GARMAN TURNER GORDON LLP
GERALD M. GORDON, ESQ., NBN 229
Email: ggordon@gtg.legal
ERIKA PIKE TURNER, ESQ., NBN 6454
Email: eturner@gtg.legal
GABRIELLE A. HAMM, ESQ., NBN 11588
Email: ghamm@gtg.legal
TERESA M. PILATOWICZ, ESQ., NBN 9605
Email: tpilatowicz@gtg.legal
7251 Amigo Street, Suite 210
Las Vegas Nevada 89119
Telephone: (725) 777-3000
Facsimile: (725) 777-3112
Attorneys for Respondent

Electronically Filed
Oct 05 2020 04:50 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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.

Case No.: 79355

Appeal from the Second Judicial District Court, Case No. CV-13-02663

OPPOSITION TO APPELLANTS'[1] MOTION TO STRIKE RESPONDENT'S AMENDED APPENDIX AND RESPONDENT'S AMENDED ANSWERING BRIEF AND MOTION TO STAY BRIEFING

[1] "Appellants" is defined as Superpumper, Inc., Edward Bayuk, Salvatore Morabito ("Morabito"), and Snowshoe Petroleum, Inc.

Respondent William A. Leonard, Trustee for the Bankruptcy Estate of Paul Anthony Morabito ("Trustee"), by and through his counsel, Garman Turner Gordon LLP, hereby respectfully submits his opposition (the "Opposition") to *Appellants' Motion to Strike Respondent's Amended Appendix and Respondent's Amended Answering Brief and Motion to Stay Briefing* (the "Motion").

I.
INTRODUCTION

Appellants waited 345 days from the date of their notice of appeal to file their opening brief. Now, on the day their reply brief (the "Reply Brief") was due, Appellants filed the Motion seeking to strike two documents included in the Trustee's Appendix: (1) an order of this Court cited in the Jurisdictional Statement section of *Respondent's Amended Answering Brief* (the "Response Brief") to clarify the scope of the appeal, and (2) a transcript of an oral ruling of the United States Bankruptcy Court for the District of Nevada (the "Bankruptcy Court") to rebut Appellant's blatantly false representation that their appeal presents some novel issue of law. The documents, however, are not included to supplement the record from the lower Court, but instead to clarify Appellants' misleading statements and omissions. Therefore, there is no basis by which they should be stricken from the Court's review.

Instead, the Motion is little more than a further attempt to delay these proceedings. Specifically, Appellants have managed to prevent execution on the

District Court's ***March 29, 2019*** Judgment[2] without a bond while this appeal has been pending. Despite this Court's denial of Appellants' motion for a stay pending appeal, Appellants ultimately obtained a stay of Trustee's collection efforts in California from the Superior Court for Orange County (the "California Court") on the basis that the Judgment is not a final order so long as this appeal remains pending. Simply put, the Motion was filed because the longer the appeal remains undecided, the longer Appellants can maintain their bond-free stay. Therefore, the Motion must be denied, and Appellants ordered to file their Reply Brief immediately.

II.
STATEMENT OF FACTS

A. The Appeals.

1. On August 7, 2019, this Court docketed an appeal of the Judgment and related orders filed by Appellants, thereby commencing this case (the "Appeal").

2. On September 10, 2019, this Court entered its *Order Denying Stay*, denying Appellants' *Emergency Motion for Relief Under NRAP 27(e)*.

3. On December 13, 2019, this Court docketed Case No. 80214, an appeal filed by Appellants of orders on post-judgment collection motions (the "Second Appeal," and together with this Appeal, the "Appeals").

4. On January 29, 2020, the day their opening brief and appendix in this

[2] "Judgment" refers to the *Findings of Fact and Conclusions of Law and Judgment*, entered by the district court (Hon. Connie Steinheimer) (the "District Court") on March 29, 2019 following an eight-day bench trial.

Appeal were due, and over five months after the Appeal was filed, Appellants filed a motion seeking to stay briefing entirely or, alternatively, until April 14, 2020 (the "First Request"), along with a *Motion to Confirm Appellate Jurisdiction and Motion to Consolidate Appeals* in the Second Appeal. *See* First Request, at pp. 2-3 and *Notice of Filing of Motion to Consolidate*, on file herein.

5. On March 6, 2020, this Court entered its *Order Dismissing Appeal and Regarding Motions* (the "March 6 Supreme Court Order"), dismissing the Second Appeal, denying the request to consolidate as moot, and granting Appellants 30 days from the date of the order, or until April 6, 2020, to file their opening brief.

6. Rather than file their opening brief pursuant to the March 6 Supreme Court Order, Appellants filed a second request for extension, which this Court granted permitting Appellants up to and including June 5, 2020 to file their opening brief.

7. On June 5, 2020, again the day their brief was due, Appellants filed a third request for extension seeking an additional 30 days to file their opening brief.

8. On July 13, 2020, Appellants finally filed their Appellants' Opening Brief, which was amended on July 14, 2020 (the "Opening Brief").

9. On August 27, 2020, Respondents filed their Response Brief and Respondent's Amended Appendix (the "Appendix").

10. Appellants' Reply Brief was due on September 28, 2020. Instead of filing the Reply Brief, Appellants filed the Motion.

B. <u>The California Action.</u>

11. On August 15, 2019, after Trustee domesticated the Judgment in California (the "<u>California Judgment</u>"), where certain of Appellants' property is located, Appellants filed a *Motion to Vacate Sister State Judgment* in the California Court, seeking to vacate the California Judgment.

12. The California Court found no basis to vacate the California Judgment in its initial ruling. However, the California Court ultimately stayed collection efforts in California due to this pending Appeal, though this Court had denied Appellants a stay. In issuing its ruling, the California Court considered that briefing in the Appeal would be completed by *March 2020* based on the then-applicable briefing deadline of January 29, 2020. *See Notice of Ruling on Defendants' Motion to Vacate Sister State Judgment* (Dec. 6, 2019), at **Exhibit 1**.

13. Ultimately, the Trustee was permitted to, and did, file the *Motion of Trustee to Set Undertaking to Secure Stay of Enforcement* (the "<u>Bond Motion</u>") which, despite being filed in August, is not scheduled for hearing until December 18. 2020.

III.
LEGAL ARGUMENT

A. The Documents Included in the Appendix Are Properly Included to Correct Misleading Statements and Omissions by Appellants.

The Trustee agrees that the record on appeal consists of "the papers and exhibits filed in the district court, the transcript of the proceedings, if any, the district court minutes, and the docket entries made by the district court clerk," NRAP 10(a). However, NRAP 30 does not limit respondent's appendix to only those matters in the record. *See* NRAP 30(b)(4) (Appendix "…shall otherwise be limited *to those documents necessary to rebut appellant's position on appeal…*).

1. The March 6 Supreme Court Order

Despite the requirement for brevity and that only matters essential to the decision on the issues be included, Appellants filed 57 volumes of appendices consisting of all documents filed in the District Court. The appendices included orders entered subsequent to the Judgment and irrelevant to the Judgment, which orders Appellants tried to unsuccessfully appeal in the Second Appeal. Those orders are not the subject of this pending Appeal; however, they were included in the appendices and arguably referenced in the Opening Brief. Therefore, Trustee was required to clarify that those orders are not at issue in this Appeal. As stated in the Jurisdiction Statement of the Response Brief:

> Appellants also make reference to other orders in their appendix and [the Opening] Brief: (1) the *Order Denying Morabito's Claim of Exemption*; (2) the *Order Denying Bayuk's Claim of Exemption and*

> *Third Party Claim*; or (3) the *Order 52(b), or in the Alternative, Motion for Reconsideration and Denying Plaintiff's Countermotion for Fees and Costs Pursuant to NRS 7.085* (collectively, the "Exemption Orders"), which are orders denying claims of exemption asserted by Bayuk and Sam in post-judgment enforcement proceedings. The Exemption Orders were the subject of a separate appeal that was dismissed. Accordingly, the Exemption Orders are not properly the subject of Appellants' appeal.

See Response Brief, pp. 1-2.

Thus, the March 6 Supreme Court Order is not cited to supplement the record from the District Court. Instead, for the Court's convenience, the Trustee provided a copy of the March 6 Supreme Court Order so that the Court could reference it to the extent necessary to determine what issues and orders are the subject of this Appeal. To be sure, the Trustee noted in footnote 3 of its Response Brief, "The Exemption Orders were not the subject of the Appellants' notice of appeal, but as Appellants' Brief refers generally to "interlocutory orders" in the Jurisdictional Statement and includes the Exemption Orders in the Appellants' Appendix ("AA"), Trustee raises this argument to avoid waiver." *See* Response Brief, pp. 2, n. 3. Therefore, this Court should deny the request to strike the March 6 Supreme Court Order.

2. The June Bankruptcy Court Transcript

In their Opening Brief, Appellants contend "the Trustee was without authority to pursue a core matter in the District Court that lies within the exclusive jurisdiction of the Bankruptcy Court. *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000) (citing *Wood*

v. Wood, 825 F.2d 90, 97 (5th Cir. 1987))" and further state that the Bankruptcy Court's jurisdiction over the matter is one of first impression, suggesting that the issues raised are novel and not previously addressed. *See* Appellant's Brief, p. 4. However, Appellants fail to disclose to this Court that the very same argument, with respect to this very same case, has already been addressed, and rejected, by the Bankruptcy Court. As set forth in the Respondent's Brief:

> And in June 2019, when Appellants raised this very same argument (including their reliance on *Gruntz*) to challenge the District Court's jurisdiction over the matter, the Bankruptcy Court confirmed its decision. Rejecting Appellants' argument and recognizing the "permissive" nature of its own source of jurisdiction, the Bankruptcy Court explained: "We can decline -- bankruptcy courts can decline[] to hear those matters, and they go to state court. There's no doubt about that.

See Respondent's Brief, pp. 22-23.

Thus, the June Bankruptcy Court Transcript was not provided to contend that it was or was not, or should have or should not have been, considered by the District Court or was otherwise part of the record at the District Court. Instead, it is provided to correct Appellants' misleading contention that the Bankruptcy Court had exclusive jurisdiction over the underlying case when the Bankruptcy Court has rejected that argument outright. Therefore, this Court should deny the request to strike the June Bankruptcy Court Transcript.

B. Appellants' Caselaw Does Not Support the Motion Because Trustee's Documents Are Not Provided to Supplement the Record.

The cases cited by Appellants do not support striking the information necessary to apprise this Court regarding the limited issues on appeal and that the issues before it, represented by Appellants as being novel, have been squarely rejected by the Bankruptcy Court. Instead, the two cases Appellants cite, at most, establish that objections and documents which are necessary to form the basis of the appeal cannot be added at the appellate level when they are not clearly in the record from the lower court.

First, in *Carson Ready Mix, Inc. v. First Nat'l Bank of Nevada*, 97 Nev. 474, 476, 635 P. 2d 276, 277 (1981), the issue on appeal was whether the district court erred by failing to provide several proposed instructions. *Id*. at 475, 635 P.2d at 276. However, in order for the Court to consider the appeal, the objections or exceptions to instructions needed to be noted on the record, which had not been done. *Id*. at 475, 635 P.2d at 276. Thereafter, on appeal, appellant's counsel attempted "to supply the missing predicate for appellate review by affidavit and by a document not appearing in the record." *Id*. at 476, 635 P.2d at 277. Ultimately, the Court concluded that "since the record properly before us established no error which has been preserved for appellate review, the judgment must be affirmed." *Id*.

Here, the two documents included in the Appendix are not provided to supplement the record from the District Court or otherwise expand the issues to be

considered on appeal. Instead, they are submitted to correct Appellants' misleading statements and omissions.

The second case upon which Appellants rely is no more convincing. Appellants cite to *State ex. rel. Sisson v. Georgetta*, 78 Nev. 176, 178, 370 P.2d 672, 673 (1962), contending the case stands for "striking documents in writ petition proceeding that were not part of the underlying court's record." *See* Motion, p. 2. However, in that case, respondent district judge had filed an affidavit containing "Chronology of Facts and Events," and a discussion of and argument on the sufficiency of the petition. *Id.* The affidavit was stricken at the request of the Petitioner, it appears, because it attached and reflected content that was the subject of an alternative writ to prevent disclosure issued by the Nevada Supreme Court. *Id.* Therefore, *State ex. rel. Sisson v. Georgetta*, does not support striking the documents in the Appendix here.

C. <u>Appellants Should Be Ordered to Immediately File Their Reply Brief.</u>

As set forth above, it was not improper for the Trustee to include documents for this Court to review to correct misleading statements and omissions. Nonetheless, to the extent Appellants were truly concerned about whether the two documents were properly included in the Appendix, they could have properly raised the issue in advance of the deadline for filing their Reply Brief. Instead, Appellants waited until the day their Reply Brief was due to file the Motion and request that the

briefing be stayed.

Appellants have now, for the *fourth* time, sought an extension of the deadlines to file their briefs such that, despite the appeal having been filed 427 days ago, this Appeal is still not fully briefed. Appellant's Motion is little more than a bid for further delay for the purpose of continuing the bond-free stay currently in place in California. Such tactics should be rejected, and Appellants ordered to file their Reply Brief immediately so that this fourteen-month old appeal can finally be fully briefed and decided.

IV.
CONCLUSION

Based upon the foregoing, Respondent respectfully requests that the Court deny the Motion, and issue such other relief as this Court deems just and proper.

Dated October 5, 2020.

GARMAN TURNER GORDON LLP

By: */s/ Teresa M. Pilatowicz*

GERALD M. GORDON, ESQ.
Nevada Bar No. 229
ERIKA PIKE TURNER, ESQ.
Nevada Bar No. 6454
GABRIELLE A. HAMM, ESQ.
Nevada Bar No. 11588
TERESA M. PILATOWICZ, ESQ.
Nevada Bar No. 9605
7251 Amigo Street, Suite 210
Las Vegas Nevada 89119
Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that on October 5, 2020, I electronically filed the foregoing **Opposition to Appellants' Motion to Strike Respondent's Amended Appendix and Respondent's Amended Answering Brief and Motion to Stay Briefing** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic filing system. I further certify that counsel of record for all other parties to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

By: */s/ Melissa Burkart*
An employee of Garman Turner Gordon LLP

4845-9245-1276, v. 2

EXHIBIT 1

EXHIBIT 1

LAW OFFICES OF CLINTON L. HUBBARD
Clinton L. Hubbard, Bar No. 81389
2030 Main Street, Suite 1200
Irvine, CA 92614
(949) 475-4480 Facsimile (949) 475-4484
Clint@chubbardlaw.net

Attorney for EDWARD BAYUK, individually and as Trustee of the Edward William Bayuk Living Trust; THE EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, also known as SAM MORABITO, an individual; SNOWSHOE PETROLEUM, INC., a New York Corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

WILLIAM A. LEONARD, JR., Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, vs. EDWARD BAYUK, individually and as Trustee of the Edward William Bayuk Living Trust; THE EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, also known as SAM MORABITO, an individual; SNOWSHOE PETROLEUM, INC., a New York Corporation, Defendants.	Case No.: 30-2019-01068591-CU-EN-CJC **NOTICE OF RULING ON DEFENDANTS' MOTION TO VACATE SISTER STATE JUDGMENT** Date: September 27, 2019 Time: 9:30 a.m. Dept.: 16 Judge: Hon. James J. Di Cesare

PLEASE TAKE NOTICE that the Motion to Vacate Sister State Judgment came on for hearing on December 6, 2019 at 9:30 a.m. in Department 16 of the Orange County Superior Court. Jonathan S. Dabbieri, Esq. of Sullivan Hill Rez & Engel appeared on behalf of Plaintiff

William A. Leonard Trustee for the Bankruptcy Estate of Paul Morabito, and Clinton L. Hubbard appearing on behalf of all Defendants.

The Tentative Ruling of the Court is attached hereto as Exhibit "A", and became the Order of the Court.

DATED: December 6, 2019

LAW OFFICES OF CLINTON L. HUBBARD

By: _____

CLINTON L. HUBBARD,
Attorney for Defendants EDWARD BAYUK, individually and as Trustee of the Edward William Bayuk Living Trust; THE EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, also known as SAM MORABITO, an individual; SNOWSHOE PETROLEUM, INC., a New York Corporation

EXHIBIT "A"

5.	LEONARD VS. BAYUK 2019-01068591	MOTION TO SET ASIDE/VACATE JUDGMENT This is a special ministerial proceeding to domesticate a foreign judgment and debtor's motion to vacate that domesticated judgment. Under the Sister State Money-Judgments Act (CCP §1710.10 *et seq*), a money judgment obtained in another state may be filed with a California court and a California judgment immediately entered thereon. The statute provides a summary, expeditious and economical registration procedure for permitting out-of-state creditors to reach assets here in California. See *Conseco Marketing, LLC v. IFA & Ins. Services, Inc.* (2013) 221 Cal.App.4th 831, 838. The original judgment is referred to as the "foreign" judgment, and the locally-entered judgment is referred to as the "domesticated" judgment. It is important not to confuse the two. A foreign judgment domesticated here by clerical entry does not necessarily mean that the judgment can be fully enforced locally. For example, if enforcement of the foreign judgment has been stayed for any reason in the foreign state, the domesticated judgment cannot be entered (or if entered, it cannot thereafter be enforced). CCP §1710.55(a). Moreover, if the debtor timely moves to vacate the domesticated judgment, or is presently attacking the foreign judgment directly, the creditor may not seek to enforce the domesticated judgment. CCP §1710.50(a)(3). Finally, a domesticated judgment can be vacated if the foreign judgment: ▪ is not final and unconditional; ▪ was obtained by extrinsic fraud; ▪ was rendered in excess of the foreign court's jurisdiction; ▪ is void for lack of fundamental jurisdiction (meaning a lack of personal jurisdiction over the debtor).

See *Wells Fargo Bank, NA v. Baker* (2012) 204 Cal.App.4th 1063, 1068; *Arizona ex rel. Arizona Dept. of Revenue v. Yuen* (2009) 179 Cal.App.4th 169, 178-181; *Traci & Marx Co. v. Legal Options, Inc.* (2005) 126 Cal.App.4th 155, 159-160; *Capital Trust, Inc. v. Tri-National Develop. Corp.* (2002) 103 Cal.App.4th 824, 830-831; *Washoe Develop. Co. v. Guaranty Fed'l Bank* (1996) 47 Cal.App.4th 1518, 1522-1523.

As previously indicated, this Court does not clearly see any basis for vacating the Nevada state court judgment. Although debtor contends that the Nevada state court never had fundamental jurisdiction that does not appear to be the case. Fundamental jurisdiction involves jurisdiction over the person, or the subject. There is no question that the Nevada state court had jurisdiction over the person (debtor here) by virtue of service of a summons, and jurisdiction over the subject of the dispute because state courts are empowered to resolve claims of fraudulent conveyance. After all, it is a state tort. Debtor here claims that the Nevada state court did not have personal or subject-matter jurisdiction over the fraudulent conveyance dispute because *one of the actors* (Paul) was in bankruptcy, and the proposed plaintiff was not the real party in interest for purposes of an ordinary civil action. These issues, even if true, do not seem to implicate the fundamental due process concerns of the debtor. A court decided that debtor received transfers knowing them to be part of scheme to avoid collection. It is not clear why debtor has due process grounds to control who pursued the action to judgment, or which court made the ruling. Of course, the Nevada Supreme Court is apparently going to answer that for this Court.

It is not critical to decide the issue now because by all appearances the foreign judgment is not yet final. According to plaintiff, the matter is now pending before the Nevada Supreme Court, with briefing to be completed by March 2020. Although counsel is "confident the judgment will be affirmed," so long as a direct attack of the foreign judgment is pending, a stay of enforcement is required. CCP §1710.50(a)(1). Since enforcement must be stayed, there is no need to reach the merits of the motion to vacate – particularly since the very issue at the heart of the motion to vacate is part and parcel of the debtor's appeal in Nevada. Once that issue is ruled upon in the foreign state, it will more than likely be collateral estoppel here.

Motion to vacate is Stayed pending final resolution by the Nevada
Supreme Court of the validity of the foreign judgment. Status conference set for this dept. on 3/20/20.

PROOF OF SERVICE

William A. Leonard, Jr., etc. v. Edward Bayuk, etc., et al.
Orange County Superior Court Case No: 30-2019-01068591-CU-EN-CJC

I am employed by the Law Offices of Clinton L. Hubbard and my business address is 2030 Main Street, Suite 1200, Irvine, California 92614. I am over the age of 18 and not a party to the action.

On **December 6, 2019**, I served by the foregoing document(s) described as **NOTICE OF RULING ON DEFENDANTS' MOTION TO VACATE SISTER STATE JUDGMENT** on all interested parties in this action by placing [ ] the original [X] a true copy thereof in a sealed envelope addressed as follows:

Jonathan S. Dabbieri, Esq. SULLIVAN HILL REZ & ENGEL A Professional Law Corporation 600 B Street, Suite 1700 San Diego, CA 92101 Phone: (619) 233-4100 Fax: (619 231-4372	**ATTORNEYS FOR PLAINTIFF WILLIAM A. LEONARD, JR., TRUSTEE**

[X] MAIL I am "readily familiar" with the Law Offices of Clinton Hubbard's practice of collection and processing of correspondence for mailing. Under that practice the envelope would be deposited with the U.S. Postal Service at Irvine, California, on that same date with postage thereon fully prepaid and in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

[ ] BY E-MAIL – I caused the above document to be served by electronic mail to the above interested parties. Each e-mail transmission was completed, without error or interruption on April 22, 2019.

[ ] BY FACSIMILE TRANSMISSION – I caused the above document to be served by facsimile transmission to the above interested parties. Each fax transmission was completed, without error or interruption on _____.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **December 6, 2019** at Irvine, California.

GENEVIEVE C. RAMIREZ