

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUPERPUMPER, INC.; EDWARD BAYUK, individually and as Trustee of the
EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, Jr.
and SNOWSHOE PETROLEUM, INC., Appellants,
v.
WILLIAM A. LEONARD, Trustee for the Bankruptcy States of Paul A.
Morabito, Respondent

Supreme Court No. 79355

Appeal from the Second Judicial District Court, the Hon. Connie J. Steinheimer
Presiding, Case No. CV-13-02663

RESPONDENT'S AMENDED APPENDIX

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INDEX TO RESPONDENT'S AMENDED APPENDIX

Document Description	Location
<i>Order Dismissing Appeal and Regarding Motions,</i> Nevada Supreme Court Case No. 80214 on March 6, 2020	Vol I, 001-004
Transcript of the Bankruptcy Court's June 6, 2019 Hearing, Case No. BK-N-15-05019-GWZ	Vol 1, 005-176

Dated this 27th day of August 2020.

GARMAN TURNER GORDON LLP

By: /s/ Gabrielle A. Hamm

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Respondent's Amended Appendix** was filed electronically with the Nevada Supreme Court on August 27, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Michael Lehnars

Frank Gilmore

Micah Echols

Jeffrey Hartman

/s/ *Melissa Burkart*
an employee of Garman Turner Gordon LLP

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUPERPUMPER, INC., AN ARIZONA CORPORATION; EDWARD BAYUK, INDIVIDUALLY AND AS TRUSTEE OF THE EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, AN INDIVIDUAL; AND SNOWSHOE PETROLEUM, INC., A NEW YORK CORPORATION,

Appellants,

vs.

WILLIAM A. LEONARD, TRUSTEE FOR THE BANKRUPTCY ESTATE OF PAUL ANTHONY MORABITO,

Respondent.

SUPERPUMPER, INC., AN ARIZONA CORPORATION; EDWARD BAYUK, INDIVIDUALLY AND AS TRUSTEE OF THE EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, AN INDIVIDUAL; AND SNOWSHOE PETROLEUM, INC., A NEW YORK CORPORATION,

Appellants,

vs.

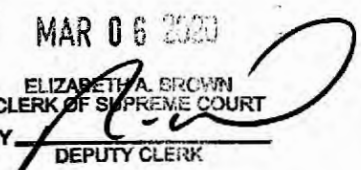
WILLIAM A. LEONARD, TRUSTEE FOR THE BANKRUPTCY ESTATE OF PAUL ANTHONY MORABITO,

Respondent.

No. 79355

FILED

MAR 06 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

No. 80214

ORDER DISMISSING APPEAL AND REGARDING MOTIONS

Docket No. 79355 is an appeal from a final judgment and award of attorney fees and costs. Docket No. 80214 is an appeal from orders denying claims of exemption asserted by appellants Edward Bayuk and Salvatore Morabito in post-judgment enforcement proceedings, and denying appellants' "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."

Appellants have filed a motion to confirm appellate jurisdiction in Docket No. 80214 and to consolidate and brief the appeal with the appeal in Docket No. 79355. Respondents oppose the motion, and appellants have filed a reply. As appellants acknowledge in their motion to confirm appellate jurisdiction, however, there is a jurisdictional defect with respect to the appeals of the orders denying the claims of exemption. This court's holding in *Settelmeyer & Sons v. Smith & Harmer*, 124 Nev. 1206, 197 P.3d 1051 (2008) provides for an appeal from a final judgment in a garnishment or execution action (*see also* NRS 31.460), but not from interlocutory orders that merely set the priorities or resolve a claim of exemption. *See also, e.g., Lee v. GNLV Corp.*, 116 Nev. 424, 996 P.2d 416 (2000) (defining a final judgment as one that resolves all issues before the court and leaves nothing further for resolution apart from attorney fees and costs); *KDI Sylvan Pools v. Workman*, 107 Nev. 340, 810 P.2d 1217 (1991); *Rae v. All American Life & Gas, Co.*, 95 Nev. 920, 605 P.2d 196 (1979). Moreover, no statute or court rule appears to allow for an appeal from an order that relates to the mere enforcement of a prior judgment. *See Gumm v. Mainor*, 118 Nev. 912, 59 P.3d 1220 (2002) (recognizing that a post-judgment order must affect rights growing out of the final judgment to be appealable); *Taylor Constr. Co. v. Hilton Hotels*, 100 Nev. 207, 678 P.2d 1152 (1984) (pointing out that, generally, this court has jurisdiction to consider an appeal only when the appeal is authorized by statute or court rule). This court lacks jurisdiction to review the orders denying the claims of exemption on appeal.

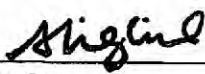
In addition, no appeal lies from an order denying a motion to alter or amend a judgment or for reconsideration. *See Uniroyal Goodrich*

Tire v. Mercer, 111 Nev. 318, 320 n.1, 890 P.2d 785, 787 n.1 (1995) (No appeal may be taken from an order denying a motion to alter or amend a judgment"), *superseded on other grounds as stated in RTTC Commc'ns, LLC v. Saratoga Flier, Inc.*, 121 Nev. 34, 110 P.3d 24 (2005). This court lacks jurisdiction over the orders challenged in Docket No. 80214, and the appeal in Docket No. 80214 is dismissed.¹

Appellants have filed a motion in Docket No. 79355 to consolidate the appeals and to extend the briefing schedule for combined briefing. Respondent opposes the motion, and appellants have replied. The motion to consolidate is denied as moot. Appellants' alternative motion for an extension of time to file the opening brief and appendix is granted to the following extent. Appellants shall have 30 days from the date of this order to file and serve the opening brief and appendix in Docket No. 79355. Thereafter, briefing shall proceed in accordance with NRAP 31(a)(1). Failure to timely file the opening brief and appendix may result in the imposition of sanctions, including dismissal of this appeal. NRAP 31(d).

It is so ORDERED.


Gibbons


Stiglich


Silver

¹This court declines to construe the appeal as a petition for extraordinary relief, but appellants are free to file a petition as deemed necessary.

cc: Chief Judge, The Second Judicial District Court
Hon. Janet Berry, Senior Judge
Robison, Sharp, Sullivan & Brust
Hartman & Hartman
Marquis Aurbach Coffing
Claggett & Sykes Law Firm
Michael C. Lehnert
Garman Turner Gordon
Washoe District Court Clerk

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA (RENO)

IN RE:	.	Case No. 13-51237-gwz
	.	
	.	Chapter 7
PAUL A. MORABITO,	.	
	.	
Debtor.	.	
.	
	.	
JH, INC., JERRY HERBST, and	.	Adv. No. 15-05019-gwz
BERRY-HINCKLEY INDUSTRIES,	.	
	.	
Plaintiffs,	.	
	.	
v.	.	
	.	
PAUL A. MORABITO,	.	
	.	
Defendant.	.	
.	
	.	
WILLIAM A. LEONARD, JR.,	.	Adv. No. 15-05046-gwz
Chapter 7 Trustee for the	.	
Estate of Paul Anthony	.	
Morabito,	.	
	.	
Plaintiff,	.	
	.	
v.	.	
	.	
PAUL A. MORABITO, MEADOW	.	
FARMS TRUST, A Delaware	.	
Trust, EDWARD BAYUK, An	.	
Individual and Grantor and	.	
Trustee of the Meadow Farms	.	
Trust, VIRSENET, LLC, A	.	
Delaware Limited Liability	.	
Company, USHF CELLULAR	.	
COMMUNICATIONS, LLC, A	.	
Delaware Limited Liability	.	
Company, and LIPPES MATHIAS	.	
WEXLER FRIEDMAN LLP, A New	.	
York Limited Liability	.	
Partnership,	.	
	.	
Defendants.	.	
.	

WILLIAM A. LEONARD, JR., . Adv. No. 16-05041-gwz
 Plaintiff, .
 v. .
 EDWARD BAYUK, BANK OF .
 AMERICA, and SNOWSHOE .
 PROPERTIES, LLC, CA, .
 Defendants. .

 WILLIAM A. LEONARD, JR., . Adv. No. 17-05038-gwz
 Chapter 7 Trustee for the .
 Estate of Paul Anthony .
 Morabito, .
 Plaintiff, .
 v. . 300 Booth Street
 . Reno, NV 89505
 EDWARD BAYUK, .
 Defendant. . Thursday, June 6, 2019
 . 10:17 a.m.

TRANSCRIPT OF APPLICATION TO EMPLOY ELIZABETH E. STEPHENS &
 SULLIVAN HILL REZ & ENGEL AS ATTORNEYS FILED BY ELIZABETH E.
 STEPHENS ON BEHALF OF WILLIAM A. LEONARD [1001]; APPLICATION TO
 EMPLOY GARMAN TURNER GORDON LLP AS SPECIAL COUNSEL APPLICATION
 FOR SUPPLEMENTAL ORDER APPROVING EMPLOYMENT OF GARMAN TURNER
 GORDON LLP AS SPECIAL COUNSEL FOR TRUSTEE, NUNC PRO TUNC TO
 MARCH 29, 2019 FILED BY MARK M. WEISENMILLER ON BEHALF OF
 WILLIAM A. LEONARD [1003]

(CONTINUED)

**BEFORE THE HONORABLE GREGG W. ZIVE
 UNITED STATES BANKRUPTCY COURT JUDGE**

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TRANSCRIPT OF (CONTINUED):

MOTION FOR CONTEMPT MOTION FOR ORDER: (I) HOLDING BAYUK IN CONTEMPT OF THE ORDER COMPELLING COMPLIANCE; (II) AWARDING SANCTIONS TO THE HERBST PARTIES: (III) FINDING THAT ANY OBJECTIONS, INCLUDING THOSE BASED UPON PRIVILEGE, WERE WAIVED; AND (IV) COMPELLING BAYUK'S FULL COMPLIANCE FILED BY MARK M. WEISENMILLER ON BEHALF OF BERRY-HINCKLEY INDUSTRIES, JERRY HERBST (DECEASED), JH INC. [274]; MOTION FOR CONTEMPT MOTION FOR ORDER: (I) FINDING MORABITO IN CONTEMPT OF THE JDE ORDER; (II) ORDERING THAT MORABITO APPEAR FOR HIS JUDGMENT DEBTOR'S EXAM IN PERSON BEFORE THIS COURT; AND (III) COMPELLING MORABITO TO HAVE IN HIS POSSESSION AT THE TIME OF HIS JUDGMENT DEBTOR'S EXAM THE 368 COMMUNICATIONS CLAIMED AS PRIVILEGED FILED BY MARK M. WEISENMILLER ON BEHALF OF BERRY-HINCKLEY INDUSTRIES, JERRY HERBST (DECEASED), JH, INC. [264]; MOTION TO COMPEL COMPLIANCE WITH SUBPOENA TO EDWARD BAYUK FILED BY MARK M. WEISENMILLER ON BEHALF OF BERRY-HINCKLEY INDUSTRIES, JERRY HERBST, JH, INC. [205]; STATUS HEARING: DOC. #283 MOTION TO COMPEL EDWARD BAYUK WITH CERTIFICATE OF SERVICE FILED BY JOHN F. MURTHA ON BEHALF OF WILLIAM A. LEONARD, JR.;

STATUS HEARING: DOC# 1 Adversary Case 15-05046, COMPLAINT FILED BY WILLIAM A. LEONARD JR. VS. PAUL A. MORABITO, MEADOW FARMS TRUST, EDWARD BAYUK, VIRSENET, LLC, USHF CELLULAR COMMUNICATIONS, LLC, LIPPES MATHIAS WEXLER FRIEDMAN LLP, FEE AMOUNT 350; AMENDED FIRST MOTION TO DISMISS ADVERSARY PROCEEDING FILED BY MICHAEL LEHNERS ON BEHALF OF EDWARD BAYUK, SNOWSHOE PROPERTIES, LLC [65]; MOTION FOR SUMMARY JUDGMENT FILED BY JOHN F. MURTHA ON BEHALF OF WILLIAM A. LEONARD, JR. [70]; APPLICATION MOTION FOR ORDER AUTHORIZING TRUSTEE TO BORROW MONEY PURSUANT TO THE PROVISIONS OF 11 U.S.C. SECTION 364(c) WITH PROPOSED ORDER FILED BY ELIZABETH E. STEPHENS ON BEHALF OF WILLIAM A. LEONARD [1010]; MOTION TO WITHDRAW AS ATTORNEY OF RECORD, MOTION TO WITHDRAW AS COUNSEL FOR EDWARD BAYUK AND JACKSON HOLE TRUST COMPANY WITH CERTIFICATE OF SERVICE FILED BY ANDREA M. GANDARA ON BEHALF OF EDWARD BAYUK, JACKSON HOLE TRUST COMPANY [427]; MOTION TO WITHDRAW AS ATTORNEY OF RECORD, MOTION TO WITHDRAW AS COUNSEL FOR EDWARD BAYUK WITH CERTIFICATE OF SERVICE FILED BY ANDREA M. GANDARA ON BEHALF OF EDWARD BAYUK [25]

APPEARANCES:

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1 (Proceedings commence at 10:17 a.m.)

2 THE COURT: There -- I have a number of matters on
3 the calendar this morning, and I've tried to organize them in a
4 fashion that allows me to deal with them. When I ask for
5 appearances, I'm only going to ask for appearances from counsel
6 and their parties in the matter that I am specifically calling.

7 There are a number of adversaries, as well as the
8 main case, and we have spent a lot of time going through our
9 minutes and looking at the dockets, and it becomes confusing if
10 we're not careful with ensuring that we attach the proper
11 number to the proper matter. So I'm going to take some extra
12 time this morning.

13 The first matters I'm going to call are in the main
14 case, and that main case is Paul A. Morabito, and I'm going to
15 ask for appearances regarding the motion to employ Sullivan
16 Hill Rez & Engel as attorneys for the debtor.

17 MS. STEPHENS: Good morning, Your Honor. Elizabeth
18 Stephens appears as proposed counsel for Trustee Leonard.

19 THE COURT: I'm sorry, I didn't --

20 MS. STEPHENS: Elizabeth Stephens appears as proposed
21 counsel for Trustee Leonard.

22 THE COURT: Thank you.

23 MR. DABBIERI: Morning, Your Honor. Jonathan
24 Dabbieri, also of Sullivan Hill, as proposed counsel for the
25 trustee, Mr. Leonard.



1 THE COURT: Thank you.

2 MR. MURTHA: Good morning, Your Honor. John Murtha.
3 I don't know how to state my appearance. I have been relieved
4 of my duties as the attorney for the trustee, but until the
5 Court relieves me of my duties, I guess I'm still counsel.

6 THE COURT: You are, and I've read the pleading where
7 you indicated that -- you were trying to explain something to
8 me in one declaration, so I understand the position you find
9 yourself in.

10 MR. MURTHA: I didn't file any pleadings.
11 Mr. Dabbieri --

12 THE COURT: Somebody filed -- no, I think you did
13 regarding one of the matters that's pending, but it doesn't
14 matter.

15 MR. MURTHA: Okay. Thank you, Your Honor.

16 THE COURT: I have read the application for authority
17 to employ general counsel. That's Docket Number 1001. I note
18 that it states in Paragraph 4 that the trustee contacted the
19 law firm, which I'll refer to as "Sullivan Hill," and has asked
20 to represent him as general counsel in the Chapter 7 case and
21 related proceedings. Do I take that correctly that that means
22 in all pending adversaries, as well as in the main case?

23 MR. MURTHA: Yes, Your Honor.

24 THE COURT: All right. I'm going to grant the
25 application. It appears to me to be in order. There was



1 obviously a breakdown in the relationship between Woodburn
2 Wedge and the trustee, and that relationship cannot be
3 repaired. And with that loss of confidence, a law firm cannot
4 continue to represent the trustee. But I'm going to ask that
5 you prepare an order substituting your firm in not only the
6 main case but in every adversary --

7 MR. DABBIERI: Yes, Your Honor.

8 THE COURT: -- so that there's no question, and
9 that's so any party involved in any of those adversaries knows
10 how to communicate with you. My next question is who's your
11 local counsel.

12 MR. DABBIERI: Ms. Stephens of our Las Vegas office,
13 Your Honor.

14 THE COURT: You're in Las Vegas?

15 MS. STEPHENS: Yes, Your Honor.

16 THE COURT: Okay. That's good enough for me.

17 Does anybody wish to be heard regarding this matter?

18 MR. MURTHA: Your Honor, we did not file any
19 pleadings in relation to this specific motion because we really
20 don't have a role or an issue in this. Mr. Leonard properly
21 has said he has lost trust in the law firm. Whether we agree
22 with the basis or not, I don't think so, but I can understand
23 that if Mr. Leonard says "I no longer have trust," that's very
24 appropriate for his decisions and we honor and respect that.

25 We're going to be willing and able to assist the



1 Dabbieri -- Mr. -- the Sullivan Hill firm as needed because of
2 the history in this case, but I did just want to be on the
3 record that we don't believe we did anything wrong. But that's
4 for another day, another matter.

5 THE COURT: I did not make any findings --

6 MR. MURTHA: I know.

7 THE COURT: -- regarding the reasons except to note
8 that there is obviously a breakdown in the relationship, as
9 you've just noted, and that's the basis for my order.

10 MR. MURTHA: Thank you, Your Honor.

11 THE COURT: Thank you.

12 MR. DABBIERI: Thank you, Your Honor.

13 THE COURT: The next matter I have is Number 2 on my
14 calendar, and that's the application to employ Garman, Turner &
15 Gordon LLP as special counsel.

16 MR. WEISENMILLER: Good morning, Your Honor. Mark
17 Weisenmiller here on behalf of William Leonard, the Chapter 7
18 trustee.

19 THE COURT: Thank you.

20 MR. WEISENMILLER: Gerald Gordon is also here from my
21 office.

22 THE COURT: Thank you. I've reviewed Docket Number
23 1003. It's filed on May 7th. It's the application for
24 supplemental order approving employment at Garman Turner LLP.
25 I've reviewed it. I reviewed Mr. Gordon's declaration, Docket



1 Number 1004. I think that this application is more just to
2 make sure that there's no problems. It appears -- I would
3 actually kind of put it into the comfort order category. I
4 know that on July 29th, 2015 at Docket Number 386, I issued an
5 order authorizing the employment of a Garman Turner Gordon as
6 special counsel for litigation Chapter 7 trustee. The
7 Chapter 7 trustee still wishes to employ the firm. I see no
8 reason not to continue that employment. And I'm going to grant
9 the motion. Submit the order.

10 MR. WEISENMILLER: Thank you, Your Honor.

11 THE COURT: I hope I don't hear those ever again in
12 this courtroom. Thank you.

13 The next matter I have IS I signed an order two days
14 ago, a notice of an order for a hearing on trustee's motion to
15 authorize the trustee to borrow money pursuant to Section
16 364(c). Who's appearing in this matter?

17 MS. STEPHENS: Elizabeth Stephens appears for William
18 Leonard. Your Honor --

19 THE COURT: One moment please.

20 MS. STEPHENS: Is there a problem --

21 THE COURT: One moment. Right behind you.

22 MS. STEPHENS: Oh, I'm sorry.

23 MR. GORDON: Gerald Gordon of Garman Turner Gordon on
24 behalf of the Herbst parties.

25 THE COURT: Thank you. I signed the notice and order



1 shortening time on June 4th, Docket 1021, after reviewing
2 Docket Number 1010, which was the motion for an order
3 authorizing the trustee to borrow money. I reviewed the
4 exhibits. I reviewed the application for an order shortening
5 time, Docket Number 1011. I read the declaration of
6 Mr. Leonard, Docket Number 1014. I read Ms. Stephens's
7 decoration, Docket Number 1012, has been properly noticed and
8 served.

9 Does anybody wish to be heard other than Ms. Stephens
10 on this matter? No.

11 This is the fifth request of this court to authorize
12 the trustee to borrow money, from her point, for the purposes
13 of pursuing the litigation because the estate does not have the
14 financial ability to do so. Is that correct?

15 MS. STEPHENS: Yes, Your Honor.

16 THE COURT: I think I've authorized a borrowing in
17 the amount of \$1,550,000.

18 MS. STEPHENS: That's correct.

19 THE COURT: And this would put it over \$2 million.

20 MS. STEPHENS: Yes, Your Honor.

21 THE COURT: And under 364(c)(1), the security for
22 that is an administrative priority lien -- a superpriority
23 administrative lien. Is that correct?

24 MS. STEPHENS: Yes, Your Honor.

25 THE COURT: There's been no opposition. I assume



1 this was properly served upon the Office of the U.S. Trustee.

2 MS. STEPHENS: Yes.

3 THE COURT: And no response from that office?

4 MS. STEPHENS: No response.

5 THE COURT: All right. I'll -- and I know there's no
6 response to the record. I see no reason not to approve this
7 application. It's consistent with what's occurred in this
8 matter on prior occasions. Please submit the order. Have the
9 office of the U.S. Trustee sign off, please.

10 MS. STEPHENS: Okay. Thank you, Your Honor.

11 THE COURT: Thank you.

12 That takes care of the matters in the main case.

13 Now. I'm going to go to an adversary, 17-05038. This is --
14 according to the docket sheet, this is an action by the
15 trustee, and the defendant is Mr. Edward Bayuk. I need
16 appearances in this matter. And there's a motion to withdraw
17 as attorney of record for Mr. Bayuk.

18 MR. HOLLEY: Good morning, Your Honor. Richard
19 Holley on behalf of Holley Driggs. We're the movant on the
20 motion to withdraw.

21 MR. HARTMAN: Morning, Your Honor. Jonathan Dabbieri
22 of Sullivan Hill on behalf of Mr. Leonard, who is present in
23 the courtroom.

24 MR. HARTMAN: Morning, Your Honor. Jeff Harman for
25 Edward Bayuk. I filed a short declaration response by



1 Mr. Bayuk or --

2 THE COURT: What I've --

3 MR. HARTMAN: -- or a response, not a declaration.

4 THE COURT: Right. What I've for the purposes of
5 this hearing is I signed an order shortening time on June 4th,
6 Docket Number 29. I reviewed the declaration of Andrea Gandara
7 filed in support of it, and I reviewed the motion itself. When
8 did you file the declaration?

9 MR. HARTMAN: I'm sorry, it wasn't a decoration, Your
10 Honor. It was a --

11 THE COURT: When did you file a response?

12 MR. HARTMAN: -- response. Yesterday afternoon. I
13 --

14 THE COURT: There was a response, but I thought it
15 was only regarding the other matters, which I have read it.
16 One moment.

17 MR. HARTMAN: It was simply saying that Mr. Bayuk did
18 not object to --

19 THE COURT: Oh, I know what -- exactly what it said.

20 MR. HARTMAN: -- withdrawal.

21 THE COURT: I know exactly what it said.

22 MR. HOLLEY: I think technically, Your Honor, it was
23 filed in Adversary Number 15-05046.

24 THE COURT: Yes. It was in another adversary. But
25 I'll get to it.



1 MR. HARTMAN: All right. Thank you.

2 THE COURT: There was nothing filed in this
3 adversary. I've got the docket sheet in front of me because
4 I'm very concerned about the status of this adversary. It's a
5 548 action. It was filed and commenced on August 15th, 2017,
6 nearly two years, and nothing has occurred in this adversary
7 with the exception of the filing of the complaint. And then an
8 answer was filed on behalf of Mr. Bayuk by Mr. Frank Gilmore,
9 who is a prior lawyer that represented Mr. Bayuk, one of at
10 least three or four that I've counted so far. And maybe more
11 because there were associates with other lawyers that appeared
12 here.

13 Finally, file -- the filing of the answer on
14 September 15th, 2017. There was a scheduling order issued on
15 February 1st. I think that -- I think maybe the parties had
16 entered -- excuse me, on September 28th, 2017, it got continued
17 for various reasons. And then on February 1st of this year,
18 Mr. Gilmore filed his motion to withdraw. That was the subject
19 of, I think, at least two hearings that I had. There were some
20 timing issues. He represented other parties. There was the
21 trustee's response filed on the 19th of February, and it's
22 Docket Number 19. Well, I think it was finally heard around
23 the 28th of February. I entered an order granting the motion
24 to withdraw on March 11.

25 Now on April -- if I've read this correctly, you



1 filed -- Mr. Holley, there was filed a notice of appearance by
2 you on -- it's Docket Number 24 on April 10th.

3 MR. HOLLEY: That is correct, Your Honor.

4 THE COURT: And 51 days later, you filed your motion
5 to withdraw.

6 MR. HOLLEY: That is correct.

7 THE COURT: Okay. Do you -- when I went through your
8 motion, Docket Number 25, the authority's correct. You know,
9 if there's no hearings, there's no trial, there's no discovery
10 plan. That's all true. There's nothing.

11 MR. HOLLEY: Correct.

12 THE COURT: Are you going to prosecute this action on
13 behalf of the trustee?

14 MR. DABBIERI: Yes, Your Honor. We are.

15 THE COURT: Why has it taken so long?

16 MR. DABBIERI: That may be one of the reasons for new
17 counsel, Your Honor.

18 THE COURT: Well, it may have been stayed, either
19 formally or informally, because of pending appeals. I'm not
20 sure, but I see no reason for this matter not to proceed.

21 MR. DABBIERI: We agree, Your Honor. In fact, we did
22 file a late pleading yesterday, and we did not oppose the
23 withdrawal, but we did ask that it not delay these proceedings.

24 THE COURT: I did not get that.

25 MR. DABBIERI: I apologize, Your Honor. It was filed



1 about four --

2 THE COURT: Were copies brought to chambers? I
3 didn't see it. Did just see it?

4 MR. HOLLEY: Perhaps not, Your Honor. I apologize.
5 Again, Your Honor, I think technically that was actually filed
6 in Adversary 15-05046.

7 THE COURT: Which is exactly, exactly why I'm going
8 to spend time today making sure we have the right numbers --

9 MR. HOLLEY: Yes, Your Honor.

10 THE COURT: -- on these matters. Nothing was filed
11 in this adversary. You need to be cautious and careful.

12 And, Mr. Holley, I'll get back to you in a minute on
13 that because you've got a mistake in one of your pleadings.

14 So I'm now cognizable of the status. I want some
15 action taken, or we're going to file an order to show cause why
16 the matter -- why the adversary should not be dismissed. We've
17 got enough -- we have enough litigation in this case and the
18 related adversaries. We don't need any that isn't going to be
19 prosecuted. That simple.

20 MR. DABBIERI: We concur, Your Honor.

21 THE COURT: Good. Submit the order. Have Mr. Murtha
22 sign off. No, no. Wrong one, excuse me.

23 MR. DABBIERI: I don't think --

24 THE COURT: There's nobody to sign up. Just submit
25 it.



1 MR. HOLLEY: Thank you, Your Honor.

2 THE COURT: Thank you.

3 MR. DABBIERI: Thank you, Your Honor.

4 THE COURT: That's all I have in that adversary.

5 Let's go on to Adversary 15-5046. And the first matter I have
6 is that adversary is a motion to withdraw as attorney of record
7 for Mr. Bayuk and Jackson Hole Trust Company. I need
8 appearances.

9 MR. HOLLEY: Yes, Your Honor. Richard Holley on
10 behalf of Holley Driggs, the movant, on the motion to withdraw.

11 MR. HARTMAN: Again, Your Honor, Jeff Hartman for
12 Mr. Bayuk, and I am the one that filed the response yesterday
13 in this adversary.

14 MR. DABBIERI: Jonathan Dabbieri on behalf of
15 Mr. Leonard, Chapter 7 trustee.

16 THE COURT: All right. I signed an order shortening
17 time on June 4th to hear this matter today. That was Docket
18 Number 431. I signed it after reviewing the motion to withdraw
19 as counsel, Docket Number 427. And I went through it, and it
20 states that the reasons -- here, the firm's withdrawal from
21 representation of Bayuk and Jackson Hole is appropriate based
22 upon irreconcilable differences that render continued
23 representation of -- unreasonably difficult. In addition,
24 withdrawal's mandatory under the Nevada Rules of Professional
25 Conduct because -- or based upon Mr. Bayuk's request to



1 terminate the firm's representation.

2 I read Mr. Gandara's declaration, Docket 429. There
3 was a response filed by Mr. Hartman. I believe this is the one
4 you're referring to, Mr. Hartman.

5 MR. HARTMAN: Correct.

6 THE COURT: That's Docket Number 434, and I read it,
7 and I was a little bit confused. First of all, you said you're
8 just doing -- you're just special appearance counsel. I don't
9 exactly know what that is in the federal court.

10 MR. HARTMAN: Well, Your Honor, Mr. Gilmore had
11 withdrawn, and I assisted Mr. Bayuk in trying to find
12 substitute litigation counsel. I didn't join on to litigate
13 the case. That's why we got Mr. Holley engaged. Now, I have
14 to assist Mr. Bayuk in getting additional litigation counsel,
15 substitute litigation counsel, if you will.

16 THE COURT: Okay. You also say you're attorney for
17 Mr. Bayuk in this same adversary, 15-0546 [sic], in a pleading
18 that is on your letterhead, and that is the declaration of
19 Mr. Bayuk in support of proposed amendments to statement of
20 settled facts. That's Docket Number 386 that was filed March
21 27th.

22 MR. HARTMAN: That's correct. And --

23 THE COURT: Do you represent him or not?

24 MR. HARTMAN: Well --

25 THE COURT: I'm a little confused. I'm not trying



1 to --

2 MR. HARTMAN: Well, I understand, and I certainly
3 understand. Again, when Mr. Gilmore withdrew, there were
4 certain matters in process.

5 THE COURT: There was a motion for summary judgment.
6 I did not grant the summary judgment, but I found that certain
7 matters were -- they were not the subject of genuine issue of
8 material facts. I had the parties designate which of those
9 facts were. We made a record of it.

10 MR. HARTMAN: I understand.

11 THE COURT: I know that Mr. Murtha prepared it on
12 behalf of the trustee, sent it to Mr. Gilmore. Mr. Gilmore
13 edited it, sent it back. But Mr. Gilmore cannot complete the
14 editing because of the end of his representation of Mr. Bayuk.

15 MR. HARTMAN: Right. And --

16 THE COURT: And I signed an order on March 11th,
17 Docket Number 378 in this adversary, settling certain facts for
18 the purpose of trial. And now I'm getting some kind of a -- I
19 get a decoration, that's fine, and I actually read it and -- in
20 support a proposed amendments, but I don't see a motion to
21 amend. I don't know how -- it's not set for calendar unless I
22 missed it.

23 MR. HARTMAN: It's not, Your Honor. And just to be
24 clear, when I stepped in to help Mr. Bayuk make a transition,
25 he was under the impression that he had until the end of March



1 to make his comments with respect to the proposed stipulated
2 facts. I helped him because I was, like, seven days into the
3 case, not very long. And then I attended the hearing here with
4 respect to the next matter that's on calendar regarding the --
5 or one of the matters regarding the stipulated preliminary
6 injunction from early 2016, and I assisted him --

7 THE COURT: And the contempt issues that arise --

8 MR. HARTMAN: And that is one of the matters on
9 calendar today for a status hearing. So I had, in the process,
10 arranged for Mr. Holley's firm to talk with Mr. Bayuk, and
11 eventually there was engagement. So that was the transition
12 from Mr. Gilmore to litigation counsel. But right now, he's
13 unrepresented in the matter.

14 THE COURT: Well, he's also had Mr. Trey Monsour
15 represent him. He's had other folks represent him, as well.

16 MR. HARTMAN: I don't -- and frankly, I don't know if
17 Mister --

18 THE COURT: And I think -- isn't Mr. Lehnors
19 representing him now?

20 MR. HARTMAN: Mr. Shemano's on the phone, I believe.

21 THE COURT: Who is?

22 MR. HARTMAN: David Shemano.

23 THE COURT: Mr. Shemano, I think, has filed --

24 Mr. Shemano, I'm sorry, I need your appearance.

25 MR. SHEMANO: Good morning, Your Honor. David



1 Shemano on behalf of Paul Morabito and Edward Bayuk only in the
2 judgment collection efforts against Mr. Morabito in that
3 adversarial.

4 THE COURT: Right. And I allowed you to appear
5 telephonically based upon your representation that Mr. Hartman
6 would be primarily responsible for handing -- handling that
7 argument, and that's what -- I'm going to hold you to that.

8 And was -- is there anybody else on the telephone? I
9 need to know that. No?

10 You called yesterday and thought perhaps Mr. Bayuk
11 would be on the telephone, Mr. Hartman?

12 MR. HARTMAN: I called Ms. Duffy, asked for
13 permission. She reported back that Your Honor wanted me to
14 reach out to Mr. Gordon to see if that was permissible.
15 Mr. Gordon was not willing to agree to that. So Mr. Bayuk is
16 not on the phone.

17 THE COURT: Let me tell you exactly what I think
18 Mrs. Duffy told you because I was not here, but I responded to
19 your inquiry, was that he could appear telephonically, but I
20 would not accept any testimony telephonically.

21 MR. HARTMAN: Well, then it was my fault for
22 misinterpreting that because I wanted him to be on the phone in
23 case the Court had any questions of him, not for --

24 THE COURT: Well, I had no objection to that.

25 MR. HARTMAN: Well --



1 THE COURT: Isn't that what you passed on, Mrs.
2 Duffy?

3 THE CLERK: Yes, I believe so, Your Honor.

4 THE COURT: Okay.

5 MR. HARTMAN: Then I misunderstood.

6 MR. GORDON: Your Honor, Gerald Gordon on behalf of
7 the Herbst parties. My -- but I tried to express to
8 Mr. Hartman exactly that, that I intended -- given he submitted
9 declarations, I intended to cross him on those declarations.
10 He could be on the phone, but I would not agree that he could
11 testify on the phone.

12 THE COURT: That was exactly what I said because it's
13 very difficult to take testimony telephonically. I don't know
14 where the witness is. I don't know who the witness is with. I
15 don't know what it is in front of the witness. I can't judge
16 the witness's credibility and demeanor. And as we all know,
17 credibility and demeanor has been a constant thread, not only
18 in this court, but in at least two state court proceedings and
19 others. So that's why I'm -- any testimony, barring
20 extraordinary circumstances, I'm going to require the witnesses
21 to be here.

22 But yeah, I would've liked the movant on the phone
23 too if I had a question because I really like to know --

24 MR. HARTMAN: Well, Your Honor, just --

25 THE COURT: Because I'm not going to give him 120



1 days.

2 MR. HARTMAN: Well, just so that you know, last night
3 Mr. Gordon and I exchanged emails, and Mr. Bayuk has agreed to
4 be available next week in Orange County for three, two-hour
5 sessions of deposition.

6 THE COURT: Let me -- we'll get to that later. Let
7 me get -- this is a motion that I have pending --

8 MR. HARTMAN: Sure.

9 THE COURT: -- regarding employment, and then I did
10 read your response where you wanted more time, and I'm trying
11 to determine what is really equitable here. I have status
12 conferences in this adversary later on. These are the
13 pleadings that I have received regarding the two matters that
14 I'm going to consider in the status conference. One is the
15 motion to compel Mr. Bayuk to produce documents pursuant to
16 Federal Rule of Bankruptcy Procedure 7037, and then there is
17 the, in the -- the other matter, which is Number 7. Let me put
18 my fingers on that. And that's on -- that's a status
19 conference in the adversary. So you've got the adversary in
20 the contempt matter that I'm conducting a status conference on,
21 and frankly, the best explanation to that was in this motion to
22 withdraw because Mr. Holley did a good job of explaining what
23 they were withdrawing from. Let me put my fingers on it.
24 Paragraph 3 did a good job of explaining it, and -- because we
25 weren't quite sure that everybody understood it was a status



1 conference because I kept getting pleadings and couldn't -- and
2 I signed a motion to seal one of the pleadings.

3 So let me have one moment. I've read your response.
4 I -- his response that you've submitted says that the reason --
5 it has a couple of facts. One, he had paid a \$75,000 retainer
6 in March 2019 that Mr. Clark Vellis, who was a member of that
7 firm, had a, quote, "adversarial actions," end of quote, with
8 Mr. Bayuk that had been disclosed to him. And in fact,
9 Mr. Vellis, as demonstrated by Exhibit 1 to this response, was
10 the attorney for Mr. Herbst, JH, Inc., and Berry-Hinckley
11 Industries in the 2010 trial and the state court litigation
12 that resolved -- that ended up with \$149 million judgment.

13 And then I noted that the motion and the affidavit
14 did not mention that particular issue, but I just received a
15 reply that was filed about six o'clock last night.

16 MR. HARTMAN: Correct, Your Honor.

17 THE COURT: And if you'd give me a moment, I'm going
18 to take a minute and read it.

19 Yeah. And I should note that Mr. Bayuk expressly
20 stated that he did not object to the withdrawal. Obviously, he
21 thinks it's a conflict he couldn't object. Okay. The law firm
22 does not believe that the adversary, 15-05046 and the 2010
23 state court action related to each other. It goes on to say
24 why. I should also note that this adversary has been referred
25 to as the Virsenet adversary by almost all counsel. So we know



1 what it is. And that's what it dealt with.

2 Then correctly states at 15-0538 was a complaint just
3 against Mr. Bayuk regarding a transfer in the approximate
4 amount of \$352,000. First parties aren't parties in either of
5 the two -- those two adversaries, 5046 or 5038. Mr. Holley
6 indicates he advised Mr. Bayuk that Mr. Vellis had participated
7 in the litigation against Mr. Morabito but asked for permission
8 to have Mr. Vellis join the litigation team. Points out
9 Mr. Bayuk was not a party to that state court action. And the
10 law firm does not believe that it had a conflict.

11 All of that does not change my opinion that, once
12 again, a relationship between an attorney and client has been
13 dissolved. It can't be fixed when the client thinks there's a
14 conflict, the law firm thinks there isn't a conflict. I don't
15 think there's a conflict, but it doesn't matter because the
16 basis, based on the evidence I have in front of me, there's no
17 reason for me to believe there's a conflict except that
18 Mr. Bayuk is so closely associated with Mr. Morabito, as shown
19 by a Judge Connie Steinheimer's decision entered in March of
20 this year in the Superpumper state court action, that it's very
21 difficult to distinguish between the two.

22 MR. HARTMAN: Well, Your Honor, may I --

23 THE COURT: Let me finish. And moreover, at the
24 commencement of this involuntary proceeding in July of 2013.
25 there was -- there were inconsistent positions. I found



1 inconsistent positions taken by Mr. Bayuk regarding whether he
2 was or was not a creditor in this case for purposes of whether
3 this case met the requirements of Section 303 of the Bankruptcy
4 Code in any respect. I'm not making any findings regarding
5 whether there was a conflict, whether there was not a conflict.
6 All I'm saying is I'm making a finding that they -- that the
7 predicate facts necessary to allow the law firm to withdraw had
8 been established. That's all I need to know. That's all I
9 need to find. So enter the order.

10 MR. HARTMAN: Thank you, Your Honor.

11 THE COURT: Just submit the order.

12 Do you want to sign off on it Mr. Hartman?

13 MR. HARTMAN: No, I'm fine, Your Honor.

14 THE COURT: All right.

15 Now, I was also given trustee's response, so I'd like
16 to read it right now. That's Docket Number 435.

17 MR. HOLLEY: Your Honor, do you need me to continue
18 in the courtroom?

19 THE COURT: This is tough to read. Does not object,
20 just doesn't want it to affect or delay any of the deadlines in
21 this case. I was going to talk about that in a moment.

22 I'm going to be -- I'll be conducted a status
23 conference in this case, I believe.

24 MR. HARTMAN: Your Honor --

25 THE COURT: That's a good time for me to do that.



1 MR. HARTMAN: Well, I think it might be helpful, my
2 recollection is it Mr. Holley worked with -- I think it was
3 Mr. Murtha on extending certain deadlines.

4 THE COURT: Neither of whom now represent their
5 respective clients.

6 MR. HARTMAN: I get it, but I think there was an
7 agreement to extend certain deadlines. I can't tell the Court
8 what they are.

9 MR. HOLLEY: I can, Your Honor.

10 MR. HARTMAN: There -- I -- when I was going through
11 this paperwork, did you file two or three motions?

12 MR. HOLLEY: I filed two motions. One to withdraw --
13 I mean two motions to withdraw, but previously we had entered
14 into a stipulation and an order that was submitted to the Court
15 in the 5046 adversary, and the current deadlines are as follows
16 pursuant to that --

17 THE COURT: We have dispositive motion deadlines.

18 MR. HOLLEY: Yeah, the -- if I could, Your Honor,
19 I'll just walk through those deadlines in --

20 THE COURT: One moment.

21 MR. HOLLEY: -- chronological sequence.

22 THE COURT: Let me take a look here for a second.

23 MR. HOLLEY: Okay.

24 THE COURT: Because I wrote --

25 (Clerk and court confer)



1 THE COURT: Yeah, I have it right here. Oh, I found
2 it.

3 In the Virsenet case, expert deadline was August 3rd.
4 Discovery cutoff is --

5 MR. HOLLEY: September 1st, Your Honor.

6 THE COURT: -- September 1st, dispositive motions,
7 November 18th.

8 MR. HOLLEY: I have, I think, October 18th, Your
9 Honor.

10 THE COURT: All right.

11 MR. HOLLEY: And then, the --

12 THE COURT: Because we set those -- we had discussed
13 those at an earlier hearing, and your point in your motion,
14 that's more than enough time for new counsel to get up to speed
15 because of those deadlines. I think that's what you told me.

16 MR. HOLLEY: I wanted the Court to be aware of the
17 deadlines that were set in the case, lest that was a concern on
18 the Court's part.

19 THE COURT: Right.

20 MR. HOLLEY: Your Honor, in the --

21 THE COURT: Oh, here's where I had -- I'm going now
22 back to Docket Number 27 in adversary 5038, one we discussed
23 earlier.

24 MR. HOLLEY: Yes.

25 THE COURT: At Paragraph 8, you say: "The firm is



1 also counsel for Bayuk and another party, Jackson Hole Trust."
2 And then you cite the caption. Then, you say that's 17-05038.
3 That is, in fact, 17-0 -- that's 46 not 38. Take a look at
4 your Paragraph 8.

5 MR. HOLLEY: No, no, no, I --

6 THE COURT: I think you've got the wrong --

7 MR. HOLLEY: Yes, Your Honor. If I could --

8 THE COURT: I've got to straighten these out
9 because --

10 MR. HOLLEY: No, I --

11 THE COURT: -- it'll cause confusion down the line.

12 MR. HOLLEY: The -- we're -- the mistake that I made,
13 Your Honor, was in the reply, and if we made it in the initial
14 motion -- in the initial motion --

15 THE COURT: Well, I'm reading -- no, this is Docket
16 27 and Ms. Gandara's declaration, where you say the firm's
17 counsel for Bayuk in the matter of the trustee versus, as
18 stated, Paul Morabito and Paul Anthony Morabito, et al,
19 Adversary 17-05038. That's wrong.

20 MR. HOLLEY: No --

21 THE COURT: That's 17 --

22 MR. HOLLEY: No. That is correct, Your Honor. We
23 were counsel in --

24 THE COURT: Let me straighten it out.

25 MR. HOLLEY: Okay.



1 THE COURT: That's 17-5046 [sic], and that's what I'm
2 dealing with here. So --

3 MR. HOLLEY: The --

4 THE COURT: I've already granted the motion --

5 MR. HOLLEY: Yes, yes, yes, yes, yes.

6 THE COURT: -- in 5038.

7 MR. HOLLEY: That's correct.

8 THE COURT: I just want to straighten out the typo
9 because it gets --

10 MR. HOLLEY: Yeah, no, that's correct, Your Honor.
11 Thank you.

12 THE COURT: All right.

13 MR. HOLLEY: So if I could, Your Honor, with respect
14 to the stipulation that we entered into with Mr. Murtha where
15 those --

16 THE COURT: I think I --

17 MR. HOLLEY: -- where those -- and I apologize, I
18 don't have the docket reference, Your Honor.

19 THE COURT: I may have it.

20 MR. HOLLEY: The -- so the -- at the time --

21 THE COURT: I have a -- on -- there was a hearing set
22 for May 2nd, and we continued it.

23 MR. HOLLEY: Until --

24 THE COURT: That's Docket 418. I've got the amended
25 complaint in front of me that was filed on February 1st, 2016,



1 Docket 69. I've got Mr. Bayuk's answer that was filed by
2 Walter Wilhelm [sic] Bauer and -- counsel for Mr. Bayuk,
3 another law firm. Holly Estes, I think, was the lawyer at that
4 firm that filed it and the local counsel with Alan Smith.

5 And then, I read the answer to the amended complaint.
6 That was filed on March 10th, 2016, Docket 18. And then, there
7 are related pleadings, order of dismissal without prejudice as
8 to Virsenet, and that was based upon -- and I read Virsenet's
9 answer, Docket Number 79.

10 There was a scheduling order entered on March 21,
11 2017. That was before you were in the case.

12 MR. HARTMAN: Correct.

13 THE COURT: That's Docket Number 188, and I've read
14 that.

15 MR. HARTMAN: Your Honor --

16 THE COURT: Let me -- I need to finish.

17 MR. HARTMAN: Well, you're going back and forth, I
18 think, between 5038 and 5046.

19 THE COURT: Nope, this is --

20 MR. HARTMAN: This is --

21 THE COURT: Nope, this is all 5046.

22 MR. HARTMAN: Okay.

23 THE COURT: I'm done with 5038.

24 MR. HARTMAN: Well, but earlier you -- I'm pretty
25 sure you mentioned 17-5046, and it's 15-5046.



1 THE COURT: 15-05046.

2 MR. HARTMAN: Right, right.

3 THE COURT: That's right. 17 is the 038.

4 MR. HARTMAN: Right.

5 THE COURT: And I only pointed that out to clarify
6 the typographical mistake that was in the declaration. All
7 these pleadings are in 15-05046. And if they said "17," thank
8 you because I want to make sure that I do it correctly.

9 So there was a scheduling order entered on March 21,
10 2017 following a status conference so that I conducted on
11 February 28th. We set a dispositive motion filing date, and
12 then we -- a trial date would be set at the time of that
13 hearing. And then, there was a Mr. Trey Monsour that
14 represented, I thought, Mr. Bayuk at that matter.

15 Then, there was an order entered on March 24th,
16 Docket Number 190 --

17 MR. HARTMAN: Which year?

18 THE COURT: -- extending the deadline for discovery
19 and filing of dispositive motions.

20 MR. HARTMAN: March 24th of which year?

21 THE COURT: 2017.

22 MR. HARTMAN: Okay.

23 THE COURT: And that had discovery deadlines that are
24 irrelevant now because they're two years old. I signed
25 various pleadings regarding a motion for summary judgment, and



1 I don't know if that motion for summary judgment was ever filed
2 or not, or if it was done, it was just done recently. Do you
3 know? Does anybody know?

4 MR. HOLLEY: There were countermotions for summary
5 judgment.

6 THE COURT: Mr. Murtha, please step forward. You
7 were working on a motion for summary judgment, were you not?

8 MR. MURTHA: Yes, Your Honor. We're still talking
9 about the VirseNet adversary, 5046.

10 THE COURT: Yes, we are.

11 MR. MURTHA: There was a motion for summary judgment.
12 It was opposed, went to hearing in July of --

13 THE COURT: Is that the one where we did the
14 statement of facts?

15 MR. MURTHA: Statement of facts.

16 THE COURT: Thank you.

17 MR. MURTHA: Yes, Your Honor. And that motion was
18 denied at that time.

19 THE COURT: Yeah. I reviewed the pleadings regarding
20 that motion, and that led to the -- you're exactly right, thank
21 you -- the order settling certain facts for purposes of trial
22 that was entered in March of this year, Docket Number 378.
23 Thank you.

24 There was -- I've got a number of older pleadings
25 that I'm not going to even relate to. When did you submit that



1 stipulation regarding those dates that I put on the record, do
2 you know?

3 MR. HOLLEY: I believe it was in April, Your Honor.
4 Maybe the early part of May.

5 THE COURT: I granted an order on April 23rd, and
6 there it is. I hadn't seen it. That's Docket Number 411.
7 I've read it.

8 MR. HOLLEY: Yes.

9 THE COURT: Thank you. I appreciate that.

10 All right.

11 MR. HOLLEY: And if I could, Your Honor, with respect
12 --

13 THE COURT: So that's where we're -- that's the
14 present status --

15 MR. HOLLEY: Yes.

16 THE COURT: -- of this matter.

17 Mr. Hartman, you filed something -- let me take a
18 look at it, please -- on May 28th. I don't know if I'm looking
19 at the same -- no. I referred to your -- the declaration of
20 Mr. Bayuk that you filed, Docket Number 386, and that was filed
21 March 27th. On April -- May 28th, a week ago, you filed -- I
22 granted an order allowing certain items --

23 MR. HARTMAN: Right.

24 THE COURT: -- certain items to be filed under seal
25 for in-camera inspection.



1 MR. HARTMAN: Right.

2 THE COURT: And I've also reviewed my contempt order
3 because that's all. And then the declaration of Mr. Bayuk re:
4 contempt is Docket Number 423, and I'm assuming the sealing
5 order related to Docket Number 423. Is that correct?

6 MR. HARTMAN: That's correct.

7 THE COURT: Yeah. And, once again, you say you're
8 attorney for Mr. Bayuk.

9 MR. HARTMAN: And again, Your Honor, if you'll
10 remember, there was a deadline previously set for Mr. Bayuk to
11 respond to the motion for contempt regarding the stipulated
12 preliminary injunction from 2016. I came to court and asked
13 the Court for an extension of time so that I could assist him
14 in responding to that motion. And the deadline was set for --
15 I can't remember the dates specifically, but that was filed in
16 response to that deadline.

17 MR. MURTHA: May 24th.

18 THE COURT: Okay.

19 MR. HARTMAN: May 24th.

20 THE COURT: The reason I'm discussing all of these
21 matters, the status on the contempt, status on the adversary,
22 as well as the motion to withdraw, is because they relate to
23 each other. And I'm going to allow, obviously, as I indicated
24 earlier, Mr. Holley's firm to withdraw.

25 Right now, Mr. Bayuk doesn't have a lawyer.



1 MR. HARTMAN: Not for the litigation of Virsenet.

2 THE COURT: Unless you're still the lawyer because
3 you have filed documents as late as a week ago.

4 MR. HARTMAN: Well, I'm his attorney of record on
5 that matter because of my making the appearance. But I'm
6 basically asking for time to find litigation counsel to
7 substitute in for Mr. Holley. As the Court knows, this
8 Virsenet litigation has been going on since 2015. It's very
9 complicated. It's not set for trial in this court because I
10 think that the reference is going to be withdrawn so that Judge
11 Du can hear it when it's set for trial.

12 So it's not as if trial's imminent, and it's not as
13 if anybody's prejudiced since it's been going on since 2015.

14 THE COURT: Well, I -- we did set discovery cutoff
15 dates, and I did not study the pleadings for the purpose to
16 see, one, if there was an absence of consent to this Court's
17 entering a final judgment.

18 MR. HARTMAN: Yeah. And I'm sorry, I can't address
19 what happened before I got involved with Mr. Gilmore?. I just
20 don't know.

21 THE COURT: You represented --

22 MR. HOLLEY: Your Honor, my understanding is that
23 Mr. Gilmore did object to this Court's jurisdiction over this
24 matter and made a jury demand.

25 THE COURT: I didn't hear the end.



1 MR. HOLLEY: And made a jury demand --

2 THE COURT: Okay.

3 MR. HOLLEY: -- in the case.

4 THE COURT: And that being the case, under our rules
5 -- and I -- the bankruptcy court functions in a role similar to
6 the magistrate judge, handles all the pretrial matters, but
7 that -- if that's the case and there was no objection to
8 that --

9 MR. MURTHA: No. Matter of fact, Your Honor --

10 THE COURT: -- on behalf of the trustee --

11 MR. MURTHA: -- we filed a motion to get it
12 clarified, and it has been certified to the district court
13 already.

14 THE COURT: I thought we went through that process.

15 MR. MURTHA: Yes.

16 THE COURT: So it's there. Okay. I'm simply going
17 handle the pretrial matters. If there's a trial that's going
18 to be set, it will be set by -- I assume it went to Judge Du.

19 MR. MURTHA: Yes.

20 THE COURT: Then that -- Judge Du will have to handle
21 it. Okay.

22 MR. MURTHA: Right. As I understand it, the way --

23 THE COURT: So what we have here are dispositive --
24 we -- what I have here are experts, discovery, and potential
25 dispositive motions, and even if they are dispositive, if this



1 Court does not have the constitutional authority to enter a
2 final judgment, those would go to Judge Du as proposed findings
3 of fact pursuant to Rule 9033.

4 MR. HARTMAN: Correct.

5 THE COURT: Okay. All right. Do I have -- do I
6 understand the status now? That's a question --

7 MR. HOLLEY: Your Honor, if I could just make one
8 other observation in the stipulation that was submitted to the
9 Court as Docket Number 411, I believe.

10 THE COURT: Yes.

11 MR. HOLLEY: We also -- we set up these extended
12 dates that the Court has just gone through. We also reserved
13 our rights to further extend those dates if we deemed it
14 necessary to do so.

15 THE COURT: "If we" being whom? The counsel?

16 MR. HOLLEY: Our office, yes, having been recently
17 engaged in the case. And so I just wanted to bring that to the
18 Court's attention, as well.

19 THE COURT: Well, I signed an order. Let me take a
20 look. Was an order entered on that stipulation?

21 UNIDENTIFIED: Yes, it was, Your Honor.

22 MR. HOLLEY: Yes, it was, Your Honor.

23 THE COURT: All right. What's the docket number of
24 that order? It would have be, like, 412, I think.

25 MR. HOLLEY: Mr. Murtha reserved the rights of



1 Mr. Leonard to object to any further requests for an extension,
2 but we did preserve the right to ask for additional time --

3 THE COURT: One moment, please.

4 MR. HOLLEY: -- if we deemed it to be necessary.

5 THE COURT: I have the order. It is Docket Number
6 411. The stipulation's 407. The order provides that the
7 defendants, Bayuk and Jackson Hole Trust, "reserve the right
8 without prejudice to seek additional extension of these
9 deadlines, And the plaintiff reserves the right without
10 prejudice to oppose."

11 So you didn't reserve the right to extend the
12 deadlines. You were happy with the deadlines and say --

13 MR. MURTHA: Yes.

14 THE COURT: -- on behalf of your client.

15 MR. MURTHA: Yes.

16 THE COURT: Okay.

17 MR. MURTHA: But we always understood anybody can ask
18 for an extension and anybody --

19 THE COURT: I don't see where it's barred.

20 MR. MURTHA: -- can oppose it Yeah.

21 THE COURT: Okay.

22 MR. HOLLEY: And, Your Honor, we just wanted to make
23 clear that we wanted to preserve --

24 THE COURT: All right.

25 MR. HOLLEY: -- that right to do so.



1 THE COURT: You're now counsel --

2 MR. DABBIERI: Yes, Your Honor.

3 THE COURT: -- for the trustee in this adversary.

4 MR. DABBIERI: Yes. And like Mr. Murtha --

5 THE COURT: Why don't you put your name on the record
6 so that --

7 MR. DABBIERI: I'm sorry, Your Honor. Jonathan
8 Dabbieri of Sullivan Hill on behalf of Mr. Leonard, Chapter 7
9 trustee. And, Your Honor, we're satisfied with the dates that
10 are set, and we have not been presented with a request to
11 extend other than the suggestion perhaps they could be. I
12 think the Court is being asked to do it somewhat in a vacuum
13 because we don't know how long he's going to take to get new
14 counsel, who that will be, what, if anything, that counsel will
15 request. At this juncture, our request would be we stick with
16 the dates we have, and if at some point it's appropriate, as
17 Your Honor indicated, you can always come in and request a
18 change.

19 THE COURT: Here's what I'm going to do. Number One,
20 I'm granting the motion to withdraw, so there's no doubt about
21 that. That means Mr. Bayuk, at this point, is pro se. The
22 trust has to get a lawyer. We went through this before in
23 February when Mr. Gilmore was withdrawing as to who could
24 represent themselves, because they were individuals, and who
25 needed counsel. And we spent considerable time going through



1 this exercise.

2 I was pleased when I saw that Mr. Bayuk had retained
3 Mr. Holley's firm, good lawyers. Good lawyers make things
4 easier because we can go on a path and utilize the process.
5 Constant, for whatever reasons, changing of counsel raises
6 difficulties.

7 I'm not persuaded that the passage of time is without
8 prejudice. You can see it already in matters in which I've had
9 testimony in this court regarding this case and others -- this
10 and others in the case. Memories fade. Documents can
11 disappear. Then more explanations. Becomes more difficult to
12 evaluate the evidence.

13 And now based upon my review of the order that I
14 entered, Docket Number 411 Mr. Bayuk and Jackson Hole were
15 provided the ability to seek to extend. So there was built-in
16 protection for those two defendants, and I see no reason to
17 amend that earlier order. And Mr. Bayuk or his lawyer or the
18 lawyer for Jackson Hole should take whatever steps they believe
19 are appropriate and necessary.

20 I would also suggest to new counsel for the trustee
21 to analyze any requests in a reasonable manner. And there may
22 -- it may be helpful to provide some additional time. It has
23 not been set for trial. I don't know how Judge Du sets matters
24 for trial and whether she just waits until all the discovery is
25 complete. I just don't know the answer to that. And there



1 would be some certainly no prohibition against counsel for
2 either the trustee or the defendants to make a request to Judge
3 Du to set it for trial so you know what the ultimate deadline
4 is and it -- often, that's the way I do it so I can then go
5 backwards and set that cutoff dates for experts, discovery, and
6 dispositive motions.

7 So I do believe that Mr. Bayuk is protected under the
8 terms of that prior order, Mr. Hartman. I see, as I said, no
9 reason to change the status, and it's up to him or you or
10 whoever represents you to go forward. So just submit the
11 order, and there won't be any modification of my prior order
12 regarding deadlines in this case.

13 MR. HARTMAN: So you -- what's the order exactly?

14 THE COURT: The order is just going to allow
15 withdraw, and it can be put in there that I'm denying
16 Mr. Bayuk's request in his response.

17 MR. HARTMAN: I thought you were suggesting a
18 separate order, so --

19 THE COURT: I don't think I need it. Do you?

20 MR. HARTMAN: No, I don't think so.

21 THE COURT: We have enough orders.

22 Mr. Bayuk, are you on the telephone? Mr. Bayuk?

23 THE OPERATOR: Your Honor, this is the operator. I'm
24 seeing his line being assisted by an operator at this time.

25 THE COURT: What did she say to me?



1 THE CLERK: They're connecting him.

2 THE COURT: Oh, they're connecting. I'm going to
3 wait a minute because I think it'd be helpful if he heard this.

4 THE OPERATOR: He's now online.

5 THE COURT: Mr. Bayuk, are you on the telephone?

6 MR. BAYUK: Yes, I am. Good morning, Your Honor.

7 THE COURT: I need you to enter your appearance. I
8 need your name please.

9 MR. BAYUK: Sure. Edward Bayuk.

10 THE COURT: And where are you physically located
11 right now, please?

12 MR. BAYUK: Laguna Beach, California.

13 THE COURT: I need an address, sir.

14 MR. BAYUK: 371 El Camino del Mar --

15 THE COURT: Thank you.

16 MR. BAYUK: -- Laguna Beach, California.

17 THE COURT: I want to explain -- thank you. I read
18 the response that was filed on your behalf by Mr. Hartman to
19 the request by Richard Holley's law firm to withdraw as
20 counsel. I want you to know that we have already addressed
21 that issue. I'm going to allow that law firm to withdraw. You
22 did not object to withdrawal. I just found that the
23 attorney-client relationship was so fractured and there was a
24 lack of confidence that the motion had to be granted. That
25 being said, I just conducted a status conference in both --



1 regarding -- well, actually, regarding the adversary. I'll
2 talk about the content matter in a moment, but as of this time
3 you're -- you represent yourself. Mr. Hartman said he was
4 appearing specially, he wasn't appearing for the purposes of
5 this litigation, if I understood him correctly.

6 Did I understand you correctly?

7 MR. HARTMAN: Yes, Your Honor.

8 THE COURT: So you're representing yourself, and I
9 wanted you on the telephone. And Jackson Hole is an entity
10 that needs to have a lawyer. We've been through this before,
11 as I noted, when Mr. Gilmore withdrew. So you need to find a
12 lawyer and you need to find a lawyer soon.

13 I entered an order, Docket Number 411, providing
14 certain discovery cutoff, expert witness cutoff, and
15 dispositive motion cutoff. I am not going to change those. I
16 believe they provide you sufficient time, but the order itself
17 does provide that you can make a request to have further
18 extensions. And you or your counsel may want to contact
19 counsel for the trustee, which is new counsel now because I
20 granted the Sullivan Hill Law Firm's motion to be substituted
21 in place of Woodburn & Wedge.

22 So that's the situation. Do you have any questions
23 of me?

24 MR. BAYUK: My only question is do you understand why
25 I released Richard Holley from -- and his firm?



1 THE COURT: I know that it's disputed, and I know
2 that I don't have to make a defining. All I have to do is find
3 that there's a basis exists for granting the motion to
4 withdraw, and that's what I did. But I did read your pleading.

5 MR. BAYUK: He did misinform me and lied to me who
6 worked at his firm, and --

7 THE COURT: And they disagree with that.

8 MR. BAYUK: -- and totally --

9 THE COURT: And they disagree with that. I read your
10 pleading, sir. I'm not going to resolve it. It's not
11 necessary. Okay?

12 MR. BAYUK: Okay. Okay. Okay.

13 THE COURT: So --

14 MR. BAYUK: And --

15 THE COURT: -- you can -- I'm going to need you to
16 stay on the telephone for a while longer. All right?

17 MR. BAYUK: Oh, absolutely. Absolutely.

18 THE COURT: Thank you very much.

19 Mr. Holley?

20 MR. HOLLEY: Just one point of clarification, Your
21 Honor. On the order granting the motion to withdraw is, am I
22 also supposed to include something in there with respect to the
23 request for additional time or does that just flow into the --

24 THE COURT: Yeah, just -- I want that in that --
25 we're going to put it in that order. There was a request to



1 extend, that I denied that request, and I'm going to, until
2 further order of the Court, enforce the deadlines in order,
3 Docket Number 411.

4 MR. HARTMAN: So it's denied without prejudice to --

5 THE COURT: Yes.

6 MR. HARTMAN: -- Mr. Bayuk to request an extension.

7 THE COURT: The order 411 shall remain in full force
8 and effect.

9 MR. HOLLEY: So what I'll do, Your Honor, with
10 respect to that order granting the motion to withdraw, I will
11 present it to Mr. Dabbieri so he can sign off on that --

12 THE COURT: That'd be good --

13 MR. HOLLEY: -- since it also deals with --

14 THE COURT: -- because he's going to --

15 MR. HOLLEY: -- the discovery issues.

16 THE COURT: Good. Thank you.

17 MR. HOLLEY: Thank you, Your Honor.

18 THE COURT: You're welcome.

19 All right. Let me put some of these pleadings away
20 while I pull out others.

21 You can sit down, Mr. Hartman. I think we're --
22 well, you filed this thing regarding the contempt motion, so I
23 probably have to hear from you. I'm doing a status on the
24 contempt. I think I need some additional appearances.

25 I'm not going to conduct a hearing on whether I'm



1 going to find him -- I'm going to find anybody in contempt. I
2 want to know what the status is. And if I have to set it for
3 hearing, I'll set it for hearing.

4 MR. MURTHA: Your Honor, there are several motions --
5 or at least two motions for contempt today. Can we tell --
6 define which case it is?

7 THE COURT: This is still in --

8 MR. MURTHA: 5046?

9 THE COURT: -- 5046.

10 MR. MURTHA: Thank you.

11 THE COURT: I haven't left it yet. I'll get to your
12 -- the others in a minute.

13 MR. DABBIERI: Jonathan Dabbieri of Sullivan Hill on
14 behalf of Mr. Leonard, Chapter 7 trustee, Your Honor.

15 THE COURT: What do you want to do?

16 MR. DABBIERI: Well, Your Honor --

17 MR. HARTMAN: Well, Your Honor, just to be clear, are
18 we talking about Docket Entry 283 in 5046? Since we're --

19 THE COURT: We're talking about --

20 MR. HARTMAN: Since we're trying to keep the record
21 straight.

22 THE COURT: -- 5046 and -- one moment please, let me
23 pull it out. On May 1st, I entered an order continuing the
24 status conference, but that was on the main case, and I've
25 already been through those pleadings, already been through the



1 pleadings regarding the order settling certain facts for trial.
2 There was a contempt order entered on May 1, Docket Number 416,
3 following a hearing date of April 2nd of this year. And as we
4 went through the various minutes orders, today is a status
5 conference regarding that contempt order in Adversary 15-5046.
6 And what you filed on May 24th, Docket 423, relates to that
7 contempt order, I believe, Mr. Hartman.

8 MR. HARTMAN: Right.

9 THE COURT: Because that's what it says. So -- and
10 as you properly labeled the declaration of Mr. Bayuk, today's
11 the status here.

12 MR. HARTMAN: Right.

13 THE COURT: So --

14 Ball's in your court, sir.

15 MR. DABBIERI: Yes sir. Thank you, Your Honor. We
16 did receive those pleadings, Mr. Bayuk's declaration and the
17 papers that were produced with those. We have -- I would say
18 at least facially, he appears to have responded. However,
19 there's a number of factual assertions made, and we have not
20 had an opportunity to really test the truth of those assertions
21 and/or the completeness of the documents which she has
22 produced. So our request would be that we continue the status
23 conference so we have the time to do that testing and see if he
24 has indeed purged himself of contempt or if there is a ground
25 to go forward.



1 Tc That would certainly be my recommendation.

2 Mr. Hartman, do you have any --

3 MR. HARTMAN: No objection, Your Honor.

4 THE COURT: Mr. Bayuk, do you have any objection to
5 continuing this status conference to allow counsel for the
6 trustee to evaluate the voluminous documents you submitted with
7 your declaration on the 24th of May?

8 MR. BAYUK: I assume the 24th of May documents are
9 the ones regarding --

10 THE COURT: I didn't hear him.

11 MR. BAYUK: -- the medical and --

12 THE COURT: I didn't -- sir, you assume what? I just
13 didn't hear you.

14 MR. BAYUK: Oh, I'm sorry. I assume that the
15 documents we're talking about are the ones regarding answering
16 my medical condition and stuff like that. Correct?

17 THE COURT: I don't think so. I think they --

18 Mr. Hartman, why don't you explain what --

19 MR. HARTMAN: May I address -- Mr. Bayuk, the
20 declaration that you filed -- that I filed on your behalf with
21 several hundred exhibits regarding credit card statements, the
22 promissory notes --

23 MR. BAYUK: Oh, yeah.

24 MR. HARTMAN: -- all those things. The judge is
25 asking if you have any objection to that matter because today's



1 the status hearing being set at some point in the future.

2 MR. BAYUK: Yeah, that's fine. Yeah.

3 THE COURT: Okay, good. We have agreement.

4 Here's what I'm going to have you do. I'm going to
5 have you prepare your review, and if you determine that you
6 want to go forward, that you file a notice of that, and then we
7 will have a scheduling hearing and I'll set it for hearing.

8 MR. DABBIERI: Your Honor, if I could, I --

9 THE COURT: My time is very full, and so I am
10 reluctant to give away time if I don't need to.

11 MR. DABBIERI: Okay. I'll just make a comment.

12 THE COURT: And everybody here locally knows that
13 this -- the fact that I'm retired, and it's becoming a bigger
14 joke every week.

15 UNIDENTIFIED: It's an absentee judge thing.

16 MR. DABBIERI: Yes, Your Honor. And in speaking with
17 the Court previously on a motion -- the motion to dismiss,
18 which we'll get to, I was surprised --

19 THE COURT: That's in a different adversary.

20 MR. DABBIERI: Yes, Your Honor, but I was surprised
21 the next date available on Your Honor's calendar for
22 essentially everything, anything as I understand it, was August
23 8.

24 THE COURT: Excuse me?

25 MR. DABBIERI: I was surprised that the earliest date



1 available on Your Honor's calendar was August 8 for most
2 matters.

3 THE COURT: That early? Wow.

4 MR. DABBIERI: That's the date I was given for, if
5 necessary, that other matter. Could we reserve that date for
6 this?

7 THE COURT: Yes.

8 MR. DABBIERI: Thank you, Your Honor.

9 THE COURT: Let's be clear what we're reserving it
10 for.

11 MR. DABBIERI: Yes.

12 THE COURT: Further status or to have the matter
13 considered on its merits?

14 MR. DABBIERI: Yes, Your Honor.

15 THE COURT: Tell me. That was a question.

16 MR. DABBIERI: To go forward, we will file in advance
17 --

18 THE COURT: August 8th will be a date set for
19 determining the contempt order on its merits.

20 MR. DABBIERI: And we will file in advance a pleading
21 -- if we determine we are not going forward --

22 THE COURT: Let me finish.

23 MR. DABBIERI: I'm sorry.

24 THE COURT: I want supplemental pleadings filed on
25 behalf of the trustee no later than Friday, July 19th. That's



1 enough time for you to evaluate these?

2 MR. DABBIERI: Yes, Your Honor.

3 THE COURT: And then, Mr. Bayuk, you're going to have
4 to respond no later than a Thursday, August 1st. And then --

5 MR. BAYUK: Okay.

6 THE COURT: And if you're going to testify, you're
7 going to have to be here in court on the 8th of August.

8 MR. BAYUK: Okay.

9 THE COURT: I don't know that you'll have to. I
10 don't know how -- if the trustee is going to believe these
11 documents that purges you of the contempt.

12 MR. BAYUK: Your Honor, can I --

13 THE COURT: But save that date.

14 MR. BAYUK: Okay.

15 THE COURT: Thank you.

16 MR. BAYUK: I --

17 THE COURT: That takes -

18 MR. BAYUK: Your Honor, I have one --

19 THE COURT: Do you have a question? Sure, go ahead.

20 MR. BAYUK: May I ask a question to you? Back in --
21 I submitted -- David Shemano, Attorney Shemano, submitted my
22 medical --

23 THE COURT: Yes.

24 MR. BAYUK: -- letters. Did you get a copy of those?

25 THE COURT: Oh, I -- there was a declaration filed



1 some time ago regarding your medical condition, and I -- there
2 were exhibits from doctors.

3 MR. BAYUK: Okay.

4 THE COURT: Yeah, I'm familiar with all of that.

5 MR. BAYUK: Okay.

6 THE COURT: You had your surgery on December 26,
7 2018, if I remember correctly.

8 MR. BAYUK: That's right.

9 THE COURT: Yeah, I'm -- I know that. And the
10 doctors indicated --

11 MR. BAYUK: Oh, okay.

12 THE COURT: That the doctors indicated that perhaps
13 it would be July. Well, the date we set is August, so I hope
14 we're consistent with that.

15 MR. HARTMAN: I think Mr. Bayuk is trying to tell you
16 something additional.

17 THE COURT: What?

18 MR. HARTMAN: Well --

19 MR. BAYUK: What happened in January --

20 THE COURT: Are you trying to tell me anything
21 additional?

22 MR. BAYUK: Yeah, I'm trying to explain one more
23 point.

24 THE COURT: Go ahead.

25 MR. BAYUK: I -- Attorney Murtha and Attorney Gilmore



1 forced me to provide (indiscernible) work in January, February
2 when I was in homebound, and I provided -- anyway, long story
3 short, I had a medical (indiscernible) not to do any work
4 whatsoever and they basically forced me to provide documents,
5 and I gathered them, submitted them and, anyway, fell down a
6 flight of stairs during the process. And basically, the
7 lawyers weren't respecting my medical letters and nor -- and
8 that's why I'm asking you to judge why I was forced to do all
9 that in January and February and fell down a flight of steps
10 and why the lawyers wouldn't respect the medical letters

11 THE COURT: You're going to have to ask -- sir,
12 you're going to have to ask your lawyers. When the matter came
13 before me, I read the declaration, I read the exhibits. I
14 think it was after the time that you're talking about.
15 Mr. Hartman was here one time because I've reviewed the minutes
16 of hearing that we had because you had an issue with your hands
17 and whether that could be done.

18 MR. BAYUK: No.

19 THE COURT: Let me finish.

20 MR. BAYUK: Mr. Hartman was in --

21 THE COURT: So -- let me -- please, sir. So I was
22 aware of some of those issues. That's one of the reasons we
23 continued -- candidly, we continued the hearings on some of the
24 other matters that were pending. We tried to take your medical
25 condition into account. I believe that -- and I know that I've



1 read others that you appeared in front of the Laguna City
2 Council and you explained to me that it was only a few miles
3 from your house. I understand all of that. I have read it
4 all, sir.

5 MR. BAYUK: Yes. That was in late April.

6 THE COURT: I know, I've read it all. So if you
7 think -- I just want to reassure you that I am familiar with
8 those issues, and that is why the August date, I think, is
9 consistent. If other problems come up and you have other
10 medical issues, there's absolutely no prohibition against you
11 bringing it to the attention of the Court.

12 But let me be clear. Please let me be clear. These
13 matters have gone on for a considerable length of time. All
14 parties in this case have expended a lot of money for
15 attorneys' fees and costs. And, in addition, they have had to
16 expend a great deal of their own time and energy, both for
17 appearances in court, for discovery, for the trial in state
18 court, for any number of issues. These matters need to be
19 resolved. And I am going to try to manage these matters.
20 Mr. Shemano doesn't -- believes that this Court probably
21 shouldn't be the court that's being utilized to enforce the
22 judgment, that I entered, but that is what it is, and there is
23 no stay, and I believe I have that obligation to go forward.
24 So consistent with your medical issues or any other
25 issue than any other party has, I intend to keep this matter



1 proceeding so that we can try to get resolution consistent with
2 Federal Rule of Civil Procedure 1 that calls for efficient and
3 economical resolution of disputes. And that's what I'm going
4 to do. But I'll always be glad to read what you filed, sir.
5 Okay?

6 MR. BAYUK: Okay.

7 THE COURT: Thank you.

8 All right. August 8th. And if you're not going to
9 go forward, let us know at the earliest possible time and
10 Mr. Bayuk, as well.

11 And, Mr. Bayuk, as soon as you retain counsel, make
12 sure that that lawyer or law firms files its notice so that
13 we're aware of it, and it shouldn't be at the last minute.
14 August 8th, this is a June 6th. This is the anniversary of
15 D-Day. So you've got a considerable time to get a lawyer and
16 try -- if it's last minute, I'm going to be less likely to
17 grant extra time. Just fair warning.

18 MR. HARTMAN: Your Honor, just with respect to the
19 schedule of the supplemental briefing, if -- I will make -- if
20 there's an issue, I will make every attempt to address it --

21 THE COURT: Thank you.

22 MR. HARTMAN: -- so that we don't have to have a
23 hearing, but we'll comply with the deadlines.

24 THE COURT: I have no choice but to do what I've
25 done.



1 MR. HARTMAN: No, I understand.

2 THE COURT: Okay. Prepare the order, please.

3 MR. DABBIERI: Yes, Your Honor.

4 THE COURT: Thank you. Make sure Mr. Bayuk gets a
5 copy of it because right now, he's pro se.

6 MR. DABBIERI: Yes, Your Honor.

7 THE COURT: And send it to Jackson Hole at whatever
8 address you have.

9 MR. DABBIERI: Yes, Your Honor.

10 THE COURT: Thank you.

11 That is -- I believe that that covers all the matters
12 regarding a adversary 05046. Is that correct?

13 MR. DABBIERI: I believe so, Your Honor.

14 MR. HARTMAN: I believe so, Your Honor.

15 THE COURT: Thank you. Thank you.

16 All right. Progress.

17 Well, let's look at Adversary Number 15-05019. I
18 have a -- who's -- there's a notice of hearing set on Garman
19 Turner Gordon letterhead. The first matter I have, I believe,
20 is on Docket Number -- regarding Docket Number 274, which was a
21 motion for an order holding Mr. Bayuk in contempt of the order
22 compelling compliance, awarding sanctions to the Herbst
23 parties, finding that any objections, including those based
24 upon privilege, were waived, and compelling Bayuk's full
25 compliance. I need appearances.



1 Mr. Bayuk, are you represented by counsel in this
2 matter?

3 MR. SHEMANO: Your Honor, it's David Shemano. I
4 believe I am counsel to Mr. Bayuk in this matter.

5 THE COURT: Okay, good.

6 So Mr. Hartman is here. He'll -- handling this
7 matter primarily. That's what I was told.

8 MR. HARTMAN: Well, Your Honor, I will attempt just
9 because the historical documents were filed -- I think were
10 filed by Mr. Shemano. I will attempt to deal with as I can.

11 THE COURT: I'll be glad to listen to Mr. Shemano,
12 but as you know, I typically require counsel to be here unless
13 they give me good cause not to be.

14 MR. HARTMAN: I understand.

15 THE COURT: The only cause that Mr. Shemano gave me
16 was he was in Los Angeles. I get that. And he said that
17 you're going to primarily handle it. I don't want to prejudice
18 your client, but --

19 MR. HARTMAN: I understand.

20 THE COURT: -- I want to keep that in mind.

21 MR. HARTMAN: I understand.

22 THE COURT: Thank you. Docket Number 274 is a motion
23 for an order, as I just mentioned. Have you folks entered your
24 appearances yet for the purposes of this matter?

25 MR. GORDON: Your Honor, Gerald Gordon and Mark



1 Weisenmiller of Garman Turner Gordon on behalf of the Herbst
2 partners.

3 THE COURT: All right.

4 MR. DABBIERI: And, Your Honor, because this is in
5 the case but I hope not to say anything, Jonathan Dabbieri of
6 Sullivan Hill on behalf of the trustee.

7 THE COURT: I'm going to make sure I'm pronouncing
8 your name right, counsel. Dabbieri?

9 MR. DABBIERI: Dabbieri. Middle syllable is beer
10 basically.

11 THE COURT: Okay.

12 MR. DABBIERI: Dabbieri. Thank you, Your Honor. I
13 appreciate the consideration.

14 THE COURT: The Sullivan in your law firm's name,
15 what was the full name of that.

16 MR. DABBIERI: It was James Solomon, I believe, Your
17 Honor. He passed away before I joined the firm. I believe it
18 was James Sullivan.

19 THE COURT: Okay.

20 MR. DABBIERI: Thank you, Your Honor.

21 THE COURT: I practiced '73 to '75 in San Diego, and
22 I -- at Gray, Carey, Ames & Frye, and that's --

23 MR. DABBIERI: Now, DLA Piper.

24 THE COURT: Well, the motion, Docket 274, was filed
25 on February 11th. I've read it. This is an action seeking, as



1 I understand it, discharge of Mr. Morabito. I was requested to
2 set this on shortened time. I denied that motion pursuant to
3 an order entered on February 20th after I read the application,
4 Docket 276. There have been notices regarding the hearing that
5 was set originally for May 2nd. I had that hearing continued
6 until today, and that's how we're here.

7 I've read, in addition to Docket 274 and the
8 pleadings regarding the request for an OST, Docket 275, which
9 was Mr. Weisenmiller's declarations. I read a supplemental
10 report that was filed on April 25th, Docket Number 348. It was
11 filed on behalf of the Herbst parties. There was a declaration
12 of Mr. Gordon in support thereof, Docket Number 349, also filed
13 on April 25th. I've read it.

14 I believe -- yeah, one moment. I have in my notes --
15 perhaps it's in the next matter. Was there a second supplement
16 filed regarding --

17 MR. GORDON: Yes, there is.

18 THE COURT: Yes, excuse me. It's under a piece of
19 paper.

20 I read -- Mr. Shemano filed on behalf of Mr. Bayuk on
21 April 26 Docket Number 351, Mr. Bayuk's declaration, and I
22 think this was what Mr. Bayuk was referring to earlier
23 regarding his spinal surgery on December 21st, that he expended
24 considerable time and effort with assistance gathering,
25 reviewing documents to respond to multiple Herbst subpoenas,



1 that "the process was physically very difficult on my hands and
2 has had a negative impact on my recovery from surgery," that he
3 was still recovering, he's still on pain medication, and the
4 use of his hands remains difficult, and he's had to have
5 additional tests, including an MRI, to determine if he needs to
6 have additional spinal surgery.

7 Then, he refers to the city council meeting at Laguna
8 Beach. He indicates that the city council building's only
9 three blocks from his home. He was at the meeting for 25
10 minutes and "spoke about trees near my house for less than two
11 minutes." He said he was willing to make himself available for
12 deposition in Orange County on July 2, 2019. That caught my
13 attention.

14 Then, there was a second supplement filed by the
15 Herbst parties on April 29, three days after Mr. Bayuk's
16 declaration. And that was a -- really to put before the Court
17 as Exhibit 1 a motion that had been filed February 19th in the
18 Second Judicial District Court, Case CV-13-02663.

19 Have I read all the pleadings have been filed now
20 regarding this matter?

21 MR. GORDON: Yes, Your Honor.

22 THE COURT: Mr. Shemano, did you file anything else?

23 MR. SHEMANO: I did not, Your Honor.

24 THE COURT: Okay. Mr. Bayuk, you had asked me
25 earlier if I had read what had been filed, and I think the



1 pleading I've just referred to that was filed by Mr. Shemano is
2 what you were referring to. Am I correct?

3 MR. BAYUK: Yes.

4 THE COURT: Thank you.

5 All right. Now, I had entered an order, Number --
6 Docket Number 227, July 3rd compelling compliance. I provided
7 deadlines, January 25th. There have been issues raised
8 regarding the privilege log, that it doesn't satisfy the
9 requirements, doesn't identify subjects, and there was a
10 failure to assert any privilege. It was required 14 days after
11 service. Any objections that were boilerplate, pursuant to
12 authority, should not be given great weight. And these are
13 documents not just within the possession of the respondent, but
14 any documents within their custody or control. In other words,
15 that they could get the documents.

16 MR. GORDON: Your Honor, I think the privilege log
17 issue was Mr. Morabito's.

18 THE COURT: No, this is also in -- read your motion.

19 MR. GORDON: Okay.

20 THE COURT: It also applies to the next matter. It's
21 the same thing. I just -- I understand the law that's
22 involved, the issues that are being raised.

23 Contempt is a serious matter, and to find somebody in
24 contempt requires clear and convincing evidence. I cannot
25 ignore the submission by Mr. Bayuk, with the help of



1 Mr. Hartman, in Adversary 15-05046 that he filed two weeks ago.
2 A lot of documents there. I don't know because I wasn't about
3 to go through each of your requests to see if there -- any of
4 that documentation was relevant for your purposes, as well. I
5 do believe that discovery is a serious matter and there should
6 be responses formally and responses -- if there's a request for
7 production of documents, they should be labeled and address the
8 particular request, or if they're being kept in the normal
9 course of business, that they're so labeled so that they can be
10 reviewed and analyzed with a certain degree of efficiency and
11 speed, and I believe that's what the rules and the case law
12 require. It's not just sufficient to make a document dump.
13 Here they are. That doesn't do it.

14 Any assertion of privilege must be made consistent
15 with the authority in the Ninth Circuit and subject matter.
16 Who saw these documents? Who also is -- well, those
17 requirements are set forth numerous locations, and they're not
18 difficult.

19 So my question is -- I don't know who's handling
20 this. Mr. Gordon?

21 MR. GORDON: Yes.

22 THE COURT: Mr. Bayuk says he's willing to be
23 deposed. Are you going to -- do you believe that you are in a
24 position that you can knowledgeably conduct that deposition?

25 MR. GORDON: Yes.



1 THE COURT: All right. Then --

2 MR. GORDON: We're prepared to conduct it in Orange
3 County. We don't have any desire to require him to come here.
4 We will do in Orange County. We believe we -- I have grave
5 reservations with the amount of documentation he produced for
6 us, basically 20 pages, but --

7 THE COURT: I know. That was 20 pages that was
8 produced months ago.

9 MR. GORDON: Two months, two and a -- yeah, three
10 months, four months. Time passes in this matter. Yes, we
11 believe there's other documentation. But most importantly, and
12 I want to stress this again and the Court realizes, our
13 interest solely is with regard to the conduct and activities of
14 Mr. Morabito related to assets which arose after the petition
15 date. That's what we're after. If the Court recalls, when the
16 Court granted the order on December 20, the Court required us
17 to work with Mr. Shemano and reduce the four questions down,
18 one going away, Number 2, which we then did with Mr. Shemano,
19 which resulted in the order being entered in January 3.

20 Our problem has been that we have attempted to take
21 the examination of Mr. Bayuk. We understand -- we were
22 notified on December 28 that he had surgery. We understood
23 that would delay. We consistently asked during the month of
24 January for an update. We really never got it. We were
25 basically stonewalled. Then we get -- and what really --



1 something that really aggravated it was finally, two months
2 ago, we hear, yeah, he can do it July 1st.

3 THE COURT: 2nd.

4 MR. GORDON: July 7th, I'm sorry. And what we knew
5 was, number one, we wanted to do it down in Orange County.
6 Number two, what really aggravated us is when, as we disclosed
7 to the Court, he then shows up at the Laguna Beach City
8 Council. We have the disk. We supplied it to the Court. We
9 have it here, ready to see.

10 THE COURT: He doesn't deny being there.

11 MR. GORDON: I know he doesn't. I take issue with
12 the matter it's only a few blocks, I could walk to court. I
13 have a house in Laguna Beach. I know what it is. I know where
14 his house is located. I know where it is. But I also know
15 that that three box includes a hill that challenges anything in
16 San Francisco that I can't walk up or down. So to get there,
17 he either had the walk that -- do that, which he had to be in
18 great physical shape, or more likely, he walked three-quarters
19 of a mile to get around, going through downtown.

20 But that's not what really aggravated us. The fact
21 is, is that Mr. Gilmore, in the state court matter with regard
22 to a post-judgment matter, the Court set a hearing for March
23 31st, and he responded -- Mr. Gilmore, on behalf of Mr. Bayuk,
24 saying he can be there in court in Reno on April 8th.

25 THE COURT: That was your exhibit.



1 MR. GORDON: Yes. What we have here is we have,
2 believe, a consistent attempt to delay. And the problem is, is
3 that when you take lies and lies and lies, you kind of forget
4 what you said in each instance and you can't keep track of it.
5 So I think we've shown an appropriate statement for the Court
6 that -- how does he purge it? I think he can purge it by
7 showing up for his deposition. I said -- Mr. Hartman talked
8 about doing it next week in Orange County.

9 THE COURT: Is this what you referred to earlier,
10 Mr. Hartman?

11 MR. HARTMAN: Yes, Your Honor. I sent an email
12 yesterday to Mr. Gordon about this issue, and he graciously
13 called me and explained to me the history that I was not aware
14 of. So I -- he wanted to take the deposition next weekend,
15 Orange County. I had discussions with Mr. Bayuk about it, and
16 he agreed to be available next week.

17 THE COURT: Mr. Bayuk, are you still on the
18 telephone?

19 MR. BAYUK: Yes, I am.

20 THE COURT: Have you agreed to be deposed next week
21 in Orange County?

22 MR. BAYUK: Two hours, two days, each day. And, Your
23 Honor, Gerry Gordon is not being truthful with you regarding
24 January/February, my medical condition and the walk down to
25 city hall. My doctors told me to walk after two weeks after



1 the surgery. So I do do a lot of walking, and I do, you know,
2 elliptical machine. So Gerry Gordon is not being truthful to
3 you, Your Honor.

4 THE COURT: Thank you. All right.

5 MR. GORDON: Your Honor, may --

6 THE COURT: I want to make sure I understood
7 correctly.

8 MR. GORDON: Well --

9 THE COURT: I'll let you speak. I want to make sure
10 I understand what Mr. Bayuk said. He'd be available for two
11 hours a day for two days?

12 MR. HARTMAN: Your Honor, the one caveat I went back
13 to Mister --

14 THE COURT: No, is that what I heard?

15 MR. HARTMAN: Yes.

16 THE COURT: Thank you.

17 MR. HARTMAN: That's what you heard from Mr. Bayuk.

18 MR. GORDON: What the -- the substance of it was that
19 he would appear in a law office of Mr. -- attorney named
20 Hubbard in Irvine. That's good. Two hours Wednesday morning
21 --

22 MR. HARTMAN: What we talked about, Your Honor, was
23 two hours Wednesday afternoon and then two hours Thursday
24 morning. And I contacted Mr. Hubbard and Mr. Bayuk --

25 THE COURT: He's a lawyer at whose offices the



1 deposition will be conducted?

2 MR. HARTMAN: Yes. And then, Mr. Gordon responded he
3 wanted to reserve two hours on Friday morning. He didn't think
4 he would need it, but just in case he wasn't able to accomplish
5 it. I sent that email to Mr. Bayuk late last night. I don't
6 know when he was able to look at it. But I don't think -- and
7 we can ask him. I don't think that's an issue to have the
8 possibility of two hours on Friday morning.

9 MR. GORDON: There were three other conditions, Your
10 Honor. Three --

11 THE COURT: Let me get rid of this one first.

12 Mr. Bayuk, do you have any objection to setting aside
13 two hours on Friday morning if needed?

14 MR. BAYUK: No.

15 THE COURT: Thank you.

16 Go ahead, Mr. Gordon.

17 MR. GORDON: The other conditions were, one, that it
18 would be solely with regard to the discharge judgments, the 523
19 judgment, and not Superpumper. That was absolutely correct.
20 That was in agreement.

21 THE COURT: It would be regarding the --

22 MR. GORDON: In other words, the scope of the
23 examination is solely with regard to Mr. Morabito's assets
24 under the 523 non-discharge judgment. It would not relate at
25 all to the Superpumper case.



1 THE COURT: Right.

2 MR. GORDON: Absolutely.

3 THE COURT: The judgment entered in this court. --

4 MR. GORDON: Yes.

5 THE COURT: -- that's on appeal but there's no stay.

6 MR. GORDON: No stay. That is absolutely correct.

7 No problem. The second item was, is that we reserved our
8 rights to seek attorneys' fees and costs under this motion for
9 the time we spent, subject to obviously opposition and a court
10 decision. And the third was that with regards to the contempt
11 proceeding itself, the contempt of court, that we would not
12 take any initiative on that. I consider that really to be --
13 we put evidence before the Court. It would be a court decision
14 as to whether or not Mr. Bayuk was in contempt of court. I
15 would remain silent.

16 THE COURT: Explain to me what you're doing with
17 contempt again. I'm not sure that I totally grasp it.

18 MR. GORDON: We have put before the Court what we
19 believe is a showing that he has -- we believe it is a contempt
20 before the -- contempt of court for his actions. We would not
21 initiate any action in that. We would not take an issue in
22 arguing before the Court. That will be left to the Court to
23 decide if, in fact, Mister --

24 THE COURT: Well, here's what I'm going to do
25 regarding that matter. I'm not going to issue a ruling on



1 contempt. Mr. Bayuk has agreed to appear at a deposition for
2 Wednesday, Thursday and Friday next week, Friday if needed,
3 limited to an examination regarding the debtor's post-judgment
4 assets regarding the 523 judgement and not Superpumper, that
5 counsel conducting the examination may file an application for
6 fees and the costs associated, to which there could be a
7 response and a reply. We treat it like any other motion. And
8 that regarding the contempt, I'm simply going to stay it until
9 we -- she what happens next week.

10 MR. GORDON: I was mentioning -- and one other point
11 I mentioned with regard of that was it'd simply be continued to
12 the August 8th hearing.

13 THE COURT: Well. that's -- I was going there next.
14 And August 8th for this content motion will be a status
15 conference and not -- will not be heard on the merits.

16 MR. GORDON: That's fine.

17 THE COURT: Because I will -- you'll need more time
18 and I'll need more time to be ready for a contempt hearing. I
19 take them very seriously.

20 MR. GORDON: We will file -- in anticipation of the
21 status, we'll file --

22 THE COURT: File a status report no later than --

23 MR. GORDON: Choose the same dates that you gave --

24 THE COURT: Yeah.

25 MR. GORDON: -- in the --



1 MR. HARTMAN: July 19th.

2 MR. GORDON: -- July 19th and August 1st?

3 THE COURT: Yep.

4 MR. GORDON: Okay. Well, a status report --

5 THE COURT: I only need a status report due August 1.

6 MR. GORDON: -- doesn't need a reply.

7 THE COURT: Just do August 1.

8 MR. HARTMAN: And we'll attempt to do it joint.

9 THE COURT: I would hope so.

10 MR. GORDON: Okay. That's fine.

11 THE COURT: All right. Mr. Shemano?

12 MR. SHEMANO: Yes, Your Honor.

13 THE COURT: You've heard the discussion with
14 Mr. Bayuk and Mr. Hartman and Mr. Gordon. I'm going to have
15 Mr. Gordon prepare an order consistent with what we just placed
16 on the record. My question for you and Mr. Hartman is who's
17 going to sign off on that order, Mr. Hartman or you?

18 MR. HARTMAN: Your Honor --

19 MR. DABBIERI: I'm happy to sign off on the order,
20 Your Honor. That's fine with me.

21 THE COURT: I can --

22 MR. HARTMAN: He's -- Mr. Shemano agreed. I was
23 going to say something when he didn't say something, but he'll
24 sign off.

25 THE COURT: Mr. Shemano -- okay, thank you very much,



1 Mr. Shemano. We'll get the order to you.

2 MR. GORDON: One question just -- and it may not have
3 an answer. Is Mr. Bayuk going to have counsel at those at the
4 --

5 THE COURT: That's a good question, and I was going
6 to ask the same thing and I forgot.

7 MR. GORDON: Mister --

8 THE COURT: Do you know, Mr. Shemano, are you going
9 to represent Mr. Bayuk at the deposition?

10 MR. HARTMAN: No, Your Honor.

11 MR. SHEMANO: I do not know -- yeah, I do not know
12 the answer to that question. I'll leave that to Mr. Hartman.

13 MR. HARTMAN: Your Honor --

14 THE COURT: I can't hear him. It's a little loud.
15 I'm sorry, Mr. Shemano.

16 MR. HARTMAN: There's an attorney that will be
17 representing Mr. Bayuk next week. His name is Clint Hubbard,
18 Clint Hubbard. He's local in Irvine.

19 THE COURT: So this -- all right. And it's that
20 lawyer's office where the deposition will be conducted.

21 MR. HARTMAN: That is correct.

22 MR. GORDON: If Mister --

23 THE COURT: Now, is he going to file a request to be
24 employed? How do I know? I don't understand. This is one of
25 the problems that I see.



1 MR. GORDON: He's going to have to file --

2 THE COURT: Is he going to be another special
3 counsel?

4 MR. GORDON: Your Honor, he doesn't have to file an
5 application to be employed. He has to file an appearance and
6 notice of appearance.

7 THE COURT: That's what I meant.

8 MR. HARTMAN: Right. Yes. And I will sort that out
9 later today, Your Honor.

10 THE COURT: I need to have that straightened out.

11 MR. HARTMAN: I understand.

12 THE COURT: Because I'm not sure special counsel
13 works anymore. I'm not sure it ever did, but I want to make
14 sure

15 MR. HARTMAN: I appreciate --

16 THE COURT: -- he's there, he's representing
17 Mr. Bayuk.

18 Mr. Bayuk, can you hear me?

19 MR. BAYUK: Yes.

20 THE COURT: I understand that an attorney named
21 Clint --

22 MR. HARTMAN: Hubbard

23 THE COURT: -- Hubbard will be representing you at
24 the deposition next week at Mr. Hubbard's office. Do you
25 understand the same thing?



1 MR. BAYUK: Yes.

2 THE COURT: And do you agree to that?

3 MR. BAYUK: Yes.

4 THE COURT: All right. And you understand that
5 Mr. Hubbard is your lawyer, at least for the purposes of this
6 deposition, correct?

7 MR. BAYUK: Yes.

8 THE COURT: Thank you.

9 MR. GORDON: Your Honor, one more. When we did
10 Mr. Morabito's examination, the Court was standing aside if we
11 had --

12 THE COURT: I'm in trial next week in the Central
13 District of California on a 523 action. If you need me, you
14 can -- I'm in trial Tuesday and Wednesday. I'm free Thursday.
15 Friday, I'm traveling. Actually, Thursday, I'm traveling.

16 MR. GORDON: Then we know where we can find you.

17 THE COURT: Okay. That's where I'm at because I have
18 nothing else to do.

19 MR. GORDON: Thank you, Your Honor.

20 THE COURT: Thank you.

21 All right. Thank you, Mr. -- Mr. Shemano, anything
22 that you'd like to mention?

23 MR. DABBIERI: No, I'm -- this seems like a
24 satisfactory resolution at this point, Your Honor.

25 THE COURT: Thank you. I agree. All right.



1 The next matter I have is also in the same adversary,
2 15-0519. And this is a motion -- well, I'm going to take this
3 out of order while I have a moment. I have a hearing that's
4 Number 5 on my calendar, but I think we may have just resolved
5 it. This is the motion to compel compliance with subpoena to
6 Mr. Bayuk, Docket Number 205. I think that that's moot.

7 MR. HARTMAN: It is.

8 THE COURT: Okay.

9 MR. GORDON: There was a confusion in terms of
10 docketing that we didn't catch until last week.

11 THE COURT: That's moot. It will have no further
12 hearings.

13 Number 4 on my calendar is pursuant to Docket Number
14 264, motion for order of finding Morabito in contempt of the
15 JDE order, that's the judgment debtor exam order ordering that
16 Mr. Morabito appear for his judgment debtor exam in person
17 before this Court and compelling Morabito to have in his
18 possession at the time of his -- of the judgment debtor exam
19 368 communications that he claimed as privileged. That was
20 filed on January 31st at Docket 264, and there was notice at
21 Docket Number 266 and a notice to continue the hearing to May
22 2nd. It was originally set for February 28th, then continued
23 to May 2nd. The notice of continued hearing was also filed.

24 Now, there was filed, on January 31st,
25 Mr. Weisenmiller's declaration, Docket 265, in support of the



1 motion. There was a response filed by Mr. Shemano on behalf of
2 Mr. Morabito on February 14th. And then, on February 21st,
3 Docket 307 was filed on behalf of the Herbst parties. A reply
4 to the response of Mr. Morabito with exhibits filed on February
5 21st, also as Docket 308. The declaration of Mr. Weisenmiller.
6 There was a supplemental report filed on April 26th by the
7 Herbst parties, Docket Number 352. Mr. Weisenmiller's
8 declaration was filed in support thereof on the 26th of April,
9 Docket Number 353. And on April 29th, there was a second
10 supplemental report.

11 Have I read all the pleadings that have been filed
12 regarding this motion?

13 MR. HARTMAN: Yes.

14 THE COURT: Mr. Shemano, have you filed anything
15 other than the pleading to which I've referred?

16 MR. SHEMANO: Sorry, I got distracted for a second.
17 Did you -- I think Mr. Hartman filed a declaration yesterday.
18 I just want to make sure that was included.

19 THE COURT: Who did? You did, Mr. Hartman?

20 MR. SHEMANO: I believe --

21 MR. HARTMAN: Your Honor, yes. I filed a declaration
22 yesterday for a limited purpose. I probably filed it early.
23 It relates to one of the matters that's set for August 8th.

24 THE COURT: There was a declaration filed by
25 Mr. Morabito.



1 MR. HARTMAN: Yes.

2 THE COURT: Very short one.

3 MR. HARTMAN: Yes.

4 THE COURT: Yeah.

5 MR. HARTMAN: And like I said, it was probably
6 premature, but it had to do with the questions surrounding
7 asset protection trusts and things like that.

8 THE COURT: Right. He said he didn't -- I read it.

9 MR. HARTMAN: Right. So -- but like I said, that, I
10 think, is a matter is set for August 8th.

11 THE COURT: And I didn't know where to put it.

12 MR. HARTMAN: I understand. You're doing a better
13 job than I am trying to keep it all straight.

14 THE COURT: Okay, thank you.

15 So other than that, Mr. Shemano, I think I've read
16 all the pleadings.

17 MR. SHEMANO: I believe so, Your Honor.

18 THE COURT: All right. I'm well aware of the
19 assertions.

20 MR. HARTMAN: Thank you, Your Honor.

21 THE COURT: I've read the reply. I've read the
22 supplemental report. I've got the same issue with privilege
23 logs.

24 MR. HARTMAN: Your Honor, Mr. Morabito is present in
25 correct.



1 THE COURT: Okay, good. All right.

2 MR. GORDON: I had the same question when I saw the
3 declaration filed yesterday because it says hearing date,
4 June 6, 2019 and I also -- I also considered it to be -- may
5 respond to what we filed, but on the other hand, it really goes
6 to the consent decree, the consensual --

7 THE COURT: It's filed. It's of record. It has
8 nothing to do with the date. I'll let Mr. Hartman straighten
9 that out with the courtroom deputy. They're both far more
10 competent than I am.

11 MR. GORDON: Your Honor, as the Court knows, we
12 conducted the judgment debtor exam of Mr. Morabito.

13 THE COURT: Was there a judgment debtor exam
14 conducted?

15 MR. GORDON: Yes, we did, and we conducted it. He
16 answered our questions. I answered some --

17 THE COURT: What was the date? Is that in your
18 second supplemental report?

19 MR. GORDON: Yeah, it is. I'm sorry, Your Honor.

20 THE COURT: No, don't --

21 MR. GORDON: I don't have it in front of me. March
22 7, 2019.

23 THE COURT: You also attached deposition testimony of
24 a Mr. Cunningham.

25 MR. GORDON: But it's also -- but this goes to --



1 THE COURT: And a gentleman from Morgan Stanley, I
2 think.

3 MR. GORDON: What this goes to is -- and I'll get to
4 it in a second -- is that he did testify under oath. He
5 answered questions, some he answered definitively, others he
6 did not recall. But --

7 THE COURT: This was the judgment debtor exam where I
8 made myself available, but I never received a telephone call.

9 MR. GORDON: Correct. But the problem that we have
10 is with the document production and his response in that
11 regard. So let me start by putting --

12 THE COURT: Well, the contempt's seeking it for --
13 regarding the judgment debtor exam.

14 MR. GORDON: The contempt did -- but then we -- it
15 also was for production of documents, so we're focused on the
16 production of documents. I can't say it's a contempt. He
17 showed up for the deposition, for the exam. He did that.

18 THE COURT: I understand that.

19 MR. GORDON: And I'd like to --

20 THE COURT: Your real problem is with an assertion of
21 privilege and you don't think the privilege log is specific
22 enough.

23 MR. GORDON: Well, there's privileges and other
24 issues. I'll go through that in a second. And the Court kind
25 of alluded to the standard for privileged documents, so let me



1 talk about it.

2 We received discovery in really in three or four
3 batches. The first batch was about 6,600 documents, of which
4 about 600 were relevant. Most of them were simply brochures
5 and stuff that made no -- just puffery on various ShipCon deals
6 and all that stuff. We then proceeded to receive the privilege
7 log, which is really the focus of our concern. But let me go
8 back and try to say where -- what the focus is.

9 And I think it's best captured in the declaration of
10 Paul Morabito, Document -- Docket 295, which was filed on
11 February 14, 2019. In fact, in the second paragraph. And he
12 says:

13 "As a result of the Herbst fraudulent legal crusade
14 against me going way back to 2007, I am penurious and
15 entirely dependent on assistance from friends and
16 family to pay my living expenses."

17 Now, I know the word "penurious." I don't use it
18 very often. So I went and looked it up just to make sure I
19 understand the definition. And it basically is extremely poor,
20 poverty stricken.

21 THE COURT: That's Docket 295 in this adversary?

22 MR. GORDON: Yes.

23 THE COURT: And this is the adversary in which the
24 judgment's been entered.

25 MR. GORDON: Paul Morabito. I think --



1 THE COURT: And what was the purpose of that
2 declaration?

3 MR. GORDON: In response to what documents he
4 produced and that this was all he had. But I think that
5 captures really where Mr. Morabito has been this entire case,
6 and that is -- and it goes to -- it flows throughout. I
7 thought it just captured really well.

8 THE COURT: Oh, I'm sorry. I do have it. I have it
9 in front of me and --

10 MR. GORDON: Paragraph 2.

11 THE COURT: Hold on just a minute. 295 is the
12 response.

13 MR. GORDON: Yes. And attached to that is, on Page
14 10, the declaration of Paul A. Morabito.

15 THE COURT: I'm going to ask counsel again, and I
16 thought I had previously. We have a local rule, and all
17 declarations should be separately filed so that they can be
18 separately docketed so they can be easily found. I have read
19 this declaration. I was going to make that comment, but thank
20 you.

21 MR. GORDON: So I think that really captures the
22 theme here, that -- and that is, hey, look, I have no assets, I
23 have no ability to support myself, I rely on friends and
24 family.

25 But just what we do know and what came out of the



1 deposition, just to give just some oversight, is that
2 Mr. Morabito and his fiancé, Mr. Wegner, occupy the premises at
3 370 Los Olivos, which is connected to Mr. Bayuk's premises on
4 El Del Mark -- Camino Del Mar, and he pays \$10,000 a month in
5 rental to Mr. Bayuk. Mr. Wegner doesn't contribute to that, he
6 testified in his deposition. So where's the money come from?

7 Mr. Wegner attended college at King's College in
8 London, I believe, for at least one year, maybe longer, and
9 Mr. Wegner or did not pay for that, according to his testimony,
10 Mr. Morabito did. Where did that money come from? Where did
11 Morabito's money come from that he spent living there off and
12 on during that period of time, including staying at first-class
13 hotels in London.

14 So none of those questions were answered in the depo.
15 And then, ultimately, we received discovery, and we received
16 this declaration in which he basically responds at length to
17 the various productions that were made. And specifically, he
18 references a series of individuals and issues that we addressed
19 in our earlier pleading. If I may, Your Honor.

20 As we point out, a series of the request were simply
21 not responded to, and we believe, as we set forth in our
22 various points and authorities and supplements, that the
23 discovery has been woefully inadequate.

24 The Court made a point about the privilege logs, and
25 I'll get to those in a minute, but going through the discovery



1 as proposed as set forth in the order itself -- I'd like to go
2 through that and show you where we find the discovery to be
3 inadequate.

4 THE COURT: That's -- please make the record, order
5 number -- docket number?

6 MR. GORDON: That would be -- one second. The JDE
7 order --

8 THE COURT: That's the order you're talking about?

9 MR. GORDON: -- is ECF Docket Number 228.

10 THE COURT: 228. That was entered after I made the
11 determination regarding money judgment.

12 MR. GORDON: You heard the hearing on December 20.
13 You made your decision on December 20. The order was entered
14 in January 3. Sorry for the delay, but I attached it as a copy
15 and the docket number was written over it.

16 THE COURT: No, but I want to make sure because
17 sometimes there have been so many hearings that that the --

18 MR. GORDON: Yes. It is order granting application
19 --

20 THE COURT: -- that the chronology, sometimes I lose
21 it, but I know I took matters under submission. I wanted to
22 resolve the money judgment issues that have been raised by both
23 the Sullivan Law Firm and also here. I found that it was a
24 money judgment. That's part of the appeal, I believe. But
25 there's no stay, and that's why we're going forward.



1 MR. GORDON: That is correct. There is no stay.

2 THE COURT: Thank you.

3 MR. GORDON: This is the order granting application
4 for judgment debtor exam. And the court approved it. It's
5 attached to our subpoena and the document -- and the request.
6 And it includes 54 separate categories, some of which overlap,
7 some of which are very -- are minor. But I'd like to go
8 through, give you a sense of what he did produce and what he
9 didn't produce because I think it's more important what he
10 didn't produce because it doesn't make sense that these
11 documents don't exist.

12 We asked for copies of his 2016/2017 financial
13 records, K-1s, et cetera, and his response was, well, I don't
14 -- I can't produce 2017/18 because I didn't file, I didn't have
15 to. You have to file something, has to be something. He's
16 never produced that for us. We've requested.

17 Number 6 is really important because Number 6 is
18 documents, communications (indiscernible) investments and/or
19 value of any investments belonging to you or any affiliate in
20 which you or any affiliate have or had an interest whatsoever
21 since June 20, 2013. That's our deadline. We're going
22 forward. That's the petition date.

23 What he had testified to in deposition was that he --

24 THE COURT: What was the date? June 20th?

25 MR. GORDON: June 20 --



1 THE COURT: That was the --

2 MR. GORDON: Yeah.

3 THE COURT: The petition date was June 20th. The
4 order for relief was entered --

5 MR. GORDON: December.

6 THE COURT: -- December 17th, 2014.

7 MR. GORDON: During his deposition, he testified that
8 he and Andrew Wegner, who's now his fiancé, were members of an
9 entity called ENT Investments, a Delaware LLC. He owned 90
10 percent, Mr. Wegner owned 10 percent. I think that was what
11 the memory was. And that entity owned a joint venture interest
12 in two other entities called C4-Nvis, N-V-I-S, and KEPAMI, both
13 LLCs that they have a joint interest in those. Those are
14 active entities that are doing business. None of the documents
15 were produced for any of those of those entities. The only
16 thing produced for ENT was, I think, one tax return.

17 THE COURT: And which request was that?

18 MR. GORDON: Number 6.

19 THE COURT: And that was Nvis?

20 MR. GORDON: It's C4 hyphen N-V-I-S, though it's
21 pronounced Nevis, as in the island, but it's N-V-I-S.

22 THE COURT: That was a subject of deposition
23 testimony?

24 MR. GORDON: Yeah, that was in his depo. And KEPAMI,
25 in which he testified both of those are joint ventures with



1 other companies to which he's not affiliated doing business.
2 And I asked about it, and he said basically, well -- his
3 response was, you know, this is what I do, I think of things, I
4 come up with ideas. Okay, good. I'm happy for that. We're --
5 we want you to come up with ideas, but we're also entitled to
6 know what these entities are.

7 THE COURT: Did you go through these requests during
8 the judgment debtor exam?

9 MR. GORDON: Pardon me?

10 THE COURT: Did you go through these requests during
11 the judgment debtor exam?

12 MR. GORDON: We found out about these assets, and we
13 asked for them. We -- a lot of this was finding out. I know
14 the judgment debtor exam --

15 THE COURT: The date of the judgment debtor exam was,
16 what, about a month ago.

17 MR. GORDON: March 17.

18 THE COURT: So you his responses.

19 MR. GORDON: And the responses, we have nothing.

20 THE COURT: Okay. I just want to make sure that I
21 understand correctly that Mr. Morabito was, in fact, asked
22 about his responses to this request for production.

23 MR. GORDON: Right. Number 9, in which he says
24 "communications and documents relating to any and all stock,
25 securities, annuities under bonds belong to you or any



1 affiliate in going on -- either any of the person or entities,
2 including those held by others for your benefit, including
3 trusts and similar devices, since June 20 2013, and the answer
4 was, "I don't have any of that." Part of what we wanted to do
5 was put before the Court the evidence which we're developing
6 with regard to offshore asset protection devices. And that's
7 really in the consent directive motion, which is set now for
8 August. And that's what it kind of piqued my interest when he
9 presented this declaration from yesterday talking about the
10 Arcadia trust and it was converted in 2010 from your --

11 THE COURT: He said "disassembled."

12 MR. GORDON: Disassembled. We know those
13 transactions, and we have documentation of those transactions,
14 and I'm sorry, none of that happened on those dates. The
15 Arcadia trust, according to the disassembled Arcadia trust
16 document, which was executed September 2010, specifically
17 referenced having been set up in 2009. What we know is the
18 setup in 2004 was an offshore trust in Guernsey through Peter
19 (indiscernible) who was then the representative of the trust --
20 Seftin (phonetic) trustees. But that's for August.

21 But the answer is no. We'll accept at this moment a
22 brightline answer by him of no. We don't think the answers are
23 all no, but that's for later. We got -- the purpose, as I said
24 to the -- to you when we pushed for the exam, was not only find
25 out what he did know, but also to tie him down definitively on



1 questions when he wanted to say no, not simply "I don't
2 recall," "I don't remember," but no.

3 So we accomplished that, so we have a no, but I want
4 to point out he did not produce any documents. We believe that
5 documents exist.

6 THE COURT: And he denies those documents existing.

7 MR. GORDON: He denies it.

8 THE COURT: So what exactly do you think a Court can
9 do in that situation?

10 MR. GORDON: Can't. I'm just pointing it out.

11 With regard to Number 14, which is credit cards, we
12 did receive copies both directly from him and also through
13 Mr. Bayuk, in terms of his response with regard to his credit
14 cards, but what we haven't seen since June of 2013 is he uses
15 Sam Morabito's credit cards. In January, Mr. Shemano wrote to
16 us and said, "We're in the process of obtaining Mr. Sam
17 Morabito's credit card records." We've never seen them.

18 Also, on June 20, 2013, Mr. Morabito still had his
19 AMEX card, in which shortly before that in an email between him
20 and Mr. (indiscernible), not knowing about the bankruptcy, he
21 asked, "What happens to my two million points on AMEX?" What
22 about the AMEX card? Did he continue it after or was it
23 terminated? All we care about is after June 20. We're
24 entitled to know. In other words, it all goes to what friends
25 and family or how are you being supported if you're



1 poverty-stricken?

2 With regard to Number 18, we received -- this is
3 related to all places you've resided since June 20, 2013 but
4 not limited to any leases and proof of payments, whether
5 periodic or otherwise, related to same. All documents related
6 to you reside. We know that on -- when the petition was filed,
7 he was residing in the Hollywood Hills. We know that sometime
8 after that, around 2015, he was residing in Palm Springs. The
9 only lease he produces is the one with Mr. Bayuk for 370
10 Olivos. We're missing leases. We're missing documents.

11 Documents and communications relating to all of your
12 -- any affiliates' consulting or employment agreements -- this
13 is Number 21 -- with UAC affiliate, UAC wages, consulting fees,
14 expenses, nothing. And we know he was employed. We know he
15 got consulting fees until he was terminated in 2015 by Joe --
16 by Mr. Jacobs.

17 Number 20, documents and communications relating to
18 HF Net (phonetic), HF Keys (phonetic), HFP Partnership
19 (phonetic), HFPB Partnership, Global Wideband (phonetic),
20 Terlingua LLC (phonetic), JJCD Ellis (phonetic), Global Widenet
21 LLP, an Alberta Canada limited partner, and Terlingua LLP
22 (phonetic). We know that he had various transactions with
23 these entities. We know he's involved with these entities.
24 They're all related to him and Mr. Bayuk and USHF CC. Nothing.
25 Nothing.



1 And by the way, Terlingua is a Canadian entity, which
2 we believe, based on documents we filed with the Court
3 previously, that he actually was the originator of that. He
4 set it up for the benefit through George Longo (phonetic), his
5 cousin in Canada with Tower Hill, which he was going to then
6 benefit the ownership to Mr. Bayuk and other people and family
7 members, et cetera. Nothing.

8 Number 24, this is the KPMI -- the CV at Nvis, the
9 ENT Investments, and entity called Runyon, which Mr. Wegner
10 apparently owns, but we believe that Mr. Morabito has
11 connections to. Nothing for number 24.

12 Number 28, these are documents relating to Meadows
13 Farm Irrevocable Trust, Maple Leaf Brunswick and Myrtle Trust,
14 and other trusts including RBB Irrevocable, which is the Robert
15 Burke Wyoming Trust. And we've receive nothing. He doesn't
16 have anything.

17 THE COURT: What number?

18 MR. GORDON: And there's no way of proving other
19 than --

20 THE COURT: What number?

21 MR. GORDON: Pardon me?

22 THE COURT: What number?

23 MR. HARTMAN: That was 28.

24 MR. GORDON: That's 28. Sorry.

25 THE COURT: He said in his declaration attached to



1 Docket 295 he didn't produce any documents regarding -- you
2 said 28?

3 MR. GORDON: Yes, 28.

4 THE COURT: He said he didn't produce anything
5 because -- and he reaffirms -- he did not have any responsive
6 non-privileged documents to those requests in his possession,
7 custody, or control. "If I become aware of any such documents,
8 I will produce them."

9 MR. GORDON: Now, we get to --

10 THE COURT: And he's under oath.

11 MR. GORDON: Yes.

12 Now, we get to 32, and this is where --

13 THE COURT: 32, that's another one --

14 MR. GORDON: This is Mr. Burke.

15 THE COURT: -- another request to which he did not
16 respond because he did not have any responsive non-privileged
17 documents in his possession, custody, or control.

18 MR. GORDON: Well, 32 is other than disclosing
19 response to requests about documents and communication related
20 to your any affiliates, business dealings, loans from/to,
21 relationship with Robert Burke, or any affiliate since June 20,
22 2013.

23 THE COURT: Right. I'm aware -- let me stop you.
24 I'm aware of the issues revolving around Mr. Burke. I believe,
25 if I've read everything correctly, Mr. Morabito takes the



1 position that Mr. Burke was his lawyer and therefore their
2 communications are subject to the attorney-client privilege,
3 but it would also appear that Mr. Burke has an interest. I
4 believe it's in a trust, if nothing as -- not a lot, not a big
5 interest, but an interest, and that he is a business associate.
6 And then, Mr. Burke also stated that he was not counsel for
7 Mr. Morabito in a paragraph that I found mystifying, but that's
8 what he said, and that you've attempted to examine Mr. Burke.

9 MR. GORDON: We have.

10 THE COURT: And you were going to have a hearing in
11 the Central District of California --

12 MR. GORDON: Yes.

13 THE COURT: -- regarding this matter on May 26th.

14 MR. GORDON: That's correct.

15 THE COURT: What's happened?

16 MR. GORDON: We served on the matter. We serve
17 Mr. Burke for the hearing. We served Mr. Shemano, on behalf of
18 Mr. Morabito. We went to the hearing. The court -- and by the
19 way, Mr. Burke neither showed up nor filed anything. No one
20 filed a pleading.

21 THE COURT: Who was the judge handling it?

22 MR. GORDON: Judge Kwan. Judge Kwan, under the local
23 rule of the Central District, agreed that service of
24 Mr. Shemano was sufficient, but he wanted it re-served on
25 Mr. Morabito at his home address, residence address. So it's



1 been continued, but with regard --

2 THE COURT: To when?

3 MR. GORDON: Pardon me?

4 THE COURT: To when?

5 MR. GORDON: I don't have a -- I don't know the date.

6

7 THE COURT: Okay. The purpose of that hearing was
8 what?

9 MR. GORDON: To compel Mr. Burke to show up for a
10 deposition examination and to produce documents.

11 THE COURT: And he was properly served to be at the
12 May 26th hearing but did not appear.

13 MR. GORDON: That's right. The same as he had been
14 served with a subpoena and he refused. He just ignored the
15 subpoena.

16 THE COURT: Okay.

17 MR. GORDON: In fact, as we pointed out, since after
18 he got served with the subpoena, he terminated his phone line,
19 closed his business office, his governmental affairs office.
20 We know where he lives, and that's where we were serving him.

21 THE COURT: All right.

22 MR. GORDON: Now, what -- the issue before this court
23 is the privilege --

24 THE COURT: Because there's also issue, I believe,
25 with a Mr. Richmond, whether or not he's just --



1 MR. GORDON: Right.

2 THE COURT: -- I guess the lawyer. There's also an
3 assertion of privilege there.

4 MR. GORDON: Well, I'll get to that, but with Mr. --
5 let's just start with Mr. Burke because what we have is we have
6 a privilege log that was filed as an exhibit.

7 THE COURT: I read it.

8 MR. GORDON: And the privilege log just for
9 Mr. Burke, which is maybe 35 or 36 items, clearly includes --
10 doesn't include what the matter's about other than its cites
11 for most of them "the matter is FTB matter." And I had a
12 little time trying to figure out FTB, but I figured out.
13 That's the franchise tax board.

14 The franchise tax board has filed a claim in this
15 proceeding, a priority claim, for \$4.5 million, claiming that
16 they're due for taxes from Mr. Morabito for the period
17 2004/2005 when he established residence in Nevada. And they
18 claim that he didn't exactly terminate his residence in
19 California, he's still a resident. I disagree. I've read
20 that, and I studied it, and I think it's subject to
21 disallowance, at least as far as a priority claim is concerned,
22 and probably in its entirety. I agree with Mr. Morabito and
23 his position that he has taken that he's not a claimant, that
24 they don't have a right because he wasn't a resident.

25 THE COURT: I've litigated, I've had a trial shortly



1 after I went on the bench where the California Franchise Tax
2 Board was the plaintiff seeking similar against another
3 resident, another state of Nevada named --

4 MR. HARTMAN: It was Mr. DeDomenico, Your Honor.

5 THE COURT: Mr. DeDomenico, yes.

6 MR. GORDON: And I've had a similar case I've been
7 in, tangentially involved --

8 THE COURT: And Mr. DeDomenico jumped out of the
9 witness box and started to strangle the lawyer for the
10 California Franchise Tax Board. One does not forget those
11 things.

12 MR. GORDON: One does not forget those. And I have a
13 similar case I've been tangentially involved for a much larger
14 sum.

15 THE COURT: And I found in favor of the debtor, but I
16 did it on burden of proof, and now the Supreme Court has
17 changed the burden of proof.

18 MR. GORDON: Yes, it has.

19 THE COURT: So who knows what the result would be
20 today.

21 MR. GORDON: Yes, it has. But -- and that kind of
22 leads to something else. So it's the franchise tax board, and
23 I'm trying to figure out what is going on with Mr. Burke in
24 terms of the franchise tax board as an attorney with regard to
25 pre-petition claims filed in this court that takes place from



1 starting in 2014 but has a significant amount of activity up to
2 December 1, 2018 that doesn't involve the trustee.

3 In any event, with regard to Mr. Burke, I can't see
4 how that has anything to do with them as a lawyer since he's
5 already hired attorneys and accountants and a law firm to
6 handle that matter.

7 THE COURT: It's 12:30. We've been going a long
8 time. I have had staff that has not had a break.

9 MR. GORDON: Okay.

10 THE COURT: Here --

11 MR. GORDON: But, Your Honor, just -- I believe based
12 on the law --

13 THE COURT: What I'm trying to determine -- I
14 understand, and I know what Mr. Shemano believes and what
15 Mr. Morabito believes. I understand all of that. But if
16 you're asking me to find a matter of contempt today, that's
17 going to be -- I'm not going to.

18 MR. GORDON: What I'm trying --

19 THE COURT: I'm just not going to.

20 MR. GORDON: What I'm looking for you to do is order
21 him to produce those documents that the --

22 THE COURT: He says he doesn't have them.

23 MR. GORDON: No, he has them. These are privilege
24 log.

25 THE COURT: Oh, the privilege log. Here's -- when he



1 puts in his declaration that he has no documents, but if he
2 finds more, he'll produce him. We've already had it -- there
3 was a trial in the state court. There are voluminous
4 documents. I've read the findings and the conclusions. It's
5 been an exhibit on at least two pleadings before me today. I'm
6 well familiar with Judge Steinheimer's findings.

7 My point is this -- and Mr. Shemano, I'll be glad to
8 listen to you.

9 Regarding the privilege log, I have a real problem
10 with it. I want Mr. Shemano, on behalf of Mr. Morabito, to
11 prepare a supplemental privilege log that says exactly what the
12 subjects were, who saw the documents, what their purpose was.
13 And if it needs to be filed under seal, fine, but it's got to
14 be shown to counsel, opposing counsel, as well as to the Court.
15 And if I determine that a hearing is necessary, I'll have a
16 hearing. Because some of these notations or matters on the
17 (indiscernible) don't make any sense to me, and I don't think
18 they're complete.

19 I also need a further declaration from Mr. Morabito
20 regarding what he has or has not found regarding these various
21 requests. And what I'm going to do is order that you set
22 forth, Mr. Gordon, exactly as you're doing for me -- because I
23 can't do anything now -- where are you believe you need
24 supplemental responses or any response at all, allow
25 Mr. Morabito, through Mr. Shemano because I believe Mr. Shemano



1 is representing him in this matter, to respond to it, and we'll
2 -- and then I'm going to conduct a status conference on this on
3 August 8th. And if I need to order a supplemental judgment
4 debtor exam, I will. And I want -- when can you file that list
5 of requests that you believe --

6 MR. GORDON: End of next week.

7 THE COURT: Okay. I'll give you a deadline of June
8 14th.

9 Mr. Shemano?

10 MR. DABBIERI: Yes, Your Honor.

11 THE COURT: I need you to file your amended privilege
12 log and to respond to the pleading filed by Mr. Gordon no later
13 than July 15th. That's more than a month. And I need also
14 filed at the same time Mr. Morabito's supplemental declaration.

15 Mr. Gordon, you then have until July 26th to file a
16 reply, and then, I will conduct a status conference on the 8th
17 of August, and that's where -- reserving any rights that I may
18 -- regarding any relief that's being sought by the parties.

19 MR. GORDON: Will you take -- with regard to, I
20 assume, Mr. Morabito's response which would be a declaration,
21 will you take cross-examination on it?

22 THE COURT: Not at that time.

23 MR. GORDON: Okay. And one point I'd like to clarify
24 with regarding --

25 THE COURT: In your reply, you can set forth. If you



1 believe you need cross-examination, then I'll set a date for
2 it.

3 MR. GORDON: Okay. One more point, and I'd like to
4 just clarify so we'll make it easier for Mr. Shemano.

5 THE COURT: Because I've got a number of matters set
6 that day, and I don't know how long. Look how long this is
7 taking.

8 MR. GORDON: Let me just, for Mr. Shemano, it may
9 make it easier. We are not, with regard to Mr. Song,
10 Mr. Wegner, or Mr. Speier, looking for anything that they
11 produced that's related to whatever work they did.

12 THE COURT: Make it very specific.

13 MR. GORDON: All we want and all we asked for was
14 sources of payment. Again, how is it paid?

15 THE COURT: I think sources of payment are relevant,
16 nothing else is.

17 MR. GORDON: That's where I'm coming from.

18 THE COURT: That's what I think.

19 MR. GORDON: As far as Mr. Richmond is concerned,
20 it's a little bit different.

21 THE COURT: Because this is an attempt to discover
22 assets, not to do discovery regarding the merits of
23 Mr. Morabito's claims against your clients.

24 MR. GORDON: Exactly. With regard to Mr. Richmond,
25 Mr. Richmond serves numerous roles. I'm not aware that he



1 actually has represented Mr. Morabito as counsel. I was not --
2 he attended lunch with him, but --

3 THE COURT: Any basis for asserting the privilege has
4 to be specifically set forth.

5 MR. GORDON: And Mr. Richmond is involved in numerous
6 business transactions. That's all I'm concerned about.

7 THE COURT: Any claim of privilege regarding anybody,
8 but particularly Mr. Richmond and Mr. Burke, which is all over,
9 Mr. Burke said he didn't represent Mr. Morabito, but in he
10 first sentence of the same paragraph kind of said maybe he did
11 -- but if there is an assertion of privilege, it has to be
12 specific.

13 MR. GORDON: That's fine. Will do.

14 THE COURT: All right.

15 MR. GORDON: Thank you, Your Honor.

16 THE COURT: Prepare an order consistent with what --

17 Mr. Shemano, I'm sorry. I don't mean to ignore you.
18 Do you have any objection to what I've just done?

19 MR. SHEMANO: I do not, Your Honor. We can live with
20 that.

21 THE COURT: Thank you.

22 Prepare the order, Mr. Gordon. Submit it. Submit it
23 to Mr. Shemano under Local Rule 9021.

24 MR. DABBIERI: Your Honor, Jonathan Dabbieri again.
25 Before we go into recess, would the Court be agreeable if



1 Ms. Stephens could be excused for the afternoon session?

2 THE COURT: Sure.

3 MR. DABBIERI: Thank you, Your Honor.

4 THE COURT: All right. I believe that takes care of
5 all the matters except for the motion to dismiss a motion for
6 summary judgment. Am I -- which is in a different adversary,
7 and I'm going to get -- okay.

8 MR. HARTMAN: What time to resume Your Honor?

9 THE COURT: Well, first I'm going to call the matter.

10 MR. HARTMAN: Okay.

11 THE COURT: I have -- I'm not going to review all
12 the pleadings. I'm going to ask for appearances regarding the
13 motion to dismiss filed on behalf of Mr. Bayuk and Snowshoe
14 Properties and the motion for summary judgment filed on behalf
15 of the trustee. May I have appearances.

16 MR. LEHNERS: Good morning, Your Honor. Michael
17 Lehnerns appearing on behalf of defendants with respect to the
18 motion to dismiss and the motion for summary judgment.

19 MR. DABBIERI: Afternoon, Your Honor. John Dabbieri
20 of Sullivan Hill on behalf of Mr. Leonard, Chapter 7 trustee.

21 THE COURT: All right. I have reviewed all the
22 pleadings. I'll put them on the record when we get done.

23 I paid particular attention to the motion for summary
24 judgment because of the reply to the motion to dismiss.
25 Mr. Lehnerns basically said, look at the motion for summary



1 judgment, and he raised issues in the reply that it didn't even
2 raise in his motion to dismiss, which typically is not allowed.

3 MR. LEHNERS: Typically, you're right.

4 THE COURT: But I read them all. My preliminary
5 conclusions are this. The motion to dismiss will be denied. I
6 don't -- the reliance on Gruntz is misplaced by a number -- as
7 demonstrated by a number of cases. Gruntz dealt with automatic
8 stay, which by implications and order of the bankruptcy court,
9 that doesn't exist in this matter. This is a preference
10 action. It's not a fraudulent conveyance action. And I'll be
11 glad to read excerpts from cases that we found regarding this
12 matter.

13 I don't see how there can be a violation of the
14 automatic stay. Number One, I'm not sure you have standing --
15 that Mr. Bayuk has standing to raise that motion. Is he a
16 party in interest in this bankruptcy case?

17 MR. LEHNERS: No, Your Honor, he's not.

18 THE COURT: And then, he can't seek, under 362(c),
19 for violation if I've read it correctly because -- or (d) --
20 because it says "upon a party in interest." So -- but even if
21 I were to consider, it's the trustee bringing this matter, and
22 there is absolutely no objection to the trustee doing that.
23 There was a stipulation substituting the trustee in under Rule
24 17.

25 Now, as to the issue of constitutional authority, the



1 Stern issue, fascinating issue. Stern said that there might be
2 core proceedings that -- for which there was jurisdiction but
3 no constitutional authority for a bankruptcy court to enter a
4 final judgment. Okay. And what it had in front of it was a
5 counterclaim, and it said it was a very narrow decision. Well,
6 in fact, it may not be as narrow as the Supreme Court through,
7 even though in the last few decision, it appears that it's
8 narrow, they've gone back to that language.

9 Then we had Arkison. What did Arkison say? Arkison
10 said, well, you can treat those what I'll call "Stern claims"
11 -- core proceedings that there was no constitutional authority
12 to enter final judgment -- the same as you treat non-core or
13 magistrates -- they do reports and recommendations. Bankruptcy
14 judges can do proposed findings and conclusions pursuant to
15 Federal Rule of Bankruptcy Procedure 9033. Great.

16 Almost immediately -- but it didn't answer the real
17 question. Wellness answered the real question. Bankruptcy
18 courts have authority to enter a final judgment if there is
19 consent, whether it be expressed or implied.

20 And then we have a new rule, Federal Rule of
21 Bankruptcy Procedure 8018.1, which actually simply made a rule
22 what was happening in many locations. And I'll read it to you:

23 "If on appeal, a district court determines that the
24 bankruptcy court did not have the" --

25 What's that sound? Is that on -- you can hang that



1 up.

2 Is anybody still on the telephone? No.

3 "If on appeal, a district court determines that the
4 bankruptcy court did not have the power under Article
5 III of the Constitution to enter the judgment, order,
6 or decree appealed from, the district court may treat
7 it as a proposed findings of fact and conclusions of
8 law."

9 So there's a remedy. So even if I'm wrong, it'll be
10 treated as proposed findings and conclusions. The only
11 objection that I saw to treating the state court judgment,
12 which is considered a final judgment in the state of Nevada,
13 unlike the state of California, is that Gruntz precludes this
14 court from considering. Well, I respectfully disagree, and
15 I'll be glad to point that out. I don't think it matters
16 whether there's a proof of claim filed. Gruntz dealt with a
17 violation of the automatic stay, which is, by implication, an
18 order of the court. That's not the case here. Number of cases
19 have made that point.

20 This is a preference action. It is not a fraudulent
21 transfer action, and there are two prongs to that, and they've
22 both been satisfied. It's intimately part of the Code. I
23 mean, I just -- so I just want to give you a heads up of my
24 tentative conclusions, and maybe you can just get right to the
25 heart of it during the argument.



1 Oh, I also believe that they are non-statutory
2 insiders for all the reasons that are set forth in the
3 pleadings that I don't have time to repeat right now. Look at
4 the findings, which you say I can give preclusive effect to if
5 Gruntz would allow it, and Gruntz does, and it is issue
6 preclusion. It's collateral estoppel. All the elements of
7 collateral estoppel have been satisfied under Nevada law, and
8 you've got to look to the state in which the judgment was
9 entered. And didn't -- I think you conceded it because you
10 didn't raise the issue.

11 I thought you made a real -- I thought you took some
12 really aggressive points. That's okay. I don't mind that.
13 And I think you did about as good a job for your client as
14 could be done, but I -- it's just -- I haven't the cases here.
15 I've read them. By the way, your reliance on Williams, that's
16 a totally different case. And that, you know, deals with
17 standing of the trustee to bring the matter. I wrote a
18 decision -- unfortunately you're running into this, but I did
19 this research, I researched Williams in 1997, I believe it was,
20 in a -- I'll give you the citation -- In re Folks, 211 B.R. 378
21 (9th Cir. BAP 1997).

22 Now, in a case decided about five, six years ago, the
23 Ninth Circuit said that the -- after, I think, about 20 years,
24 they said that portion of Folks that dealt with the alter ego
25 claim was probably wrong under California law, that it's not a



1 distinct cause of action. That really hadn't been raised in
2 Folks. What was raised in Folks was the standing of the
3 trustee. And the parties' objection to the standing of the
4 trustee dealt with Williams, and I noted that in California,
5 only a creditor with a particularized injury has standing to
6 assert an alter ego claim. In bankruptcy, if the alter ego
7 claim has been determined to be property of the estate -- and
8 that was the issue where later they said no -- only the debtor
9 or trustee has standing to assert the alter ego claim where
10 injury to the corporation is alleged, cites the case.

11 In Williams v. California First Bank, the debtor
12 financed its business through a Ponzi scheme by selling
13 investment contracts and notes guaranteeing a monthly return.
14 California First Bank allegedly participated in the scheme.
15 The investment program collapsed. An involuntary petition was
16 filed. After obtaining court permission, the trustee solicited
17 and accepted from investors the assignment of their claims
18 against California First Bank for violation of federal
19 securities law. The bank filed a motion to dismiss on the
20 ground that the trustee lacks standing to sue a third party on
21 behalf of creditors of the estate. Notwithstanding the
22 assignment of claims, the court held the trustee lacked
23 standing to proceed on an alter ego claim on behalf of the
24 creditors.

25 And then Williams applied the express principles



1 found in a Supreme Court case, Caplin v. Marine Midland, where
2 the Supreme Court held a reorganization trustee under Chapter X
3 had no standing under the old bankruptcy act to assert on
4 behalf of holders of the debtor the ventures, claims of
5 misconduct against the third party. In Caplin, the claims were
6 not general claims, but specific and personal to the venture
7 holders. And then Williams applied the four factors from
8 Caplin, and I went through what occurred 1978 when Congress
9 enacted the Code, and Section 544 originally proposed would
10 have permitted the trustee to assert the cause of action on
11 behalf of creditors, overruling Caplin. That never happened.
12 I cite authorities.

13 The omission from the Code does not affect a
14 trustee's right to bring a general action on behalf of all
15 creditors rather than a personal one on behalf of only some.
16 And that's what the trustee in this case is doing is bringing
17 an action on behalf of all creditors and not just some.

18 The Williams court agreed with the holding in the
19 Ozark case, where the Eighth Circuit recognized Congress's
20 expressed decision not to overrule Caplin as extremely
21 noteworthy. In Ozark, the trustee was denied standing because
22 under Arkansas law, the (indiscernible) claim was considered
23 personal, creditors cannot be pursued by the corporations. It
24 was not property of the estate.

25 And so then I go -- I'm looking at various other



1 cases and I find that the holding in Williams was consistent
2 with that in several other cases, recognizing that the
3 bankruptcy trustees lack standing to assert actions against
4 parties on behalf of creditors. The trustee has a right to
5 bring any action which the debtor has an interest because this
6 is property of the estate. The trustee is acting to benefit
7 the debtor's estate and is ultimately benefitting the estate's
8 creditors upon distribution. This promotes equitable
9 distribution in accordance with the Bankruptcy Code's ultimate
10 goal of balancing the equities and interests of all affected
11 parties in a bankruptcy case. However, trustees are prohibited
12 from asserting personal claims on behalf of creditors. These
13 are not personal claims.

14 And I -- this is in an adversary, just so we're all
15 clear, 16-05041, and it's a preference action, and that's all
16 it is. It has to do with the -- what Judge Steinheimer called
17 a sham obligation that Mr. Bayuk says he had.

18 Speaker 8: And then, (indiscernible) went into Bayuk
19 and then Snowshoe, payments were made to Bank of America for
20 the benefit of Mr. Morabito, paid off his line of credit, the
21 obligation -- there's nearly a million dollars by the time he
22 added it up with interest, but I think that payment was about
23 \$736,000 that exonerated Snowshoe from its limited guarantee,
24 as well as released the deed of trust on one of the properties
25 that have been the very properties -- Genneyre [sic] street if



1 that's how you pronounce it, I'm not quite sure how you
2 pronounce it.

3 UNIDENTIFIED: I think was --

4 UNIDENTIFIED: Glenneyre.

5 THE COURT: Huh?

6 UNIDENTIFIED: Glenneyre Street, yeah. And just
7 because the bank got paid the value of the collateral,
8 according to Ninth Circuit law, is not relevant, and there was
9 no waiver of any -- and there was a waiver of indemnification,
10 but it wasn't effective to cut the benefit. And so in a sense,
11 a Deprizio analysis is still applicable

12 Anyway, I wanted you to know I looked at it. I
13 wanted you to know, I've considered it. When we come back here
14 at 1:30, I'll be glad to listen to your argument. Maybe this
15 will focus it.

16 UNIDENTIFIED: Thank you, Judge.

17 UNIDENTIFIED: Thank you, Your Honor.

18 THE COURT: Thank you all very much.

19 UNIDENTIFIED: Thank you, Your Honor.

20 THE CLERK: All rise.

21 THE COURT: And we're going to be done by 2:30.

22 UNIDENTIFIED: I'm sorry?

23 THE COURT: An hour's enough --

24 (Recess taken at 12:47 p.m.)

25 (Proceedings resumed at 1:43 p.m.)



1 THE COURT: Go ahead and be seated.

2 This is a continued hearing on a motion to dismiss
3 and motions for summary judgment in Adversary 16-05041, which
4 is a 547 preference action, and the defendants are Edward Bayuk
5 and Snowshoe Properties, LLC. The Bank of America was
6 dismissed.

7 I read the amended complaint. It was filed June
8 12th, 2017. I have read the defendant's first amended motion
9 to dismiss, Docket Number 65, filed on March 26th, the
10 opposition filed on behalf of the trustee on May 23rd, Docket
11 Number 84, and the defendant's reply, Docket Number 87. The
12 matter's been properly noticed and served.

13 Those -- have I referred to all the pleadings that
14 have been filed in support of and in opposition to the motion
15 to dismiss?

16 MR. LEHNERS: You have, Your Honor.

17 THE COURT: All right.

18 MR. DABBIERI: Yes, Your Honor.

19 THE COURT: As to the motion for summary judgment,
20 the motion for summary judgment was filed on April 24th, 2019
21 as Docket Number 70. Filed at the same time was the
22 plaintiff's Local Rule 56-1. Federal Rule of Bankruptcy
23 Procedure 7056, statement of facts in support. I've read it,
24 and I've read the exhibits.

25 On May 14th, Mr. Lehnerns, on behalf of the two



1 defendants, Bayuk and Snowshoe Properties, filed your
2 opposition to the motion for summary judgment. I've read it,
3 and I've read the exhibits attached thereto.

4 There was -- actually, I took one thing out of order.
5 There was a declaration of Mr. Murtha that was filed in support
6 of the motion for summary judgment. That was Docket Number 72.
7 Docket Number 79 also -- which was filed on May 15th by
8 Mr. Lehnert, is the defendants' Local Rule 56(c) and FRBP 7056
9 statement in opposition to plaintiff's statement of undisputed
10 facts.

11 I am showing counsel that I have gone through
12 Docket 71, which was the plaintiff's statement of undisputed
13 facts, and I've annotated on the sides the responses that were
14 Docket Number 79 that were filed on behalf of the defendants'
15 admission. Most, almost all, were admitted. None were denied
16 in their totality. And usually there -- rather than a denial,
17 there was an attempt to assert additional facts in Docket
18 Number 79, correct?

19 MR. LEHNERT: Correct.

20 THE COURT: Yeah. So I just want the record to be
21 clear that I read those. And I read Mr. Lehnert's declaration,
22 Docket Number 81. There was a reply memorandum filed May 28th,
23 Docket Number 85. I've read it, and then I read, because I
24 didn't realize it, there was an amended reply that was filed as
25 Docket Number 86. The only difference was there was an



1 attachment to the amended reply, which is -- no, the first
2 amended complaint filed on May 15th, 2015 in the Second
3 Judicial District Court in the State of Nevada and for the
4 County of Washoe, Civil Case Number 13-02663.

5 I should also point out that I did read the exhibit.
6 I'm well aware of the proposed amended complaint, if it's
7 necessary in response to the motion to dismiss, and the redline
8 consists, to a great extent, of reference to the findings that
9 were made in the state court action to show and to assert
10 consistent with Iqbal and Twombly, specific pleadings regarding
11 the potential non-statutory insider issues and probably
12 satisfied them.

13 That matter's been properly noticed and serve. Have
14 I read all the pleadings that have been filed?

15 MR. HARTMAN: You have, Your Honor.

16 MR. DABBIERI: Yes, Your Honor.

17 THE COURT: All right. I put on the record before we
18 broke for lunch my tentative conclusions. I did it quickly and
19 briefly. I see no reason to go through all of my notes.

20 I will tell you I have read a number of cases. I've
21 made reference to Folks. I have that here. I have in front of
22 me Hopkins v. Plant Insulation Company, 349 B.R. 805-06, where
23 they found that Gruntz stood for the proposition that the
24 violation of the automatic stay is really a violation of a
25 federal court order, and that's not at all an exact that



1 occurred in Hopkins, and we'll go through that if I have to.
2 And I have various portions to read. In Re Mnyandu,
3 M-N-Y-A-N-D-U, and once again this was -- the citation for this
4 is -- the best I have is 2016 U.S. Dist. LEXIS 103031.

5 I think this is the one where you said you couldn't
6 find it on LEXIS, Mr. Lehnert?

7 MR. LEHNERT: Yes. Apparently if you type in LEXIS
8 sites to WestLaw, it overheats and won't give you anything.
9 So --

10 THE COURT: Well, we found --

11 MR. LEHNERT: -- counsel did send me a copy of the
12 opinion --

13 THE COURT: It's not very long.

14 MR. LEHNERT: I have it.

15 THE COURT: Yeah. And what happened in that case --
16 and both it and Hopkins are appeals from bankruptcy courts, and
17 both the bankruptcy courts said Gruntz didn't apply in that
18 situation. Both bankruptcy courts were affirmed, and in
19 Mnyandu, if I'm pronouncing that correctly, it is apparent that
20 the plaintiff was trying to use Gruntz to avoid the -- or was
21 trying to avoid the application in it and was arguing
22 Rooker-Feldman, and it just didn't work for obvious reasons.
23 And there, you -- it's a little more difficult because the
24 appellant was also pro per/pro se, so it makes it difficult.
25 Noted that Mnyandu's reliance on this case -- and



1 that's Rooker -- or Gruntz, excuse me, is misplaced. Mnyandu
2 appears to contend that the Rooker-Feldman doctrine does not
3 apply in cases where the state court orders are void ab initio.
4 However, Gruntz does not stand for this proposition. Rather in
5 Gruntz, the Ninth Circuit held that the federal courts are not
6 bound pursuant to Rooker-Feldman doctrine by state court
7 modifications of the automatic stay because decisions regarding
8 the applicability of the automate stay ultimately rest with the
9 federal courts.

10 So once again showing my -- Gruntz is limited to its
11 facts. Gruntz actually went through three iterations and
12 finally en banc before the circuit kind of came up with its
13 order, and it makes it clear that the bankruptcy court does not
14 necessarily have to decide whether there was a violation of the
15 automatic stay. The state court can do it. Bit if the state
16 court -- if -- then, if the person who was aggrieved in the
17 state court wishes to bring the matter before the bankruptcy
18 court, it can and the bankruptcy court is the ultimate arbiter
19 of violations of the automatic stay.

20 So if you go to the state -- I used to teach this.
21 If you go to the state court, you run the risk of having
22 somebody who is unhappy with the result going back to the
23 bankruptcy court, getting a different result, and the
24 bankruptcy court is the only authority that really will be
25 dispositive in that situation. So don't go to state court. GO



1 to the bankruptcy court the first time and save yourself a lot
2 of time and money. That's really what Gruntz stands for.

3 I have read -- I went back and re-read Stern,
4 Arkison, and Wellness. That's always fun to do. And I have
5 read a number of the other cases that were cited. I have Swift
6 -- I've also pulled some other cases, Swift Air LLC. This was
7 decided by the bankruptcy court in Arizona, March 15th, 2019.
8 It's found at WestLaw, 2019 WL 1266100, and it does a pretty
9 good -- I think a really good job of analyzing the Stern issue,
10 what the courts -- bankruptcy courts can do in preference
11 claims, and it starts at Page 3 of the slip opinion. It talks
12 about Langkamp. It looks at a number of cases. It said
13 preference claims directly bear upon the debtor/creditor
14 relationship, which the bankruptcy court is uniquely designed
15 to address. A bankruptcy court must deny a claim of a creditor
16 that's liable to the bankruptcy estate for receiving a
17 preferential transfer. That's a Section 502(d). Once a
18 bankruptcy estate collects on the claim, the preference
19 defendant will have a claim against the bankruptcy estate,
20 506(d) and (h).

21 Given the impact of a preference and determination on
22 the claims process, preference litigation meets the second
23 Stern criteria. And, of course, a preference claim is not
24 independent of federal bankruptcy law. It only exists as a
25 matter of bankruptcy law, satisfies both prongs. Bankruptcy



1 court has not only jurisdiction but has the constitutional
2 authority to enter a final judgment. And I think that's
3 correct.

4 It cites a number of cases, and also I read the case
5 that was cited at length out of Illinois in 2016, and I have
6 that one in front of me, too. So those are just some of the
7 cases, and I wanted the record to be completed.

8 I went through the facts pretty carefully because I
9 believe that that's the obligation of the trial court, and a
10 real determination is akin to whether or not I or any court
11 would direct a verdict at the end of the plaintiff's case. The
12 following are the legal standards I utilize and have utilized
13 for years regarding motions for summary judgment because, as
14 the parties have indicated, it's truly the motion for summary
15 judgment that's dispositive and not only of it but also the
16 motion to dismiss. Correct. Mr. Lehnert?

17 MR. LEHNERS: Correct, Your Honor.

18 THE COURT: Mister --

19 MR. DABBIERI: Yes, Your Honor.

20 THE COURT: Thank you.

21 "The party moving for summary judgment has the
22 initial burden of showing the absence of a genuine
23 issue of material fact. A material issue of fact is
24 one that affects the outcome of the litigation and
25 requires a trial to resolve the different versions of



1 the truth. Once that movant's burden is met by
2 presenting evidence which, if uncontroverted, would
3 entitle the movement to a directed verdict at trial,
4 the burden then shifts to the respondent to set forth
5 specific facts demonstrating there is no genuine
6 issue for trial."

7 And that was written by Judge Phillip Pro, in
8 Rudberg, R-U-D-B-E-R-G, versus State of Nevada, 896 F.Supp.
9 1017, 1050 (1995). And he cited from a trilogy of Supreme
10 Court cases decided in 1986, those being Anderson v. Liberty
11 Lobby at 477 U.S. 242, Celotex Corporation v. Catrett, found at
12 477 U.S. 317, and Matsushita Electrical Industry Company v.
13 Zenith Radio Corporation, found at 475 U.S. 574, and he quotes
14 from them extensively.

15 "If the party seeking summary judgment meets this
16 burden, summary judgment will be granted unless there
17 is significant probative evidence tendered to support
18 the opponent's legal theory.

19 "Parties seeking to defeat summary judgment cannot
20 stand on their pleadings once a movant has submitted
21 affidavits or other materials. Affidavits that do
22 not affirmatively demonstrate personal knowledge are
23 insufficient. Likewise, legal memoranda and oral
24 argument are not evidence and do not create issues of
25 fact capable of defeating an otherwise valid motion



1 for summary judgment."

2 All the facts and inferences drawn must be viewed in
3 the light most favorable to the responding party when
4 determining whether a genuine issue of material fact exists for
5 summary judgment purposes. Judge Pro took that quote out of
6 Poller, P-O-L-L-E-R versus CBS, Inc., 368 U.S. 464 (1962).

7 After drawing inferences favorable to the respondent,
8 summary judgment will be granted only if all reasonable
9 inferences defeat the respondent's claims. Anderson v. Liberty
10 Lobby held that the standard for summary judgment mirrors the
11 standard for a directed verdict under Federal Rule of Procedure
12 50(a), which is that the trial judge must direct a verdict if,
13 under governing law, there can be but one reasonable conclusion
14 as to the verdict. If reasonable minds could differ as to the
15 import of the evidence, however, verdict should not be granted.
16 Supreme Court continued in Anderson to state that the court has
17 said that summary judgment should be granted where the evidence
18 such that it would require a directed verdict and that the
19 genuine issue summary judgment standard is very close to the
20 reasonable jury-directed verdict standard, the only difference
21 really being one of timing. Summary judgments occur before
22 trial. Directed motions are after the evidence has been
23 admitted.

24 The Supreme Court also noted in Anderson that:

25 "The mere existence of a scintilla of evidence in



1 support of the plaintiff's position will be
2 insufficient. There must be evidence on which a jury
3 could reasonably find for the plaintiff. The judge's
4 inquiry, therefore unavoidably asks whether
5 reasonable jurors could find by a preponderance of
6 the evidence that the plaintiff is entitled to a
7 verdict."

8 Likewise, opposition must have facts that are more
9 than a scintilla of evidence. That's the standard.

10 I did not see any affidavits or declarations that
11 were filed in opposition.

12 MR. LEHNERS: That's correct, Your Honor.

13 THE COURT: The only attempt to distinguish between
14 the plaintiff's statement of undisputed facts or the additions
15 that were included by Mr. Lehnern in a pleading signed by him,
16 but they were not supported by any testimony, written or oral,
17 correct?

18 MR. LEHNERS: Correct.

19 THE COURT: Therefore, they're really legal
20 memoranda, and legal memoranda does not substitute for
21 evidence. However, I have considered it.

22 I'm aware of the facts. I understand the
23 transactions that occurred in -- I am aware of those. I
24 understand the equalizing obligation, if it really did exist or
25 not, the note, the Bayuk note, which represented that. I know



1 that there were two ledgers submitted. They appear to treat
2 the no payments in a similar manner, but there are other
3 payments allegedly made on behalf of Mr. Morabito by Mr. Bayuk
4 that aren't capable of being easily understood or, according to
5 Judge Steinheimer, understood at all.

6 To say that Mr. Morabito surrendered any control or
7 all control of the property that was ultimately transferred to
8 Snowshoe through this chain is belied by the fact that he
9 attempted to use this Snowshoe property to negotiate a
10 \$5 million loan for the benefit of Mr. Bayuk that, when there
11 was an overpayment made on the payment to Bank of America, he
12 referred to it as, quote, "my refund," end of quote.

13 All the indicia are is that notwithstanding the form
14 of the transaction, the substance was that an attempt to
15 utilize Mr. Bayuk, or entities, uh, to retain control over
16 funds and assets that would not be available to his creditors.
17 Snowshoe, which has limited guarantee of the Bayuk obligation
18 -- actually, the Morabito obligation. Bank of America -- and
19 Bank of America then wanted the security that the limited
20 pledge and a deed of trust on the property, one of the three
21 pieces of property. A guarantee as a result of the payments
22 was satisfied, and the deed of trust was released.

23 Snowshoe was at creditor as the third-party guarantor
24 and held a contingent claim against the debtor that became --
25 that would have become fixed if the guarantor had to pay. The



1 facts are set forward in detail in the statement of undisputed
2 facts demonstrating the statutory non-insider status of both
3 defendants. I can read them into the record, but I'm simply
4 going to adopt what's in those facts.

5 And it's worth noting, for example, at Page 11 of
6 Docket Number 71, this was put together by loss of Woodburn &
7 Wedge. Paragraph 38, by statuses (indiscernible) the debtor
8 was an issue on the Superpumper actions. In that regards,
9 Judge Steinheimer filed it. It goes through a number of her
10 findings testimony by Mr. Morabito's council, Mr. Bocco
11 (phonetic). As far as he knew, Mr. Bayuk and Mr. Morabito had
12 ongoing relationship after the subject transfers that -- on
13 September 30, 2010. Mr. Morabito executed an amendment and
14 restatement of the trust agreement for self-settled Arcadia
15 trust, which described Mr. Bayuk as Mr. Morabito's boyfriend
16 and longtime companion. Mr. Bayuk was 70-percent beneficiary
17 of the Arcadia Trade -- Trust.

18 On April 13, 2012 Mr. Morabito represented that
19 "Mr. Bayuk is my former longtime companion, but we have a
20 strong personal relationship. He is my family and will be the
21 central person in my life for the rest of my life." That's a
22 close relationship.

23 Mr. Morabito has been and continues to be financially
24 supported by his brother, Sam Morabito, as well as by
25 Mr. Bayuk. Mr. Morabito has possessed and used Mr. Bayuk's



1 credit card, Mr. Bayuk paying the bills. In addition, Bayuk
2 pays for all Morabito's attorney fees and other amounts as
3 directed by Paul Morabito.

4 It should also be noted that Snowshoe ended up paying
5 another one. Snowshoe Petroleum, I believe it was, a different
6 entity, ended up paying more than \$125,000, if memory serves me
7 correct, of the Robinson law firm's attorneys' fees on
8 Mr. Morabito's behalf.

9 Paragraph 39, in addition to their close personal
10 relationship, Bayuk and Paul Morabito are also longtime
11 business partners. Moreover, despite the alleged purpose of
12 the subject transfers being to separate their financial
13 interests -- and "separate" is in quotes -- they co-owned a
14 business after the oral ruling. Now, that's admitted. All
15 those are admitted in the response subject to the following.

16 Admit the transfer of note that at no time did --
17 well, that -- I started at 38. That's 37. 38. Admit the
18 Superpumper action was tried in state court, and the state
19 court made the findings of fact and conclusions of law but
20 denies these findings are preclusive in this case. See Gruntz.
21 In other words, relying upon Gruntz, is objecting to the
22 preclusive nature of those findings, not that those -- not
23 objecting to the findings, but just that they shouldn't be
24 preclusive. And, of course, I've already indicated before
25 lunch my analysis of Gruntz. I'll be glad to go through that.



1 Same with 39, 40. And what's the test for
2 non-statutory insider. Both parties cite to the same law.
3 Maybe the closest on the relationship and whether or not they
4 would constitute an arm's-length transaction. Same test in the
5 federal court and the bankruptcy court is that Judge
6 Steinheimer had in front of her, and that's why they're --
7 those findings are particularly appropriate anywhere.

8 The point is I've been through the facts. I tried to
9 explain quickly my nature of -- the nature of my legal
10 analysis. I think now I should hear from counsel.

11 You're the movant.

12 MR. DABBIERI: Given Your Honor's preliminary
13 comments, I'll be very brief. The only additional points I
14 would point out is, as Your Honor has already said, there is no
15 contrary evidence. And to the extent they have put in some
16 additional arguments in their statement of facts, that's an
17 unverified pleading. It's not a declaration. And as Your
18 Honor said, that's not evidence. It's merely another part of
19 his memorandum of points and authorities. So it really doesn't
20 negate the admissions, and the findings in Superpumper, and
21 Your Honor has found that those are preclusive, and we agree
22 with the court's analysis that Gruntz is basically limited to
23 its facts.

24 They have cited the Bellingham case, I believe, but
25 that case, first of all, is dicta. It is a fraudulent



1 conveyance action. And the court did not really analyze the
2 unique nature of preferences. They made some sort of glancing
3 blows about it, but as Your Honor has pointed out, when there
4 is a preference, that creates automatically a claim by the
5 creditor in the bankruptcy. And so it is part of the
6 relationship with the debtor/creditor restructuring because the
7 preference defendant gets a claim when the preference judgment
8 is entered and paid.

9 You can't go into state court and sue on a
10 preference. The only court that can do that is the bankruptcy
11 court. It is part of the unique structure. It meets all the
12 criteria of Stern, where it is something which can only be
13 handled within the context of the federal court. In fact, only
14 within the district and the bankruptcy court. The analyses
15 that we've provided to the Court in the Hopkins case and
16 Mnyandu -- I have as much trouble as Your Honor does just
17 pronouncing that -- is controlling. And Your Honor has cited
18 other cases, all of which are controlling.

19 Unless the court has some questions, that's my
20 argument.

21 THE COURT: Thank you.

22 Mr. Lehnert?

23 MR. LEHNERS: Thank you.

24 Your Honor, I want to thank you for your analysis.
25 It's always easier arguing when the court is very well prepared



1 and very much aware of what's been filed. There are many, many
2 myriad issues here. It's very complex. I got into the case
3 about two months ago, and it has been quite a task coming up to
4 speed on this.

5 As far as the statement of undisputed facts, what we
6 admitted were based upon stipulations that had been signed off
7 by the parties earlier. So we can't go back on our
8 stipulations. And we also had to admit the facts that you
9 found in your order deeming facts admitted for the purposes of
10 trial. So that is why we admitted --

11 THE COURT: And that's what I've already referred to.
12 That was the order of March 11th, 2019, Docket Number 378.

13 MR. LEHNERS: Correct. Now, I would like to start
14 out with the motion to dismiss based upon Adamson Apparel
15 unless the Court would like to hear the summary judgment first.
16 In other words, would you like me to discuss my motion to
17 dismiss based on the Adamson Apparel holding or move straight
18 into --

19 THE COURT: Based upon what?

20 MR. LEHNERS: Adamson Apparel, Your Honor. That's
21 what my motion to dismiss was based upon.

22 THE COURT: Sure. Go ahead.

23 MR. LEHNERS: All right. What we have here --

24 THE COURT: I have read that.

25 MR. LEHNERS: Okay, thank you. What we have --



1 THE COURT: And I think at one point, you confused
2 who they were, but I think it's Mr. Simon. But anyway, go
3 ahead.

4 MR. LEHNERS: Right, Mr. Simon instead of
5 Mr. Adamson. But, you know, what we have there is a classic
6 Deprizio analysis. Why does Deprizio work? Why -- how can a
7 non-insider be paid within the year by an insider, make that
8 insider liable for a preference? And the answer is easy.

9 Speaker 13: What happens when you have a
10 soon-to-become debtor and a guarantor guarantee the same
11 obligation, when the guarantor pays that on behalf of its
12 principal, there is an implied promise to be repaid by the
13 principal. It is this implied promise that creates the
14 debtor/creditor relationship, which is critical for the
15 preference analysis.

16 What happened in Adamson, the indemnity requirement
17 had been eliminated. It had been waived, so to speak. And
18 what the court focused on is whether or not that waiver was a
19 sham, and they found that it wasn't, hence no preference.
20 Because when Mr. Simons paid that obligation, he'd waived any
21 right to seek indemnity from Adamson Apparel. Therefore, he
22 wasn't liable on it.

23 We have a very parallel situation here. We have a
24 company called Baruk Properties, owned about four properties.
25 And in 2010 or so, Mr. Bayuk, my client, had bought



1 Mr. Morabito's one-half interest in that. In so doing, he
2 signed a promissory note for \$1.6 million. Nobody disputes
3 that the note didn't exist, and nobody disputes that Mr. Bayuk
4 had made payments on it. Now, he was free to make payments on
5 that note so long as he wasn't in default and should
6 Mr. Morabito say, Mr. Bayuk, I would like you to pay off Bank
7 of America, and he did, he got a credit on the note. That's
8 shown by the ledger that I've attached to my motion.

9 So in other words, we have to analyze exactly what
10 happened when Mr. Bayuk paid that on December 12th -- or
11 December 4th, 2012 because he was contractually obligated to
12 pay Mr. Morabito for what he got in the Baruk Properties.

13 THE COURT: That assumes that the obligation is a
14 real one and not illusory.

15 MR. LEHNERS: I'm sorry, Your Honor.

16 THE COURT: Doesn't that assume that the obligation
17 is a true obligation and not an illusory obligation?

18 MR. LEHNERS: Yes, which is why we're rejecting what
19 Judge Steinheimer found. I understand -- and I wasn't there.
20 Mr. Gilmore tried that case. I wasn't there.

21 THE COURT: I don't care who tried it. I've got
22 findings of fact and I've got admissions, and she found it to
23 be illusory.

24 MR. LEHNERS: She did, but --

25 THE COURT: And she found the note the same way.



1 MR. LEHNERS: She did. But as you said at the
2 beginning of your announcement today, when you have issues
3 involving core matters, go to the bankruptcy court because
4 you're the final arbitrator of that. You're the final person,
5 the final judge with the authority to determine whether it was
6 or whether it wasn't. Now, you can --

7 THE COURT: Are you telling me that I -- your points
8 and authorities indicated that based on Gruntz, that was the
9 basis upon which you argued that that I should not give
10 preclusive effect to Judge Steinheimer's findings?

11 MR. LEHNERS: Correct. And what --

12 THE COURT: And where does Gruntz say that?

13 MR. LEHNERS: Okay. Gruntz dealt with a fraudulent
14 conveyance, which is a core matter. And a core matter -- in
15 other words, a preference is so inherent to the bankruptcy
16 court process that it arises out of the bankruptcy itself and
17 it can't be one of those core matters that's discussed. And
18 that's what the cases say. However, there is a distinction
19 here where the creditor -- where a claim is not filed. Because
20 if a claim is not filed, the preference can't be part of the
21 claims resolution process under 502(d). So if the claims
22 process cannot be done, then all the trustee can do on the
23 preference is seek a money judgment. And I cited an
24 unpublished decision called Meat Camp [sic], and what it
25 basically says is relevant. I mean, I was very surprised to



1 see the Indiana decision. Counsel has done excellent work in
2 research this. I thought it was hard, but he's done a great
3 job. But then when you look at the Meatco case, what it
4 basically says is that the Ninth Circuit hasn't specifically
5 addressed the application of Stern to preferential claim
6 transfers. But Stern and In re Bellingham provide guidance.

7 And what it says is here, as in Langkamp, the
8 defendants has not filed proofs of claim against the debtor's
9 bankruptcy estate. Thus, the debtor can recover the alleged
10 preferential transfers only by instituting illegal action.
11 Here's where it gets good. As the Supreme Court explained in
12 Stern, such illegal action is not necessarily one that is to be
13 resolved as part of the bankruptcy court's claims allowance
14 process. Thus, it is not subject to a final resolution by a
15 bankruptcy court.

16 The absence of the proof of claim is why Gruntz
17 applies. And it, too, is a core matter. So because -- you
18 know, and this gets into the Stern jurisdiction, but basically
19 this court is the court that has to determine the insider
20 statute or the insider status. It can review the judge's --
21 Judge Steinheimer's decision. But just as in in Gruntz, I
22 believe what happened in Gruntz, the stay didn't apply anyway.
23 It was a criminal action. I think that's what the end result
24 was is Mr. Gruntz had fallen behind on this child support and
25 filed a 13, and they prosecuted him. He says, hey, you can't



1 do that. And I think all the court did is it says, no, we're
2 the ones, the federal authority. Rooker-Feldman doesn't apply
3 because it wasn't a final judgment before the bankruptcy had
4 been filed. We're the one that filed --

5 THE COURT: Rooker-Feldman has a very limited
6 application.

7 MR. LEHNERS: Agreed. Agreed.

8 THE COURT: Because the Supreme Court has narrowed it
9 and explained it in subsequent decisions, and -- but it still
10 stands for the proposition which Judge (indiscernible) found in
11 Mnyandu or however you pronounce that case, is that a
12 bankruptcy court, you know, will get full faith and credit to a
13 decision in the state court, and bankruptcy courts do not sit
14 as appellate courts for state court decisions.

15 MR. LEHNERS: That's right, but --

16 THE COURT: o I don't see the application of
17 Rooker-Feldman here at all unless I've missed something.

18 MR. LEHNERS: No, I agree. I'm trying -- and I'm
19 trying to say that it does not apply because Judge
20 Steinheimer's decision --

21 THE COURT: I don't think it was ever argued that it
22 did.

23 Did you argue that Rooker-Feldman applies, counsel?

24 MR. DABBIERI: Well, we are arguing that this Court
25 is not supposed to review the findings of the bankruptcy --



1 THE COURT: I'm not being asked to do that.

2 MR. LEHNERS: Yeah.

3 THE COURT: I don't think you're asking me to do
4 that.

5 MR. LEHNERS: No. I'm saying you have to make your
6 own findings. You're not asking me to do that.

7 MR. LEHNERS: No, we're --

8 THE COURT: You're asking me to utilize it.

9 MR. LEHNERS: Yes, Your Honor. That's where we are
10 requesting.

11 THE COURT: That's why I don't think Rooker-Feldman's
12 applicable.

13 MR. LEHNERS: Right. But in order to utilize them,
14 it ignores the fact that, well, this Court is the one that has
15 to make that determination, and I think it has to be done by
16 adversary.

17 THE COURT: And why can't I do that based upon the
18 facts that I urge to give preclusive effect to? I'll make the
19 decision.

20 MR. LEHNERS: Oh, you'll make --

21 THE COURT: I'm being asked to do that today.

22 MR. LEHNERS: Judge, you can make the decision. But
23 one of the problems is that --

24 THE COURT: And I have the constitutional authority
25 to do it.



1 MR. LEHNERS: Well, I would respectfully disagree.

2 THE COURT: I know you do.

3 MR. LEHNERS: And the reason --

4 THE COURT: And if I'm wrong, as I've indicated, than
5 the district court can treat it as proposed findings of fact
6 and conclusions of law, which by the way is exactly what the
7 district judge did in Stern when Judge (indiscernible), the
8 bankruptcy judge. He went over to the district court. The
9 district court disagreed with Judge (indiscernible), but said,
10 I'll treat it as proposed findings and conclusions.

11 MR. LEHNERS: Well, Judge, I do understand that, but
12 -- and this gets into the summary judgment, which I was kinda
13 just trying to stay away from. I'm trying to go back, and
14 where we got off, where I got off track, is the application of
15 Judge Steinheimer's findings that the Baruk Properties note was
16 a sham, a fraud. And you know, obviously, we disagree with
17 that.

18 One of the things that I did note in my motion, and
19 this is very important, is at Page 12 of my opposition to
20 motion for summary judgment, I did -- because it's odd. It
21 happens, and Mr. Murtha was completely correct in his right to
22 file a motion from summary -- for summary judgment, but it's
23 odd, before an answer's been filed, before discovery has taken
24 place. And I do point out that it's in the -- what would Bank
25 of America has gotten from the debtor's property had it, you



1 know --

2 THE COURT: Why is that relevant?

3 MR. LEHNERS: What's that?

4 THE COURT: Why is that relevant --

5 MR. LEHNERS: On account of the --

6 THE COURT: -- when payments from the third party are
7 not relevant to the determination of the preference?

8 MR. LEHNERS: That's true, but the debtor's assets
9 are, and the debtor signed a pledge agreement to Bank of
10 America, and that's Exhibit 3 to my opposition. And I say:
11 "Accordingly, discovery is needed in order to determine the
12 value of collateral as of the transfer date," and that has do
13 with Exhibit 3, which is the pledge agreement that Mr. Morabito
14 side.

15 Again, I don't know exactly what was pledged on that
16 date. He told me -- and this, of course, he's sitting right
17 there, I'll make an offer of proof -- that he gave lots of
18 stuff to Bank of America.

19 THE COURT: I'm not going to take what
20 Mr. Morabito --

21 MR. LEHNERS: No, I understand.

22 THE COURT: -- told you in the courtroom today.

23 MR. LEHNERS: No, I understand that, but it does
24 demonstrate that there are issues of fact here with respect to
25 how much Bank of America would have received. Now, I realize



1 I'm skipping ahead from my motion to dismiss.

2 THE COURT: Bank of America didn't have to exercise
3 their rights under the guarantee or the pledge agreement. It
4 could take -- I mean there's --

5 MR. LEHNERS: Well --

6 THE COURT: It had that various options open to it.

7 MR. LEHNERS: Well, Your Honor, that's like if -- in
8 the event that --

9 THE COURT: They may have waived their security of
10 the (indiscernible), or at least on the real property.

11 MR. HARTMAN: Well, I believe there was a personal
12 property and possibly real property, as well. But if it's an
13 oversecured creditor, then it's not going to be a preferential
14 transfer because they would've gotten the same amount in a
15 hypothetical Chapter 7 because they could have resorted to the
16 collateral of the debtor, you see.

17 But in any event, one of the problems that I have
18 with Judge Steinheimer's opinion, besides the fact that it
19 hurts my argument, is I've represented trustees since 1995, and
20 I love representing trustees. And from what I've heard, Biff
21 Leonard Jr. is a fine trustee. He's got an excellent
22 reputation, and I want to say for the record in no way that I
23 wish to attack him. But one of the things that we have here is
24 that when you're going to attempt to recover money or property,
25 that's a core matter. You go to the bankruptcy court. You



1 don't hijack a pending state court case. Why? Because
2 Adversary Rule -- Bankruptcy Rule of Procedure 7001 says an
3 adversary is required for the recovery of money or property.

4 THE COURT: Wasn't that a stipulated substitution in
5 the state court action?

6 MR. LEHNERS: It was NRCP 17(a), stipulation and
7 order substituting him in.

8 THE COURT: And who stipulated?

9 MR. LEHNERS: Mr. Leonard stipulated, and so did JH,
10 Inc. And so did Jerry Herbst. Jerry Herbst and JH, Inc. were
11 the original plaintiffs.

12 THE COURT: And who else stipulated?

13 MR. LEHNERS: Well, Mr. Leonard did.

14 THE COURT: Who?

15 MR. LEHNERS: Mr. Leonard, the trustee, and that was
16 after he was appointed after this Court granted summary
17 judgment in December of 2014, making the involuntary case
18 viable.

19 So yes, they did. But, Your Honor, nobody's arguing
20 that Mr. Leonard didn't have the right to pursue these
21 fraudulent conveyance claims. He did. He just did it in the
22 wrong court. A classic example would be, I'm married to a
23 wonderful lady named Cheryl Lehnern. Now, if I ever chose to
24 divorce her, which I wouldn't do -- if I filed for divorce --

25 THE COURT: You realize --



1 MR. LEHNERS: I'm on a record here. Yes, Your Honor.
2 But if I were to have a change of heart, what would happen if I
3 filed for divorce in Washoe County Small Claims Court? They
4 couldn't adjudicate it. I'd have to file in family court.

5 So too, Mr. Leonard derives his powers from Chapter
6 5, specifically 548 and 544. What he could have done, file the
7 adversary here, move to stay the proceedings, allow the trial
8 in Superpumper to go forward, and bring those back in an
9 adversary that had been filed in this court. By failing to do
10 so, he simply took over a case from a couple of creditors.
11 There's more. We have the California State Franchise Tax Board
12 out there that's owed over \$3 million, and he proceeded to take
13 it to judgment, never coming to this court in an adversary
14 proceeding.

15 That's why this Court needs to make the factual
16 determinations of whether or not there's a preference in an
17 adversary before this Court, at a trial or after discovery on a
18 motion for summary judgment, not now because to rely on Judge
19 Steinheimer's findings, it's a core matter. This Court has to
20 make its own findings. Those findings can be preclusive, but
21 we should be able to be given the chance to rebut that.

22 THE COURT: I noticed when you wrote your points and
23 authorities, I did not see any authority cited for the -- that
24 proposition.

25 MR. LEHNERS: The proposition of --



1 THE COURT: What you argued was you said that the
2 trustees should file an adversary in the bankruptcy court, stay
3 this litigation in the state court, then ask this Court to give
4 preclusive effect.

5 MR. LEHNERS: Right.

6 THE COURT: I didn't see any authorities cited for
7 that process.

8 MR. LEHNERS: Well, Your Honor, that's just the
9 procedures that can be -- it's common knowledge that those are
10 the procedures, and the authority is Bankruptcy Rule 7001.

11 THE COURT: Okay.

12 MR. LEHNERS: Okay. I mean, it says if you could
13 recover

14 THE COURT: But you -- nothing precludes the state
15 court action from proceeding and substituting in the trustee,
16 does it?

17 MR. LEHNERS: Yes. How did --

18 THE COURT: Does it?

19 MR. LEHNERS: Yes, it does.

20 THE COURT: Okay. So in cases where there may be a
21 pending state court action for a debtor, the debtor files --
22 and then the -- let's say it's a personal injury action. Then,
23 the trustee substitutes in --

24 MR. LEHNERS: Because it's a right of the estate
25 that's exists -- and the debtor.



1 THE COURT: That's exactly what -- isn't that the
2 case here?

3 MR. LEHNERS: No, because Paul Morabito cannot sue
4 himself for a fraudulent conveyance, and that's what it --

5 THE COURT: No, but the lawsuit isn't against him.
6 The lawsuit is against Mr. Bayuk and Snowshoe.

7 MR. MURTHA: Yes. Which are property rights of the
8 bankruptcy estate that the trustee pursues under Chapter 5.
9 Well, they are. And if he wants to pursue those property
10 rights, he has to file an adversary.

11 It's important how he got into state court because
12 there are multiple creditors in this case. I've read the
13 claims register. JH, Inc. And Jerry Herbst are but two. And
14 one of the things that happened when Trustee Leonard did
15 substitute in, he took the case as he got it. He can't acquire
16 greater rights as an assignee than the assignor. All of his
17 rights are derivative to two creditors, JH, Inc and Jerry
18 Herbst. They are not derivative as to the others, which would
19 be the California State Franchise Tax Board and others who have
20 filed proofs of claim. Rather, it's a very, very important
21 distinction, and we're getting over into the Williams territory
22 now.

23 A trustee cannot bring actions on behalf of third
24 parties. He can only bring actions on behalf of the debtor.
25 What he did in the Superpumper case is bring actions on behalf



1 of the estate by taking those rights from JH and Jerry Herbst.
2 That was improper. He should have simply filed his adversary
3 here, as Gruntz indicates, but he didn't. That's why Judge
4 Steinheimer's finding that the Baruk note of \$1.6 million is a
5 sham, should not be even considered, because she never had the
6 jurisdiction to make that finding. This Court needs to make
7 that finding with evidence submitted before this Court. That's
8 my point.

9 Now, had Trustee Leonard gone ahead and filed the
10 adversary, it's very common for this court to stay it so if
11 there are matters of a state law involved, oftentimes this
12 court will abstain to allow that court to make its findings,
13 and then it comes back. We've seen that I don't know how many
14 times in nondischargeability cases, Your Honor. How many times
15 has it been where there's some state court case going on and
16 the nondischargeability action is stayed so the state court can
17 make findings. It happens. But the point is, is that the
18 complaint has to originate in this court. It's a core matter.

19 And as Gruntz says, you should've gone to bankruptcy
20 court in the first place, and because Trustee Leonard didn't,
21 the finding of Connie -- Judge Steinheimer that the Baruk note
22 was a sham is not binding on this court. It can't be.

23 THE COURT: When I asked you who signed the
24 stipulation to substitute, Mr. Lehnert, you indicated that it
25 was --



1 MR. LEHNERS: An assignment.

2 THE COURT: -- the Herbst parties and Mr. Leonard,
3 right?

4 MR. LEHNERS: Yes, yes.

5 THE COURT: I'm looking at an amended stipulation and
6 order that you attached as Exhibit 40 to your opposition, which
7 I'll take judicial notice because it's a filing dated June 16,
8 2015 in the state court action, and it's signed by counsel for
9 the trustee and attorneys for defendant.

10 So the -- counsel for your client signed off on the
11 substitution.

12 MR. LEHNERS: Well --

13 THE COURT: Mr. Lehnerns, if they believe that the
14 trustee --

15 MR. LEHNERS: Right. I see --

16 THE COURT: -- had the ability to bring it, why would
17 they sign that stipulation?

18 MR. LEHNERS: Well, Mr. Gilmore and Mr. Breslow did
19 sign it. But again, so what, it still ignores --

20 THE COURT: So what? Doesn't a signed stipulation by
21 counsel on behalf of the client bind the client?

22 MR. LEHNERS: It binds --

23 THE COURT: Is that -- that that's how I understood
24 it.

25 MR. LEHNERS: Well, Your Honor, it basically binds



1 the client as far as the Superpumper case proceeding where
2 Trustee Leonard substitutes in in place of two creditors. In
3 other words, he's --

4 THE COURT: And they agreed to that. They agreed to
5 that procedure.

6 MR. LEHNERS: Your Honor, they should --

7 THE COURT: They didn't say this is an -- this isn't
8 proper. They didn't say you belong in the bankruptcy court.
9 They said fine.

10 MR. LEHNERS: All right.

11 THE COURT: And they got Mr. Morabito dismissed,
12 didn't they?

13 MR. LEHNERS: I believe so.

14 THE COURT: Yeah. So they got consideration for that
15 stipulation. You want to set all that aside and have
16 Mr. Morabito go back in that court or in this court and become
17 a defendant again?

18 MR. LEHNERS: Well, Your Honor, I don't -- I mean, I
19 understand what you're basically saying, but still, even though
20 they may have agreed to it, it's still a finding that this
21 Court has to make.

22 THE COURT: I understand your point on that.

23 MR. LEHNERS: And you can't waive --

24 THE COURT: But you're arguing standing, not who has
25 authority to enter -- you're conflating the two.



1 MR. LEHNERS: It's very difficult to keep apart.
2 I've tried to do it several times. It's tough to keep apart,
3 but --

4 THE COURT: I'm going to be the judge that's going to
5 enter a decision in this adversary.

6 MR. LEHNERS: Yes.

7 THE COURT: That doesn't mean I can't give preclusive
8 effect to the facts that have been established.

9 MR. LEHNERS: I think you can weigh them, but
10 preclusive effect, I believe, is going too far.

11 THE COURT: Okay.

12 MR. LEHNERS: Fair enough? I mean --

13 THE COURT: What facts do I have in opposition to
14 those that you say I can weigh?

15 MR. LEHNERS: Well, Your Honor, the facts --

16 THE COURT: I don't see any.

17 MR. LEHNERS: Because it is too early to even do
18 discovery.

19 THE COURT: Oh, no. I would disagree with that.
20 That state court action had been pending for a long time.
21 There was a trial in that state court action. There was a
22 decision in March. There was more than enough time to put
23 together some type of a declaration. It was done, in fact, in
24 this court by Mr. Morabito when we were talking about Judge
25 Adams. Judge Adams wrote findings of fact and conclusions of



1 law. There was an appeal to the Supreme Court. Mr. Morabito
2 thought he hadn't committed any fraud. He wanted that findings
3 of fact, conclusions of law and that -- and the judgment
4 entered thereupon to be vacated. He entered into a settlement
5 for \$85 million to get them vacated. Then, there was a
6 confession of judgment, and I had to deal with whether those
7 facts were admitted and whether I could give weight to them,
8 and I said the facts is still the facts. I don't -- I'm not
9 going to give -- I'm not -- the judgment itself had been
10 vacated. No question about it.

11 MR. LEHNERS: Right, right.

12 THE COURT: That's been affirmed at one step in the
13 appellate process. I think it's up in front of the Ninth
14 Circuit now. But my point is now you're saying, well, even if
15 you don't get -- Judge, you can weigh them even if you don't
16 give a preclusive effect to those facts that Judge Steinheimer
17 found. Fine. Then, what alternative facts did you give me?
18 Because when you read the basis for summary judgment, there has
19 to be some -- the burden then falls to you to give me evidence.
20 And there's no discovery that has to be done regarding
21 non-insider status. I mean --

22 MR. LEHNERS: Well, Judge --

23 THE COURT: -- your client testified in that trial,
24 did he not?

25 MR. LEHNERS: He did, but there --



1 THE COURT: So it's there.

2 MR. LEHNERS: But --

3 THE COURT: I had a difficult time with that
4 argument.

5 MR. LEHNERS: Judge, I understand it. But when we go
6 to non-insider status, do you recall the hearing on the motion
7 to -- it was a motion to remand an adversary brought up by
8 Mr. Morabito.

9 THE COURT: I remember that because that's also the
10 subject of appeal, and that's also, I believe, in front of the
11 Ninth Circuit.

12 MR. LEHNERS: I believe it is, sir. And I've read --
13 believe me, I read every transcript I could find, trying to
14 come up to speed on this case.

15 THE COURT: That ought to cure your insomnia.

16 MR. LEHNERS: It did. And there was an August 3rd,
17 2017 hearing on that, and I read that transcript. And what it
18 basically says is the transcript is relevant about comments
19 regarding the non-statutory insider status of the parties. It
20 appears at Page 16 of my opposition.

21 THE COURT: I read the quote and your points and
22 authorities.

23 MR. LEHNERS: Yeah. I thought there were genuine
24 issues of material --

25 THE COURT: Guess what? That was two and a half --



1 that was more than two years ago.

2 MR. LEHNERS: And Judge Steinheimer -

3 THE COURT: Facts change, and now I've got new -- and
4 now I've got further development of those facts. I wrote a
5 note to myself on that when I read it.

6 MR. LEHNERS: Right.

7 THE COURT: I don't have the same set of facts before
8 me now that are uncontroverted that I had before me in 2017.

9 MR. LEHNERS: Judge, I understand that.

10 THE COURT: Now, you want me to give preclusive --

11 MR. LEHNERS: No, not preclusive.

12 THE COURT: Was it -- do think that's law of the
13 case?

14 MR. LEHNERS: No, it's not law of the case because it
15 was never brought in this court.

16 THE COURT: There's never been an order entered.

17 MR. LEHNERS: In other words, the whole point of my
18 argument -- and I'll admit they're creative arguments. I'm
19 kind of up against an eightball here.

20 THE COURT: You're doing a good job.

21 MR. LEHNERS: Thank you. Thank you. I'm trying.
22 But if you want to think about it, we have an involuntary
23 petition that's filed in June of 2013. Automatic --

24 THE COURT: And then I stayed the action to see if
25 the parties -- because I was concerned whether or not it even

1 belonged here.

2 MR. LEHNERS: Right, right.

3 THE COURT: I had Mr. Bayuk's representations. And
4 then, I said, okay fine. And then it became apparent that
5 something had to be done. We went forward. There was a -- I
6 think a motion to dismiss the involuntary, if memory serves me
7 correctly.

8 MR. LEHNERS: Right.

9 THE COURT: I entered summary judgment. That was, I
10 believe, affirmed, then there was a next step appellate -- I
11 think that it was after appellate review to the circuit. Then,
12 the appeal was dismissed. The order for relief was entered.

13 MR. LEHNERS: Right. Now, at the time that it was
14 filed, the automatic stay goes into effect and it prohibits --

15 THE COURT: 303 says so.

16 MR. LEHNERS: 303 does say so. And 362(a) -- 362
17 says so.

18 THE COURT: Well, excuse me, that's backwards.

19 MR. LEHNERS: Right.

20 THE COURT: 362 says --

21 MR. LEHNERS: 303.

22 THE COURT: -- the stay's applicable under 303, which
23 is an involuntary petition.

24 MR. LEHNERS: Right. So 362(a) stops what? The
25 commencement of any action that could have been commenced



1 before June of 2013.

2 THE COURT: And who has -- we've already been through
3 this. Your client is not a person in interest, and there's
4 even authority in the Ninth Circuit that says a defendant can't
5 object on the basis of the action violates the automatic stay.
6 So your client does not have, so far as I can determine,
7 standing to raise the automatic stay argument.

8 MR. LEHNERS: As to damages, absolutely. As to the
9 effect that acts in violation of the automatic stay are deemed
10 void. Ab initio, I believe he does because there's a
11 distinction.

12 THE COURT: What authority do you have -- I don't
13 care what you believe. What authority do you have for that?

14 MR. LEHNERS: Well, Your Honor --

15 THE COURT: If you're -- it says -- because the
16 statute is clear, is it not? 362 (d), I believe, let's take a
17 look.

18 MR. LEHNERS: That's termination for cause. And --

19 THE COURT: I like going back to the statute
20 because --

21 MR. LEHNERS: Yeah.

22 THE COURT: -- I think it's good source.

23 On request of a party in interest and after notice
24 and a hearing, the court show grant relief from the
25 stay."



1 Well, guess what? That's the only party under 362(c)
2 is a party in interest, but who can raise the stay objection?
3 At best, I would think it would be a party in interest.
4 There's authority in there that says a defendant can't and
5 perhaps even a creditor can't raise it.

6 MR. LEHNERS: Well --

7 THE COURT: Because the right to the stay belongs to
8 whom?

9 MR. LEHNERS: It belongs to the estate and the
10 debtor.

11 THE COURT: Exactly right.

12 MR. LEHNERS: You're right, it does.

13 THE COURT: And who represents the estate?

14 MR. LEHNERS: The trustee.

15 THE COURT: Thank you.

16 MR. LEHNERS: All right. But (d) says a party in
17 interest has rights to --

18 THE COURT: To seek relief from the stay.

19 MR. LEHNERS: -- to seek relief.

20 THE COURT: But there's nothing to seek relief from.
21 That's my point. And now, I've got a non-party in interest
22 saying that the stay has been violated.

23 MR. LEHNERS: Oh, we have -- there was the ability to
24 seek relief at the time that the involuntary was filed because
25 Trustee Leonard had not yet been appointed. So --



1 THE COURT: But then he was appointed by stipulation,
2 and nobody objected on the basis that it violated the stay.

3 MR. LEHNERS: Well, I wish they would have, but --

4 THE COURT: I bet you do, but they didn't.

5 MR. LEHNERS: But, Judge, think about it this way.
6 When the --

7 THE COURT: And they didn't because the stay is not
8 applicable.

9 MR. LEHNERS: Well, it's not applicable --

10 THE COURT: Why is the stay applicable?

11 MR. LEHNERS: The stay is applicable because it
12 nullifies any act in violation of it. Granted, Mr. Bayuk, my
13 client, does not have the right to seek stay relief, and he
14 does not have the right to seek damages under 362(k) for a stay
15 violation. That's not what he's doing. What the case law says
16 is that if there is an action in violation of the stay, the
17 resulting act is null and void. Pinkstaff, I believe is one of
18 them, and Schwartz is another one.

19 So if we have a void judgment, are you saying that
20 it's void ab initio as to --

21 THE COURT: If one reads -- it was a case, Tilley v.
22 Vucurevich -- it's In re Pecan Groves of Arizona at 951 F.2d
23 242, (9th Cir. 1991), where they said the defendants' own
24 argument that they are not even creditors makes them even --
25 that they can't -- they have -- they lack standing to assert



1 violations of the automatic stay.

2 MR. LEHNERS: But --

3 THE COURT: That's the Ninth Circuit.

4 MR. LEHNERS: But assert violations how? To seek
5 damages? To seek recourse? I'm simply saying --

6 THE COURT: There's been no assignment of these
7 claims to the trustee.

8 MR. LEHNERS: I'm sorry?

9 THE COURT: There was no assignment of these claims
10 for the trustee, was there?

11 MR. LEHNERS: Of whose claims to the --

12 THE COURT: The claims that are -- that were being
13 brought.

14 MR. LEHNERS: Oh, you mean the fraudulent conveyance
15 action filed by a Herbst in 2013, December?

16 THE COURT: The fraudulent transfer claims were
17 property of the estate. As property of the estate, they're
18 subject to the control of the trustee. The stay doesn't
19 preclude actions by the trustee because the trustees is the
20 representative of the estate.

21 MR. LEHNERS: But we didn't have a trustee at that
22 time. We had two creditors. And if you want to be technical,
23 I believe that the Herbst creditors did violate the stays,
24 filing it six months after the involuntary was filed. There
25 wasn't any trustee, but still there is an automatic stay in



1 effect. We know that from 362 and 303. So if the stay is in
2 effect and the Herbst creditors go out and file this complaint,
3 it's void ab initio as to the Herbst creditors. If it's void
4 ab initio as to the Herbst creditors, then when the Trustee
5 Leonard substituted in, he substituted into a null and void
6 action.

7 THE COURT: Mr. Morabito was dismissed.

8 MR. LEHNERS: Right.

9 THE COURT: And therefore, there couldn't be any
10 violation of the sta, even if there was prior to that time,
11 after the time he's dismissed, correct?.

12 MR. LEHNERS: Well, he was named originally, right?

13 THE COURT: I didn't -- I understand that.

14 MR. LEHNERS: He was subsequently --

15 THE COURT: The only reason he'd be dismissed.

16 MR. LEHNERS: But, Your Honor, it's temporally
17 relevant because the bankruptcy is filed in June of '13. In
18 December of '13, the Superpumper case is filed, and
19 Mr. Morabito is named in that, is he not?

20 THE COURT: The state court action was a fraudulent
21 transfer action.

22 MR. LEHNERS: Yes, it was, which was an act that
23 could have been commenced prior to the filing of the bankruptcy
24 and stayed by 362(a). So when Herbst, not Trustee Leonard
25 --when Herbst filed this lawsuit in December of 2000 and --



1 THE COURT: December of 2013 13

2 MR. LEHNERS: '13, thank you. When he filed it in
3 December of 2013, that's what violated the stay. That's what
4 was void. That complaint was void because it was filed by
5 creditors, not by the estate. Trustee Leonard hopped on --

6 THE COURT: And who -- and you say your client has
7 standing to assert the violation of the stay?

8 MR. LEHNERS: No. My client has standing to say that
9 the complaint is a nullity because of a stay violation. We
10 can't --

11 THE COURT: Isn't that raising the stay?

12 MR. LEHNERS: No, it's a null and void act because it
13 violated the stay. Because it's null and void, it's not --

14 THE COURT: There's been no finding of a state
15 violation, has there?

16 MR. LEHNERS: No. But --

17 THE COURT: And who is asserting that the stay was
18 violated?

19 MR. LEHNERS: Well, Your Honor, we are saying that
20 the stay was violated.

21 THE COURT: And "we" being your client.

22 MR. LEHNERS: My client. And I see --

23 THE COURT: And does your client has standing to do
24 so? That's my question.

25 MR. LEHNERS: Under the case that you say, no. But



1 if you extend those holdings to this fact, what you're doing is
2 you're allowing void actions could be reanimated as if they
3 were zombies, and they can't be because had the estate --

4 THE COURT: So what you're saying is that case should
5 have been dismissed and another case filed in the bankruptcy
6 court even though --

7 MR. LEHNERS: Yes.

8 THE COURT: -- counsel for your client stipulated to
9 the substitution of Mr. Leonard -- of Mr. Leonard for the
10 plaintiffs. And at the time that that occurred, Mr. Morabito
11 was dismissed.

12 MR. LEHNERS: Yes.

13 THE COURT: And therefore, the debtor wasn't -- there
14 was no action being taken against the debtor at that time.

15 MR. LEHNERS: At that time.

16 THE COURT: And you folks all agreed to that.

17 MR. LEHNERS: Yes. However, we agreed to substitute
18 in on a case that was initially void because of when it was
19 filed in December 2013.

20 THE COURT: You agreed what -- you don't know why.
21 You weren't there. All I can do is read you your exhibit.

22 MR. LEHNERS: I know. Well, no, what I --

23 THE COURT: What happened was Mr. Morabito got
24 dismissed and you substituted --

25 MR. LEHNERS: Yes, right.



1 THE COURT: -- and you stipulated -- your client
2 stipulated to the substitution of Mr. Leonard. That's what
3 happened.

4 MR. LEHNERS: That's exactly what happened in a
5 complaint that was void ab initio.

6 THE COURT: That nobody raised, and now there was --
7 even if there had been a violation of stay, that violation was
8 cured because no longer was Mr. Morabito a party. So in a
9 sense, it was starting over. You had a new plaintiff. You no
10 longer had that dependent. Why doesn't that work?

11 MR. LEHNERS: Because it's reanimating a dead case,
12 and --

13 THE COURT: What?

14 MR. LEHNERS: It's reanimating a dead case. In other
15 words, it had to be filed in the bankruptcy court once Trustee
16 Leonard was appointed.

17 THE COURT: And --

18 MR. LEHNERS: Because one --

19 THE COURT: And your rule for that is?

20 MR. LEHNERS: My rule for that, it'll go back to what
21 I previously stated. When the complaint was filed, it was a
22 fraudulent conveyance action. Correct?

23 THE COURT: Excuse me.

24 MR. LEHNERS: When the Superpumper complaint was
25 filed, it was a fraudulent conveyance action, yes?



1 Okay. It was filed in December of 2013. True?

2 THE COURT: Yes.

3 MR. LEHNERS: That complaint could have been brought

4 --

5 THE COURT: Before the order for relief was entered.

6 MR. LEHNERS: Yeah. After the order for relief was

7 entered --

8 THE COURT: No.

9 MR. LEHNERS: Oh --

10 THE COURT: Wrong.

11 MR. LEHNERS: The order for relief -- I understand
12 what you're saying, but the automatic stay was in effect by
13 virtue of the involuntary.

14 THE COURT: The automatic stay's in effect, but
15 there's no order for relief.

16 MR. LEHNERS: Correct, that's true. That's true.
17 When the case was filed in 2013, it is a case that could have
18 been brought prior to June of 2013. t could have been. The
19 Herbsts, had they wanted to file the same --

20 THE COURT: Under state law.

21 MR. LEHNERS: Under state law, absolutely, which is
22 what they did anyway. So if they could have filed it prior to
23 June of 2013, June of '13 comes, automatic stay in place.
24 December of '13, they file it under state law. Creditors, not
25 on behalf of the estate, as their own creditors under state



1 law, violated the stay.

2 THE COURT: Okay. I get your point. I understand.

3 MR. LEHNERS: All right. May I answer any other
4 questions?

5 THE COURT: No.

6 MR. LEHNERS: Do you have anything else you'd like to
7 hear from me?

8 THE COURT: I think we've covered it.

9 MR. LEHNERS: Thank you for listening to my
10 arguments, Your Honor.

11 THE COURT: Appreciate it.

12 MR. LEHNERS: It's been a pleasure. Thank you.

13 THE COURT: Reply? Is there -- was there, in fact, a
14 violation of stay when the creditors filed this lawsuit, and
15 does that make everything -- all of the proceedings void ab
16 initio?

17 MR. DABBIERI: Well, perhaps --

18 THE COURT: That appears to be the position.

19 Did I state that right, Mr. Lehnerns?

20 MR. LEHNERS: I'm sorry, Your Honor, I was wool
21 gathering.

22 THE COURT: Is it your position that the filing of
23 the complaint was a violation of the stay. Therefore,
24 everything that occurred thereafter is void ab initio.

25 MR. LEHNERS: Absolutely.



1 THE COURT: That's the position.

2 MR. DABBIERI: The first thing I would point is that
3 to the extent there was a violation of the stay, it was suing
4 Mr. Morabito. It was not suing Mr. Bayuk and Snowshoe
5 Properties. That part of the lawsuit --

6 THE COURT: So then, therefore it's only void as to
7 the debtor, not to the other defendants.

8 MR. DABBIERI: Exactly. It's as if I had a suit
9 going, one of my defendants files bankruptcy, and without
10 seeking relief from stay, I continue on and get judgment. As
11 to the non-debtor defendants, it's not void, it's void ab
12 initio. It's not void ever.

13 THE COURT: Void ab initio as to the debtor.

14 MR. DABBIERI: Perhaps. I don't agree with that.

15 THE COURT: There's even a recent case, I forget
16 where it was at, that's was arguing that they shouldn't be void
17 ab initio. But it's clearly the rule in the Ninth Circuit,
18 it's void ab initio.

19 The (indiscernible) case, which we cited, actually
20 says -- Stern -- none of the cases say that you do not give
21 issue preclusive effect, even if the underlying action is void
22 ab initio. He doesn't really explore that much further, but in
23 any event, here, it's only asking Mr. Morabito, at most, that
24 that state court action was void ab initio. It wasn't as to
25 Mr. Bayuk and it wasn't as to Snowshoe. So that's a red



1 herring. It really doesn't apply here.

2 And as Your Honor pointed out, the automatic stay, to
3 the extent it did exist, disappeared when Mr. Morabito was
4 dismissed and when Mr. Leonard came in as the trustee. And, in
5 fact, the action did start anew because he filed a first
6 amended complaint. We didn't go to trial on the original
7 complaint. So whatever allegations were in there are totally
8 irrelevant to what went to trial and what may or may not been
9 decided by the Nevada state court judge.

10 So it's not void, and this court should give -- since
11 it was within the purview of the state court to make those
12 findings of fact -- preclusive effect. The fact that a
13 preference action is a core proceeding does not affect whether
14 or not there's preclusive effect to a properly rendered state
15 court judgment. And as we pointed out in our points and
16 authorities, it is common for the bankruptcy court to give
17 preclusive effect to findings of the state court. And the most
18 common example of that is nondischargeability actions where
19 whether the debtor committed fraud is frequently determined by
20 what did the state court find pre-bankruptcy or during the
21 bankruptcy, and those are given issue preclusive affects, even
22 though nondischargeability is a core matter.

23 THE COURT: Okay.

24 MR. DABBIERI: Unless Your Honor has some questions,
25 that's my argument.



1 THE COURT: What about the argument regarding
2 Adamson?

3 MR. DABBIERI: I'm sorry?

4 THE COURT: Adamson.

5 MR. DABBIERI: If I could have a moment to look at
6 Adamson again.

7 THE COURT: Mr. Adamson waived any indemnification
8 rights you may have.

9 MR. DABBIERI: Oh, yes. That's answered by the sham
10 nature of the note. If it's a sham obligation, then Mr. Bayuk
11 did not waive indemnity rights because he wasn't contractually
12 obligated to make the payments to Mr. Morabito. And the state
13 court judge found that that was a sham obligation. It was
14 illusory. The note was illusory. Therefore, when Mr. Bayuk
15 made those payments, he did have a right to indemnification.

16 And as to Snowshoe, there was no equalizing
17 obligation, so certainly Snowshoe has an indemnification
18 obligation. But so also does Mr. Bayuk because of the illusory
19 nature of the equalization obligation, which has been found and
20 has preclusive effect here.

21 THE COURT: All right. Anything else you wish to
22 add?

23 MR. DABBIERI: No, Your Honor.

24 THE COURT: All right.

25 Well, as noted, I'm going to apply those principles



1 that I placed on the record regarding analysis of a motion for
2 summary judgment. And the fact of the matter is there have
3 been no facts that fall within the application of evidentiary
4 principles. There's just been no evidence offered in
5 opposition. None. And there's no discovery to be done
6 regarding the evidence regarding the statutory insider. None
7 of them. Or that the obligation was both the note and the
8 obligation, equalizing obligation or shams. None.

9 I've been through all that, and I'm adopting the
10 statement of undisputed facts as set forth by the plaintiff.
11 They were well-written and well-done.

12 As to the assertion that only the bankruptcy court
13 can consider core matters, that's not, in my opinion, really
14 correct. The jurisdiction that comes to here matters or that
15 saturated the here matters, preference coming from 544(b), and
16 it's permissive. We can decline -- bankruptcy courts can
17 declined to hear those matters, and they go to state court.
18 There's no doubt about that.

19 And it doesn't really matter whether it was a proof
20 of claim filed. I think the analysis done by the judge in the
21 Pentazelas (phonetic) case is right on point. Stern never held
22 that if the proof of claim was not filed, there would be no
23 jurisdiction to adjudicate and preference claim in the
24 bankruptcy court. It did not hold that if a cause of action
25 fails to involve the claims allowance process, instead seeks to



1 augment the bankruptcy state, the bankruptcy judge lacks
2 jurisdiction.

3 That was a critical part of Stern. If the party is
4 attempting to augment the bankruptcy estate, then it's a Stern
5 claim. Bankruptcy courts may enter final orders on preference
6 claims regardless of whether a proof of claim had been filed
7 because the proceeding stems from the bankruptcy itself and
8 would thus otherwise not exist without any regard to the
9 bankruptcy proceeding.

10 In the Swift Air case that I referred to, the judge
11 wrote as follows. It noted that Stern applies two distinct
12 criteria to determine whether -- what to determine a bankruptcy
13 court's constitutional authority to enter final orders. Does
14 the action stem from the bankruptcy itself with a claim
15 necessarily being resolved in the claim allowance process? The
16 answer's yes. A preference claim is not independent of federal
17 bankruptcy law, only arises as a matter of bankruptcy law. And
18 it bears upon the debtor/creditor relationship because once the
19 bankruptcy estate collects on the claim, the preference
20 defendant will have a claim against the bankruptcy estate.
21 And, of course, the holding in Stern was intended to be narrow.

22 This opinion cites from a number of other courts, and
23 I'm not going to place all those citations on the record due to
24 time limitations, but it noted that neither Grand Fancier
25 (phonetic) nor Stern required disposition of a fraudulent



1 transfer claims by an Article III court. Therefore, the
2 bankruptcy courts may finally adjudicate those fraudulent
3 transfer claims. And then, others applied a narrow holding to
4 Stern, et cetera.

5 This is different than a fraudulent transfer case
6 because in a fraudulent transfer claim, if a party didn't file
7 a proof of claim, then it doesn't have a right to have its
8 claim adjudicated, if it's not scheduled for that matter. A
9 non-creditor has a right to a jury trial when sued by
10 bankruptcy trustee for the avoidance of fraudulent transfer,
11 not for preference.

12 While the bankruptcy court does have jurisdiction to
13 decide core proceedings, that does not mean that a bankruptcy
14 court cannot give preclusive effect to a state court action.
15 Gruntz stands for the proposition that a state court does not
16 have concurrent jurisdiction with the bankruptcy court to
17 modify the stay. As I've noted and I've referred to and placed
18 on the record, other cases have recognized state court's
19 findings and conclusions on matters within its jurisdiction is
20 appropriate. And clearly, Judge Steinheimer's finding
21 conclusions are matters within her jurisdiction. Therefore, a
22 state court's finding and conclusions on matters within its
23 jurisdiction is appropriate, notwithstanding its bankruptcy
24 characterization as a court proceeding, so long as the state
25 court findings and conclusion do not violate a prior federal



1 court order.

2 Mnyandu, Hopkins, both say that the federal court
3 that was violated in Gruntz was the automatic stay. Didn't
4 happen here.

5 In Hopkins, the defendants argued that Gruntz stood
6 for the proposition that only federal courts have jurisdiction
7 to adjudicate core bankruptcy proceedings. As a result,
8 according to defendants, debtor's 544(b) claim must be heard in
9 federal court. Found out that's incorrect, Gruntz holding was
10 not that broad and that the power given to the bankruptcy
11 courts is permissive because the statute provides that
12 bankruptcy judges may hear and determine all cases under Title
13 11 and all core proceedings under -- arising under Title 11 or
14 arising in a case under Title 11, referred to under subsection
15 (a) of the section, and may enter appropriate orders and
16 judgments subject to review under Section 158, and that's found
17 at 28 U.S.C. 157(b).

18 The statute does not require that bankruptcy judges
19 hear core proceedings, but grants them the power to do so if
20 they choose. And I specifically said I wasn't going to
21 interfere with the state court action. I made that choice. I
22 made that choice a long time ago.

23 And the arguments regarding whether it was a
24 violation of the stay or whether that was standing, all those
25 could have been raised. Instead, what happened is that the



1 parties stipulated that Mr. Leonard could be substituted in
2 place of the Herbst parties, and Mr. Morabito was dismissed.
3 There is no stay violation under Gruntz or any other theory
4 that I'm familiar with.

5 Mr. Bayuk and Snowshoe do not get the benefit of the
6 stay. Debtors do. And after the amended complaint, the debtor
7 was not a party in the state court action.

8 And as the Hopkins court note second, unlike in
9 Gruntz, the state court in this case was not acting in
10 derogation of any bankruptcy court order. Then contrary --
11 both the Delaware Bankruptcy Court and the Delaware District
12 Court, because it had been filed in Delaware then -- dealt with
13 (indiscernible) that was removed to a California court. Both
14 of those Delaware courts aggressively held that the debtor's
15 claim, including the 544(b), may proceed in California State
16 Court, made the same determination I made in this case.

17 In Gruntz, where the bankruptcy court had acted,
18 although implicitly initially in the automatic stay, the state
19 court was without power to review or disagree with that action.
20 Here, in contrast, the bankruptcy court especially refrains
21 from acting on the 544(b) claim, leaving the adjudication of
22 the claim to state court. Nothing in Gruntz indicates that a
23 bankruptcy court lacks the power to decline jurisdiction over
24 core matters. That's true.

25 You can go back to the transcript of August 3, 2017,



1 where I said I'm not going to interfere with the state court.
2 I've already dealt with the stay violation. I don't believe
3 there was a violation of the stay. It's certainly not a
4 violation of any state that didn't exist regarding the other
5 two defendants. You can proceed against other defendants in an
6 action if the -- even if it's stayed as against the debtor.
7 That's not uncommon. I'm sure you've had that experience,
8 Mr. Lehnert.

9 MR. LEHNERT: Yes, Your Honor.

10 THE COURT: Even if you have standing to raise it.
11 I'm going to have to take a break for one minute.
12 Give me one minute, please.

13 THE CLERK: All rise.

14 (Recess taken at 3:03 p.m.)

15 (Proceedings resumed at 3:04 p.m.)

16 THE COURT: I apologize. Let me go back, please.

17 You know, in the Agribiotech case, the court
18 recognized that a trustee has standing to pursue causes of
19 action that belonged to the estate. These causes of action
20 asserted in the Superpumper constituted property of the estate.
21 Therefore, the trustee has standing to pursue them.

22 Even if the trustee lacks standing, the defendants
23 waive the right under Nevada law to assert that defense. See
24 Contrail Leasing Partners v. Executive Service Corporation, 688
25 P.2d 765. And they talked about NRCP 8 and NRCP 9 that mirror



1 Federal Rule of Civil Procedure 8 and 9.

2 Require this allegation regarding the lack of
3 standing to be pleaded and with particularity. Defendants not
4 only failed to plead it but affirmatively endorsed the
5 trustee's pursuit of the Superpumper action by stipulating to
6 substitute him in under Rule 17(a).

7 As to the insiders, already indicated I'm adopting
8 the -- all the facts that are really without dispute in the
9 trustee's submission of undisputed facts. This specifically is
10 found by Judge Steinheimer in her March 2019 judgment. The
11 test she employed was the same test I am required to employ.

12 When determining whether a transferee is a
13 non-statutory insider, two factors must be considered: the
14 closeness of the relationship between the transferee and the
15 debtor; and whether the transactions between them were
16 conducted at arm's length. And the citation for that just
17 happens to be a case decided by my colleague, Judge Beesley, in
18 Village at Lake Ridge, 814 F.3d 993. It went up to the United
19 States Supreme Court on standards -- an appellate standard,
20 whether it's de novo or clear error, but did not implicate the
21 test for statutory insider. And in that case, Judge Beesley
22 found that they were not statutory insiders.

23 So you look at the closest of the relationship. Oh,
24 I've already put it on the record, even in a summary form, the
25 closeness of the relationship between Mr. Morabito and



1 Mr. Bayuk. To me, it's undisputable. And Judge Steinheimer
2 found the same way, and -- in addition in this court, you can
3 go back to the origins of this case and the inconsistent
4 positions that Mr. Bayuk took, and I found those then. Had to
5 deal with the number of creditors and other issues regarding
6 303.

7 Arm's length. There was nothing arm's length about
8 these transactions. As a -- in 2010, right after the oral
9 ruling by Judge Adams in the -- in that state court action that
10 resulted in \$149 million judgment, and then you had
11 Mr. Morabito's own statements that other than the Panorama
12 house, there wasn't anything for the Herbst plaintiffs to
13 execute upon. I paraphrased it.

14 And he talked about VirseNet dilution and maybe
15 4-percent value. That would be in the amount of the \$85
16 million settlement figure. I've looked at all of that.

17 He's been paying his bills. He's been using this
18 credit cards. They would have been married if the state law
19 had permitted it. They both -- that's fine, but it establishes
20 the non-statutory insider relationship. And they're still
21 close. And you agree that that's a test to be utilized to that
22 -- your objection to the motion for summary judgment at Page
23 14.

24 You know, the Baruk LLC was owned by the Bayuk Trust,
25 who I would consider to be -- probably be considered to be a



1 statutory insider under 101(31)(e) [sic] in any event. And
2 then, of course, Snowshoe steps into those shoes because it
3 ends up with all the property, and Mr. Morabito treated
4 Snowshoe like it was his own company. He did. And at one
5 point, he even wanted to set aside that note. No, let's just
6 set it up for an option, so you could do some other business
7 transaction.

8 He did what was convenient at the time for himself as
9 Judge Steinheimer found, and that's what I found before. And
10 that -- of course, at the basis of it is that these
11 transactions were illusory. They only existed for one reason,
12 to shield any assets that Mr. Morabito had from collection by
13 his creditors and also gave him control over those funds. And
14 he considered it to be that.

15 When the payment was made by Snowshoe -- I don't
16 think that's right. The payment was made by Mr. Bayuk to
17 satisfy -- purportedly to satisfy an obligation that
18 Mr. Morabito had with Bank of America. Who asked for the
19 refund of about \$3,000? Mr. Morabito did. It was his refund.
20 Well, it couldn't have been if it wasn't his money and was
21 either Mr. Bayuk's or Snowshoe's. At some point, you're bound
22 by your own conduct and your own representations.

23 I don't get any pleasure in making these findings,
24 and I doubt that Judge Steinheimer did, but the evidence, to me
25 -- appears to me to be indisputable.



1 And, of course, the fact that it's illusory totally
2 undermines the Adamson Apparel approach. It just does. There
3 was no contractual obligation to pay anything to Bank of
4 America. And then, there was some waiver language that's
5 actually included in that pledge agreement, in any event.

6 You know, I think it's conceded that when Bayuk, who
7 owns Snowshoe through his trust, the Bayuk Trust, made the
8 equalizing -- what he calls equalizing payment to Bank of
9 America, Morabito says -- it was treated as a partial payment.
10 And that's different than under Adamson Apparel. I don't think
11 that the absence of a proof of claim changes this analysis.

12 I've already said that when you would take a look at
13 the Powerine Oil Company case, any potential recovery from a
14 third party's not relevant to another preference analysis. In
15 that case, the circuit, Ninth Circuit, held that courts have
16 long held that the key factor in determining whether payment as
17 a preference is a percentage creditors' claims are entitled to
18 draw out of the estate of the bankrupt. Thus, the relevant
19 inquiry focuses now on whether a creditor may have recovered
20 all the monies owed by the debtor from any source whatsoever,
21 but instead upon whether the creditor would have received less
22 than 100-percent payout from the debtor's estate. That -- and
23 that case, Koch, K-O-C-H, had resource against the third party
24 in the case the debtor defaulted, thus has no bearing on this
25 issue.



1 Now, I'd go right to the value of the collateral.
2 Don't need any of that discovery. It's not necessary.

3 (Pause)

4 THE COURT: There's no question that this debtor was
5 insolvent. I don't think you would dispute that.

6 MR. LEHNERS: No.

7 THE COURT: Nope. So if you want to go through all
8 the elements of Section 547, there was a transfer of an
9 interest of the debtor and property that was to or for the
10 benefit of a creditor, for an account of an antecedent debt
11 owed by the debtor before the transfer was made, made while the
12 debtor was solvent, within between 90 days and one year before
13 the date of the filing of the petition, if such creditor at the
14 time such transfer was an insider, and I've made findings that
15 they're non-statutory insiders, that would enable such creditor
16 to receive more than such creditor would receive if it was case
17 under Chapter 7 of this title had the transfer not been made.

18 And if it take a look, Bank of America would have
19 done better -- did better with this analysis because if its
20 claim was just a claim placed into the body of claims in this
21 case and it's administrative insolvent, or according to
22 Mr. Morabito, he just didn't never have any money, even if --
23 would have never received \$739,000 or whatever it did receive.

24 So I have actually spent more time than I thought I
25 would, but I am persuaded that the motion for summary judgment



1 is appropriate in this case. And I've even treated legal
2 memoranda as evidence for the purpose of the analysis, but I do
3 not want to overlook that I did not receive any contrary
4 evidence. I suspect I didn't because I'm not sure that it
5 exists.

6 What I received was some, I think, excellent legal
7 arguments, but one can't ignore the evidence. I would have
8 directed a verdict, and therefore I'm going to grant the motion
9 for summary judgment.

10 MR. DABBIERI: Thank you, Your Honor.

11 THE COURT: I'm instructing counsel for the trustee
12 to prepare detailed findings and conclusions consistent with
13 the oral findings and conclusions that I placed on the record
14 pursuant to Federal Rule of Bankruptcy Procedure 7052, and then
15 prepare a final -- let me think about this. Yes, I have the
16 constitutional authority to enter a final judgment. Prepare a
17 judgment based upon those findings and conclusions. Please
18 follow the procedures of Local Rule 9021. Submit them to
19 Mr. Lehnert.

20 And you don't have to necessarily be limited to what
21 I said in the transcript. That's why I said "consistent with
22 the transcript." I've already indicated I've adopted your
23 findings -- or your, excuse me, your statement of undisputed
24 facts.

25 I believe that there's a substantial likelihood, as



1 with everything else that happens in this case, that it may be
2 reviewed, and that's fine. If I've made a mistake, it should
3 be corrected, but I want to make sure that the findings and the
4 conclusions are complete and adequate.

5 MR. DABBIERI: Yes, Your Honor.

6 THE COURT: Are there any questions?

7 MR. LEHNERS: No, Your Honor. Thank you for hearing
8 my argument.

9 THE COURT: Oh, that's all right.

10 MR. DABBIERI: No questions, Your Honor.

11 THE COURT: Okay. Thank you all.

12 (Proceedings concluded at 3:18 p.m.)
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C E R T I F I C A T I O N

I, Alicia Jarrett, court-approved transcriber, hereby
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter, and to the best of my ability.

Alicia J. Jarrett

ALICIA JARRETT, AAERT NO. 428

DATE: June 24, 2019

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