IN THE SUPREME COURT OF THE STATE OF NEVADA

SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD BAYUK LIVING TRUST; SALVATORE MORABITO, an individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Appellants, vs. WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Respondent.	Case No. 79355 Electronically Filed Dec 14 2020 11:44 p.m. Elizabeth A. Brown Clerk of Supreme Court Appeal from the Second Judicial District Court, the Honorable Connie J. Steinheimer Presiding

APPELLANTS' REPLY BRIEF

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UPDATED NRAP 26.1 DISCLOSURE

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

1. Appellant Superpumper, Inc. is an Arizona corporation.

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

3. Snowshoe Petroleum, Inc. owns 100% of the stock of Superpumper, Inc.

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

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

Dated this 14th day of December 2020.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In their opening brief, Defendants presented three issues for this Court's review. First, Defendants argued that the District Court lacked subject matter jurisdiction over this action, due to the nature of this litigation, and the Trustee's inability to pursue the fraudulent transfer claim that belonged to the Herbst Parties. Second, Defendants argued that the District Court lacked subject matter jurisdiction over the Bayuk Trust since no *in rem* action was filed against it. Third, Defendants argued that the District Court erred by allowing the disclosure of Defendants' confidential attorney-client privileged communications, which prejudiced them. For the first two arguments, Defendants asked this Court to vacate the District Court's orders due to the void nature of the orders entered without subject matter jurisdiction. For the third argument, Defendants asked this Court to order a new trial before a different District Judge, due to the trial rulings based upon evidence that should have been excluded as privileged.

In his answering brief, the Trustee argues that the first two issues of subject matter jurisdiction have been waived. Respondent's Answering Brief ("RAB") 3–4. However, the Trustee agrees that the third issue has been preserved for this Court's review but, nevertheless, argues that the District Court did not substantively err in requiring Defendants' attorney-client privileged information to be produced, which was relied upon at trial. RAB 4. On the substance of Defendants' first

argument, the Trustee argues that the Trustee could pursue the Herbst Parties' fraudulent transfer claim in either the Bankruptcy Court or the District Court. RAB 6. On the substance of Defendants' second argument, the Trustee argues that his claim against Bayuk, as trustee, was the same as a claim against the Bayuk Trust. RAB 7. On the third issue, the Trustee claims that both the District Court and the Bankruptcy Court ruled that Defendants had no attorney-client privilege because it had been waived. RAB 7.

In this reply brief, Defendants ask this Court to determine that due to the nature of Defendants' arguments on the District Court's lack of subject matter jurisdiction, Defendants' first two issues are not waived for review before this Court. Based upon the substance of Defendants' arguments, they also ask this Court to vacate all the District Court orders for lack of subject matter jurisdiction, due to the nature of this litigation, and the Trustee's inability to pursue the fraudulent transfer claim that belonged to the Herbst Parties. Defendants further ask this Court to vacate the District Court's judgment against the Bayuk Trust since no *in rem* action was filed against it, which is also an issue of subject matter jurisdiction.

Alternatively, Defendants ask this Court for a new trial based upon the District Court's absurd interpretation of the attorney-client privilege, which impermissibly allowed the Trustee to have access to Defendants' own privileged information. If the Court alters the judgment in any way, the awards of attorney fees and costs to

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

II. LEGAL ARGUMENT

A. THE TRUSTEE'S WAIVER ARGUMENTS WITH RESPECT TO DEFENDANTS' FIRST TWO ISSUES OF SUBJECT MATTER JURISDICTION ARE WITHOUT MERIT.

In his answering brief, the Trustee first argues that Defendants have waived their first two arguments regarding subject matter jurisdiction. RAB 17–18. Notably, however, the Trustee fails to acknowledge that issues of subject matter jurisdiction cannot be waived but can be raised at any time, even sua sponte by a reviewing court. Appellants' Opening Brief ("AOB") 18–19. Indeed, the lack of subject matter jurisdiction is a recognized exception to the prohibition against raising issues for the first time on appeal. *Id.* (citing *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) ("Whether a court lacks subject matter jurisdiction can be raised by the parties at any time, or sua sponte by a court of review, and cannot be conferred by the parties."); *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990) (stating that the lack of subject matter jurisdiction is not waivable and cannot be conferred by the parties)); *see also Old Aztec Mine v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, **unless it goes to the jurisdiction of that court**, is deemed to have been waived and will not be considered

on appeal.") (emphasis added and citations omitted). By definition, "subject matter jurisdiction" is "[j]urisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things." BLACK'S LAW DICTIONARY, 1020 (11th ed. 2019).

To the extent that the Court disagrees with the nature of Defendants' argument regarding the District Court's lack of subject matter jurisdiction over the Bayuk Trust, Defendants have repeated this argument in their writ petition filed in Case No. 82157. The Trustee acknowledges that Defendants properly raised the issue within the scope of the orders challenged in Defendants' writ petition. RAB 18. Of course, if the Court resolves the merits of this argument in this appeal, the Court need not reach the identical issue in Defendants' writ petition.

Thus, the Court should reject the Trustee's waiver arguments as to Defendants' first two issues regarding the District Court's lack of subject matter jurisdiction and decide both issues on the merits.

B. THE ARGUMENTS IN THE TRUSTEE'S ANSWERING BRIEF DO NOT CHANGE THE DISTRICT COURT'S LACK OF SUBJECT MATTER JURISDICTION OVER THE ENTIRE CASE, DUE TO THE TRUSTEE'S INABILITY TO PURSUE THE FRAUDULENT TRANSFER CLAIM THAT BELONGED TO AND BENEFITTED THE HERBST PARTIES.

In their opening brief, Defendants argued that the District Court lacked subject matter jurisdiction over this entire litigation, due to the Trustee's inability to pursue

the fraudulent transfer claim that belonged to and benefitted the Herbst Parties. The Trustee's answering brief offers a series of segmented responses. RAB 19–27. After considering each of the Trustee's arguments, the Court should determine that the District Court lacked subject matter jurisdiction over the entire case, such that the court's orders are rendered void. *See State Indus. Ins. Sys. v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984) ("There can be no dispute that lack of subject matter jurisdiction renders a judgment void.").

1. Ultimately, this Court Must Determine the Scope of the Subject Matter Jurisdiction of the District Court.

According to the NEVADA CONSTITUTION, Article 6, the jurisdiction of the several classifications of courts in Nevada is delineated. Ultimately, this Court must interpret these constitutional provisions, along with the arguments presented, to determine the jurisdiction of the District Court to act. *See, e.g., We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008). Along this same line of reasoning, the converse is also true that another court cannot dictate the scope of authority that the District Court had, or that the district courts have, in general, within the State of Nevada. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 73, 117 S.Ct. 1055 (1997) ("[E]very federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction . . . , even though the parties are prepared to concede it.") (internal quotation marks omitted); *In re Resorts Int'l Inc.*,

372 F.3d 154, 161 (3d Cir. 2004) ("Subject matter jurisdiction cannot be conferred by consent of the parties.") (internal quotation marks omitted); *Landreth*, 127 Nev. at 177, 251 P.3d at 164 (resolving the issue of the scope of authority of judges in the family court division). For example, even though a bankruptcy court may approve a stipulation and order, this Court independently reviews the order whether it is valid under Nevada law. *See Tower Homes, LLC v. Heaton*, 132 Nev. 628, 633, 377 P.3d 118, 121 (2016) (resolving the issue of whether a bankruptcy order impermissibly assigned a legal malpractice claim under Nevada law).

2. The Trustee's Arguments Against His Lack of Authority to Pursue Claims in the District Court Are Unavailing.

In their opening brief, Defendants argued that adversary complaints for fraudulent conveyance are "core" matters in the Bankruptcy Court. AOB 19. Defendants supported this argument with FED. R. BANKR. P. 7001(1) and 28 U.S.C. § 157(b)(2)(H) and the related case law. *Id.* The Trustee does not disagree with this argument. RAB 19. However, the Trustee asserts that both the Bankruptcy Court and the District Court had concurrent jurisdiction over the Trustee's fraudulent transfer claim. RAB 19–20. The effect of this argument, along with the Trustee's other arguments, amounts to the notion that the Trustee could shift between the two courts to have rulings from both courts binding upon each other. Such an argument would confuse the jurisdiction of the two courts, which is why a claim for fraudulent

conveyance must be brought as an adversary proceeding in the Bankruptcy Court. *See, e.g., In re Gruntz*, 202 F.3d 1074, 1078 (9th Cir. 2000) ("At its core, the *Rooker-Feldman* doctrine stands for the unremarkable proposition that federal district courts are courts of original, not appellate, jurisdiction.") (citing *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 44 S.Ct. 149 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303 (1983)); "*Gruntz* bars state court intrusions on all 'bankruptcy court orders' (or other 'core' bankruptcy proceedings), 202 F.3d at 1082, not just the automatic stay." *In re McGhan*, 288 F.3d 1172, 1179 (9th Cir. 2002).

In his answering brief, the Trustee asserts that the District Court and the Bankruptcy Court had "concurrent" jurisdiction over the case. RAB 20–22. Defendants contend that based upon the unique facts of this case, the Trustee's cited authorities are either distinguishable or should be rejected. For example, the Trustee cites to *In re McCarthy*, 230 B.R. 414 (B.A.P. 9th Cir. 1999). However, *McCarthy* involved unique claims of California state law. *Id.* at 418. Likewise, *Fidelity Nat'l Title Ins. Co. v. Franklin*, 179 B.R. 913, 929 (Bankr. E.D. Cal. 1995) involved a motion to remand filed in the bankruptcy court, which is not present in this case. Not only is the case largely dicta, but it also holds, "federal jurisdiction over the bankruptcy case itself and over the property of the debtor and of the estate is exclusive." *Id.* at 919.

Likewise, the issue in *Hopkins v. Plant Insulation Co.*, 349 B.R. 805, 813 (N.D. Cal. 2006) focused on whether the state law issues were predominant in a remand proceeding, which included a claim for wrongful death and several tort claims. Further, *In re Brady Municipal Gas Corp.*, 936 F.2d 212, 217 (5th Cir. 1991) did not involve a claim for fraudulent transfer. Rather, the issue was based upon the argument of "exclusive jurisdiction over their damage claim, which arose out of the debtor's decision to reject the farm-out agreement…." *Id.*

The Trustee's answering brief then argues that the notion of a state court exercising concurrent jurisdiction in a fraudulent conveyance case is widespread. RAB 21. However, *In re Rosenblum*, 545 B.R. 846, 857 (Bankr. E.D. Pa. 2016) confirms that "11 U.S.C. 544(b) allows the bankruptcy trustee to step into the shoes of a creditor for the purpose of asserting causes of action under state fraudulent conveyance acts for the benefit of all creditors, not just those who win a race to judgment," which is Defendants' argument based upon *Williams v. California 1st Bank*, 859 F.2d 664, 667 (9th Cir. 1988). Yet, *Rosenblum* also distinguished the Trustee's argument on concurrent jurisdiction by stating that the court would not have had the ability to enter final orders unless both parties consented. *Id.* at 854.

Further, the Trustee's citation to *In re CitX Corp.*, 302 B.R. 144, 161 n.10 (Bankr. E.D. Pa. 2003) contains the important exclusion "unless an action involves the actual recovery of property of the estate, rather than reparations paid for damages

suffered, the action may proceed in state court without offending the exclusivity provision." Thus, by implication, *In re CitX Corp.* supports Defendants' exclusivity argument based upon the facts of this case. Finally, *In re Kaufman & Roberts, Inc.*, 188 B.R. 309, 314 (Bankr. S.D. Fla. 1995) is inapposite because the issue in that case dealt with the defendant's assertion that "the state court action is duplicative and that the Trustee should be required to pursue any claim under Florida law in that forum."

Defendants will not belabor the arguments they already made with regard to *Gruntz* and *McGhan* (AOB 19–21). But, Defendants point out that the Trustee failed to respond to their citation to *Bear v. Coben (In re Golden Plan)*, 829 F.2d 705, 711–712 (9th Cir. 1986) and *In re Loloee*, 241 B.R. 655, 660 (B.A.P. 9th Cir. 1999), which enforce FED. R. BANKR. P. 7001 and require an adversary proceeding instead of some other form of proceeding for fraudulent transfer claims. AOB 20. Thus, the Court may treat this failure as a confession of error. *See* NRAP 31(d)(2); *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (imposing a confession of error where certain arguments were avoided in the answering brief).

3. The Trustee's Argument that the Bankruptcy Court "Blessed" His Ability to Pursue the Herbst Parties' Fraudulent Transfer Claim Is Not Properly Before the Court.

In an effort to bolster his argument, the Trustee argues that the Bankruptcy Court "blessed" the District Court's authority to adjudicate the claims. However,

the Bankruptcy Court's order cited in the answering brief abstained from hearing this case. 18 AA 2813, ¶ 8. As a matter of law, the Bankruptcy Court cannot both abstain from the case and simultaneously comment on the merits of the case. As a matter of law, abstention under section 305 dismisses or suspends the entire bankruptcy proceeding. *In re Bellucci*, 119 B.R. 763, 771 (E.D. Cal. 1990) (citing 11 U.S.C. § 305).

Additionally, the Trustee offers only an unfiled hearing transcript before the Bankruptcy Court from June 6, 2019, while this appeal was pending. 1 Respondent's Appendix ("RA") 163. Yet, this transcript is not subject to judicial notice under either NRS 47.103 or NRS 47.140, particularly because the transcript does not identify any governing law, it is unfiled, and it was dated after this appeal was already docketed in this Court.

According to NRAP 10(a), "[t]he trial court record 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." (emphasis added). NRAP 30(c)(1) mandates that "[a]ll documents included in the appendix shall be placed in chronological order by the dates of filing beginning with the first document filed, and **shall bear the file-stamp of the district court clerk**, clearly showing the date of the document was filed in the proceedings below." (emphasis added). With respect to the presentation of documents not filed in the

District Court, this Court has articulated, "We cannot consider matters not properly appearing in the record on appeal." *Carson Ready Mix, Inc. v. First Nat'l Bank of Nevada*, 97 Nev. 474, 476, 635 P. 2d 276, 277 (1981); *see also State ex rel. Sisson v. Georgetta*, 78 Nev. 176, 178, 370 P.2d 672, 673 (1962) (striking documents in writ petition proceeding that were not part of the underlying court's record). As the Court previously denied Defendants' motion to strike this fugitive transcript, the Court should elect to disregard it in resolving the issues presented in this appeal.

4. <u>The Trustee's Standing Argument Is Misplaced.</u>

The Trustee once again avoids the District Court's lack of subject matter jurisdiction by arguing that Defendants impliedly consented to such lack of jurisdiction. RAB 23–24. However, subject matter jurisdiction cannot be waived, even with a stipulation. *See Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990). With a citation to *Contrail Leasing Partners v. Executive Serv. Corp.*, 100 Nev. 545, 549 n.2, 688 P.2d 765, 768 n.2 (1984), the Trustee characterizes Defendants' argument on this point as a waived standing argument. However, *Contrail* does not specifically discuss standing. *Id.* In any event, standing is a matter of subject matter jurisdiction and cannot be waived. *See Applera Corp. v. MP Biomedicals, LLC*, 173 Cal. App. 4th 769, 785, 93 Cal. Rptr. 3d 178, 192 (Cal. App. 2009) ("A party's standing can be raised at any time in the litigation, even for the first time on appeal.") (citation omitted).

5. The Trustee Largely Misconstrues Defendants' Argument Regarding the Trustee's Inability to Pursue Claims Belonging to and for the Benefit of the Herbst Parties.

In their opening brief, Defendants argued that the Trustee was without authority to appear in the District Court on behalf of the Herbst Parties to pursue their sole claim of fraudulent transfer for their benefit. AOB 21–24. The Trustee largely misconstrues this argument and instead argues that he had the authority to pursue the fraudulent transfer claim for the Herbst Parties—without addressing that the fraudulent transfer claim only benefitted the Herbst Parties. RAB 24–27. Notably, the Trustee's own authority, from an earlier argument section (RAB 21), supports the very argument that Defendants have presented to this Court. *See In re Rosenblum*, 545 B.R. 846, 857 (Bankr. E.D. Pa. 2016) (confirming that "11 U.S.C. 544(b) allows the bankruptcy trustee to step into the shoes of a creditor for the purpose of asserting causes of action under state fraudulent conveyance acts for the benefit of all creditors, **not just those who win a race to judgment**") (emphasis added). As such, almost the entirety of the Trustee's argument on this issue is inapposite. RAB 25–27. The District Court's findings reflect that the Trustee stepped into the shoes of the Herbst Parties, but does not specifically mention any other creditors. 48 AA 8301. Thus, the Trustee's pursuit of this litigation on behalf of the Herbst Parties' own interest violates his own citation to *Rosenblum*.

It is undisputed that the Herbst Parties originally had authority from the Bankruptcy Court to pursue the fraudulent transfer claims—for their own interest. 18 AA 2813. At no point in either the District Court or the Bankruptcy Court was the Trustee granted authority to pursue the Herbst Parties' sole claim for fraudulent transfer. Defendants cited to *In re New England Fish Co.*, 33 B.R. 413, 419 (Bankr. W.D. Wash. 1983) ("It is well settled bankruptcy law that on important decisions, whatever their character, the trustee must get the court's approval . . . .") (citing *Newport v. Sampsell*, 233 F.2d 944, 946 (9th Cir. 1956)). AOB 22. Notably, these authorities use the phrase "whatever their character," but the Trustee attempts to limit these holdings to their facts, while avoiding the specific language. RAB 23 n.49.

6. The Trustee Does Not Meaningfully Respond to Defendants' Argument that the Herbst Parties' Fraudulent Transfer Claim Was Personal and, Therefore, Could Not Be Assigned Under Nevada Law.

In responding to Defendants' argument that *Reynolds v. Tufenkjian*, 461 P.3d 147, 152 (Nev. 2020) prevents an assignment of fraud claims (AOB 23), as a matter of Nevada law, the Trustee asserts that a fraud claim is distinct from a fraudulent transfer claim. RAB 24–25. Tellingly, the Trustee acknowledges that fraud claims are personal and, therefore, not assignable under Nevada law. RAB 24. However, the Trustee then asserts that a fraudulent transfer claim should be construed under

bankruptcy law. RAB 25. But, at the time the Bankruptcy Court acknowledged the Herbst Parties' fraudulent transfer claim, it was characterized under state law. 18 AA 2813. Thus, the question before this Court is whether the Herbst Parties' state law fraudulent transfer claim was personal to them, such that it could not be assigned under *Reynolds*. *Cf. Tower Homes, LLC v. Heaton*, 377 P.3d 118, 121, 132 Nev. 628, 633 (2016) ("The decision as to whether to bring a malpractice action against an attorney is one peculiarly vested in the client.") (citation omitted).

In *Reynolds*, 461 P.3d at 151, this Court cited to *Gruber v. Baker*, 20 Nev. 453, 469, 23 P. 858, 862 (1890), which voided the assignment of a right to bring a claim in action for fraud as being contrary to public policy because a fraud claim is personal to the one defrauded. Notably, *Gruber* involved fraud in obtaining mining claims. *Id.*, 20 Nev. at 460, 23 P. 858; *see also Prosky v. Clark*, 32 Nev. 441, 445, 109 P. 793, 794 (1910) (stating that fraud claims are not assignable because they "are personal to the one defrauded"). This Court further clarified that when an injured party retains control of his lawsuit without any interference from a third-party assignee, the proceeds are assignable. *Reynolds*, 461 P.3d at 151.

By the Trustee's own admission, the Herbst Parties relinquished control of their claim. RAB 25. Additionally, Nevada law references "badges of fraud" in the context of fraudulent transfer cases. *See, e.g., Sportsco Enters. v. Morris*, 112 Nev. 625, 632, 917 P.2d 934, 938 (1996) ("[W]here the creditor establishes the existence

of certain indicia or badges of fraud, the burden shifts to the defendant to come forward with rebuttal evidence that a transfer was not made to defraud the creditor."). Indeed, this Court further recognized that "indicia of fraud" are another way to characterize the badges of fraud. *Id.* (citation omitted); NRS 112.180(2). In essence, the term "fraud" is used within a claim for fraudulent transfer within Nevada law.

Additionally, the Herbst Parties' amended complaint, even after the Trustee substituted in, alleged notions of fraud personal to the Herbst parties. *See, e.g.,* 4 AA 600, ¶ 30 ("the transfers were intentional"); 602, ¶ 31 ("these transfers were done in an effort to avoid the Herbst Entities' efforts"); 603, ¶ 42 ("transfers by the Debtor to the Defendants were made with the actual intent to hinder, delay, and defraud the Herbst Entities as a creditor of the Debtor"). Therefore, on this additional basis, the Court should determine that the Trustee's purported prosecution of the Herbst Parties' fraudulent transfer claim was void, as a matter of law.

C. THE TRUSTEE'S RESPONSE TO DEFENDANTS' ARGUMENT REGARDING THE DISTRICT COURT'S LACK OF SUBJECT MATTER JURISDICTION OVER THE BAYUK TRUST AVOIDS CONTROLLING LAW.

In their opening brief, Defendants argued that the District Court lacked subject matter jurisdiction over the Bayuk Trust, such that the District Court's judgment, as it relates to the Bayuk Trust is void. AOB 24–26. Defendants relied principally upon *In re Aboud Inter Vivos Tr.*, 129 Nev. 915, 921–922, 314 P.3d 941, 945–946

(2013) for the distinction between *in personam* jurisdiction and *in rem* jurisdiction. Instead of addressing the distinction outlined by this Court, the Trustee offers only a footnote that *Aboud* is supposedly inapposite because it involves a trust administration. RAB 28 n.52. Yet, *Aboud* relied upon *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 453, 124 S.Ct. 1905 (2004) for the legal principal that there must be separate *in rem* jurisdiction over a trust to enter a judgment against a trust, which is separate from personal jurisdiction to enter judgment against a person. *Aboud*, 129 Nev. at 921–922, 314 P.3d at 945–946. Defendants further relied upon the seminal case *Hanson v. Denckla*, 357 U.S. 235, 250, 78 S.Ct. 1228, 1238 (1958), which held, "Since a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction. Therefore, so far as it purports to rest upon jurisdiction over the trust assets, the judgment of the Florida court cannot be sustained." AOB 25. Noticeably missing from the Trustee's answering brief is any response to *Hanson*.

The Trustee's answering brief first argues that NRS Chapter 164 is not relevant to the jurisdictional issue because this case does not involve a trust administration. However, the distinction in *Aboud*, 129 Nev. at 921–922, 314 P.3d at 945–946 was not limited to trust administration cases. Rather, this Court's

discussion on jurisdiction was presented as a general matter. Thus, the Trustee has failed to distinguish the controlling language in *Aboud*.

The Trustee next attempts to justify the void judgment against the Bayuk Trust by relying upon *Klabacka v. Nelson*, 394 P.3d 940 (Nev. 2017). However, the full caption of *Klabacka* includes "LSN Nevada Trust dated May 30, 2001" as a party to the appeal, along with the various individuals and trustees. As such, *Klabacka* actually supports Defendants' position. In any event, this Court explained that since *Klabacka* was a divorce proceeding, the family court had jurisdiction over the trust based upon NRS Chapter 125. *Id.* at 946.

The Trustee offers an additional section in his answering brief that attempt to conflate *in rem* and *in personam* jurisdiction—contrary to *Aboud*, 129 Nev. at 921–922, 314 P.3d at 945–946. RAB 30–31. However, none of these cases distinguish *Aboud* or attempt to overrule it. These cases from other jurisdictions simply reach a different conclusion than *Aboud*. Defendants acknowledge that other courts have reached different conclusions than *Aboud*. But, the distinctions in *Aboud* are controlling and support Defendants' position that the District Court lacked subject matter jurisdiction over the Bayuk Trust.

The Trustee finally argues that other cases within Nevada actually support his theory that suing a trustee of a trust is the same as suing the trust itself. RAB 32–34. But, the Trustee's cited Nevada cases do not actually reach this conclusion. For

example, *Causey v. Carpenters S. Nev. Vacation Trust*, 95 Nev. 609, 610, 600 P.2d 244, 245 (1979) states, "It is the trustee, or trustees, rather than the trust itself that is entitled to **bring** suit." (emphasis added). As such, *Causey* is not parallel to the instant case because a trust is not "bringing" suit in the instant. Rather, the Bayuk Trust was never sued as a defendant. The remaining cases in the Trustee's answering brief fall into the same distinction as *Causey* or they simply contradict the controlling authority in *Aboud*. Although the Trustee cites to *Thomas & Kathleen Garland Family Trust v. Melton*, 460 P.3d 31, Dkt. No. 77182-COA (Nev. Ct. App. 2020) (unpublished) as an attempted extension of *Causey*, this case cannot be cited as an unpublished order from the Court of Appeals. *See* NRAP 36(c)(3) ("Except to establish issue or claim preclusion or law of the case as permitted by subsection (2), unpublished dispositions issued by the Court of Appeals may not be cited in any Nevada court for any purpose."). Thus, *Melton* also does not overcome *Aboud*. Accordingly, the Court should conclude that the District Court lacked subject matter jurisdiction over the Bayuk Trust, such that the judgment entered against it is void.

D. THE DISTRICT COURT'S MISINTERPRETATION OF NRS 49.095 AND NRS 49.115 PERMEATED THE ENTIRE TRIAL AND THE DISTRICT COURT'S DECISION, JUSTIFYING A NEW TRIAL.

In their opening brief, Defendants first outlined general principles regarding the attorney-client privilege and the common interest privilege. AOB 26–28.

Defendants then outlined the District Court's absurd interpretation of these privileges that allowed not only the discovery of the Debtor Paul Morabito's confidential communications with his former attorneys, but also Defendants' confidential communications. AOB 28–32. Defendants then outlined that the District Court's absurd interpretation of these privileges deprived them of a fair trial, aside from the fact that the various emails were not otherwise admissible as evidence. AOB 32–36. Finally, Defendants asked this Court for a new trial, as an alternative to declaring the entire judgment void, before a different District Judge due to the inadmissible evidence that the Judge already heard and expressed an opinion. AOB 36–37 (citing *FCH1, LLC v. Rodriguez*, 326 P.3d 440, 446 (Nev. 2014)). Due to his failure to respond, the Trustee does not oppose the reassignment of this case on remand if the Court orders a new trial. *See* NRAP 31(d)(2); *Bates*, 100 Nev. at 682, 691 P.2d at 870 (imposing a confession of error where certain arguments were avoided in the answering brief).

1. The District Court's Interpretation of NRS 49.095 and NRS 49.115 Was Absurd.

On the merits of these arguments, the Trustee argues that since it stood in the shoes of the Debtor, Paul Morabito, it was entitled to his confidential communications. RAB 39–41. Defendants do not deny this narrow issue, nor did they argue against this ruling in their opening brief. However, the dispute on this

issue focuses on the District Court's further orders that allowed the Trustee to obtain Defendants' confidential communications. *See, e.g.,* 7 AA 1113–1126. Tellingly, the Bankruptcy Court was unwilling to reach the disclosure of Defendants' confidential communications, as a matter of Nevada law.

Since the Bankruptcy Court has jurisdiction over the Debtor, Paul Morabito, the Bankruptcy Court make the rulings with respect to Paul Morabito based upon bankruptcy law. "If the allegations can be proven, this would appear to be the only court that would have jurisdiction over Mr. [Paul] Morabito. And its jurisdiction over Mr. Morabito is asserting the privilege that is the critical issue before me… Any order I issue will just be dealing with the privilege that's being asserted of Mr. Morabito." 5 AA 872. Understandably, when ruling upon Paul Morabito's privilege, the Bankruptcy Court explained, "[S]tate law does not supply the rule decision for privilege determination." 5 AA 875.

With this context, the Court can understand why the analysis of the privilege with respect to the Debtor Paul Morabito was based upon bankruptcy law. However, because the privilege issues in this appeal arose in the District Court, the rulings should have been wholly based upon the law governing Nevada. *Cf.* 7 AA 1113–1126. As a matter of Nevada law, Defendants should not have had their confidential communications under the common interest rule ordered disclosed to the Trustee. *See, e.g., Cotter v. Eighth Judicial Dist. Court of Nev.*, 416 P.3d 228, 230 (2018)

(explaining that the common interest rule allows "attorneys to share work product with third parties that have a common interest in litigation without waiving the work-product privilege"). Instead of acknowledging *Cotter* and other Nevada law, the Trustee relies upon bankruptcy law that is not controlling in Nevada. RAB 39.

The Trustee next argues in his answering brief that based upon federal law, he was only required to present a prima facie case of crime or fraud to pierce Defendants' common interest privilege. RAB 37–38. However, NRS 49.115(1) contains no such prima facie language: "If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." But, as Defendants pointed out in their opening brief, the District Court was undecided on whether there was any fraud. 19 AA 2982–2997. As such, the Trustee should have been required to prove its case against Defendants without the benefit of their confidential communications. *See We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008) (stating that the Court must interpret a statute in harmony with other statutes "to avoid unreasonable or absurd results").

2. With the Backdrop of a Forced Waiver of the Attorney-Client Privilege, Defendants Were Deprived of a Fair Trial.

In addition to the forced waiver of their attorney-client privilege, in their opening brief, Defendants illustrated Exhibit 145 (26 AA 4379–4418) which was

not authenticated and hearsay. AOB 32. Yet, instead of focusing on Nevada law, the Trustee argues that bankruptcy and federal law on evidence should apply in the District Court. RAB 43. However, the determination of Defendants' privileges must be based upon Nevada law to afford them the statutory protections that they are due. *See Canarelli v. Eighth Judicial Dist. Court of Nev.*, 464 P.3d 114, 136 (Nev. 2020) ("[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected."). To illustrate that Defendants' substantial rights were materially affected, they indicated in their opening brief that the privilege issue was widespread. AOB 36.

The Trustee's support of the District Court's rulings on NRS 51.345 and NRS 51.035 further demonstrate the exacerbation of the District Court's erroneous ruling on Defendants' attorney-client privilege and common interest privilege. RAB 44–46. In essence, the Trustee used the unauthenticated statements of Defendants' counsel against Defendants to prove his claim for fraudulent transfer. Aside from the fact that the District Court's rulings on these two issues were erroneous (AOB 32–36), the hypothetical chain built by the District Court allowed the Trustee to (1) step into the shoes of the Herbst Parties, who were creditors, and obtain their confidential and privileged information; (2) step into the shoes of the Debtor Paul Morabito and obtain his confidential and privileged information; (3) treat Paul

Morabito as adverse to Defendants, even though he was no longer a party to the case, to obtain Defendants' confidential information; and (4) then use Defendants' confidential information against them, as if it were their own statements. 7 AA 1113–1126. Because the District Court's interpretation, as well as the result, is absurd as a matter of law, this Court should, alternatively, order a new trial before a new District Judge. *Cf. Heaton*, 132 Nev. at 635, 377 P.3d at 123 ("Allowing such assignments would embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.") (citations and internal quotation marks omitted).

III. CONCLUSION

In summary, Defendants ask this Court to determine that due to the nature of Defendants' arguments on the District Court's lack of subject matter jurisdiction, Defendants' first two issues are not waived for review before this Court. Based upon the substance of Defendants' arguments, they also ask this Court to vacate all the District Court orders for lack of subject matter jurisdiction, due to the nature of this litigation, and the Trustee's inability to pursue the fraudulent transfer claim that belonged to the Herbst Parties. Defendants further ask this Court to vacate the District Court's judgment against the Bayuk Trust since no *in rem* action was filed against it, which is also an issue of subject matter jurisdiction.

Alternatively, Defendants ask this Court for a new trial based upon the District Court's absurd interpretation of the attorney-client privilege, which impermissibly allowed the Trustee to have access to Defendants' own privileged information. If the Court alters the judgment in any way, the awards of attorney fees and costs to the Trustee should be vacated. If there are any further proceedings in the District Court, the Court should assign a new District Judge since the current District Judge has already heard and ruled upon the evidence that should have been excluded.

Dated this 14th day of December 2020.

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CERTIFICATE OF COMPLIANCE

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

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

☒ proportionally spaced, has a typeface of 14 points or more and contains 5,850 words; or

☐ does not exceed _____ pages.

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

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

Dated this 14th day of December 2020.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANTS' REPLY BRIEF** was filed electronically with the Supreme Court of Nevada on the 14th day of December 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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