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 Jul 14 2020 04:14 p.m. Elizabeth A. Brown Clerk of Supreme Court Appeal from the Second Judicial District Court, the Honorable Connie J. Steinheimer Presiding

APPELLANTS' AMENDED OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Appellant Superpumper, Inc. is an Arizona corporation and has no parent company or publicly held company that owns 10% or more of its stock.

2. The Edward Bayuk Living Trust is a Nevada spendthrift trust and has no parent company or publicly held company that owns 10% or more of its stock.

3. Snowshoe Petroleum, Inc. is a New York corporation and has no parent company or publicly held company that owns 10% or more of its stock.

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4. Appellants are or have been represented by Robison, Sharp, Sullivan & Brust; Hartman & Hartman; Michael C. Lehners; Marquis Aurbach Coffing; and Claggett & Sykes Law Firm.

Dated this 13th day of July, 2020.

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I. JURISDICTIONAL STATEMENT

On August 5, 2019, Defendant/Appellant Edward Bayuk ("Bayuk"), individually and as the trustee of the Edward Bayuk Living Trust ("Bayuk Trust"), timely filed a notice of appeal listing the final judgment; several interlocutory orders; and the post-trial orders denying Defendants' motion for new trial, granting attorney fees to Plaintiff/Respondent, William A. Leonard, Jr., Trustee for the Bankruptcy Estate of Paul Anthony Morabito ("Trustee"), and the award of costs to the Trustee. 53 Appellants' Appendix ("AA") 9261–9263. The remaining Defendants/Appellants, including Bayuk and the Bayuk Trust (collectively "Defendants" where appropriate), also filed a notice of appeal on August 5, 2019, which included these same orders. 53 AA 9270–9349.

Defendants' appeal from the final judgment is authorized by NRAP 3A(b)(1). *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). The interlocutory orders are also reviewable under the umbrella of Defendants' appeal from the final judgment. *Consolidated Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998). Defendants' appeal from the award of attorney fees and costs is authorized by NRAP 3A(b)(8) as a special order. *Lee*, 116 Nev. at 426, 996 P.2d at 417. Defendants' appeal from the denial of the motion for new trial is authorized by NRAP 3A(b)(2). *Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 5–6, 106 P.3d 134, 136–137 (2005). The denial of

Defendants' motion to alter or amend is reviewable under Defendants' appeal from the final judgment. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). Therefore, this Court has appellate jurisdiction over all the issues presented in this appeal.

II. ROUTING STATEMENT

The Supreme Court should retain this appeal. According to NRAP 17(b)(5), this case is not presumptively assigned to the Court of Appeals because the judgment for the Trustee's sole claim for fraudulent transfer against Defendants exceeds the $250,000 threshold. 48 AA 8270–8333. Further, based upon NRAP 17(a)(11) and (12), Defendants have presented three issues of first impression: First, the District Court lacked subject matter jurisdiction over the entire case due to the nature of the litigation. *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000) (citing *Wood v. Wood*, 825 F.2d 90, 97 (5th Cir. 1987)). The bankruptcy court has plenary power over "core" proceedings. *Id.* at 1080–1081. "*Gruntz* bars state court intrusions on all 'bankruptcy court orders' (or other 'core' bankruptcy proceedings), 202 F.3d at 1082, not just the automatic stay." *In re McGhan*, 288 F.3d 1172, 1179 (9th Cir. 2002). Additionally, the Trustee also lacked authority to pursue claims belonging to certain creditors. *Williams v. California 1st Bank*, 859 F.2d 664, 667 (9th Cir. 1988). Second, the District Court never acquired subject matter jurisdiction over the Bayuk Trust because it was not named as a defendant. 4 AA 594–607. Instead, the Trustee

only named Bayuk, as the trustee of the Bayuk Trust. *Id.* Yet, NRS 164.010 specifies that the action must be one *in rem* against the trust. *In re Aboud Inter Vivos Tr.*, 129 Nev. 915, 922, 314 P.3d 941, 945–946 (2013). Third, the District Court misinterpreted NRS 49.095 and NRS 49.115 regarding the attorney-client privilege between Defendants and their former counsel. The District Court first ruled that the Trustee stood in the shoes of the Debtor, Paul Anthony Morabito, in the Bankruptcy Court, such that the Trustee was entitled to all of the confidential communications between Paul Morabito and his attorneys. 7 AA 1113–1126. In construing NRS 49.115(5), the District Court then treated Paul Morabito as adverse to Defendants to require them to have their own confidential communications divulged. *Id.* This ruling was carried through the case, and Defendants were unfairly forced to defend a case where their own confidential communications were produced. 48 AA 8270–8333. For these reasons, the Supreme Court should retain this appeal.

III. ISSUES ON APPEAL

A. WHETHER THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER THE ENTIRE DISTRICT COURT CASE, DUE TO THE NATURE OF THIS LITIGATION, AND THE TRUSTEE'S INABILITY TO PURSUE THE FRAUDULENT TRANSFER CLAIM THAT BELONGED TO CERTAIN CREDITORS.

B. WHETHER THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER THE BAYUK TRUST SINCE NO *IN REM* ACTION WAS FILED AGAINST IT.

C. WHETHER, ALTERNATIVELY, THE DISTRICT COURT ERRED BY ALLOWING THE DISCLOSURE OF DEFENDANTS' CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS WHICH PREJUDICED THEM.

IV. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This is an appeal in which Defendants ask this Court to define the parameters of the Trustee's authority and, if necessary, construe NRS Chapter 49 regarding the attorney-client privilege when a Trustee becomes involved in state court litigation. In particular, Defendants ask this Court to conclude that the District Court was without subject matter jurisdiction over this entire litigation due to the nature of this litigation. That is, the Trustee was without authority to pursue a core matter in the District Court that lies within the exclusive jurisdiction of the Bankruptcy Court. *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000) (citing *Wood v. Wood*, 825 F.2d 90, 97 (5th Cir. 1987)). The bankruptcy court has plenary power over "core" proceedings. *Id.*

at 1080–1081. The Trustee first appeared in this litigation by substitution to take the place of some of the creditors from Paul Morabito's involuntary Chapter 7 bankruptcy. 4 AA 594–611. But, the Trustee lacked authority to pursue the creditors' sole claim for fraudulent transfer. *Williams v. California 1st Bank*, 859 F.2d 664, 667 (9th Cir. 1988). Importantly, the fraud claim was personal to the creditors and not assignable under Nevada law. *Reynolds v. Tufenkjian*, 461 P.3d 147, 152 (Nev. 2020). Therefore, due to the District Court's lack of subject matter jurisdiction, Defendants first ask this Court to vacate the District Court's orders as void. *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) (noting that when the district court lacks subject matter jurisdiction, the judgment rendered is void) (citing *State Indus. Ins. System v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984)).

Second, the District Court never acquired subject matter jurisdiction over the Bayuk Trust because it was not named as a defendant. 4 AA 594–607. Instead, the Trustee only named Bayuk, as the trustee of the Bayuk Trust. *Id.* An *in personam* judgment against the trustee is not the same as an *in rem* judgment against the trust. NRS 166.170(1) and (8) establish clear time limits to bring an action under NRS 164.010. And, NRS 164.010 specifies that the action must be one *in rem* against the trust. *See also In re Aboud Inter Vivos Tr.*, 129 Nev. 915, 922, 314 P.3d 941, 945–946 (2013). NRS 164.010(1) confers *in rem* jurisdiction on a district court over trust

property in all trust administration actions. NRS 164.015(6) also provides that a district court's order in a trust administration action is binding *in rem* upon the trust estate and upon the interests of all beneficiaries. But, a trustee in his representative capacity is a different legal person than the person in his individual capacity, or the trust itself. *Cf. Mona v. Eighth Judicial Dist. Court*, 380 P.3d 836, 842, 132 Nev. 719, 728 (2016) ("[Petitioner], in her individual capacity, is a distinct legal person and is a stranger to [Petitioner] in her representative capacity as a trustee of the Mona Family Trust.") (citing *Alexander v. Todman*, 361 F.2d 744, 746 (3d Cir. 1966)). Thus, Bayuk, as trustee, is not the same as Bayuk, individually, or the Bayuk Trust. Since the District Court did not have subject matter jurisdiction over the Bayuk Trust, the corresponding portions of the judgment are void. *See Landreth*, 127 Nev. at 179, 251 P.3d at 166.

Third, the District Court misinterpreted NRS 49.095 and NRS 49.115 regarding the attorney-client privilege between Defendants and their former counsel to the prejudice of Defendants. The District Court first ruled that the Trustee stood in the shoes of Paul Morabito in the Bankruptcy Court, such that the Trustee was entitled to all of the confidential communications between Paul Morabito and his attorneys. 7 AA 1113–1126. In construing NRS 49.115(5), the District Court then treated Paul Morabito as adverse to Defendants to require them to have their own confidential communications divulged. *Id.* This ruling was carried through the case,

and Defendants were unfairly forced to defend a case where their own confidential communications were produced. 48 AA 8270–8333. In essence, the District Court treated the Trustee as being on both sides of the case. Since this is an absurd interpretation of NRS 49.095 and NRS 49.115, Defendants ask this Court to, alternatively, grant them a new trial with instructions that the privileged information cannot be admitted into evidence. *We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008) (stating that the Court must interpret a statute in harmony with other statutes "to avoid unreasonable or absurd results"). If the Court orders a new trial, Defendants further request that a new District Judge be assigned on remand since the current District Judge, as the fact finder, "heard the evidence that should have been excluded and formed and expressed an opinion on the ultimate merits." *FCH1, LLC v. Rodriguez*, 326 P.3d 440, 446 (Nev. 2014).

In summary, Defendants ask this Court to vacate all the District Court orders for lack of subject matter jurisdiction, due to the nature of this litigation, and the Trustee's inability to pursue the fraudulent transfer claim that belonged to certain creditors. Defendants further ask this Court to vacate the District Court's judgment against the Bayuk Trust since no *in rem* action was filed against it. Alternatively, Defendants ask this Court for a new trial based upon the District Court's absurd interpretation of NRS 49.095 and NRS 49.115, which allowed the Trustee to act on both sides of the case. If the Court alters the judgment in any way, the awards of

attorney fees and costs to the Trustee should be vacated. *Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1162 n.33, 146 P.3d 1130, 1140 n.33 (2006). If there are any further proceedings in the District Court, the Court should assign a new District Judge since the current District Judge has already heard and ruled upon the evidence that should have been excluded.

V. STANDARDS OF REVIEW

A. STANDARDS FOR REVIEWING QUESTIONS OF SUBJECT MATTER JURISDICTION.

This Court reviews questions regarding subject matter jurisdiction de novo. *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009).

B. STANDARDS FOR REVIEWING QUESTIONS OF STANDING.

Standing is a question of law reviewed de novo. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011) (citing *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 629, 218 P.3d 847, 850–851 (2009) (applying de novo review in deciding upon whom a statute conferred standing)).

C. STANDARDS FOR REVIEWING QUESTIONS OF LAW.

This Court reviews questions of law de novo. *Birth Mother v. Adoptive Parents*, 118 Nev. 972, 974, 59 P.3d 1233, 1235 (2002). Statutory interpretation is a question of law that this Court reviews de novo. *Id.* A district court's application

of an improper legal rule also carries a de novo review. *Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 505–506 (2007)

D. STANDARDS FOR REVIEWING A DISTRICT COURT'S ERRONEOUS ADMISSION OF EVIDENCE.

This Court reviews claims of prejudice concerning errors in the admission of evidence based upon whether the error substantially affected the rights of the appellant. This demonstration is made when the appellant demonstrates from the record that, but for the error, a different result "might reasonably have been expected." *Hallmark v. Eldridge*, 124 Nev. 492, 505, 189 P.3d 646, 654 (2008).

E. STANDARDS FOR REVIEWING ORDERS DENYING MOTIONS FOR NEW TRIAL.

This Court reviews a district court's decision to grant or deny motions for new trial with an abuse of discretion standard. *Id.* While this Court's review for abuse of discretion is ordinarily deferential, deference is not owed to legal error. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). An abuse of discretion occurs if the district court's decision is arbitrary and capricious or if it exceeds the bounds of law or reason. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "Arbitrary and capricious" is defined as a willful and unreasonable action without consideration or in disregard of the facts or law, or without a determining principle. *State v. Dist. Ct.*, 118 Nev. 140, 146–147, 42 P.3d 233, 237 (2002). "Abuse of discretion" is defined as the failure to exercise a sound,

reasonable, and legal discretion. BLACK'S LAW DICTIONARY, 11 (6th ed. 1990). "Abuse of discretion" is a strict legal term indicating that the appellate court is of the opinion that there was a commission of an error of law by the trial court. *Id.* It does not imply intentional wrongdoing or bad faith, or misconduct, nor any reflection on the judge but refers to the clearly erroneous conclusion and judgment—one that is clearly against logic. *Id.*

VI. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. THE ORIGINAL COMPLAINT, CLAIMS, AND PARTIES.

This litigation began with the filing of a complaint in December 2013. 1 AA 1–17. The complaint was filed by JH, Inc.; Jerry Herbst; and Berry-Hinckley Industries (collectively the "Herbst Parties") against Paul Morabito, individually and as trustee of the Arcadia Living Trust; Superpumper, Inc.; Edward Bayuk, individually and as trustee of the Edward Bayuk Living Trust; and Snowshoe Petroleum, Inc. *Id.* This original complaint alleged claims for (1) fraudulent transfers (1 AA 10–11); (2) breach of contract (1 AA 12); (3) breach of the implied covenant of good faith and fair dealing (1 AA 13); (4) fraudulent inducement/misrepresentation (1 AA 13–14); (5) civil conspiracy (1 AA 14–15); and (6) aiding and abetting fraudulent misrepresentation (1 AA 16).

The Herbst Parties alleged that following an oral ruling finding fraud in a separate case against Paul Morabito and non-party Consolidated Nevada

Corporation ("CNC") for $149,444,777.80, Paul Morabito and CNC agreed to settle the case for $85,000,000 to be paid over a period of time. 1 AA 4. The Herbst Parties further alleged that Paul Morabito and CNC failed to abide by the terms of the settlement agreement by failing to make payments. 1 AA 4–7. The Herbst Parties then alleged that Paul Morabito engaged in a series of fraudulent transfers involving the remaining Defendants. 1 AA 7–10.

B. PAUL MORABITO'S INVOLUNTARY CHAPTER 7 BANKRUPTCY.

In February 2015, the Herbst Parties provided notice to the District Court that they had filed involuntary Chapter 7 bankruptcy petitions for both Paul Morabito and CNC. 3 AA 495–574. These notices still listed the Herbst Parties as the plaintiffs. *Id.*

C. THE STIPULATIONS AND THE TRUSTEE'S AMENDED COMPLAINT, ABANDONMENT OF CERTAIN CLAIMS, AND PARTIES.

The parties stipulated to remove the Herbst Parties and substitute in the Trustee as the plaintiff. 4 AA 608–611. In this stipulation, the parties also removed Paul Morabito, individually and as a trustee of the Arcadia Living Trust, as defendants. *Id.* In a separate stipulation, the parties agreed to allow the Trustee to file an amended complaint, which referred to Paul Morabito as the "Debtor," but alleged the same underlying facts, and abandoned all claims except for the claimed

fraudulent transfers. 4 AA 575–607. The parties filed a further stipulation to substitute parties to remove the Arcadia Living Trust as a defendant. 4 AA 624–627.

D. DEFENDANTS' MOTION TO PARTIALLY QUASH OR FOR A PROTECTIVE ORDER TO SAFEGUARD ATTORNEY-CLIENT PRIVILEGED INFORMATION FROM DENNIS VACCO, ESQ.

Relying on an oral ruling from the Bankruptcy Court that the Trustee could step into Paul Morabito's shoes to obtain his attorney-client privileged information, the Trustee then sought to take that ruling one step further to get all of Defendants' attorney-client privileged information. 4 AA 657–659. The Trustee's position required Defendants to then file a motion to quash the subpoena sent from the Trustee to Dennis Vacco, Esq. ("Vacco"). 4 AA 628–659. The Trustee's opposition relied completely upon bankruptcy law and other federal case law to support its position. 5 AA 726–925. The Discovery Commissioner and the District Court simply echoed the Trustee's arguments based upon bankruptcy law and added that the Trustee was also entitled to confidential attorney-client privileged information from Defendants based upon an absurd reading of NRS 49.115(5). In essence, the District Court's ruling was that the Trustee stood in the place of Paul Morabito for purposes of bankruptcy law to get confidential attorney-client information from his former attorneys. 7 AA 1113–1126. However, the District Court also held, based upon NRS 49.115(5), that the Trustee was adverse to Defendants, such that he could

also obtain confidential attorney-client information from Defendants based upon a dispute among parties in a common interest privilege. *Id.*

E. DEFENDANTS' SECOND MOTION TO QUASH SUBPOENA OR FOR PROTECTIVE ORDER TO ONCE AGAIN SAFEGUARD ATTORNEY-CLIENT PRIVILEGED INFORMATION FROM LAW FIRM HODGSON RUSS, LLP.

Now working within the parameters of the District Court's ruling on the waiver of the attorney-client privilege, Defendants objected to the Trustee's subpoena to law firm Hodgson Russ, LLP. 9 AA 1390–1460. Defendants objected on the basis that the subpoena was issued after the close of discovery. 9 AA 1391–1392. Defendants also objected since the Trustee had agreed to limit the scope of the deposition, but reneged at the deposition. *Id.* Hodgson Russ had represented both Paul Morabito and Defendants. 9 AA 1398. As noted in the Discovery Commissioner's ruling, Defendants had objected to any invasion of their attorney-client privilege. 11 AA 1745–1746. The Discovery Commissioner also acknowledged that these objections were preserved for appeal. 11 AA 1751. Ultimately, the Discovery Commissioner rejected all of Defendants' contentions. 11 AA 1752. Upon Defendants' objection to the Discovery Commissioner's ruling (18 AA 2727–2734), the District Court confirmed and adopted the Discovery Commissioner's rulings in their entirety. 19 AA 2974–2981.

F. THE DISTRICT COURT'S DENIAL OF THE TRUSTEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

Prior to the bench trial, the Trustee filed a motion for summary judgment. 11 AA 1754–17 AA 2726. The Trustee asked the District Court to grant summary judgment on his sole claim for fraudulent transfer, including minimum monetary amounts to be awarded that could be increased at trial. 11 AA 1791–1793. The Trustee alternatively asked to be awarded real properties for certain transfers. *Id.*

In denying the Trustee's motion for summary judgment, the District Court found that "a material issue of fact exists as to whether Bayuk should be considered an insider for the purpose of NUFTA [Nevada Uniform Fraudulent Transfer Act]." 19 AA 2994. The District Court also determined that "a material issue of fact exists as to whether Paul [Morabito] maintained possession or control of all the transferred property." 19 AA 2994. The District Court further found that "the inclusion of appraisers and lawyers to the various transaction[s] cuts against the evidence that the transfers were concealed. Therefore, the Court finds a material issue of fact exists as to this badge of fraud." 19 AA 2995.

Elaborating on additional factual issues, the District Court found that "there are [] material issues of fact as to whether Paul [Morabito] received reasonably equivalent value for the various transfers." 19 AA 2995. The Court detailed additional factual issues, including the "transfer of the Laguna Properties for the

Reno Property was a transfer of reasonable equivalent value, as well as the value of the Reno Property being in dispute." *Id.* The District Court also recognized, with respect to Paul Morabito's interest in the Baruk Properties, that there is a material issue of fact as to whether the Baruk Note was a 'sham note' and whether the Baruk Note has been paid." *Id.* The District Court reasoned that since "some evidence has been provided that Paul [Morabito] was compensated for the Sparks Property, the Court cannot find because the Property was not considered in the appraisal matrix, that this alone shows fair value was not given for the Baruk Transfer." *Id.*

The District Court similarly found "multiple issues of fact concerning whether fair value was received in regards to [the] Superpumper Transfer." 19 AA 2995. There were material issues of fact with regard to both "the value of Superpumper at the time of the transfer," "whether the promissory notes issued in connection with the transfer were illusory," and "whether [the] promissory notes were paid." *Id.* Due to these several factual issues, the District Court denied the Trustee's motion for summary judgment. 19 AA 2996.

G. DEFENDANTS' OBJECTIONS TO THE TRUSTEE'S PROPOSED DOCUMENTS TO BE USED AT TRIAL.

In response to the Trustee's pretrial disclosures, Defendants objected to the Trustee's identification of 786,824 pages of documents expected to be offered at trial. 20 AA 3297–3299. Specifically, Defendants objected to the Trustee's

numerous hearsay documents. *Id.* Defendants further objected to emails from Paul Morabito and Vacco because they were not available at the time of their depositions, and no one was available at trial to authenticate them. 20 AA 3322–3325.

H. THE DISTRICT COURT'S DECISION.

Following the bench trial, the District Court issued its findings of fact, conclusions of law, and judgment. 48 AA 8270–8333. Within the decision, the District Court characterized the Herbst Parties as one group of creditors, among others in Paul Morabito's bankruptcy. 48 AA 8237. Yet, the District Court determined that the Trustee had standing to pursue the sole claim for fraudulent transfer against Defendants on behalf of the Herbst Parties. 48 AA 8301–8302.

Additionally, the District Court relied upon various exhibits that either violated Defendants' attorney-client privilege or lacked foundation, such that they should not have been admitted at trial. *See* 48 AA 8310–8316.

The District Court's decision entered judgment against Bayuk and the Bayuk Trust, as follows: (1) avoiding the transfer of the El Camino Property and the Los Olivos Property, and awarding the Trustee damages in the amount of $884,999.95, with offset for amounts collected on account of the El Camino Property and the Los Olivos Property; (2) avoiding the transfer of Baruk LLC and awarding Plaintiff damages in the amount of $1,654,550 with offset for amounts collected on account of Baruk LLC; (3) avoiding the transfer of $420,250 and awarding the Trustee

damages in the amount of $420,250 with offset for amounts collected on account of the $420,250; and (4) avoiding the Superpumper transfer and awarding the Trustee damages in the amount of $4,949,000 with offset for amounts collected on account of the Superpumper transfer. 48 AA 8331.

Against Sam Morabito as follows: (1) avoiding the transfer of $355,000 and awarding the Trustee damages in the amount of $355,000 with offset for amounts collected on account on account of the $355,000; and (2) avoiding the Superpumper transfer and awarding the Trustee damages in the amount of $4,949,000 with offset for amounts collected on account of the Superpumper transfer. *Id.*

Against Snowshoe, avoiding the Superpumper transfer and awarding the Trustee damages in the amount of $9,898,000 with offset for amounts collected on account of the Superpumper transfer. *Id.*

I. THE POST-TRIAL PROCEEDINGS.

Following the District Court's decision, Defendants filed motions for new trial or to alter or amend the judgment. 49 AA 8638–50 AA 8777. Within these motions, Defendants reasserted, among other issues, an unfair trial due to evidence that was admitted, even though it contained hearsay information and lacked foundation. 49 AA 8638–8657; 50 AA 8658–8676. The District Court generally considered Defendants' arguments but rejected them in a written denial order. 52 AA 9122–9124.

The District Court also granted attorney fees and costs to the Trustee in the amount of $764,987.33 for attorney fees based upon an offer of judgment and $109,427 in costs. 51 AA 8983–8988. Defendants now appeal from the District Court's orders. 53 AA 9261–9263, 9270–9349.

VII. LEGAL ARGUMENT

A. THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER THE ENTIRE DISTRICT COURT CASE, DUE TO THE NATURE OF THIS LITIGATION, AND THE TRUSTEE'S INABILITY TO PURSUE THE FRAUDULENT TRANSFER CLAIM THAT BELONGED TO CERTAIN CREDITORS.

Defendants ask this Court to conclude that the District Court was without subject matter jurisdiction over this entire litigation due to the nature of this litigation, and the Trustee's inability to pursue the fraudulent transfer claim that belonged to certain creditors.

1. Background on Subject Matter Jurisdiction.

By definition, "subject matter jurisdiction" is "[j]urisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things." BLACK'S LAW DICTIONARY, 1020 (11th ed. 2019). "Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation." *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255, 114 S.Ct. 798, 803 (1994). "Whether a court lacks subject matter

jurisdiction can be raised by the parties at any time, or sua sponte by a court of review, and cannot be conferred by the parties." *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011). The lack of subject matter jurisdiction is not waivable and cannot be conferred by the parties. *See Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990). "There can be no dispute that lack of subject matter jurisdiction renders a judgment void." *State Indus. Ins. Sys. v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984).

2. <u>The Nature of this Litigation Results in the District Court's Lack of Subject Matter Jurisdiction Over this Entire Litigation.</u>

Adversary complaints based upon a claim for fraudulent conveyance (such as the claims alleged by the Trustee) are "core" matters in the Bankruptcy Court. *See* FED. R. BANKR. P. 7001(1); *see also* 28 U.S.C. § 157(b)(2)(H). A "core proceeding" in bankruptcy is one that "invokes a substantive right provided by title 11 or a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000) (citing *Wood v. Wood*, 825 F.2d 90, 97 (5th Cir. 1987)). The bankruptcy court has plenary power over "core" proceedings. *Id.* at 1080–1081. "[T]he separation of "core" and "non-core" proceedings in the 1984 Act creates a distinction between those judicial acts deriving from the plenary Article I bankruptcy power and those subject to general Article III federal court jurisdiction." *Id.* at 1081. The Trustee was without authority to pursue

a core matter in the District Court that lies within the exclusive jurisdiction of the Bankruptcy Court. *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000) (citing *Wood v. Wood*, 825 F.2d 90, 97 (5th Cir. 1987)).

"*Gruntz* bars state court intrusions on all 'bankruptcy court orders' (or other 'core' bankruptcy proceedings), 202 F.3d at 1082, not just the automatic stay." *In re McGhan*, 288 F.3d 1172, 1179 (9th Cir. 2002). This case is an action to recover money or property, and FED. R. BANKR. P. 7001 mandates that it be brought by an adversary proceeding filed in the Bankruptcy Court, which was never done. Motion practice cannot be used to circumvent the requirement of an adversary proceeding. *See Bear v. Coben (In re Golden Plan)*, 829 F.2d 705, 711–712 (9th Cir. 1986); *In re Loloee*, 241 B.R. 655, 660 (B.A.P. 9th Cir. 1999). Rather, a claim for fraudulent conveyance must be brought as an adversary proceeding. *See Bear*, 829 F.2d at 711–712. *Gruntz* illustrates the Bankruptcy Court's jurisdiction over core matters. Robert Gruntz was divorced. He did not pay his child support obligations, so he filed a Chapter 13 bankruptcy to repay the support arrears over time. Frustrated, the ex-spouse took her complaints to the Los Angeles District Attorney, who filed a misdemeanor criminal complaint charging Gruntz with a violation of California Penal Code § 270 (failure to support dependent children). A jury convicted him.

Gruntz filed an adversary proceeding against the County in the bankruptcy court, requesting the court to declare the state criminal proceedings void as violative

of the automatic stay imposed under 11 U.S.C. § 362. The bankruptcy court dismissed the complaint as collaterally estopped by the state judgment. On appeal, the district court affirmed. A divided Ninth Circuit panel reversed.

The Ninth Circuit held that final judgments in state courts are not necessarily preclusive in United States bankruptcy courts. Indeed, the rule has long stood that a state court judgment entered in a case that falls within the federal courts' exclusive jurisdiction is subject to collateral attack in the federal courts. *Id*. at 1079. Since the District Court's judgment was entered without the proper subject matter jurisdiction, the entire judgment is void. *See Landreth*, 127 Nev. at 179, 251 P.3d at 166.

3. The Trustee Was Without Authority to Pursue the Fraudulent Transfer Claim Belonging to the Herbst Parties.

The Trustee first appeared in this litigation by substitution to take the place of some of the creditors from Paul Morabito's involuntary Chapter 7 bankruptcy. 4 AA 594–611. But, the Trustee lacked authority to pursue the creditors' sole claim for fraudulent transfer. *Williams v. California 1st Bank*, 859 F.2d 664, 667 (9th Cir. 1988). In *Williams*, the Ninth Circuit agreed with the argument that "a trustee lacks standing to sue a third party on behalf of creditors of the estate." *Id.* at 666. The United States Supreme Court reached a similar holding in *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 434, 92 S. Ct. 1678, 1688 (1972) ("[W]e conclude that petitioner does not have standing to sue an indenture trustee on behalf of

debenture holders."). Ultimately, *Williams* concluded, "We agree with the Eighth Circuit that Congress' express decision not to overrule *Caplin* is 'extremely noteworthy.' We also share that court's certitude that Congress' message is clear—*no* trustee, whether a reorganization trustee as in *Caplin* or a liquidation trustee[,] has power under . . . the Code to assert general causes of action, such as [an] alter ego claim, on behalf of the bankrupt estate's creditors." 859 F.2d at 667 (emphasis in original) (citing *In re Ozark Restaurant Equipment Co.*, 816 F.2d 1222, 1228 (8th Cir. 1987).

Notably, the Trustee did not obtain authorization from the Bankruptcy Court before pursuing this litigation regarding a sole claim for fraudulent transfer. *See In re New England Fish Co.*, 33 B.R. 413, 419 (Bankr. W.D. Wash. 1983) ("It is well settled bankruptcy law that on important decisions, whatever their character, the trustee must get the court's approval . . . .") (citing *Newport v. Sampsell*, 233 F.2d 944, 946 (9th Cir. 1956)). But, the Trustee also did not obtain an assignment from the Herbst Parties to pursue their claim against Defendants. The District Court impermissibly assumed that the Trustee had standing, even though the District Court's analysis was incomplete. 48 AA 8301–8302.

In reviewing the potential assignability of a legal malpractice claim in the bankruptcy context, this Court reasoned that the underlying claim must be evaluated. *Tower Homes, LLC v. Heaton*, 132 Nev. 628, 633, 377 P.3d 118, 121 (2016). In the

instant case, the Herbst Parties asserted claims against Paul Morabito and Defendants for (1) fraudulent transfers (1 AA 10–11); (2) breach of contract (1 AA 12); (3) breach of the implied covenant of good faith and fair dealing (1 AA 13); (4) fraudulent inducement/misrepresentation (1 AA 13–14); (5) civil conspiracy (1 AA 14–15); and (6) aiding and abetting fraudulent misrepresentation (1 AA 16). In the amended complaint, the Trustee then asserted a sole claim for fraudulent transfers against Defendants. 4 AA 594–607. But, this fraud claim was personal in nature to the Herbst Parties and, therefore, not assignable under Nevada law. *Reynolds v. Tufenkjian*, 461 P.3d 147, 152 (Nev. 2020). In *Reynolds*, this Court explained, "Nevada generally prohibits the assignment of tort claims on public policy grounds, as many tort claims are personal in nature and meant to recompense the injured party." 461 P.3d at 152 (citing *Maxwell v. Allstate Ins. Cos.*, 102 Nev. 502, 506, 728 P.2d 812, 815 (1986) (rejecting the subrogation of tort claims via an insurance contract on public policy grounds); *Prosky v. Clark*, 32 Nev. 441, 445, 109 P. 793, 794 (1910) (recognizing that fraud claims are not assignable due to their personal nature)). Thus, the Herbst Parties could not legally assign their fraud claims to the Trustee, even if they had executed an assignment. Due to the District Court's lack of subject matter jurisdiction, Defendants first ask this Court to vacate the District Court's orders as void. *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) (noting that when the district court lacks subject matter jurisdiction, the

judgment rendered is void) (citing *State Indus. Ins. System v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984)).

B. THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER THE BAYUK TRUST SINCE NO *IN REM* ACTION WAS FILED AGAINST IT.

The District Court never acquired subject matter jurisdiction over the Bayuk Trust because it was not named as a defendant. 4 AA 594–607. Instead, the Trustee only named Bayuk, as the trustee of the Bayuk Trust. *Id.* BLACK'S LAW DICTIONARY, 1019 (11th ed. 2019) defines "*in rem* jurisdiction" as "[a] court's power to adjudicate the rights to a given piece of property, including the power to seize and hold it." An *in personam* judgment against the trustee is not the same as an *in rem* judgment against the trust. NRS 166.170(1) and (8) establish clear time limits to bring an action under NRS 164.010. And, NRS 164.010 specifies that the action must be one *in rem* against the trust. *See In re Aboud Inter Vivos Tr.*, 129 Nev. 915, 922, 314 P.3d 941, 945–946 (2013).

NRS 164.010(1) confers *in rem* jurisdiction on a district court over trust property in all trust administration actions. NRS 164.015(6) also provides that a district court's order in a trust administration action is binding *in rem* upon the trust estate and upon the interests of all beneficiaries. But, a trustee in his representative capacity is a different legal person than the person in his individual capacity, or the trust itself. *Cf. Mona v. Eighth Judicial Dist. Court*, 380 P.3d 836, 842, 132 Nev.

719, 728 (2016) ("[Petitioner], in her individual capacity, is a distinct legal person and is a stranger to [Petitioner] in her representative capacity as a trustee of the Mona Family Trust.") (citing *Alexander v. Todman*, 361 F.2d 744, 746 (3d Cir. 1966)). Thus, Bayuk, as trustee, is not the same as Bayuk, individually, or the Bayuk Trust. The United States Supreme Court recognized the same distinction in *Hanson v. Denckla*, 357 U.S. 235, 250, 78 S.Ct. 1228, 1238 (1958): "Since a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction. Therefore, so far as it purports to rest upon jurisdiction over the trust assets, the judgment of the Florida court cannot be sustained."

This Court explained that once a court obtains *in rem* jurisdiction, "*in personam* jurisdiction is not necessary to enter a judgment." *In re Aboud Inter Vivos Tr.*, 129 Nev. at 921, 314 P.3d at 945. However, the opposite is not supported by any legal authority. This Court continued, "Because the district court's order was a judgment against Betty Jo and I.C.A.N., and not against any trust property, it exceeded the *in rem* jurisdiction over trust assets provided by NRS 164.010(1) and NRS 164.015(6) and is void." *Id.*, 129 Nev. at 922, 314 P.3d at 946. Since the District Court did not have subject matter jurisdiction over the Bayuk Trust, the corresponding portions of the judgment are void. *See Landreth*, 127 Nev. at 179,

251 P.3d at 166. These portions of the judgment that should be vacated, include: (1) avoiding the transfer of the El Camino Property and the Los Olivos Property, and awarding the Trustee damages in the amount of $884,999.95, with offset for amounts collected on account of the El Camino Property and the Los Olivos Property; (2) avoiding the transfer of Baruk LLC and awarding Plaintiff damages in the amount of $1,654,550 with offset for amounts collected on account of Baruk LLC; (3) avoiding the transfer of $420,250 and awarding the Trustee damages in the amount of $420,250 with offset for amounts collected on account of the $420,250; and (4) avoiding the Superpumper transfer and awarding the Trustee damages in the amount of $4,949,000 with offset for amounts collected on account of the Superpumper transfer. 48 AA 8331.

C. ALTERNATIVELY, THE DISTRICT COURT ERRED BY ALLOWING THE DISCLOSURE OF DEFENDANTS' CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS WHICH PREJUDICED THEM.

The District Court misinterpreted NRS 49.095 and NRS 49.115 regarding the attorney-client privilege between Defendants and their former counsel, which prejudiced them.

1. Background on the Attorney-Client Privilege and the Common Interest Privilege.

In its most basic form, the attorney-client privilege is "[t]he client's right to refuse to disclose and to prevent any other person from disclosing confidential

communications between the client and the attorney." BLACK'S LAW DICTIONARY, 1450 (11th ed. 2019). These communications are protected by the "long-standing privilege at common law that protects communications between attorneys and clients." *Wynn Resorts, Ltd. v. Dist. Ct.*, 399 P.3d. 334, 341 (Nev. 2017) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677 (1981)).

Courts typically define the "common interest rule" as an exemption from normal waiver rules that apply when a third party to whom privileged information is disclosed shares a common legal interest with the party that made the disclosure. *See United States v. Schwimmer*, 892 F.2d 237, 243–244 (2d Cir. 1989). In recognizing the common interest doctrine, courts cite to the same two-fold purpose as that of the attorney-client privilege and the joint defense doctrine—the free flow of communication to enhance the quality of legal advice. *See* Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 62 (2005); *see also* Susan K. Rushing, Note, *Separating the Joint-Defense Doctrine from the Attorney-Client Privilege*, 68 TEX. L. REV. 1273, 1289 (1990) ("Several courts have worked the joint-defense requirement into the framework of the attorney-client privilege . . . reasoning that the attorney-client privilege extends to shared information in the first place because the parties could have hired the same lawyer."). The common interest rule applies when the "transferor and transferee anticipate litigation against a

common adversary on the same issue or issues" and "have strong common interests in sharing the fruit of the trial preparation efforts." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

2. The District Court's Absurd Interpretation of Nevada Law When Ordering the Disclosure of Defendants' Attorney-Client Privileged Information.

The District Court first ruled that the Trustee stood in the shoes of Paul Morabito in the Bankruptcy Court, such that the Trustee was entitled to all of the confidential communications between Paul Morabito and his attorneys. 7 AA 1113–1126. In construing NRS 49.115(5), the District Court then treated Paul Morabito as adverse to Defendants to require them to have their own confidential communications divulged. *Id.* This ruling was carried through the case, and Defendants were unfairly forced to defend a case where their own confidential communications were produced. 48 AA 8270–8333. In essence, the District Court treated the Trustee as being on both sides of the case. Since this is an absurd interpretation of NRS 49.095 and NRS 49.115, Defendants ask this Court to, alternatively, grant them a new trial with instructions that the privileged information cannot be admitted into evidence. *We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008) (stating that the Court must interpret a statute in harmony with other statutes "to avoid unreasonable or absurd results").

NRS 49.095(3) has not been substantively interpreted by this Court. *See Meyers v. Meyers*, 126 Nev. 739, 367 P.3d 800 (2010) (applying NRS 49.053(3) without significant analysis). However, this Court recently adopted a common interest rule that allows "attorneys to share work product with third parties that have a common interest in litigation without waiving the work-product privilege." *Cotter v. Eighth Judicial Dist. Court of Nev.*, 416 P.3d 228, 230 (2018). This approach mirrors the prevailing view in federal courts. *See, e.g., United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012); *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990); *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1466 (11th Cir. 1984); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). *Cotter* makes no mention of NRS 49.095(3) and does not limit the common interest rule to disclosures to a third party's attorney.

However, the common interest law, as articulated by the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, allows for the disclosure to another client: "Under the [common interest] privilege, any member of a client set—a client, the client's agent for communication, the client's lawyer, and the lawyer's agent—can exchange communications with members of a similar client set" with whom they have a common interest that is "either legal, factual, or strategic in character." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 76 cmts. d & e (2000). These common interests "need not be entirely congruent" and "may converge on

nonlitigated issues as well." *Id.* Thus, the common interest rule applies to the disclosure of privileged materials from a client to a third party with whom the client shares a common interest, without necessity of disclosing to the third party's attorney.

In the instant case, the District Court erroneously interpreted NRS 49.115 to require Defendants to disclose attorney-client information that should have otherwise been privileged and protected by NRS 49.095. As such, Defendants urge this Court to reject the District Court's absurd interpretation because "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Canarelli v. Eighth Judicial Dist. Court of Nev.*, 464 P.3d 114, 136 (Nev. 2020) (citing Upjohn Co, v. United States, 449 U.S. 383, 393, 101 S.Ct. 677 (1981)). In other words, the privilege enjoyed by Defendants in NRS 49.095(3) (common interest) should be superior to the exceptions in NRS 49.115(1) (crime or fraud) and NRS 49.115(5) (dispute between clients) under the facts of this case. First, the Trustee has always been adverse to Defendants since appearing in this litigation as the plaintiff in place of the Herbst Parties. 4 AA 594–607. And, Paul Morabito was removed from this litigation at the same time. *Id.* Thus, to maintain that the Trustee is both adverse to Defendants (according to the caption) and also steps into the shoes of Paul Morabito and is adverse as a co-Defendant is a legal fiction because Paul

Morabito was not adverse to Defendants. In essence, this absurd interpretation allowed the Trustee to have confidential information from both sides of the case, all to the detriment and prejudice to Defendants. *Cf. Tower Homes, LLC v. Heaton*, 132 Nev. 628, 635, 377 P.3d 118, 123 (2016) ("Allowing such assignments would embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.") (citations and internal quotation marks omitted).

Second, the crime or fraud exception in NRS 49.115(1) should not apply in this case because the Trustee did not have a favorable ruling on his sole claim for fraudulent transfer until after trial. 48 AA 8270–8333. Yet, even with the benefit of Defendants' privileged information, the District Court was unsure if there was any fraudulent transfer in the summary judgment proceedings. 19 AA 2982–2997. In other words, under the District Court's interpretation, a mere allegation of a crime or fraud would pierce the attorney-client privilege and require disclosure. Thus, Defendants ask this Court to order a new trial because based upon the District Court's own observations at the summary judgment stage, there might have been a different result at trial, which is the very definition of prejudice. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) ("To establish that an error is prejudicial, the movant must show that the error affects the party's substantial rights

so that, but for the alleged error, a different result might reasonably have been reached.").

3. The District Court's Error Was Exacerbated by Admitting Privileged Information at Trial, Which Was Not Authenticated, then Relying Upon this Inadmissible Evidence to Reach Its Conclusions, All to the Prejudice of Defendants.

The District Court erroneously relied on Exhibit 145 (26 AA 4379–4418) to support the conclusion that the transfer of the Baruk properties was a sham. 48 AA 8329, ¶ 76. Exhibit 145 was a hearsay email with no foundation that should not have been admitted. Exhibit 145 was an email from Vacco to Bayuk. The Trustee offered the email first as a "statement against interest from his counsel to him." 36 AA 6094. The District Court overruled the objection and admitted the document. *Id*. at 6095. The District Court appeared to admit the Exhibit on three grounds, first that Defendants' foundation argument was wrong, second that the statement—made by Vacco—was against Bayuk's interest and therefore an exception to hearsay, and third that the exhibit should be admitted as an admission of a party opponent. Each ruling was erroneous.

First, the foundation objection should have been sustained. A federal court confronting almost this identical issue excluded hearsay statements like the ones in question here. *See Adams v. United States*, No. CIV. 03-0049-E-BLW, 2009 WL 2207690 (D. Idaho July 15, 2009). In *Adams*, the witness testified in his deposition

that he had reviewed "inspection reports" prior to giving his deposition. *Id.* at *1. However, those inspection reports, like the documents in this case, were neither identified nor marked as an exhibit during the deposition. At trial, the party who took the deposition tried to introduce the four inspection reports through the deponent who, like Paul Morabito and Vacco, was unavailable. *Id.* The court first determined that there was no foundation to admit the documents because the exhibits were not shown to the deponent or opposing counsel during the deposition, even though the party claimed the deponent authored the reports. *Id.* Next, the court explained that even if the exhibits could overcome the issues concerning foundation, the exhibits may be barred as hearsay. *Id.* Finally, the court determined that "another party's inability to cross-examine a witness about a particular document is not only potentially unfair, but also may very well contribute to jury confusion under FRE 403 without the benefit of a complete exchange of contextual questions, independent of the exhibits' separate admission." *Id.*

Second, the District Court erroneously applied the "statement against interest" exception to hearsay under NRS 51.345. The exception applies only where "[a] statement which at the time of its making: (a) Was so far contrary to the pecuniary or proprietary interest of the declarant." NRS 51.345. In other words, a statement can only be against interest when the statement was made by the declarant. In Exhibit 145, the declarant was Vacco, not Bayuk. Yet, the District Court admitted

the Exhibit as a statement against Bayuk's interest. This was clear error. Moreover, even if the email was against Vacco and Bayuk's interest (which it was not), the statute provides that, "[t]his section does not make admissible a statement or confession offered against the accused made by a codefendant or other person implicating both himself or herself and the accused." NRS 51.345(2).

Third, the Court erroneously concluded that a statement by Vacco—as Bayuk's attorney—was not hearsay as an admission of a party opponent because Vacco is Bayuk's agent:

MR. GILMORE: Might I have a ruling on the hearsay objection?

THE COURT: Overruled.

MR. GILMORE: Okay. It is a statement made by a party opponent that is adverse to the position they are taking in this case. I am confused at the ruling. This is a statement by Mr. Vacco who is not a party.

MS. TURNER: He's an agent.

THE COURT: He's an agent.

MR. GILMORE: He's not speaking to a third party. He's speaking to Mr. Bayuk.

THE COURT: Doesn't that make it even more important for Mr. Bayuk to say hold on in a return e-mail perhaps, that you probably might have where he told Mr. Vacco no, this is wrong?

MR. GILMORE: All I am arguing is the APO objection.

THE COURT: I ruled on it. You're wrong. It is admitted.

36 AA 6096. This ruling is clearly erroneous for several reasons. First, it is clear that the only participants to the communication were Vacco (as the declarant), his assistant Stefanie Canastro, and Vacco's clients, Paul Morabito and Bayuk. NRS 51.035 provides the definition (and exclusions) of hearsay. A statement is not hearsay if "[t]he statement is offered against a party and is: (a) The party's own statement, in either the party's individual or a representative capacity; (b) A statement of which the party has manifested adoption or belief in its truth; (c) A statement by a person authorized by the party to make a statement concerning the subject; (d) A statement by the party's agent or servant concerning a matter within the scope of the party's agency or employment, made before the termination of the relationship; or (e) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy." None of these apply.

There was no evidence that Bayuk "manifested adoption" of Vacco's statement. The burden to establish manifestation is on the party that offers the evidence. *Bourjaily v. United States*, 483 U.S. 171, 171 (1987) (interpreting FRE 801(d)). The Trustee supplied no argument or evidence that Bayuk adopted Vacco's statement. Just because Vacco was Bayuk's counsel does not follow that everything Vacco says qualifies as an adoptive statement under NRS 51.035(2)(b) or (c).

Indeed, courts applying this rule have found just the opposite. "Although an attorney does not have authority to make an out-of-court admission for his client in all instances, he does have authority to make admissions which are directly related to the management of litigation." *Hanson v. Waller*, 888 F.2d 806, 814 (11th Cir. 1989).

The District Court committed similar errors in allowing 25 emails drafted by Paul Morabito to be admitted into evidence, even though they were produced after the close of discovery. 22 AA 3682–3683, 3690–3694, 3697, 3699–3701; 24 AA 3981–3985, 4056–4057, 4060–4066; 26 AA 4344, 4352, 4353, 4368, 4372–4378, 4419–4422, 4429–4432, 4435–4436; 27 AA 4658–4659. Due to these evidentiary issues, Defendants were deprived of their right to a fair trial.

4. A New Trial Is the Proper Remedy Before a Different District Court Judge on Remand.

If the Court orders a new trial, Defendants further request that a new District Judge be assigned on remand since the current District Judge, as the fact finder, "heard the evidence that should have been excluded and formed and expressed an opinion on the ultimate merits." *FCH1, LLC v. Rodriguez*, 326 P.3d 440, 446 (Nev. 2014). As outlined, the District Court relied heavily upon inadmissible emails and other information that both violated Defendants' attorney-client privilege, as well as basic evidentiary notions of foundation. Therefore, the District Judge in this case

can no longer be neutral, having reviewed evidence that should have been excluded and making it a focus of the decision. If the Court orders any further proceedings on remand, Defendants respectfully request that a new District Judge be appointed to this litigation.

VIII. CONCLUSION

In summary, Defendants ask this Court to vacate all the District Court orders for lack of subject matter jurisdiction, due to the nature of this litigation, and the Trustee's inability to pursue the fraudulent transfer claim that belonged to certain creditors. Defendants further ask this Court to vacate the District Court's judgment against the Bayuk Trust since no *in rem* action was filed against it. Alternatively, Defendants ask this Court for a new trial based upon the District Court's absurd interpretation of the attorney-client privilege. If the Court alters the judgment in any way, the awards of attorney fees and costs to the Trustee should be vacated.

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If there are any further proceedings in the District Court, the Court should assign a new District Judge since the current District Judge has already heard and ruled upon the evidence that should have been excluded.

Dated this 13th day of July, 2020.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 10,113 words; or

☐ does not exceed _____ pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13th day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANTS' OPENING BRIEF** was filed electronically with the Supreme Court of Nevada on the 13th day of July, 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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