IN THE SUPREME COURT OF THE STATE OF NEVADA

SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD BAYUK LIVING TRUST; SALVATORE MORABITO, an individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Appellants, vs. WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Respondent.	Case No. 79355 Electronically Filed Jun 02 2020 05:57 p.m. Elizabeth A. Brown Clerk of Supreme Court Appeal from the Second Judicial District Court, the Honorable Connie J. Steinheimer Presiding

APPELLANTS' APPENDIX, VOLUME 45
(Nos. 7667–7893)

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

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

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

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

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

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

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

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

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

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

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<tr><th colspan="2"><u>DOCUMENT DESCRIPTION</u></th><th><u>LOCATION</u></th></tr>
<tr><td colspan="2">Objection to Recommendation for Order filed August 17, 2017 (filed 08/28/2017)</td><td>Vol. 18, 2727–2734</td></tr>
<tr><td colspan="2">Exhibit to Objection to Recommendation for Order</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Plaintiff’s counsel’s Jan. 24, 2017, email memorializing the discovery dispute agreement</td><td>Vol. 18, 2735–2736</td></tr>
<tr><td colspan="2">Opposition to Objection to Recommendation for Order filed August 17, 2017 (filed 09/05/2017)</td><td>Vol. 18, 2737–2748</td></tr>
<tr><td colspan="2">Exhibit to Opposition to Objection to Recommendation for Order</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>A</td><td>Declaration of Teresa M. Pilatowicz, Esq., in Support of Opposition to Objection to Recommendation for Order (filed 09/05/2017)</td><td>Vol. 18, 2749–2752</td></tr>
<tr><td colspan="2">Reply to Opposition to Objection to Recommendation for Order filed August 17, 2017 (dated 09/15/2017)</td><td>Vol. 18, 2753–2758</td></tr>
<tr><td colspan="2">Defendants’ Opposition to Plaintiff’s Motion for Partial Summary Judgment (filed 09/22/2017)</td><td>Vol. 18, 2759–2774</td></tr>
<tr><td colspan="2">Defendants’ Separate Statement of Disputed Facts in Support of Opposition to Plaintiff’s Motion for Partial Summary Judgment (filed 09/22/2017)</td><td>Vol. 18, 2775–2790</td></tr>
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DOCUMENT DESCRIPTION		LOCATION
Exhibits to Defendants' Separate Statement of Disputed Facts in Support of Opposition to Plaintiff's Motion for Partial Summary Judgment		
Exhibit	**Document Description**	
1	Judgment in *Consolidated Nevada Corp., et al v. JH. et al.*; Case No. CV07-02764 (filed 08/23/2011)	Vol. 18, 2791–2793
2	Excerpted Transcript of October 20, 2015 Deposition of Dennis C. Vacco	Vol. 18, 2794–2810
3	Order Denying Motion to Dismiss Involuntary Chapter 7 Petition and Suspending Proceedings Pursuant to 11 U.S.C §305(a)(1); Case No. BK-N-13-51237 (filed 12/17/2013)	Vol. 18, 2811–2814
4	Excerpted Transcript of March 21, 2016 Deposition of P. Morabito	Vol. 18, 2815–2826
5	Excerpted Transcript of September 28, 2015 Deposition of Edward William Bayuk	Vol. 18, 2827–2857
6	Appraisal	Vol. 18, 2858–2859
7	Budget Summary as of Jan. 7, 2016	Vol. 18, 2860–2862
8	Excerpted Transcript of March 24, 2016 Deposition of Dennis Banks	Vol. 18, 2863–2871
9	Excerpted Transcript of March 22, 2016 Deposition of Michael Sewitz	Vol. 18, 2872–2879
10	Excerpted Transcript of April 27, 2011 Deposition of Darryl Noble	Vol. 18, 2880–2883

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

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

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<tr><td colspan="2">Order Denying Motion for Partial Summary Judgment (filed 12/11/2017)</td><td>Vol. 19, 2982–2997</td></tr>
<tr><td colspan="2">Defendants' Motions in Limine (filed 09/12/2018)</td><td>Vol. 19, 2998–3006</td></tr>
<tr><td colspan="2">Exhibits to Defendants' Motions in Limine</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Plaintiff's Second Supplement to Amended Disclosures Pursuant to NRCP 16.1(A)(1) (dated 04/28/2016)</td><td>Vol. 19, 3007–3016</td></tr>
<tr><td>2</td><td>Excerpted Transcript of March 25, 2016 Deposition of William A. Leonard</td><td>Vol. 19, 3017–3023</td></tr>
<tr><td>3</td><td>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)</td><td>Vol. 19, 3024–3044</td></tr>
<tr><td colspan="2">Motion in Limine to Exclude Testimony of Jan Friederich (filed 09/20/2018)</td><td>Vol. 19, 3045–3056</td></tr>
<tr><td colspan="2">Exhibits to Motion in Limine to Exclude Testimony of Jan Friederich</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Defendants' Rebuttal Expert Witness Disclosure (dated 02/29/2016)</td><td>Vol. 19, 3057–3071</td></tr>
<tr><td>2</td><td>Condensed Transcript of March 29, 2016 Deposition of Jan Friederich</td><td>Vol. 19, 3072–3086</td></tr>
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DOCUMENT DESCRIPTION		LOCATION
Opposition to Defendants' Motions in Limine (filed 09/28/2018)		Vol. 19, 3087–3102
Exhibits to Opposition to Defendants' Motions in Limine		
Exhibit	**Document Description**	
A	Declaration of Teresa M. Pilatowicz, Esq. in Support of Opposition to Defendants' Motions in Limine (filed 09/28/2018)	Vol. 19, 3103–3107
A-1	Plaintiff's February 19, 2016, Amended Disclosures Pursuant to NRCP 16.1(A)(1)	Vol. 19, 3108–3115
A-2	Plaintiff's January 26, 2016, Expert Witnesses Disclosures (without exhibits)	Vol. 19, 3116–3122
A-3	Defendants' January 26, 2016, and February 29, 2016, Expert Witness Disclosures (without exhibits)	Vol. 19, 3123–3131
A-4	Plaintiff's August 17, 2017, Motion for Partial Summary Judgment (without exhibits)	Vol. 19, 3132–3175
A-5	Plaintiff's August 17, 2017, Statement of Undisputed Facts in Support of his Motion for Partial Summary Judgment (without exhibits)	Vol. 19, 3176–3205
Defendants' Reply in Support of Motions in Limine (filed 10/08/2018)		Vol. 20, 3206–3217
Exhibit to Defendants' Reply in Support of Motions in Limine		
Exhibit	**Document Description**	

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

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<tr><th colspan="2"><u>DOCUMENT DESCRIPTION</u></th><th><u>LOCATION</u></th></tr>
<tr><td colspan="2">Minutes of September 11, 2018, Pre-trial Conference (filed 10/19/2018)</td><td>Vol. 20, 3312</td></tr>
<tr><td colspan="2">Stipulated Facts (filed 10/29/2018)</td><td>Vol. 20, 3313–3321</td></tr>
<tr><td colspan="2">Defendants' Points and Authorities RE: Objection to Admission of Documents in Conjunction with the Depositions of P. Morabito and Dennis Vacco (filed 10/30/2018)</td><td>Vol. 20, 3322–3325</td></tr>
<tr><td colspan="2">Plaintiff's Points and Authorities Regarding Authenticity and Hearsay Issues (filed 10/31/2018)</td><td>Vol. 20, 3326–3334</td></tr>
<tr><td colspan="2">Clerk's Trial Exhibit List (filed 02/28/2019)</td><td>Vol. 21, 3335–3413</td></tr>
<tr><td colspan="2">Exhibits to Clerk's Trial Exhibit List</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Certified copy of the Transcript of September 13, 2010 Judge's Ruling; Case No. CV07-02764</td><td>Vol. 21, 3414–3438</td></tr>
<tr><td>2</td><td>Findings of Fact, Conclusions of Law, and Judgment; Case No. CV07-02764 (filed 10/12/2010)</td><td>Vol. 21, 3439–3454</td></tr>
<tr><td>3</td><td>Judgment; Case No. CV07-0767 (filed 08/23/2011)</td><td>Vol. 21, 3455–3456</td></tr>
<tr><td>4</td><td>Confession of Judgment; Case No. CV07-02764 (filed 06/18/2013)</td><td>Vol. 21, 3457–3481</td></tr>
<tr><td>5</td><td>November 30, 2011 Settlement Agreement and Mutual Release</td><td>Vol. 22, 3482–3613</td></tr>
<tr><td>6</td><td>March 1, 2013 Forbearance Agreement</td><td>Vol. 22, 3614–3622</td></tr>
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	DOCUMENT DESCRIPTION	LOCATION
8	Order Denying Motion to Dismiss Involuntary Chapter 7 Petition and Suspending Proceedings, Case 13-51237. ECF No. 94, (filed 12/17/2013)	Vol. 22, 3623–3625
19	Report of Undisputed Election– Appointment of Trustee, Case No. 13-51237, ECF No. 220	Vol. 22, 3626–3627
20	Stipulation and Order to Substitute a Party Pursuant to NRCP 17(a), Case No. CV13-02663, May 15, 2015	Vol. 22, 3628–3632
21	Non-Dischargeable Judgment Regarding Plaintiff's First and Second Causes of Action, Case No. 15-05019-GWZ, ECF No. 123, April 30, 2018	Vol. 22, 3633–3634
22	Memorandum & Decision; Case No. 15-05019-GWZ, ECF No. 124, April 30, 2018	Vol. 22, 3635–3654
23	Amended Findings of Fact, Conclusions of Law in Support of Judgment Regarding Plaintiff's First and Second Causes of Action; Case 15-05019-GWZ, ECF No. 122, April 30, 2018	Vol. 22, 3655–3679
25	September 15, 2010 email from Yalamanchili to Vacco and P. Morabito RE: Follow Up Thoughts	Vol. 22, 3680–3681
26	September 18, 2010 email from P. Morabito to Vacco	Vol. 22, 3682–3683
27	September 20, 2010 email from Vacco to P. Morabito RE: Spirit	Vol. 22, 3684–3684
28	September 20, 2010 email between Yalamanchili and Crotty RE: Morabito -Wire	Vol. 22, 3685–3687

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<tr><td colspan="2">Notice of Entry of Findings of Fact, Conclusions of Law, and Judgment (filed 03/29/2019)</td><td>Vol. 48, 8334–8340</td></tr>
<tr><td colspan="2">Memorandum of Costs and Disbursements (filed 04/11/2019)</td><td>Vol. 48, 8341–8347</td></tr>
<tr><td colspan="2">Exhibit to Memorandum of Costs and Disbursements</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Ledger of Costs</td><td>Vol. 48, 8348–8370</td></tr>
<tr><td colspan="2">Application for Attorneys’ Fees and Costs Pursuant to NRCP 68 (filed 04/12/2019)</td><td>Vol. 48, 8371–8384</td></tr>
<tr><td colspan="2">Exhibits to Application for Attorneys’ Fees and Costs Pursuant to NRCP 68</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Declaration of Teresa M. Pilatowicz In Support of Plaintiff’s Application for Attorney’s Fees and Costs Pursuant to NRCP 68 (filed 04/12/2019)</td><td>Vol. 48, 8385–8390</td></tr>
<tr><td>2</td><td>Plaintiff’s Offer of Judgment to Defendants (dated 05/31/2016)</td><td>Vol. 48, 8391–8397</td></tr>
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<tr><td>5</td><td>Plaintiff's Memorandum of Costs and Disbursements (filed 04/11/2019)</td><td>Vol. 48, 8457–8487</td></tr>
<tr><td colspan="2">Motion to Retax Costs (filed 04/15/2019)</td><td>Vol. 49, 8488–8495</td></tr>
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<tr><td colspan="2">Exhibits to Plaintiff's Opposition to Motion to Retax Costs</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Declaration of Teresa M. Pilatowicz In Support of Opposition to Motion to Retax Costs (filed 04/17/2019)</td><td>Vol. 49, 8508–8510</td></tr>
<tr><td>2</td><td>Summary of Photocopy Charges</td><td>Vol. 49, 8511–8523</td></tr>
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<tr><td colspan="2">Exhibit to Opposition to Application for Attorneys' Fees and Costs Pursuant to NRCP 68</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Plaintiff's Bill Dispute Ledger</td><td>Vol. 49, 8579–8637</td></tr>
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<tr><td colspan="2">Defendants, Salvatore Morabito, Snowshoe Petroleum, Inc., and Superpumper, Inc.'s Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60 (filed 04/25/2019)</td><td>Vol. 49, 8638–8657</td></tr>
<tr><td colspan="2">Defendant, Edward Bayuk's Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60 (filed 04/26/2019)</td><td>Vol. 50, 8658–8676</td></tr>
<tr><td colspan="2">Exhibits to Edward Bayuk's Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>February 27, 2019 email with attachments</td><td>Vol. 50, 8677–8768</td></tr>
<tr><td>2</td><td>Declaration of Frank C. Gilmore in Support of Edward Bayuk's Motion for New Trial (filed 04/26/2019)</td><td>Vol. 50, 8769–8771</td></tr>
<tr><td>3</td><td>February 27, 2019 email from Marcy Trabert</td><td>Vol. 50, 8772–8775</td></tr>
<tr><td>4</td><td>February 27, 2019 email from Frank Gilmore to eturner@Gtg.legal RE: Friday Trial</td><td>Vol. 50, 8776–8777</td></tr>
<tr><td colspan="2">Plaintiff's Reply in Support of Application of Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 04/30/2019)</td><td>Vol. 50, 8778–8790</td></tr>
<tr><td colspan="2">Exhibit to Plaintiff's Reply in Support of Application of Attorneys' Fees and Costs Pursuant to NRCP 68</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Case No. BK-13-51237-GWZ, ECF Nos. 280, 282, and 321</td><td>Vol. 50, 8791–8835</td></tr>
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<tr><th colspan="2"><u>DOCUMENT DESCRIPTION</u></th><th><u>LOCATION</u></th></tr>
<tr><td colspan="2">Plaintiff's Opposition to Defendants' Motions for New Trial and/or to Alter or Amend Judgment (filed 05/07/2019)</td><td>Vol. 51, 8836–8858</td></tr>
<tr><td colspan="2">Defendants, Salvatore Morabito, Snowshoe Petroleum, Inc., and Superpumper, Inc.'s Reply in Support of Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60 (filed 05/14/2019)</td><td>Vol. 51, 8859–8864</td></tr>
<tr><td colspan="2">Declaration of Edward Bayuk Claiming Exemption from Execution (filed 06/28/2019)</td><td>Vol. 51, 8865–8870</td></tr>
<tr><td colspan="2">Exhibits to Declaration of Edward Bayuk Claiming Exemption from Execution</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Copy of June 22, 2019 Notice of Execution and two Write of Executions</td><td>Vol. 51, 8871–8896</td></tr>
<tr><td>2</td><td>Declaration of James Arthur Gibbons Regarding his Attestation, Witness and Certification on November 12, 2005 of the Spendthrift Trust Amendment to the Edward William Bayuk Living Trust (dated 06/25/2019)</td><td>Vol. 51, 8897–8942</td></tr>
<tr><td colspan="2">Notice of Claim of Exemption from Execution (filed 06/28/2019)</td><td>Vol. 51, 8943–8949</td></tr>
<tr><td colspan="2">Edward Bayuk's Declaration of Salvatore Morabito Claiming Exemption from Execution (filed 07/02/2019)</td><td>Vol. 51, 8950–8954</td></tr>
<tr><td colspan="2">Exhibits to Declaration of Salvatore Morabito Claiming Exemption from Execution</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Las Vegas June 22, 2019 letter</td><td>Vol. 51, 8955–8956</td></tr>
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2	Writs of execution and the notice of execution	Vol. 51, 8957–8970
Minutes of June 24, 2019 telephonic hearing on Decision on Submitted Motions (filed 07/02/2019)		Vol. 51, 8971–8972
Salvatore Morabito's Notice of Claim of Exemption from Execution (filed 07/02/2019)		Vol. 51, 8973–8976
Edward Bayuk's Third Party Claim to Property Levied Upon NRS 31.070 (filed 07/03/2019)		Vol. 51, 8977–8982
Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 07/10/2019)		Vol. 51, 8983–8985
Order Granting in part and Denying in part Motion to Retax Costs (filed 07/10/2019)		Vol. 51, 8986–8988
Plaintiff's Objection to (1) Claim of Exemption from Execution and (2) Third Party Claim to Property Levied Upon, and Request for Hearing Pursuant to NRS 21.112 and 31.070(5) (filed 07/11/2019)		Vol. 52, 8989–9003
Exhibits to Plaintiff's Objection to (1) Claim of Exemption from Execution and (2) Third Party Claim to Property Levied Upon, and Request for Hearing Pursuant to NRS 21.112 and 31.070(5)		
Exhibit	**Document Description**	
1	Declaration of Gabrielle A. Hamm, Esq.	Vol. 52, 9004–9007
2	11/30/2011 Tolling Agreement – Edward Bayuk	Vol. 52, 9008–9023
3	11/30/2011 Tolling Agreement – Edward William Bayuk Living Trust	Vol. 52, 9024–9035

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

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

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<tr><td colspan="2">Plaintiff's Objection to Notice of Claim of Exemption from Execution Filed by Salvatore Morabito and Request for Hearing (filed 07/16/2019)</td><td>Vol. 52, 9142–9146</td></tr>
<tr><td colspan="2">Reply to Objection to Claim of Exemption and Third Party Claim to Property Levied Upon (filed 07/17/2019)</td><td>Vol. 52, 9147–9162</td></tr>
<tr><td colspan="2">Exhibits to Reply to Objection to Claim of Exemption and Third Party Claim to Property Levied Upon</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>March 3, 2011 Deposition Transcript of P. Morabito</td><td>Vol. 52, 9163–9174</td></tr>
<tr><td>2</td><td>Mr. Bayuk's September 23, 2014 responses to Plaintiff's first set of requests for production</td><td>Vol. 52, 9175–9180</td></tr>
<tr><td>3</td><td>September 28, 2015 Deposition Transcript of Edward Bayuk</td><td>Vol. 52, 9181–9190</td></tr>
<tr><td colspan="2">Reply to Plaintiff's Objection to Notice of Claim of Exemption from Execution (filed 07/18/2019)</td><td>Vol. 52, 9191–9194</td></tr>
<tr><td colspan="2">Declaration of Service of Till Tap, Notice of Attachment and Levy Upon Property (filed 07/29/2019)</td><td>Vol. 52, 9195</td></tr>
<tr><td colspan="2">Notice of Submission of Disputed Order Denying Claim of Exemption and Third Party Claim (filed 08/01/2019)</td><td>Vol. 52, 9196–9199</td></tr>
<tr><td colspan="2">Exhibits to Notice of Submission of Disputed Order Denying Claim of Exemption and Third Party Claim</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Plaintiff's Proposed Order Denying Claim of Exemption and Third-Party Claim</td><td>Vol. 52, 9200–9204</td></tr>
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	DOCUMENT DESCRIPTION	LOCATION
2	Bayuk and the Bayuk Trust's proposed Order Denying Claim of Exemption and Third-Party Claim	Vol. 52, 9205–9210
3	July 30, 2019 email evidencing Bayuk, through counsel Jeffrey Hartman, Esq., requesting until noon on July 31, 2019 to provide comments.	Vol. 52, 9211–9212
4	July 31, 2019 email from Teresa M. Pilatowicz, Esq. Bayuk failed to provide comments at noon on July 31, 2019, instead waiting until 1:43 p.m. to send a redline version with proposed changes after multiple follow ups from Plaintiff's counsel on July 31, 2019	Vol. 52, 9213–9219
5	A true and correct copy of the original Order and Bayuk Changes	Vol. 52, 9220–9224
6	A true and correct copy of the redline run by Plaintiff accurately reflecting Bayuk's proposed changes	Vol. 52, 9225–9229
7	Email evidencing that after review of the proposed revisions, Plaintiff advised Bayuk, through counsel, that Plaintiff agree to certain proposed revisions, but the majority of the changes were unacceptable as they did not reflect the Court's findings or evidence before the Court.	Vol. 52, 9230–9236
Objection to Plaintiff's Proposed Order Denying Claim of Exemption and Third Party Claim (filed 08/01/2019)		Vol. 53, 9237–9240

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<tr><th colspan="2"><u>DOCUMENT DESCRIPTION</u></th><th><u>LOCATION</u></th></tr>
<tr><td colspan="2">Exhibits to Objection to Plaintiff's Proposed Order Denying Claim of Exemption and Third-Party Claim</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Plaintiff's Proposed Order Denying Claim of Exemption and Third-Party Claim</td><td>Vol. 53, 9241–9245</td></tr>
<tr><td>2</td><td>Defendant's comments on Findings of Fact</td><td>Vol. 53, 9246–9247</td></tr>
<tr><td>3</td><td>Defendant's Proposed Order Denying Claim of Exemption and Third-Party Claim</td><td>Vol. 53, 9248–9252</td></tr>
<tr><td colspan="2">Minutes of July 22, 2019 hearing on Objection to Claim for Exemption (filed 08/02/2019)</td><td>Vol. 53, 9253</td></tr>
<tr><td colspan="2">Order Denying Claim of Exemption (filed 08/02/2019)</td><td>Vol. 53, 9254–9255</td></tr>
<tr><td colspan="2">Bayuk's Case Appeal Statement (filed 08/05/2019)</td><td>Vol. 53, 9256–9260</td></tr>
<tr><td colspan="2">Bayuk's Notice of Appeal (filed 08/05/2019)</td><td>Vol. 53, 9261–9263</td></tr>
<tr><td colspan="2">Defendants, Superpumper, Inc., Edward Bayuk, Salvatore Morabito; and Snowshoe Petroleum, Inc.'s, Case Appeal Statement (filed 08/05/2019)</td><td>Vol. 53, 9264–9269</td></tr>
<tr><td colspan="2">Defendants, Superpumper, Inc., Edward Bayuk, Salvatore Morabito; and Snowshoe Petroleum, Inc.'s, Notice of Appeal (filed 08/05/2019)</td><td>Vol. 53, 9270–9273</td></tr>
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<tr><th colspan="2"><u>DOCUMENT DESCRIPTION</u></th><th><u>LOCATION</u></th></tr>
<tr><td colspan="2">Exhibits to Defendants, Superpumper, Inc., Edward Bayuk, Salvatore Morabito; and Snowshoe Petroleum, Inc.'s, Notice of Appeal</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Findings of Fact, Conclusions of Law, and Judgment (filed 03/29/2019)</td><td>Vol. 53, 9274–9338</td></tr>
<tr><td>2</td><td>Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment (filed 07/10/2019)</td><td>Vol. 53, 9339–9341</td></tr>
<tr><td>3</td><td>Order Granting in Part and Denying in Part Motion to Retax Costs (filed 07/10/2019)</td><td>Vol. 53, 9342–9345</td></tr>
<tr><td>4</td><td>Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 07/10/2019)</td><td>Vol. 53, 9346–9349</td></tr>
<tr><td colspan="2">Plaintiff's Reply to Defendants' Objection to Plaintiff's Proposed Order Denying Claim of Exemption and Third-Party Claim</td><td>Vol. 53, 9350–9356</td></tr>
<tr><td colspan="2">Order Denying Claim of Exemption and Third-Party Claim (08/09/2019)</td><td>Vol. 53, 9357–9360</td></tr>
<tr><td colspan="2">Notice of Entry of Order Denying Claim of Exemption and Third-Party Claim (filed 08/09/2019)</td><td>Vol. 53, 9361–9364</td></tr>
<tr><td colspan="2">Exhibit to Notice of Entry of Order Denying Claim of Exemption and Third-Party Claim</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Order Denying Claim of Exemption and Third-Party Claim (08/09/2019)</td><td>Vol. 53, 9365–9369</td></tr>
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DOCUMENT DESCRIPTION		**LOCATION**
Notice of Entry of Order Denying Claim of Exemption (filed 08/12/2019)		Vol. 53, 9370–9373
Exhibit to Notice of Entry of Order Denying Claim of Exemption		
Exhibit	**Document Description**	
1	Order Denying Claim of Exemption (08/02/2019)	Vol. 53, 9374–9376
Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration (filed 08/19/2019)		Vol. 54, 9377–9401
Exhibits to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration		
Exhibit	**Document Description**	
1	Order Denying Claim of Exemption and Third Party Claim (filed 08/09/19)	Vol. 54, 9402–9406
2	Spendthrift Trust Amendment to the Edward William Bayuk Living Trust (dated 11/12/05)	Vol. 54, 9407–9447
3	Spendthrift Trust Agreement for the Arcadia Living Trust (dated 10/14/05)	Vol. 54, 9448–9484
4	Fifth Amendment and Restatement of the Trust Agreement for the Arcadia Living Trust (dated 09/30/10)	Vol. 54, 9485–9524
5	P. Morabito's Supplement to NRCP 16.1 Disclosures (dated 03/01/11)	Vol. 54, 9525–9529

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

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<tr><th colspan="2"><u>DOCUMENT DESCRIPTION</u></th><th><u>LOCATION</u></th></tr>
<tr><td colspan="2">Errata to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration (filed 08/20/2019)</td><td>Vol. 57, 9891–9893</td></tr>
<tr><td colspan="2">Plaintiff's Opposition to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 08/30/2019)</td><td>Vol. 57, 9894–9910</td></tr>
<tr><td colspan="2">Errata to Plaintiff's Opposition to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 08/30/2019)</td><td>Vol. 57, 9911–9914</td></tr>
<tr><td colspan="2">Exhibits to Errata to Plaintiff's Opposition to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs Pursuant to NRS 7.085</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Declaration of Gabrielle A. Hamm, Esq.</td><td>Vol. 57, 9915–9918</td></tr>
<tr><td>2</td><td>Plaintiff's Amended NRCP 16.1 Disclosures (February 19, 2016)</td><td>Vol. 57, 9919–9926</td></tr>
<tr><td>3</td><td>Plaintiff's Fourth Supplemental NRCP 16.1 Disclosures (November 15, 2016)</td><td>Vol. 57, 9927–9930</td></tr>
<tr><td>4</td><td>Plaintiff's Fifth Supplemental NRCP 16.1 Disclosures (December 21, 2016)</td><td>Vol. 57, 9931–9934</td></tr>
<tr><td>5</td><td>Plaintiff's Sixth Supplemental NRCP 16.1 Disclosures (March 20, 2017)</td><td>Vol. 57, 9935–9938</td></tr>
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<tr><td colspan="2">Reply in Support of Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs (filed 09/04/2019)</td><td>Vol. 57, 9939–9951</td></tr>
<tr><td colspan="2">Exhibits to Reply in Support of Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>19</td><td>Notice of Submission of Disputed Order Denying Claim of Exemption and Third Party Claim (filed 08/01/19)</td><td>Vol. 57, 9952–9993</td></tr>
<tr><td>20</td><td>Notice of Submission of Disputed Order Denying Claim of Exemption and Third Party Claim (filed 08/01/19)</td><td>Vol. 57, 9994–10010</td></tr>
<tr><td colspan="2">Order Denying Defendants’ Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration and Denying Plaintiff's Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 11/08/2019)</td><td>Vol. 57, 10011–10019</td></tr>
<tr><td colspan="2">Bayuk’s Case Appeal Statement (filed 12/06/2019)</td><td>Vol. 57, 10020–10026</td></tr>
<tr><td colspan="2">Bayuk’s Notice of Appeal (filed 12/06/2019)</td><td>Vol. 57, 10027–10030</td></tr>
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<tr><th colspan="2"><u>DOCUMENT DESCRIPTION</u></th><th><u>LOCATION</u></th></tr>
<tr><td colspan="2">Exhibits to Bayuk’s Notice of Appeal</td><td></td></tr>
<tr><td>Exhibit</td><td>Document Description</td><td></td></tr>
<tr><td>1</td><td>Order Denying [Morabito’s] Claim of Exemption (filed 08/02/19)</td><td>Vol. 57, 10031–10033</td></tr>
<tr><td>2</td><td>Order Denying [Bayuk’s] Claim of Exemption and Third Party Claim (filed 08/09/19)</td><td>Vol. 57, 10034–10038</td></tr>
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<tr><td>A</td><td>Order Denying Defendants’ Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration and Denying Plaintiff’s Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 11/08/19)</td><td>Vol. 57, 10053–10062</td></tr>
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saw this in effect in November of 2010. You had a restatement of the amount of value that would be conferred to Paul Morabito as a result of his transfer of 80 percent of the equity of Superpumper to Sam and Ed. And they said, Well, we'll restate the amount so that the obligations from Paul Morabito will now become the obligations of Snowshoe.

And what that does as a practical matter is it strips the value from Superpumper where Paul Morabito gets a credit for the value that he took out of Superpumper with the Compass loan and then it's -- and then he double-dips with the provision of these new note obligations on the books reducing the value and not having anything tangible that can go to the Herbsts.

THE COURT: This is probably a good place to take a break.

MS. TURNER: Okay.

THE COURT: So we'll take a short recess now. Court's in recess.

(Recess taken.)

THE COURT: Thank you. Please be seated.

Counsel, you may proceed.

MS. TURNER: Your Honor, I know we're going through this in painstaking detail, but when our burden is clear and convincing evidence, I do think it's important to take the time on these factors and I appreciate your patience. Hopefully, you got a shot of coffee during the break.

When we left off, we were talking about the valuation of the Superpumper equity and specifically Mr. McGovern's valuation of the insider receivables and inclusion of those receivables as part of his $13,050,000 opinion of value. Gursey Schneider said these are collectable. These are collectable receivables in 2009. Paul Morabito verified that signing the letter and he had certified his financials in 2009 and 2010 showing that he was capable of paying those receivables, and then you had the merger in conjunction with the transfer on September 30th, 2010. And despite the testimony that the result of that merger was the receivables were zeroed out by the operation of that transaction, those insider receivables were restated and reflected on the 2010 financials.

Now, Mr. McGovern was criticized by Ms. Salazar for the discount rate that he used in

his valuation. It was the same rate, or substantially the same rate, 14.2 percent, as that used by Spencer Cavalier of Matrix. Although Spencer called it an "LOI rate," it was essentially a discount rate. He described the risk factors that he considered in determining that rate. It is no coincidence that Spencer Cavalier of Matrix and James McGovern came to the same ultimate rate of discount applied as well as the ultimate conclusion of the value of the -- pardon me -- of the operating assets at roughly $6.5 million. That's what experienced business evaluators do, is you would expect independent people who were real evaluators with extensive appearance, they get to the same place.

The outlier is Ms. Salazar with her criticism. She said they shouldn't have used that 14, 14.2 percent discount rate. It should have been -- I believe it was 22 percent. It was substantially more than 20 percent. When on cross-examination we asked, Why? Why would you use that higher rate, she kept referring to risk factors. Risk factors. You have to have specific company risk factors in addition to the general

market factors, except when you read Mr. McGovern's report. And you can look at his testimony and he describes the risk factors that he looked at. He not only looked at the market, the specific industry, but he looked at small companies and he looked at this being a sale of 80 percent as opposed to 100 percent of the interest in Superpumper and whether or not that was a sufficient controlling interest. He looked at the specific company and there were at least three risk factors outlined in the mechanic -- there was -- you input numbers and there's a calculator. You heard testimony about the printouts from that calculation specifically referred to risk factors.

Ms. Salazar said, I'm not familiar with how that process works, that mechanical, you input numbers and they do the calculator, but she did rely on the hard copy of this same Duff. It was called "the Duff report." She couldn't substantiate 22 percent as opposed to a different number for use as the discount rate. She said she added five points for the specific company risk factors that she thought Mr. McGovern and Mr. Cavalier missed. When asked why that number she relied merely on,

Well, I have discretion and I thought that was appropriate. No real basis was explained.

At the end of Ms. Salazar's cross-examination I think it became clear she was criticizing without any actual basis for concluding that there was error by Mr. Cavalier in his analysis or Mr. McGovern in his and, of course, she said that there should be no inclusion of the 6.5 million in non-operating assets or insider receivables because there were no written notes that she saw. To support those insider receivables, not only is that inconsistent with the auditor saying these are fully collectable and Paul Morabito verifying the same, but in September 2010 you had the $939,000 note from Paul Morabito, written note, and you had the subsequent restated notes from Sam Morabito and so that criticism is a hollow one.

In addition to Mr. McGovern's valuation in September of 2010, you have what the defendants agreed to with Paul Morabito and at the time of the transaction there was an agreement where Sam, Ed and Paul said, All right, the new company Snowshoe Petroleum, a New York company, will pay you $1 million for your interest in Superpumper, Paul, and

that agreement was restated to add a $1.4 million promissory note -- $1,462,000 promissory note and that was further restated in early 2011 with the successor notes and ultimately the only note payable to Paul Morabito was for $492,000.

Underlying the $2.5 million, we'll call it, the approximately $2.5 million that is reflected by the $1 million to be paid in September 2010 at the time of closing and then the $1,462,000 note from November 2010 is the analysis of Christian Lovelace, counsel for defendants and Paul Morabito, concurrent counsel. We have at Exhibit 236 the analysis of Christian Lovelace, not a business evaluator, a partner in the law firm representing Paul Morabito as the seller and the defendants, Ed Bayuk, Sam Morabito and Snowshoe Petroleum as the buyer. And we have some real gymnastics here to get to the $2.5 million. You have the Matrix-appraised value from August of 2010 at $6,484,000 less the Compass term loan of $1.6 million, which is, essentially, the $3 million less the $939,000 that was paid to Paul Morabito. This deduction of the $1,682,000 ignores Sam Morabito and Ed Bayuk's recapitalization of Superpumper on September 30th with payment of

$659,000 each. And then you have net value of 4.8 million, according to Mr. Lovelace, with a risk discount of 35 percent applied. And that risk discount of 35 percent has no analysis whatsoever to accompany it, save and except Mr. Vacco testified briefly that there was a risk discount that would apply because of the Compass defaults and you can't ignore that there was a default as a result of this transaction, not only with Compass, but the leases.

Ultimately Paul Morabito reaffirmed his guarantee of the leases, the Compass issue was resolved and, in fact, you heard testimony from Mr. Kraus that Compass was prepared to refinance Superpumper as soon as they got audited financials from 2010. There is no legitimate basis for a $2.5 million valuation as of the date of transfer as confirmed by the defendants themselves. Sam Morabito and Ed Bayuk in February of 2011 estimated their respective 50 percent interests in Snowshoe Petroleum, Inc., the 100 percent owner of Superpumper -- this is Exhibit 126 -- and each of them said that 50 percent interest would be worth four and a half million, that the total value was nine, and that was a certification to the auditors

of Superpumper. At the same time that they certified the value was $9 million on the heels in April of 2011, Snowshoe Petroleum, Ed Bayuk signing on behalf of Snowshoe Petroleum, represented that the ownership interest of Snowshoe Petroleum, Inc. was worth $10 million, valued at $10 million. That was Exhibit 131. And this was the Nella letter of intent that was communicated to third-party Nella where there was a valuation of $10 million and you saw related emails where this was a transaction that was -- that involved Paul Morabito, but ultimately Ed Bayuk was included on the communications and he is the signer of the communication to the third party.

And, your Honor, we noted in our findings and conclusions -- and I'll note it again -- I do not envy the Court who is being asked by the defendants to believe them when they say that the value is X amount and at the same time they are communicating to third parties a different amount. Ed Bayuk and Sam Morabito testified you can't believe what Paul Morabito says to third parties and, indeed, there was a fraud judgment against him for that very issue. When he communicates with

third parties, he is not truthful. He is not trustworthy. Well, there is a story about the purpose of these transactions and the value conferred to say that the debtor is not trustworthy in certain respects but is trustworthy in others is untenable and anything that Paul Morabito says that is not contrary to his interest should be disregarded.

I'm not saying that the value of Superpumper was $30 million or $20 million, as Paul Morabito said in April and May -- pardon me -- in May of 2010. But certainly the defendants when they are making the representations in April of April 2011 and to the auditors themselves when they're certifying the value themselves in February of 2011, those values are -- should be considered and should be considered to the detriment of the defendants.

There was testimony this letter of intent was prepared in conjunction with Paul Morabito so it should be disregarded. I agree Paul Morabito's statements should be disregarded, except Ed Bayuk saw it, signed it, and provided it to a third party, and he has to himself be responsible for his own

conduct whether in conjunction with Paul Morabito or not. At the end of the day with the varying descriptions of the value of the Superpumper equity, whether it's $9 million, $10 million, $6.5 million, it is certainly not the $2.5 million that was ascribed by the defendants and Paul Morabito in conjunction with Mr. Lovelace. It was not $2.5 million. And I submit to you that Mr. McGovern's $13 million valuation that includes, not only the operating assets, but the insider receivables, is more in line with what the actual value was at the time of the transfer.

Now, to just summarize the Superpumper transfers, we had, Step 1, removing the equity from Superpumper through the Compass loan distribution. You had $3 million in loan proceeds in the company that were distributed out September 14th, the day after the oral ruling. Assets -- or Raffles was purportedly removed as an asset from CWC with a value of $2,234,175 and that was the explanation for the payments of $355,000 and $420,000 to the defendants. Step 3, merge CWC with Superpumper to eliminate the non-operating assets from Superpumper. Step 4, Paul Morabito sells his interest to Sam and

Ed Bayuk through Snowshoe Petroleum, a New York company. And then, finally, we have a cash payment of $1,035,094, which was reduced to $542,000 -- I'll get to the reason for that -- and you have a sham note of $423,213. That was the value, the value purportedly conferred to Paul Morabito in exchange for his 80 percent ownership in Superpumper, was a cash payment of $1,035,094 that there's no question was made in October of 2010. However, Paul Morabito in July of 2013 at Exhibit 107 in the declaration prepared in conjunction with his counsel, including Mr. Gilmore who is representing the defendants, said at paragraph 10, "I sold my interest in the company Consolidated Western Corporation for cash payments of approximately $542,000 and a note of approximately $933,000.694, which I had received partial payments on and the principal balance has been subsequently canceled based on a post-closing reevaluation of the significant decrease in the fair market value of the business."

There was no evidence of post-closing reevaluation, save and except when there was a restatement of the one million and some-odd-thousand dollar note to the successor notes and what Paul

Morabito is saying under penalty of perjury to the bankruptcy court is he only received $542,000. And then there's the remaining note $423,213 that was the successor note that remained, and Mr. Morabito, Paul Morabito said it was canceled. Sam Morabito testified it was paid and that it was paid when he paid Vacco $560,000 in November of 2011. As he was on the stand, I asked him to look for anything in the financials, the income tax return, the financial statements to indicate that the loan had been satisfied. There was certainly no evidence presented in the form of a written satisfaction or any email writing, text, anything to indicate that the payment from Sam Morabito to the Lippes law firm of $560,000 in November of 2011 was intended to satisfy the obligation under the $423,000 note or that Snowshoe Petroleum reimbursed Sam Morabito, gave him a credit on his capital account or anything. We looked at the K-1s for 2011.

They were exactly the same for Ed Bayuk and Sam Morabito, contradicting Sam Morabito's testimony that when he paid the Lippes law firm his counsel, as well as Paul Morabito, in November of 2011, that that should be credited to Snowshoe Petroleum's

payment of the $423,000 note obligation. In addition, $560,000 to the Lippes law firm, that amount does not correlate in any way, shape or form with the amount due and owing under the $423,000 note. When we looked at the communication that resulted in the payment of $560,000 from Sam Morabito in November of 2011 at Exhibit 140, we saw Dennis Vacco, Paul Morabito and Sam Morabito communicating about the need to send $560,000 from Sam to the Lippes firm. Nothing whatsoever about the purpose being to satisfy this note obligation. And it wasn't a Sam Morabito note obligation. It was a Snowshoe Petroleum obligation. So we would expect there to be some reflection on Sam Morabito's capital account or otherwise in the financials of Snowshoe Petroleum if the payment had been made on behalf of Snowshoe Petroleum. It wasn't there.

Now, Sam Morabito was adamant in his testimony, I didn't pay anything for the benefit of Paul Morabito. I don't support his lifestyle. I don't make payments to him. The very first thing we heard from Paul Morabito in his testimony -- again for whatever that's worth -- is, I've gotten money from my brother since I was three years old. He

supports me in the lifestyle that I have. He and Ed Bayuk. He was very upfront on the fact that these two give him money whenever he wants it for whatever he needs it for.

And there's documentary evidence to that effect as well. In Exhibit 138 you have Paul Morabito communicating to Dennis Vacco, "Dennis, tell Sam he has to wire you a $1 million by the 21st." Dennis Vacco responds, "Yes." This was the way they conducted their internal affairs, was Ed Bayuk, Sam Morabito, they paid at Paul's insistence as he directed. Again, supporting somebody's lifestyle, supporting a debtor's lifestyle does not benefit a creditor and it is not value to be considered by this Court in determining whether or not there was reasonably equivalent value exchanged for the transfer of Paul Morabito's interest in Superpumper. In exchange for the $13,050,000 value of Superpumper, which 80 percent of that is the $10,440,000, according to Paul Morabito it was in exchange for $542,000. Now, we've gone through and seen how much of the assets Paul Morabito had prior to the oral ruling and how much had been transferred. One thing he kept was the Reno home on

Panorama and Edward transferred his 30 percent interest in the Panorama house to Paul Morabito as part of these transfers. It was the swap for the interest in the Laguna properties. And when I came into this case one of the things I thought about is why? Why keep the Reno house? That's kind of inconsistent with moving everything else out of Nevada and moving everything else away from the Herbsts.

Well, in September of 2010 Paul Morabito describes exactly why he kept the Panorama house. And that was in conjunction with discussions of the Nevada exemptions to execution, which Paul Morabito describes and he certainly understood. He says, "I should declare my residence with Edward in Laguna Beach ASAP. I don't care about the $550,000 Nevada homestead exemption. I want to protect my household assets," which we saw the documents and the testimony that all the personal property in the Panorama house were sold to Ed Bayuk. "My Nevada house has a $1.1-million mortgage and I'm going to offer Bank of America a $2 million second for my line of credit." He's going to use equity he thought he had in the Reno house to pay Bank of

America. Now, ultimately he didn't have sufficient equity, which is why the Glenneyre property was used for that deed of trust, but he had the purpose of levering it up and using it to pay Bank of America.

Now, a summary of the assets for collection before and after the transfers certainly illustrate the fact there was no reasonably equivalent exchange of value. You had the 80 percent interest in Superpumper valued at $10,440,000 excluding the Raffles asset. That's not considering that. In exchange for the $1 million in cash reduced to $542,000 and the sham successor note that was never paid. 50 percent interest in Baruk LLC in exchange for a $1,617,000 sham Baruk note and that was the Baruk note that was assigned to the Canadian Woodland Heights company and then the payor denied the existence of the assignment and instead tried to apply various payments he had made for the benefit of his Los Olivos property and other amounts to support Paul Morabito's lifestyle. Purported satisfaction of that note, that is not value conferred for the purpose of determining reasonably equivalent value because it is not value to the creditor.

Ed had a 75 percent in the El Camino property, 50 percent in the Los Olivos property, and that was the swap for the 70 percent interest in -- that's actually 30 percent. Paul Morabito resulted in 100 percent interest in the Panorama property which only had a value of $971,136 plus he did receive cash of $60,000. So you had $14 million in assets at issue here. That doesn't include the cash, Watch My Block, and the substantial other assets that were transferred. But here these subject transfers, the Baruk Properties LLC interest, Superpumper, and then the residence swap, you had 14 million in value with Paul Morabito before the transfer, subsequent to the transfer of $1.5 million -- $1,573,253. That is not reasonably equivalent value.

Now, with respect to the sham notes, there's a Ninth Circuit case that's been cited to throughout the circuit. The Sateriale case that describes when a note is sham. "A promise is illusory when it imposes an actual enforceable obligation -- that should be "no actual enforceable obligation at all on the promisor, who says, in effect, I will if I want to." That is the

circumstance that we have here. With the notes that were executed to purportedly provide value to Paul Morabito, the promise was illusory because whether it was Snowshoe Petroleum or Ed Bayuk, you had them take the position I will if I want to. There was not one payment that matched the schedule of the notes, not one payment with a memo or a financial statement that reflected satisfaction of the note.

And, instead, it was an I-will-if-I-want-to and, effectively, Mr. Bayuk was supporting Mr. Morabito's lifestyle. Sam Morabito was paying the counsel fees for Paul Morabito and they were ascribing that value as purported satisfaction of the notes. Unreasonable equivalence, the bankruptcy courts deal with reasonable equivalence and these issues of fraudulent transfer on a more frequent basis than the Nevada courts, at least, as reflected in the Nevada Supreme Court case law and so just looking at other courts including the bankruptcy courts that applied their versions of the Uniform Fraudulent Transfer Act, they have defined what reasonable equivalence factors that are relevant to determining reasonable equivalence and that includes whether value of what was transferred is equal to

the value of what was received. I think that's the common sense application that we have argued here, the market value of what was transferred and received. That would be the opinions of the experts. Whether the transaction took place at arm's length, that is a factor that is clear by the evidence as earlier discussed. No transaction here was at arm's length. There was no listing, sale, exposure to the market, marketing that you would see in an arm's-length transaction. There was no negotiation, no representation by separate counsel. These were not arm's-length transactions. These were transactions with insiders.

And you must have a good-faith transferee as part of the analysis on reasonable equivalence and, of course, as earlier indicated, "Reasonable equivalence must be determined from the standpoint of the creditor. If the transferor leave creditors in substantially the same position then consideration is reasonably equivalent."

Transferring a right to payment to an entity in Canada is not reasonably equivalent because the creditor here is hindered, delayed in collection against that asset, if there is even a

capability of collecting on that asset. And here when you have the payor saying that the obligation was satisfied at the same time the payee is saying that the obligation was transferred, it would be impossible to find reasonable equivalence under the definition I just provided.

Again, it was NRS 112.250 -- I think I said "150" earlier. It's my error -- that says Nevada Chapter 112 must be complied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it. It's important when we do not have law that we look to the other states who are construing and enforcing the act. The act's purpose is to protect creditors. The act's purpose is to, one, protect the defendant so that if a debtor actually defrauds them and transfers an asset beyond their reach, the creditor is protected. At the same time you have protection for good-faith transferees, so Skip Avansino, who has no relationship with Paul Morabito, when he purchases the Panorama house and he provides value, he negotiates and provides value and he's not an insider, he has an arm's-length relationship, the

creditor doesn't have any redress with Mr. Avansino. He's protected. Insiders such as the defendants who do not have good-faith intentions, they do not have that same defense. And what do I mean by "they do not have good faith"? That is an objective standard.

Once the Court finds that the plaintiff has met its burden on showing that the badges of fraud, the factors outlined in the SportsCo case and NRS 112.180, we've met our burden, then the burden shifts to the defendants and they have an affirmative burden to say, despite that, they met their burden and showed actual fraud and that these -- or constructive fraud and these transactions should be avoided or are voidable, we have a good-faith defense; that is, that they took in good faith and for reasonably equivalent value.

We've already talked about the failure to show reasonable equivalent value. "Good faith cannot be proved when there is some knowing participation by the transferee in a transaction that directs assets to transferees at the expense of creditor recoveries." That's the Hall v. World Savings and Loan Association case from Arizona.

"Actual knowledge of the debtor's fraud is not required so long as the transferee has knowledge of sufficient facts to put him on inquiry notice that the transfer might be voidable for fraud he does not take in good faith." And there's multiple cases we cite to in our proposed findings and conclusions on that, that point.

When there is a requirement to show objective good faith, these insiders who are the defendants cannot meet that burden, not in these circumstances. One, counsel who represented Paul Morabito in these transactions where he was intentionally delaying, hindering or preventing collection from the Herbst parties was the same counsel representing the defendants. You had concurrent representation by the Vacco firm with respect to the transfers and subsequent to those transfers. And, your Honor, at Exhibit 294 you have the Lippes law firm billings that went to Paul Morabito, that went to Paul Morabito for September, October 2010, and Sam Morabito said, But those are Paul's obligations and the Vacco firm was acting on behalf of Paul Morabito trying to distance himself from those transactions contemplated and effectuated

as described in the billing records of the Vacco firm, as otherwise described in the email communications. He was trying to distance himself but at the same time he and Ed Bayuk acknowledged and participated in the transactions to the benefit of Paul Morabito. They didn't negotiate these agreements. They didn't have their own separate counsel. They lock, stock and barrel did what Paul Morabito and the Lippes firm directed them to do. You saw Sam Morabito executing documents to effectuate the Snowshoe Petroleum, establishing that entity, and facilitating the transfer of Paul Morabito's interest in CWC to Snowshoe Petroleum. Sam Morabito executed documents, Ed Bayuk executed documents, and at all times the Vacco firm was acting with respect to both sides. How can -- not only was there inquiry notice on the purpose of these transfers with respect to the defendants as a result of the way that these transactions were effectuated with the Lippes firm, but they had actual notice. Paul Morabito's intentions were imputed through this concurrent counsel.

So they had inquiry notice as well as actual notice that would defeat objective good

faith. Now, there can be no question from Paul Morabito's own statements the timing of the transaction and all the other badges of fraud that the ultimate goal of these transactions that were in the days following the oral ruling was to hinder, delay and defraud the collection activities of the Herbsts.

You had on September 20th, 2010, in an email from Paul Morabito to counsel, Dennis Vacco, as well as Sujatha Yalamanchili -- sorry to the court reporter -- Exhibit 29, "The Herbsts no longer have home court, good ol' boy advantage." That was Paul Morabito's own words, "The Herbsts no longer have home court, go ol' boy advantage," and that was on the heels of describing Judge Adams's oral ruling and the transfers that they were planning to follow. That was the goal and that was the successful goal. Because, in fact, the Herbsts were hindered, delayed, and prevented as a result from their collection on the judgment entered eventually as a result of these transfers.

Now, Paul Morabito on September 20th says, I have no doubt it will be challenged in court and they may try to come up with their own

appraisals but in the end the underlying selling for value will be allowed." Again, Paul Morabito taking the position that, so long as some value is promised or conferred or there's some valuation that was done, that he was justified or would be justified in these transactions. Reasonable equivalent value is but one badge of fraud and it is no defense without good faith, no defense without good faith and if under the present circumstances the defendants can't get there. When Judge Adams on September 13th said "There's simplicity which lies beyond complexity," that is so true in this case. It was in the underlying Herbst litigation, apparently, that's why he cited to it, but it's what we have here. We had sophisticated counsel and parties doing a multitude of transfers with valuations being done and they are coming to court and saying as a result of that sophistication and the fact that there were valuations that we could not have fraudulent transfer.

But at the end of the day their story doesn't jibe. It doesn't jibe because of the timing of the transactions. On the heels of the oral ruling, that was the only time that they took action

to transfer Paul Morabito's assets away from his title and this story that it was so that the assets that remained with Paul could stand alone and be used by the Herbsts, that doesn't jibe with Paul Morabito transferring that $6 million. It doesn't. $6 million was transferred the day after the judgment. That is inconsistent with that story.

The Watch My Block, everything was moved to New York, to Canada, to California, outside of Nevada so that the Herbst parties when a judgment was ultimately entered into October of 2010 there was nothing to attach here in Nevada except for the Panorama house. Ultimately they did collect from the sale to Skip Avansino. It wasn't much, because it had a $2.5 million sale price, not the $4.3 million value. But that was despite Paul Morabito's intention to lever it up so that the Herbst parties could not even get that. He had the intention to lever it up. And that was the only reason he kept that in Nevada. Everything else was gone by the time a written judgment as entered.

The oral ruling has been called "the oral judgment" in this case. It was no judgment at all that could be executed upon. There was nothing that

the Herbst parties could have done prior to the ultimate judgment. And you had written findings, conclusions and judgment following the actual damages portion of the trial in October 2010, the final judgment wasn't entered until August 2011.

And we know that as a result of the transfers in September of 2010 the Herbst parties have an unsatisfied judgment. There's been nothing else. Ms. Salazar does the analysis of Paul Morabito's assets and says, but for the judgment, then Paul Morabito would be solvent. Because of the judgment, he's not. Now, if we compare the financial statements from 2010 to Michelle Salazar's report in 2011, other than the judgment, there's no other change in Paul Morabito's status except for the September 2010 transfers that resulted in nothing left for the Herbsts to attach except for the interest in the Panorama house.

Now, Ed and Sam testified, But we didn't know what Paul did, we didn't know what his purpose was. Our purpose was just to stand alone and be free from the Herbsts because we had been exonerated. Paul Morabito's own words in November 16th, 2010, to Dennis Vacco, "Edward has an

intense need to protect me as well as himself and things that get done without his input or approval that affects both of us drive him nuts."

It is to say that Ed Bayuk is the most central person in Paul Morabito's life at the time of the transfers and subsequent and he didn't know that these transfers were being done to avoid the Herbsts, that's not credible, not given the undisputed evidence that Ed Bayuk and Paul Morabito had an ongoing very close relationship, not only at the time of transfers, but subsequent.

So what are the remedies to Plaintiff for fraudulent transfer? For constructive or actual fraud, which we're asking for a determination of both, avoidance of the transfer is a statutory remedy, avoidance of the transfer to the extent necessary to satisfy the creditor's claim. In addition to that, an injunction against further disposition of the asset transferred or of other property any other relief the circumstances may require.

In addition, as a separate remedy for actual fraud, judgment against the transferee of the asset or for the person for whose benefit the

transfer was made for the value of the asset transferred at the time of the transfer subject to adjustment as the equities may require." Those are the plaintiff's remedies.

"The Uniform Fraudulent Transfer Act is intended to prevent debtors from defrauding creditors by moving assets out of reach. The focus in crafting the remedy is to ensure the satisfaction of a creditor's claim when the elements of fraudulent transfer are proven." Here avoidance is insufficient. Avoidance is an attribute of the transfer, not the party, and so the transferred asset goes back to the plaintiff -- pardon me -- it does not get conferred to Plaintiff. It goes back to Paul Morabito.

Now, we're in a special circumstance here because the plaintiff is now the trustee of the bankruptcy estate for Paul Morabito. So if an asset -- or a transfer is avoided, it goes back to Paul Morabito in the bankruptcy estate. It does not come to the Herbsts or any other creditor but for Judge Zive making a distribution there and it would be subject to execution by the Herbsts or subject to execution by the other creditors. It would be in a

bankruptcy context. So we are in a unique position here. It is an independent remedy avoidance for money damages.

We had testimony from Yon Friedrick that on the day after his deposition he took a subsequent transfer of the equity in Superpumper so an avoidance of the transfer of Paul Morabito's interest to Snowshoe Petroleum would not be enough. It would not be enough. The plaintiff would then have to sue Yon Friedrick to avoid as a subsequent transferee with knowledge of the claim and so we have asked with respect to Snowshoe, that transfer of Paul Morabito's 80 percent equity interest, for avoidance of Paul Morabito's transfer, which means the plaintiff would then have to have a subsequent action, as well as money damages, and specifically avoid the transfer of 80 percent and award the plaintiff the value of 80 percent equity in Superpumper, $10,440,000, minus the $542,000 that Paul Morabito has acknowledged as value conferred to him, which is a total damages amount of $9,898,000. We outlined this in the findings of fact and conclusions of law.

Then with respect to the Bayuk Properties

transfer -- Baruk Properties -- sorry -- where you had Paul Morabito transferring his 50 percent interest in Baruk Properties LLC, the ownership was subsequently transferred to Snowshoe Properties LLC, a New York company, and then we learned for the first time from Mr. Bayuk in his testimony he's subsequently transferred Snowshoe Properties, the New York company, to a Delaware company, so we have subsequent transfer again.

Mary Fleming was also subsequently transferred out of Snowshoe Properties to the Ed Bayuk trust. Ultimately Ed Bayuk and Bayuk trust were the beneficiaries of the transfer, so we ask for avoidance of the transfer of Paul Morabito's 50 percent interest in Baruk Properties LLC to the Baruk trust as well as an award to the plaintiff of 50 percent of Baruk Properties LLC, which is a value of $1,654,550. That's the amount outlined in the Baruk note, the $1,617,000 plus 50 percent of the value of the Clayton property. It represents a 50 percent interest to the Clayton property that was not included in the $1,617,000 note.

With respect to the Laguna properties, we ask for avoidance of the transfer of Paul Morabito's

interest in the Laguna properties as well as an award to Plaintiff for the value of Paul Morabito's interest in the Laguna properties subject to credit for the amount of value conferred to Paul Morabito in exchange, which is 30 percent of $2 million, the 30 percent of the $2 million fair market value of Panorama as well as the $60,117. That totals $248,601.95.

In addition to those avoidances as well as monetary awards that we're asking for --

THE COURT: You're asking for those alternatively, correct?

MS. TURNER: We are not. So they're independent remedies but they're subject to equity. So that's why we're asking for -- and I'll use the example of the value that was conferred in exchange would be credited against the monetary amount and on the avoidance as just how it's applied. If there is collection as a result of avoidance, that would be credited against a judgment against the defendants.

THE COURT: Well, just look at the Laguna properties. You're asking for the avoidance and you're also asking for $248,601 in damages --

MS. TURNER: Right.

THE COURT: -- monetary damages.

MS. TURNER: Right.

THE COURT: Does that mean, in effect, that the avoidance could be resolved with the payment of $248,601?

MS. TURNER: Yes. We would only be entitled to --

THE COURT: One?

MS. TURNER: Yes.

THE COURT: Okay. That's where I thought we were going.

MS. TURNER: Yes. We would only be entitled to the amount of the damages awarded. The avoidance just assists in getting us there. Because if we collect as a result of the avoidance, that's offset. Yes, we're not trying to double dip here.

In addition to those transfers being avoided, though, to facilitate collection of the monetary damages, we also have the cash transferred. And this is part of the subject action, the $355,000 and the $420,000 that were paid to Sam and Ed Bayuk in September 2010 purportedly in exchange for the Raffles asset. The Raffles asset was not valued as part of the Superpumper transfer, not in any of the

valuations, not by McGovern, Matrix, and not by Mr. Lovelace. There's email that outlines the fact it was not considered an asset of CWC at the time of the transfer for whatever reason. Because it was on the financial statement as an asset of Paul Morabito in May of 2010, May of 2009, prior to September 2010, we don't think that it was a CWC asset; however, it was certificated in the name of CWC. In either event, the value, if it had been a purchase, that the cash paid should come to the creditor. If it was just cash transferred without any exchange of value, which I think the evidence more strongly supports that, since there was not a document, a piece of paper, anything to reflect the $750,000 paid in September 2010 was, in fact, in exchange for the Raffles asset, we ask for the damages equal to the value transferred. There is no offset.

In addition to the monetary damages and the avoidance, given that there have been post-litigation transfers, subsequent transfers and obligations incurred by Mr. Bayuk in particular, we'd ask for a permanent injunction as permitted under NRS Section 112.210, a permanent injunction

restraining Mr. Bayuk and the Bayuk trust from transferring their interests or incurring an obligation secured by their assets without first obtaining a determination of reasonably equivalent value by stipulation or further court order. On the subject of avoidance -- properties. So the Laguna properties and those interests that were transferred as a result of the Baruk Properties transfer, we ask that any further transfers being restrained and finally post-judgment and prejudgment interest, we've asked for that.

We believe the evidence is clear and convincing to support the badges of fraud and finding of actual fraud and certainly constructive fraud. Once a judgment is entered -- and you do have broad, broad, discretion, equities are applied, but this is our suggestion of what a judgment should look like -- then, the value conferred as a result of the judgment benefits the creditors of Paul Morabito. When this case commenced the Herbst parties were the plaintiffs. They were the only creditors that pursued these claims at that time. And certainly the transfers were to address the Herbst parties because it was on the heels of the

oral ruling and I believe everybody has acknowledged that on the defense side that it was in response to the oral ruling that these transfers were made. But a judgment would be to the benefit of all creditors. At Exhibit 303 is the claims register for the Paul Morabito bankruptcy estate. As Mr. Leonard indicated, there is no bar date so additional creditors can file claims. But as of the time of trial the claims register, not only included the Herbst claim under the confessed judgment, but also you have four others inclusive of substantial obligations for taxes, the Franchise Tax Board out of California, and other creditors, insurance companies and the like. So it would benefit everybody at that point in time.

And, your Honor, with that, unless you have any questions, I will pass to Mr. Gilmore.

THE COURT: Okay. No questions. But I think it's time for lunch. So we will come back at 1:30 and, Mr. Gilmore, it will be your turn at that time.

(Lunch recess taken at 12:12 p.m.)

THE COURT: Thank you. Please be seated. Mr. Gilmore.

MR. GILMORE: Thank you, your Honor. Your Honor, before I begin, I would like to give my heartfelt thanks to the Court's staff for the professionalism they have shown throughout this trial and they quite always show. And congratulations to counsel for the professionalism with which they put on this case today and, of course, thank you, your Honor, for your attention and putting up with us during this two weeks of difficulty.

In my opening statement I explained that the plaintiff's case would be built upon the quintessential elements of the fraudulent transfer, the fraudulent transfer with the facts that would be most likely to accompany the fraudulent transfer statute or, as we've been calling it, the UFTA. And I think my prediction was true. They, Plaintiff, presented their case by the UFTA playbook going through by measuring the badges of fraud that are spelled out in the statute and using the traditional and classical ways that a bankruptcy practice might prove fraudulent transfer against an adversary defendant.

With all due respect to the plaintiff's

case, I think they completely got it wrong and here's why: No. 1, as I said in my opening statement, the classic fraudulent transfer involves a situation where the transferor's intent is to divest himself or herself of their assets and the transferee then receives the asset without any reasonable basis for the transferee's receipt of the asset or desire to receive the asset or rationale for receiving it. This case immediately sets apart the traditional facts in an UFTA case from this case. The facts are undisputed in this regard. Mr. Bayuk, Mr. Sam Morabito, and Paul Morabito were not strangers. They were co-owners of the assets in question. That differentiates them right away from the classic transferee. As I said in my opening statement, the Ferrari in the garage. Hey, Uncle, will you take my Ferrari so my creditors won't get it. We can title it in your name but I'll be driving it and I'll keep the keys in my pocket. The uncle cannot explain why he's driving the nephew's Ferrari. That is a quintessential element. In this case that element is not present.

The testimony was undisputed. Mr. Bayuk and Mr. Sam Morabito each had their own individual

reasons why they chose to purchase and not receive gratuitously and not to purchase the assets that they had no previous interest in, the assets that were previously owned, and that is an important distinction.

One of the badges of fraud that typically carries the day in a traditional UFTA case in the bankruptcy court is the timing of the transfers relative to the judgment. In this case I would submit that that particular badge is not relevant because it is stipulated that the impetus behind the transfer was the judgment. There was no reason for Sam and Ed to buy the assets they already co-owned with Paul except for the judgment.

So the real question is, Why did the transfers occur? And I would submit, your Honor, that the badges of fraud as set forth in the UFTA don't get us to why these transfers occurred. Were the transfers purchased by the defendants for the purpose of delaying, defrauding or hindering the Herbst creditors or was there some other legitimate purpose? In this case the evidence showed and the testimony from all of the witnesses with knowledge was that defendants had good cause for separating

their assets. The testimony was they could have the option of doing nothing or they had the option of doing something.

And I think the evidence in this case, your Honor, showed that doing nothing certainly would have embroiled the defendants in the Paul Morabito v. Jerry Herbst and Company -- what I can only characterize as fight to the death, and I think that this trial evidenced that. This trial evidenced the ferocity with which the Herbsts intended to bring Mr. Morabito down and anybody associated with him. This case was not about Mr. Bayuk and Sam Morabito. This case was clearly about Paul Morabito and the desire that the trustee has, the desire that the people to whom he answers, primarily the Herbst parties, what their intention was.

What did Mr. Leonard say? Well, No. 1, he testified that he was handpicked by the Herbsts. It's undisputed. It's undisputed that he met with the Herbsts after already deciding to take the case against my clients. Of course, he admitted he met with them but he conveniently forgot everything they talked about but, assuredly, they talked about nothing other than prosecution of this case. It's

undisputed that he was appointed with the single vote of the Herbsts. This was not, as the plaintiffs are now suggesting, for the benefit of the creditors at large. That's not the case. There was one creditor and there was one creditor that elected the trustee and there was one creditor that essentially put Mr. Morabito in involuntary bankruptcy. Mr. Leonard testified that, although he knew nothing about the facts of this case, everything he learned about the facts of this case he learned from Mr. Murtha, which is another one of his lawyers being paid for by the Herbsts. Before he knew a single relevant fact of this case, he decided to take the case and he had already testified he wanted to put my clients in jail.

What is that indicative of? It's not relevant and, perhaps, maybe to the underlying material claims it's not, but it's relevant to establish that when my clients decided at the day of the judgment or the oral ruling -- I've been calling it "the oral judgment" -- when the defendants had the option to do something or do nothing, they knew what this Court knows now, and that is, had they done nothing, they almost assuredly would have been

swooped into the Herbst dragnet and been involved along with Mr. Morabito in defending against the Herbsts' ferocious attacks. It was the testimony of Mr. Bayuk and Sam Morabito between their two options of doing nothing or something, doing nothing and being swept into the dragnet was not acceptable.

We heard testimony about Mr. Leonard's personal beliefs as to Mr. Morabito and his character even though that testimony is related to events that occurred six or seven years after the transfer. It is easy to see why the defendants simply wanted no part of being involved in the Herbsts after the trial which they were forced to endure. It's worth mentioning that Mr. Bayuk and Mr. Sam Morabito were originally sued in the Herbst action, not as original plaintiffs. They were not involved. They were sued as counter-defendants and they were sued for unjust enrichment. Certainly a bogus theory. They were not part of the original case. They were dragged into it and they were rightfully, as Mr. Bayuk put and Mr. Vacco put it, exonerated by Judge Adams. They had no business in that lawsuit and they had no business entangling -- further entangling their assets with the Herbsts'.

The problem, of course, was their assets were co-owned with Paul Morabito's assets and that goes to, as I said, the initial one of the primary elements of the fraudulent transfer -- quintessential fraudulent transfer, which is that the transferees had no business owning the assets after the transfer. And in this case they already owned the assets. And in hindsight, your Honor, their decision to do whatever they could to avoid getting entangled between the Herbsts and Paul Morabito, in hindsight that decision was correct. In light of those options that they had available to them, doing nothing was simply not an option.

In deciding to do something, the testimony as to what the defendants intended, indeed what Paul Morabito intended, was consistent as to all of the witnesses, all of them. Mr. Vacco, the architect of the transfer, said this transfer was consummated and completed for the purpose of extricating Mr. Bayuk from the Herbsts. Mr. Vacco testified that Edward called him and said, I don't want to be involved in the Herbst efforts to chase Paul and his assets and I want to be released from that. That was Mr. Vacco's uncontroverted testimony. Sam Morabito

testified that his sole and only goal was to protect the Superpumper business that he had spent a considerable number of years building. Although he was only a minority owner, he worked on the Superpumper business day to day and he received a salary and he had an interest in preserving it. That testimony was uncontroverted. Your Honor, it's important to note that the plaintiff would, in fact, in their filings and even in their finding of fact and conclusions of law they submitted, they referred to the defendants collectively in almost every instance. "They," Sam Morabito and Mr. Ed Bayuk. It's they, they, they.

Well, the law requires that each defendant be given their own trial based on, not only Paul Morabito's intent with respect to actual fraud, but their intent with respect to the good-faith defense. So I think, although the plaintiffs' desire would be that this court simply lump all of the bad guys in together and impute to each one their own separate intent, I don't think the law permits this court to do that. This court has to, even though the defendants are here together and are jointly represented, the court has to evaluate the intent of

each defendant in deciding whether or not they deserve the good-faith defense, No. 1, and, No. 2, whether or not Paul Morabito's alleged intent should be imputed to them. I think that's an important distinction.

Sam Morabito testified his only interest was to protect Superpumper. He had no reason to care about them, and that was his testimony and it was uncontroverted. Sujatha Yalamanchili, who was the lawyer that Paul Morabito retained in -- to obtain advice related to the options available to Paul, it's important to note that Sujatha Yalamanchili and Gary Graber both testified that they did not have attorney-client relationships with the defendants. The Hodgson Russ firm represented Paul Morabito only with respect to the transfers at issue. And that's important because when plaintiff points to this court -- points this court to the emails between Paul Morabito and Sujatha, Edward Bayuk and Sam Morabito are not even copied or discussed or involved. And the idea that because Paul Morabito is having conversations with his lawyers at Hodgson Russ that what he says and what he does should be imputed to my clients is simply

wrong, I think.

Sujatha Yalamanchili in her testimony made an important distinction and I think bears repeating and emphasis; that is, the law provides a permissive method for judgment debtors to protect their assets. We have statutes that have been on the books in this state -- in fact, on the books in every state as far as I'm aware -- that provide judgment debtors the ability to ensure that their judgment creditors do not seize and execute upon all of their assets and put them in the little or metaphorical debtor's prison.

So the idea that simply because somebody wants to maximize their ability to protect their assets against the creditors is not, per se, fraudulent transfer under the statute. Nor is it, per se, fraudulent intent. Yet that's exactly the shortcut the plaintiff wants this court to make. Is it simply because there's an adverse judgment against Paul Morabito, the first thing he does is contacts his lawyers and says, Let's circle the wagons, what can we do about this. The insinuation by the plaintiffs is as soon as he's done that, he's already formulated a fraudulent intent. Well,

that's not borne out by the facts in this case or by the law.

The defendant judgment debtor has the right to take advantage of all of the permissive methods by which they can protect their assets in the result unfortunate adverse judgment, and Plaintiff gives no weight to that statutory protection. In fact, they argue just the opposite, which is, as soon as Paul Morabito calls his lawyers and says, What can I do to help me protect my assets, he's all of a sudden guilty of a fraudulent actual intent, and I think that that's not borne out by the law or facts in this case.

When I asked Sujatha Yalamanchili, Did you believe in dealing with Paul Morabito that his intent was to seek the permissive or nonpermissive version of asset protection, she said permissive, and even though Gary Graber, who testified he didn't like Paul very much, he testified that he never witnessed Paul doing anything except -- Gary Graber's own words -- attempting to evade his creditors. And when I asked him, Well, you realize 'evade' has a bit of a negative connotation to it, he said, If I'm driving through an intersection and

a car tries to hit me and I swerve and I evade, that's the context with which I mean. The idea that having a desire to protect your assets permissibly from your judgment creditors, there is a permissive and nonpermissive way.

The way the plaintiff presented their case is that anybody who even pursues the permissive method of protecting their assets has already taken the first large step toward the fraudulent transfer. And that simply can't be the case, otherwise, bankruptcy counsel in assisting judgment debtors, giving advice would be facilitating a fraud. Sujatha said that didn't happen. In support of that it's been established definitively that approximately 10,000 pages of emails between Paul Morabito and Hodgson Russ were produced and approximately 114,000 pages of emails between Paul Morabito and his lawyers in New York, Dennis Vacco and company. And in none of those emails was the smoking gun that one might expect if a client was using his lawyers to facilitate an outright fraud. We would expect to have seen that. Paul Morabito saying, I want to make sure that the Herbsts get nothing and that I'm protected, whether it's

permissive or nonpermissive, well, they don't have that.

The best email that they have that the plaintiff presented actually when read in context and when read completely establishes exactly what Ms. Yalamanchili said, which is that Paul desired to ensure a permissive method of protecting his assets but, more importantly, protecting the assets of the innocent parties here, which were Sam and Ed Bayuk. One would think as bad a guy as Paul Morabito has been made out to be by Mr. Leonard, by, apparently, Judge Adams and, apparently, Judge Zive, that not one email they could present which would be anything other than attenuated circumstantial evidence of actual fraud. They don't have one. And that's particularly striking in light of the fact it is obvious, your Honor, when you read these emails between Paul and his lawyers that Paul has no expectation that these emails would ever be produced and would ever be read in open court.

So, ironically, although Plaintiff would tell you nothing Paul Morabito says can ever be considered at face value, I would submit if there is a time in which the Court can believe what Paul

Morabito is saying, it would be in those emails to his lawyers where he has no expectation that they would ever be made public and used against him. At that backdrop, not a single email directly corroborates Plaintiff's theories. I'll go through some of them and explain in context why I believe the emails that Plaintiff relies most heavily upon are actually indicative of his genuine intent, which was to ensure that Sam and Ed were protected, even if it was at Paul's own expense.

Those emails start at Exhibit 29. If Plaintiff had a smoking gun email, they would say it would be this one. This is an email between Paul Morabito, Mr. Vacco, and Sujatha Yalamanchili, September 20th, so approximately a week after the oral judgment and around about the time that Paul has made a decision that he's going to sell a portion of his assets -- sell some of his assets to Sam and Ed and Sam and Ed are going to buy a portion of his. Paul Morabito here is speaking, not to the court. He's not signing a declaration to somebody that he knows is going to be read and perhaps scrutinized. This is an email he's writing to his private counsel at 10:00 at night and he's

responding because Gary, who testified he doesn't like Paul very much, and the testimony was that they had had a little bit of what I can characterize as a tiff on the phone, Paul's saying to Sujatha to Dennis Vacco, Gary asked me what my rationale was to do this and that I would be asked. Well, here it is. Here's Paul's rationale. And he's not giving this with the expectation the Court will ever read this. He's giving this to his lawyers, which is, by the way, consistent entirely with what Sujatha Yalamanchili testified to.

Judge Adams specifically exonerated Edward and Sam. They hold assets together. They agreed amongst themselves that Paul was best standing alone with his assets and so on the advice of counsel they found a way to do that. And the way that counsel had advised them to do that to ensure that Sam and Ed could extricate themselves from the Herbst mess, while also standing the best chance of avoiding the appearance of impropriety, that they could have them valued and transferred, not transferred to some random third-party uncle, but purchased by the people who already own the assets and in some cases actually lived in these houses. Context is very

important. The context of this email is not that Paul's plan all along, because he says, you know, he's dissatisfied with the Herbsts or he doesn't like what he perceived to be the Herbsts' home court advantage in Department 6, that that's indicative of what his intent was. His intent is clear and it's right here. That is to protect Sam and Ed.

So when it comes to intent, as Plaintiff suggests, there were several transfers. Each one of these transfers in order to be determined to be fraudulent and subject to avoidance, this Court has to determine that each of these transfers were fraudulent, either actually fraudulent as to Paul Morabito's intent, or constructively fraudulent because they were not exchanged for a reasonably equivalent value.

What was the testimony related to the intent of Superpumper? Well, I believe that that testimony was uncontroverted. The testimony was that Superpumper, its assets were held in a Nevada corporation now. Although the Nevada corporation owned the assets, these were not Nevada assets and the insinuation that's been made throughout this trial is that Paul took some effort to remove Nevada

assets from Nevada. Well, what are the assets exactly that the plaintiff's referring to? This is their summary of the assets that were allegedly transferred beyond the reach of the creditor. I'll address that in detail. What were they? Well, CWC Superpumper. Yes, Consolidated Western is a Nevada corporation but there are no assets in Nevada. Baruk Properties LLC is a Nevada LLC, true, but none of the assets are located in Nevada and none were with the exception of the Clayton place, which the parties admitted that they hadn't even considered because it was insignificant to them.

The next two properties, El Camino and Los Olivos, those are residential properties in Laguna Beach, California. No Nevada asset there. The only Nevada asset that these parties ever co-owned for which these plaintiffs are complaining is the Panorama property. There was no removal of assets from the state of Nevada. That's simply a false assertion.

The testimony was, and it was uncontroverted, that the judgment rendered against Paul resulted in a default under both the lease and loan agreement. Now, Plaintiff in her closing

argument -- counsel in her closing argument suggested that it was something other than that, but she suggested that without evidence to back it up. The evidence was uncontroverted. Much of the evidence is uncontroverted. What's not uncontroverted is the spin that is attempted to be put on it by counsel. There were no fewer than four default letters delivered to, not just Superpumper Inc., but Superpumper Properties as well in which BBVA Compass and their lawyers confirmed that one of the primary basis for the default was the $75 million judgment rendered against the guarantor. I'm looking, of course, at Exhibit 231, page two. This isn't that hard to understand, your Honor. A guarantor who has liquidity provisions in the lease and the loan agreements now has a $75 million judgment against him and the testimony was uncontroverted that that was the primary event in default.

So whatever plaintiff's counsel attempts to suggest without evidence to support it, that there was some other cause for the default which could have been cured, is simply unsupported by the evidence. It was undisputed that BBVA Compass did

call the note and those exhibits evidence that they called the note, and then they said, We may agree to forbear if you're willing to meet our forbearance conditions. And Sam Morabito testified that for the next 11 months he spent hours working with the bank and with spirit to obtain the forbearance to ensure Superpumper's survival. The testimony was uncontroverted without those efforts Superpumper would not have survived.

It's interesting that plaintiff's counsel raised the exhibit related to the claims register in the bankruptcy. The first claims register is the Hartford Insurance Company. The Hartford Insurance Company claim arises from the failed Big Wheel transaction when Paul Morabito got his judgment against him and could no longer serve the debt associated with the Big Wheel. Big Wheel failed and that's what the Hartford claim is. They were the surety on the performance bond.

What did happen to the Big Wheel project out in Fernley is exactly what would have happened to Superpumper had Sam not decided to step in, take over, and do everything that was necessary in order to get the forbearance from Spirit and from Compass.

Testimony was uncontroverted that, had Sam done nothing, Superpumper would have gone the same way Big Wheel did, which was defunct and foreclosed upon in a matter of months. Sam's testimony was genuine. He cared about Superpumper. He had moved to Scottsdale to take over control in day-to-day operations of the company. He had a real reason for buying Superpumper, not a pretext. And that's -- in the classic quintessential transfer it's always about the pretext. What did the transferee say was the reason for the transfer and what was the actual reason. In this case the actual reason was consistent with what Sam Morabito said, not pretext.

Additionally, it was uncontroverted that when Sam and Edward bought Superpumper they put millions of dollars of their own money to shore it up. This was not money that was Paul's. This was not money that was proceeds. With the exception of the $659,000, which was the immediate repayment of the term loan from Compass, this money was all money that Sam and Ed personally contributed to shore up the capital requirements of Superpumper.

THE COURT: Which exhibit is this?

MR. GILMORE: I'm sorry, your Honor. This

is 248.

THE COURT: Thank you.

MR. GILMORE: In the quintessential fraudulent transfer you wouldn't have this. You wouldn't have Sam and Ed -- you wouldn't have Sam move to Scottsdale become the 24-hour-a-day operator of these 11 gas stations and then put -- if you do the math between -- not including the 659, if you do all the math from this Exhibit 248, 250, and 251, you'll see that Sam Morabito put a million and a half of his own dollars, not including the Compass proceeds, in order to shore up this business.

Now, in the quintessential fraudulent transfer you wouldn't have that. You wouldn't have the transferee take personal ownership of the asset. No. The quintessential fraudulent transfer is the transferee takes it and holds it as a shill for the transferor so that the transferor can benefit and there's no genuine and honest exchange. In this case the facts are uncontroverted. Sam and Ed had put in their own money to shore up Superpumper because they genuinely desired to purchase it and had their own reasons for doing so. It had nothing to do with the Herbsts.

The testimony was consistent with respect to the Raffles. The testimony was uncontroverted. Raffles was a pre-Herbst asset. It was an excluded asset as part of the sale and when it was -- when BHI was sold, it was an asset without a home. It was an insurance captive that needed to be held in a like-kind business. There were no premiums paid after the BHI sale. It was simply a pool that, if circumstances favored them with respect to the amount of claims, Raffles insurance pool would pay out to the benefit of the captive owners. This was nothing but the potential for a dividend distribution, dividend payment to the owners of CWC.

At the time of the oral judgment the evidence was uncontroverted. The parties decided what they wanted and Paul said he was willing to take the risk with respect to the value of the Raffles asset and he paid Sam and Edward for their respective shares. It was shown in Plaintiff's closing. This is uncontroverted. The testimony was Edward Bayuk owned 25 percent of BHI so he received 25 percent of the Raffles and Sam Morabito owned 20 percent and he had received 20 percent of the proceeds. Plaintiff's counsel showed the exhibit,

which was the September 30th Raffles valuation, and argued that this was the document that Plaintiff -- or that Edward Bayuk used to value Raffles. Well, that wasn't the evidence at all. The evidence was that Mr. Bayuk called Kensington at Raffles and asked him to send him the June statement and that by going through the June statement and determining what they believed the value was as of the end of September, Mr. Bayuk's testimony was it was 1.8 million. He testified that the spreadsheet showing the value of the Raffles was not received until some months later but that it was indicative of the ballpark area. It was also uncontroverted that the value of Raffles fluctuates based on the extent of the claims made or not made during the policy periods. The testimony was uncontroverted that the letter of credit retirement held at the Royal Bank of Canada was Paul's money, not CWC's. Therefore, all of the emails that Plaintiff showed the Court related to the desire to get the letter of credit released has nothing to do with Mr. Bayuk, nothing to do with CWC, has nothing to do with Snowshoe, and has everything to do with Paul Morabito's desire to get the cash collateral that he had on deposit at

Bank of America released that was securing the RBC letter of credit. It had nothing whatsoever to do with CWC or nothing to do with Superpumper. It was simply going through the motions to ensure that Paul could get his cash on deposit at Bank of America released so that he could use that to satisfy his own obligations.

Remember, the testimony was that Paul Morabito had a personal line of credit with Bank of America, which neither Mr. Bayuk nor Sam Morabito knew anything about. When the Bank of America sued Paul Morabito to recover from that line of credit, Paul Morabito said to the effect, Well, you've got a million-three on deposit in your bank, Bank of America. Why don't you just seize that 1.3 and offset it from the amount that is owed to you. And the Bank of America said, as Mr. Bayuk testified, We can't do that because that money is pledged to secure a letter of credit that we've issued to Royal Bank of Canada to secure the buy-in of the Raffles.

And so there were emails that Plaintiff's counsel showed you about conversations related to where is it certificated, where is it not certificated all taken out of context. Those

conversations were limited to one purpose and that is finding a way to get Bank of America to release the deposit that was on -- the cash on deposit at Bank of America so that it could be used to satisfy Paul's personal account. It had nothing to do with Raffles, nothing to do with CWC and everything to do with reducing the letter of credit requirements so that Paul could use his own money to pay the Bank of America lawsuit. Uncontroverted evidence.

Plaintiff's counsel argued Paul received no benefit. And, by the way, Paul didn't receive any benefit from the Raffles so, therefore, it was a scam. Well, not according to the tax returns that were filed by CWC. CWC tax returns establish that Paul Morabito received $680,000 from Raffles -- that's Exhibit 158, your Honor -- which was discussed at length in the trial evidence. Raffles was carried on the books of CWC because it had to be, but it was always a Paul Morabito asset and he received the benefit of it. Uncontroverted evidence. Exhibit 272 established through the accountants that Paul received approximately $658,000 in 2011 from the Raffles distribution and he was 1099'd for it. The reason why the Herbsts

never executed upon that will be addressed later, but it was for the same reason that none of these assets were executed upon and it had nothing to do with these defendants. The testimony with respect to Baruk Properties was that it was a Nevada LLC owned by Mr. Bayuk and Mr. Morabito's trust and that there were four pieces of property owned by Baruk, the Glenneyre commercial properties in Laguna Beach, the Mary Fleming property, residential property in Palm Springs and the Clayton Place. The testimony was uncontroverted that Mr. Bayuk decided after the oral judgment that he was going to leave Nevada and resume his residence in Orange County, right down the street from the Glenneyre properties, and that Paul's intent was to live in L.A.

The testimony was that Edward Bayuk did not have the ability, the liquidity to write a check to Paul for the $1.6 million and so he did so through a note. The reason he didn't have the liquidity, as Mr. Bayuk testified, was because his obligations he had undertaken with respect to Superpumper forbearance required him to have a certain amount of cash on hand, which he was not able to maintain simultaneously the cash on hand and also to pay Paul

the $1.6 million. That testimony was uncontroverted.

It was uncontroverted that after Mr. Bayuk acquired the Baruk Properties he created a holding company to own and operate them exclusively on his own. There's no nefarious intent that can be inferred from Mr. Bayuk's desire to create a new holding company to hold those assets. It's uncontroverted that those transfers were not secret and underhanded. Those transfers were done by way of recorded deeds. Anybody in the world with an internet connection can spend five minutes and pull the records and see all the property that Mr. Bayuk owns or his companies own. There was nothing secretive or secluded about that transfer. It was open and notorious.

There was commentary about the Woodland Heights transfer. During the trial, your Honor, I objected to the presentation of that evidence because my argument was there was no foundation and I believe the way in which the plaintiff has argued it in closing argument evidences the fact that there was no foundation. Nobody was here testify what Woodland Heights was or did. No one was here to

testify whether there was a conveyance, whether that conveyance was unwound or not. So we can look at the exhibit and read the words on the page, but without any testimony supporting what Woodland Heights was, I would submit this Court has no ability to infer anything with respect to what Woodland Heights was or was not as it related to Mr. Bayuk or Sam Morabito. All we have is a lawyer file that was provided without any context and without any testimony, so I would submit that Woodland Heights is a red herring.

The testimony with respect to the Laguna houses was that those properties were co-owned. They were co-owned as tenants in common and that because Paul was going to live in L.A. and Edward was going to live in Orange County, it made sense that Edward would take the Laguna houses in exchange for the Panorama house. As with the other properties, they were appraised by certified appraisers. The values came in and the exchanges were made.

Plaintiff has not contended that the values attributed to the Laguna houses or to any of the properties at Baruk to the Laguna houses or the

Baruk properties were valued incorrectly as part of this exchange. Again, as Plaintiff contended in -- Plaintiff Counsel contended in her closing argument, reasonably equivalent value is a big issue when it comes to, not only the badges of fraud, but also it's a required element in constructive fraud. Plaintiff has not contested the values that were assessed to the transfers with two exceptions: They had no evidence to suggest the values of Raffles were incorrect or evidence to suggest Watch My Block was incorrect or no evidence to subject that Superpumper properties, which was the card locks, was incorrect -- or over or understated is a better way, perhaps, of arguing it. There was no evidence that the Laguna houses were valued incorrectly. No evidence that the Baruk properties were valued incorrectly. So when it comes to reasonably equivalent value for the exchange, all of the assets, save two, are undisputed. That badge of fraud assuredly goes in favor of the defendants.

As with the Glenneyre properties and the Mary Fleming property, the Laguna houses were appraised. They were recorded by way of deed and that transaction was not secretive. There was some

testimony and argument about the lease at Panorama -- I'm sorry -- the lease at Doheny Road that I think deserves treatment because I believe there was mischaracterization in the argument as to exactly what happened. The argument was not consistent with the testimony. This is Exhibit 35. It's the email between Mr. Layman and Paul Morabito and Ed Bayuk related to first amendment to the residential lease at Doheny. Plaintiff's counsel insinuated that the Doheny Road condo was evidence that Paul and Edward had decided that, even though they testified at trial, they were no longer residing together after the oral judgment, but they actually were. And that insinuation is not supported by the language of this document and it's not supported by any of the uncontroverted evidence.

The uncontroverted evidence in this case was July 31, 2010, on Exhibit 35, so predating the oral judgment by several months before Paul or Edward had any expectation that an adverse judgment would be rendered against them, Paul Morabito obtained a residential lease at Doheny Road, which is a very upscale apartment building in West Hollywood owned by celebrities, Elton John, amongst

others and that Paul Morabito was living at Doheny Road July 31st, 2010, with his new boyfriend in Los Angeles. That was the evidence.

The evidence was that the purpose for this first amendment was simply to add Mr. Bayuk as a co-tenant, not to live there. The testimony was uncontroverted. Mr. Bayuk never lived at Doheny Road. He may have stayed there a few nights occasionally with Paul and his other boyfriend, but he did not live there. And he testified and it was uncontroverted that the reason why this amendment was made was that at Mr. Bayuk's request and that was so that he could ensure that, if Paul Morabito needed assistance as a result of his physical condition, Mr. Bayuk could provide it. That was the reason for this first amendment to the residential lease. The spin that plaintiff's counsel put on this document and with respect to Mr. Bayuk and Mr. Morabito's living situation is simply not borne out by the evidence. Another mischaracterization based on undisputed evidence.

THE COURT: So I don't think I heard testimony that Elton John lived there.

MR. GILMORE: Was that not part of it? But

he did live there. I do know that.

THE COURT: I was wondering was I sleeping during that part? I thought I'd remember that.

MR. GILMORE: I thought it came out but it's immaterial to the case but, yes, Elton John has a place at Doheny Road.

Plaintiff's counsel raised the issue of Watch My Block at trial, not for the idea that they can present any evidence that Watch My Block was a fraudulent transfer in and of itself because, of course, Plaintiff has no valuation expert to support that. Even though it stands to reason that, had they been able to obtain a valuation expert to support that they certainly would have, they did not. Instead, they bring Watch My Block up only as part of this big-picture conspiracy argument that everything of value that Paul Morabito owned he found a way to divest himself of. Watch My Block is important because, like many of the other assets that were transferred or purchased by Sam and Ed, these had no future value and would have provided no benefit whatsoever to any subsequent creditor.

There was no dispute as to value and there's no evidence that Paul was divesting himself

of anything that a creditor could have seized upon and there's no evidence that Paul Morabito had anything to do with Watch My Block the day after he transferred it to Edward Bayuk for a nominal sum. The only evidence that was provided at trial was that Edward Bayuk liked the idea, he had the time and temperament to, perhaps, pursue it and that Paul Morabito did not. The testimony, of course, is that, although Edward liked the idea, it never became of anything other than the idea. The primary thrust of defendant's case is what I contended in my opening statement would be.

The second primary theme of the quintessential transfer, and, that is, that the assets being transferred were removed beyond the reach of the creditor. And that comes from the case law interpreting UFTA, that Paul Morabito did something transferring these assets beyond the reach of the creditor. And I provided the summary that Plaintiff used as part of their Power Point closing and I'd like to go through that to establish how false this accusation is.

Plaintiff contends that it would have been entitled to at the date of the judgment 80 percent

interest in CWC Superpumper at a value. Now, we, obviously, contest that value but for purposes of this line of argument, this is not about the value. It's about the idea and the argument that as of the day of the judgment, absent these transfers, that Plaintiff would have been able to recover anything from CWC. Well, they take it for granted. They say, Well, we would have been able to collect, Herbst creditors could have executed upon CWC to the tune of $10 million and change. That's their valuation. By our valuation it would be something in the 2.5 range.

But that's not the point. The point is Consolidated Western Corporation is a Nevada corporation which has built-in statutory protections in situations just like this where a shareholder gets an adverse judgment against him or her and then the creditor seeks to charge against that judgment debtor's assets. It is undisputed Nevada law protects shareholders of Nevada corporations from execution upon their assets. There's no ability as of the date of the judgment for the Herbst creditors to do anything with respect to CWC except obtain a charging order. And we know exactly what a charging

order entitles a judgment creditor to do, ensure that any economic benefit associated with that shareholder ownership would be provided then to the judgment creditor. Well, where was the evidence that even a charging order would have been beneficial in any way to the plaintiffs? There wasn't any. They had completely ignored that entire line of argument. Plaintiff in this case entirely avoided the reality that there's no possibility that Herbst could have ever executed upon CWC and taken anything from the assets of the corporation.

Same thing with respect to Baruk Properties LLC. That's a Nevada limited-liability company. Nevada statute provides that individual members of a Nevada LLC, their membership interest in the LLC cannot be executed upon. It can in California. Perhaps it can in Arizona. Cannot here. So the judgment creditors cannot take and seize Paul Morabito's interest in Baruk Properties LLC and foreclose upon it to the tune of $1.6 million. They simply could not do that by operation of law. Plaintiff completely, completely ignored that reality. It's undisputed.

Indeed, the testimony was that Baruk

Properties LLC was not even cash flow positive, so even if Plaintiff had come into this case and argued that there was a charging order that had some value to the plaintiff, the facts don't support that contention. Baruk Properties LLC was cash flow negative at the time of the transfer and it was for nearly a year and a half after the fact. Herbst would have been able to obtain nothing from Baruk Properties LLC and certainly not a 50 percent interest.

The rest of the three personal properties were all held tenants in common. Plaintiff presented no argument overcoming the testimony that tenant in common means any tenant in common gets to own the property 100 percent right to possess and own and use just with -- just as well as all of the other tenants in common do. California law -- and this is presented in my brief -- California law for the California properties and Nevada law for the Nevada properties do not let a judgment creditor of a tenant in common seize and foreclose upon and sell a membership interest. It's undisputed. The only thing California or Nevada law permits the judgment creditor to do in this case is co-own but does not

have the ability to foreclose.

So $808,000 was not available to the creditor, $427,000 was not available to the creditor, and $679,000 was not available to the creditor. This is Plaintiff's own spreadsheet. There's not a dollar on this spreadsheet that Plaintiff could have achieved by way of execution even if they tried. And I'll explain in a minute why the evidence was uncontroverted that they did not. But even had they tried to execute, they could not have obtained anything associated with their before-and-after spreadsheet.

Plaintiff ignored that entirely. So how can there be as a matter of law a delay, a hindrance or a defrauding? As plaintiff's counsel said several times, the question of value is value to the creditor, not value to the transferor or transferee, value to the creditor. If the value to the creditor of these assets is nothing more than a tenancy-in-common interest or a charging order, then how do these transfers remove these assets beyond the reach of the creditor? They were never within the reach of the creditor to begin with. In fact, I think verbatim Plaintiff's counsel argument was,

Without the transfers, the Herbsts could have executed. Not true. They could not have. They could not have. The law did not permit the Herbsts to execute upon any of these assets without the help of Paul Morabito and Ed Bayuk. Ironically, as Dennis Vacco testified at length, they understood -- Dennis Vacco testified he had studied and evaluated Nevada law and he understood what the options were. And in light of these options, which was as standing these properties and assets were not subject to execution, that they decided, Paul Morabito -- Dennis Vacco, Edward and Sam all decided they were better off dismantling their asset protections in order to put Paul on an island and, hopefully, protect Sam and Ed's preexisting interest in these assets and that it would, therefore, subject Paul to have execution, whereas, before he was not subject to.

The transfers provided the Herbsts the ability to execute upon Paul's interest in Panorama. Before the transfers they could not have done that. They would not have been able to do that. That's not an insignificant fact. That is a matter of law issue. Secondarily, with respect to the

beyond-the-reach-of-the-Herbsts-or-the-creditors argument, there's this argument that's not borne out by the facts that these transfers left Paul with nothing upon which the Herbsts could have executed, and that's not true. In fact, it's just the opposite. They could not have executed upon these assets before the transfers, but what was stopping them from executing after the transfers? The testimony was that Paul received $1,035,000 in cash from the downstroke of the Superpumper sale. That cash, as was shown by the exhibit, went straight into Mr. Morabito's bank account.

What was preventing the plaintiffs from seizing that cash as a result of the sale from Superpumper? It was the transfer that provided the availability for the Herbsts to seize that cash, had they desired. We don't know why they didn't do what they didn't do but they could have done. The Superpumper note of $1.4 million was expressly assignable to the creditors. That was uncontroverted evidence. What evidence did Plaintiff present as to why they could not have executed upon that note that Paul received as part payment for the Superpumper sale? Plaintiff

presented no evidence as to why they could not have executed upon Paul's 1099 he received from Raffles in late 2011. They provided no testimony as to why they could not have seized the proceeds from the Card Locks that Paul sold in late 2011 after he acquired the Superpumper properties from Sam and Edward.

Lastly, Plaintiff presented no evidence as to why they could not have executed upon Paul's beneficial interest in the $1.6 million Baruk note. They presented no evidence. The only thing they've argued is that these transfers prevented the Herbsts from ever being able to collect and then they argue that because in 2017 Herbsts still have an outstanding judgment, that everything that was done as part of these transfers frustrated the Herbsts' ability to collect. That's not supported by the evidence at all. This evidence was also uncontroverted. The judgment, not the oral ruling, but the actual judgment was delivered in October of 2011. Nevada statutes provide that, even before the judgment, a judgment creditor can -- and this is NRS Chapter 21 -- that a judgment creditor can request of the court an order for a writ of attachment

post-judgment. Actually be done prejudgment but it can definitely be done post-judgment. In fact, Nevada statute says, if a judgment debtor owns property outside the state, you can get it without even noticing a hearing. You just have to apply for it. Well, the judgment was delivered in October of 2011. What did the Herbsts do? Well, I asked their witness and he said, Well, we have really smart lawyers. I'm sure they did everything they could. They did nothing. Exhibit 278 shows they never did a single thing to execute upon their judgment. They didn't domesticate -- well, let me back up.

If you were a judgment creditor who really had intent to execute upon your judgment, when you get your judgment the first thing a reasonable judgment creditor would do is you would go and get a writ of execution, a writ of execution and then you would go and domesticate that judgment in every county in which the judgment debtor owned property. I don't think it takes a judgment collection expert to testify to that. That's what somebody would do.

The Herbsts had a year between the entry of the judgment and the settlement in which they could have done a number of things. They could have

domesticated the judgment, they could have done judgment debtor interrogatories, they could have done debtor requests for production, they could have obtained a writ of attachment and done a number of things available easily, very easy to do once you have a judgment in your favor. They did none of it.

So they did nothing and now seven years later they're complaining that these transfers, which although with respect to all of these properties but two, the value was equivalent, that's undisputed. It's undisputed the value that Paul Morabito received for all transfers except two was reasonably equivalent value, that now they were frustrated or delayed or hindered as a result of these transfers.

I would submit, your Honor, that's not how it happened. The Herbsts had some alternative plan. In fact, what the finding was is obvious because it bore out a couple years later, which is the day after they recorded the confession of judgment, they filed a petition for involuntary bankruptcy. Why? Because they wanted the trustee to do their collection work. They didn't want to utilize the statutory availability under Nevada and California

law to actually collect their judgment. They wanted the trustee to do it. How do we know that? Well, because Judge Zive actually said that. In Exhibit 8 when Judge Zive was trying to figure out what to do with the two-party creditor action, he said, Exhibits 8, paragraph 6, "The Court has not been presented evidence that the alleged debtor has any significant creditors other than the petitioning creditors," which were the Herbsts, "and that this is, essentially, a two-party collection action. This Court is not the proper forum for petitioning creditors to seek to collect on their judgment against the alleged debtor and the bankruptcy code was not intended for such purposes."

Now, Judge Zive entered that ruling in response to the motion that Paul's bankruptcy lawyers filed saying this is a two-party collection action. Why don't you go to state court and collect your judgment there. And the Herbsts said, No, we would prefer to have the bankruptcy court do it and the trustee court and the bankruptcy court says, at least initially, No, go collect your judgment in state court. In fact, that's what Judge Zive said. He said in his order, I'm going to stay the

bankruptcy case so that you can go to state court and try to execute, like you should have done before you filed. It was the plaintiff's own failures when they had obtained the judgment that now provides the alleged injury. They had a year. They could have taken efforts. They did not. It was not the defendant's fault that the plaintiffs sat on their rights. More importantly -- and this is the most important part of this case -- is that after the transfers, Paul Morabito retained the same value in assets that he had before the transfers. With respect to all of the assets except two, that's undisputed. They did not challenge the value.

The third element of a quintessential fraudulent transfer is the idea that the transferor retains control and/or ownership of the asset even after the transfer. The plaintiff's counsel show the court several emails where Paul Morabito, after the transfers, was trying to put together deals with Cerberus or with Nella, or whoever. And their argument was, even though they had 125,000 pages of emails and all of Mr. Vacco's files, the best they could do is show this Court three or four emails where Paul Morabito said, Hey, I'm trying to put a

deal together between his new company, Snowshoe Capital, and Sam and Ed's company called Snowshoe Petroleum. And there's two or three emails where Paul is saying, I'm trying to put a deal together with Nella, and that's all the evidence they have of control. That's it. The only evidence Plaintiff presented in this case of Paul's continued control over Superpumper was two or three emails like Exhibit 30 where Paul is trying to put together a deal with Nella Oil. That's it. Sam Morabito testified that Paul had no involvement in the day-to-day operations of Superpumper. In fact, Yon Friedrick testified that even before the sale Paul had no involvement in the day-to-day operations of Superpumper. Yon Friedrick testified that after the sale Paul was gone and Yon dealt with him -- did not deal with him at all. He testified the only time -- Yon Friedrick testified the only time he dealt with Paul Morabito at all was when Paul was trying to put together a deal with Nella Oil.

So there was no evidence that Paul had actual control. Sure, it's easy to stay up late at night and send emails to your friends and lawyers saying, I'm going to put together a $160 million

deal of a company that's already in default, which Dennis Vacco said, quote, has no basis in reality," this deal that Paul was trying to put together.

But that's all the evidence Plaintiff could muster suggesting that Paul had control of Superpumper after the sale. He received no payments, he received no dividends or distributions. He received no salary and he had no involvement in the day-to-day affairs of the company. Well, I would submit to the Court that real control that's contemplated in the badges of fraud is not the ability to write some emails to lawyers and friends saying, Let's put together a $160 million deal. That's not control. That's not ownership.

Edward Bayuk's testimony was, Sure, if Paul wants to continue to put together deals, I'll listen. If he wants to go and try to put anything together, if it's got value and the ability to make us money, I'll listen. But that's not the same thing as having control and ownership of Superpumper. The evidence with respect to control and ownership was uncontroverted. Exhibit 30, Plaintiff tries to get a lot of traction from this line, that "Paul explained that he would no longer

be actively seeking to accumulate assets in companies that I'm a shareholder in." Plaintiff's argument was, Well, there you go. There's Paul Morabito saying the week after the judgment that his intent is to defraud the Herbsts by disposing of assets. Well, that's not what it says at all.

There is no authority to support Plaintiff's position, your Honor, that a judgment creditor as soon as they've received an adverse judgment against them has any obligation to continue to do anything which they think may or may not benefit their judgment creditor. There's no obligation. Plaintiff plays the morality game, that as soon as Paul Morabito has a judgment against him, the first thing he should do is call the Herbsts and say, Here's what I'm going to do. I'm going to work as hard as I can to ensure you get whatever you think you're entitled to. That would be the first, in my experience, of any judgment creditor ever doing that with respect to a judgment debtor. And the plaintiff comes from that angle with the morality game that Paul Morabito now owes a duty to ensure that he doesn't do anything that the law allows him to do or that there is no duty that

prohibits him from doing. All he says in that email is, You know what, now that I have a big judgment against me, maybe I don't think I need to work so hard. Maybe I don't need to go out to Fernley and guarantee all of these projects in order to try to make money, because doing so might just cause more problems for me or will be ineffectual anyway because the Herbsts might be able to obtain it.

There's nothing improper, certainly nothing illegal or immoral about doing that. All Paul says here is, I don't have an obligation to continue working in light of my judgment status. And there's been no cases provided by Plaintiff which suggest that a judgment creditor has a moral obligation to continue to work or do whatever they were doing before the judgment in order to benefit their judgment creditor.

When I asked Gary Graber in his deposition, he said, I agree, asset protection is not a morality construct. There's permissive ways to do it and nonpermissive ways to do it, but I provide my clients with all the advice and options available to them and let them choose, but it's not morality. Yet, what's implicit in Plaintiff's argument is it

was immoral for Paul to say, Hey, I just decided I don't want to continue to amass -- continue to work in properties which might be subject to execution. There's nothing immoral about that.

Plaintiff presented Exhibit 143 and then misconstrued all of the evidence that surrounded the context of this email. Plaintiff's argument with respect to this was that Paul Morabito has all this control over the Glenneyre properties and he's telling Edward what to do. Well, that ignored all the evidence with respect to this email. Mr. Bayuk testified exactly what the context of this email was. April 20th, 2012, Edward has just found out that Paul Morabito's been sued by Bank of America on Paul's $2 million line of credit, which Edward knew nothing about and was not associated with anything that they co-owned. It was simply a personal line of credit. Well, Edward testified that David Mayerella of Bank of America contacted him -- well, he was contacted by David Mayerella by a different department of B and A and asked for an appraisal. He testified he thought that was weird because David Mayerella is not his banker. David Mayerella is the plaintiff in the Bank of America case. He's the

person running the Bank of America lawsuit against Paul Morabito in April of 2012. And we established that, for example, he was the one that was copied on the letter between Bank of America and Raffles to release the letter of credit. So Edward is saying to his lawyer, Mr. Vacco, I find it strange that David Mayerella is coming to my property and asking for information like tenant improvement expenses, a lease agreement, drawings, and here is the thrust of the email. I'm very reluctant to give him all this information at this point in time.

And Edward was right to be suspicious. Why is Dave Mayerella coming to Glenneyre and asking for all this information related to his property when he's learned that David Mayerella is running the lawsuit with Paul Morabito. So Edward's question is not indicative of Paul Morabito having any control. This is Edward Bayuk saying I want to know if I should give this information or should I have Bank of America give me a call, and Paul says, No, no, no, no. Paul's involved in a lawsuit with Bank of America. Why would he want Edward to give Bank of America information that Bank of America could use against both of them? This email has nothing to do

with control of Glenneyre but has everything to do with the lawsuit that Bank of America filed against Paul taken out of context.

Another email with no context, nobody to testify to it, what it means or what it doesn't mean is Exhibit 138. It was offered in closing argument to support the contention that whatever Paul says to his lawyers or anybody else is what Sam and Edward do. We don't know why Paul is saying to his lawyer, Tell Sam to wire you $1 million. Nobody was here to testify as to that. And Dennis basically says okay. But what we do know is Sam Morabito said, If Paul asked him to send a $1 million, I definitely didn't get that request and I sure as heck didn't send $1 million. And the plaintiff knows he didn't send a $1 million because the plaintiff has every single bank statement of Paul Morabito's from 2005 to the present. They know this didn't happen. It's taken out of context. It doesn't say what the plaintiff says it does. We know it didn't happen. We don't know why Paul is asking for it. We have no clue. It's irrelevant.

These are the emails I was referring to that the plaintiff uses to suggest Paul Morabito had

all the control of Snowshoe Petroleum and the other assets. This is Exhibit 131 and 132 and 133, for that matter, where it was uncontroverted at trial that Paul Morabito was attempting to put together a deal between Nella, funded by a company called Cerberus that involved the combination of factors including all of these things that evidence suggested could have never, ever come to fruition, a $160 million deal that involved $100 million in cash at closing. Nobody was here to testify as to where this $100 million in cash would come from, but Dennis Vacco said when he was asked about this email that this project has very little basis in reality.

So two emails out of 125,000 that were available to the plaintiffs, that's what they've given us. Paul Morabito trying to put together a deal is evidence of continued ownership or control. Simply does not support the allegation, certainly not to the standard as required. There was the argument that, in addition to the control that Paul Morabito enjoyed over these assets after the transfers, that he retained a benefit. Well, the evidence didn't support that either. The evidence was uncontroverted. At the time of the transfers,

Baruk Properties was cash flow negative and Superpumper was a failing business. We've discussed that Superpumper required several million dollars in capital infusions just to survive through the forbearance but the testimony was also uncontroverted that Baruk Properties, of the four assets it owned, two were not income producing. They were only liabilities and that, of course, is Mary Fleming and Clayton Place. And that two Glenneyre properties were not cash flow positive either because as Mr. Bayuk testified under oath and it's uncontroverted, he had no tenant in 570 for about 12 to 16 months after the transfer. He had to do a big capital improvement and the tenant that he had in 1460 was under market.

So even by Mr. Bayuk's calculation it was not -- it was at least 16 months before Baruk Properties started to see any cash flow positive. So under the traditional theories, what's the benefit to Paul Morabito of transferring 50 percent of his interest in an entity that has no cash flow positive? It was undisputed that Superpumper was a failing business. Yon Friedrick said it was a failing business and that he was hired specifically

to address the issues that it was a failing business and that was a year before the judgment, no relationship to the judgment and had a relationship to the fact that the Superpumper owners realized it was failing and they needed to fix it.

So what's the claim with respect to Superpumper that the plaintiff's put forward? That they believe by Paul Morabito selling a failing business that didn't turn a profit for almost four years after the transfer that somehow an asset that they were never going to be able to execute upon because of its structure, that somehow they were defrauded by Paul Morabito selling to the existing owners an asset that had no continued positive value? What could the creditors possibly have obtained, even if they had the ability to pierce the statutory protections, what would they have been able obtain? A losing asset. Well, maybe the Court knows this, but when the trustee takes over from an estate, the trustee has the ability to abandon assets that are losers for the estate, either not administer or abandon them. There's, I guess, two different ways to do that.

What's the argument here? That because

Superpumper was a losing business when Sam and Ed bought it and put $2 million in of their own money that the Herbsts would have pursued that? That's the insinuation. That doesn't make any sense. So they say, Give us a value for this -- give us a judgment for the value that we believe we can prove even though Superpumper was a failing business. They didn't present any evidence it was not a failing business. They didn't present any evidence that, other than their valuation -- which I'll get to in a minute -- they didn't say, No, it's not. This is a business that would have immediately provided cash flow to the judgment creditor.

Not true. It was a liability. And it goes without saying but it bears mentioning that just because something has a positive value, positive market fair market value like Superpumper had a positive fair market value, that's not the same thing as saying that buying it requires significant capital infusion in order to maximize that ability. That's true of businesses all across this country all the time. Entity enterprise has value, but if you're going to buy it, you have to know that you're going to come out of pocket to make capital

contributions to keep it active and surviving. So even though this Superpumper had positive fair market value, the testimony was uncontroverted that it required significant capital infusion to maintain it, particularly to obtain forbearance by the bank and by the lessor.

So, legally speaking, as a matter of law, if there's no upside to the creditor by virtue of the transfer, then can Plaintiff legitimately claim that it was harmed as a result of the transfer? I would say as a matter of law, no. If the transferor judgment debtor divests themself of an asset which has fair market value but which requires significant capital infusion to maintain, is the creditor really losing there? I would suggest as a matter of law, no.

And that brings us to the idea of value. Now, plaintiff's counsel brought in and showed to the Court a number of extra jurisdictional definitions of what value is or isn't, but we don't need to look at extra jurisdictional resources. We have a statute that tells us what reasonably equivalent value is and means and that's NRS 112.170, and it's not that complicated. Value is

given for a transfer or an obligation if, in exchange for the transfer or obligation property is transferred or an antecedent debt is secured. That's it. If property is transferred, then it can constitute value. What is property as defined in UFTA? Property includes -- an asset means property of a debtor, anything that is susceptible of ownership. So we don't need extra jurisdictional explanations as to what reasonably equivalent value means. We know what it means in this state. And we don't need extra jurisdictional cases to tell us how reasonably equivalent value is applied in the terms of UFTA. We have a case on that and that case is the Matusik case, that which I provided in my brief, the reasonably equivalent standard in Nevada is not what these other states are. It's different. It's the quote, shock-the-conscience standard. In Nevada reasonably equivalent value is exchanged unless the disparity of the value is such that it shocks the conscience that, as the case puts it, that strikes the belief that the transfer could not have been legitimate. That's what reasonably equivalent value in this state means. The plaintiff has to prove by their burden that the value differential between the

assets that Paul Morabito acquired and the assets he divested himself of shocked the conscience to make the objective observer of that transaction say to themselves, This simply cannot be legitimate.

Nevada law requires, of course, that although some of the badges of fraud can have the burden shifted to the defendant when a prime fascia case is showing, Nevada law says, with respect to insolvency and reasonable equivalent value, the plaintiff always bears that burden. It's never transferred to the defendant. The citations are in my brief.

THE COURT: So we should probably take a break.

MR. GILMORE: Perfect timing, yes.

THE COURT: Okay. Are you going to want to do a rebuttal argument?

MS. TURNER: Certainly, your Honor, but brief.

THE COURT: Okay.

MS. TURNER: I will be brief, and I'll work on the break to make it briefer.

THE COURT: I'm just looking at the time. We did slip our jury trial from today but we do

start it tomorrow morning at 9:30.

MR. GILMORE: Understood.

THE COURT: Court's in recess.

(Recess taken.)

THE COURT: Please be seated. Go ahead, counsel.

MR. GILMORE: On the point of reasonably equivalent value, as plaintiff's counsel argued, it shows up in two contexts that are important for this trial. No. 1, it's a badge of fraud which can be used to show that a transfer was fraudulent as to the judgment debtor's creditors when the transfer was given for anything less than reasonably equivalent value. And the second obvious context here is for constructive fraud. And in Nevada there cannot be constructive fraud where reasonably equivalent value is exchanged. NRS 112.180, 1 sub B that deals with constructive fraud says "Without receiving a reasonably equivalent value in exchange for the transfer and the debtor either was engaged in a transaction for which the remaining assets were unreasonably small or the debtor was intended to incur or believed reasonably incur debts beyond his ability to pay as they become few," which, as we

know, is the definition of insolvency for purposes of the statute.

So, your Honor, it's important in this context. You cannot have constructive fraud where the transfers are for reasonably equivalent value under the statute. The prerequisite is reasonably equivalent value. So it's important, not only in the badge of fraud context with respect to what the intent of the parties were, but it's also a prerequisite to construct a fraud. This Court can decide that if there is no actual intent to defraud, delay or hinder the creditors. This Court can then determine that reasonably equivalent value was exchanged, even if the Court were to accept the valuation proposals of the plaintiffs in Superpumper and Panorama. It's undisputed that reasonably equivalent value was exchanged with respect to the other assets.

Plaintiff attempted to argue in closing argument that Paul Morabito was not paid the $1,035,000 downstroke on the Superpumper sale and they used a declaration that was prepared by Mr. Morabito's Los Angeles bankruptcy counsel to challenge undisputed fact right here that Mr.

Morabito received an incoming wire of $1,035,000 and the testimony was undisputed that that $1,035,000 consisted of two identical payments by Mr. Bayuk and Mr. Morabito, Mr. Sam Morabito, in the amount of $517,000, and that's corroborated by Exhibit 234.

So Paul Morabito can say what he likes. Paul Morabito is not the defendant in this case, although he's on trial in some respects. Sam Morabito and Edward Bayuk paid Paul $1,035,000 and it went to his bank account, and all arguments, insinuations to the contrary are not supported by the undisputed evidence. Plaintiff's counsel conceded that Mr. McGovern's valuation of Superpumper was within $40,000 of Matrix's valuation of Superpumper and that's not surprising for two reasons. No. 1, Spencer Cavalier of Matrix knows what he's doing and is actually a gas station evaluator. That's what he does for a living; whereas, Mr. McGovern testified that he's never valid valued a gas station and doesn't understand the nuances of doing so. But, more importantly, what Mr. McGovern used to calculate his discounted cash flows were not projected budgets but were the actuals, so it's not surprising. So, in fact, what

Mr. McGovern did in his discounted cash flow analysis, the idea of projecting future incomes and then reducing to present values, there were no projections. He used the actuals, which does nothing except confirm by actual numbers four or five years after Matrix's appraisal how spot on. Matrix's appraisal was borne out, not only by Mr. McGovern's use of the actual numbers in determining fair market value, but also by Michelle Salazar's after-the-fact assessment that Mr. Cavalier of Matrix knew what he was doing, although she disputed his discount rate -- his capitalization rate, I should say -- there's no contention genuinely that Spencer Cavalier of Matrix did not get the valuation right on the number.

So, really, what are we talking about? Well, Plaintiff spent several hours of trial and several minutes in closing argument arguing a point which is immaterial and irrelevant and that is the collectability or viability of these due-from affiliates. It's a total red herring. And it's a total red herring because it's the only thing Plaintiff can do to support McGovern's decision to add $6 million to the operating asset value of this

enterprise.

And when plaintiff's counsel was arguing in closing argument, she said, Well, McGovern testified that these assets were important assets to a buyer of this enterprise. Wrong. He did not say that. In fact, he couldn't say that. He said just the opposite. When I asked Mr. McGovern point blank, We're you using the fair market value standard of value, which always has to assume a rationale buyer, a rationale seller with knowledge of the relevant information and not under a compulsion to buy or sell. So in order to determine fair market value, we have to imagine what the hypothetical buyer is actually considering when potentially making an acquisition of the assets in question. I asked Mr. McGovern, I said, Why would a rational buyer in the gas station marketplace -- remember, your Honor, people buying Superpumper that helped determine what the fair market value of a Superpumper-type business is, these people are not receivables factoring, these people are not speculators. These people are buying gas-station-operating businesses for the purpose of securing that income.

So if we know that's what the rational

buyer is doing, I asked Mr. McGovern, Why would a rational buyer pay $6.5 million for operating assets of Superpumper, which is another way of saying, the necessary assets that Superpumper owns in order to do its job, why would a gas station buyer in the fair market value context pay another $6 million to acquire shareholder notes that have been carried on the books of Superpumper for years, which the auditors have determined to be noncurrent?

Plaintiff's counsel said McGovern said that's what buyers would do. That's not what he said. I asked him, Why would somebody do that, and he said -- I said, "Is it your opinion based on fair -- I'm reading from page 184 of Mr. McGovern's transcript, the trial transcript -- "Is it your opinion based on the fair market value standard of value that a gas station buyer would be interested in buying at face value a note from Paul Morabito as of September 28th, 2010, in the face value of $623,000?" And he said, "Well, I think it is likely if somebody wanted to just buy the gas station, they would just buy the gas station."

So, your Honor, it's not whether or not the due-from affiliates were collectable or whether or

not they were viable or whether or not there were notes in existence. I mean, all of those things can be considered. But only if we don't get over the initial hurdle the plaintiff has to prove, and that is why would the rational buyer pay $13 million for an enterprise when over half of the value is made up of due-from affiliates notes receivable that have been carried on the books of Superpumper for years, which are predominantly made by what Plaintiff now argues is an insolvent obligor? That makes no sense in the real world. A gas station buyer -- and Spencer Cavalier knew this. He doesn't have to give it treatment in his report because it's so obvious. If 54 percent of the book value of the company consists of due-from affiliates, he knows what Yon Friedrick knows, which is what Michelle Salazar knows, which is nobody in the real world would buy $6.5 million of unsecured notes at face value when you're just trying to buy a gas station business. That's what McGovern said. Well, probably not. If you just want to buy gas stations, you'll just buy the operating assets. You're not going to buy $6.5 million of confusing notes receivable made by people who either no longer exist, like Big Wheel, or by

somebody like Paul Morabito who now has a $75 million judgment against him. The concept is a buyer in the -- a rational buyer in the marketplace would pay to acquire a note made by Paul Morabito at face value with no security. It's insane. No buyer would do that. So it cannot be included. It cannot be included in the fair market valuation of this enterprise.

Moreover, beyond the obvious flaw in McGovern's reasoning, he did two things. One, he inexplicably converted these noncurrent assets to current, and they've been current since 2007. The financial statements of the company showed that these due-from affiliates which grew from $3 million to $9 million between the time Paul Morabito owned it and the time he sold it were never current assets. They were never used in the business. They were never relied upon as accounts receivable for the purpose of operating this business.

Mr. McGovern, when I asked him, Why did you do that, he said, Well, I assumed they were collectable and I switched them from noncurrent to current. That was his first mistake. The second mistake was proven by Michelle Salazar, and, that

is, even if you want to address the issue of book value, which is essentially the balance sheet value, not the fair market value, but the book value, which is what Mr. McGovern testified he was going after, in order to ensure that these non-operating assets should be included in the book value of the company, you have to have evidence of the notes and evidence of the intent to repay. That's what Mr. McGovern testified to and that's what Gary Krause, the auditor, testified to and that's what Michelle Salazar testified to.

The evidence showed in the 2009 year-end financials, so ten months before the Superpumper sale, all of the due-from affiliates were on-demand notes which Mr. McGovern said was the reason why he converted them from current to noncurrent, because they were on demand. The problem with that reasoning, as Ms. Salazar explained, if they're on demand it means there's no repayment terms. So if a note is on demand, it's indicated as on demand because there's no promissory note explaining what the terms are. The terms, of course, are the maturity date and interest rate.

It was only year-end 2010 that for the

first time the financial statements showed anything other than on-demand notes. So McGovern was wrong twice. He was wrong on the assumption that he can simply convert it from noncurrent to current, even though the auditors had not done that in the previous six years and, No. 2, he said, I simply assumed they were collectible. When I asked him, Did you do any investigation? He said, I did none of my own investigation.

Well, Ms. Salazar did her investigation. She said she contacted Cavalier, she contacted Bernstein and contacted Mr. Sam Morabito and said, I'm looking for evidence of these notes. And the responses that she got from Mr. Bernstein, according to her testimony, is there were no notes in existence as of the sale date and any notes that were created were created after the sale date. So she opined that, if there are no notes in existence and a year-end 2009 financial showed that they were all on demand, then no auditor could conclude they were current assets sufficient to buoy up the book value of the company. That was her conclusion, Michelle Salazar's independent conclusion, and it corroborated what Mr. Cavalier provided in his

report. Although it was not expressly stated, it was implicit. He simply adjusted the due-from affiliates off the balance sheet. He looked at the balance sheet and said, There's $9 million in due-from affiliates. That makes up about 54 percent of the book value of this whole enterprise. No buyer will want that and he just struck it. He doesn't need to explain the obvious.

Exhibit 236 is a critical exhibit in the analysis of Superpumper. It's critical for a number of reasons but, most importantly, your Honor, this number, the risk discount of 35 percent. There's no dispute that Matrix without using the due-from affiliates of the Matrix valuation was a fair value. Plaintiff's counsel says, Well, there's a lot of confusion about whether or not they included the term loan or whether they didn't include the term loan. And what Plaintiff's counsel said was this number represents 3 million minus $939,000. That's what she said. Well, that's because Plaintiff still after two weeks of trial doesn't understand what these numbers reflect. 3 million minus $939,000 is not 1.6 million.

When Matrix did their valuation, they

included the line of credit, which was maxed out at 3 million. That was the working capital line. So the working capital line was included in the Matrix valuation, and then you can see that right in the report. What Matrix did not include was the outstanding obligation of the term loan. The date of the valuation, the Compass term loan was not $3 million, because as the evidence established, both Edward and Sam contributed $659,000 each to pay down the Compass term loan such that as of the date of valuation, the remaining balance owed on the term loan was 3 million minus $659,000 minus $659,000. That's where this number 1.682 comes from.

So as of the date of valuation this is the obligation that Superpumper owes to Compass. And if this is an obligation -- and I asked Mr. McGovern. I said, Well, if you have that obligation, don't you have to account for it? Well, yeah, I did. Because this is an obligation of the company. It's an obligation that the buyers are inheriting. It's not an excluded liability. So that comes off of the value. It results in the net value, which is just math, 6.4 minus 1.6, and this is the important part here, the risk discount.

Mr. McGovern, I asked him, Did you perform a discount? Marketability, lack of control, any of those discounts? He said no, he did not perform a discount. Ms. Salazar said in a situation where you're talking about a fair market value of an enterprise, you have to consider the marketability and you have to consider the lack of control. And the marketability discount is derived from the fact that you cannot take a closely held corporation to market immediately. It takes time to liquidate and there's risks associated with doing that.

Both Ms. Salazar and Christian Lovelace, who, by the way, is a mergers and acquisitions expert, testified that a risk discount should have been applied. Now, Plaintiff takes issue with the amount of the discount, but that's expert territory. If they wanted to challenge the amount of the discount as being disproportionate to the actual risk, that requires technical specialized training for which an expert should have come in here and told this Court that the risk discount applied by Mr. Lovelace was not appropriate. There was no evidence addressing whether or not the risk discount in this case based on the company-specific risk was

appropriate or inappropriate.

The only thing you're going to get on that score is argument, which is not evidence, which does not supplement the record. Simply coming up here and saying Mr. Lovelace's got this wrong because he was a lawyer for Snowshoe Petroleum is not evidence to refute the undisputed testimony that this company had risk. And it wasn't just Mr. Vacco that said it was the risk. Mr. Vacco said when asked, What does this risk discount consist of, he said, Well, Mr. Lovelace primarily handled that but I'll tell you what I think the risk is. The risk that we'll actually be sitting here. The risk that the owners of this company might actually get sued and have to defend the fact that they bought this company. That's what Mr. Vacco said and he didn't offer much else.

But Mr. Lovelace offered a lot. Mr. Lovelace said, Well, for one, you have a situation where Superpumper owns no real property. It's just an income stream and has nothing but the gas in the ground and the snacks on the shelves. So if something were to happen to Superpumper's working line of credit, it would be out of business in a

week. And he said, By the way, we're talking about a company that's already in default, where the letters by the bank's lawyers have already called the note and said, We don't have an obligation to work with you. That was undisputed. So Plaintiff wants to take issue with this 35 percent risk discount but they don't have any evidence to do so. It's just argument. And that's not enough. Then it's just math. If you take the discounted net value and an 80 percent acquisition value, which was Mr. Paul Morabito's ownership, less the gas paid, you find where the $1.4 million comes from.

Now, there was a lot of confusion on the successor notes. It's not that complicated. If the original balance owed was $1.46 million and, as Sam testified, after this transaction had been consummated they realized Paul was not willing to return the $939,000. Had he done so, he would have been given credit under the term loan, but he didn't so that obligation remained with Superpumper and had to be repaid. They demanded that he execute a note evidencing his willingness to repay. Well, it makes no sense to have two offsetting payments, so the $1.4 million was reduced to offset the $939,000 and

then there was an assignment agreement that ensured that between the three of them it was trued up.

It's not that complicated. The testimony was that Paul Morabito was paid the remaining balance of the Superpumper purchase and that Sam Morabito wired it to Dennis Vacco's office after the forbearance had been completed. Sam's testimony, which was uncontroverted, by the way, was that he told Paul and told Dennis Vacco that he was not willing to make the final payment on Superpumper until he was assured that it was not going to be defaulted. He testified that in November the forbearance agreement was finally reached -- actually, it was the fourth forbearance agreement they attempted was finally resolved and new loan terms were provided by BBVA Compass in November. And after Sam had been satisfied that he was no longer in default and he wasn't going to lose his investment in Superpumper, he was willing to make the payment and he said in November he made the payment and he wired it.

He then testified that although -- that the payment he made to Mr. Vacco's office from his personal account was reflected in a capital account

adjustment in the tax returns in the years that followed. That was his testimony and it's uncontroverted. I showed Mr. McGovern Exhibit 1115 and said to him, according to the 2009 year-end notes to financial statements, these were the obligor's. This is the best information as to who the obligors were from the due-from affiliates at the time of the sale. We know "BWH" is Big Wheel Hospitality, which was defunct, had no ability to repay, so the argument posed by Mr. McGovern that a buyer would acquire $443,000 of notes receivable from Big Wheel Hospitality that was defunct belies the definition of a fair market buyer.

The next is Paul Morabito, $623,000 by the date of the sale Paul Morabito, according to the plaintiffs, was insolvent. And then the remaining two CWC and Pam-As, as was explained by Stan Bernstein and Gary Krause, those notes are shareholder, parent subsidiary notes and in a merger they wash. So, again, what rational buyer with full knowledge of the relevant facts would buy Superpumper for $13 million?

This is an important distinction. When Plaintiff filed this lawsuit, they contended in

their allegations that Paul Morabito's stock basis in Superpumper was 5-point-something-million dollars and because Paul Morabito sold his interest in Superpumper for $2.5 million and his stock basis was $5.8 million, there was a $4 million question as to whether or not reasonably equivalent value had been exchanged.

And I asked Christian Lovelace what's the relationship between book value and fair market value and he laughed and he said, They're apples and oranges. Then I asked Stan Bernstein what's the correlation between fair market value and book value and he said there is no correlation. Although sometimes they can be the same, there is no correlation in that context. And then I asked the same of Michelle Salazar and she said book value is an accounting concept and fair market value is a valuation concept. They're not related.

But you heard plaintiff's counsel argue, argue, argue that somehow something related to these -- the merger associated with Snowshoe Petroleum and Superpumper, as she put it, pulls equity off the table. That's confusing apples and oranges. The book value that's attributed to notes like the $2.5

million by Sam Morabito and Edward Bayuk, those are to assist with the book value of the enterprise but they have no affiliation and no relationship with fair market value. The idea that these receivables that get merged out in a parent subsidiary merger somehow devalues the fair market value of the company is simply incredible concept that has no basis in reality.

What drives fair market value, as Mr. McGovern said, is what is the income stream of this business projected forward. It has nothing to do with book value notes. Has nothing to do with related-party transactions unless the fair market buyer is actually looking at investing in acquiring these notes for the purpose of benefiting from their income stream. And based on the rational buyer, there's simply no possibility any rational buyer would look at this and say, Yeah, I want to pay $8 million to acquire all of these notes, half of which are made by people who are allegedly defunct or insolvent.

The emails that Plaintiff's counsel argued, which there was a spreadsheet that showed, you know, Paul Morabito said Superpumper was worth $20 million

or $30 million or $10 million, there's been no argument that that was intended to be competent evidence of fair market value as of the transfer date. They don't even argue that, nor could they, because it's not. Plaintiff has all but conceded that the fair market value of Superpumper as of the transfer date was either $6 million or it was $13 million depending on how the Court comes down on the due-from affiliates. But it was not $30, it was not $20 or $10 million. What Plaintiff uses to substantiate the argument that the value was something other than what the experts provided was in Exhibit 126. Exhibit 126 is the two statement of assets and liabilities by Sam Morabito and Edward Bayuk that postdated the transfer. And the plaintiff makes a big deal about how Edward and Sam had indicated that their share of Superpumper was $4.5 million each, which reflects $9 million. It's not that complicated. We just looked at the $2.5 million book value notes that Sam and Ed had put on the books of Superpumper. And the testimony was that, I asked Gary Krause in his deposition, I said, Can you think of a reason why Sam and Ed would inherit a liability they didn't need to inherit as

part of this merger? He said, Sure. Because this company has to have $6 million of stockholder equity, which is a synonym for book value, and in order to do that they had to inherit the liabilities that were merged out in the merger.

So if you take $5 million of the book value of the $2.5 million notes that Sam and Ed included, then you get exactly what Spencer Cavalier provided, which is $4 million with the risk discount plus the $5 million of book value based on those notes. What's missing here, obviously, is the liability. This is an unremarkable document, if Sam Morabito and Ed Bayuk had included the $2.5 million liability that was on the book of Superpumper, as we showed in Exhibit 120. The books of Superpumper show that Sam and Edward owed $2.5 million to the company and their K-1s of that same year show that they were being taxed on the interest. They were paying on the interest. So the existence of that obligation is not undisputed. The fact is it doesn't show up on this personal financial statement and it should have. Had it been on there, this would have be an unremarkable document because the $2.5 million that makes up the 4.5 here would be offset by the

liability resulting in Edward Bayuk and Sam Morabito's contention that Superpumper was only worth $4 million, not $9 million. It was never worth $9 million.

Lastly, with respect to value -- and then I have one more point and then I will rest my case -- the Panorama property, the dispute between Mr. Noble and Mr. Kimmel can be boiled down to two positions. The first position is, as Mr. Kimmel puts it, Well, there were no properties in Reno as of the transfer date which were sold for that amount, and he uses that -- of course he did not include that in his report but he testified to that, but he uses that to support his conclusion that, Okay, even if I wasn't given access to the property to determine what the actual quality was, it doesn't matter. I could have given you a valuation around $2 million simply based on my knowledge that no house in Reno had sold for that in amount in 2010.

Well, that's not surprising because Mr. Kimmel testified when I asked him, people who own houses at Montreux or the top of Eagle's Nest or Lake Tahoe, when you're at the doldrums of a market, you don't sell. People with those kinds of houses

have the ability to avoid selling multimillion-dollar properties at the bottom of the market. I said, Isn't that true? He said, Yes. People who own a $10 million home don't have to sell when they don't want to. They wait. What Mr. Kimmel did not say, your Honor -- and this is critical -- that there weren't houses in Reno that could -- that were worth that. He didn't say that. He didn't say there's no houses in Reno or Montreux or Arrowcreek that don't have a $4 million value. What he said was people that own houses of that value at that time were not selling. Why does that matter? Because fair market value and the rational buyer and rational seller. It's not that there were not houses in Reno that were worth that. It's just that at that time people were not selling. That's not the same thing as saying there were no $4 million houses in Reno. Of course there were.

Secondarily, Mr. Kimmel attempted to backfill in cross-examination with respect to this idea of functional obsolescence, the idea that somebody could build the Taj Mahal in Reno that nobody would want to buy. That's not included in his report. In fact, his report said nothing about

it, and I asked him, You didn't give any treatment to this idea of functional obsolescence in your report and he said no. In fact, it's clear, the only thing that Mr. Kimmel included in his report with respect to telling us why he gave the value he did was because of the condition of the property, nothing else.

Here's his commentary, your Honor, Exhibit 53. When he says, These are the comparables that I evaluated and here's why I believe these comparables are superior to the subject property. He didn't say, Well, my estimation was that the Panorama property was functional obsolete. He didn't say that. He says only one thing. These properties were in better condition. He says with respect to sale one, similar size, similar location; however, it's my opinion that it was not in as good a quality. Outside inspection appears to be better condition. This is the only factor he gives us to differentiate these comps from the subject property.

Same with Subject 2. Good condition, and the Panorama property, according to him, was in bad condition. Number 3, the same. So Mr. Kimmel tried to rehabilitate himself by saying, Well, quality

doesn't really matter. It's really a function of what does somebody want to buy and there's this concept of functional obsolescence but that's not his report. His report is he made a determination that Panorama was not of the same quality as the comparables and, therefore, not worthy of the same value a square foot. That was his opinion.

So what did Mr. Noble say? No. 1, Plaintiff's counsel said Mr. Noble didn't give any treatment to the idea that we were in a down market. Well, that's not true. He did and I asked him if he did and he said he did. Page 15 of his report, Exhibit 276, he talks about the bubble and he talks about the bubble collapsing and then he talks about the ongoing national housing crisis. Plaintiff's counsel was wrong. He didn't ignore those things. He considered them. And then Plaintiff's counsel said, well, the reason why his number came so high was he relied primarily on the cost approach. Well, that's not true other. His cost approach determination was 4.36 million. And I asked him, Did you rely on that? He said, No. I relied on the comparable sales. I just did this to give you an idea. His ultimate conclusion of value was

comparables, not cost approach, as Plaintiff's counsel said. Take a look at this comparable, which for unexplained reasons Mr. Kimmel didn't use. The only thing that really matters for purposes of valuation, and this Court knows that, is how do we get to the square footage of a comparable property. And Mr. Noble said based on this Boulder Glen Way sale that commanded $686 a square foot, his judgment was that Panorama was at least as good a quality and could command at least a square footage of Boulder Glen and the square footage he attributed to Panorama was $681, which was below the square footage of the Boulder Glen Way property. He didn't just pick a number out of thin air. He said -- and his testimony was -- he picked the price per square foot at the high end of the range, which goes from $386 to $686 and he determined based on his assessment of the quality of the Panorama property that it was the high end.

So does Mr. Noble's testimony shock the conscience into making this Court believe that the Panorama sale was a fluke -- not a fluke, that it clearly could not be legitimate, that what Mr. Noble did, his report and testimony, lead the Court to

believe that it was so out of whack that it shocks the conscience into believing that what Mr. Bayuk and what Mr. Morabito were trying to do was clearly not legitimate in trying to determine the value. It doesn't make sense. It's important to note the initial allegation against Mr. Bayuk and Mr. Morabito was that all the properties were intentionally altered, either overstated or understated in value, in order to maximize their scheme.

Well, they abandoned that theory when they realized that all of the other properties that defendants valued were spot on. So if all of the other properties they valued with these appraisers are not subject to being contested, then why would Panorama be any different? Well, the argument was -- and I don't think it was very compelling but the argument was, well, it had to do what they needed to marry up the value of Panorama so that it would match the value of the Laguna properties. Well, the purchase and sale agreement doesn't bear that out. Because if Plaintiffs' argument was correct, the purchase and sale agreement would be different. In the original purchase and sale agreement -- this is

Exhibit 45 -- and this is a critical point to refute what Plaintiff is contesting without evidence. In the original purchase and sale agreement the value of Panorama was decided first so they already knew that Panorama was 4.3 million. So in the initial purchase and sale agreement Mr. Bayuk and Paul Morabito did not have the appraisals from El Camino or Los Olivos at that point. So what they did was they imputed $2.5 million to each subject to correction when the appraisals came in.

Now, if Plaintiff's theory on this was true, it would be the other way around and that is Los Olivos and El Camino would be decided and then Panorama would be backfilled to make sure that they're square. That's not what happened. Panorama is already valued and they imputed these values to Los Olivos and El Camino subject to a true-up. The very next Exhibit 46 trues it up and determines that the fair market value of El Camino is not 2.5, it's 1.9, and the fair value of Los Olivos is not 2.5, but 1.9. So the plaintiff's theory that this was all one big scheme to make sure it equaled out does not match their evidence. Panorama was valued first and then Los Olivos and El Camino were valued second

and Plaintiff does not contest the value of Los Olivos or El Camino, so their theory that this was just some match-up falls flat.

Mr. Kimmel admitted he doesn't know what the literature is on retrospective appraisals and so because he didn't know what the literature requires of retrospective appraisals, he violated basically every rule that's required in the literature for retrospective appraisals, which is you cannot consider events that occurred after the fact unless the parties would have been able to accurately predict them. So he did a whole bunch of things that made no sense in light of that requirement. He considered the quality of the property as it existed four years after the valuation date as though somehow that's relevant to anything.

He considered the testimony of Skip Avansino, who had a beef with Mr. Bayuk because Mr. Bayuk wouldn't agree to decorate the property for them, which makes no sense. It makes no sense that, as Mr. Avansino says, the house was trashed if immediately upon Skip Avansino taking possession of the property his wife calls their broker and asks the broker to ask Ed Bayuk to decorate the house for

them. If it was really trashed, why would they call Ed Bayuk to come back to decorate the place a couple years later. So Skip Avansino was mad. He told Mr. Kimmel, I'm not letting you in my house, which he could have done but he didn't. Number 2, they stood at the gate and Skip told him all the things that was wrong with the property, which was not supported by any evidence. The only evidence in this case was that when Mr. Bayuk vacated it, it was in flawless condition. That's the only evidence here. It was not trashed by the date of valuation. It was flawless.

Your Honor, lastly, the idea of insolvency. Plaintiff's counsel focused a lot of attention on this report from Michelle Salazar that showed that Paul Morabito was insolvent as of April 2011. Well, that ignores a couple of key facts. First, Tim Herbst testified that he was aware that Herbst had retained Craig Green in April of 2011 to do a net worth evaluation of Paul Morabito for the purposes of determining punitive damages. And Tim Herbst testified that Craig Green determined as of spring of 2011 that Paul Morabito's net worth was $90 million after the transfers. That's the Herbsts'

own expert. And the Herbsts' own expert relied on that report and the Herbsts relied on that report in order to obtain a punitive damages assessment against Paul Morabito of $15 million. That's undisputed. So there's an inconsistency in plaintiff's position. Well, was Paul Morabito insolvent or not, because in 2011 when it suited the Herbsts to take the position that Paul Morabito had a massive net worth, the report from Mr. Green, as Mr. Tim Herbst testified to, showed that Paul Morabito had a net worth of 90 million. He was not insolvent. So that was the position the Herbsts took when it suited them at the time. Well, the position they're taking now is that he was insolvent and rendered insolvent because he transferred, at least by their valuation, $14 million of assets.

You can't have it both ways, an insolvent debtor who also has a punitive damages award against him of $15 million based on a $90 million net value report. He can't be insolvent and have $90 million at the same time depending on when it suits the Herbsts. I would submit, your Honor, that the Herbsts have to take it the way that they argued it, which is that Paul Morabito after the transfers had

$90 million in assets and it was those $90 million in assets that resulted in a punitive damages award of $15 million. You can't argue he's both insolvent and subject to punitive damages out of the same side of your mouth. They should be judicially estopped from taking positions contrary to those that they had taken in prior actions. Mr. Herbst testified that the punitive damages award that was stipulated to was based on and resulted from Craig Green's report that Paul Morabito had a net worth of $90 million.

And, lastly, your Honor, even if he was insolvent by virtue of the judgment, consideration for insolvency still is whether or not after the transfers Paul Morabito maintained a net neutral result. In other words, the statute says was he rendered insolvent by virtue of the transfer. Is it the actual transfer of these assets that renders him insolvent so he can go to his creditors and say, Sorry, I have nothing to give you. Well, in this case, no. Because if they transferred all those properties at a reasonably equivalent value, then what Paul received in exchange for what he gave is the same and there is no net delta on Paul's

insolvency. Either way. No matter whose version of net worth you want to accept, if he receives exactly what he gave, then it's a net neutral result for purposes of insolvency.

To summarize, none of these assets were available for collection at the time of the judgment. There's nothing Herbst could have done to seize or execute upon any of these values. It was only by virtue of the fact that they made the decision to do something and transfer their assets that they dismantled the statutory protections in place and it was only by virtue of those transfers that resulted in the Herbsts getting anything.

The Herbsts would not have gotten the Panorama house had they done nothing. Yeah, the Herbsts maybe could have gotten a key to the door but not liquidated it. Nevada law would not have allowed it. So the transfers did not prevent or frustrate or hinder the creditors. Statutory protections were already in place that prevented the Herbsts from getting what they wanted. It was only after the transfers that they had access to any of these things. And that's why Dennis Vacco says it's ironic that the position that Herbst was in at the

time was worse than the position they're in today because had nothing been done -- granted, there would be charging orders and tenancy-in-common issues and all those kinds of things, but the Herbsts wouldn't have the ability to execute upon anything those except charging orders.

So the irony, as Mr. Vacco puts it, the fact that we did it this way and attempted to be transparent about the way we did it actually provided the Herbsts something they could have never gotten and ironically exposed his clients and my clients to the liability they wouldn't have faced. So, lastly, with two sets of lawyers and accountants assisting in this process, which fraudster with fraud on their mind would elect to take the position that dismantles their statutory creditor protections in order to facilitate the Herbsts getting anything if really what they were trying to do was defraud the Herbsts? Makes no sense. All the badges of fraud put together, the purpose is to try to determine why the transferor did what he did, and to a lesser extent for good-faith purposes, why the defendants did what they did. And it simply makes no sense to argue that the defendants would have

dismantled all of the statutory protections available to them in order to then just defraud the creditors. It simply makes no sense and there's no reason why it would be done that way. And Mr. Vacco testified it wasn't done that way. Sujatha testified it wasn't done that way. Gary Graber testified it wasn't done that way. And, of course, the defendants testified it wasn't done that way.

Your Honor, my clients have testified as to why they did these transfers and their intent was not to frustrate, to hinder or delay. There was no testimony suggesting that my clients participated in any way in any of the activities which the plaintiffs have contested were proof of actual intent. This state provides a good-faith defense for people who deserve it. The badges of fraud are not all-inclusive. This court can consider all of the facts and circumstances surrounding why these people did what they did. In light of the fact that they had the statutory protections in place, in light of the fact they had received good counsel on what their options were and that they decided to dismantle their protections in order to separate their assets and, hopefully, extricate themselves

from the Herbsts, it makes no sense that my clients would have done that and harbored anything other than a good-faith intent to simply buy what was theirs and leave Paul exposed to his own devices.

Your Honor, my client's request that this Court give due consideration to those arguments and these facts and that this Court render a verdict in favor of the defendants on all counts.

THE COURT: Thank you.

MS. TURNER: I will be as quick as I can and, certainly, I'm giving myself a 20-minute window. It might be 30.

First, we're working backwards a bit, addressing the insolvency, it's a badge of fraud, as well as an element of constructive fraud that the plaintiff show insolvency of Paul Morabito. There was argument that Tim Herbst relied on Paul Morabito's expert -- or Craig Green to say that Paul Morabito was worth $90 million post-judgment. And your Honor, the testimony, if you review the transcript, does not correlate with the arguments that is being made.

There was certainly an indication of $90 million in value with Paul Morabito. That's the May

2010 -- the certification from Paul Morabito of what his assets were worth. Now, Tim Herbst is certainly not an expert on the assets of Paul Morabito. Michelle Salazar in Exhibit 44 discusses the insolvency by virtue of the judgment as well as the condition that Mr. Morabito was in post-transfer after the transfer of his assets in September 2010.

But we can also go to the sworn testimony of Paul Morabito and in his declaration that counsel now wants to distance himself from that's set forth at Exhibit 107, a sworn declaration that was filed with the bankruptcy court, page three, Sections 11 and 12, after describing the transactions that are the subject of this litigation, Mr. Paul Morabito says, "The cash from these transactions and notes has been used to pay my living expenses and make payments to Herbst as set forth above. My sole remaining assets consist of the following: Cash of less than $10,000. Approximately $10,000 in two bank accounts. Ownership of CNC value of less than zero. Ownership of commercial property through Nevada LLC value of approximately $150,000 and personal effects, clothing, and home furnishings."

That was insufficient what is described by

Paul Morabito and, again, he doesn't describe any supervening event, anything other than the judgment and transfers at issue in this case to come to the conclusion that he had basically $170,000. Certainly insufficient to pay the Herbsts what they were due. In addition to this testimony of Paul Morabito in the bankruptcy under penalty of perjury, at page 222 of his deposition transcript, which we had the video play, he confirms the matters that are set forth in his sworn declaration including that he received $542,000, not $1 million, in exchange for his interest in Superpumper. Whether or not there was some payment of $1 million is really not relevant to whether that value was in exchange for his interest in Superpumper.

In deposition and in his sworn testimony to the bankruptcy court, Paul Morabito said, In exchange for my interest in Superpumper, I received cash payments of approximately $542,000 and the rest was canceled. Now, to listen to argument of defendants, all the material evidence was uncontroverted or misconstrued. In our proposed findings and conclusions, 63 pages, half of that is reference to the record. This morning I touched on

three hours' worth of exhibits and testimony, and when taken together, the circumstantial evidence put together of the badges of fraud show that Paul Morabito had the actual intent to delay or hinder or defraud, its conjunctive. It's "or delay, hinder or defraud the Herbst in their collection."

Now, it is our role as officers of this court to provide a roadmap to the relief that we are requesting as well as any defense that is being propounded. Counsel in his argument and in his proposed findings cites to the wrong standard for fraudulent transfer and for reasonably equivalent value.

He is trying to sell this court on the Matusik holding, a 1969 case from the Nevada Supreme Court that was prior to Nevada's enactment of UFTA. It was prior to enactment of the Uniform Fraudulent Transfer Act and it discusses NRS Chapter 112 specifically with regard to 112.050, a repealed statute. So, your Honor, at the time of the Matusik case there was no reasonably equivalent value standard that we have here today. Nor is there any good cause defense, whether there was a good cause for making a transfer. Rather, we have the badges

of fraud that we apply and, your Honor, the debtor's intent does not have to be to defraud the creditor to find actual fraud. It is here but it doesn't have to. The intent element is satisfied with hindrance or delay as the intended consequence of the transfers.

When you review the email exchanges with counsel and Paul Morabito, the testimony of Paul Morabito, the testimony of Ed Bayuk, Sam Morabito, they all indicate the reason for the transfers was to react to the oral ruling and the determination that the Herbst parties would be a creditor to Paul Morabito to the tune of $85 million. These transfers would not have gone forward but for that oral ruling. There was no plan in effect prior to the oral ruling and the purpose was to hinder or delay collection and, in fact, that's what happened.

It is odd that there is an argument that the Herbsts are aggressive in their pursuit of a right to their wrong, the right to Paul Morabito's wrong, I should say. And at the same argument there's this position taken, Well, the Herbsts didn't do anything. They sat on their rights. The Herbsts didn't do anything so they couldn't have

been hindered and they couldn't have been delayed.

Well, the Herbsts have spent $10 million to address the fraud from Paul Morabito and the Fraudulent Transfer Act is remedial to address that further conduct for the purpose of delaying, hindering and defrauding them. $10 million, and though Tim Herbst didn't know the detail, he certainly knew how much it cost his family in pursuing them. When we look at the timeline of the transactions at play, September 13th, 2010, being the day of the oral ruling, you have the next day the transfer of $6 million, a week later the transfer of $355,000 to Sam Morabito, September 23rd, $420,000 to Ed Bayuk. On September 27th there's a transfer of the interest in the real properties, the residences, the Laguna properties in exchange for the Panorama property.

And then you have the CWC and Superpumper merge and Paul transfers his interest in Superpumper, not to CWC, not to Ed Bayuk and Sam Morabito, but the valuable interest in Superpumper gets transferred to a New York corporation. What we don't have is an explanation, a rational explanation of why the transfer of Paul's interest was to a New

York corporation, except when we look at the email from Paul Morabito of September 20th where he says the Herbsts will no longer have the home court advantage. It was to move the interest out of Nevada.

October 1st Paul Morabito transfers his 50 percent interest in Baruk Properties and transfers his 50 percent interest in that and it is promptly transferred to Snowshoe Properties LLC, a New York entity. No purpose whatsoever. There's no reason why Ed Bayuk couldn't have purchased Paul Morabito's 50 percent interest in the name of the Nevada LLC, Baruk Properties. It was to get the interest out of Nevada.

And by October 1st, 2010, all subject transfers were substantially complete. With the judgment being entered October 12th, 2010, the Herbsts had no right of collection prior to October 12th, 2010. And, your Honor, the final judgment was not entered into until August 23rd, 2011. There were motions to amend, there was the punitive damages phase. The final judgment was a year -- almost a year later.

By October 12th, 2010, the transfers were

complete, save and except that we had the subsequent transfer of the $1,617,000 note in exchange for Baruk Properties that went to Woodland Heights in October of 2010. Counsel says they should have gotten a prejudgment writ. They had an obligation to get a prejudgment writ. They didn't do it. They sat on their rights. It is not good faith. It is not good faith to say that a creditor has a right to get a prejudgment writ of attachment or beware, the property can be gone. That's an unreasonable position to take.

Now, he bolsters that argument by saying, you know, they didn't have any rights in these interests before the transfers, so the fact that they didn't have any rights after the transfers is -- it's wash. Well, certainly upon a judgment being entered, the Herbst parties were entitled to a charging order. Mr. Gilmore acknowledges that. And with a charging order they would be entitled to 50 percent of a sale of any property owned by Baruk Properties LLC. They were denied that right of collection because the interest was transferred to a non-debtor and not for reasonably equivalent value. It was for a $1,617,000 note that was transferred to

Woodland Heights.

Now, Mr. Gilmore said the Woodland Heights conveyance is a red herring. It's not a red herring. When you review it, you'll see it's conclusive evidence of Paul Morabito's actual intent to delay and hinder collection by promptly conveying his right to repayment under that note to a Canadian company with execution of an allonge that was never released, never set aside. You never saw any testimony saying that -- or any evidence indicating that it wasn't in full force and effect or he hadn't taken that position otherwise.

And Mr. Gilmore said but nobody provided testimony why it was conveyed to Woodland Heights or the details of it and it wasn't discussed with anybody else. Exhibit 44, Paul Morabito's expert, Michelle Salazar, discusses her conversation with Paul Morabito where he told her that the $1.67 million note had been conveyed to Woodland Heights and March of 2011 was the date of that report and his interest in Woodland Heights pursuant to that conveyance is outlined in his asset list. He provided that to his expert and his expert used it in the underlying Herbst litigation in the

punitive damage phase.

THE COURT: Counsel, I'm just going to stop you there. I don't want to use up your time, but part of the argument of Mr. Gilmore was that you had all of this at the punitive damage hearing and you represented to Judge Adams or you argued to Judge Adams that Paul Morabito was not insolvent. He had 90 million in assets.

Do you have any comment on that?

MS. TURNER: Well, when there is $90 million in assets being reported and there hasn't been discovery of the extent of these transfers, what we had were notes that you didn't have reason to believe on their face that they weren't valid. It's subsequently learned that there's a conveyance, da, da, da.

The punitive damages were ultimately set aside by stipulation resulting in the confessed judgment, so there is a whole lot of history there on the stipulated punitive damages and the stipulated and confessed judgment. The timeline is this. You had the punitive damages phase, the final judgment August 23rd, 2011, the settlement agreement was entered in November of 2011, really on

the heels of the final judgment where the punitive damages became a nonissue because the confessed judgment is $85 million. We went back to the $85 million.

THE COURT: For some reason I thought you talked this morning about learning -- or maybe it was Mr. Gilmore -- learning of some of these transfers from Ms. Salazar when she was preparing -- when discovery was being done with regard to the punitive damage phase.

MS. TURNER: In her report she describes the $1,617,000 note. That was March of 2011. So that was much -- the point being it wasn't at the time of the transfer. It was not like we could go in and collect on the note, the $1,617,000 note. The note itself wasn't known until that punitive damages -- known to exist until the punitive damage phase of that trial.

THE COURT: Okay.

MS. TURNER: So on the concealment badge of fraud there's no question that the transfers were discovered in the punitive damages phase inclusive of Michelle Salazar's report that's set forth in Exhibit 44. And that there was a belief, hope,

dream that Paul Morabito's $90 million that he had in May of 2010 was still available to satisfy this judgment.

As you saw in the sworn testimony of Paul Morabito in the bankruptcy, it wasn't the case. He didn't have the assets for the Herbsts to attach that they believed were available. Part and parcel of the reason for the involuntary bankruptcy, you heard Mr. Herbst's testimony on that, was to try to capture assets for the benefit of the creditors, which include the Herbsts. Now, speaking of which, Mr. Gilmore read from an order that this was a two-party dispute. And we know that there are multiple claimants and, in fact, it was a result of the discovery multiple claimants against Paul Morabito that there was an order for relief entered.

He's an adjudicated bankrupt debtor. Not that you have to be insolvent to be bankrupt, but when you provide sworn testimony the bankruptcy court just setting forth how you're unable to pay your living expenses going forward, that it was kind of surprising that there was an argument against insolvency. We still have close to $80 million that remains outstanding on the confessed judgment and it

isn't for a lack of trying, as Mr. Herbst described.

Now, when we go through the badges of fraud -- which, if multiple badges of fraud are proven, that is conclusive evidence of actual fraud -- a lot of these went, really -- they weren't addressed by evidence or argument by the defendants that the transfers were to insiders. The fact that the defendants are statutory insiders and Mr. Bayuk is otherwise a non-statutory insider with respect to his personal relationship with Paul Morabito, that's been established. The debtor retained possession or control of the property transferred.

The fact that Paul Morabito retained control or possession of the Los Olivos property is not in dispute. There's testimony he lives there. With respect to possession or a control of the Baruk Properties, the commercial properties in Laguna Beach, no question he used those properties to address his issues for his exclusive benefit including resolving his dispute with Bank of America. And the $5 million in loan that was obtained and secured by the properties, that was for his benefit. He continued to receive that beneficial interest in those properties. And with

respect to Superpumper we had multiple examples of how he was communicating with third parties saying that he had an interest or implying that he had an ongoing interest in Superpumper. He remained on emails with auditors and counsel with respect to Superpumper's business.

And all in all, there is the additional factor that the Nevada Supreme Court in the SportsCo case said that, even in addition to possession or control of the property transferred, is retaining a beneficial interest. And that's what Paul Morabito did here with respect to all of the transferred assets. The debtor removed or concealed assets. Again, the fact that these were ultimately discovered is not really the issue. It's whether or not they were concealed at the time. And reasonably equivalent value, this is something that Mr. Gilmore spent some time on, is whether or not there was reasonably equivalent value on Superpumper. He said Matrix had it right but for the cap rate. Mr. Cavalier had it right with the $6.5 million roughly valuation.

Michelle Salazar challenged the cap rate that was used but there wasn't a rational basis for

her challenge. If you review the report and you listen to the testimony of Spencer Cavalier, he did consider risk factors. When you listen to the testimony of Mr. McGovern and you look at his report, there were risk factors considered. Both of them concluded that there was no marketability factor here that was necessary in addition to the other risk factors. And Mr. McGovern described this is a controlling interest and you don't have that same issue that you would have if it was a minority interest. Mr. Lovelace is not an expert. He is not an expert on business valuation and certainly wasn't an expert here. He is counsel for the defendants and Paul Morabito and he has an interest in the outcome of the action. He cannot provide a rational basis for the value that would be reliable and, in fact, the $2.5 million number that he created was not reliable. You can't ignore the insider receivables that have been deemed collectable by the auditors. And they weren't written off subsequent to Gursey Schneider saying they were collectable. Rather, they restated them and went one further, put them in writing and they restated them with new equity signing off on the obligation, Ed Bayuk and

Sam Morabito. If the business was sold to a third-party -- and I'll use Yon Friedrick as an example and those notes are on the books of Superpumper, then he can pursue them. And we note from the testimony of Gary Kraus that they were collectable when Paul Morabito signed the certification outlining his assets subsequent to the transfer, subsequent to the judgment against Paul Morabito, Sam Morabito, and Ed Bayuk executed the notes. Was that a discount on the value that was paid by -- paid by Yon Friedrick? We don't know because that was done during litigation when discovery had finished.

But certainly to say that those should be ignored is -- there's no rational basis for that. There's no auditor who said these are not collectable and, therefore, they should have been written off and they were, in fact, not written off.

Now, even the $5 million value, which would be roughly 80 percent of the 6.5 million, even that wasn't conferred on Paul Morabito, not even the $2.5 was actually conferred. As we otherwise discussed, it was only $542,000 that was exchanged for Paul's 80 percent interest. That is not a net-net value.

And when we look at the Laguna properties, when we look at the Baruk property transfer, you do not have a net-net value and certainly not net-net from the standpoint of a creditor.

If you have a sale of the Panorama property to Skip Avansino in exchange for $2.5 million, that is a reasonably equivalent value exchange. That is the perfect example, which is why Skip Avansino is not a defendant to any action. He paid $2.5 million and he took the transfer of the Panorama property in good faith.

That is not what we have here. Once the Court finds that there's been actual fraud, it is only then that the good-faith defense is examined. And it's two factors. It's that reasonably equivalent value has been conferred. There's been net-net exchange of value and you took in good faith. And an innocent party should be protected from the remedial effect of the UFTA but that's because they're good-faith transferees. They're arm's length and they paid reasonably equivalent value that would stand in the shoes of the asset transfer for the benefit of the transferor's creditors. Here these insiders, who are not acting

arm's length, are acting in a rush to finalize these transfers before judgment is entered. They have joint representations. It was on the heel of the oral rulings establishing liability without disclosure to the creditor, with removal of the assets outside of Nevada and otherwise beyond the reach of the Herbsts, and it was when there was a reservation of benefits to Paul Morabito. As he represented to Kevin Cross, he stayed on as an adviser to Superpumper and he had the benefit of the other properties that he levered up to his exclusive benefit.

When determining good faith, you have to look at whether or not it's objective good faith and whether the defendants had actual or inquiry notice of Paul Morabito's intent to delay, hinder or defraud the Herbsts. We have that here. I'm not going to belabor it because we went over it this morning, but with joint representation and the agreement amongst them, an admitted agreement that they would do these transfers to address the impending Herbst judgment, that is reason enough to determine this is not a good-faith defense case.

Now, the Raffles asset that is for the

benefit of Paul Morabito but in the name of CFC, it is included on the May 2009-May 2010 financial statements for Paul Morabito, still that was the excuse for the cash that was transferred out of his account on the heels of the oral ruling, was, I was buying an interest in Raffles. We don't have any rational basis for the $355,000 to Sam Morabito or the 420,000 to Ed Bayuk in settlement of 2010. And so that certainly -- we still don't have a rational basis. That needs to be clawed back and rendered a part of the judgment.

Your Honor, a distribution pursuant to a charging order, that is something. And if, really, the Herbsts couldn't collect against these assets, then the reason provided for the transfers, the reason stated by Sam Morabito and Ed Bayuk, Dennis Vacco makes no sense, which is, Well, we were trying to help the Herbsts. We were trying to protect the defendants from having to deal with the Herbsts and we were going to set these assets aside for the benefit of the Herbsts.

Well, the Herbsts didn't receive the benefit of the assets and they only acted, the transfers, to prevent those execution tools, the use

of those tools in the state of Nevada as the Herbsts parties would have been entitled to do with Baruk Properties LLC, a Nevada LLC and CWC, a Nevada corporation.

So in closing, your Honor, a travesty existed in September 2010 as a result of Paul Morabito's fraud directed to the Herbsts and that travesty was exacerbated with these transfers. And the requested judgment will not right all of Paul Morabito's wrongs but it's a start consistent with the remedial purpose of the statute. We do not have innocent transferees here and to the extent there was any actual value conferred, our proposed judgment provides an offset.

With that, your Honor, thank you.

THE COURT: Okay. Thank you. Counsel, I'm going to take this under submission. I appreciate your arguments and I appreciate the efforts everyone has put through for the trial. I'm not ready to rule on it today but I will as quickly as I can. You know that the rest of this week is a jury trial. Currently we have jury trials set every Monday until Christmas, but we hope to get through this. I'm hoping maybe one trial will be taken by another

judge so we'll see and we'll get it to you as quickly as we can. Court's in recess.

(End of proceedings at 4:48 p.m.)

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STATE OF NEVADA)
) SS.
COUNTY OF WASHOE)

I, CHRISTINA MARIE AMUNDSON, official reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That as such reporter, I was present in Department No. 4 of the above court on November 26, 2018, at the hour of 9:15 a.m. of said day, and I then and there took verbatim stenotype notes of the proceedings had and testimony given therein in the case of William Leonard, Trustee, Plaintiff, v. Superpumper, et al., Defendants, Case No. CV13-02663.

That the foregoing transcript is a true and correct transcript of my said stenotype notes so taken as aforesaid, and is a true and correct statement of the proceedings had and testimony given in the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada, this 3rd day of February 2019.

/S/ Christina Marie Amundson, CCR #641

Christina Marie Amundson, CCR #641

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