER: Yes, Your Honor. I left one part of my
22 inquiry out.

23 BY MS. TURNER:

24 Q In addition to the Lippes firm, did you also seek

1 documents from the Hodgson Russ firm?

2 A Yes, ma'am, I did.

3 Q If there is an HR lettering, Bates lettering, what
4 do you understand that to be?

5 A I understand HR Supp. Bates lettering is something,
6 it may not have Supp, on it, it was received electronically by
7 your firm due to a subpoena and order.

8 MS. TURNER: Your Honor, those numbers that I listed
9 were either HR or from the Lippes firm as described by the
10 Trustee. I move admission of those documents.

11 MR. GILMORE: Objection. It would be hearsay and
12 foundation.

13 MS. TURNER: I am ready to respond to that, Your
14 Honor. With respect to foundation, that is authentication.
15 NRS 52.015 provides the basis for authentication, which is
16 somewhere. Ah. 50.015, authentication. The requirement that
17 authentication as a condition precedent to admissibility is
18 satisfied by evidence or other showing sufficient to support a
19 finding that the matter in question is what its proponent
20 claims. We have that here when all documents were produced
21 pursuant to court order, subpoena or 341 request. Specific to
22 these, there was court order or subpoena, so there is indicia
23 of reliability by penalties if there is not compliance with
24 that obligation. There were no new documents added to the

1 production set, also supporting that reliability. And then
2 you have the issue of relevance or hearsay. I am sorry, you
3 said hearsay.

4 MR. GILMORE: Hearsay.

5 MS. TURNER: And hearsay we are under the exception
6 at 51.075, 51.135, 51.315 and 51.345. I will go through each
7 one of those. Also we filed a brief. There is the In Re
8 National Management Association and Bernie Madoff case we
9 outlined there. They describe exactly how a Trustee in this
10 very similar circumstance receives documents, and so long as
11 it isn't a Trustee picking up a piece paper up off the floor
12 or in a desk where he doesn't know where it initially came
13 from, who the source is, so long as there is indicia of
14 reliability on how the information was collected and how it is
15 being produced, that the Trustee is the appropriate and
16 qualified person to testify, similar to a custodian of
17 records, a person submitting an Affidavit from a bank. That
18 is why the Trustee is here. He has marshaled the documents of
19 the debtor and is presenting them in a way that makes it a
20 record of regularly conducted activity from a qualified
21 person.

22 We also have 51.075. A statement is not excluded by
23 the hearsay rule if the nature and the special circumstances
24 under which it was made offer assurance of accuracy not likely

1 to be enhanced by calling the declarant as a witness.
2 You have 51.135. That is: A statement will not be excluded by
3 the hearsay rule if the nature and special circumstances under
4 which it was made offer strong assurance of accuracy and the
5 declarant is unavailable. That is certainly the case here.
6 This is e-mails produced pursuant to a subpoena to a
7 non-resident. And these are attorney files. They are
8 certainly strong assurance of accuracy here.
9 And then we have 41.345 a statement against
10 interest. These communications and other documents are
11 certainly against the interests of Paul Morabito or his
12 counsel who are the declarants. For that reason, we offer
13 these documents.
14 THE COURT: The objection of authenticity and
15 hearsay are overruled. The documents will be admitted.
16 Exhibits 25, 29, 30 and 79 were were previous admitted are
17 now admitted. Exhibits 26, 28, 31, 33, 34, 68, 70, 78, 134,
18 135, 137, 138, 139, 141, 143, 144, 159, 161 and 162 are
19 admitted.
20 (Exhibits 26, 28, 31, 34, 68, 70, 78, 134, 135, 137,
21 138, 139, 141, 143, 144, 159, 161 and 162 admitted in
22 evidence.)
23 MS. TURNER: Thank you, Your Honor.
24 ///

1 BY MS. TURNER:

2 Q Now it is up to counsel to match the facts with the
3 law in closing argument. I am not asking for you to render
4 any opinion on whether you believe that there is a fraudulent
5 transfer here. But I do want to ask, have you seen facts when
6 you have reviewed the information in your role as Trustee,
7 that you believe raises red flags? Go ahead.

8 MR. GILMORE: Objection. Relevance.

9 MS. TURNER: It goes to the ultimate issue.

10 THE COURT: I am sorry?

11 MS. TURNER: It goes to the ultimate issue.

12 THE COURT: You think it goes to what? You are not
13 asking him to give specific instances. You're just asking if
14 he thinks there is an issue?

15 MS. TURNER: That is exactly right. I am asking if
16 he -- I'm not asking for him to tie the facts to the law. I
17 am asking for him to discuss the fact his observations of the
18 facts as they have been presented to him.

19 MR. GILMORE: Objection. Relevance. Even if it is
20 relevant, it is outweighed substantially by -- the prejudice
21 is outweighed by its probative value.

22 THE COURT: The Court is aware of the potential
23 issues with regard to prejudice, but the Court is capable of
24 setting aside any prejudicial effect of the testimony and make

1 a determination that is appropriate unlike perhaps a jury.
2 That objection is overruled. I will allow you to proceed.

3 THE WITNESS: In answer to your question, let me
4 preface that with, it is a fact that I have been Trustee,
5 appointed Trustee in over 37,000 cases, and having talked to
6 so many debtors over this 20 year span of time, I have a real
7 good indication or idea when someone is not telling the truth,
8 or I look at facts as I see them and they raise red flags. In
9 this particular case, I saw so many red flags that the case
10 file was brilliant red. I am not saying what I was looking
11 for. I am going to let the facts match up with the law to
12 determine what it is, but I smelled a rat.

13 BY MS. TURNER:

14 Q What are you asking the Court to do on behalf of the
15 Paul Morabito bankruptcy Estate?

16 A I would like to see the Court-- We have all these
17 transfers of equity interests. Some of them cannot be undone,
18 because you have additional buyers or third party
19 beneficiaries, all sorts of people here. But I would ask the
20 Court to look at the transfers that they see and the Court to
21 render a cash judgment in favor of the Estate for that which
22 cannot be undone, and those assets, the transfers that can be
23 undone and unraveled, to be unraveled and returned to the
24 Estate so we can take and liquidate these Estate assets and

1 get money to pay the creditors.

2 Q And has there been a bar date on creditors filing
3 their proofs of claim?

4 A I have not filed a claims bar date on this case yet,
5 because I am still reviewing documents.

6 THE COURT: I have a question. Have you received a
7 creditor's claim from Edward Bayuk or Sam or Salvatore
8 Morabito?

9 THE WITNESS: I can't -- I don't remember if I
10 received one from either of those individuals, Your Honor. I
11 would have to look at the docket. But I usually don't look at
12 the claims docket until such time as I put -- there will be
13 significant creditors filed, but I don't know if they have
14 filed one at all.

15 THE COURT: But you haven't set a bar date?

16 THE WITNESS: Yes, ma'am. Plenty of time to file
17 their claims if they choose to file them, but I don't think
18 they would like to.

19 THE COURT: Okay.

20 MS. TURNER: I will pass the witness.

21 THE COURT: Counsel.

22 MS. TURNER: Your Honor, if you would like the claim
23 docket we can provide that to you. It is certainly relevant.
24 I will represent to you that the last time the docket was

1 reviewed, there was no claim filed on behalf of the
2 defendants. I think Mr. Gilmore could clarify, but we can
3 provide that to you.

4 THE COURT: It is relevant with regard to the
5 request that you are making.

6 MS. TURNER: Yes.

7 MR. GILMORE: I am sorry. The claims register is
8 being offered into evidence in this case?

9 THE COURT: Well, the question of the Court was
10 whether or not any of your clients had filed a claim in the
11 Paul Morabito bankruptcy with the Trustee, and the Trustee
12 said he didn't believe so, but he didn't know. Counsel is
13 suggesting the best way, the best evidence to determine
14 whether or not that had been done would be the claims file.

15 MS. TURNER: Claims register.

16 THE COURT: Words I don't usually use.

17 MR. GILMORE: I recognize that. My position and my
18 clients' position would be that is not relevant, but if this
19 Court determines that it is, I don't want to play cat and
20 mouse with the Court. If the Court believes, against my
21 judgment, the claims register is relevant, then I will answer
22 the question and stipulate to the facts as I believe them to
23 be.

24 THE COURT: Well, the reason it becomes relevant is

1 because of the requested remedy. Depending on what the Court
2 does, it may be very relevant to the remedy that is requested.
3 So it may not be -- I haven't, obviously, reached a
4 conclusion, but it could be very relevant to the request made
5 by the Trustee.

6 MR. GILMORE: My understanding is neither Sam
7 Morabito nor Edward Bayuk have filed a proof of claim in the
8 bankruptcy.

9 THE COURT: And Superpumper?

10 MR. GILMORE: No, it has not.

11 THE COURT: Okay. Thank you.

12

13 CROSS-EXAMINATION

14 BY MR. GILMORE:

15 Q Mr. Leonard, there is not that many creditors.
16 There are only three that filed proofs of claim, right?

17 A I don't remember how many have filed proofs of claim
18 at this time.

19 Q Well, you admitted to me in the last answer you gave
20 there were going to be many creditors. That has never been
21 the case has it?

22 A I don't know how to answer that, counsel.

23 Q There is only three proofs of claim filed in the
24 claim register, right?

1 A I don't know how many are filed, but I have not
2 filed or given a claim bar date. Giving a claim bar date will
3 go out to everybody who had an interest in this case and tell
4 them they have to file their claim.

5 Q There was a single creditor vote that elected you
6 Trustee, true?

7 A There was a vote that elected me Trustee.

8 Q My question is more specific, that is: There was a
9 single vote cast in the election that appointed you as
10 Trustee, right?

11 A I was not there.

12 Q The Exhibit you just offered and admitted was 19.

13 THE COURT: I don't want to interrupt where you are
14 going, but it sounds like it is sort of interrupted a little
15 bit, so I am going to have to make a record of the exhibits
16 that we just admitted and you have objected to Mr. Gilmore.
17 Some of them had already been admitted. Exhibit 28, 134, and
18 137 were already admitted by stipulation. Exhibit 31 and 143
19 were admitted with no objection so we just want to make that
20 record. So the ones that were admitted in this offer are the
21 new ones.

22 MS. TURNER: Thank you, Your Honor I didn't have a
23 note it was by stipulation. Anything with those Bate numbers
24 I thought was conditional. Thank you for the clarification.

1 THE CLERK: Some of them were by stipulation, the
2 original stipulation.

3 MS. TURNER: Okay.

4 THE COURT: Okay. We have got that kind of cleared
5 up. Now you have got all the binders you want, Mr. Gilmore
6 you need?

7 MR. GILMORE: Yes.

8 THE COURT: Go ahead.

9 BY MR. GILMORE:

10 Q Mr. Leonard, you did know you were elected by the
11 sole vote of the Herbst parties, right?

12 A Ask that question again, please.

13 Q My question was very simple. You were elected by
14 the sole ballot cast by the Herbsts, right?

15 A No, I did not know that. I know there was an
16 election. I was informed after election that there was a vote
17 and I was elected as Trustee.

18 Q At the time of the vote, there was only the Herbsts
19 as creditors, right?

20 A I don't know.

21 Q Your testimony is as of you're sitting here today,
22 you don't know if the Herbsts were the sole creditors of the
23 bankruptcy Estate as of the date of the election; is that your
24 testimony?

1 A I don't know who the creditors were, how many
2 creditors there were, because I wasn't involved in the case.

3 Q I will note the document your counsel just admitted
4 against my objection says the the sole ballot, you would agree
5 with me that means one, right?

6 THE COURT: You are referring to Exhibit 19?

7 MR. GILMORE: Page 2 Exhibit 19, Yes, Your Honor.

8 BY MR GILMORE:

9 Q Right, Mr. Leonard, sole means one, correct?

10 A Sole would mean one.

11 Q Now again there was some inquiry which was admitted
12 against my objection related --

13 THE COURT: 19 you stipulated to the admission of.

14 MR. GILMORE: No, I didn't.

15 MS. TURNER: Yes he did, Your Honor.

16 MR. GILMORE: Back up. I objected to the line of
17 questioning once the line of questioning was admitted.

18 THE COURT: I don't know why, but you stipulated to
19 its admission.

20 MR. GILMORE: Fair point. Fair point. You're
21 right. You don't necessarily know why, I agree.

22 BY MS. GILMORE:

23 Q Now when the court allowed some inquiry into what
24 you had done before you decided to pursue these claims, your

1 testimony was that you did some investigation, right?

2 A That's correct.

3 Q But, really, all did you was talk to John Murtha,
4 right?

5 A I did my own investigation, and I also talked to
6 John Murtha.

7 Q What did your own investigation consist of?

8 A Reviewing the documents that were provided to me
9 through the 341 meeting of creditors. Review of the 341 tape
10 where Mr. Morabito was there answering questions.

11 Q Anything else?

12 A And conversation with Mr. Murtha.

13 Q Anything else?

14 A Not that I can think of right now.

15 MR. GILMORE: Your Honor, I would like to publish
16 the deposition of William Leonard, open and publish.

17 THE CLERK: Deposition of William Leonard dated
18 March 25, 2015 opened and published.

19 MR. GILMORE: May I approach the witness, Your
20 Honor?

21 THE COURT: You may. Do you have an extra copy or
22 is there a transcript of his deposition?

23 MR. GILMORE: I don't.

24 THE COURT: Go ahead. We just might have to run

1 around back and forth.

2 MR. GILMORE: Thank you. I hadn't anticipated
3 having to use it.

4 BY MR. GILMORE:

5 Q Mr. Leonard, let me read to you --

6 MR. GILMORE: I offer this deposition transcript to
7 impeach the testimony that was just given under oath.

8 THE COURT: So you can have him read the section you
9 want him to read and ask if it changes his testimony.

10 BY MR. GILMORE:

11 Q Start with page 60 line 23 with the question, "I
12 want to know everything." And finishing on line 23 of the
13 following page, 61.

14 A I read that. I think that is consistent with what I
15 said.

16 Q Okay. I am going to ask you some questions. I asked
17 you in the deposition: I want to know everything you did in
18 review and consideration of the strength of the claims that
19 were made against the defendants, meaning Mr. Bayuk and
20 Mr. Morabito, and the other defendants in the State court
21 action. And you said: "I would rely on my counsel there,
22 John Murtha?"

23 Q I asked you again: "So without getting into
24 specific contents of the communication, your mental

1 impressions were John Murtha relayed to you this was a case
2 you should pursue?" And your answer was: "Yes, right." Then
3 here the question I asked you in the deposition which was
4 nearly verbatim to the question I asked you just a moment ago:
5 "Did you do any independent examination on your own behalf
6 independent of what your counsel had done in order to reach
7 that conclusion?" And your answer was: "I would have spoken
8 with Mr. Murtha to find out why he came up with that
9 recommendation." That is not the same answer you gave in the
10 deposition you gave me on the stand, is it?

11 A Yes, it is.

12 Q Let's continue. I respect that answer, but it still
13 didn't quite answer my question which is: "Did you undertake
14 any individual efforts to determine whether or not the Estate
15 should pursue the claim against the defendants in the State
16 court action?" Your answer was: "My individual effort would
17 be to speak with Murtha, find out why he wanted to pursue it
18 and if he thought there was going to be recovery, and if there
19 was a recovery, how much." Then I asked you -- Then he gave
20 you his answer which I don't want to get into. Based on his
21 answer you said "yes." I said: "You took his word for it?"
22 And you said "yes."

23 So, sir, when I asked you in the deposition to give
24 the exact same explanation of what you had done to come to the

1 conclusion that these claims were worth pursuing, the only
2 thing you could tell me in your deposition was you spoke to
3 Mr. Murtha?

4 A That's correct.

5 Q Today we got a different answer from you.

6 A I believe I said I spoke with Mr. Murtha.

7 Q Today you said you spoke with your counsel. You
8 said you reviewed the documents. You said you had the 341
9 documents in your possession. You gave me a litany of reasons
10 that you didn't testify to in your deposition, right?

11 A Oh, I guess technically you would say I expanded on
12 it little more. The key thing was speaking with Mr. Murtha. I
13 had all those documents there.

14 Q Well, sir, you just gave inconsistent testimony
15 today under oath than you did then when you were under oath in
16 the deposition, right?

17 A I don't believe I did.

18 Q But at the same time, without doing any
19 investigation on your own accord, you concluded in your mind
20 that Mr. Morabito and Mr. Paul Morabito and my clients deserve
21 jail time, right? Do you remember that?

22 MS. TURNER: Objection. That misstates his prior
23 testimony.

24 THE COURT: I don't know. Is that from some other

1 part of this trial?

2 MR. GILMORE: No, it is from his prior testimony in
3 the deposition, but I have impeached him with his own
4 transcript. I want to ask if he agrees with that.

5 THE COURT: I didn't think he testified to that,
6 but--

7 MR. GILMORE: You don't know that but he did.

8 BY MR. GILMORE:

9 Q You remember in the deposition when I asked you if
10 you had any personal knowledge of the facts associated with
11 the case and your answer was no, you did not, right?

12 A No. That's correct.

13 Q I asked you: "Where did you get the information
14 that supported your belief as to the merit of these claims?"
15 You said: "From Mr. Murtha," and gave me no other source,
16 right?

17 A That's correct.

18 Q And then just a few minutes later I asked you what
19 remedy you were seeking. You said: "I want any remedy I can
20 have. If that means five years in prison, \$500,000 in fine or
21 both, I'll take it." Do you remember saying that?

22 A I do remember saying that.

23 Q So you had come to the conclusion that you wanted my
24 clients in jail before you knew a single fact about this case,

1 right?

2 A No, sir. That is the penalty for bankruptcy fraud
3 18 USC 152.

4 Q This was a yes or no question. I want to make sure
5 I get the answer. You had made a decision in your mind that
6 you wanted to see my clients in jail before you knew any facts
7 associated with this case, right?

8 A No.

9 Q Well, when I asked you in the deposition who the
10 parties were, you couldn't even tell me who the parties to
11 this lawsuit were, could you?

12 A I didn't know all the parties at that time.

13 Q You couldn't even tell me what the claims were,
14 could you?

15 A I couldn't. I don't think I knew all the claims at
16 that time.

17 Q You couldn't tell me a single claim in the
18 deposition, could you?

19 A I don't know if I did or not.

20 Q So you couldn't tell me any claim. You couldn't
21 tell me any of the parties. You didn't do any of your own
22 investigation, and you already wanted my clients in jail,
23 right?

24 A I don't think I wanted them in jail.

1 Q That is what you said. You said you wanted five
2 years in prison or \$500,000 or both. That is what you said on
3 the record, right?

4 A I think I was commenting on the penalties for a
5 violation or criminal violation 18 UFC 152.

6 Q I am going to read your deposition exactly what you
7 said: "I want any remedy I can. If that means five years in
8 prison or \$500,000 in fine or both, I will take it."

9 THE COURT: Is there a question?

10 BY MR. GILMORE:

11 Q That is what you said, right?

12 A I believe I did.

13 Q Okay. Now you had had a conversation with Jerry
14 Herbst prior to your deposition in 2015, right, 2016, right?

15 A I don't remember if I did or not.

16 Q You testified in your deposition that you did have a
17 conversation in person with Jerry Herbst and at least two of
18 his sons. Do I need to get the deposition transcript?

19 A If that is what the deposition said, I may have.
20 That was two and a half years.

21 Q When I asked you what you guys talked about, you
22 said "I can't remember," right?

23 A I can't remember.

24 Q And then when I asked you what was even the subject

1 topic area, you said, " I can't remember," right?

2 A I believe that was the line of questioning and my
3 answer.

4 Q Then I said: "Did you talk about anything that had
5 to do with anything to do with my clients?" And your answer
6 ways: " I can't remember," right?

7 A That's probably correct.

8 Q So let's talk about the claim you filed?

9 THE COURT: I am going to stop you there. Where in
10 the deposition did the witness say he met with Jerry Herbst
11 and two of his sons? Just point me to it, please.

12 MR. GILMORE: Yes, I will. It starts on page 38
13 line 13.

14 THE COURT: Thank you.

15 BY MR. GILMORE:

16 Q Mr. Leonard, in the deposition I asked you if Jerry
17 Herbst, Tim Herbst or Troy Herbst ever uttered the name Paul
18 Morabito during that meeting. Your response was: "I can't
19 recall," right?

20 A Probably.

21 Q I am on page 46 for the record. Then I said: "So
22 you don't recall anything that was said by any of the three
23 gentlemen whatsoever?" And you said: "No," right?

24 A That's correct.

1 Q Then I said: "Complete blank?"

2 A And you said: "Complete blank,"
3 right?

4 A That's correct.

5 Q I want to show you just a few portions of the
6 Complaint at issue in this case.

7 THE COURT: Counsel, I am just kind of watching the
8 time. It is a quarter to 4:00. I know I had said we would go
9 until 6:00 but we are going to be back here Monday and Tuesday
10 so I don't think we are going to be able to finish unless you
11 all think you will be able to finish with Mr. Leonard this
12 afternoon. I am thinking this might be a good time to take
13 the brake now and recess around 5:00 this afternoon instead of
14 going to till 6:00. Will that work out?

15 MR. GILMORE: I can represent to the Court I want to
16 cover three or four subsections of the Complaint and I am out.
17 I don't know, that might take ten minutes or fifteen minutes
18 at the most. So I don't know what kind of redirect there will
19 be.

20 MS. TURNER: And, Your Honor just for guidance, we
21 determined that reading in the deposition of Mr. Vacco and
22 Mr. Bernstein would probably be cumulative. So we are
23 withdrawing that, and we intend on finishing with Mr. Krausz'
24 reading and then resting with Mr. Gilmore's case to start

1 Monday.

2 THE COURT: I am sorry, who are you going to
3 withdraw?

4 MS. TURNER: Mr. Bernstein and Mr. Vacco.

5 THE COURT: And I also show a deposition of
6 Christian Lovelace.

7 MS. TURNER: We are withdrawing that as well. It
8 would just be cumulative, Your Honor.

9 THE COURT: Then we have about forty-five more
10 minutes of Mr. Krausz, is that what you think?

11 MS. PILATOWICZ: You are asking me to estimate? I
12 believe forty-five minutes we should get it done.

13 THE COURT: So we'll take a recess now and be back
14 on the record at 4:00 and go until 5:00 o'clock. And then you
15 can all decide what is going to happen on Monday. It looks
16 like we'll be able to get done, but I have another death case
17 that we have to deal with on Monday morning. But the clerk
18 and I have to talk. I am not sure. They're coming at 8:00 in
19 the morning. Rather than make you all come back Monday at
20 8:00, we are making them come at 8:00. I am not sure exactly
21 what time we can start with you. We are going to talk and let
22 you know. We are thinking in the morning, not just afternoon,
23 so we'll see. We'll talk about that on the break and see
24 everybody back at 4:00 o'clock.

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(Short recess taken.)

THE COURT: Counsel, you may continue your inquiry.

MR. GILMORE: Thank you.

BY MR. GILMORE:

Q Now, Mr. Leonard, you testified related to your possession and ownership of the records of the bankruptcy Estate, correct?

A That is correct.

Q So it is your position that, as the Trustee, you own the financial records of the debtor, correct?

A That's correct.

Q So his bank records, his -- excuse me -- his ownership interest in various business assets and things like that, true?

A That's correct.

Q So help me understand, help me understand your position when it comes to the records that you received from Hodgson Russ, who is the owner, in your understanding, who is the owner of the files that you -- strike that. Before the Trustee was appointed which took ownership of the Hodgson Russ files, according to your testimony, who was the owner of those files prior to the Trustee being appointed?

A I would say the law firm and the debtor, Mr. Morabito, would have access to them.

1 Q Well, my question wasn't with respect to access. It
2 was with respect to ownership. I want to make sure I
3 understand your testimony. Who owned them before you did?

4 A Mr. Morabito, I believe.

5 Q And so you're stepping into the shoes of
6 Mr. Morabito, right?

7 A That's correct.

8 Q Same question with respect to the Gurseyschneider
9 files. You served a subpoena equivalent of a subpoena in the
10 bankruptcy case on Gurseyschneider, right?

11 A That's correct.

12 Q And you received those files pursuant to your
13 attestation that you were the owner of those files, right?

14 A That is correct.

15 Q Prior to receiving the Gurseyschneider files, who
16 owned those files?

17 A Mr. Morabito.

18 Q And same questions with respect to Lippes Mathias,
19 prior to the Trustee being appointed, who was the owner of the
20 files you received from Lippes Mathias?

21 A I believe Mr. Morabito.

22 Q Do you happen to know the Gurseyschneider e-mail
23 retention policy?

24 A No.

1 Q Same question with respect to Hodgson Russ?
2 A No.
3 Q Same question with Lippes and Mathias?
4 A No.
5 Q Do you know what Gursey Schneider's business
6 function is?
7 A What their business function is?
8 Q Yes?
9 A No.
10 Q Other than Lippes Mathias being a law firm, do you
11 know what their business function is?
12 A No.
13 Q Do you have personal knowledge what services Gursey
14 Schneider performed for Superpumper, Inc.
15 A Not personal knowledge.
16 Q Do you have personal knowledge what business
17 function Gursey Schneider performed for Snowshoe Petroleum?
18 A No.
19 Q Do you have personal knowledge what services Gursey
20 Schneider performed for Paul Morabito?
21 A No.
22 Q If I asked you all those same questions with respect
23 Stan Bernstein or his office, would the answer all be no?
24 A Let's ask the questions so I am clear on them.

1 Q What is your -- Do you have any personal knowledge
2 of what services Stan Bernstein performed for Superpumper,
3 Inc?
4 A Not specifically.
5 Q Do you have any personal knowledge of what services
6 Stan Bernstein performed for Snowshoe Petroleum?
7 A Not specifically.
8 Q Do you have any personal knowledge of any service
9 Stan Bernstein provided for Paul Morabito?
10 A Not specifically.
11 Q Do you possess any personal knowledge as to how
12 Gursey Schneider maintains its records in the ordinary course
13 of business?
14 A No.
15 Q Same question, do you have any understanding how
16 Lippes Mathias maintains their records in the ordinary course
17 of business?
18 A No.
19 Q And do you have any understanding as to how Stan
20 Bernstein maintains his records in the ordinary course of
21 business?
22 A No.
23 MR. GILMORE: No further questions.
24 THE COURT: Anything further?

1 MS. TURNER: No, Your Honor.

2 THE COURT: Okay. Thank you, sir, you may step
3 down.

4 THE WITNESS: Thank you, Your Honor.

5 MS. TURNER: With that, Your Honor, Brian Irvine was
6 kind enough to bring us the claim register from across the
7 street, and I have provided a copy to Mr. Gilmore. We would
8 offer the claim register as a matter of judicial notice to
9 Your Honor.

10 THE COURT: Okay.

11 MR. GILMORE: My objection would be relevance.

12 THE COURT: Okay. We'll admit it at this time. The
13 clerk will give it a number.

14 THE CLERK: Oh, thank you. Appreciate it. Exhibit
15 303 marked.

16 MS. TURNER: I will just leave this, Frank.

17 THE COURT: 303 is admitted.

18 (Exhibit 303 admitted in evidence.)

19 THE COURT: Okay. So did you want to go back to the
20 deposition of Gary Krausz?

21 MS. TURNER: Yes, Your Honor.

22 THE COURT: Okay.

23 MS. TURNER: Thank you.

24 THE COURT: Mr. Loretz, you are still under oath.

1 Please take the stand.

2 MS. PILATOWICZ: Your Honor, I believe when we broke
3 yesterday we were at page 89 starting at line 19 of the Gary
4 Krausz deposition of March 16, 2016.

5 THE COURT: Okay. Great. Okay. Thank you.

6 And I am sorry, you believe you were on page 89?

7 MS. PILATOWICZ: Correct, Your Honor. I believe there
8 was some discussion over what the exhibits were that
9 correlated with the exhibits referenced in the deposition and
10 that is when we took the break for the day.

11 THE COURT: Okay. So we can begin with which line?

12 MS. PILATOWICZ: We are starting at page 89 line
13 18 -- line 19.

14

15 DIRECT EXAMINATION CONTINUED

16 BY MS. PILATOWICZ:

17 Q Line 19.

18 "Q Do you recognize Exhibit 18:"

19 MS. PILATOWICZ: Which, Your Honor, is Exhibit 43 in
20 the Court's exhibit binder. It has been admitted?

21 THE COURT: It has?

22 MS. PILATOWICZ: It has.

23 THE COURT: Okay. Thank you.

24 "A I do.

1 Q Were you copied on this e-mail?

2 A It appears that I was.

3 Q Do you recall receiving this e-mail?

4 A I don't remember, but it says that I did.

5 Q It references that all amounts, in number two, 'All
6 amounts that were due from Paul/PAMAZ were treated as a
7 distribution.'

8 Is this the 5.9 million distribution we we discussed
9 earlier?

10 A I don't recall, but it could very well be.

11 Q Do you know if there were any other distributions in
12 2010 to Paul or PAMAZ?

13 A I don't recall.

14 Q The e-mail was on March 24, 2011?

15 A Yes.

16 Q It appears that in number three, four and five
17 you're still looking, or Gursej Schneider is still looking for
18 information regarding the ability of the related parties to
19 repay the notes; is that correct?

20 A I don't think it was the ability to repay the notes.
21 I think we were still looking for information about the notes.

22 Q What were the personal financial statements used
23 for?

24 A The ability to repay the notes."

1 MS. PILATOWICZ: Moving to page 91, line 10.
2 BY MS. PILATOWICZ:
3 "Q Do you recognize Exhibit 19"--
4 MS. PILATOWICZ: Which Your Honor is Exhibit 297 in
5 the Court's exhibit binder. It has not yet been admitted, but
6 Plaintiff will stipulate to its admission.
7 THE COURT: Mr. Gilmore?
8 MR. GILMORE: Oh, yes. It is one of my exhibits. I
9 am sorry, Your Honor. No objection.
10 THE COURT: Okay, Exhibit 297 is admitted.
11 BY MS. PILATOWICZ:
12 "Q Do you recognize Exhibit 19?
13 A I do.
14 Q What is Exhibit 19?
15 A It is a memo about our consultations about
16 Superpumper.
17 Q Who is Len Weitz?
18 A Len Weitz, of blessed memory, was our peer review
19 partner.
20 Q What is a peer review partner?
21 A He was the person who inspects our audit files and
22 reports back to the Board of Accounting team that we do the
23 job or not.
24 Q What was the purpose of meeting with Mr. Weitz?

1 A Consulting with him?

2 Q Right.

3 A To get a second opinion on an accounting matter.

4 Q What was that accounting matter?

5 A Let me read the memo. The accounting memo or the
6 accounting matter was the appropriateness of issuing a scope
7 limitation on the collectability of the notes receivable.

8 Q Was it between March 24th and March 29th that you
9 decided not to audit the personal financial statements
10 regarding the ability to repay the notes receivable?

11 A Between March 24th and April 21st.

12 Q Number 20."

13 MS. PILATOWICZ: And, Your Honor, 20 has not been
14 offered as an exhibit in this case so there is no
15 corresponding exhibit number.

16 THE COURT: So why are we going to talk about it?

17 MR. GILMORE: I had it marked because of the
18 conversation. The answers he gave are not necessarily bearing
19 on Exhibit 20. I am happy to offer it if the Court believes
20 that needs to be done.

21 THE COURT: Well, I am a little uncomfortable
22 admitting testimony about an exhibit that isn't part of the
23 record.

24 MR. GILMORE: Okay.

1 THE COURT: So if you have that exhibit, I think it
2 would be more appropriate.

3 MR. GILMORE: I will produce it and ask it be marked
4 once we have identified it.

5 THE COURT: All right. Thank you. Go ahead and read
6 it with the caveat that it will be marked and identified at a
7 later time.

8 BY MS. PILATOWICZ:

9 Q Do you recognize Exhibit 20?

10 A I do.

11 Q Is this a correspondence between you and Cathy
12 Allen?

13 Q It is.

14 Q Who is Cathy Allen?

15 A Cathy Allen replaced Glen Weitz. Let me change the
16 answer to that. Len Weitz was our peer review partner. Cathy
17 Allen was our concurring review partner. Cathy Allen was a
18 CPA that did concurring review of the audit files.

19 Q And was this another e-mail discussing the limited
20 scope or the --

21 A Let me read it. Yes.

22 Q It says in the third paragraph -- well, let me ask
23 you, what do you interpret her to be saying in this?

24 A Her interpretation is it's good as long as you think

1 no user will be misinformed by the financial statements then
2 go ahead.

3 Q Okay. It says: 'If you keep the scope limitation as
4 written, should you state that the issue is 'valuation' and
5 also 'collectability?' Do you know what she meant by that?

6 A Yes.

7 Q What did she mean?

8 A There's different assertions. Assertion number one
9 is does it exist; is there a note. So the scope limitation
10 really only addressed the valuation issue of the note and not
11 the existence of a note. She didn't use those words, but
12 we're still issuing an opinion on the existence of the note.
13 The only thing we're disclaiming on is the valuation.

14 Q Your opinion was that they existed?

15 A And the opinion was that they existed, correct.

16 Q Turning to page 97, you have been handed what has
17 been marked as Exhibit 21."

18 MS. PILATOWICZ: Which, Your Honor, is Exhibit 224
19 in the Court's exhibit binders.

20 THE COURT: We are really talking about Exhibit 22
21 to the deposition?

22 MS. PILATOWICZ: Correct. I made the same mistake I
23 made during the deposition.

24 I believe it has been admitted.

1 THE CLERK: Yes, it has been admitted.

2 THE COURT: You may proceed.

3 BY MS. PILATOWICZ:

4 "Q Is this an e-mail that was forwarded to you?

5 A I was included on the cc., yes.

6 Q Do you recall receiving the e-mail?

7 A I don't recall receiving it, but --

8 Q You expect you would have received it?

9 A I expect I would have received it.

10 Q Do you know what the e-mail is?

11 A Yes. This was an e-mail to document the resolution

12 of all our questions about the loans.

13 Q Okay. And the item number one says: 'There is a

14 note receivable from '-- Well, let me back up. Who is this

15 e-mail from?

16 A The original e-mail was from Stan Bernstein.

17 Q And Stan Bernstein was the accountant you worked

18 with?

19 A Stan Bernstein is the accountant for Superpumper who

20 prepared the tax return for Superpumper.

21 Q And he provided you information on various items you

22 requested during the audit?

23 A Correct.

24 Q And he says in his e-mail number one: 'There is a

1 note receivable from Paul Morabito in the amount of \$1,611,139
2 that was removed from the books and should remain. You should
3 receive a copy of this note.' Do you know what that is?

4 A A lot of these issues there was a big disconnect
5 between what was in the books and what was in the eyes of
6 management about what the notes were, and so this was
7 correcting an adjustment that was in the books, correcting an
8 adjustment of the books of Superpumper to put a note back on
9 the books that was taken off.

10 Q Is this note reflected in the 2010 audit?

11 A I believe, yes.

12 Q Where is it?

13 A I believe it's the sum of the first note for
14 \$939,000 and the fourth note which is \$672,000. Yes, it's the
15 sum of the first and fourth notes.

16 Q And the second item, it says: 'The amount from Big
17 Wheel Hospitality of \$689,107 is a viable receivable to the
18 books of Superpumper, Inc., and should remain on the books.'
19 Do you see that?

20 A Yes.

21 Q So does that lead you to believe that the note was
22 collectible?

23 A It led us to believe that it was a note.

24 Q So by viable, it means it is an actual note?

1 A Correct.

2 Q And number three says: "Edward Bayuk's notes
3 receivable should be increased from \$2,215,500 to \$2,580,550
4 with the increase in the note as additional paid in capital.'
5 Do you know what that means?

6 A That means that the note that was drafted was
7 \$2,580,000 not \$2,215,000.

8 MS. PILATOWICZ: Moving to page 100 line 14.

9 BY MS. PILATOWICZ:

10 "Q Do you know how these amounts were arrived at?

11 A I don't know how the specific amounts were arrived
12 at. I do know that with the merger there were receivables on
13 Superpumper's books from CWC. When you put the two companies
14 together, the note goes away and it created a note. These
15 were the notes that put back the receivable onto the books of
16 Superpumper.

17 Q So, explain to me how it became a, if I'm
18 understanding you correctly, it essentially went from a
19 receivable from CWC to a receivable from Ed Bayuk and Sam
20 Morabito?

21 A Correct.

22 Q How did that work?

23 A Well, how did it work? Money was lent from
24 Superpumper to CWC in the 2009 financial statements reflecting

1 a note receivable from shareholder; I take that as CWC's money
2 was spent in 2009, so the money went out of Superpumper in
3 2009. The merger occurred. When you put the merger together,
4 this note goes away. And so these notes plus or minus a few
5 dollars replaced the note that was due from CWC, meaning it
6 put money back into -- it put an asset back onto the balance
7 sheet of Superpumper that went away with the merger.

8 Q Why did it switch from CWC to Ed Bayuk and Sam
9 Morabito?

10 A Our understanding, they were ultimate owners of CWC
11 after reorganization.

12 Q So, it is fair to say the note reflected in numbers
13 three and four, the notes receivable from Edward Bayuk and Sam
14 Morabito were somewhat of a continuation of liability from
15 CWC?

16 MR. GILMORE: No objection.

17 THE WITNESS: 'Yes.'

18 MR. GILMORE: It's me.

19 MR. GILMORE: Continuing on page 106 line 15. Are
20 you with me?

21 THE READER: Yes.

22 CROSS-EXAMINATION

23 BY MR. GILMORE:

24 "Q Okay. Now is there a relation, in your professional

1 opinion, between equity of a company and its market value,
2 meaning a street value a willing buyer would pay if there was
3 a willing seller?

4 A In my opinion, there is not, because there is a
5 myriad of examples of companies with no equity that are valued
6 in the bizillions-- I don't know if that's a real word-- that
7 are valued in nonlinear ways to the value of their equity.

8 Q Give me an example?

9 A Snapchat.

10 Q Okay. And in Snapchat, there would be a disparity
11 between the equity of the company --

12 A Yes.

13 Q -- in terms of the capital that's contributed or
14 retained by the company, correct?

15 A Yes.

16 Q And the value you could get on Wall Street if you
17 were to sell shares assuming it were a public company,
18 correct?

19 A Correct.

20 Q Okay. What creates that disparity?

21 A Perception of the willing buyer and the willing
22 seller."

23 MR. GILMORE: Continue please to page 18 line four.

24 BY MR. GILMORE:

1 "Q Would you draw the conclusion that, although there's
2 a multi-million dollar Wall Street valuation that is not
3 necessarily consistent with the equity on the balance sheet,
4 that there is a disconnect?

5 A Yes, I would draw the conclusion that there's a
6 disconnect."

7 MR. GILMORE: Line 15.

8 BY MR. GILMORE:

9 "Q Okay. Do you today or have you ever attempted to
10 determine the market valuation of Superpumper, Inc.?

11 A No.

12 Q If I say market valuation, what do you understand me
13 to mean by that?

14 A The value at which the company will change hands
15 between a willing buyer and willing seller in the ordinary
16 course of business."

17 MR. GILMORE: Page 109 line 13.

18 BY MR. GILMORE:

19 "Q Have you ever efforted to determine the value,
20 market value of the Superpumper, Inc., entity?

21 A No.

22 Q And that's true with respect to either the asset
23 valuation, correct?

24 A Correct.

1 Q That's also true with respect to the stock
2 valuation, correct?

3 A Correct.

4 Q Okay. So in any of the documents that you've
5 provided here which have been marked as an exhibit, are there
6 any documents in here which you believe are directly speaking
7 to the asset valuation of Superpumper, Inc.?

8 A No.

9 Q Okay. Not the balance sheet?

10 A Nope.

11 Q Now why wouldn't the balance sheet be reflective of
12 the market value? Give me -- hold on -- give me accounting
13 101 on that?

14 A I teach accounting 101. I teach accounting. The
15 reason is that there is the principle of historical cost
16 accounting, and the balance sheets of most companies are
17 presented under historical costs. Historical costs are the
18 costs at which a company has acquired an asset or assumed a
19 liability. Historical cost is a known dollar denominated value
20 at which a transaction took place. It doesn't necessarily
21 represent changes in value over time. Historical costs is very
22 static. And so the balance sheet of Superpumper albeit
23 there's a lot of assets and liabilities that change --
24 accounts payable; inventory, accounts receivable -- for the

1 most part they're static to the extent they're fixed at the
2 amount at which they were settled or sold when they were
3 acquired.

4 Q And that's true irrespective of what's happening in
5 the real world with respect to real property valuation,
6 equipment valuation, appraisal or depreciation?

7 A Right.

8 Q And I don't mean appraisal or depreciation in the
9 accounting sense. That doesn't make sense. I mean in the
10 market value sense?

11 A Right. Certain businesses present their balance
12 sheet differently, but those aren't Superpumper.

13 Q Okay. So if we were to open up the 2009 financial
14 Statements -- do you have that in Exhibit 3?"

15 We previously noted Exhibit 3 is 104.

16 THE COURT: Thank you.

17 BY MR. GILMORE:

18 " Q: And you were to take a look at the auditor's report
19 that references the audited financial statements, is there
20 anything in this letter drafted by Gursev Schneider that
21 discusses a market valuation related to this audit review?

22 A No.

23 Q I said audit review. That's a bad term?

24 A Yes.

1 Q I know because I have learned. With respect to this
2 audit report?

3 A There is nothing with respect to valuation in that
4 audit report.

5 Q Was Gurseey Schneider ever asked by any person at any
6 point in time, to your knowledge, to prepare a market
7 valuation of the assets of Superpumper?

8 A No."

9 MR. GILMORE: 113 line 11.

10 BY MR. GILMORE:

11 "Q Was the 2010 audit more complicated in your
12 professional opinion?

13 A The 2009 audit with respect to the amount of work
14 that Gurseey Schneider had to perform, yes.

15 Q And why would you say that?

16 A Because you had a significant transaction in 2010?

17 Q Tell me about the significant transaction?

18 A You had the merger of Superpumper with CWC, the
19 dissolution of CWC which we weren't involved with, but we had
20 to clean up the accounting that came as a result of that
21 transaction. Then we had to go through additional means to
22 obtain records and documents and the files that necessitated
23 us working with Dave Darata's firm. It necessitated us
24 working closer with management and necessitated doing more

1 work for the firm.

2 Q Okay. And it's true in your business that more work
3 on your end translates as more cost on the client's end,
4 correct?

5 A We hope.

6 Q It is the same in any business, would you agree?

7 A Yes.

8 Q I would note for the record you're being somewhat
9 sarcastic, but the answer is yes, right?

10 A Yes.

11 Q The more work you have to do to complete the audit
12 the more expensive it is going to be?

13 A Yes.

14 Q Okay. So is it then, based on what we've just
15 concluded, that because the 2010 audit was more complicated
16 and required more work to the Gurse y firm, it was likely to be
17 more expensive, if not significantly more expensive, to your
18 clients than was the 2009?

19 A Yes.

20 Q Thank you. Now let's go back to your testimony
21 about the contractual obligation that required Superpumper to
22 obtain an audit of their financial statements from Gurse y.
23 What's your recollection as to the nature of the contractual
24 obligations?

1 A There was one -- there was one of two requirements,
2 and I do not remember which of the two, but if you want I can
3 tell you both of them.

4 Q Give me your best recollection?

5 A My best recollection is I think it was Compass Bank,
6 their lender, had a covenant, a loan covenant that required
7 the GAAP financial statements. Two, their leasing company was
8 called Spirit. Spirit held the master lease for six or eight
9 of the properties. I don't remember the number. And the
10 lessor required audited financial statements, and so the
11 circumstances was either to comply with the bank covenant or
12 comply with the landlord's covenant.

13 Q Or possibly both?

14 A Or possibly both.

15 Q Okay. Now do you know if those covenants, the loan
16 covenant and lease covenant required actual audited financial
17 statements or would some lesser formal review be allowed?

18 A I don't remember. I can look it up."

19 MR. GILMORE: Page 116, line 12.

20 BY MR. GILMORE:

21 "Q Have you been made aware since Gursej Schneider
22 prepared the 2010 audit report, Superpumper's lenders and/or
23 lessor no longer required audited financial statements, but
24 that they would accept a review?

1 A Yes.

2 Q And how were you made aware of that?

3 A Two ways. Mr. Stan Bernstein. Our understanding
4 was he took over the client because the lender no longer
5 required an audit. That was something he was comfortable
6 doing. And we also -- we issued a review report. I don't
7 remember if it was 2009 or 2010. We had a year with two
8 reports issued.

9 Q In one of these years 2009 or 2010, there was a
10 dual?

11 A Yes.

12 Q There was an audit report prepared and submitted?

13 A Yes, and a subsequent review report.

14 Q Okay. Thank you. And am I correct in my conclusion
15 an audited financial statement carries with it more --

16 A Panache?

17 Q Yes, I was going to say oomph than does a review
18 statement?

19 A The user knows the difference.

20 Q There you go. And in this case, the user is not
21 Superpumper. The user is whoever holds the contractual
22 covenant to require the client to obtain the audit, right?

23 A Yes.

24 Q Okay. Would you agree with me it's not necessarily

1 the client's call as to whether an audit is required or a
2 review is required? Often times it's the lender or lessor,
3 correct?

4 A Correct.

5 Q Okay. Have you had any communication with
6 Superpumper's lender?

7 A We spoke with the lenders.

8 Q When would you have done that?

9 A It is documented in our work papers.

10 Q You would have done that as part of your typical
11 practice and procedure in preparing an audit report?

12 A Yes.

13 Q Okay. And would you also have spoken with
14 Superpumper's lessor, Spirit?

15 A Did we or would we?

16 Q Well, I guess the first question is do you have a
17 specific recollection of ever communicating directly with
18 Spirit?

19 A No.

20 Q Okay. Do you believe somebody at Gursey would have
21 communicated directly with Spirit in order to complete either
22 of these two audits?

23 A Let me -- let me walk back my answer a little bit.
24 As part of our audit procedures, we would have sent a letter

1 of confirmation to determine the terms of the lease agreement.

2 MR. GILMORE: Page 119 line 12.

3 ///

4 ///

5 ///

6 BY MR. GILMORE:

7 "Q You understand that Spirit requires Superpumper to
8 maintain certain ratios. Do you understand that?

9 A Yes.

10 Q Okay. So for example, give me an example of some of
11 the ratios that you understand Superpumper is contractually
12 obligated to maintain for purposes of conformity with their
13 lease covenant?

14 A I don't remember the specific ratios. I can look
15 them up. Generally, they're liquidity and net worth ratios
16 meaning how much income the company earns and how much
17 liquidity and net assets the company has. I don't remember
18 the specific ones for this lease.

19 Q Let's take the net asset ratio. Would you have been
20 aware in 2009 or 2010 what the specific net ratios were
21 required by the master lease?

22 A Yes.

23 Q Do you recall, as you sit here today, what it was?

24 A I believe there was a threshold of having a minimum

1 net equity of, it was four million, five million. It was like
2 a single digit million number.

3 Q Okay. And --

4 A It's actually in Exhibit 3 or it's disclosed in the
5 financial statement.

6 Q Right. Let's look at it.

7 A I don't remember the number though, but it's there.

8 Q Can you pull up one of the audits and point me in
9 the direction of where that ratio is?

10 A Exhibit 9 page 343.

11 MR. GILMORE: We previously identified 9 as Exhibit
12 120.

13 BY MR. GILMORE:

14 "Q Okay. Tell me what we're looking at here?

15 A Exhibit 9 page 343 has the footnote that discusses
16 the leases for the company, required disclosures under GAAP.
17 This is to disclose how much rent -- describe in general the
18 terms of your leases which is the first paragraph. Total rent
19 expense for the period, which is also required disclosure.
20 Then you have required disclosure of the future minimum rental
21 payments that are noncancelable which is what the table
22 represents. And then the last paragraph on page 343 is
23 discussion about the covenants when you have a -- well at
24 least with covenants, you're supposed to disclose the terms if

1 they're significant to the financial statements.

2 Q Who in your office would have been responsible for
3 drafting this paragraph on Note 5, these paragraphs?

4 A Me, Darren Takemoto. In addition to working with
5 the client.

6 Q In order to prepare Note 5, would you agree with me
7 somebody at Gurse y had to have been very familiar with the
8 loan covenant with respect to the Superpumper leasehold
9 obligation?

10 A Yes.

11 Q Okay. Because in order for you to indicate on Note
12 5, you know, the future minimum lease payments under
13 noncancelable operating leases, in order for you to make those
14 conclusions, you would had to have had some familiarity with
15 the master lease of Spirit, right?

16 A Yes.

17 Q Okay. And do you see at the last paragraph on page
18 11 of the 2010 audit Superpumper 343, you'll see that it says,
19 'If one of the lease agreements covering six of the eleven
20 store site rentals contains affirmative and negative covenants
21 including (a) maintenance of certain financial ratios.' Those
22 are some of the ratios you were discussing earlier, correct?

23 A Uh-huh.

24 Q Yes?

1 A Yes.

2 Q And (b), maintenance of a minimum of 6 million of
3 book value of stockholders' equity, and, (c), provision for
4 changes to control of company or guarantors.'

5 Let's focused on (b), maintenance of a minimum 6
6 million of book value of stockholder's equity. Is that what
7 you were referring to as the set number?

8 A Yes."

9 MR. GILMORE: Page 125 line 19.

10 BY Mr. GILMORE:

11 "Q Okay. Do you know, based on your conclusion
12 contained in the 2009 and 2010 audit reports, whether
13 Superpumper, Inc., was in compliance with the covenants that
14 were required by the leases as set forth in Note 5?

15 A The financial statements disclosed our knowledge of
16 compliance.

17 Q Okay. As you sit here today, are you aware of any
18 issues of noncompliance through the 2009 and 2010 calendar
19 years?

20 A We didn't extend our work beyond the date that we
21 issued our report, so I'm not aware of anything that's not
22 written in the report.

23 Q That's what I mean. Certainly, if Gurse were aware
24 that Superpumper was not in compliance with its lease

1 obligation, it would be identified somehow somewhere in one of
2 these two reports, correct?

3 A Correct.

4 Q Obviously, I understand the qualification with
5 respect to the time frame. I am only talking about the time
6 frame that's --

7 A Yes.

8 Q -- referenced in these audit reports, correct?

9 A Yes."

10 MR. GILMORE: Paragraph 127 line 10. I have just
11 asked the witness to review Exhibit 3 which has previously
12 been identified.

13 THE COURT: Okay.

14 BY MR. GILMORE:

15 "Q And one of the reasons why Gurseay Schneider
16 undertakes an effort to determine the viability due from
17 affiliates is to ensure that the ultimate enduser of this
18 audit report is not going to be misled by that information,
19 correct?

20 A Correct.

21 Q Okay. So, in what way do you understand the enduser
22 of this particular audit report would have been impacted,
23 misled or some similar term by whatever was located in the
24 'Due from affiliate' line item of the balance sheet?

1 A So the bottom line says, 'see accompanying notes to
2 financial statements.' And so that general footer goes on
3 every page of the financial statements to refer the reader to
4 the notes. The note discusses what that number is. Without
5 the note, the user would be tremendously misled. Without the
6 note, the user we would tremendously misled without the
7 information, and that's why the note is integral to
8 understanding the note.

9 Q I understand that.

10 A Yeah.

11 Q Do you believe that either of the endusers of this
12 2009 report had any concern about what the 'due from
13 affiliates' line item was on the company's balance sheet?"

14 MS. PILATOWICZ: No objection.

15 "THE WITNESS: I'm pretty -- I'm going to take an
16 educated guess that the users knew more about the company.
17 I'm going to take an educated guess that the users did their
18 own due diligence about the company?"

19 BY MR. GILMORE:

20 "Q Okay. And I think that your educated might be borne
21 out by the facts, and here's the question. In 2010 we have a
22 qualified audit report, right?

23 A Correct.

24 Q In 2009 it is unqualified, correct?

1 A Correct.

2 Q In 2010 the audit explains the scope of examination
3 that does not include an opinion as to -- I think the word you
4 said was viability of the 'Due from affiliates' that's located
5 on the company balance sheet, correct?

6 A Valuation.

7 Q Thank you. Now at some point in time you or someone
8 else at Gurseley must have understood that the enduser of the
9 2010 audited financial statements did not require an
10 unqualified opinion with respect to the due from affiliates,
11 correct?

12 A The enduser didn't require an unqualified opinion
13 yes.

14 Q Okay. And how do you know that?

15 A They accepted it and management signed the rep
16 letter.

17 Q At some point prior to April 21, 2011, Gurseley
18 Schneider was sufficiently satisfied that the enduser of the
19 Superpumper 2010 audit was okay with receiving the
20 qualification with respect to the due from affiliates, right?

21 A I'm going to qualify that by saying we never know
22 who the ultimate endusers are.

23 Q Okay?

24 A The endusers that we were aware of, couple that with

1 the disclosures in the report, made it so that we were
2 satisfied that the enduser wouldn't be misled by the financial
3 statements.

4 MR. GILMORE: Page 130 line 6.

5 ///

6 BY MR. GILMORE:

7 "Q The lender and the landlord were okay with getting a
8 qualified opinion in 2010, right? "

9 MS. PILATOWICZ: No objection.

10 "THE WITNESS: Let me rephrase that a little. Let me
11 rephrase that a little bit. If they weren't okay with getting
12 it, we would not have finished the audit. Because the whole
13 purpose of the audit was to provide them with financial
14 statements."

15 BY MR. GILMORE:

16 "Q And there's no question in your mind that, from the
17 client's perspective, the reason for the completion of this
18 audit report was to give to the bank and the landlord, right?

19 A The client accepted the financial statements as
20 being suitable for their purposes of whoever needed the
21 financial statements.

22 Q Okay. I respect that answer. My question, however,
23 was a little bit different?

24 A Okay.

1 Q And so I've reviewed the Gurseley production in this
2 case?

3 A Right.

4 Q And you would agree with me would you know that
5 there was no doubt in anyone's mind at Gurseley Schneider that
6 the reason Superpumper needed this audit report was to satisfy
7 the lender and to satisfy the landlord, right?

8 A Those were the only users we were aware of.

9 Q Okay. As you said before, you can't imagine a reason
10 why a client would pay the kind of money it's paying to get an
11 audit unless it's required to do so by somebody or has a
12 contractual requirement hanging over their head, correct?

13 A Correct.

14 Q And so it's reasonable to assume -- maybe not even
15 assume; maybe even definitively-- that Spirit, the landlord,
16 was okay with the qualification of the opinion in 2010, right?

17 A It is reasonable to conclude that they were okay
18 with the qualified opinion in 2010.

19 Q Okay. And, notwithstanding the qualifier, the client
20 certainly knew that Spirit would have accepted the report with
21 the qualification, right?

22 A Yes.

23 Q Okay. So in that sense, with respect to your
24 statement about, 'We want to make sure that the due from

1 affiliates is properly valued, because we don't want to
2 mislead the enduser.' That's what you said essentially,
3 correct? In 2010 we don't really have the same concern, do
4 we, because we know that Spirit and BBVA are going to accept a
5 qualified opinion that doesn't have to make any specific
6 warranties or representations or findings with respect to the
7 'Due from affiliates' column, correct?

8 A Speculating, but yes.

9 Q Okay. You're speculating in what sense?

10 A That they would not have completed this assignment
11 if we knew there was going to be an issue with the user
12 accepting the findings in the report.

13 Q Okay. But that's a fair conclusion based on what
14 you knew at the time and what you know today, right?

15 A Yes.

16 Q In 2009 when you attempt to determine the valuation
17 of the due from affiliates notes, what does GAAP require in
18 terms of the level of confidence that Gursesey has that the
19 notes are valued accurately in the balance sheet?

20 A The auditing standards require you to obtain
21 sufficient competent evidence that the value at which it's
22 carried out doesn't exceed the value at which the note will be
23 recovered. So if you think you're going to collect fifty
24 cents on the dollar, then you would not have satisfied your

1 requirements under the auditing standards.

2 Q Understood. So is it fair to say in a different
3 way, that the auditing standards require the auditors to
4 ensure that the obligor at least has the ability to repay its
5 debts?

6 A Correct.

7 Q Okay. Now do the auditing standards require the
8 auditors to determine whether or not the borrowers intend to
9 repay?

10 A Yes.

11 Q Okay. In what ways?

12 A Well, you have to have evidence that the note is
13 valid.

14 Q All right. And intent to repay is a requirement
15 under the auditing standards to ensure it is a valid note?

16 A Yes.

17 Q Okay. Do the auditing standards require the auditors
18 to determine how the debt was incurred?

19 A Yes.

20 Q In what ways?

21 A Under the accounting standards, there is literature
22 written about understanding what is debt and what is equity,
23 and there's literature on how to evaluate whether money that's
24 been put into a company meets the qualifications of being debt

1 or meets the qualifications of equity. In a nutshell, if it's
2 a short-term borrowing relationship where there's money in and
3 money out, the GAAP literature will tell you that that's more
4 an indication of being temporary, in which case it would fall
5 under the classification of a liability. And if it's
6 permanent in nature, then it generally falls in the
7 requirement of what is equity."

8 MR. GILMORE: Turn the page to page 142 line 17
9 referring to Exhibit 9 which has previously been identified.

10 BY MR. GILMORE:

11 "Q In the 2010 audit, take a look at page 13 which is
12 Bate stamp 345, you will see Note 9, 'Related Party
13 Transactions.'

14 A Okay.

15 Q You'll recall that in early 2011 the Paul Morabito
16 note -- I should say the Paul Morabito note receivable of
17 \$672,000 had not been sufficiently proven up to your
18 satisfaction in early 2011; isn't that right?

19 A That's what was in the e-mail.

20 Q You remember that, right?

21 A That's what was in the e-mail.

22 Q Right. So something to the effect that, 'Hey, we
23 still don't know what forms the basis of this \$672,000
24 obligation, and we need evidence to support it in order for us

1 to be able to do our job,' correct?

2 A Correct.

3 Q And you were asking for that, notwithstanding the
4 fact that you understood that this was going to be a qualified
5 opinion with respect to Note 9, correct?

6 A Correct.

7 Q Okay. So even though you understood it was to be a
8 qualified opinion, why would you have continued to pursue
9 information related to the Note 9 Related Party Transaction?

10 A I'll answer the question, we didn't want to mislead
11 the users of the financial statements.

12 Q And so do you recall a conversation with Dennis
13 Vacco where Dennis Vacco essentially said something to the
14 effect, 'We'll get you a Promissory Note reflecting the
15 \$672,000 so that you can have evidence sufficient to do the
16 work that you need to do'?

17 A I believe there's an e-mail that documents what
18 Dennis said.

19 Q Okay. Did you go beyond that to obtain further
20 evidence as to what the purpose for the \$672,000 note was?

21 A The purpose, no.

22 Q Okay. So you were satisfied and you were able to do
23 your job without knowing for example when Paul Morabito might
24 have taken money out of the company --

1 A Well?

2 Q -- which was reflected by this obligation?

3 A We know when Paul Morabito took money out of the
4 company.

5 Q Okay.

6 A It's in the general ledger.

7 Q Okay. Is there something in the audit that reflects
8 what you knew and when you knew it about the \$672,000
9 obligation being incurred?

10 A There's nothing in here, no.

11 Q Okay. And are you suggesting there was something in
12 your file from which you were able to conclude that you did
13 know how the \$672,000 obligation was incurred?

14 A We would have received and looked through the
15 general ledger. The general ledger is a chronological listing
16 of all the transactions of the company to show how the money
17 was taken out and when the money was taken out.

18 Q Okay. And for the 2010 audit report you would have
19 had to have access to the CWC general ledger in order to do
20 that, correct?

21 A We either had the CWC general ledger or Dave
22 Darata's firm provided us the information we needed.

23 Q Okay. And the information Dave Darata would have
24 given you would have told you how the \$672,000 obligation was

1 incurred?

2 A I don't recall.

3 Q Is there anyway that you can think that the \$672,000
4 obligation could have been incurred in ways other than Paul
5 Morabito taking cash out of the company?

6 A No.

7 Q You can't think of any?

8 A No. The company is assuming obligations on his
9 behalf.

10 Q Okay. Like what?

11 A Paying expenses on-- expenditures on his behalf. In
12 some way there must have been money taken out of the company
13 whether it was directly to him or paid on behalf of him to
14 somebody else.

15 Q What if it were obligations of Paul's toward an
16 entity which had been merged with Superpumper?

17 A Well, if that was the case, then that note should
18 have disappeared.

19 Q Okay. Tell me why?

20 A Because, if the entity to which -- for every
21 receivable there's an equal and offsetting payable. And if
22 there's an entity that merged into Superpumper, then you would
23 have been merging the payable and receivable together which is
24 exactly what happened when CWC merged into Superpumper. The

1 notes between CWC and Superpumper go away.

2 Q Now that assumes, of course, that CWC had maintained
3 the books, its books in a way that appropriately made debits
4 and credits, right

5 A Yes.

6 Q Okay. And do you know --

7 A You're telling me there's no God. First debits and
8 credits have to match for harmony in the universe.

9 Q And isn't it true that one of the reasons that Note
10 9 is a qualified opinion is because there simply wasn't enough
11 information to satisfy Gurseay with respect to the CWC books
12 that these notes properly reflected debits and credits as you
13 just discussed?

14 MS. PILATOWICZ: No objection.

15 "THE WITNESS: No, that's not true."

16 BY MR. GILMORE:

17 "Q Okay. Tell me why that's not true?

18 A It's not true. We have every-- we're satisfied with
19 our evidence that these notes are notes. That qualified
20 opinion dealt with one issue only and that was valuation.

21 Q Okay. What do you mean by that?

22 A Valuation means the ability -- meaning the ability
23 of the borrower to pay back the obligation or the ability of
24 the company to recover the amounts that it lent to other

1 people.

2 Q Got it. Is that the same thing as saying the
3 viability of the note?

4 A Correct.

5 Q Okay, viability meaning you could not opine that
6 these receivables that are reflected on the company's books
7 could actually be collected by the obligors?

8 A Correct.

9 Q Okay. So your qualification wasn't the existence of
10 the obligation; it was the collectability of the obligation?

11 A Correct.

12 Q Okay. And--

13 A We wouldn't have -- let me rephrase. We went
14 through great lengths to make sure that the terms of the notes
15 were agreed to disclose in the financial statements. There was
16 no ambiguity as to the existence of the notes, because we have
17 note agreements. We have representation letters from people
18 who are very knowledgeable about the matter. It wasn't like
19 Gabby McCllan was telling us, 'Oh, this is what the note
20 should be.' I mean we went to the highest level of management
21 as to whether these were valid notes.

22 MR. GILMORE: Page 150 line 4.

23 BY MR. GILMORE:

24 "Q Okay. Now when CWC and SPI merged your law of debits

1 and credits still applies and 7.2 million has to show up
2 somewhere?

3 A Correct.

4 Q So CWC, which owes Superpumper money, these two
5 companies merge?

6 A Yeah.

7 Q Now how is the 7.2 million then characterized in the
8 post-merger books?

9 A It's a zero.

10 Q Okay. Zero obligation owed from CWC --

11 A Right.

12 Q -- to SPI.

13 A And zero obligation that SPI -- zero receivable that
14 SPI has from CWC because the two mesh.

15 Q Then the 7.2 million doesn't just go away though
16 does it?

17 A Absolutely.

18 Q So then what is the relation to what CWC owed SPI
19 pre-merger to the 2.5 million notes that are reflected on the
20 2010?

21 A So our financial statements are prepared or the
22 books of the company are prepared so that when the merger
23 occurred, the receivable from CWC gets netted with the payable
24 on CWC's books, so you're left with a big donut, the money you

1 don't have a receivable anymore from. So if you go back to
2 the chart, the money went from Superpumper to CWC, and,
3 presumably, if the money stayed in CWC when the merger the
4 cash would have come in, but there was no cash. The only thing
5 that was left CWC was naked and we have \$100,000 of assets and
6 7 million dollars of debt. So when you put the two companies
7 together, you're basically wiping out the receivable and
8 you're getting \$100,000, whatever it was, a few dollars of
9 cash in the company and you're left with a hole. Where you
10 used to have an asset now you have nothing.

11 Q Yes?

12 A So to get rid of the asset from Superpumper's books
13 like we disclosed, it was reflected as a distribution to the
14 shareholders, and then the two new notes come in and those are
15 contributed in replace of the notes that went in. In theory,
16 we could have had netted the two together and basically had
17 a-- you've got a note from CWC that goes away. And then you
18 have a new note from the shareholders that comes in to replace
19 it.

20 Q Okay?

21 A That's effectively what happened. In a multi-step
22 process, that's the simplest way to describe it.

23 Q Simplest way to describe it is CWC owed money to
24 Superpumper of 7.2 million?

1 A Correct, approximately.

2 Q Approximately.

3 A We don't have the books of CWC, but we confirmed the
4 amount with Darata and he said, 'Yeah, that's what he's got.'

5 Q Once there is a merger, there is no longer any
6 obligation owed because it zeroed out, right?

7 A Right.

8 Q But effectively what they did was, Sam Morabito and
9 Edward Bayuk executed notes--

10 A Right.

11 Q -- to Superpumper, Inc., of essentially some amount
12 which was just less than the 7.2 million obligation, right?

13 A Right.

14 Q Now when Sam and Edward executed those notes in
15 favor of Superpumper, Inc., is there an offsetting entry?

16 A Yes.

17 Q What offsetting entry?

18 A Capital, contributing capital.

19 Q Okay. Thank you. So when Sam and Edward execute
20 notes in the amount of 2.58 million, the offsetting entry goes
21 to stockholder equity?

22 A Correct.

23 Q Am I right?

24 A Correct.

1 Q Okay. Without the contribution of those notes,
2 Superpumper doesn't have 6.3 million worth of stockholder
3 equity in 2010, correct?

4 A Correct.

5 Q Okay. So pre-merger, CWC had 7 million owed to
6 Superpumper?

7 A Uh-huh.

8 Q That would have been an asset on Superpumper's
9 books, right?

10 A Pre-merger, yes.

11 Q Okay. And the corresponding entry in the balance
12 sheet would have been stockholder equity, right?

13 A Yes.

14 Q Okay. So in effect -- this is why I want to go back
15 to something that I think I heard you say early -- in effect,
16 the 7.2 million that CWC owed to Superpumper had the practical
17 effect of increasing Superpumper's stockholder equity?

18 A Yes.

19 Q Okay. So would it not then clarify your prior
20 answer that there are other ways to increase stockholder
21 equity on the balance sheet besides just giving cash to the
22 company?

23 A Or contributing property.

24 Q Okay?

1 A And that's contributing property.

2 Q Contributing property is to contribute a Promissory
3 Note that suggests that the obligor will pay into the company,
4 right?

5 A Right.

6 Q And in doing so, the corresponding entry on the
7 balance sheet is to increase the stockholder equity?

8 A Correct.

9 Q Fair enough. Okay. So during the merger, had there
10 not been these notes contributed by Edward Bayuk and Sam
11 Morabito in the amount of approximately 2.5 million,
12 Superpumper, Inc., would not have been able to maintain a 6.3
13 million total stockholder equity, correct?

14 A Correct.

15 Q Okay. We've seen the 6 million number before, have
16 we not, today?

17 A Yes.

18 Q Okay. What's the 6 million significance.

19 A Steve Austin.

20 Q Ha ha. What's the six million significance?

21 A You didn't get the reference?

22 Q I got it, and we're about to wrap this up, but this
23 is the point I need to make?

24 A Six million was the covenant requirement in the

1 Spirit lease.

2 Q Okay. So for the 2.5 million notes that are
3 reflected on the 2010 balance sheet of Superpumper, do you
4 know if Sam and Edward actually took 2.5 million in cash out
5 of the company in order to be able to make those notes?

6 A They assumed the obligations of CWC. I am not sure
7 if they took the money out, if they received it, but they
8 assumed the obligations of CWC.

9 Q They assume the obligations, but that does not in
10 your mind definitively conclude that Sam and Edward took 2.5
11 million sometime in 2009 and 2010 in cash?

12 A Correct.

13 Q Okay. So is it inaccurate to characterize these
14 notes that are for Sam and Edward on the 2010 balance sheet as
15 journal entry notes?

16 A Is it inaccurate? Help me understand that.

17 Q Well, how would you characterize them in accounting
18 lingo if we know Sam and Edward did not contribute cash to the
19 company? In other words, they did not take cash.

20 A Let me go back to your premise of ways to increase
21 equity in the company. It's contributing cash, contributing
22 property or assuming obligations. They've assumed obligations,
23 and the assumption of obligations is what contributed to the
24 equity of the company.

1 Q Okay. Do you know, then, is there an actual note
2 written that evidences an obligation from Edward Bayuk to
3 Superpumper?

4 A We have it.

5 Q Okay. Same with respect to Sam Morabito, correct?

6 A Correct.

7 Q Okay. The evidence of the existence of a written
8 note, though, does not necessarily mean Sam Morabito and
9 Edward Bayuk took cash out of the company?

10 A I don't know -- I am not trying to split hairs -- I
11 don't think the existence of taking cash is definitive of
12 whether there's a note. The issue is of assumed obligations
13 of the company.

14 Q Okay. But let me split hairs a little bit. If you
15 understood that one of the allegations in this case, is that
16 one or more of the stockholders of Superpumper, Inc., has
17 taken cash out of the company that is reflected by the
18 obligation, 'Due from affiliates,' on the balance sheet --

19 A Right.

20 Q -- you would not agree with me that it's necessarily
21 that clean cut of a conclusion is it?

22 A It is not a clean-cut conclusion, yes.

23 Q Okay. In fact, in your work in performing the
24 audits, you didn't even attempt to determine whether the notes

1 that are found in the company's general ledgers reflected
2 actual cash that had been taken by the stockholders in
3 exchange for a written note evidencing the obligation?"

4 MS. PILATOWICZ: No objection.

5 "THE WITNESS: Correct. The cash was taken out of
6 the company. We have to have cash taken out in order to have
7 the receivable. The question is who and where; that's a
8 different question.

9 BY MR. GILMORE:

10 "Q And when?

11 A And when.

12 Q Okay. So it's possible, is it not, that the 7.2
13 million obligation CWC owed to Superpumper could have been
14 five years old?

15 A Yes."

16 MR. GILMORE: Turn to page 60 line 12.

17 BY MR. GILMORE:

18 "Q Okay. And can you think of any reason why
19 Superpumper would need to maintain these types of receivables
20 on their books through sale, through merger, through a change
21 of control, anything, like that? Is there a reason why you
22 could imagine Superpumper would need to maintain these, 'Due
23 from affiliates,' on their books?

24 A The reason we discussed.

1 Q Which is?

2 A To meet the covenant requirements.

3 Q Okay. So in a vacuum, it might not make sense why
4 shareholders of a company would want to maintain these types
5 of 'Due from affiliates' on their books through sale, through
6 merger, through change of control, correct?

7 A Right.

8 Q But we're not dealing in a vacuum today with respect
9 to Superpumper, are we, because we know Spirit requires six
10 million of book value of stockholders equity, right?

11 A Correct.

12 Q And one way that the stockholders can maintain the
13 book value of stockholder equity in Superpumper is to ensure
14 there's always a continuing obligation due from affiliates;
15 correct?

16 A Correct.

17 Q Okay. So let's take a look at --

18 A Which is why it's called 'Due from affiliates,' so
19 the reader knows there's a counterparty to the transaction.

20 Q There you go. As opposed to say --

21 A Due from GE Capital or somebody else."

22 MR. GILMORE: Page 162, line 6.

23 BY MR. GILMORE:

24 "Q Now let's take a look at the e-mail from Stan

1 Bernstein which is Exhibit 22."

2 MR. GILMORE: 22. I don't have that marked.

3 THE COURT: It is 224.

4 MR. GILMORE: Thank you, Judge.

5 "A 22.

6 Q Based on the questions and answers dialog that we've
7 had the last hour, does it make sense to you, Mr. Krausz, why
8 you would get an instruction from Stan Bernstein, the
9 company's accountant, copied by Dennis Vacco, the company's
10 attorney, why it is imperative that these due from affiliates
11 notes remain on the company's books and that they remain
12 viable? Does it make sense why they would need that?

13 A I don't know that from the e-mail as to why. The
14 e-mail clarified the amount of the note. It doesn't --
15 nowhere in here does it say, 'We need to have these notes in
16 order to be in the good graces of our counterparts."

17 Q But you know why, don't you?

18 A We suspect why.

19 Q In all of the communication you've had with the
20 client, the client's accountants, the client's lawyers, you
21 know why it is imperative the client keep these due from
22 affiliates on their books so they can maintain the covenants
23 that are required under the Spirit lease obligations, right?

24 A Correct.

1 Q Have you ever been told anything from somebody at
2 Superpumper that there was another reason why these due from
3 affiliates had to remain on the books?"

4 THE COURT: Did you purposely not read that?

5 MR. GILMORE: I'm sorry?

6 MS. PILATOWICZ: You skipped a section. "Or its
7 accountants or lawyers."

8 MR. GILMORE: I completely missed that. It was not
9 intentional. It was my fault. I will start over, page 163 line
10 6.

11 BY MR. GILMORE:

12 "Q Have you ever been told anything from somebody at
13 Superpumper, or its accountants or lawyers there what was
14 another reason why these due from affiliates had to remain on
15 the books?

16 A Well, that goes back to your earlier questions of
17 what is debt and what is equity. And the intention,
18 regardless of whether it was to support the counterparty risk,
19 is that these were amounts that were going to be repaid; they
20 were temporary. You know, it's not so much the spirit as is
21 it a note or is it not a note. And every question we asked,
22 'These are temporary instruments and they're going to get
23 repaid."

24 Q No, I get that?

1 A Yeah. Yeah. We're not engineering financial
2 statements. You're asking the question as if we're engineering
3 financial statements."
4 THE COURT: Why don't you read that again?
5 THE READER: Yeah, yeah. Sorry. "We're not
6 engineering financial statements. You're asking the question
7 as if we're engineering financial statements, and the
8 questions we're following the substance of what we were told
9 about the preface of the notes."
10 BY MR. GILMORE:
11 "Q And I don't disagree with that, and I don't think
12 anyone in this room is going to disagree with that. What I
13 was asking specifically is it has anybody related to
14 Superpumper, its managers, its controllers, its lawyers or its
15 accountants ever told you that there was another reason why
16 these needed to be characterized as receivables as opposed to
17 something else?
18 A Distributions?
19 Q Yes?
20 A No.
21 Q Okay. They've not told you any other reason why
22 they've characterized it way they have?
23 A Correct."
24 MR. GILMORE: Page 167 line 10.

1 BY MR. GILMORE:

2 "Q Do you know if the amounts due from CWC and Paul
3 Morabito increased year over year?

4 A They changed. Sometimes they increased; sometimes
5 they decreased.

6 Q Do you recall what they were roughly in 2006?

7 A I don't. All of these I can look up. I don't
8 recall."

9 MR. GILMORE: For the record, this was
10 Ms. Pilatowicz asking these questions. Since there is only a
11 dozen more lines, I will just continue.

12 MR. GILMORE: Page 167, line 14.

13

14 REDIRECT EXAMINATION

15 BY MS. PILATOWICZ:

16 "Q Do you recall what they were roughly in 2006?

17 A I don't. All of these I can look up. I don't
18 recall.

19 Q Do you have the 2006 audited financial statements
20 with you?

21 A No, 2007.

22 Q 2007?

23 A Yes.

24 Q Can you tell me what it was in 2007?

1 A 3.9 million.

2 THE WITNESS: You can mark this if you want.

3 MS. PILATOWICZ: Can we mark this as the next

4 exhibit? I don't have copies. Are you okay with that? It's

5 just the 2007 financial statement.

6 THE REPORTER: What's the number?

7 MS. PILATOWICZ: I think we're on 23.

8 (Whereupon the document referred to was marked by

9 the reporter as Exhibit 23 for identification.)

10 BY MS. PILATOWICZ:

11 Q So between the 2006 financial statements and the

12 2009 financial statements, the number had increased by at

13 least 4 million; is that correct?

14 A Yeah, 3 million and change."

15 MR. GILMORE: Your Honor. I am not certain that the

16 2006 financials were ever offered.

17 MS. PILATOWICZ: It is 2007. They're in there. They

18 have been stipulated to be admitted. My apologies. I didn't

19 write down the number.

20 MR. GILMORE: 2007 is like 117 or 118, something

21 like that.

22 MS. PILATOWICZ: 113.

23 THE COURT: Exhibit 23 of the deposition pages did

24 you say 118?

1 MR. GILMORE: 113.

2 THE COURT: 113. Thank you. That concludes the

3 deposition reading. Thank you.

4 MR. GILMORE: Your Honor, for clarification, I

5 referenced Exhibit 20 of the Krausz deposition which had not

6 been previously marked. I received it from my staff. I will,

7 circulate a copy to counsel.

8 MS. PILATOWICZ: We have no objection to it being

9 admitted.

10 MR. GILMORE: Madam clerk, I would offer this as

11 304, I believe.

12 THE CLERK: It will be marked as 304.

13 MR. GILMORE: Thank you. May I approach the clerk,

14 Your Honor.

15 THE COURT: You may.

16 (Exhibit 304 marked for identification.)

17 THE COURT: Exhibit 20 to the deposition has been

18 marked as Exhibit 304 in the trial exhibits, and I understand

19 there's a stipulation for the admission.

20 MR. GILMORE: That's correct, Your Honor.

21 MR. PILATOWICZ: That's correct.

22 THE COURT: 304 is admitted.

23 (Exhibit 304 admitted in evidence.)

24 THE COURT: You can step down. Thank you.

1 MS. TURNER: That's what you went to law school for.

2 THE COURT: Is this your first trial?

3 THE READER: Not first attendance, first testimony.

4 THE COURT: We made it too easy for him. Okay,
5 counsel.

6 MR. GILMORE: Your Honor, with that, the Plaintiffs
7 rest their case with the reservation that if we need rebuttal,
8 that we may reserve the right to call a rebuttal witness, but
9 other than that, we're done.

10 THE COURT: Okay.

11 MR. GILMORE: Your Honor, my expectation is having
12 learned at lunch today of the withdrawal of the Dennis Vacco's
13 deposition transcript and the withdrawal of Stan Bernstein's
14 deposition transcript, I do intend, the best I have time and
15 am able to review these transcripts and see which portions of
16 those if any I will intend to offer in the defendants'
17 case-in-chief. As the Court was aware, these depositions were
18 marked by both parties. I have had communication with counsel
19 surrounding their expectations as to how we would address
20 that. I don't think we need to bother the Court with that.
21 But, they have been withdrawn from the Plaintiff's
22 case-in-chief, but I anticipate offering Mr. Vacco, certainly
23 Mr. Loveless, certainly in the defendants' case-in-chief, and
24 I am undecided as to Stan Bernstein.

1 Further, I expect by Monday there will be no need to
2 offer the deposition transcript of Mark Justmann who we
3 intended to be offered in the defendants' case-in-chief. He
4 was one of the property appraisers.

5 So with that, I anticipate Monday we will have two
6 live witnesses. The first would be Mr. Jan Friederich. I
7 expect he will be on the stand an hour, hour and a half in the
8 direct. Following Mr. Friederick's cross and redirect, we'll
9 offer Michelle Salazar. I expect she will be on the stand an
10 hour, an hour and a half in direct. And then we could
11 commence with the reading of the Vacco transcript, the
12 Lovelace transcript, and if need be, the Bernstein transcript.
13 Then my expectation would be to offer two live witnesses on
14 Tuesday morning the first of which would be Dennis Banks. I
15 expect I have 15 minutes of questions for Mr. Banks. The
16 second -- Well, I didn't ask you this, I just proposed we have
17 a deposition of Dennis Banks that lasted a few minutes. I
18 will discuss whether or not we should just read his deposition
19 as opposed to bringing him in. My expectation is he would be
20 on direct approximately fifteen to twenty minutes. Then
21 following his direct and redirect or his cross and redirect, I
22 will be offering the live testimony of Darryl Noble, the
23 appraiser for Panorama. After that, I will read certain
24 portions of the transcript of Michael Sewitz and Spencer

1 Cavalier. And, provided we finish Dennis Vacco, Christian
2 Lovelace, to the extent I need the Stan Bernstein, my
3 expectation is I can rest my case at the close of business
4 Tuesday.

5 THE COURT: I appreciate that. I didn't mean
6 necessarily you wouldn't get to it. I was a little concerned
7 about something that happened this afternoon with my calendar.

8 MR. GILMORE: Fair enough.

9 THE COURT: As I told you earlier, I thought I was
10 going to be able to start this on Monday around 10:00 o'clock.
11 It looks like I'm not going to be able to start it Monday at
12 1:00. We'll be back to what I told you last week or the
13 beginning of this week we would start. We are back there. The
14 criminal case has more witnesses. We will start your trial
15 Monday afternoon at 1:00 and we will go until 6:00 on Monday,
16 if necessary, especially with these live witnesses. You have
17 live witnesses here and I want to try to get them on and off
18 while they are here, so if that testimony goes a little
19 longer, we'll stay longer. I may not start the reading of the
20 depositions at 5:00 o'clock.

21 MR. GILMORE: Understood.

22 THE COURT: We'll kind of play that by ear. And
23 then I haven't talked to the clerk about Tuesday. Okay. So on
24 Tuesday we could start as early as 8:00 o'clock if we need

1 that extra time, and we do not have -- someone is covering the
2 criminal matters, so we should be able to do this trial.

3 So I will see you all back on Monday at 1:00.
4 Everyone stay healthy over the weekend. As I tell my jurors,
5 I don't want to lose anybody over the weekend. We have got a
6 lot of time invested, so stay healthy and have a safe weekend
7 Court's in recess.

8 (Whereupon, the proceedings were concluded.)

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1 STATE OF NEVADA,)
2) ss.
3 COUNTY OF WASHOE.)

4 I, Judith Ann Schonlau, Official Reporter of the
5 Second Judicial District Court of the State of Nevada, in and
6 for the County of Washoe, DO HEREBY CERTIFY:

7 That as such reporter I was present in Department
8 No. 4 of the above-entitled court on Friday, November 2, 2018
9 at the hour of 10:15 a.m. of said day and that I then and
10 there took verbatim stenotype notes of the proceedings had in
11 the matter of WILLIAM LEONARD, JR. TRUSTEE vs. SUPERPUMPER,
12 INC., ET AL, Case Number CV13-02663.

13 That the foregoing transcript, consisting of pages
14 numbered 1-190 inclusive, is a full, true and correct
15 transcription of my said stenotypy notes, so taken as
16 aforesaid, and is a full, true and correct statement of the
17 proceedings had and testimony given upon the trial of the
18 above-entitled action to the best of my knowledge, skill and
19 ability.

20 DATED: At Reno, Nevada this 13th day of November, 2018.

21
22 /s/ Judith Ann Schonlau
23 JUDITH ANN SCHONLAU CSR #18
24