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Elizabeth A. Brown
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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.: 80214

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

OPPOSITION TO MOTION TO CONFIRM APPELLATE JURISDICTION AND MOTION TO CONSOLIDATE APPEALS

Docket 80214 Document 2020-05063

Respondent William A. Leonard, Trustee for the Bankruptcy Estate of Paul Anthony Morabito ("Respondent"), by and through his counsel, Garman Turner Gordon LLP, hereby respectfully submits his opposition (the "Opposition") to the *Motion to Confirm Appellate Jurisdiction and Motion to Consolidate Appeals* (the "Motion"), filed by Appellants Superpumper, Inc. ("Superpumper") Edward Bayuk ("Bayuk"), Salvatore Morabito ("Salvatore"), and Snowshoe Petroleum, Inc. ("Snowshoe") (collectively the "Appellants") on January 29, 2020.

I.
INTRODUCTION

Appellants' motion is an improper request to confirm appellate jurisdiction where there is none. Without appellate jurisdiction, this Court similarly lacks jurisdiction to issue advisory opinions on how a party should proceed to this Court. The Motion must be denied. In the event that this Court does not dismiss the appeal outright for lack of jurisdiction, it should deny Appellants' improper attempts to bootstrap its infirm appeal related to post-judgment collection efforts by consolidating it with the underlying appeal of the judgment. Consolidation is not appropriate here. While arising in the same underlying case and (albeit, improperly) naming the same Appellants, there are no common questions to be resolved.

II.
STATEMENT OF FACTS

1. On March 29, 2019, following an eight day trial, the Honorable Connie Steinheimer of the Second Judicial District Court (the "District Court") issued a 63-page *Findings of Fact, Conclusions of Law, and Judgment* (the "Judgment"), attached hereto as **Exhibit "1",** awarding judgment in favor of Respondent, and against Appellants, for avoidance and recovery of certain fraudulent transfers.

2. Specifically, the evidence adduced at the lengthy District Court trial established that within weeks of a September 2010 oral decision of Honorable Brent Adams awarding damages in excess of $149 million against Paul Morabito

("Morabito"), Morabito transferred the following assets to, among others, his brother and companion:

- $6 million in cash; Ex. 1 at p. 41, ¶ 25;
- various real properties, worth $3,916,250; *Id*. at p. 48, ¶ 46, p. 50, ¶ 50(a);
- a 50% ownership interest in Baruk LLC, worth $1,654,550; *Id*. at p. 48, ¶ 46; p. 50, ¶ 50(a);
- an 80% equity interest in Superpumper's parent, worth $10,440,000; *Id*. at p. 48, ¶ 46; p. 50, ¶ 50(a);
- furniture and personal property; *Id*. at p. 48, ¶ 46.

3. Following additional post-Judgment briefing, on August 7, 2019, this Court docketed an appeal filed by Appellants, thereby commencing Case No. 79355 (the "First Appeal"). The First Appeal seeks review of: (1) the Judgment, (2) the *Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment*; (3) the *Order Granting in Part and Denying in Part Motion to Retax Costs*, and (4) the *Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68*. *See* Notice of Appeal, at **Exhibit "2."**

4. The issues raised in the First Appeal are fairly straightforward, seeking review of judgments and orders related to an action under the Nevada Uniform Fraudulent Transfer Act ("UFTA"), at NRS 112.140, *et. seq*., to avoid and recover the transfers by Morabito to the Appellants, as well as fees and costs incurred in connection therewith.

5. On July 2, 2019, following efforts by Respondent to collect on the Judgment, Appellants Bayuk and Salvatore each filed a *Notice of Claim of Exemption from Execution* (the "Claim Exemptions") and Bayuk further filed a *Third Party Claim to Properly Levied Upon NRS 31.070* (the "Third Party Claim"), which were heard and denied by the District Court on August 2, 2019 and August 9, 2019.

6. Thereafter, Bayuk and Salvatore filed *Defendants' Motion to Make Amended or Additional Findings Under NRCP 52(b), or in the Alternative, Motion for Reconsideration and Denying Plaintiff's Countermotion for Fees and Costs Pursuant to NRS 7.085*, which was likewise denied by the District Court on November 8, 2019.

7. On December 13, 2019, this Court docketed an appeal in Case No. 80214, which was also filed by Appellants (the "Second Appeal," and together with the First Appeal, the "Appeals"). It is unclear how Appellants collectively filed the Second Appeal, when the orders appealed from only related to Bayuk and Salvatore.

8. The Second Appeal seeks review of: (1) the *Order Denying [Salvatore] Morabito's Claim of Exemption* (the "Salvatore Order"); (2) the *Order Denying Bayuk's Claim of Exemption and Third Party Claim*; and (3) the *Order Denying Defendants' Motion to Make Amended or Additional Findings Under NRCP 52(b), or in the Alternative, Motion for Reconsideration and Denying Plaintiff's Countermotion for Fees and Costs Pursuant to NRS 7.085* (collectively, the "Exemption Orders"). *See* Notice of Appeal, at **Exhibit "3."**

9. The issues raised in the Second Appeal are also fairly straightforward, seeking review of claimed exemptions and a third-party claim, which have nothing to do with the facts of the underlying Judgment, but instead, parties' purported rights with respect to collection.

III.
LEGAL ARGUMENT

A. This Court Does Not Have Jurisdiction Over the Second Appeal, and the Second Appeal Should be Dismissed.

The Supreme Court's appellate jurisdiction is limited such that it may only consider appeals authorized by statute or court rule. *Brown v. MHC Stagecoach*, 301 P.3d 850, 129 Nev. 343 (2013). NRAP 3A(b) identifies those judgments and

orders arising in a civil action from which an appeal may be taken. *See* NRAP 3A(b)(1)-(10).

The Second Appeal is an appeal of orders denying claims of exemption and a third-party claim. As Appellants concede, "the question remains whether the two claims of exemption are appealable." See Motion, p. 3. Surprisingly, however, Appellants then offer no compelling argument to support jurisdiction with this Court to hear the Second Appeal. Instead, Appellants seek to pigeonhole the Exemption Orders into subsection (8) of NRAP3A(b), which provides:

> (8) A special order entered after final judgment, excluding an order granting a motion to set aside a default judgment under NRCP 60(b)(1) when the motion was filed and served within 60 days after entry of the default judgment.

See Motion, p. 3, *see* NRAP3A(b)(8). Appellants' efforts are not persuasive.

Appellants concede that in order for a special order entered after final judgment to be appealed, the special order must be "an order affecting the rights of some party to the action, growing out of the judgment previously entered. *It must be an order affecting rights incorporated in the judgment.*" *Gumm v. Mainor*, 118 Nev. 912, 920, 59 P.3d 1220, 1225 (2002). *See* Motion, p.3 (emphasis added). The Exemption Orders are not orders affecting rights under the Judgment. Instead, the Exemption Orders resulted from an attempt to collect on the Judgment. Thus, the Exemption Orders affecting rights of parties against whom possession or attachment is pursued involve completely different questions than whether the District Court abused its discretion in determining that fraudulent transfers occurred.

Having no jurisdiction, Appellants request, in the alternative, "to convert this appeal into an original proceeding … or simply allow Appellants to refile this case as a new original proceeding." *See* Motion, p. 4. Appellants do not support the

request with authority, and Respondent is not aware of any rule or statute that would permit this Court to convert an appeal over which it has no jurisdiction or otherwise approve the filing of an original proceeding that is not properly before this Court. Therefore, the unsupported request for relief must likewise be denied.

B. <u>The Court Should Not Consolidate the First Appeal and Second Appeal.</u>

When separate timely appeals have been filed by the parties, they may be consolidated. *See* NRAP 3(b)(2). As discussed above, the Second Appeal is untimely, defeating consolidation.

Further, no administrative convenience will result from consolidation here. The First Appeal is not an appropriate bootstrap that will facilitate easier disposition because there are no common issues of fact or law. The First Appeal is a review of the underlying Judgment, which requires an analysis of the UFTA. The Judgment was based on extensive factual findings and credibility determinations following a bench trial in which the District Court concluded that the subject transfers were actually fraudulent under NRS 112.180(a)(1), as made with intent to hinder, delay, or defraud; the transfers were constructively fraudulent under NRS 112.180(a)(2), as Morabito did not receive reasonably equivalent value in exchange for the transfers and he was left with insufficient assets to even meet his basic expenses; and that Appellants did not establish a defense under NRS 112.210 or NRS 112.220(1) or (4) because Appellants did not show that they did not know or have reason to know of Morabito's intent to hinder, delay, or defraud. *See generally* Judgment. The First Appeal, therefore, primarily involves an analysis of the findings of fact and conclusions of law made by the District Court after considering all the evidence at trial over the course of the eight days of evidence. There are no issues in the First Appeal concerning Bayuk or Salvatore's ability to claim exemptions.

The Second Appeal, on the other hand, if even properly appealable for the reasons discussion herein, does not involve any questions related to the underlying Judgment but instead involves a review of whether the District Court abused its discretion in denying claimed exemptions and third party claims with respect to various unidentified assets.

Ultimately, the relevant facts and law that must be considered with respect to the First Appeal have absolutely nothing to do with the relevant facts and law that must be considered in the Second Appeal. Appellants failed entirely to present any support that could lead this Court to a different conclusion. Instead, the only argument Appellants make is that the issues presented in the appeals: "involve the same parties and the same underlying District Court case." *See* Motion, p. 4. Such a conclusory statement, without any further support, is not only improper and falls well short of establishing grounds to consolidate, but as further set forth above, is simply untrue.

While not raised in the initial Motion, Appellants have previously endeavored, and Respondent expects they may attempt to do so again in their reply, to try to reframe the First Appeal entirely to attempt to identify as issues on appeal matters raised for the first time not only after entry of the Judgment, but after Appellants' reconsideration motions were submitted and determined. Specifically, Appellants seek to define as issues on appeal: (1) whether the District Court lacked subject matter jurisdiction over the Case, due to Respondent's alleged failure to obtain specific authorization from the Bankruptcy Court; (2) whether the District Court lacked subject matter jurisdiction over the Bayuk Trust since no *in rem* action was filed against it and the Bayuk Trust was purportedly a spendthrift trust under NRS Chapter 166; and (3) whether the District Court erred by not applying the limitations period in NRS 166.170(1). However, these arguments were raised for the first time three months after entry of the Judgment through Bayuk's Claim of Exemption the Third-

Party Claim. This is the subject of the Second Appeal, and it is different than the issues raised in the First Appeal. The attempt to reframe the issues on appeal, which it appears Appellants are trying to again accomplish through this request to consolidate, is nothing more than a blatant attempt to improperly expand the issues of the First Appeal, which is improper.

In sum, the First Appeal address whether the District Court abused its discretion in factual determinations and application of the law outlined in the extensive Judgment. The Second Appeal addresses whether Appellants have a right to claim certain exemptions or make claims to assets that Respondent seeks to attach. Beyond arising in the same case and having some overlapping parties, these two Appeals have nothing in common.

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 February 5, 2020.

GARMAN TURNER GORDON LLP

By: */s/ Teresa M. Pilatowicz*

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CERTIFICATE OF SERVICE

I certify that on February 5, 2020, I electronically filed the foregoing **Opposition to Motion to Confirm Appellate Jurisdiction and Motion to Consolidate Appeals** 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

EXHIBIT 1

EXHIBIT 1

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, vs. SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, and individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	**CASE NO.: CV13-02663** **DEPT. NO. 4**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Trial on this matter commenced on October 29, 2018. Plaintiff William A. Leonard, Trustee for the Bankruptcy Estate of Paul Anthony Morabito ("Plaintiff"), appeared by and through counsel, Erika Pike Turner, Teresa Pilatowicz, and Gabrielle Hamm of the law firm of Garman Turner Gordon LLP. Defendants, Superpumper, Inc., an Arizona corporation ("Superpumper"); Edward Bayuk ("Bayuk"), individually and as Trustee of the Edward William Bayuk Living Trust (the "Bayuk Trust"); Salvatore Morabito, an individual ("Sam Morabito"); and Snowshoe Petroleum, Inc., a New York corporation ("Snowshoe," and together with Superpumper, Bayuk, the Bayuk Trust, and Sam Morabito, the "Defendants," and together with Plaintiff, the "Parties"), appeared by and through counsel, Frank Gilmore of the law firm of Robison, Sharp, Sullivan & Brust ("Robison"). On February 7, 2019, after notice and arguments heard by the parties, the Court

granted Plaintiff's motion to reopened evidence under NRCP 59(a) and admitted additional trial exhibits 305, 306, 307, 308, and 309 on February 8, 2019, to which Defendants waived rebuttal. After hearing the evidence and arguments of the parties, based thereon, the Court hereby finds, concludes, and enters the following Findings of Fact, Conclusions of Law, and Judgment.

Insofar as any conclusion of law is deemed to have been or include a finding of fact, such a finding of fact is hereby included as a factual finding. Insofar as any finding of fact is deemed to have been or to include a conclusion of law such is included as a conclusion of law herein.

I.
FINDINGS OF FACT

A. The Judgment Against Paul Morabito.

1. On December 3, 2007, Paul Morabito and Consolidated Nevada Corporation ("CNC") filed a lawsuit against JH, Inc., Jerry Herbst, and Berry-Hinckley Industries (together, the "Herbst Parties") captioned *Consolidated Nevada Corp., et al. v. JH, et al.* in the Second Judicial District Court (the "State Court"), Case No. CV07-02764, Department 6 (presiding, the Hon. Brent Adams) (the "Herbst Litigation").[1] The Herbst Parties filed counterclaims against Paul Morabito and CNC as well as a claim against Bayuk and Sam Morabito.[2]

2. On September 13, 2010, the State Court entered its oral ruling on the liability and damages portion of the trial, finding the Herbst Parties were fraudulently induced by Paul Morabito, justifying an award of $85,871,364.75 in actual damages in favor of the Herbst Parties against Paul Morabito and CNC, and dismissing Bayuk and Sam Morabito from liability (the "Oral Ruling").[3] Bayuk and Sam Morabito were present at the Oral Ruling.[4]

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[1] Stipulated Facts ("SF"), ¶ 1.

[2] *Id.*; Trial Transcript ("Trans").

[3] SF, ¶ 2; Trial Exhibit ("Exh.") 1, p. 22, l. 22 – p. 23, l. 24.

[4] SF, ¶ 2.

3. On October 12, 2010, the State Court entered its written findings of fact, conclusions of law and judgment reflecting the Oral Ruling (the "FF&CL").[5] On August 23, 2011, following the punitive damages phase of the trial, the State Court entered final judgment, awarding the Herbst Parties total damages against Paul Morabito and CNC in the amount of $149,444,777.80, including both compensatory and punitive damages for Paul Morabito's fraud (the "Final Judgment").[6] After entry of the Final Judgment, Paul Morabito and CNC filed numerous appeals with the Nevada Supreme Court (together with cross-appeals, the "Appeals").[7]

4. The Herbst Parties, Paul Morabito, and CNC agreed to settle the Herbst Litigation and the Appeals and, on November 30, 2011, executed a Settlement Agreement and Mutual Release (the "Settlement Agreement").[8] Pursuant to the terms of the Settlement Agreement, the Appeals were withdrawn and vacated, as were the FF&CL and Final Judgment, and Paul Morabito executed a Confession of Judgment for a compromised $85 million based upon the same findings of facts and conclusions of law, inclusive of those grounded in fraud, as set forth in the FF&CL.[9]

5. Paul Morabito and CNC defaulted under the terms of the Settlement Agreement.[10] By the time of the Settlement Agreement, the Herbst Parties had already experienced difficulty in collecting on the Final Judgment, as assets had been moved out of Paul Morabito's name.[11] Wanting to try to resolve the matter as opposed to engage in more collection actions, the Herbst Parties agreed to give Paul Morabito more time, and the Herbst Parties, Paul Morabito and CNC entered into a Forbearance Agreement dated March 1, 2013.[12] However, Paul Morabito and CNC

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[5] SF, ¶ 3; Exh. 2.

[6] SF, ¶ 4; Exh. 6.

[7] SF, ¶ 5.

[8] SF, ¶ 6; Exh. 5.

[9] SF, ¶¶ 6-7; Exh. 4, p. 10, § 2(k), and pp. 13-15, and Exh. 5.

[10] SF, ¶ 8.

[11] Exh. 5, p. 2, Sect. I-J; Trans. 10/29/18, p. 65, ll. 16-24.

[12] SF, ¶ 9; Exh. 6; Trans. 10/29/18, p. 12, ll. 12-17.

also defaulted under the terms of the Forbearance Agreement, making none of the due payment obligations.[13]

6. On June 18, 2013, the Herbst Parties filed the Confession of Judgment and the Stipulation of Nondischargeability (the "Confessed Judgment") and the Confessed Judgment was thereafter entered on the judgment roll of the Clerk of the State Court.[14]

B. The Bankruptcy.

7. On June 20, 2013, following Paul Morabito's defaults of the Settlement Agreement and Forbearance Agreement,[15] the Herbst Parties commenced an involuntary bankruptcy against Paul Morabito and CNC in the U.S. Bankruptcy Court for the District of Nevada (the "Bankruptcy Court").[16]

8. On December 17, 2014, the Bankruptcy Court entered an order adjudicating Paul Morabito a chapter 7 debtor.[17]

9. Multiple parties have filed claims in the Bankruptcy Court,[18] inclusive of the Herbst Parties' $77 million claim based on the unsatisfied Confessed Judgment.[19] There is currently no bar date for Paul Morabito's creditors to file their claims with the Bankruptcy Court.[20]

10. On April 30, 2018, the Bankruptcy Court entered judgment in favor of the Herbst Parties, determining that their claim evidenced by the Settlement Agreement and Confessed Judgment was nondischargeable under 11 U.S.C. § 523(a)(2), as the factual basis for the Confessed Judgment met each of the elements of fraudulent inducement under Nevada law and

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[13] SF, ¶ 10; Exh. 6, p. WL003105; Trans. 10/29/18, p. 69, ll. 2-9.

[14] SF, ¶ 11; Exh. 4.

[15] Trans. 10/29/18, p. 73, ll. 3-4.

[16] SF, ¶ 12.

[17] SF, ¶¶ 13-14.

[18] Exh. 303 (identifying five claims, including a $4,232,980.52 claim from the Franchise Tax Board).

[19] *See* Exh. 303; Trans. 10/29/18, p. 74, ll. 7-13, and p. 78, l. 19 – p. 79, l. 9.

[20] Trans. 11/2/18, p. 114, ll. 15-18.

nondischargeability under bankruptcy law.[21] Paul Morabito appealed the nondischargeability judgment, which appeal is pending.[22]

C. The Parties.

11. The Herbst Parties have spent nearly $10 million in fees and costs in their attempt to collect from Paul Morabito.[23] Still, approximately $80 million of the Confessed Judgment remains unsatisfied.[24]

12. As part of their collection effort, on December 17, 2013, the Herbst Parties commenced this action under NRS Chapter 112 (the "UFTA") for fraudulent transfer against transferor Paul Morabito, individually and as Trustee of his Arcadia Living Trust ("Arcadia Trust"), as well as transferees Superpumper, Bayuk, individually and as trustee of his Bayuk Trust, Sam Morabito, and Snowshoe.[25]

13. Sam Morabito is Paul Morabito's brother.[26] Sam Morabito resides in Canada, and is a former resident of Reno .[27]

14. Superpumper is an Arizona corporation that owns and operates gas stations and convenience stores in Arizona.[28] Consolidated Western Corporation, Inc., a Nevada corporation ("CWC") was the sole shareholder of Superpumper through September 28, 2010 when Sam Morabito executed a Plan of Merger and Articles of Merger upon Bayuk's consent on behalf of CWC, and filed Articles of Merger of CWC into Superpumper with the States of Arizona and

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[21] SF, ¶ 14; Exhs. 22 and 23, p. 11, ll. 14-18.

[22] *Id.*

[23] Trans. 10/29/18, p. 78, ll. 16-17; p. 78, l. 22 – p. 79, l. 1; p. 102, ll. 11-23l; p. 103, ll. 2-3.

[24] Trans. 10/29/18, p. 79, ll. 2-9.

[25] SF, ¶ 15.

[26] SF, ¶ 18.

[27] Trans. 10/31/18, p. 142, l. 5; 145, ll. 305; p. 164, ll. 16-19.

[28] SF, ¶ 36.

Nevada on September 29, 2010, thereby effectuating CWC's merger into Superpumper (the "Merger").[29]

15. Prior to the Merger, CWC's ownership was Paul Morabito -80%, Sam Morabito - 10% and Bayuk -10%,[30] and Paul Morabito, Bayuk and Sam Morabito each had a role as director and officer of Superpumper and CWC.[31] After the Merger of CWC into Superpumper, both Bayuk and Sam Morabito were directors and officers of Superpumper.[32]

16. On September 29, 2010, Dennis Vacco, ("Vacco"), joint counsel to Paul Morabito and the Defendants,[33] formed Snowshoe, a New York corporation,[34] for the purpose of acquiring Paul Morabito's interest in CWC.[35] Upon formation, Bayuk and Sam Morabito each owned 50% of the equity in Snowshoe and were designated as directors.[36] Snowshoe never had any other business operations or investments other than as a holding company for Superpumper's equity.[37]

17. From 1997 through at least the Oral Ruling date, Bayuk could be characterized as Paul Morabito's long-time boyfriend or companion.[38] The Bayuk Trust is Bayuk's self-settled trust formed and existing for estate-planning purposes.[39] While Bayuk and Paul Morabito were not registered as "domestic partners," Bayuk intimated that was only the case because they could not be married under Nevada or California law at that time.[40] Although Bayuk indicated that he

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[29] SF, ¶ 17; Exhs. 81-86.

[30] SF, ¶ 36.

[31] Trans. 10/29/18, p. 123, ll. 20-22; p. 125, l. 19 – p. 126, l. 6.

[32] SF, ¶¶ 16-19, 37.

[33] Trans. 10/31/18, p. 90, l. 19 – p. 91, l. 18.

[34] SF, ¶ 40; Exh. 87.

[35] Trans. 10/29/18, p. 148, ll. 21-24, p. 149, ll. 1-7; Trans. 11/6/18, p. 159, ll. 1-3.

[36] SF, ¶¶ 20, 40; Exh. 87, p. 1.

[37] Trans. 10/29/18, p. 185, l. 14 – p. 186, l. 1.

[38] SF, ¶ 19; Trans. 10/29/18, p. 110, ll. 5-9.

[39] Trans. 10/29/18, p. 143, ll. 13-18.

[40] Trans. 10/29/18, p. 120, ll. 18-24.

and Paul Morabito separated in 2010,[41] substantial evidence supports that there was a special close personal relationship between Bayuk and Paul Morabito at the time of the Oral Ruling and continuing thereafter even through the time of trial.

a. Vacco testified that as far as he knew, Bayuk and Paul Morabito had an ongoing relationship even after the subject transfers.[42]

b. On September 18, 2010, Paul Morabito emailed Vacco regarding judgment enforcement statutes and stated, "I should declare my residence with [Bayuk] in Laguna Beach asap..."[43] Consistent therewith, Paul Morabito and Bayuk moved from Reno to California.[44]

c. On September 23, 2010, Bayuk was added as a co-tenant on a West Hollywood, California residence leased in the name of Paul Morabito, rendering Bayuk and Paul Morabito jointly and severally liable for the lease obligations.[45]

d. On September 30, 2010, Paul Morabito executed an amendment and restatement of the Trust Agreement for his self-settled Arcadia Trust, which described Bayuk as Paul Morabito's "boyfriend and longtime companion," which Bayuk testified was true as of that date.[46] Bayuk was named the 70% beneficiary of the Arcadia Trust.[47]

e. On April 13, 2012, Paul Morabito represented that "[Bayuk] is my former long-time companion but we have a very strong personal relationship and he is my family and will be the central person in my life for the rest of my life."[48]

f. Paul Morabito currently resides in a home located at 370 Los Olivos, Laguna Beach, California (the "Los Olivos Property") along with his new boyfriend. The Los

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[41] Trans. 10/29/18, p. 109, ll. 15-17.

[42] Trans. 11/6/18, p. 212, l. 23 – p. 213, l. 15.

[43] Exh. 26; *see also* Exh. 29 (same, September 20, 2010); Exh. 32 (same, September 23, 2010).

[44] Trans. 10/29/18, p. 106, ll. 14-21.

[45] Exh. 35, p. 1, Sect. 1.

[46] Trans. 10/29/18, p. 147, ll. 14 – 23.

[47] Exh. 39, pp. RBSL001877-1878, 1903, 1906.

[48] Exh. 134, p. LMWF SUPP 068536.

Olivos Property is located adjacent to Bayuk's current residence at 371 El Camino del Mar, Laguna Beach, California (the "El Camino Property").[49] The Bayuk Trust owns both the Los Olivos Property and the El Camino Property as Paul Morabito transferred his interests in both the Los Olivos Property and the El Camino Property (along with all of the personal property in the Los Olivos and El Camino Properties) to the Bayuk Trust following the Oral Ruling.

g. Paul Morabito has been, and continues to be, financially supported by his brother, Sam Morabito, as well as by Bayuk.[50] Paul Morabito has possessed and used Bayuk's credit card with Bayuk paying the bills,[51] In addition, Bayuk pays Paul Morabito's attorneys' fees, and other amounts as directed by Paul Morabito.[52]

h. During the Herbst Litigation and through the time of trial in this case, Paul Morabito, Sam Morabito and Bayuk have had concurrent representation by the same counsel.[53]

18. In addition to their close personal relationship hallmarked by Bayuk's seemingly unwavering support of Paul Morabito,[54] Bayuk and Paul Morabito are also long-time business partners.[55] They co-owned multiple businesses before the Oral Ruling. Moreover, despite the alleged purpose of the subject transfers being to "separate" their financial interests, they co-owned a business after the Oral Ruling.[56]

19. On January 22, 2015, the Bankruptcy Court appointed Plaintiff as the trustee for the bankruptcy estates of Morabito and CNC.[57] On May 15, 2015, Plaintiff was substituted in

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[49] Trans. 10/29/18, p. 107, l. 10 –p. 108, l. 10.

[50] *See* Testimony of Paul Morabito, Deposition Trans. p. 27, ll. 10-16; p. 28, ll. 1-2; p. 31, l. 7- p. 33, l. 24.

[51] *Id.* at p. 34, ll. 14-20.

[52] Trans. 10/29/18, p. 188, ll. 19-23; p. 189, l. 7-9; 10/30/18, p. 98, l. 19 – p. 99, l. 7.

[53] Trans. 10/30/18, p. 5, l. 16 – p. 6, l. 8.

[54] Trans. 10/30/18, p. 98, l. 4 – p. 99, l. 7.

[55] SF, ¶ 19.

[56] *See, e.g.*, Testimony of Paul Morabito, Deposition Trans. p. 48, l. 16-p. 49, l. 24; Exh. 134, p. LMWF SUPP, p. 068536 (discussing Bayuk's co-ownership of Virsenet, a company formed in 2011 or 2012).

[57] SF, ¶ 21; Exh. 19.

place of the Herbst Parties in this case, and Paul Morabito and his revocable Arcadia Trust were dismissed from the action with only transferees of Paul Morabito's assets remaining in the case.[58]

D. Immediately After the State Court's Oral Ruling, Paul Morabito Implemented a Plan to Delay, Hinder and Prevent Collection by the Herbst Parties.

20. Within two days after the Oral Ruling, Paul Morabito had engaged at least two out-of-state law firms, Hodgson Russ LLP (attorneys-Garry Graber ("Graber") and Sujata Yalamanchili) and Lippes Mathias Wexler & Friedman ("LMWF") (attorneys-Vacco and Christian Lovelace), for advice on how to evade the Herbst Parties' judgment and to protect his assets.[59] In his email communications with lawyers from these firms,[60] Paul Morabito made clear his intent to thwart the Herbst Parties' enforcement of the judgment by cutting his (and Bayuk's) ties with Nevada and moving to California, while also converting and moving the majority of his assets that could be used to satisfy the Herbst Parties' judgment outside of Nevada.[61]

21. Graber of Hodgson Russ testified that he was engaged by Morabito to "protect his assets and/or escape liability on account of the judgment."[62] When asked which assets, Graber indicated "well, I think he was seeking to protect them all" and further specified that "I believe one of his principal assets which he expressed concern was his stock and his equity interest in an entity that was in the auto service business, I believe, and I believe that was this Superpumper entity."[63] When questioned regarding Paul Morabito's intent, Graber testified "I think he had an

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[58] SF, ¶ 22; Exh. 20.

[59] *See* Exh. 25 (Hodgson Ross indicating they had a number of ideas, "including a possible marital split between Paul [Morabito] and [Bayuk] pursuant to which [Bayuk] could retain some of Paul [Morabito's] assets" and Vacco of LMWF following with discussion of Paul Morabito selling his interest in CWC to Bayuk and Sam Morabito).

[60] Any attorney-client privilege was waived by Plaintiff. In addition, the privilege was deemed waived by the crime/fraud exception. See this Court's order of 7/6/16 (approving a Report & Recommendations of the Discovery Commissioner of 6/13/16).

[61] *See* Exhs. 26 (discussing moving to California) and 32 ("[Bayuk] and I plan on changing our primary residence from Reno to Laguna Beach.").

[62] Trans. 11/1/18, p. 29, ll. 13-18 and p. 30, ll. 21-22.

[63] Trans. 11/1/18, p. 33, ll. 1-6.

intent to avoid paying the judgment, whether that's by winning on appeal or divesting himself of his assets."[64] Ultimately, after Hodgson Russ attorneys advised Paul Morabito that he could not simply transfer his assets for value, Paul Morabito terminated them, as he did not like the advice that he was being provided.[65]

22. Paul Morabito utilized LMWF to complete the subject transfers. The same firm also concurrently represented Defendants.[66]

23. There is no evidence indicating that the subject transfers were contemplated before the Oral Ruling. The subject transfers were substantially completed in a short window of September 14, 2010 (the day after the Oral Ruling) to October 1, 2010, before any written order on the Oral Ruling was entered.[67]

24. At no time prior to, or at the time of, the subject transfers did Paul Morabito or any of the Defendants advise the Herbst Parties that Paul Morabito's assets were being converted or transferred, or any of the details of the subject transfers.[68]

25. Paul Morabito's email communications to his counsel contemporaneous with the subject transfers were inconsistent with the proffered explanation for the subject transfers that his goal was solely to separate out his interests from Sam Morabito and Bayuk once they were relieved from liability in the Herbst Litigation.[69] For example, in an email to counsel dated September 20, 2010, Paul Morabito recognized that the transfers would be challenged in court at the same time he described his intention to deprive the Herbst Parties of what he perceived to be the Herbst Parties' "home court, good old boy advantage."[70] In an email dated September 21, 2010, Paul

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[64] Trans. 11/1/18, p. 46, ll. 13-15.

[65] Trans. 11/1/18, p. 35, ll. 6-14.

[66] Trans. 10/29/18, p. 140, l. 8 – p. 141, l. 9.

[67] Exhs. 45, 46, 61, 80.

[68] Trans. 10/29/18, p. 62, ll. 15-20 (on line 20, first sentence only); p. 63, ll. 4-12.

[69] Deposition Testimony of Paul Morabito, Trans. p. 69, ll. 8-16.

[70] Exh. 29.

Morabito discussed his intention to continue to be active in the business of Superpumper, save and except as only an "advisor" with ownership to be in the name of Sam Morabito and Bayuk.[71]

1. **The $6,000,000 Cash Transfer.**

26. Immediately after the Oral Ruling, on September 14, 2010, Paul Morabito transferred $6 million out of his bank account.[72] While this transfer is not the subject of Plaintiff's claims here, the pattern of Paul Morabito's conduct in the same timeframe as the subject transfers is still relevant as evidence of Paul Morabito's intent. The story that Paul Morabito was merely separating his assets from Bayuk and Sam Morabito in September 2010 is belied by the transfer of Paul Morabito's $6 million from his account immediately following the Oral Ruling.

2. **The CWC/Superpumper Transfers.**

27. Prior to the Oral Ruling, Paul Morabito communicated his opinion of the value of Superpumper to the company's auditors,[73] as well as third-party potential business partners.[74]

28. Subsequent to the Oral Ruling, at the same time that the subject transfers were being contemplated, significant value was intentionally stripped out of CWC by Paul Morabito in conjunction with Sam Morabito and Bayuk.

a. On August 13, 2010, which was just prior to the Oral Ruling but while the Herbst Litigation was pending, CWC had $3 million in loan proceeds from a term loan obtained

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[71] Exh. 30.

[72] Exh. 37, p. 4, MORABITO (341).005352.

[73] Exh. 42 (May 5, 2009- $20 million value for 100% of equity in CWC); Exh. 43 (Mach 10, 2010- "nothing has materially changed" with respect to Paul Morabito's identified assets, including value).

[74] Exhs. 76, 77, 79. It is notable that in addition to both the State Court and the Bankruptcy Court finding that Paul Morabito had intentionally defrauded the Herbst Parties as the basis for their respective judgments against Paul Morabito, Bayuk, Paul Morabito's closest ally, admitted that Paul Morabito is not honest in his dealings with third parties and is not trustworthy. (Trans. 10/31/18, p. 28, l. 24 – p. 31, l. 2). Sam Morabito also confirmed that Paul Morabito is not honest in his communications with third parties (Trans. 10/31/18, p. 236, l. 6 – p. 237, l. 34). The Court is in the untenable position of being asked by Defendants to believe Paul Morabito (and his agent, Vacco) with regard to his intentions with respect to the subject transfers at the same time Defendants are asking the Court to disregard Paul Morabito's representations that there was significant value of the equity in Superpumper.

from Compass Bank (the "Compass Loan").[75] On September 14, 2010, Paul Morabito, Sam Morabito and Bayuk each took a $939,000 distribution from CWC,[76] which together totaled almost all of the $3 million in loan proceeds. On September 30, 2010, Sam Morabito and Bayuk each contributed $659,000 of their distribution monies back into Superpumper; however, Paul Morabito did not contribute any portion of his $939,000 distribution.[77] Instead, Paul Morabito executed a Term Note dated September 1, 2010, documenting a loan obligation from Paul Morabito to CWC for $939,000 (the "$939,000 Note").[78]

b. Prior to the Oral Ruling, Raffles, an insurance captive, was certificated in CWC's name (the "Raffles Asset"). The Raffles Asset was valued on September 30, 2010 at $2,234,175.[79] On September 21, 2010, Paul Morabito paid Sam Morabito $355,000.00 and paid Bayuk $420,250.[80] Sam Morabito and Bayuk testified that the purpose of these payments was for Paul Morabito to purchase Sam Morabito and Bayuk's interests in the Raffles Asset. There is no documentation whatsoever reflecting the purpose of these September 2010 payments to Sam Morabito and Bayuk. Further, it is undisputed that the title of the Raffles Asset was never transferred out of the CWC name to Paul Morabito,[81] and no one advised the Herbsts that any distributions of the Raffles proceeds they received would be payable to Paul Morabito,[82]

c. Then, CWC was merged into Superpumper.[83] The effect of the Merger was that amounts due to Superpumper from Paul Morabito and his affiliates were cancelled.[84]

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[75] SF, ¶ 38.

[76] SF, ¶ 38.

[77] Trans. 10/31/18, p. 126, l. 22 – p. 127, l. 2.

[78] Exh. 110.

[79] Exh. 256; *see also* Exh. 44, WL004539 (identifying Raffles Asset value of $2,352,017).

[80] Exh. 37, p. 4, MORABITO (341).005352.

[81] Trans. 10/31/18, p. 96, ll. 6-21.

[82] Trans. 10/31/18, p. 101, ll. 3-10.

[83] SF, ¶ 39.

[84] Exh. 144, p. 1, SPI NO PAM 00000018.

Inclusive, the $939,000 Note was cancelled. Paul Morabito had taken distributions over the years from Superpumper and those distributions were booked as loan receivables on the audited books of Superpumper.[85]

29. The ability to quickly manipulate Superpumper's financials in order to make it appear as if the company had little value is consistent with Bayuk's representation that Paul Morabito is a "financial genius when it comes to understanding financing."[86]

30. On September 30, 2010, after the distribution of the Compass Loan proceeds, transfer of CWC's right to distributions from the Raffles Asset, and the cancellation of Paul Morabito's loan receivables due to Superpumper, Paul Morabito sold his 80% equity interest in the merged CWC/Superpumper to Snowshoe pursuant to a Shareholder Interest Purchase Agreement (the "Superpumper Agreement").[87] As a result of this transfer (the "Superpumper Transfer"), Sam Morabito and Bayuk each received 50% of Paul Morabito's 80% equity interest in Superpumper. On January 1, 2011, Bayuk and Sam Morabito transferred their respective 10% interests in Superpumper to Snowshoe.[88]

31. While Sam Morabito and Bayuk contend that the purpose of the Superpumper Transfer, and related transactions, was for their exclusive benefit in order to separate their assets from Paul,[89] the billing records from LMWF show that the entirety of the transactions was billed to, and for the benefit, of Paul Morabito.[90] There was no bill to Sam Morabito or Bayuk. Further, Sam Morabito and Bayuk's contention on the purpose of the transactions provides no rational explanation for the Merger and the creation of a new company, Snowshoe, a New York corporation, to be the transferee of Paul Morabito's interest.

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[85] Trans. 11/1/18, p. 249, l. 8 – p. 250, l. 7.

[86] Trans. 10/29/18, p 225, ll. 6-17.

[87] SF, ¶ 41.

[88] SF, ¶ 42.

[89] Trans. 10/29/18, p. 130, ll. 9 -24; 10/31/18, p. 31, ll. 8-11.

[90] Exh. 294; Trans. 11/1/18, p. 10, l. 3 – p. 11, l. 22.

32. The Court finds the testimony and report of James McGovern, CPA/CCF, CVA, a CPA and forensic accountant for over 35 years ("McGovern"),[91] credible and accepts his valuation of the 100% equity interest in Superpumper as of September 30, 2010 at $13,050,000, placing Paul Morabito's 80% interest as of September 30, 2010 at $10,440,000.[92]

33. Through their joint counsel, Vacco, Paul Morabito, together with Bayuk, Sam Morabito, and Superpumper, ordered an appraisal to support the transfer of Paul Morabito's 80% interest—consistent with Paul Morabito's plan[93] to obtain appraisals to justify transfers intended to divest himself of any interest the Herbst Parties could attach. On October 13, 2010 (two weeks *after* the Superpumper Agreement), Spencer Cavalier of Matrix Capital Markets Group, Inc. ("Matrix") completed a valuation of Superpumper in which he opined that the value of 100% of the equity interest in Superpumper as of August 31, 2010 (one month before the Superpumper Transfer date) was $6,484,514, which equates to $5,187,611.20 for Paul Morabito's 80% interest (the "Matrix Valuation").

34. The Matrix Valuation is nearly identical to McGovern's valuation,[94] save and expect that Matrix inexplicably adjusted accounts receivables due to Superpumper from Paul Morabito and his affiliates (the "Insider Receivables") to zero[95] while McGovern included the Insider Receivables in his valuation.

35. The decision on whether to include the Insider Receivables in the valuation of Superpumper's equity requires inquiry into whether the Insider Receivables can be repaid.[96] McGovern relied on Superpumper's audited financial statements for 2009 to confirm his opinion

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[91] Trans. 11/1/18, p. 111, ll. 17-20.

[92] Exh. 91; Trans. 11/1/18, p. 123, ll. 2 -3.

[93] Exh. 29 (Paul Morabito's September 20, 2010 email to Vacco and Yalamanchili: "selling for value" will be allowed").

[94] Excluding the Insider Receivables (*i.e.*, non-operating assets) from his valuation, McGovern's valuation of the Superpumper equity was $6,550,000. *See* Exh. 91, pp. 8, 11 and 19 of the McGovern report, MCGOVERN 00009, 12, and 20; *see also* Trans. 11/1/18, p. 137, ll. 3-10.

[95] Exh. 235, at Exhibit 7 of 14.

[96] Trans. 11/1/18, p. 125, ll. 5-24.

that the Insider Receivables should be included in the valuation of Superpumper's equity, wherein the auditors concluded the Insider Receivables were valid and collectible.[97] Defendants take issue with the recognition of the Insider Receivables in determining the value of the Superpumper equity in light of the fact that there were no notes introduced relative to a majority of the Insider Receivables and the Merger wiped out the Insider Receivables in any event; however, the Court finds that McGovern's determination that the debt underlying the Insider Receivables was valid and collectible is corroborated by the fact that before the end of 2010, new written notes were executed by Sam Morabito and Bayuk, without any new consideration, and placed on the Superpumper books, and Sam Morabito and Bayuk certified that they had sufficient assets to pay the Insider Receivables obligations.[98]

36. To get to a lower value, LMWF, counsel (and therefore the agent) for Paul Morabito and Defendants, reduced the Matrix Valuation[99] by (1) $1,682,000 for the "Compass Term Loan" (the "Compass Reduction"), despite the fact that the outstanding amounts of the Compass Term Loan loaned to Superpumper's members were supposed to be repaid and indeed $1,318,000 had been returned by Sam Morabito and Bayuk by September 30, 2010[100] and Paul Morabito executed the $939,000 Note with a promise to repay his distributed $939,000,[101] and (2) $1,680,880 for a 35% "risk reduction" (the "Risk Reduction," and together with the Compass Reduction, the "Additional LMWF Reductions"). This resulted in an ultimate "acquisition value" for the Superpumper Transfer of $2,497,307. There was no attempt to show how anyone at LMWF, a law firm, was in any way qualified to determine or quantify the LMWF Reductions. The Risk

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[97] *Id.*; *see also* Exh. 42 (auditor's notes verifying Paul Morabito had sufficient net assets to satisfy Compass liquidity obligation and to support $7.2 million of receivables on Superpumper's books); Exh. 118, at GURSEY004850 (verifying the Inside Receivables were fully collectible); Trans. 11/1/18, p. 168, l. 9 – p. 169, l. 3 (the Insider Receivables were on current (due on demand) on the books and had not been written off or otherwise indicated as uncollectible).

[98] Exhs. 105, 122-123, 126.

[99] Exh. 236

[100] Trans. 10/31/18, p. 75, ll. 1-5; Trans. 11/1/18, p. 120, ll. 15-22.

[101] Exh. 244.

Reduction was based, at least in part, on (1) the defaults under the Compass Term Loan and under Superpumper's real estate leases that are the result of the voluntary distributions of the Compass Term Loan proceeds to Paul Morabito, Bayuk, and Sam Morabito on September 14, 2010 and the Merger[102] and (2) the risk that Bayuk and Sam Morabito would be sued for the fraudulent transfers.[103] Defendants fail to explain how defaults and fraudulent transfers they engineered support a 35% "risk reduction," particularly where purported defaults would not exist in an arms-length sale to a third party. Furthermore, both McGovern and Mr. Cavalier testified that they had already considered risk when valuing the equity in Superpumper, which is reflected in their discount rate.[104] Finally, whether or not there were actual defaults of Superpumper obligations as a result of the Compass Loan distributions, the Oral Ruling, the Merger or otherwise, they did not prove to be so material that they were not ultimately resolved.[105] Superpumper's auditors confirmed that Compass was even prepared to refinance the existing obligation upon receipt of the 2010 audited financials.[106]

37. The Court reviewed the testimony of Michele Salazar ("Salazar"). Salazar did not perform a valuation of Superpumper,[107] but rather she criticized the Matrix Valuation and McGovern's report as purportedly incorrect. Ultimately, Salazar has two primary criticisms of the reports, neither of which is supported. First, Salazar disagreed with Mr. Cavalier's capitalization rate in the Matrix Valuation and McGovern's discount rate because, according the Salazar, they failed to take into account company specific risks.[108] However, both Cavalier[109] and McGovern[110]

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[102] Trans. 11/6/18, p. 253, l. 21 – p. 255, l. 21.

[103] Trans. 11/6/18, p. 173, ll. 5-8.

[104] Trans. 11/1/18, p. 120, 12- p. 122, l. 23 (14.2% discount rate- McGovern); Trans. 11/6/18, p. 282, ll. 13 – p. 284, l. 5 (13.25% to 13.4% capitalization rate- Matrix).

[105] Exhs. 27 and 33; Trans. 10/31/18, p. 122, ll. 16-22.

[106] Trans. 11/1/18, p. 253, l. 16 – p. 254, l. 9.

[107] Trans. 11/5/18, p. 101, l. 17 – p. 102, l. 2.

[108] Trans. 11/5/18, p. 60, l. 16 – p. 63, l. 18; p. 93, l. 24 – p. 94, l. 13.

[109] Trans. 11/6/18, p. 282, l. 19 – p. 286, l. 17.

[110] Trans. 11/1/18, p. 122, ll. 6-23; Exh. 91, McGovern 000018 and McGovern 000053-75.

testified as to the company specific risks they applied and tellingly, both came up with similar rates. Second, Salazar criticized McGovern for including the Insider Receivables in his valuation because, according to Salazar, there were no written notes and, as a result, the Insider Receivables could not be found to be valid and collectible.[111] Salazar's conclusion is directly contradicted by the testimony of Gary Kraus, Superpumper's auditor, who confirmed the Insider Receivables were valid and collectible obligations.[112]

38. Immediately following the 2016 deposition of Jan Friederich, a witness designated by Defendants as a rebuttal expert on the value of Superpumper's equity, Snowshoe transferred its equity to Supermesa Fuel & Merc, LLC ("Supermesa"), an entity affiliated with Mr. Friederich.[113] As Mr. Friederich stood to benefit from a lower valuation, his testimony is not helpful to the Court in determining the value of Superpumper's equity and his related testimony was accordingly given no weight by the Court.

39. The ultimate $2.5 million valuation for Paul Morabito's 80% interest is further belied by Sam Morabito's and Bayuk's own financial statements that they provided to Superpumper's auditors on February 1, 2011, just four months after the transfer, that represent their respective 50% equity interests as valued at $4,514,869, for a total combined value of Superpumper as of February 1, 2011 of $9,029,738.[114] Bayuk testified that this was his good faith statement of what the value of his 50% interest was as of February 1, 2011.[115]

40. As of the September 30, 2010 date of transfer of Paul Morabito's 80% equity interest in Superpumper to Snowshoe, pursuant to the Superpumper Agreement, Snowshoe was required to pay Paul Morabito $1,035,094 in cash. While Paul Morabito received $1,035,068 wire on October 1, 2018, there is no proof that such payment reflects the cash payment for the

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[111] Trans. 11/5/18, p. 48, l. 22 – p. 49, l. 18.

[112] Trans. 11/1/18, p. 222, l. 23 – p. 225, l. 18; see also Exh. 118, p. GURRSEY004850 (auditor confirmation that they were fully collectible).

[113] Trans. 11/5/18, p. 37, l. 9 – p. 38, l. 9.

[114] Exh. 126.

[115] Trans. 10/29/18, p. 236, ll. 8-11.

Superpumper equity and such evidence would be inconsistent with Paul Morabito's sworn testimony to the Bankruptcy Court that he only received $542,000 for his equity in Superpumper.[116] In any event, under any opinion of value, even if the $1,035,094 were received, that is not reasonably equivalent value for Paul Morabito's interest.

41. Subsequent to the execution of the Superpumper Agreement, Snowshoe became obligated for an additional $1,462,213 to Paul Morabito, as set forth in a $1,462,213 term note from Snowshoe to Paul Morabito (the "$1,462,213 Note") dated November 1, 2010.[117] The $1,462,213 Note required Snowshoe to make monthly payments commencing on December 1, 2010 in the amount of $19,986.71 for 84 months, with interest accruing at 4.0% per annum.[118] There were no payments made on the $1,462,213 Note, and on February 1, 2011, the Snowshoe obligation to Paul Morabito under the $1,462,213 Note was cancelled and a successor note from Snowshoe to Paul Morabito in the amount of $492,937 was executed (the "$492,937 Successor Note")[119] at the same time a successor note from Snowshoe to Superpumper (purportedly reflecting the amount of the $939,000 Note that had been cancelled at the time of the Merger) in the amount of $939,000 was executed (the "939,000 Successor Note").[120]

42. There is no record of payment from Snowshoe to Paul Morabito due under the terms of the Superpumper Agreement, the $1,462,213 Note or the $492,937 Successor Note. Likewise, there is no record of payment of the $939,000 Successor Note from Snowshoe to Superpumper. Sam Morabito conceded that, post-merger, it would not matter if there were papered obligations between Snowshoe and Superpumper because Snowshoe has no funds other than what Superpumper generated.[121] Finally, other than $542,000 Paul Morabito reported to have received,

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[116] Exh. 233.

[117] SF, 43.

[118] SF, 44.

[119] Ex. 104; Trans. 10/31/18, p. 217, ll. 6-16.

[120] Ex. 105.

[121] Trans. 10/31/18, p. 109, ll. 7-11.

the details of which are unknown, any remainder due to him on account of notes was unequivocally "cancelled."[122]

43. Contrary to Paul Morabito's representation to the Bankruptcy Court, Sam Morabito testified that he paid the $492,937 Successor Note obligation when he transferred $560,000 to LMWF on November 28, 2011 at the direction of Paul Morabito.[123] Not only does the amount paid by Sam Morabito not correspond with the $492,937 Successor Note or any identifiable obligation from Sam Morabito, there is no record of any satisfaction of the $492,937 Successor Note obligation in the Snowshoe books and records, including on Snowshoe's tax returns or amended tax returns.[124] There is no evidence of a capital contribution by Sam Morabito to Snowshoe for the payment, nor is there a corresponding capital contribution by Bayuk.[125] Furthermore, Sam Morabito's testimony that Vacco contacted him and told him the amount was due is contradicted by the communication from Paul Morabito instructing Sam Morabito to transfer funds[126] and also Vacco's testimony that he had no knowledge as to whether the amounts due under the $492,937 Successor Note were paid.[127]

44. In light of the evidence presented, inclusive of no corresponding payments, the Court finds that the $1,462,213 Note and the $492,937 and $939,000 Successor Note obligations were contrived in order to give the appearance of an arms-length exchange of value.

3. **Paul Morabito's Equity in the Real Properties.**

45. Immediately prior to the Oral Ruling, Paul Morabito and Bayuk, through their respective trusts, owned three real properties improved with homes as tenants in common:[128]

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[122] Ex. 107, ¶ 10.

[123] Trans. 10/31/18, p. 13, l. 21 – p. 115, l. 5.

[124] Trans, 10/31/18, p. 246, l. 18- p. 249, l. 11.

[125] Trans. 10/31/18, p. 131, l. 18 – p. 132, l. 19.

[126] Exh. 140.

[127] Trans. 11/6/18, p. 181, l. 22 – p. 182, l. 8.

[128] SF, ¶ 23.

a. Paul Morabito owned 75% of the El Camino Property and Bayuk owned 25%.[129]

b. Paul Morabito and Bayuk each owned 50% of the Los Olivos Property.[130]

c. 8355 Panorama Drive, Reno, Nevada (the "Panorama Property," and together with the El Camino Property and the Los Olivos Property (the "Laguna Properties"), the "Real Properties"). Paul Morabito owned 70% and Bayuk owned 30% of the Panorama Property.[131]

46. On September 27, 2010, Paul Morabito and Bayuk executed a Purchase and Sale Agreement, which was amended September 28, 2010 (as amended, the "Real Properties Agreement"), for the transfer of their respective interests in the Real Properties, as well as all of their personal property located at the Real Properties, which all went to Bayuk.[132] The Real Properties Agreement was prepared by one lawyer on behalf of both Bayuk and Paul Morabito.[133] Pursuant to the Real Properties Agreement, Paul Morabito sold his interests in the Laguna Properties to Bayuk in exchange for Bayuk's 30% interest in the Panorama Property and a payment of $60,117.00.[134]

47. According to Paul Morabito and Bayuk, the equity in the Laguna Properties at the time of the transfers on October 1, 2010 was $1,933,595: the equity in the Los Olivos Property was valued at $854,954 and the equity in the El Camino Property was valued at $1,078,641.[135] Paul Morabito's interests in the Laguna Properties therefore had an aggregate value of approximately $1,236,457.75, and Bayuk's interests in the Laguna Properties had an aggregate value of approximately $697,137.25.[136] Plaintiff did not dispute these values.[137]

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[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] SF, ¶ 24; Exhs. 45-46.

[133] Trans. 10/30/18, p. 89, ll. 21-23.

[134] Exhs. 45, 26, 233 .

[135] SF, ¶¶ 25-26.

[136] *Id.*

[137] *Id.*

48. Paul Morabito and Bayuk obtained an appraisal of the Panorama Property from Darryl Noble, who is not an MAI.[138] Mr. Noble opined that the Panorama Property had a purported fair market value as of October 1, 2010 (the approximate date of the transfer) of $4.3 million. Mr. Noble relied heavily on the cost approach, focusing on the cost of the home and its significant improvements.[139] Mr. Noble's conclusion of value was within the range of values suggested to him by Paul Morabito.[140]

49. As of the date of transfer, there had never been a sale of a home in excess of $4 million in Reno, and there was no sale for more than $3.35 million in the year preceding the transfer.[141] Whereas the transfer of the Panorama Property occurred on October 1, 2010, the $3.35 million sale which Mr. Noble used in his sales comparison approach occurred in September 2009, before the residential real estate market significantly worsened.[142] The sale prices of other properties on which Mr. Noble relied as comparables were not adjusted to account for significant differences, such as finished basements, or the significant deterioration in the residential real estate market throughout late 2009 and 2010. The sale price of one comparable was incorrectly reported in the appraisal.[143] Accordingly, the comparables on which Mr. Noble relied in his sales comparison approach do not support the concluded value. These errors were the result, at least in part, of the haste with which Mr. Noble was required to conduct the appraisal at the insistence of Paul Morabito.[144]

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[138] Exh. 276. Although another appraiser from Mr. Noble who is an MAI signed off on the appraisal report, no evidence was presented of his involvement in the assignment beyond reviewing and signing the report.

[139] Exh. 276, Trans. 11/6/18 , p. 32, ll. 3-13; p. 83, l. 23 – p. 84, l. 2; see Trans. 11/2/18, p. 16, l. 14-p. 18, l. 2 (Mr. Kimmel testifying that the cost approach is used to determine replacement cost by valuing the property and deducting depreciation, including physical depreciation, functional depreciation, and externalities such as economic factors.).

[140] Exh. 276, Trans. 11/6/18, p. 65, l. 2 – p. 65, l. 14.

[141] Trans. 11/6/18, p. 79, l. 18 – p. 80, l. 8.

[142] Id.; Trans. 11/6/18, p. 79, ll. 16-21.

[143] Trans. 11/6/18, p. 77, l. 3 – p. 78, l. 14; Ex. 277 at Superpumper 001124.

[144] Trans. 11/6/18, p. 83, l. 9 – p. 83, l. 8.

50. Moreover, the Court finds that Mr. Noble was focused on the undisputed significant cost of improvements to the Panorama Property, without regard to the devastated real estate market in October 2010. Indeed, in the cost approach, Mr. Noble's appraisal made no downward adjustment at all for functional obsolescence resulting from overimprovement or for external obsolescence, including the realities of the depressed real estate market at that time. Rather, Mr. Noble increased his conclusion of value by at least 25% more than the amount suggested by a calculation of replacement costs under the cost approach in order to arrive at a valuation of $4.3 million, an amount consistent with the value suggested to him by Paul Morabito.[145]

51. Consistent with the opinion of long-time Reno appraiser William Kimmel, MAI,[146] SREA,[147] the Court finds that the devastated local real estate market[148] had a greater impact on the valuation of real property in October 2010 than the cost of a home or its improvements.[149] The Court therefore agrees with Mr. Kimmel's appraisal of the Panorama Property, which relied primarily on the sales comparison approach,[150] determining a fair market value of $2,000,000 as of September 30, 2010, before deducting $1,028,864 in secured debt. The Court's finding is not based on, but is supported by, the subsequent sale of the Panorama Property for $2,584,000 to a third-party purchaser in December 2012.[151]

52. As part of the Real Property Agreement, Paul Morabito provided a credit to Bayuk in the amount of $45,000 for certain water rights associated with the Panorama Property and

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[145] Trans. 11/6/18, p. 70, l. 18 – p. 71, l. 2.

[146] Trans. 11/2/18, p. 7, ll. 5-6 (since 1968).

[147] Trans. 11/2/18, p. 7, ll. 8-9, 18 (Senior Residential Real Estate Analyst/Appraiser).

[148] Trans. 11/2/18, p. 17, ll. 14-15, and p. 21, l. 19- p. 22, l. 1.

[149] Trans. 11/2/18, p. 18, ll. 11-15; *see also* Trans. 11/2/18, p. 20, l. 1- p. 21, l. 6 (explaining that there were reported issues with the home in 2016; however, those did not change Mr. Kimmel's opinion of value because the reported condition of the improvements was communicated years after the October 1, 2010 retrospective date of valuation).

[150] Exh. 53; Trans. 11/2/18, p. 15, l. 16 – p. 19, l. 13; p. 85, ll. 5-8.

[151] Trans. 11/2/18, p. 22, ll. 8-15

$150,000 for theatre equipment purportedly located in the Panorama Property,[152] though neither Paul Morabito nor Bayuk obtained a valuation of the alleged water rights[153] or theatre equipment.[154]

53. Thus, Paul Morabito transferred his interests in the Laguna Properties worth $1,236,457.75 in exchange for Bayuk's interests in the Panorama Property worth only $291,340.80, plus $60,117.00,[155] resulting in a difference of $884,999.95.

4. Paul Morabito's 50% Equity Interest in Baruk Properties, LLC.

54. Prior to the Oral Ruling, Paul Morabito and Bayuk each owned 50% of a real estate holding company called Baruk Properties, LLC, a Nevada limited liability company ("Baruk LLC").[156] Baruk LLC owned four real properties (the "Baruk Properties"):

a. 1461 Glenneyre, Laguna Beach, CA ("1461 Glenneyre"), a commercial property with a stipulated appraised value of $1.4 million as of September 30, 2010;[157]

b. 570 Glenneyre, Laguna Beach, CA ("570 Glenneyre"), a commercial property with an appraised value of $2.5 million as of September 30, 2010, or $1,129,021 after deduction for the mortgage on property;[158]

c. 1254 Mary Fleming, Palm Springs, CA (the "Palm Springs Property"), a home with an appraised value of approximately $1,050,000 as of September 30, 2010, or $705,079 after deduction for the mortgage;[159] and

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[152] Ex. 247.

[153] Trans. 10/30/18, p. 158, ll. 2-19.

[154] Trans. 10/30/18, p. 158, l. 20 – p. 159, l. 7.

[155] Exhs. 46, 233.

[156] SF, ¶ 27, 29.

[157] SF, ¶ 27-28.

[158] *Id.*

[159] *Id.*

d. 49 Clayton Place, Sparks, NV (the "Clayton Property"), a vacant property with an appraised value of approximately $75,000 as of September 30, 2010.[160]

55. Accordingly, Paul Morabito's 50% interest in the Baruk Properties had a value of at least $1,654,550.

56. On October 1, 2010, Paul Morabito transferred his 50% membership interest in Baruk LLC to Bayuk pursuant to a Membership Interest Transfer Agreement (the "Baruk Transfer").[161]

57. Immediately after the Baruk Transfer, on October 4, 2010, Baruk LLC, a Nevada entity, was merged into a newly formed entity owned 100% by the Bayuk Trust called Snowshoe Properties, LLC, a California limited liability company ("Snowshoe Properties"),[162] thereby transferring the assets owned by Baruk Properties to Snowshoe Properties.

58. Snowshoe Properties is solely owned by the Bayuk Trust. Bayuk, through the Bayuk Trust, converted Snowshoe Properties from a California limited liability company to a Delaware limited liability company during the pendency of this litigation.[163]

59. On November 2, 2010, Bayuk transferred the Palm Springs Property from Snowshoe Properties to the Bayuk Trust.[164]

60. Following this series of transfers, the Bayuk Trust owned 100% of 1461 Glenneyre, 570 Glenneyre, and the Clayton Property indirectly through Snowshoe Properties, and directly owned 100% of the Palm Springs Property.[165]

61. The Membership Interest Transfer Agreement required that in exchange for Paul Morabito's 50% interest in Bayuk LLC, Bayuk deliver a promissory note in the principal amount

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[160] *Id.*

[161] SF, ¶ 30.

[162] SF, ¶¶ 31-32.

[163] Trans. 10/31/18, p. 26, ll. 1-14; p. 27, ll. 16-19.

[164] SF, ¶ 33.

[165] SF, ¶ 34.

of $1,617,050 to Paul Morabito (the "Baruk Note").[166] The terms of the Baruk Note required principal and interest payments in equal monthly installments of $7,720.04 over 360 months, accruing interest at 4.0%.[167]

62. There was no evidence of any payments corresponding with the terms of the Baruk Note. Bayuk's own records don't support alleged repayment. Specifically, Bayuk produced "ledgers" purporting to show payments to Paul Morabito under the Baruk Note.[168] These ledgers and supporting documents[169] are not credible as showing repayment of the Baruk Note for several reasons, including: (i) they include payments to Kim's Marble, Doheny Builder Supplier, Geo Technical, American Vector, Mark Paul Designs, Bead Painting, and Atlas Sheet Metal that were made for construction on Los Olivos after Paul Morabito's interests in the Real Properties were transferred,[170] (ii) $341,952.69 was credited for payment of the Chase mortgage on the Palm Springs Property, which was already taken into account in the valuation of the Palm Springs Property;[171] (iii) certain payments occurred or were applicable to expenses incurred prior to the date of the $1,617,050 Note;[172] (iv) Bayuk had no knowledge as to the purpose of $105,084.09 of payments for "Comerica" and believed it was on the ledger in error;[173] and (v) they include a $50,000 credit for the Clayton Property that was purportedly applied on October 4, 2010,[174] despite Bayuk's testimony that he did not recognize that the Clayton Property was owned by Baruk LLC until years later when it was used to settle a lawsuit from Desi Moreno against Paul Morabito.[175]

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[166] SF, ¶ 35.

[167] *Id.*

[168] Exhs. 71 and 73.

[169] Exh. 271.

[170] Trans. 10/31/18, p. 50, l. 20 – p. 52, l. 20; p. 56, l. 19 – p. 58, l. 2.

[171] Trans. 10/31/18, p. 52, l. 21 – p. 55, l. 19.

[172] Trans. 10/31/18, p. 56, l. 22 – p. 57, l. 15;

[173] Trans. 10/31/18, p.. 58, l. 10 – p. 59, l. 7.

[174] Exh. 73.

[175] Trans. 10/31/18, p. 64, l. 19 – p. 65, l. 1; p. 65, l. 14 – p. 66, l. 8.

63. On October 31, 2010, with an effective date of October 1, 2010, Paul Morabito assigned the Baruk Note to Woodland Heights, Ltd., a Canadian entity, and executed an allonge, purportedly in exchange for a 20% ownership interest in Woodland Heights, Ltd. (the "Woodland Assignment").[176] Bayuk purported to not even know of the Woodland Assignment, and testified he never paid payments pursuant to the Woodland Assignment.[177] Thus, it appears that the Woodland Assignment was a sham designed to further hinder the Herbst Parties from enforcing their judgment against Paul Morabito's interest in the $1,617,050 Note.

5. Watchmyblock.

64. On October 1, 2010, Paul Morabito also transferred his 90% interest in Watchmyblock LLC, a Nevada limited liability company, to Bayuk, the other 10% owner.[178]

65. Watchmyblock, LLC was a Nevada limited liability company at the time of transfer, but Bayuk changed it to a New York entity at the time of the transfer.[179]

66. Paul Morabito valued his equity in Watchmyblock, LLC at $2,250,000,[180] yet transferred that same equity to Bayuk in exchange for $1,000. Although Plaintiff is not seeking to avoid the Watchmyblock transfer in this case, the transfer is further evidence of Paul Morabito's motive and intent to move his assets out of the Herbst Parties' reach.

E. Paul Morabito Continued to Control the Transferred Interests After the Transfers.

67. Contrary to Defendants' denial of Paul Morabito's continuing interest and control over Superpumper and Snowshoe following the Superpumper Transfer, substantial evidence establishes that Paul Morabito retained control and continued to receive benefits. Beginning in October of 2015—over five years after Defendants allege Paul Morabito ceased to have any involvement or financial interest in Superpumper—and continuing through March 2018,

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[176] Exh. 68; *see also* Exh. 44, WL004540 (Salazar describes the assignment and purported value provided to Paul Morabito by Woodland Heights, Ltd. in return).

[177] Trans. 10/30/18, p. 81, ll. 1-8; p. 82, ll. 11-14.

[178] Trans. 10/31/18, p. 64, l. 24 – p. 65, l. 2; Exh. 163.

[179] Exh. 164; Trans. 10/31/18, p. 65, l. 3 – 4.

[180] Exhs. 42, 43.

Snowshoe paid more than $126,000 of Paul Morabito's personal legal expenses to the law firm of Robison, Sharp, Sullivan & Brust ("RSSB"), joint counsel to Paul Morabito and Defendants.[181] Indeed, the majority of Paul Morabito's legal fees in his personal bankruptcy case between May of 2017 and March of 2018 were paid by Snowshoe.[182]

68. Defendants attempted to conceal these payments. The centerpiece of Defendants' case-in-chief was Defendants' contention that the subject transfers were a "good faith" attempt to maintain separateness of Sam Morabito's and Bayuk's assets from those of Paul Morabito. As part and parcel of this defense, Defendants sought to minimize Paul Morabito's continued direction of Superpumper's business as mere "whiteboarding"[183] or an altruistic attempt to help Bayuk and Sam Morabito in their new endeavor. To maintain this fiction, Defendants failed to disclose the payments by Snowshoe during discovery or in trial, and Defendants' counsel actively avoided disclosing the payments until after the close of evidence.[184] During trial, Defendants testified that Paul Morabito had no interest or economic stake in Snowshoe, and Bayuk expressly denied that Snowshoe gave any money to Paul Morabito[185] or that Snowshoe paid any of Paul Morabito's attorneys' fees.[186]

69. Defendants Snowshoe, Superpumper, and Sam Morabito, along with their joint counsel, knew Bayuk's testimony was false both when it was offered[187] and when Defendants

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[181] Exhs. 308 (Detail Payment Transaction File List at RSSB_000001–RSSB_000002) and 309 (Declaration of Frank C. Gilmore).

[182] Exh. 308 at RSSB_000002.

[183] Trans. 10/31/18, p. 236, l. 21 – p. 237, l. 1; Trans. 11/1/18, p. 21, ll. 4-14; Trans., 11/6/18, p. 199, l. 3 – p. 200, l. 21.

[184] RSSB's billing records were the subject of a pending subpoena in Paul Morabito's bankruptcy case. Exh. 305 (Aug. 27, 2018 Subpoena to RSSB). RSSB failed to comply with the subpoena until an order compelling compliance was entered by the Bankruptcy Court. Exhs. 306 (Aug. 30, 2018 letter from F. Gilmore to M. Weisenmiller), 307 (Bankruptcy Court's order compelling RSSB's compliance).

[185] Trans. 10/29/18, p. 206, l. 3 – p. 207, l. 1.

[186] Trans. 10/29/18, p. 189, ll. 14-17;

[187] Snowshoe made the payments to RSSB for Paul Morabito's attorneys' fees, and RSSB, joint counsel to Defendants and Paul Morabito, accepted and applied the payments. Exh. 308, 309.

relied upon it in closing argument and post-trial submissions[188] in support of their contention that Paul Morabito had no interest or involvement in Snowshoe. Defendants offered no explanation for their false testimony after Plaintiff introduced evidence of the Snowshoe payments.

70. In addition to receiving concrete financial benefits from Snowshoe in the years following the Superpumper Transfer, substantial evidence established that prior to the subject transfers, Paul Morabito developed a scheme to continue to control the transferred assets and use them for his benefit while concealing his interest by having his brother and Bayuk hold title, and that following the transfers, he in fact retained significant control of the transferred assets (including Superpumper, the Baruk Properties, and Los Olivos) and used them for his benefit as if he still owned them.

71. Prior to the Superpumper Transfer, on September 21, 2010, Paul Morabito emailed his counsel, Vacco, and a third party potential business partner, Kevin Cross of Cerberus California, LLC, to advise that he "would no longer be actively seeking to accumulate assets in companies that [he was] a shareholder in, and instead would be acting as an advisor to amongst other entities, Snowshoe Petroleum LLC, a company to be owned and operated by [his] brother, Sam; Edward Bayuk, and Dennis Vacco..."[189]

72. Consistent with Paul Morabito's plan, following the Superpumper Transfer, Paul Morabito continued to utilize the transferred assets as if he still owned them. Paul Morabito remained active and involved with respect to the Superpumper business by, among other things, (1) providing advice; (2) directing Superpumper and Snowshoe's auditors and accountants with respect to handling questions related to Superpumper's financials, and (3) remaining a guarantor for the Spirit leases.[190]

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[188] Trans. 11/26/18, p. 132, ll. 5-15 (arguing that Paul Morabito received no payments following the Merger); [Defendants' Proposed] Findings of Fact, Conclusions of Law, and Judgment (submitted Nov. 26, 2018), at para. 101 ("After the merger and acquisition, Paul had no control, management, or economic stake in Snowshoe.").

[189] Exh. 30.

[190] Exh. 144; Trans. 10/29/18, p. 192, ll. 5-22; p. 202, ll. 2-10; p. 224, l. 24 – p. 225, l. 17.

73. On April 11, 2011, Paul Morabito sought to negotiate a sale on behalf of Snowshoe. Specifically, Snowshoe sought to acquire Nella Oil Company, LLC and Flyers LLC (the "Nella Deal").[191] Paul Morabito had commenced discussions with Nella prior to the Superpumper Transfer.[192] The April 11, 2011 proposal included the contribution of Snowshoe's 100% interest in Superpumper, "valued at $10,000,000." Despite having no ownership interest in Snowshoe, Paul Morabito negotiated on behalf of Snowshoe without the involvement of Bayuk or Sam Morabito, and admitted that he had simply changed the name on a loan required for the deal from CWC to Snowshoe.[193]

74. In August 2011, Paul Morabito retained Tim Haves, a real estate broker, on behalf of Superpumper Properties, LLC ("Superpumper Properties"), a company apparently owned by Paul Morabito which is distinct from Superpumper.[194] However, Vacco instructed Morabito, without copying Bayuk or Salvatore, to simply use Superpumper to make payment to conceal the payment from the Herbst Parties.[195]

75. In November 2011, despite previously transferring his interest in Baruk LLC to Bayuk, Paul Morabito sought to use the assets of Snowshoe Properties (the successor to Baruk LLC) to settle a lawsuit against him.[196]

76. When the sham of the sale to Bayuk became inconvenient, Paul Morabito advised Vacco to just undo it—to cancel the Baruk Note, convert it back into a 50% share interest in Snowshoe Properties, and to give Paul Morabito the right to trigger an option to split the assets so that Morabito would own 1461 Glenneyre and Bayuk would own 570 Glenneyre.[197]

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[191] Exhs. 131-133, 135

[192] *See* Exh. 30.

[193] Exh. 132.

[194] Trans. 10/31/18, p. 239, l. 17 – p. 240, l. 17.

[195] Exhs. 136, 137.

[196] Exhs 145, 146.

[197] Exh. 70

77. In February 2012, Paul Morabito, through Vacco and Timothy Haves, sought to negotiate a third-party sale of 1461 Glenneyre[198] and to prepare a master lease with the new buyer for Snowshoe Capital, a company owned by Paul Morabito, for the property,[199] without any involvement by Bayuk.

78. Later, in September 2012, in connection with a settlement of Paul Morabito's lawsuit with Bank of America, which had nothing to do with Bayuk, Paul Morabito caused a deed of trust to be placed on 1461 Glenneyre. Vacco simply instructed Bayuk when and where to sign for Paul Morabito, which Bayuk did.[200]

79. Similarly, in September of 2012, Bayuk instructed his and Paul Morabito's counsel that he would sign a second deed of trust Paul Morabito wanted to put on the Mary Fleming House[201] in connection with funding for Virsenet, an entity in which Bayuk and Paul Morabito held joint interests.[202]

80. On October 3, 2012, Morabito instructed Vacco and Christian Lovelace, another lawyer at LMWF, regarding negotiation of a $5 million loan to Snowshoe Properties—in which Morabito supposedly held no interest—without including Bayuk.[203]

81. Ultimately, Paul Morabito and Bayuk finalized the $5 million loan and a first deed of trust was placed on 1461 Glenneyre and a Second Deed of Trust was placed on 570 Glenneyre.[204]

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[198] Exh. 142.

[199] Exh. 142; Trans. 10/30/18, p. 28, l. 9 – p. 29, l.1.

[200] Exhs. 145-148, 225.

[201] Exh. 150.

[202] Trans. 10/31/18, p. 35, ll. 2-9.

[203] Exh. 151.

[204] Exh. 151; Trans. 10/30/18, p. 35, l. 5 – p. 38, l. 16.

82. The funds loaned, and secured by the Glenneyre Properties, were used, in part, to pay for Paul Morabito's obligations including over $700,000 to satisfy Paul Morabito's obligation to Bank of America.[205]

83. In March 2013, nearly three years after the Superpumper Transfer, Paul Morabito was still bargaining with Superpumper. For example, Paul Morabito proposed a settlement with the Herbst Parties whereby he would transfer Superpumper to the Herbst Parties in partial satisfaction of the judgment. Though Bayuk and Sam Morabito supposedly owned Superpumper at that point through Snowshoe, neither was included in these discussions.[206]

84. In March 2014, Paul Morabito caused Bayuk to transfer the Clayton Property to Desi Moreno without any value to Bayuk.[207]

85. Paul Morabito's continued control makes clear that the intent of the transfers was not to separate Sam Morabito's and Bayuk's interests from Paul Morabito's interests, as Bayuk and Sam Morabito now contend. There was never any separation that one would expect in an arms-length transaction; rather, the Parties remained very much intertwined, and the only difference following the transfers was that the transferred assets were now out of the Herbst Parties' reach.

F. Paul Morabito Rendered Himself Judgment-Proof.

86. By the transfers at issue in this action, along with other transfers, Paul Morabito effectively transferred all or substantially all of his assets prior to any enforceable judgment even being entered against him, which is confirmed by Michele Salazar's net worth report submitted in the punitive damages phase of the Herbst Litigation,[208] the subject transfers rendered Paul Morabito insolvent, unable to satisfy his obligation to the Herbst Parties.

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[205] Trans. 10/21/18, p. 68, ll. 13-15.

[206] Exh. 153.

[207] Trans. 10/30/18, p. 66, ll. 1-12.

[208] Exh. 44. Notably, the report was from March 2011, well after the subject transfers had been finalized. There is no evidence presented of any disclosure of Paul Morabito's holdings or the detail of the transfer prior to, or at the time of, the subject transfers.

87. Although there was testimony presented from Bayuk[209] and attorney Vacco[210] that the transfers of Paul Morabito's interests to Bayuk after the Oral Ruling were for the purpose of separating Bayuk's interests from Paul Morabito, that testimony is belied by the fact that Bayuk and Paul Morabito co-owned new companies subsequent to the Oral Ruling. For instance, as of April 2012, Bayuk was co-owner of a company with Paul Morabito called Virsenet.[211]

II.
CONCLUSIONS OF LAW

A. Plaintiff has standing to assert a claim for fraudulent transfer under NRS Ch. 112.

1. Paul Morabito became a "debtor" no later than December 3, 2007[212] and remains a debtor under NRS 112.150(6).[213]

2. The Herbst Parties were "creditors" under NRS 112.150(4) no later than December 3, 2007, and they were entitled to assert claims under NRS Chapter 112, the Uniform Fraudulent Transfer Act ("UFTA"), pursuant to NRS 112.210 when this action was commenced.

3. 11 U.S.C. § 544(a)(1) provides that a trustee has "the rights and powers of ... a creditor" as of the commencement of the bankruptcy case. Thus, Plaintiff has standing to sue to avoid and recover transfers under NRS 112.210 and is the proper party in interest under NRCP 17. Plaintiff stands in the shoes of the bankrupt debtor, Paul Morabito, under the Bankruptcy Code, including under 11 U.S.C. § 541, and at the same time stands in the shoes of Paul Morabito's creditors, inclusive of the Herbst Parties, in the pursuit of fraudulently transferred assets under 11

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[209] Trans. 10/29/18, p. 130, l. 9-24.

[210] Trans. 11/6/18, p. 105, l. 17 – p. 106, l. 23.

[211] Exh. 134, p. LMWF SUPP, p. 068536.

[212] A "debtor" under NRS 112.150(6) is "a person who is liable on a claim," and a "claim" means "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured" under NRS 112.150(3), which is derived from § 101(5) of the Bankruptcy Code. *See* UFTA, § 1, cmt. 3. A creditor has a "claim" if the injury giving rise to the right to payment manifests itself to the party holding the potential claim, even if both liability and damages are contested and unresolved. In re Flynn, 238 B.R. 742, 746 (Bankr. N.D. Ohio 1999) (citing Grady v. A.H. Robins Co., 839 F.2d 198, 202–03 (4th Cir. 1988), cert. dism'd 487 U.S. 1260, 109 S.Ct. 201, 101 L.Ed.2d 972 (1988). Thus, the Herbst Parties' claim against Paul Morabito and CNC arose prior to the date they commenced the State Court Action, or December 3, 2007.

[213] Exhs. 4, 21-23, 303.

U.S.C. § 544(b). See In re MortgageAmerica Corp., 714 F.2d 1266, 1275 (5th Cir. 1983) (section 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").

4. This court retains concurrent jurisdiction over claims by a trustee pursuant to 11 U.S.C. § 544(b) under 28 U.S.C. § 1334(b). See In re Rosenblum, 545 B.R. 846, 855-56 (Bankr. E.D. Pa. 2016); Hopkins v. Plant Insulation Co., 349 B.R. 805, 812 (N.D. Cal. 2006); In re Kaufman & Roberts, Inc., 188 B.R. 309, 314 (Bankr. S.D. Fla. 1995) ("[b]ecause of this Court's concurrent jurisdiction with the state court, the Trustee may intervene in the state court action"); In re CitX Corp., 302 B.R. 144, 161 n. 10 (Bankr. E.D. Pa. 2003) (citing Quality Tooling, Inc. v. United States, 47 F.3d 1569, 1573 (Fed. Cir. 1995)) (observing that, under 28 U.S.C. § 1334(b), "bankruptcy courts do not have exclusive jurisdiction over adversary proceedings, and such matters may be heard in a non-bankruptcy forum").

B. The Court Has Jurisdiction Over the Defendants.

5. Jurisdiction over a nonresident defendant is proper when the plaintiff shows that the existence of jurisdiction satisfies Nevada's long-arm statute and does not offend the principles of due process. Viega GmbH v. Eighth Jud. Dist. Ct., 130 Nev. 368, 374-75 (2014); Trump v. Eighth Judicial Dist. Court, 109 Nev. 687, 698 (1993); see also NRS 14.065(1).

6. "Due process requires that "minimum contacts" exist "between the defendant and the forum state 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice'". Consipio Holding, BV v. Carlberg, 128 Nev. 454, 458 (2012) (quoting Trump, 109 Nev. at 698). The defendant should "reasonably anticipate being haled into court" in the forum state due to its conduct and connection there. Id. at 458 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)). Ultimately, the Court applies a three part-inquiry to determine whether specific personal jurisdiction exists, which consists of: (1) whether the defendant purposely availed itself to the privilege of conducting business in the state, or purposefully directed its actions towards the state, (2) whether the cause of action arises out of

the defendant's forum-related activities, and (3) whether the exercise of jurisdiction over the defendant is reasonable. See Consipio, 128 Nev. at 458-459.

7. "A defendant's contacts with a state are sufficient to meet the due process requirement if either general personal jurisdiction or specific personal jurisdiction exists." Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court ex rel. County of Clark, 122 Nev. 509, 512 (2006) The Court has specific personal jurisdiction over any defendant when that defendant "purposefully enters the forum's market or establishes contacts in the forum and affirmatively directs conduct there, and the claims arise from that purposeful contact or conduct." Viega GmbH, 130 Nev. at 375.

8. In Nevada, a defendant who assists with fraudulent transfers or other efforts to impede satisfaction of a judgment is subject to personal jurisdiction. See Casentini v. Ninth Judicial Dist. Court of State In & For County of Douglas, 110 Nev. 721, 727 (1994). Further, intentional conduct occurring outside the forum state, but designed to cause harm in the forum state, may be a basis for finding minimum contacts. Calder v. Jones, 465 U.S. 783, 787-90 (1984) (holding that defendants must "reasonably anticipate[] being haled into court [in the forum state]" because "their intentional, and allegedly tortious, actions were expressly aimed at" the forum state, even though they occurred outside the forum state, and "they knew that the brunt of th[e] injury would be felt "in the forum state.").

9. The Court finds that based on Defendants' connections to Nevada, including that Bayuk and Sam Morabito are former residents of Reno, each Defendants' acceptance of fraudulent transfers of Nevada assets following a Nevada judgment, and Superpumper's merger with CWC, articles for which were filed in Nevada, it has jurisdiction over all Defendants.

10. With specific reference to Snowshoe, Paul Morabito held shares of CWC, a Nevada entity, which he fraudulently transferred to Snowshoe. Snowshoe is operated by Bayuk and Sam Morabito who are former Nevada residents. Snowshoe was formed with the specific purpose to accept a fraudulent transfer of the CWC shares. Defendants conceded that the Oral Judgment, announced in a Nevada court while Bayuk and Sam Morabito were present, was the impetus for the transfer to Snowshoe. Snowshoe, Bayuk, and Sam Morabito engaged in a business

transactions for the purpose of defrauding Nevada residents of a judgment won in a Nevada state court. Therefore, Snowshoe purposefully availed itself of Nevada jurisdiction and it could, along with the other Defendants, expect to be haled into court in Nevada. Snowshoe's contacts with Nevada were not the result of a unilateral act of a third party, nor were they random or fortuitous; they are the direct and intended consequence of the transfers in September 2010.

C. Nevada Has Adopted and Codified the UFTA in NRS Chapter 112.

11. The UFTA is designed to prevent a debtor from defrauding creditors by placing the subject property beyond the creditors' reach. Herup v. First Boston Fin., LLC, 123 Nev. 228 (2007); NRS Ch. 112. The underlying policy of both the fraudulent transfer provisions of the Bankruptcy Code and the UFTA are the same – "to preserve a debtor's assets ***for the benefit of creditors***." Id. at 235 (emphasis added).[214]

12. NRS 112.250 directs Nevada courts to apply and construe the UFTA "to effectuate its general purposes to make uniform the law with respect to the subject of this chapter among states enacting it." Herup, 123 Nev. at 237 (quoting NRS 112.250).[215] Fundamentally, the application of the UFTA should be consistent with its purpose of preventing and suppressing fraud. See Donell v. Kowell, 533 F.3d 762, 774 (9th Cir. 2008) (finding the terms of the UFTA are

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[214] The Nevada Supreme Court noted that it is appropriate to rely on cases interpreting 11 U.S.C. § 548 in light of the similarity of the underlying policy of both UFTA and the Bankruptcy Code of preserving the debtor's assets for the benefit of creditors and the similarity of the language of § 548 and the UFTA. Id., 123 Nev. at 235, 162 P.3d at 874, n. 15 (citing In re Tiger Petroleum Co., 319 B.R. 225, 232 (Bankr. N.D. Okla. 2004) (citing In re Grandote Country Club Company, Ltd., 252 F.3d 1146, 1152 (10th Cir. 2001); In re United Energy Corp., 944 F.2d 589, 594 (9th Cir. 1991); In re First Commercial Management Group, Inc., 279 B.R. 230, 240 (Bankr. N.D. Ill. 2002) ("Except for different statutes of limitations, the [Illinois] and federal statutes are functional equivalents, and the analysis applicable [under federal law] is also applicable [under Illinois law]."); In re Spatz, 222 B.R. 157, 164 (N.D. Ill. 1998) ("Because the provisions of the UFTA parallel § 548 of the Bankruptcy Code, findings made under the Bankruptcy Code are applicable to actions under the UFTA.")); see also Warfield v. Byron, 436 F.3d 551, 558 (5th Cir. 2006) (appropriate to rely on cases interpreting 11 U.S.C. § 548 where provision of UFTA at issue (which mirrored NRS 112.180(1)(a)) was "virtually identical" to 11 U.S.C. § 548 actual intent fraudulent transfer provision) (citing Ramirez Rodriguez v. Dunson (In re Ramirez Rodriguez), 209 B.R. 424 (Bankr. S.D. Tex. 1997); Cuthill v. Greenmark, LLC (In re World Vision Entm't, Inc.), 275 B.R. 641, 658 (Bankr. M.D. Fla. 2002); In re Carrozzella & Richardson, 286 B.R. 480, 485–86 (D. Conn. 2002)).

[215] Accordingly, it is appropriate for the Court to look to the application and construction of the UFTA by other courts. See, e.g., Sportsco Enters., 112 Nev. 625, 917 P.2d at 938 (citing to cases from other jurisdictions to support interpretation of Nevada's UFTA).

abstract in order to protect defrauded creditors, no matter what form a financial fraud might take) (citations omitted).

13. Further, the UFTA "is remedial and as such should be liberally construed." Cortez v. Vogt, 52 Cal.App.4th 917, 937, 60 Cal.Rptr.2d 841, 853 (Cal. App. 1997) (citing Lind v. O.N. Johnson Co., 204 Minn. 30, 40 (1938)); see also Landmark Community Bank, N.A. v. Klingelhutz, 874 N.W.2d 446 (Minn. Ct. App. 2016), review denied, (Apr. 27, 2016) (stating that the UFTA is remedial and meant to be construed broadly, applying Minnesota's enactment of the UFTA); Sigmon v. Goldman Sachs Mortg. Co., 539 B.R. 221 (S.D. N.Y. 2015) (same, applying Utah's enactment of the UFTA). The objective of UFTA "is to enhance and not to impair the remedies of the creditor." Id. at 937.

14. The UFTA provides that three types of transfers may be set aside: (1) transfers made with actual intent to hinder, delay, or defraud; (2) constructive fraudulent transfers; and (3) certain transfers by insolvent debtors. NRS 112.180(1)(a) (actual intent); NRS 112.180(1)(b) (constructive fraud); NRS 112.190 (transfers by an insolvent); Herup, 123 Nev. at 233. At issue here are NRS 112.180(1)(a) and NRS 112.180(1)(b).

15. Defendants contend that the subject transfers are not fraudulent under the UFTA because Bayuk and Sam Morabito had been "exonerated" by Judge Adams in the Herbst Litigation. But even if Judge Adam's ruling that Defendants were not liable to the Herbst Parties on the claims at issue in the Herbst Litigation was pertinent to Defendants' intent with respect to their receipt of transfers after the Oral Ruling, Defendants' intent is not relevant to the analysis of whether the transfers were made with actual intent to hinder, delay, or defraud, or were constructively fraudulent. Both the actual and constructive fraud provisions of the statute address the nature of

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the transfer and the intent of the *debtor*, rather than the transferee. Specifically, NRS 112.180(1)(a) provides:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . if ***the debtor*** made the transfer or incurred the obligation . . . [w]ith actual intent to hinder, delay or defraud any creditor of the debtor;

(Emphasis added.) NRS 112.180(1)(b) provides:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . if ***the debtor*** made the transfer or incurred the obligation . . . [w]ithout receiving a reasonably equivalent value . . . and ***the debtor***: (1) [w]as engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) [i]ntended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond his or her ability to pay as they became due.

(Emphasis added.) Thus, it is the debtor's intent, rather than the transferee's intent, which is relevant to whether a transfer is actually or constructively fraudulent under the UFTA. See Herup, 123 Nev. at 234 (NRS 112.180(1)(a) plainly provides that, for the district court to enter judgment in favor of a creditor under that statute, it must first determine whether the debtor "*actual[ly] inten[ded]* to hinder, delay or defraud any creditor of the debtor.") (emphasis in Herup); see also In re Nat'l Audit Def. Network, 367 B.R. 207, 221 (Bankr. D. Nev. 2007) ("It is key in this analysis that the required intent to hinder, delay or defraud is the debtor's; no collusion with the transferee is necessary.").

16. The transferee's knowledge becomes relevant under the good faith defense, which the transferee must prove. Herup, 123 Nev. at 236–37. Under Nevada law, determination of whether a transfer is fraudulent under NRS 112.180 is a prerequisite, but is separate and distinct, from remedies available to the creditor and whether the transferee is entitled to a good faith defense. Id. at 232, 237 (concluding that determination of whether a fraudulent transfer occurred under NRS 112.180(1)(a) is a prerequisite to setting aside the transfer or imposing damages and analysis of good faith defense, and instructing district court on remand to determine 1) whether the debtor made a fraudulent transfer under the UFTA, 2) whether the transferee acted in objective good faith in purchasing the business from the transferor, and 3) whether the transferee paid

reasonably equivalent value for the business for purposes of the good faith defense under NRS 112.220(1)).

D. The Transfers Were Made with Intent to Hinder, Delay, or Defraud the Herbst Parties.

17. The UFTA provides that a transfer made or obligation incurred by a debtor may be set aside if it is made or incurred by a debtor "with actual intent to hinder, delay or defraud any creditor of the debtor." NRS 112.180(1)(a); Herup, 123 Nev. at 231. "Traditionally, the intent required for actual fraudulent transfers is established by circumstantial evidence, since it will be the rare case in which the debtor testifies under oath that he or she intended to defraud creditors." See In re Nat'l Audit Def. Network, 367 B.R. at 219–20 (applying NUFTA) (citing Dahar v. Jackson (In re Jackson), 318 B.R. 5, 13 (Bankr. D. N.H. 2004). Intent may be established by circumstantial evidence or inferences drawn from the debtor's course of conduct. Id., 367 B.R. at 219 (citing Mazer v. Jones (In re Jones), 184 B.R. 377, 385 (Bankr. D. N.M. 1995)).

18. Moreover, the debtor's intent does not necessarily have to be to defraud a creditor. Rather, the "intent" element is satisfied if the debtor intends to hinder or delay or defraud a creditor. In re Nat'l Audit Def. Network, 367 B.R. at 221–22 ("Given the alternative phrasing of the requisite intent—a fraudulent transfer exists if there is an intent to hinder, delay *or* defraud—such transfers are also made with the requisite intent under Section 548(a)(1) and [NRS] 112.180.1(a)) (citations omitted). The debtor's knowledge that a transaction will operate to the detriment of creditors is sufficient to establish actual intent to defraud a creditor. Hayes v. Palm Seedlings Partners–A (In re Agric. Research & Tech. Group, Inc.), 916 F.2d 528, 535 (9th Cir. 1990) (quoting Coleman Am. Mov. Servs., Inc. v. First Nat'l Bank and Trust Co. (In re Am. Prop., Inc.), 14 B.R. 637, 643 (Bankr. D. Kan. 1981)). If the debtor has a motive of effecting the transaction to hinder a creditor, then the transaction is intentionally fraudulent even if the debtor also has non-fraudulent motives. See Bertram v. WFI Stadium, Inc., 41 A.3d 1239, 1247, 2012 WL 1427788 (D.C. 2012) (even if a debtor has at least one non-fraudulent motive for a transaction, the additional motive of effecting the transaction to hinder a creditor is a sufficient ground for an unassailable conclusion of fraudulent intent). Further, where the moving party proves fraudulent intent, the transfer is deemed

fraudulent, even if it is in exchange for valuable or full consideration. See In re Zeigler, 320 B.R. 362, 373 (Bankr. N.D. Ill. 2005) (applying Illinois enactment of UFTA).

19. NRS 112.180(2) sets forth the following non-exclusive list of factors (generally known as the "badges of fraud")[216] to be considered in determining actual intent:

a. the transfer or obligation was to an insider;

b. the debtor retained possession or control of the property transferred after the transfer;

c. the transfer or obligation was disclosed or concealed;

d. before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

e. the transfer was of substantially all the debtor's assets;

f. the debtor absconded;

g. the debtor removed or concealed assets;

h. the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

i. the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

j. the transfer occurred shortly before or shortly after a substantial debt was incurred; and

k. the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

This list is illustrative, not exhaustive, and none of the badges standing alone are necessary or sufficient as "the range of activities that fraudsters may use to commit fraud cannot and should not be definitively cataloged." In re Nat'l Audit Def. Network, 367 B.R. at 220.

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[216] See Nat'l Audit Def. Network, 367 B.R. at 220 (noting that the "badges of fraud" developed by the courts are recurring actions that historically have been associated with the actual intent to hinder, delay or defraud creditors) (citing Twyne's Case, 3 Coke 80b, 76 Eng. Rep. 809 (Star Chamber 1601) (developing early list of badges of fraud); Cuthill v. Greenmark, LLC (In re World Vision Entm't, Inc.), 275 B.R. 641, 656 (Bankr. M.D. Fla. 2002); Indianapolis Indiana Aamco Dealers Advertising Pool v. Anderson, 746 N.E.2d 383, 390 (Ind. App. Ct. 2001)).

20. The Nevada Supreme Court has also recognized the following indicia of fraud that will support a determination of actual fraudulent intent:

> lack of consideration for the conveyance, the transfer of the debtor's entire estate, relationship between transferor and transferee, the pendency or threat of litigation, secrecy or hurried transaction, insolvency or indebtedness of the transferor, departure from the usual method of business, the retention by the debtor of possession of the property, and the reservation of benefit to the transferor.

Sportsco Enters. v. Morris, 112 Nev. 625, 632 (1996) (citations omitted).

21. The UFTA list of "badges of fraud" provides neither a counting rule, nor a mathematical formula, and no minimum number of factors tips the scales toward actual intent. In re Beverly, 374 B.R. 221, 236 (B.A.P. 9th Cir. 2007), aff'd in part, dismissed in part, 551 F.3d 1092 (9th Cir. 2008) (applying the California enacted UFTA). The Ninth Circuit has explained that "[t]he presence of a single badge of fraud may spur mere suspicion; the confluence of several can constitute conclusive evidence of actual intent to defraud, absent 'significantly clear' evidence of a legitimate supervening purpose." In re Acequia, Inc., 34 F.3d 800 (9th Cir. 1994) (emphasis added); see also S. New England Tel. Co. v. Sahara & Arden, Inc., No. 2:09-CV-00534-RCJ-PAL, 2010 WL 2035330, at *4 (D. Nev. May 24, 2010) ("[a]lthough the 'presence of a single factor, i.e. a badge of fraud, may cast suspicion on the transferor's intent, the confluence of several in one transaction generally provides conclusive evidence of an actual intent to defraud.'") (quoting Gilchinsky v. Nat'l Westminster Bank, 159 N.J. 463, 732 A.2d 482, 490 (N.J. 1999)); In re Nat'l Audit Def., 367 B.R. at 220 ("Although none of the badges standing alone will establish fraud, the existence of several of them will raise a presumption of fraud."). In Nevada, as few as three badges have been found to establish clear and convincing evidence of actual fraudulent intent. See Sportsco Enters., 112 Nev. at 632.

22. Where the plaintiff establishes the existence of "indicia of 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." See Sportsco Enters., 112 Nev. at 632 (citing Territorial Sav. & Loan Ass'n v. Baird, 781 P.2d 452, 462 n. 18 (Utah Ct. App. 1989); see also Southern New England Telephone Co. v. Sahara & Arden, Inc., 2010 WL 2035330, *4-12 (D. Nev. May 24, 2010)

(applying the burden-shifting analysis under NRS 112.180(1)(a) and granting summary judgment to creditor).

23. The evidence relative to a confluence of at least a majority of the badges of fraud identified by Nevada statute and the Sportsco case amounts to clear and convincing evidence of Paul Morabito's actual intent to delay, hinder or defraud the Herbst Parties. See Lubbe v. Barba, 91 Nev. 596, 598 (1975) (establishing a requirement for proving contentions of fraud by clear and convincing evidence).

1. Paul Morabito's Actual Intent Is Apparent from His Own Statements and Actions.

24. The debtor made his intent clear through his actions and his own statements.

25. Immediately following the Oral Ruling, Paul Morabito transferred $6 million in cash off-shore.[217] Within two days of the Oral Ruling, he hired counsel for advice on how to evade the Herbst Parties' judgment and protect his assets from the Herbst Parties.[218] Recognizing that the transfers would be challenged, he explained his motive as depriving the Herbst Parties of a perceived "home court, good old boy advantage."[219] When he was advised by Gary Graber that the contemplated transfers may constitute fraudulent transfers, he terminated Mr. Graber's firm.[220] Paul Morabito then used his long-time counsel, Vacco, to implement a series of transactions that resulted in him being divested of most of his assets within a two-week period, before the FF&CL was even entered.

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[217] Exh. 37, p. 4, MORABITO (341).005352.

[218] *See* Exh. 25 (Hodgson Ross indicating they had a number of ideas, "including a possible marital split between Paul [Morabito] and [Bayuk] pursuant to which [Bayuk] could retain some of Paul [Morabito's] assets" and Vacco of LMWF following with discussion of Paul Morabito selling his interest in CWC to Bayuk and Sam Morabito); see also Trans. 11/1/18, p. 29, ll. 13-18 and p. 30, ll. 21-22; 11/1/18, p. 33, ll. 1-6; 11/1/18, p. 46, ll. 13-15; Exhs. 26 discussing moving to California) and 32 ("[Bayuk] and I plan on changing our primary residence from Reno to Laguna Beach.").

[219] Exh. 29.

[220] Trans. 11/1/18, p. 35, ll. 6-14.

26. Subsequent to the transfers, Paul Morabito acknowledged that he had stripped himself of any assets other than the Panorama Property and had effectively limited the Herbst Parties' collection attempts to the Panorama Property, telling Vacco:

> With the sale of the Reno house closing December 31st our friends in Las Vegas get a nice gift. They also acknowledge the change of ownership to just me. $1.5 million is [their] bounty. If we go past December 31st the only material asset that they can lay their hands on through me is access to Edward Bayuk and Virsenet - and that is now valued at $2.12 billion. After dilution Edward owns 72%. $85 million is 4% of the overall value. If they want to go after me and think that they can make a claim on him, then that's [their] value proposition. . . .[221]

27. On April 24, 2013, on the eve of Paul Morabito's default under the Forbearance Agreement with the Herbst Parties, he asked Vacco "How do you do this so that Herbst cannot ever access it?"[222]

28. Paul Morabito's communications with his counsel both before and after the transfers leave no doubt of his knowledge that the transactions would operate to the detriment of the Herbst Parties. The evidence presented at trial established the actual intent to hinder, delay, or defraud a creditor by clear and convincing evidence without any further consideration of the statutory or common-law badges of fraud. See Hayes, 916 F.2d at 535 (debtor's knowledge that a transaction will operate to the detriment of creditors is sufficient to establish actual intent).

29. Even if the court were to accept the story offered by Paul Morabito and Defendants (which this Court does not find credible) that the parties were seeking to separate their assets as a result of the Oral Ruling, a non-fraudulent motive will not "cure" a transaction effectuated with actual intent.[223] See Bertram, 41 A.3d at 1247 (transaction is intentionally fraudulent if debtor has a motive of effecting a transaction to hinder a creditor, even if the debtor also has non-fraudulent motives).

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[221] Exh. 161 (December 18, 2012 email from Paul Morabito to Dennis Vacco).

[222] Exh. 162.

[223] As noted above, the story that Paul Morabito was merely separating his assets from Bayuk and Sam Morabito in September 2010 is belied by the transfer of $6 million from Paul Morabito's account immediately following the Oral Ruling, along with Paul Morabito's continued involvement in their businesses as an "advisor."

2. The Presence of Multiple Badges of Fraud Compel a Determination of Paul Morabito's Intent to Hinder, Delay, or Defraud the Herbst Parties.

30. Even if Paul Morabito had not admitted his intent to hinder and delay the Herbst Parties, consideration of the badges of fraud compel the conclusion that Paul Morabito intended to hinder, delay, or defraud his creditors, the Herbst Parties.

a. The transfers were to insiders – NRS 112.180(2)(a).

31. The transfers at issue in this case were made to insiders. Under NUFTA, a relative of the debtor is an insider. NRS 112.150(7)(a)(1). Here, Sam Morabito is Paul Morabito's brother and, therefore, a relative of the debtor.

32. NRS 112.150(7)(d) further provides that a statutory insider includes an affiliate, or an insider of an affiliate as if the affiliate were the debtor. "Affiliate" is defined as:

> (b) A corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled or held with power to vote, by the debtor or a person who directly or indirectly owns, controls or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities: (1) As a fiduciary or agent without sole power to vote the securities; or (2) Solely to secure a debt, if the person has not in fact exercised the power to vote...

NRS 112.150(1)(b). Paul Morabito directly and indirectly owned and controlled 20% more of the outstanding voting securities of CWC, Superpumper, and Baruk LLC and therefore, they all constitute Paul Morabito's affiliates. If the affiliate is a corporation, an insider includes (1) a director of the affiliate, (2) an officer of the affiliate, or (3) a person in control of the affiliate. Here, Bayuk was a director and officer of CWC and Superpumper along with Paul Morabito and owned 50% of Baruk Properties with Paul Morabito. Therefore, Bayuk was therefore an insider of Paul Morabito's affiliates and, by extension, a statutory insider of Paul Morabito.

33. Furthermore, the "UFTA's definition of 'insider' is not intended to limit an insider to the ...listed subjects. Instead, the drafters provided the list for purposes of exemplification." See In re Holloway, 955 F.2d 1008, 110 (5th Cir. 1992) (analyzing identical provision under Texas' adopted UFTA)); Landmark Cmty. Bank, N.A. v. Klingelhutz, 874 N.W.2d 446, 452, 2016 WL 363521 (Minn. Ct. App. 2016), review denied (Apr. 27, 2016) (finding that single-member LLC of spouse was an insider because the definition of "insider" is not limiting) (citing Citizens

State Bank Norwood Young Am. v. Brown, 849 N.W.2d 55, 62–63 (Minn. 2014) (finding that former spouse was an insider). When determining whether a transferee is a non-statutory insider two factors must be considered: (1) the closeness of the relationship between the transferee and the debtor, and (2) whether the transactions between them were conducted at arm's length. In re Emerson, supra at 707 (citing to In re Holloway, 955 F.2d 1008, 1011 (5th Cir. 1992)); In re Village at Lakeridge, LLC, 814 F.3d 993, 996 (9th Cir. 2016). "The true test of 'insider' status is whether one's dealings with the debtor cannot accurately be characterized as arm's-length." In re Craig Systems Corp., 244 B.R. 529, 539 (Bankr. D. Mass. 2000).

34. Paul Morabito and Bayuk were long-time companions and business partners who cohabitated for over a decade prior to the subject transfers, owned several properties together as tenants in common, and co-owned several businesses. Domestic partners, same-sex or otherwise, are, like spouses, insiders for the purposes of an avoidance analysis.[224] Given the nature of their relationship, and the nature of the subject transactions, the subject transactions between Paul Morabito and Bayuk were not entered arm's length with one another.

b. The debtor retained possession or control of the property transferred after the transfer – NRS 112.180(2)(b).

35. It was Paul Morabito's intent that he would continue to be involved in his businesses behind the scenes, but that he would not have assets titled in his name and his businesses would be titled in the names of Bayuk, Sam Morabito, and Dennis Vacco.[225]

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[224] See Bloom v. Camp, 336 Ga. App. 891, 895, 785 S.E.2d 573, 578, adopted, (Ga. Super. May 24, 2016) (finding same-sex partner to be an insider though same-sex marriages were not recognized in Georgia at the time of the transfer); In re Fisher, 296 F. App'x 494, 502, 2008 WL 4569946, at *5 (6th Cir. 2008) (though finding no fraudulent transfer occurred, finding that opposite-sex domestic partner was an insider); In re Tanner, 145 B.R. 672, 678 (Bankr. W.D. Wash. 1992) (same-sex partner who had cohabitated with debtor was an insider) (citing Matter of Montanino, 15 B.R. 307 (Bankr. D. N.J. 1981) (parents of debtor's live-in fiancé were insiders); In re Ribcke, 64 B.R. 663 (Bankr. D. Md. 1986) (parents of a debtor's deceased wife were insiders); In re O'Connell, 119 B.R. 311 (Bankr. M.D. Fla. 1990) (a good friend who had made numerous informal loans to a debtor was an insider); In re Standard Stores, Inc., 124 B.R. 318 (Bankr. C.D. Cal. 1991) (a corporate debtor's president's ex-brother-in-law was an insider with respect to a transfer five years after divorce from debtor's president's sister).

[225] Exh. 30 (9/21/2010 email to joint counsel, Vacco, and a third party representing that he "would no longer be actively seeking to accumulate assets in companies that [he was] a shareholder in, and instead would be acting as an advisor to amongst other entities, Snowshoe Petroleum LLC, a company to be owned and operated by [his] brother, Sam; Edward Bayuk, and Dennis Vacco…").

36. Consistent with his plan, following the transfers, Paul Morabito, Bayuk, and Sam Morabito maintained the *status quo*, with Paul Morabito retaining significant control of and continuing to use the transferred assets as if he still owned them. After the transfers, Bayuk and Sam Morabito funded Paul Morabito's lifestyle and Bayuk supplied Paul Morabito with money, credit card, a Mercedes, and a luxurious home. Paul Morabito continued to receive financial remuneration from Snowshoe, which paid $126,000 in Paul Morabito's personal legal expenses between October of 2015 and March of 2018—years after his financial interests were supposedly separated from those of his brother and Bayuk.[226]

37. Paul Morabito continued to negotiate deals using Superpumper as if he still owned it, and had general authority to speak on behalf of Snowshoe.[227] Among other examples of his continued control, in April 11, 2011, without any involvement by Bayuk or Sam Morabito, Paul Morabito proposed contributing Snowshoe's 100% interest in Superpumper in connection with the proposed Nella Deal, for which negotiations had commenced prior to the transfers.[228] In August 2011, Paul Morabito's and Defendants' joint counsel advised Paul Morabito (without copying Bayuk or Sam Morabito) to simply use Superpumper to make a payment to real estate broker Tim Haves in order to conceal the payment from the Herbst Parties.[229] In April of 2012, in response to inquiries by Superpumper's auditors regarding affiliate loans, Paul Morabito instructed Vacco "MY POSITION IS BELOW - PLEASE MAKE IT HAPPEN".[230] In March 2013, nearly three years after the Superpumper Transfer, Paul Morabito was still bargaining with Superpumper, proposing a settlement with the Herbst Parties whereby he would transfer Superpumper to the Herbst Parties in partial satisfaction of the judgment.[231] Though Bayuk and Sam Morabito

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[226] Exhs. 308, 309.

[227] Trans. 10/29/18, p. 224, l. 3 – p. 226, l. 20.

[228] Exhs. 131, 132 133; Trans. 11/2/18, p. 12, l. 23 – p. 16, l. 3; p. 16, l. 4 – p. 17, l. 19.

[229] Exhs. 136 and 137.

[230] Exh. 144.

[231] Exh. 153.

supposedly owned Superpumper at that point through Snowshoe, neither was included in these discussions.

38. Paul Morabito also continued to use Superpumper Properties, the successor to Baruk LLC, and its assets as if he still owned them. In November of 2011, Paul Morabito sought to use the assets of Snowshoe Properties (the successor to Baruk LLC) to settle a lawsuit against him. In February 2012, he sought to negotiate a third-party sale of 1461 Glenneyre and a master lease with the new buyer for Snowshoe Capital, a company owned by Paul Morabito, for the property, without any involvement by Bayuk.[232] Later, he caused a second deed of trust to be placed on 1461 Glenneyre in connection with a settlement of his lawsuit with Bank of America, which had nothing to do with Bayuk—Vacco simply instructed Bayuk when and where to sign for Paul Morabito.[233] Similarly, in September of 2012, Bayuk instructed their counsel that he would sign a second deed of trust on the Mary Fleming House in Palm Springs that Paul Morabito wanted in connection with funding for Virsenet, an entity in which Bayuk and Paul Morabito held joint interests.[234] When the sham of the sale of the Baruk LLC interest to Bayuk became inconvenient, Paul Morabito instructed Vacco to just undo it.[235] On October 3, 2012, Paul Morabito instructed Vacco and Lovelace regarding negotiation of a $5 million loan to Snowshoe Properties—in which Paul Morabito supposedly held no interest—without including Bayuk.[236] In March 2014, Paul Morabito caused Bayuk to transfer the Clayton Property to Desi Moreno without any value to Bayuk.[237]

39. Paul Morabito's continued control makes clear that the intent of the transfers was not to separate Sam Morabito's and Bayuk's interests from Paul Morabito's interests, as Bayuk

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[232] Exh. 142;Trans. 10/30/18, p. 28, l. 9 – p. 29, l.1.

[233] Exhs. 145, 147, 148, 152.

[234] Exh. 150; *see also* Exhs. 159 and 160.

[235] Exh. 70.

[236] Exh. 151.

[237] Trans. 10/30/18, p. 66, ll. 1-12.

and Sam Morabito now contend. There was never any separation one would expect in an arms' length transaction; rather, Paul Morabito viewed the transferred assets as if he still owned them. The only difference following the transfers was that the assets were out of the Herbst Parties' reach. While Bayuk and Sam Morabito often attempted to characterize Paul Morabito's representations regarding the assets and his continued use of the assets as mere "whiteboarding," neither of them ever repudiated Paul Morabito's representations regarding the assets or his attempts to sell, lien, or otherwise leverage them in connection with a transaction,[238] and, consistent with their unwavering support for Paul Morabito,[239] testified that they believed in his ability to put together a favorable transaction and would have agreed to a transaction negotiated by him.[240]

c. The transfers were concealed (NRS 112.180(2)(c)) and the debtor removed or concealed assets – NRS 112.180(2)(g).[241]

40. Judge Adams announced the Oral Ruling on September 13, 2010. By October 1, 2010, the transfers were largely complete. Neither Paul Morabito, his counsel, nor Defendants informed the Herbst Parties that the transfers were occurring, despite the fact that Paul Morabito and the Herbst Parties were in the midst of preparing for the punitive damages phase of the trial.

41. The Herbst Parties were not informed of the Baruk Transfer or the subsequent transfers of the Baruk Properties. Both the name and location of the entity owning the Baruk Properties was changed to Snowshoe Properties. By October 1, 2010, Bayuk had transferred the Palm Springs Property again, this time to the Bayuk Trust. Thereafter, the $1,617,500 Note was assigned to Woodland Heights, Ltd. so the Herbst Parties could not simply attach the proceeds to satisfy the Confessed Judgment.

42. The Herbst Parties were not informed of the Compass Loan, the distributions by Superpumper, the Matrix Valuation, or the Superpumper Agreement. Further, Paul Morabito

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[238] Nor did their counsel, Vacco.

[239] See Trans. 10/30/18, p. 98, l. 4 – p. 99, l. 7; p. 233, l. 15 – 235, l. 9

[240] Trans. 10/30/18, p. 239, l. 1-13.

[241] These badges of fraud are overlapping, and therefore are discussed together.

removed his assets from Nevada when he transferred his interest to Snowshoe, a new company incorporated in New York.

43. As Paul Morabito made clear in his communications with his counsel, removing and concealing assets in different jurisdictions was an intentional measure to ensure that the assets were out of the reach of the Nevada courts and to strip the Herbst Parties of a perceived "home court, good old boy" advantage in their collection efforts.

d. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit – NRS 112.180(2)(d), the transfer occurred shortly before or shortly after a substantial debt was incurred – NRS 112.180(2)(j), and the transfers were hurried – Sportsco Enterprises.

44. The presence of these related badges of fraud are the most obvious and compelling. Not only had Paul Morabito been sued by the Herbst Parties, but Judge Adams had announced an $85 million Oral Ruling against him on September 13, 2010.

45. The transfers were largely completed within the next two weeks, when the punitive damages phase of the litigation was just commencing. See Sportsco Enters., 112 Nev. at 632 (secrecy or a hurried transaction as indicative of fraud). By the time of Judge Adams' FF&CL, let alone entry of the Final Judgment on August 23, 2011, Paul Morabito's attachable assets were gone. It is not even necessary to infer that the Oral Ruling prompted the transfers, because Paul Morabito, Bayuk and Sam Morabito all admitted it.[242]

e. The transfer was of substantially all the debtor's assets – NRS 112.180(2)(e).

46. Within days after Judge Adams announced the Oral Ruling, Paul Morabito divested himself of almost all, if not all, of his assets: approximately $7 million in funds were transferred from his bank account, Paul Morabito's interest in the Laguna Properties was transferred, the 50% interest in Baruk LLC, and the 80% interests in Superpumper. He even transferred his furnishings

[242] Trans. 10/29/18, p. 132, ll. 6-16; *see also id.*, p. 132, ll. 17-19 (stipulating that Oral Ruling was the impetus for the transfers); Trans. 10/31/18, p. 150, l. 20 – p. 151, l. 3.

and personal property (including those he continued to use), to Bayuk. Paul Morabito was left with minimal tangible assets subject to execution by his creditors.

f. The value of the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred – NRS 112.180(2)(h), and there was lack of consideration for the transfers.[243]

47. Whether a debtor receives reasonably equivalent value is determined from the perspective of creditors. In Herup, the Nevada Supreme Court found that the underlying public policy of the Bankruptcy Code and the UFTA is the same: "to preserve a debtor's assets ***for the benefit of creditors***." Herup, 123 Nev. at 235 (emphasis added). Because the language of the UFTA and § 548 of the Bankruptcy Code are nearly identical and the purposes of the different laws are the same, cases applying § 548 of the Bankruptcy Code are persuasive authority. See id. (citing cases) (synthesizing authority for the conclusion that the bankruptcy code dictates "the appropriate standard to apply under Nevada's version of the UFTA.").

48. Likewise, the comments to the UFTA expressly state that the definition of "value" within the uniform act "is adapted from § 548(d)(2)(A) of the Bankruptcy Code.... The definition [ ]is not exclusive [and] is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors." UFTA § 3, cmt. 2. "***Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition.***" Id. (emphasis added).[244]

49. To constitute a cognizable benefit under the UFTA, (1) the benefit must be received by the debtor, such that the debtor's net worth is preserved ***to the exception of the interests of the creditors***; (2) such benefits must be for a cognizable value, including "property" and "satisfaction

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[243] The lack of reasonably equivalent value is both a badge of fraud under NRS 112.180(2)(h) and an element of a constructive fraudulent transfer under NRS 112.180(1)(b).

[244] Other jurisdictions have reached the same conclusion. See In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig., No. 211ML02265MRPMANX, 2013 WL 12148482, at *6 (C.D. Cal. June 7, 2013); Janvey v. Golf Channel, Inc., 792 F.3d 539, 544 (5th Cir. 2015), certified question answered, 487 S.W.3d 560 (Tex. 2016). California's UFTA, for example, "requires 'reasonably equivalent value' to be determined from the standpoint of the creditors," as contemplated under section 548. In re Prejean, 994 F.2d 706, 708 (9th Cir. 1993) (emphasis added); see In re Bay Plastics, Inc., 187 B.R. 315, 329 (Bankr. C.D. Cal. 1995) (noting that "under California law, reasonable equivalence must be determined from the standpoint of creditors"); see also In re Blixseth, 489 B.R. 154, 184 (Bankr. D. Mont. 2013), aff'd, 514 B.R. 871 (D. Mont. 2014), aff'd in part, rev'd in part, 679 F. App'x 611 (9th Cir. 2017).

or securing of a present or antecedent debt of the debtor;" and (3) the benefit must have been received by the debtor in exchange for the transfer or obligation.[245] The reasonably equivalent value of a given transfer under the UFTA is not determined relative to the transferee or the transferor, but relative to assets available for the benefit of creditors. Consideration is "reasonably equivalent" if it leaves *creditors* in the substantially the same position as before the transfers.

50. Here, Paul Morabito did not receive reasonably equivalent value in exchange for the assets he transferred.

a. Prior to the subject transfers, Paul Morabito owned (1) a 70% interest in the Panorama Property, a 75% interest in the El Camino Property, and a 50% interest in the Los Olivos Property, with a collective value of approximately $1,916,250; (2) a 50% interest in Baruk LLC, with a value of approximately $1,654,550, and (3) 80% of the equity of CWC, which held an 100% interest in Superpumper, with a value of $10,440,000. In addition, he owned personal property at the El Camino, Los Olivos, Panorama, and Mary Fleming Properties which he valued at $2,000,000.

b. After the transfers, Paul Morabito owned the Panorama Property, which had an equity value of only $971,136 (further reduced by credits for the theatre equipment and water rights that Bayuk retained), $60,000 in cash and nominal payments for the personal property, the $1,617,050 Note, the $492,937.30 Note, and a slew of payments as directed to the LMWF firm (who represented Paul Morabito and Defendants) and other third parties to support his lifestyle.

51. The evidence establishes because the bulk of the "value" received—the $1,617,050 and $492,937.30--Notes by Paul Morabito were illusory, and certainly did not result in tangible assets available for Paul Morabito's creditors. A promise is illusory when it appears "so insubstantial as to impose no obligation at all on the promisor – who says, in effect, 'I will if I want to.'" See Sateriale v. R.J. Reynolds Tobacco Co., 687 F.3d 1132, 1146 (9th Cir. 2012). Paul

[245] See In re Blixseth, 489 B.R. at 184; see also SE Prop. Holdings, LLC v. Braswell, 255 F. Supp. 3d 1187, 1198 (S.D. Ala. 2017) (citing UFTA and synthesizing similar bankruptcy authority for the conclusion that "reasonably equivalent value" is measured from the net effect of the transfer on the debtor's estate and the value of the transfer to the creditors at-issue).

Morabito's relationships with Bayuk and Sam Morabito were such that Bayuk's and Sam Morabito's obligations on the Notes were nothing more than "I will if I want to." Defendants have been unable to credibly account for payments on the Notes, the terms of which were never enforced and meaningless to the parties. While Paul Morabito transferred executable assets to the Defendants, he received only a fraction of the value in cash, illusory notes, and promises to maintain his lifestyle without regard for the terms of the notes or the agreements documenting the transfers.

A. The Transfers Were Constructively Fraudulent as to Creditors.

52. The evidence presented, the chronology of events and transfer of assets, and the other surrounding circumstances lead to the inescapable conclusion that the transfers to the Defendants were intentionally, willfully and fraudulently designed to evade collection by the Herbst Parties. But even if actual intent had not been established, the transfers would be avoidable as constructively fraudulent. Under Nevada's constructive fraud provision:

> [a] transfer made... by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made., if the debtor made the transfer... [w]ithout receiving a reasonably equivalent value in exchange for the transfer..., and the debtor:
>
> (1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (2) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond his or her ability to pay as they became due."

NRS 112.180(1)(b).

53. While the creditor generally bears the burden of proof both with respect to the insolvency of the debtor and the inadequacy of consideration, as with the actual fraudulent transfer statute, "under [the] constructively fraudulent transfer statute, where 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 hinder, delay, or defraud the creditor. See Sportsco Enters., 112 Nev. at 632 (citing Territorial Sav. & Loan Ass'n v. Baird, 781 P.2d 452, 462 n. 18 (Utah Ct. App. 1989); Erjavec v. Herrick, 827 P.2d 615, 617 (Colo. Ct. App. 1992)); In

re Nat'l Audit Defense Network, 367 B.R. 207, 226 (Bankr. D. Nev. 2007) (applying burden shifting analysis to constructive fraud). While "[i]t may appear contradictory to consider facts used to infer actual intent to defraud in order to determine 'constructive' fraud," the "[f]actors relevant to determining actual intent to defraud, a higher culpability standard, should be equally probative where something less than actual intent will suffice." In re Soza, 542 F.3d 1060, 1066-67 (5th Cir. 2008).

54. To rebut an inference of fraud, the defendant must show either that the debtor was solvent at the time of the transfer and not rendered insolvent thereby or that the transfer was supported by fair consideration.[246] Sportsco Enters., 112 Nev. at 632 (citing Kirkland v. Risso, 98 Cal.App.3d 971, 159 Cal.Rptr. 798, 802 (Ct. App. 1980)).

55. A number of the badges of fraud are present in this case, giving rise to a presumption that the transfers were constructively fraudulent, thereby shifting the burden to Defendants to establish the transfers were not constructively fraudulent. Defendants have not offered evidence sufficient to overcome the presumption. As discussed in the context of actual intent under NRS 112.180(a)(1), Paul Morabito did not receive reasonably equivalent value in exchange for the subject transfers. Moreover, after the transfers, Paul Morabito was left with insufficient assets to even meet his basic expenses, relying on Bayuk and Sam Morabito to pay his living expenses. The transfers were made immediately following Judge Adams' Oral Ruling, but before entry of the Final Judgment. As of the Oral Ruling, Paul Morabito knew, or at the very least, should have known, that he would incur a debt to the Herbst Parties beyond his ability to pay as it came due. That insolvency was imminent upon entry of the final judgment was confirmed by Michele Salazar in her net worth expert report submitted in the Herbst Litigation.[247]

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[246] The term "fair consideration" derives from the Uniform Fraudulent Conveyance Act, 7A U.L.A. 427, 428 (1985), the predecessor to the UFTA. In re Bay Plastics, Inc., 187 B.R. 315, 322, 329 (Bankr. C.D. Cal. 1995). The UFTA replaced "fair consideration" with "reasonably equivalent value." Id. at 329.

[247] Exh. 44.

B. Plaintiff Is Entitled to Avoidance of the Transfers and Return of the Property or the Value Thereof.

56. Having determined that the transfers were actually or constructively fraudulent under NRS 112.180(a)(1) or (a)(2), the Court must evaluate the Defendants' good faith defense and the equable remedies under NRS 112.210 and NRS 112.220. See Herup, 123 Nev. at 232; Cadle Co. v. Woods & Erickson, LLP, 131 Nev 114, 119 (2015) (finding that Nevada's fraudulent transfer statute creates equitable remedies including avoidance, attachment, and, subject to principles of equity and the rules of civil procedure, injunction, receivership, or other relief under NRS 112.210 or payment for value under NRS 112.220).

57. Nevada law provides a complete defense to avoidance to a good faith transferee who pays reasonably equivalent value as follows:

> A transfer or obligation is not voidable under paragraph (a) of subsection 1 of NRS 112.180[248] against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

NRS 112.220(1). A partial defense is afforded to a good faith transferee under NRS 112.220(4), which provides:

> Notwithstanding voidability of a transfer or an obligation under this chapter, a transferee or obligee who took in good faith is entitled, to the extent of the value given the debtor for the transfer or obligation, to:
>
> (a) A lien on or a right to retain any interest in the asset transferred;
>
> (b) Enforcement of any obligation incurred; or
>
> (c) A reduction in the amount of the liability on the judgment.

Thus, under Nevada law, if the complete defense under subsection (1) of NRS 112.220 does not apply to a transfer made with actual intent because less than "reasonably equivalent value" was given, a good faith transferee may receive a lien, enforcement of any obligation incurred, and/or

[248] Transfers which are made with actual intent to hinder, delay, or defraud.

"a reduction in the amount of the liability on the judgment" to the extent of the value provided. See In re Nat'l Audit Def. Network, 367 B.R. at 223 (describing good faith defense).

58. Under either NRS 112.220(1) or (4), however, the transferee bears the burden of proof to establish that the transferee received the transfer in good faith. Herup, 123 Nev. at 236-237. Good faith is an indispensable element of the defense, and as such, even if a transferee gives reasonably equivalent value in exchange for the transfer avoided, the transferee may not recover such value if the exchange was not in good faith. In re Agric. Research & Tech. Group, Inc., 89-15416, 1990 WL 149820 (9th Cir. 1990) (applying Haw.Rev.Stat. § 651C–8 with Bankruptcy Code § 548(c) as persuasive authority) (citing In re Candor Diamond Corp., 76 B.R. 342, 351 (Bankr. S.D.N.Y. 1987); Dean v. Davis, 242 U.S. 438, 37 S.Ct. 130, 61 L.Ed. 419 (1917); In re Roco Corp., 701 F.2d 978, 984 (1st Cir. 1983); In re Health Gourmet, Inc., 29 B.R. 673, 677 (Bankr. D. Mass. 1983)).

59. "A majority of courts applying the UFTA hold that a transferee must prove that he received the transfer in ***objective*** good faith. That is, good faith must be determined on a case-by-case basis by examining whether the facts would have caused a reasonable transferee to inquire into whether the transferor's purpose in effectuating the transfer was to delay, hinder, or defraud the transferor's creditors." Herup, 123 Nev. at 236-237 (emphasis added) (adopting the objective standard of good faith applicable under the Bankruptcy Code and other states' adoption of UFTA and collecting cases). "[T]o establish a good faith defense to a fraudulent transfer claim, the transferee must show objectively that he or she did not know or had no reason to know of the transferor's fraudulent purpose to delay, hinder, or defraud the transferor's creditors." Id. at 237.

60. Under this objective, inquiry notice standard, transferees "have a duty to investigate if there is sufficient information to put the transferee on notice that something is wrong." Leonard v. Woods & Erickson, LLP (In re AVI, Inc.), 389 B.R. 721, 736 (B.A.P. 9th Cir. 2008) (applying objective standard of good faith under Bankruptcy Code § 550 that is similar to UFTA) (citing Bonded Fin. Servs., Inc. v. Eur. Am. Bank, 838 F.2d 890, 897–98 (7th Cir. 1988)).

61. Defendants contend that because they were, in their words, "exonerated" by Judge Adams in the Herbst Litigation, they are absolved of liability. However, whether Bayuk or Sam

Morabito were participants in the original fraud that resulted in the judgment does not mean they had no reason to know that Paul Morabito intended to hinder or delay enforcement of the Herbst Parties' judgment. Bayuk and Sam Morabito were present at the Oral Ruling when Judge Adams awarded the Herbst Parties $85 million in damages against Paul Morabito on the basis of actual fraud. In the Oral Ruling, Judge Adams not only awarded the Herbst Parties $85 million, but he expressly found by clear and convincing evidence that Paul Morabito knowingly and intentionally made material misrepresentations which "had no basis in reality."[249] Within the next two weeks, the Defendants received substantially all of Paul Morabito's assets. This alone put Defendants on notice that something was wrong.

62. Bayuk and Sam Morabito cannot demonstrate that they did not know or have reason to know of Paul Morabito's intent to hinder, delay, or defraud the Herbst Parties. They were aware of the Oral Ruling and Paul Morabito's obligations to the Herbst Parties at the time of the transfers. They utilized the same counsel to orchestrate the transfers. They participated in the actions to strip the value from Superpumper prior to Paul Morabito's transfer of the equity. They allowed Paul Morabito to continue using and controlling the assets transferred. They assisted in ensuring that the Notes were not paid in accordance with their terms, thereby hindering collection by the Herbst Parties. They continued to fund Paul Morabito's lifestyle to ensure that, after the assets were transferred, the Herbst Parties could not collect their judgment but Paul Morabito's high-flying lifestyle would not change. They did not receive the transfers in objective good faith. They were complicit in all respects.

63. Even if good faith could have been established, the transferee must still demonstrate that it has provided value in exchange for the transfer. A complete defense to a fraudulent transfer arises in favor of a good faith transferee only if reasonably equivalent value is provided in exchange. NRS 112.220(1). If the value provided is not "reasonably equivalent," the value

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[249] Exh. 1 (Sept. 13, 2010 Transcript of Judge Adams' Oral Ruling) at LMWF SUPP 23106, l. 14 – LMWF SUPP 23107, l. 6; LMWF SUPP 23117, ll. 11-22 (finding that Paul Morabito "knew firsthand from his own employees and from his own accountant that [the working capital estimate] was incorrect," that it "materially inflated and false inflated the value of the company," and that it had "no basis in reality, but it was contrary to what he knew firsthand to be the truth.")

provided a good faith transferee entitles the transferee to a lien or reduction in liability to the extent of the value given. NRS 112.220(4)

64. Prior to the transfers, Morabito owned interests in the Laguna Properties and Panorama Property with an aggregate value of approximately $1,916,250; (2) a 50% interest in Baruk, with a value of approximately $1,654,550, and (3) an indirect 80% interest in Superpumper, with a value of at least $10,440,000. After the transfers, Paul Morabito owned the Panorama Property, with a net value of only $971,136 and the sham Notes, and received no more than $60,000 in cash in connection with the Real Properties transfers and $1,035,068 in cash in connection with Superpumper. For the reasons discussed above, the total amounts received by Morabito are not reasonably equivalent to the more than $14 million in value transferred.

65. Because the Defendants did not take the transfers in good faith, the Court does not find they have established a good faith defense.

C. Plaintiff is Entitled to Avoidance of the Transfers and Return of the Property Transferred Under NRS 112.210(a) and 11 U.S.C. § 541(a), and Judgment Under NRS 112.220

1. <u>Remedies Available to Plaintiff Under Chapter 112.</u>

66. The equitable remedies under UFTA are found in NRS 112.210 and 112.220(2). NRS 112.210 provides:

> 1. In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in NRS 112.220, may obtain:
>
> (a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
>
> (b) An attachment or garnishment against the asset transferred or other property of the transferee pursuant to NRS 31.010 to 31.460, inclusive; and
>
> (c) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:
>
> (1) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;
>
> (2) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
>
> (3) Any other relief the circumstances may require.

> 2. If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

NRS 112.210. Subsection (2) of NRS 112.220 provides:

> Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under paragraph (a) of subsection 1 of NRS 112.210, the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection 3 of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:
>
> (a) The first transferee of the asset or the person for whose benefit the transfer was made; or
>
> (b) Any subsequent transferee other than a transferee who took in good faith for value or from any subsequent transferee.

67. Thus, under NRS 112.210(1)(a), the first remedy is actual avoidance of the transfers—undoing the transfer sued upon. NRS 112.150 expressly advises Nevada courts construing the UFTA to harmonize its ruling with other states' courts construing the UFTA. Courts in other states interpreting UFTA have found that avoidance operates as a reconveyance of the property to the transferor. See In re Sexton, 166 B.R. 421, 426 (Bankr. N.D. Cal. 1994) (applying California law, ". . . a creditor that succeeds in causing a fraudulent transfer to be avoided merely causes the property to be reconveyed to the transferor.") (citing Wagner v. Trout, 124 Cal.App.2d 248, 254, 268 P.2d 537 (1954); Wright v. Salzberger, 121 Cal.App. 639, 9 P.2d 860 (1932)); United States v. Ultra Dimensions, 803 F. Supp. 2d 596, 601 (E.D. Tex. 2011) (under the Texas UFTA, "a conveyance which is found to be fraudulent as to creditors is wholly null and void as to such creditors, and the legal as well as the equitable title remains in the debtor for the purpose of satisfying debts.'") (citing California Pipe Recycling, Inc. v. Southwest Holdings, Inc., 2010 WL 56053, at *5 (S.D. Tex. 2010).

68. Further, under NRS 112.210(1)(c), this Court has authority to issue an injunction "against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property." In addition to the power to grant injunctive relief under NRS 112.210(1)(c), the court is also vested with the power to issue injunctive relief pursuant to NRCP 65 and NRS 33.010. NRS 33.010(3) provides for injunctive relief when a party acts in "violation of the plaintiff's rights

respecting the subject of the action, and tending to render the judgment ineffectual." NRS 33.010(3). The Nevada Supreme Court has long held that "if the injury is likely to be irreparable, or if the defendant be insolvent, equity will always interpose its powers to protect a person from a threatened injury." Champion v. Sessions, 1 Nev. 478, 483 (1865) (emphasis added). Injunctive relief may be of either a mandatory or prohibitive nature, and is properly issued where "it is essential to preserve a business or property interests." Guion v. Terra Marketing of Nevada, Inc., 90 Nev. 237, 240; City of Reno v. Matley, 79 Nev. 49, 60 (1963).

69. In addition, NRS 112.220(2) allows a creditor to recover judgment for the value of the asset transferred," subject to adjustment as equities may require. Moreover, NRS 112.220 permits the plaintiff to recover judgment against the initial transferee or the person for whose benefit the transfer was made—in this case, Bayuk and Sam Morabito.

70. Finally, NRS 112.210(1)(c)(3) broadly permits the court to award "[a]ny other relief the circumstances may require" subject to principles of equity and the applicable rules of civil procedure.

71. The breadth and flexibility of these remedies is reflected in Altus Brands II, LLC v. Alexander, a Texas appellate decision discussing provisions of Texas's UFTA which are substantively identical to NRS 112.210 and 112.220. 435 S.W.3d 432 (Tex.App.--Dallas 2014, no pet.) (applying Chapter 24 of the Texas Business & Commerce Code and specifically, Tex. Bus. & Com. Code Ann., §§ 24.008 and 24.009). The Altus court described the purpose and remedial provisions of UFTA as follows:

> UFTA is intended to prevent debtors from defrauding creditors by moving assets out of reach. "[T]he focus of an UFTA claim is to ensure the satisfaction of a creditor's claim when the elements of a fraudulent transfer are proven."

Id. at 441.

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As to a particular remedy, the court stated:

> However, UFTA does not specify how a remedy is to be selected in a particular case. To the extent appellees contend UFTA limits a creditor who has obtained a judgment against the debtor to the remedy described in Subsection 24.008(b), i.e. execution on the asset transferred or its proceeds, the language of UFTA does not, on its face, state such a limitation. Further, appellees cite no case law supporting such a limitation, and we have found none.

Id. at 444 (internal citations omitted).[250]

72. The remedial provisions of UFTA are equitable in nature and intended to restore the creditor to the position he would have had if the fraudulent transfer had not occurred. The court has the equitable power to fashion a remedy that fully restores the creditor—in this case, the bankruptcy estate—to the position it would have held had the transfers not occurred.

73. Plaintiff is therefore entitled to avoidance of the transfers to the extent necessary to satisfy the claims of creditors against Paul Morabito's estate pursuant to NRS 112.210(a) and 11 U.S.C. § 544(b). It is undisputed that the combined value of the property transferred from September 13, 2010 to October 10, 2010 is less than the amount of the claims, inclusive of the Herbst Parties' claim arising from the Confessed Judgment. Therefore, Plaintiff is entitled to avoidance of the transfers in their entirety, such that all of the transferred assets are returned to the bankruptcy estate.[251]

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[250] See also Arriaga v. Cartmill, 407 S.W.3d 927, 933 (Tex.App.--Houston [14th Dist.] 2013, no pet.) (reversing trial court's award of judgment instead of execution on transferred property in light of debtor's evasion of prior judgment, finding that "the trial court's award of a money judgment effectively denies [plaintiff], the prevailing party, the equitable relief she sought—a result that is contrary to the purpose of the UFTA."); Matter of Galaz, 850 F.3d 800, 806 (5th Cir. 2017) (given the evidence of actual intent to defraud and the broad remedial authority conferred by authority to grant "any other relief the circumstances may require" and to make "adjustment as the equities may require" of UFTA, the trial court properly awarded creditor amount which would restore her to the position she would have had if the fraudulent transfer had not occurred, which included percentage of gross income after the date of the transfer, over transferee's objection the district court should have limited compensatory damages to the value of the royalty rights at the time of the transfer).

[251] Here, because Paul Morabito is a debtor under Chapter 7 of the Bankruptcy Code, all legal and equitable interests of Paul Morabito as of June 20, 2013 are property of the bankruptcy estate. 11 U.S.C. § 541(a). Reconveyance of the property to the transferor—Paul Morabito—therefore requires conveyance of the property to the bankruptcy estate.

2. Plaintiff Is Entitled to Avoid the Real Property Transfers and Recover Paul Morabito's Interest in the Laguna Properties, as well as Monetary Judgment Against Bayuk and the Bayuk Trust Based on the Real Property Transfers in the Amount of $1,236,458.

74. Bayuk and the Bayuk Trust continue to own the Laguna Properties. Therefore, under NRS 112.210(1)(a) and 11 U.S.C. § 541(a), the bankruptcy estate is entitled to a return of Paul Morabito's 75% interest in the El Camino Property and his 50% interest in the Los Olivos Property.

75. Plaintiff is also entitled to a monetary judgment equal to the value of the transferred asset as of the date of transfer. Paul Morabito's 75% interest in El Camino Property was valued at $808,981 at the time of the transfers, and his 50% interest in Los Olivos Property had a value of $427,477 at the time of the transfers, for a total interest in the Laguna Properties at the time of the transfers of $1,236,458.

3. Plaintiff Is Entitled to Avoid the Baruk Transfer and Recover the Equity Interest in Baruk LLC, and Monetary Judgment Against Bayuk and the Bayuk Trust Based on the Baruk Transfer in the Amount of $1,654,550.

76. Paul Morabito indirectly owned 50% of the Baruk Properties prior to the transfers through Baruk LLC. Bayuk testified that he transferred the interest in Baruk LLC acquired from Paul Morabito to Snowshoe Properties and the Bayuk Trust. Bayuk still owns and controls the transferred properties (except the Clayton Property)—the Bayuk Trust owns 100% of the Glenneyre Properties indirectly through Snowshoe Properties, and directly owns the Mary Fleming Property. While litigation has been pending, Bayuk converted Snowshoe Properties from a California company to a Delaware company.

77. Plaintiff is entitled to avoidance of the Baruk Transfer, thereby restoring Paul Morabito's 50% equity interest in the remaining Baruk Properties. However, as a result of the subsequent transfers, Plaintiff is not remedied with avoidance alone.

78. Plaintiff is entitled to a monetary judgment against Bayuk and the Bayuk Trust based on the Baruk Transfer in the amount of $1,654,550 under NRS 112.220(2). As evidenced by the valuations obtained by Paul Morabito and Defendants, and the appraisal of the Clayton Property which was not valued by Defendants at the time of the transfers, the total value of Baruk

LLC on September 30, 2010 was $3,309,100. Morabito's 50% interest, therefore, had a value of $1,654,550. As a result, the Trustee is entitled to judgment against Bayuk and the Bayuk Trust in the amount of $1,654,550.

4. Plaintiff Is Entitled to Monetary Judgments Against Bayuk, Sam Morabito, and Snowshoe Based on the Superpumper Transfers.

79. While this action was pending, Defendants sold Superpumper and therefore, avoidance of the Superpumper Transfer is an inadequate remedy. Under NRS 112.220(2), Plaintiff is entitled to a judgment against the Defendants in the amount of the value of Morabito's interest at the time of the transfers.

80. Between September 21 and 23, 2010, Morabito transferred $355,000 to Salvatore and $420,250 to Bayuk, purportedly in exchange for their interests in Raffles. However, the Raffles assets remained an asset of CWC and Snowshoe, demonstrating that the alleged transfer was intended solely to strip CWC of one of its two assets and thereby reduce the valuation of Superpumper. Plaintiff is entitled to judgment in the amount of $355,000 against Salvatore and $420,250 against Baruk for the fraudulently-transferred cash.

81. Furthermore, Morabito's 80% interest in Superpumper had a value of $10,440,000 (exclusive of Raffles). In exchange for his interest in Superpumper, Morabito received only $1,035,068 and the Superpumper Note, which was illusory and provided no benefit to Morabito's creditors. Snowshoe was the initial transferee of the Superpumper Transfer. Bayuk and Salvatore were the ultimate recipients of the equity interests in Superpumper and therefore, the persons for whose benefit the transfers were made. Accordingly, Plaintiff is entitled to a judgment against Snowshoe in the amount of $9,404,932, and judgments against each of Bayuk and Salvatore for $4,702,466.

5. Plaintiff Is Entitled to Injunctive Relief.

82. During the pendency of this action, Defendants sold Superpumper to a third party, and Bayuk converted Snowshoe Properties from a California company to a Delaware company. Defendants have demonstrated both the ability and the willingness to engage in shell games to prevent Paul Morabito's creditors and Plaintiff from recovering assets to satisfy their claims.

Absent injunctive relief, Defendants are likely to transfer assets in an attempt to evade the court's judgment in favor of the Plaintiff.

III.
JUDGMENT

Based upon the foregoing and good cause appearing,

IT IS HEREBY ORDERED that judgment is entered in favor of Plaintiff and against Bayuk and the Bayuk Trust, as follows:

1. Avoiding the transfer of the El Camino Property and the Los Olivos Property, and awarding Plaintiff damages in the amount of $884,999.95, with offset for amounts collected on account of the El Camino Property and the Los Olivos Property;
2. Avoiding the transfer of Baruk LLC and awarding Plaintiff damages in the amount of $1,654,550 with offset for amounts collected on account of Baruk LLC;
3. Avoiding the transfer of $420,250 and awarding Plaintiff damages in the amount of $420,250 with offset for amounts collected on account of the $420,250; and
4. Avoiding the Superpumper Transfer and awarding Plaintiff damages in the amount of $4,949,000 with offset for amounts collected on account of the Superpumper Transfer.

IT IS HEREBY FURTHER ORDERED that judgment is entered in favor of Plaintiff and against Sam Morabito as follows:

1. Avoiding the transfer of $355,000 and awarding Plaintiff damages in the amount of $355,000 with offset for amounts collected on account on account of the $355,000; and
2. Avoiding the Superpumper Transfer and awarding Plaintiff damages in the amount of $4,949,000 with offset for amounts collected on account of the Superpumper Transfer.

IT IS HEREBY FURTHER ORDERED that judgment is entered in favor of Plaintiff and against Snowshoe, avoiding the Superpumper Transfer and awarding Plaintiff damages in the amount of $9,898,000 with offset for amounts collected on account of the Superpumper Transfer.

IT IS HEREBY FURTHER ORDERED that Plaintiff is awarded pre-judgment interest on the amounts set forth above at the Nevada statutory rate from date of service of the summonses and complaint to the date of entry of this judgment.

IT IS HEREBY FURTHER ORDERED that Plaintiff is awarded post-judgment interest on the amounts set forth above at the Nevada statutory rate until the judgment is paid in full.

IT IS HEREBY FURTHER ORDERED that under NRCP 65, NRS 33.010, and NRS 112.210(1)(c), the Court hereby enjoins and restrains Defendants, and each of them, as well as their officers, directors, agents, servants, and attorneys, and those persons or entities in concern with them who receive actual notice of this Judgment, whether acting directly or indirectly, or through any third party, from concealing, transferring, disposing of, or encumbering the El Camino Property, the Los Olivos Property, the Baruk Properties (or their proceeds), Snowshoe Properties or any successor thereto, or any assets held for the benefit of Paul Morabito.

Dated this 28 day of March, 2019.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

CASE NO. CV13-02663

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 29 day of March, 2019, I filed the **FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

_____**Personal delivery to the following: [NONE]**

X **Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User Agreement.**

GABRIELLE HAMM, ESQ. for WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

MARK WEISENMILLER, ESQ. for WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

FRANK GILMORE, ESQ. for SNOWSHOE PETROLEUM, INC. et al

TERESA PILATOWICZ, ESQ. for WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

ERIKA TURNER, ESQ. for WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

_____**Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada: [NONE]**

_____**Placed a true copy in a sealed envelope for service via:**

_____ Reno/Carson Messenger Service – **[NONE]**

_____ Federal Express or other overnight delivery service **[NONE]**

DATED this 29 day of March, 2019.

EXHIBIT 2

EXHIBIT 2

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Marquis Aurbach Coffing
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Attorneys for Defendants

IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, vs. 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, Defendants.	Case No.: CV13-02663 Dept. No.: 4

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

NOTICE OF APPEAL

Defendants, Superpumper, Inc.; Edward Bayuk, individually and as Trustee of the Edward Bayuk Living Trust; Salvatore Morabito; and Snowshoe Petroleum, Inc., by and through their attorneys of record, Marquis Aurbach Coffing, hereby appeal to the Supreme Court of Nevada from: (1) the Findings of Fact, Conclusions of Law, and Judgment, which was filed on March 29, 2019 and is attached as **Exhibit 1**; (2) the Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment, which was filed on July 10, 2019 and is attached as **Exhibit 2**; (3) the Order Granting in Part and Denying in Part Motion to Retax Costs, which

was filed on July 10, 2019 and is attached as **Exhibit 3**; and (4) the Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68, which was filed on July 10, 2019 and is attached as **Exhibit 4**.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned affirms that the pleading or document now being present to the Court in the above-entitled action does **not** contain any Personal Information (as defined in NRS 603A.040).

Dated this 5th day of August, 2019.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols
Micah S. Echols, Esq.
Nevada Bar No. 8437
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF APPEAL** was submitted electronically for filing and/or service with the Second Judicial District Court on the 5th day of August, 2019. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:

ERIKA TURNER, ESQ.
for WILLIAM A. LEONARD, JR, TRUSTEE OF ESTATE OF PAUL A. MORABITO

FRANK GILMORE, ESQ.
for SALVATORE R. MORABITO, SNOWSHOE PETROLEUM, INC.,
and SUPERPUMPER, INC.

MARK WEISENMILLER, ESQ.
for WILLIAM A. LEONARD, JR, TRUSTEE OF ESTATE OF PAUL A. MORABITO

JEFFREY HARTMAN, ESQ.
for EDWARD WILLIAM BAYUK LIVING TRUST, and EDWARD BAYUK

TERESA PILATOWICZ, ESQ.
for WILLIAM A. LEONARD, JR, TRUSTEE OF ESTATE OF PAUL A. MORABITO

GABRIELLE HAMM, ESQ.
for WILLIAM A. LEONARD, JR, TRUSTEE OF ESTATE OF PAUL A. MORABITO

MICHAEL LEHNERS, ESQ.
for EDWARD WILLIAM BAYUK LIVING TRUST, and EDWARD BAYUK and
SALVATORE R. MORABITO

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

GERALD M. GORDON, ESQ.
Garman Turner Gordon LLP
650 White Drive, Ste. 100
Las Vegas, Nevada 89119
SPECIAL COUNSEL TO TRUSTEE

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing

INDEX OF EXHIBITS

Exhibit No.	Document Description	No. of Pages
1	Findings of Fact, Conclusions of Law, and Judgment (filed 03/29/19)	65
2	Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment (filed 07/10/19)	3
3	Order Granting in Part and Denying in Part Motion to Retax Costs (filed 07/10/19)	4
4	Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 07/10/19)	4

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Exhibit 1

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Clerk of the Court
Transaction # 7192125

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, vs. SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, and individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	**CASE NO.: CV13-02663** **DEPT. NO. 4**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Trial on this matter commenced on October 29, 2018. Plaintiff William A. Leonard, Trustee for the Bankruptcy Estate of Paul Anthony Morabito ("Plaintiff"), appeared by and through counsel, Erika Pike Turner, Teresa Pilatowicz, and Gabrielle Hamm of the law firm of Garman Turner Gordon LLP. Defendants, Superpumper, Inc., an Arizona corporation ("Superpumper"); Edward Bayuk ("Bayuk"), individually and as Trustee of the Edward William Bayuk Living Trust (the "Bayuk Trust"); Salvatore Morabito, an individual ("Sam Morabito"); and Snowshoe Petroleum, Inc., a New York corporation ("Snowshoe," and together with Superpumper, Bayuk, the Bayuk Trust, and Sam Morabito, the "Defendants," and together with Plaintiff, the "Parties"), appeared by and through counsel, Frank Gilmore of the law firm of Robison, Sharp, Sullivan & Brust ("Robison"). On February 7, 2019, after notice and arguments heard by the parties, the Court

granted Plaintiff's motion to reopened evidence under NRCP 59(a) and admitted additional trial exhibits 305, 306, 307, 308, and 309 on February 8, 2019, to which Defendants waived rebuttal. After hearing the evidence and arguments of the parties, based thereon, the Court hereby finds, concludes, and enters the following Findings of Fact, Conclusions of Law, and Judgment.

Insofar as any conclusion of law is deemed to have been or include a finding of fact, such a finding of fact is hereby included as a factual finding. Insofar as any finding of fact is deemed to have been or to include a conclusion of law such is included as a conclusion of law herein.

I.
FINDINGS OF FACT

A. The Judgment Against Paul Morabito.

1. On December 3, 2007, Paul Morabito and Consolidated Nevada Corporation ("CNC") filed a lawsuit against JH, Inc., Jerry Herbst, and Berry-Hinckley Industries (together, the "Herbst Parties") captioned *Consolidated Nevada Corp., et al. v. JH, et al.* in the Second Judicial District Court (the "State Court"), Case No. CV07-02764, Department 6 (presiding, the Hon. Brent Adams) (the "Herbst Litigation").[1] The Herbst Parties filed counterclaims against Paul Morabito and CNC as well as a claim against Bayuk and Sam Morabito.[2]

2. On September 13, 2010, the State Court entered its oral ruling on the liability and damages portion of the trial, finding the Herbst Parties were fraudulently induced by Paul Morabito, justifying an award of $85,871,364.75 in actual damages in favor of the Herbst Parties against Paul Morabito and CNC, and dismissing Bayuk and Sam Morabito from liability (the "Oral Ruling").[3] Bayuk and Sam Morabito were present at the Oral Ruling.[4]

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[1] Stipulated Facts ("SF"), ¶ 1.

[2] *Id.*; Trial Transcript ("Trans").

[3] SF, ¶ 2; Trial Exhibit ("Exh.") 1, p. 22, l. 22 – p. 23, l. 24.

[4] SF, ¶ 2.

3. On October 12, 2010, the State Court entered its written findings of fact, conclusions of law and judgment reflecting the Oral Ruling (the "FF&CL").[5] On August 23, 2011, following the punitive damages phase of the trial, the State Court entered final judgment, awarding the Herbst Parties total damages against Paul Morabito and CNC in the amount of $149,444,777.80, including both compensatory and punitive damages for Paul Morabito's fraud (the "Final Judgment").[6] After entry of the Final Judgment, Paul Morabito and CNC filed numerous appeals with the Nevada Supreme Court (together with cross-appeals, the "Appeals").[7]

4. The Herbst Parties, Paul Morabito, and CNC agreed to settle the Herbst Litigation and the Appeals and, on November 30, 2011, executed a Settlement Agreement and Mutual Release (the "Settlement Agreement").[8] Pursuant to the terms of the Settlement Agreement, the Appeals were withdrawn and vacated, as were the FF&CL and Final Judgment, and Paul Morabito executed a Confession of Judgment for a compromised $85 million based upon the same findings of facts and conclusions of law, inclusive of those grounded in fraud, as set forth in the FF&CL.[9]

5. Paul Morabito and CNC defaulted under the terms of the Settlement Agreement.[10] By the time of the Settlement Agreement, the Herbst Parties had already experienced difficulty in collecting on the Final Judgment, as assets had been moved out of Paul Morabito's name.[11] Wanting to try to resolve the matter as opposed to engage in more collection actions, the Herbst Parties agreed to give Paul Morabito more time, and the Herbst Parties, Paul Morabito and CNC entered into a Forbearance Agreement dated March 1, 2013.[12] However, Paul Morabito and CNC

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[5] SF, ¶ 3; Exh. 2.

[6] SF, ¶ 4; Exh. 6.

[7] SF, ¶ 5.

[8] SF ¶ 6; Exh. 5.

[9] SF ¶¶ 6-7; Exh. 4, p. 10, § 2(k), and pp. 13-15, and Exh. 5.

[10] SF, ¶ 8.

[11] Exh. 5, p. 2, Sect. I-J; Trans. 10/29/18, p. 65, ll. 16-24.

[12] SF, ¶ 9; Exh. 6; Trans. 10/29/18, p. 12, ll. 12-17.

also defaulted under the terms of the Forbearance Agreement, making none of the due payment obligations.[13]

6. On June 18, 2013, the Herbst Parties filed the Confession of Judgment and the Stipulation of Nondischargeability (the "Confessed Judgment") and the Confessed Judgment was thereafter entered on the judgment roll of the Clerk of the State Court.[14]

B. The Bankruptcy.

7. On June 20, 2013, following Paul Morabito's defaults of the Settlement Agreement and Forbearance Agreement,[15] the Herbst Parties commenced an involuntary bankruptcy against Paul Morabito and CNC in the U.S. Bankruptcy Court for the District of Nevada (the "Bankruptcy Court").[16]

8. On December 17, 2014, the Bankruptcy Court entered an order adjudicating Paul Morabito a chapter 7 debtor.[17]

9. Multiple parties have filed claims in the Bankruptcy Court,[18] inclusive of the Herbst Parties' $77 million claim based on the unsatisfied Confessed Judgment.[19] There is currently no bar date for Paul Morabito's creditors to file their claims with the Bankruptcy Court.[20]

10. On April 30, 2018, the Bankruptcy Court entered judgment in favor of the Herbst Parties, determining that their claim evidenced by the Settlement Agreement and Confessed Judgment was nondischargeable under 11 U.S.C. § 523(a)(2), as the factual basis for the Confessed Judgment met each of the elements of fraudulent inducement under Nevada law and

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[13] SF, ¶ 10; Exh. 6, p. WL003105; Trans. 10/29/18, p. 69, ll. 2-9.

[14] SF, ¶ 11; Exh. 4.

[15] Trans. 10/29/18, p. 73, ll. 3-4.

[16] SF, ¶ 12.

[17] SF, ¶¶ 13-14.

[18] Exh. 303 (identifying five claims, including a $4,232,980.52 claim from the Franchise Tax Board).

[19] *See* Exh. 303; Trans. 10/29/18, p. 74, ll. 7-13, and p. 78, l. 19 – p. 79, l. 9.

[20] Trans. 11/2/18, p. 114, ll. 15-18.

nondischargeability under bankruptcy law.[21] Paul Morabito appealed the nondischargeability judgment, which appeal is pending.[22]

C. The Parties.

11. The Herbst Parties have spent nearly $10 million in fees and costs in their attempt to collect from Paul Morabito.[23] Still, approximately $80 million of the Confessed Judgment remains unsatisfied.[24]

12. As part of their collection effort, on December 17, 2013, the Herbst Parties commenced this action under NRS Chapter 112 (the "UFTA") for fraudulent transfer against transferor Paul Morabito, individually and as Trustee of his Arcadia Living Trust ("Arcadia Trust"), as well as transferees Superpumper, Bayuk, individually and as trustee of his Bayuk Trust, Sam Morabito, and Snowshoe.[25]

13. Sam Morabito is Paul Morabito's brother.[26] Sam Morabito resides in Canada, and is a former resident of Reno .[27]

14. Superpumper is an Arizona corporation that owns and operates gas stations and convenience stores in Arizona.[28] Consolidated Western Corporation, Inc., a Nevada corporation ("CWC") was the sole shareholder of Superpumper through September 28, 2010 when Sam Morabito executed a Plan of Merger and Articles of Merger upon Bayuk's consent on behalf of CWC, and filed Articles of Merger of CWC into Superpumper with the States of Arizona and

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[21] SF, ¶ 14; Exhs. 22 and 23, p. 11, ll. 14-18.

[22] *Id.*

[23] Trans. 10/29/18, p. 78, ll. 16-17; p. 78, l. 22 – p. 79, l. 1; p. 102, ll. 11-23l; p. 103, ll. 2-3.

[24] Trans. 10/29/18, p. 79, ll. 2-9.

[25] SF, ¶ 15.

[26] SF, ¶ 18.

[27] Trans. 10/31/18, p. 142, l. 5; 145, ll. 305; p. 164, ll. 16-19.

[28] SF, ¶ 36.

Nevada on September 29, 2010, thereby effectuating CWC's merger into Superpumper (the "Merger").[29]

15. Prior to the Merger, CWC's ownership was Paul Morabito -80%, Sam Morabito - 10% and Bayuk -10%,[30] and Paul Morabito, Bayuk and Sam Morabito each had a role as director and officer of Superpumper and CWC.[31] After the Merger of CWC into Superpumper, both Bayuk and Sam Morabito were directors and officers of Superpumper.[32]

16. On September 29, 2010, Dennis Vacco, ("Vacco"), joint counsel to Paul Morabito and the Defendants,[33] formed Snowshoe, a New York corporation,[34] for the purpose of acquiring Paul Morabito's interest in CWC.[35] Upon formation, Bayuk and Sam Morabito each owned 50% of the equity in Snowshoe and were designated as directors.[36] Snowshoe never had any other business operations or investments other than as a holding company for Superpumper's equity.[37]

17. From 1997 through at least the Oral Ruling date, Bayuk could be characterized as Paul Morabito's long-time boyfriend or companion.[38] The Bayuk Trust is Bayuk's self-settled trust formed and existing for estate-planning purposes.[39] While Bayuk and Paul Morabito were not registered as "domestic partners," Bayuk intimated that was only the case because they could not be married under Nevada or California law at that time.[40] Although Bayuk indicated that he

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[29] SF, ¶ 17; Exhs. 81-86.

[30] SF, ¶ 36.

[31] Trans. 10/29/18, p. 123, ll. 20-22; p. 125, l. 19 – p. 126, l. 6.

[32] SF, ¶¶ 16-19, 37.

[33] Trans. 10/31/18, p. 90, l. 19 – p. 91, l. 18.

[34] SF, ¶ 40; Exh. 87.

[35] Trans. 10/29/18, p. 148, ll. 21-24, p. 149, ll. 1-7; Trans. 11/6/18, p. 159, ll. 1-3.

[36] SF, ¶¶ 20, 40; Exh. 87, p. 1.

[37] Trans. 10/29/18, p. 185, l. 14 – p. 186, l. 1.

[38] SF, ¶ 19; Trans. 10/29/18, p. 110, ll. 5-9.

[39] Trans. 10/29/18, p. 143, ll. 13-18.

[40] Trans. 10/29/18, p. 120, ll. 18-24.

and Paul Morabito separated in 2010,[41] substantial evidence supports that there was a special close personal relationship between Bayuk and Paul Morabito at the time of the Oral Ruling and continuing thereafter even through the time of trial.

a. Vacco testified that as far as he knew, Bayuk and Paul Morabito had an ongoing relationship even after the subject transfers.[42]

b. On September 18, 2010, Paul Morabito emailed Vacco regarding judgment enforcement statutes and stated, "I should declare my residence with [Bayuk] in Laguna Beach asap..."[43] Consistent therewith, Paul Morabito and Bayuk moved from Reno to California.[44]

c. On September 23, 2010, Bayuk was added as a co-tenant on a West Hollywood, California residence leased in the name of Paul Morabito, rendering Bayuk and Paul Morabito jointly and severally liable for the lease obligations.[45]

d. On September 30, 2010, Paul Morabito executed an amendment and restatement of the Trust Agreement for his self-settled Arcadia Trust, which described Bayuk as Paul Morabito's "boyfriend and longtime companion," which Bayuk testified was true as of that date.[46] Bayuk was named the 70% beneficiary of the Arcadia Trust.[47]

e. On April 13, 2012, Paul Morabito represented that "[Bayuk] is my former long-time companion but we have a very strong personal relationship and he is my family and will be the central person in my life for the rest of my life."[48]

f. Paul Morabito currently resides in a home located at 370 Los Olivos, Laguna Beach, California (the "Los Olivos Property") along with his new boyfriend. The Los

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[41] Trans. 10/29/18, p. 109, ll. 15-17.

[42] Trans. 11/6/18, p. 212, l. 23 – p. 213, l. 15.

[43] Exh. 26; *see also* Exh. 29 (same, September 20, 2010); Exh. 32 (same, September 23, 2010).

[44] Trans. 10/29/18, p. 106, ll. 14-21.

[45] Exh. 35, p. 1, Sect. 1.

[46] Trans. 10/29/18, p. 147, ll. 14 – 23.

[47] Exh. 39, pp. RBSL001877-1878, 1903, 1906.

[48] Exh. 134, p. LMWF SUPP 068536.

Olivos Property is located adjacent to Bayuk's current residence at 371 El Camino del Mar, Laguna Beach, California (the "El Camino Property").[49] The Bayuk Trust owns both the Los Olivos Property and the El Camino Property as Paul Morabito transferred his interests in both the Los Olivos Property and the El Camino Property (along with all of the personal property in the Los Olivos and El Camino Properties) to the Bayuk Trust following the Oral Ruling.

g. Paul Morabito has been, and continues to be, financially supported by his brother, Sam Morabito, as well as by Bayuk.[50] Paul Morabito has possessed and used Bayuk's credit card with Bayuk paying the bills,[51] In addition, Bayuk pays Paul Morabito's attorneys' fees, and other amounts as directed by Paul Morabito.[52]

h. During the Herbst Litigation and through the time of trial in this case, Paul Morabito, Sam Morabito and Bayuk have had concurrent representation by the same counsel.[53]

18. In addition to their close personal relationship hallmarked by Bayuk's seemingly unwavering support of Paul Morabito,[54] Bayuk and Paul Morabito are also long-time business partners.[55] They co-owned multiple businesses before the Oral Ruling. Moreover, despite the alleged purpose of the subject transfers being to "separate" their financial interests, they co-owned a business after the Oral Ruling.[56]

19. On January 22, 2015, the Bankruptcy Court appointed Plaintiff as the trustee for the bankruptcy estates of Morabito and CNC.[57] On May 15, 2015, Plaintiff was substituted in

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[49] Trans. 10/29/18, p. 107, l. 10 –p. 108, l. 10.

[50] *See* Testimony of Paul Morabito, Deposition Trans. p. 27, ll. 10-16; p. 28, ll. 1-2; p. 31, l. 7- p. 33, l. 24.

[51] *Id.* at p. 34, ll. 14-20.

[52] Trans. 10/29/18, p. 188, ll. 19-23; p. 189, l. 7-9; 10/30/18, p. 98, l. 19 – p. 99, l. 7.

[53] Trans. 10/30/18, p. 5, l. 16 – p. 6, l. 8.

[54] Trans. 10/30/18, p. 98, l. 4 – p. 99, l. 7.

[55] SF, ¶ 19.

[56] *See, e.g.*, Testimony of Paul Morabito, Deposition Trans. p. 48, l. 16-p. 49, l. 24; Exh. 134, p. LMWF SUPP, p. 068536 (discussing Bayuk's co-ownership of Virsenet, a company formed in 2011 or 2012).

[57] SF, ¶ 21; Exh. 19.

place of the Herbst Parties in this case, and Paul Morabito and his revocable Arcadia Trust were dismissed from the action with only transferees of Paul Morabito's assets remaining in the case.[58]

D. Immediately After the State Court's Oral Ruling, Paul Morabito Implemented a Plan to Delay, Hinder and Prevent Collection by the Herbst Parties.

20. Within two days after the Oral Ruling, Paul Morabito had engaged at least two out-of-state law firms, Hodgson Russ LLP (attorneys-Garry Graber ("Graber") and Sujata Yalamanchili) and Lippes Mathias Wexler & Friedman ("LMWF") (attorneys-Vacco and Christian Lovelace), for advice on how to evade the Herbst Parties' judgment and to protect his assets.[59] In his email communications with lawyers from these firms,[60] Paul Morabito made clear his intent to thwart the Herbst Parties' enforcement of the judgment by cutting his (and Bayuk's) ties with Nevada and moving to California, while also converting and moving the majority of his assets that could be used to satisfy the Herbst Parties' judgment outside of Nevada.[61]

21. Graber of Hodgson Russ testified that he was engaged by Morabito to "protect his assets and/or escape liability on account of the judgment."[62] When asked which assets, Graber indicated "well, I think he was seeking to protect them all" and further specified that "I believe one of his principal assets which he expressed concern was his stock and his equity interest in an entity that was in the auto service business, I believe, and I believe that was this Superpumper entity."[63] When questioned regarding Paul Morabito's intent, Graber testified "I think he had an

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[58] SF, ¶ 22; Exh. 20.

[59] *See* Exh. 25 (Hodgson Ross indicating they had a number of ideas, "including a possible marital split between Paul [Morabito] and [Bayuk] pursuant to which [Bayuk] could retain some of Paul [Morabito's] assets" and Vacco of LMWF following with discussion of Paul Morabito selling his interest in CWC to Bayuk and Sam Morabito).

[60] Any attorney-client privilege was waived by Plaintiff. In addition, the privilege was deemed waived by the crime/fraud exception. See this Court's order of 7/6/16 (approving a Report & Recommendations of the Discovery Commissioner of 6/13/16).

[61] *See* Exhs. 26 (discussing moving to California) and 32 ("[Bayuk] and I plan on changing our primary residence from Reno to Laguna Beach.").

[62] Trans. 11/1/18, p. 29, ll. 13-18 and p. 30, ll. 21-22.

[63] Trans. 11/1/18, p. 33, ll. 1-6.

intent to avoid paying the judgment, whether that's by winning on appeal or divesting himself of his assets."[64] Ultimately, after Hodgson Russ attorneys advised Paul Morabito that he could not simply transfer his assets for value, Paul Morabito terminated them, as he did not like the advice that he was being provided.[65]

22. Paul Morabito utilized LMWF to complete the subject transfers. The same firm also concurrently represented Defendants.[66]

23. There is no evidence indicating that the subject transfers were contemplated before the Oral Ruling. The subject transfers were substantially completed in a short window of September 14, 2010 (the day after the Oral Ruling) to October 1, 2010, before any written order on the Oral Ruling was entered.[67]

24. At no time prior to, or at the time of, the subject transfers did Paul Morabito or any of the Defendants advise the Herbst Parties that Paul Morabito's assets were being converted or transferred, or any of the details of the subject transfers.[68]

25. Paul Morabito's email communications to his counsel contemporaneous with the subject transfers were inconsistent with the proffered explanation for the subject transfers that his goal was solely to separate out his interests from Sam Morabito and Bayuk once they were relieved from liability in the Herbst Litigation.[69] For example, in an email to counsel dated September 20, 2010, Paul Morabito recognized that the transfers would be challenged in court at the same time he described his intention to deprive the Herbst Parties of what he perceived to be the Herbst Parties' "home court, good old boy advantage."[70] In an email dated September 21, 2010, Paul

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[64] Trans. 11/1/18, p. 46, ll. 13-15.

[65] Trans. 11/1/18, p. 35, ll. 6-14.

[66] Trans. 10/29/18, p. 140, l. 8 – p. 141, l. 9.

[67] Exhs. 45, 46, 61, 80.

[68] Trans. 10/29/18, p. 62, ll. 15-20 (on line 20, first sentence only); p. 63, ll. 4-12.

[69] Deposition Testimony of Paul Morabito, Trans. p. 69, ll. 8-16.

[70] Exh. 29.

Morabito discussed his intention to continue to be active in the business of Superpumper, save and except as only an "advisor" with ownership to be in the name of Sam Morabito and Bayuk.[71]

1. The $6,000,000 Cash Transfer.

26. Immediately after the Oral Ruling, on September 14, 2010, Paul Morabito transferred $6 million out of his bank account.[72] While this transfer is not the subject of Plaintiff's claims here, the pattern of Paul Morabito's conduct in the same timeframe as the subject transfers is still relevant as evidence of Paul Morabito's intent. The story that Paul Morabito was merely separating his assets from Bayuk and Sam Morabito in September 2010 is belied by the transfer of Paul Morabito's $6 million from his account immediately following the Oral Ruling.

2. The CWC/Superpumper Transfers.

27. Prior to the Oral Ruling, Paul Morabito communicated his opinion of the value of Superpumper to the company's auditors,[73] as well as third-party potential business partners.[74]

28. Subsequent to the Oral Ruling, at the same time that the subject transfers were being contemplated, significant value was intentionally stripped out of CWC by Paul Morabito in conjunction with Sam Morabito and Bayuk.

a. On August 13, 2010, which was just prior to the Oral Ruling but while the Herbst Litigation was pending, CWC had $3 million in loan proceeds from a term loan obtained

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[71] Exh. 30.

[72] Exh. 37, p. 4, MORABITO (341).005352.

[73] Exh. 42 (May 5, 2009- $20 million value for 100% of equity in CWC); Exh. 43 (Mach 10, 2010- "nothing has materially changed" with respect to Paul Morabito's identified assets, including value).

[74] Exhs. 76, 77, 79. It is notable that in addition to both the State Court and the Bankruptcy Court finding that Paul Morabito had intentionally defrauded the Herbst Parties as the basis for their respective judgments against Paul Morabito, Bayuk, Paul Morabito's closest ally, admitted that Paul Morabito is not honest in his dealings with third parties and is not trustworthy. (Trans. 10/31/18, p. 28, l. 24 – p. 31, l. 2). Sam Morabito also confirmed that Paul Morabito is not honest in his communications with third parties (Trans. 10/31/18, p. 236, l. 6 – p. 237, l. 34). The Court is in the untenable position of being asked by Defendants to believe Paul Morabito (and his agent, Vacco) with regard to his intentions with respect to the subject transfers at the same time Defendants are asking the Court to disregard Paul Morabito's representations that there was significant value of the equity in Superpumper.

from Compass Bank (the "Compass Loan").[75] On September 14, 2010, Paul Morabito, Sam Morabito and Bayuk each took a $939,000 distribution from CWC,[76] which together totaled almost all of the $3 million in loan proceeds. On September 30, 2010, Sam Morabito and Bayuk each contributed $659,000 of their distribution monies back into Superpumper; however, Paul Morabito did not contribute any portion of his $939,000 distribution.[77] Instead, Paul Morabito executed a Term Note dated September 1, 2010, documenting a loan obligation from Paul Morabito to CWC for $939,000 (the "$939,000 Note").[78]

b. Prior to the Oral Ruling, Raffles, an insurance captive, was certificated in CWC's name (the "Raffles Asset"). The Raffles Asset was valued on September 30, 2010 at $2,234,175.[79] On September 21, 2010, Paul Morabito paid Sam Morabito $355,000.00 and paid Bayuk $420,250.[80] Sam Morabito and Bayuk testified that the purpose of these payments was for Paul Morabito to purchase Sam Morabito and Bayuk's interests in the Raffles Asset. There is no documentation whatsoever reflecting the purpose of these September 2010 payments to Sam Morabito and Bayuk. Further, it is undisputed that the title of the Raffles Asset was never transferred out of the CWC name to Paul Morabito,[81] and no one advised the Herbsts that any distributions of the Raffles proceeds they received would be payable to Paul Morabito,[82]

c. Then, CWC was merged into Superpumper.[83] The effect of the Merger was that amounts due to Superpumper from Paul Morabito and his affiliates were cancelled.[84]

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[75] SF, ¶ 38.

[76] SF, ¶ 38.

[77] Trans. 10/31/18, p. 126, l. 22 – p. 127, l. 2.

[78] Exh. 110.

[79] Exh. 256; *see also* Exh. 44, WL004539 (identifying Raffles Asset value of $2,352,017).

[80] Exh. 37, p. 4, MORABITO (341).005352.

[81] Trans. 10/31/18, p. 96, ll. 6-21.

[82] Trans. 10/31/18, p. 101, ll. 3-10.

[83] SF, ¶ 39.

[84] Exh. 144, p. 1, SPI NO PAM 00000018.

Inclusive, the $939,000 Note was cancelled. Paul Morabito had taken distributions over the years from Superpumper and those distributions were booked as loan receivables on the audited books of Superpumper.[85]

29. The ability to quickly manipulate Superpumper's financials in order to make it appear as if the company had little value is consistent with Bayuk's representation that Paul Morabito is a "financial genius when it comes to understanding financing."[86]

30. On September 30, 2010, after the distribution of the Compass Loan proceeds, transfer of CWC's right to distributions from the Raffles Asset, and the cancellation of Paul Morabito's loan receivables due to Superpumper, Paul Morabito sold his 80% equity interest in the merged CWC/Superpumper to Snowshoe pursuant to a Shareholder Interest Purchase Agreement (the "Superpumper Agreement").[87] As a result of this transfer (the "Superpumper Transfer"), Sam Morabito and Bayuk each received 50% of Paul Morabito's 80% equity interest in Superpumper. On January 1, 2011, Bayuk and Sam Morabito transferred their respective 10% interests in Superpumper to Snowshoe.[88]

31. While Sam Morabito and Bayuk contend that the purpose of the Superpumper Transfer, and related transactions, was for their exclusive benefit in order to separate their assets from Paul,[89] the billing records from LMWF show that the entirety of the transactions was billed to, and for the benefit, of Paul Morabito.[90] There was no bill to Sam Morabito or Bayuk. Further, Sam Morabito and Bayuk's contention on the purpose of the transactions provides no rational explanation for the Merger and the creation of a new company, Snowshoe, a New York corporation, to be the transferee of Paul Morabito's interest.

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[85] Trans. 11/1/18, p. 249, l. 8 – p. 250, l. 7.

[86] Trans. 10/29/18, p 225, ll. 6-17.

[87] SF, ¶ 41.

[88] SF, ¶ 42.

[89] Trans. 10/29/18, p. 130, ll. 9 -24; 10/31/18, p. 31, ll. 8-11.

[90] Exh. 294; Trans. 11/1/18, p. 10, l. 3 – p. 11, l. 22.

32. The Court finds the testimony and report of James McGovern, CPA/CCF, CVA, a CPA and forensic accountant for over 35 years ("McGovern"),[91] credible and accepts his valuation of the 100% equity interest in Superpumper as of September 30, 2010 at $13,050,000, placing Paul Morabito's 80% interest as of September 30, 2010 at $10,440,000.[92]

33. Through their joint counsel, Vacco, Paul Morabito, together with Bayuk, Sam Morabito, and Superpumper, ordered an appraisal to support the transfer of Paul Morabito's 80% interest—consistent with Paul Morabito's plan[93] to obtain appraisals to justify transfers intended to divest himself of any interest the Herbst Parties could attach. On October 13, 2010 (two weeks *after* the Superpumper Agreement), Spencer Cavalier of Matrix Capital Markets Group, Inc. ("Matrix") completed a valuation of Superpumper in which he opined that the value of 100% of the equity interest in Superpumper as of August 31, 2010 (one month before the Superpumper Transfer date) was $6,484,514, which equates to $5,187,611.20 for Paul Morabito's 80% interest (the "Matrix Valuation").

34. The Matrix Valuation is nearly identical to McGovern's valuation,[94] save and expect that Matrix inexplicably adjusted accounts receivables due to Superpumper from Paul Morabito and his affiliates (the "Insider Receivables") to zero[95] while McGovern included the Insider Receivables in his valuation.

35. The decision on whether to include the Insider Receivables in the valuation of Superpumper's equity requires inquiry into whether the Insider Receivables can be repaid.[96] McGovern relied on Superpumper's audited financial statements for 2009 to confirm his opinion

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[91] Trans. 11/1/18, p. 111, ll. 17-20.

[92] Exh. 91; Trans. 11/1/18, p. 123, ll. 2 -3.

[93] Exh. 29 (Paul Morabito's September 20, 2010 email to Vacco and Yalamanchili: "selling for value" will be allowed").

[94] Excluding the Insider Receivables (*i.e.*, non-operating assets) from his valuation, McGovern's valuation of the Superpumper equity was $6,550,000. *See* Exh. 91, pp. 8, 11 and 19 of the McGovern report, MCGOVERN 00009, 12, and 20; *see also* Trans. 11/1/18, p. 137, ll. 3-10.

[95] Exh. 235, at Exhibit 7 of 14.

[96] Trans. 11/1/18, p. 125, ll. 5-24.

that the Insider Receivables should be included in the valuation of Superpumper's equity, wherein the auditors concluded the Insider Receivables were valid and collectible.[97] Defendants take issue with the recognition of the Insider Receivables in determining the value of the Superpumper equity in light of the fact that there were no notes introduced relative to a majority of the Insider Receivables and the Merger wiped out the Insider Receivables in any event; however, the Court finds that McGovern's determination that the debt underlying the Insider Receivables was valid and collectible is corroborated by the fact that before the end of 2010, new written notes were executed by Sam Morabito and Bayuk, without any new consideration, and placed on the Superpumper books, and Sam Morabito and Bayuk certified that they had sufficient assets to pay the Insider Receivables obligations.[98]

36. To get to a lower value, LMWF, counsel (and therefore the agent) for Paul Morabito and Defendants, reduced the Matrix Valuation[99] by (1) $1,682,000 for the "Compass Term Loan" (the "Compass Reduction"), despite the fact that the outstanding amounts of the Compass Term Loan loaned to Superpumper's members were supposed to be repaid and indeed $1,318,000 had been returned by Sam Morabito and Bayuk by September 30, 2010[100] and Paul Morabito executed the $939,000 Note with a promise to repay his distributed $939,000,[101] and (2) $1,680,880 for a 35% "risk reduction" (the "Risk Reduction," and together with the Compass Reduction, the "Additional LMWF Reductions"). This resulted in an ultimate "acquisition value" for the Superpumper Transfer of $2,497,307. There was no attempt to show how anyone at LMWF, a law firm, was in any way qualified to determine or quantify the LMWF Reductions. The Risk

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[97] *Id.*; *see also* Exh. 42 (auditor's notes verifying Paul Morabito had sufficient net assets to satisfy Compass liquidity obligation and to support $7.2 million of receivables on Superpumper's books); Exh. 118, at GURSEY004850 (verifying the Inside Receivables were fully collectible); Trans. 11/1/18, p. 168, l. 9 – p. 169, l. 3 (the Insider Receivables were on current (due on demand) on the books and had not been written off or otherwise indicated as uncollectible).

[98] Exhs. 105, 122-123, 126.

[99] Exh. 236

[100] Trans. 10/31/18, p. 75, ll. 1-5; Trans. 11/1/18, p. 120, ll. 15-22.

[101] Exh. 244.

Reduction was based, at least in part, on (1) the defaults under the Compass Term Loan and under Superpumper's real estate leases that are the result of the voluntary distributions of the Compass Term Loan proceeds to Paul Morabito, Bayuk, and Sam Morabito on September 14, 2010 and the Merger[102] and (2) the risk that Bayuk and Sam Morabito would be sued for the fraudulent transfers.[103] Defendants fail to explain how defaults and fraudulent transfers they engineered support a 35% "risk reduction," particularly where purported defaults would not exist in an arms-length sale to a third party. Furthermore, both McGovern and Mr. Cavalier testified that they had already considered risk when valuing the equity in Superpumper, which is reflected in their discount rate.[104] Finally, whether or not there were actual defaults of Superpumper obligations as a result of the Compass Loan distributions, the Oral Ruling, the Merger or otherwise, they did not prove to be so material that they were not ultimately resolved.[105] Superpumper's auditors confirmed that Compass was even prepared to refinance the existing obligation upon receipt of the 2010 audited financials.[106]

37. The Court reviewed the testimony of Michele Salazar ("Salazar"). Salazar did not perform a valuation of Superpumper,[107] but rather she criticized the Matrix Valuation and McGovern's report as purportedly incorrect. Ultimately, Salazar has two primary criticisms of the reports, neither of which is supported. First, Salazar disagreed with Mr. Cavalier's capitalization rate in the Matrix Valuation and McGovern's discount rate because, according the Salazar, they failed to take into account company specific risks.[108] However, both Cavalier[109] and McGovern[110]

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[102] Trans. 11/6/18, p. 253, l. 21 – p. 255, l. 21.

[103] Trans. 11/6/18, p. 173, ll. 5-8.

[104] Trans. 11/1/18, p. 120, 12- p. 122, l. 23 (14.2% discount rate- McGovern); Trans. 11/6/18, p. 282, ll. 13 – p. 284, l. 5 (13.25% to 13.4% capitalization rate- Matrix).

[105] Exhs. 27 and 33; Trans. 10/31/18, p. 122, ll. 16-22.

[106] Trans. 11/1/18, p. 253, l. 16 – p. 254, l. 9.

[107] Trans. 11/5/18, p. 101, l. 17 – p. 102, l. 2.

[108] Trans. 11/5/18, p. 60, l. 16 – p. 63, l. 18; p. 93, l. 24 – p. 94, l. 13.

[109] Trans. 11/6/18, p. 282, l. 19 – p. 286, l. 17.

[110] Trans. 11/1/18, p. 122, ll. 6-23; Exh. 91, McGovern 000018 and McGovern 000053-75.

testified as to the company specific risks they applied and tellingly, both came up with similar rates. Second, Salazar criticized McGovern for including the Insider Receivables in his valuation because, according to Salazar, there were no written notes and, as a result, the Insider Receivables could not be found to be valid and collectible.[111] Salazar's conclusion is directly contradicted by the testimony of Gary Kraus, Superpumper's auditor, who confirmed the Insider Receivables were valid and collectible obligations.[112]

38. Immediately following the 2016 deposition of Jan Friederich, a witness designated by Defendants as a rebuttal expert on the value of Superpumper's equity, Snowshoe transferred its equity to Supermesa Fuel & Merc, LLC ("Supermesa"), an entity affiliated with Mr. Friederich.[113] As Mr. Friederich stood to benefit from a lower valuation, his testimony is not helpful to the Court in determining the value of Superpumper's equity and his related testimony was accordingly given no weight by the Court.

39. The ultimate $2.5 million valuation for Paul Morabito's 80% interest is further belied by Sam Morabito's and Bayuk's own financial statements that they provided to Superpumper's auditors on February 1, 2011, just four months after the transfer, that represent their respective 50% equity interests as valued at $4,514,869, for a total combined value of Superpumper as of February 1, 2011 of $9,029,738.[114] Bayuk testified that this was his good faith statement of what the value of his 50% interest was as of February 1, 2011.[115]

40. As of the September 30, 2010 date of transfer of Paul Morabito's 80% equity interest in Superpumper to Snowshoe, pursuant to the Superpumper Agreement, Snowshoe was required to pay Paul Morabito $1,035,094 in cash. While Paul Morabito received $1,035,068 wire on October 1, 2018, there is no proof that such payment reflects the cash payment for the

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[111] Trans. 11/5/18, p. 48, l. 22 – p. 49, l. 18.

[112] Trans. 11/1/18, p. 222, l. 23 – p. 225, l. 18; see also Exh. 118, p. GURRSEY004850 (auditor confirmation that they were fully collectible).

[113] Trans. 11/5/18, p. 37, l. 9 – p. 38, l. 9.

[114] Exh. 126.

[115] Trans. 10/29/18, p. 236, ll. 8-11.

Superpumper equity and such evidence would be inconsistent with Paul Morabito's sworn testimony to the Bankruptcy Court that he only received $542,000 for his equity in Superpumper.[116] In any event, under any opinion of value, even if the $1,035,094 were received, that is not reasonably equivalent value for Paul Morabito's interest.

41. Subsequent to the execution of the Superpumper Agreement, Snowshoe became obligated for an additional $1,462,213 to Paul Morabito, as set forth in a $1,462,213 term note from Snowshoe to Paul Morabito (the "$1,462,213 Note") dated November 1, 2010.[117] The $1,462,213 Note required Snowshoe to make monthly payments commencing on December 1, 2010 in the amount of $19,986.71 for 84 months, with interest accruing at 4.0% per annum.[118] There were no payments made on the $1,462,213 Note, and on February 1, 2011, the Snowshoe obligation to Paul Morabito under the $1,462,213 Note was cancelled and a successor note from Snowshoe to Paul Morabito in the amount of $492,937 was executed (the "$492,937 Successor Note")[119] at the same time a successor note from Snowshoe to Superpumper (purportedly reflecting the amount of the $939,000 Note that had been cancelled at the time of the Merger) in the amount of $939,000 was executed (the "939,000 Successor Note").[120]

42. There is no record of payment from Snowshoe to Paul Morabito due under the terms of the Superpumper Agreement, the $1,462,213 Note or the $492,937 Successor Note. Likewise, there is no record of payment of the $939,000 Successor Note from Snowshoe to Superpumper. Sam Morabito conceded that, post-merger, it would not matter if there were papered obligations between Snowshoe and Superpumper because Snowshoe has no funds other than what Superpumper generated.[121] Finally, other than $542,000 Paul Morabito reported to have received,

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[116] Exh. 233.

[117] SF, ¶ 43.

[118] SF, ¶ 44.

[119] Ex. 104; Trans. 10/31/18, p. 217, ll. 6-16.

[120] Ex. 105.

[121] Trans. 10/31/18, p. 109, ll. 7-11.

the details of which are unknown, any remainder due to him on account of notes was unequivocally "cancelled."[122]

43. Contrary to Paul Morabito's representation to the Bankruptcy Court, Sam Morabito testified that he paid the $492,937 Successor Note obligation when he transferred $560,000 to LMWF on November 28, 2011 at the direction of Paul Morabito.[123] Not only does the amount paid by Sam Morabito not correspond with the $492,937 Successor Note or any identifiable obligation from Sam Morabito, there is no record of any satisfaction of the $492,937 Successor Note obligation in the Snowshoe books and records, including on Snowshoe's tax returns or amended tax returns.[124] There is no evidence of a capital contribution by Sam Morabito to Snowshoe for the payment, nor is there a corresponding capital contribution by Bayuk.[125] Furthermore, Sam Morabito's testimony that Vacco contacted him and told him the amount was due is contradicted by the communication from Paul Morabito instructing Sam Morabito to transfer funds[126] and also Vacco's testimony that he had no knowledge as to whether the amounts due under the $492,937 Successor Note were paid.[127]

44. In light of the evidence presented, inclusive of no corresponding payments, the Court finds that the $1,462,213 Note and the $492,937 and $939,000 Successor Note obligations were contrived in order to give the appearance of an arms-length exchange of value.

3. <u>Paul Morabito's Equity in the Real Properties.</u>

45. Immediately prior to the Oral Ruling, Paul Morabito and Bayuk, through their respective trusts, owned three real properties improved with homes as tenants in common:[128]

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[122] Ex. 107, ¶ 10.

[123] Trans. 10/31/18, p. 13, l. 21 – p. 115, l. 5.

[124] Trans, 10/31/18, p. 246, l. 18- p. 249, l. 11.

[125] Trans. 10/31/18, p. 131, l. 18 – p. 132, l. 19.

[126] Exh. 140.

[127] Trans. 11/6/18, p. 181, l. 22 – p. 182, l. 8.

[128] SF, ¶ 23.

a. Paul Morabito owned 75% of the El Camino Property and Bayuk owned 25%.[129]

b. Paul Morabito and Bayuk each owned 50% of the Los Olivos Property.[130]

c. 8355 Panorama Drive, Reno, Nevada (the "Panorama Property," and together with the El Camino Property and the Los Olivos Property (the "Laguna Properties"), the "Real Properties"). Paul Morabito owned 70% and Bayuk owned 30% of the Panorama Property.[131]

46. On September 27, 2010, Paul Morabito and Bayuk executed a Purchase and Sale Agreement, which was amended September 28, 2010 (as amended, the "Real Properties Agreement"), for the transfer of their respective interests in the Real Properties, as well as all of their personal property located at the Real Properties, which all went to Bayuk.[132] The Real Properties Agreement was prepared by one lawyer on behalf of both Bayuk and Paul Morabito.[133] Pursuant to the Real Properties Agreement, Paul Morabito sold his interests in the Laguna Properties to Bayuk in exchange for Bayuk's 30% interest in the Panorama Property and a payment of $60,117.00.[134]

47. According to Paul Morabito and Bayuk, the equity in the Laguna Properties at the time of the transfers on October 1, 2010 was $1,933,595: the equity in the Los Olivos Property was valued at $854,954 and the equity in the El Camino Property was valued at $1,078,641.[135] Paul Morabito's interests in the Laguna Properties therefore had an aggregate value of approximately $1,236,457.75, and Bayuk's interests in the Laguna Properties had an aggregate value of approximately $697,137.25.[136] Plaintiff did not dispute these values.[137]

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[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] SF, ¶ 24; Exhs. 45-46.

[133] Trans. 10/30/18, p. 89, ll. 21-23.

[134] Exhs. 45, 26, 233 .

[135] SF, ¶¶ 25-26.

[136] *Id.*

[137] *Id.*

48. Paul Morabito and Bayuk obtained an appraisal of the Panorama Property from Darryl Noble, who is not an MAI.[138] Mr. Noble opined that the Panorama Property had a purported fair market value as of October 1, 2010 (the approximate date of the transfer) of $4.3 million. Mr. Noble relied heavily on the cost approach, focusing on the cost of the home and its significant improvements.[139] Mr. Noble's conclusion of value was within the range of values suggested to him by Paul Morabito.[140]

49. As of the date of transfer, there had never been a sale of a home in excess of $4 million in Reno, and there was no sale for more than $3.35 million in the year preceding the transfer.[141] Whereas the transfer of the Panorama Property occurred on October 1, 2010, the $3.35 million sale which Mr. Noble used in his sales comparison approach occurred in September 2009, before the residential real estate market significantly worsened.[142] The sale prices of other properties on which Mr. Noble relied as comparables were not adjusted to account for significant differences, such as finished basements, or the significant deterioration in the residential real estate market throughout late 2009 and 2010. The sale price of one comparable was incorrectly reported in the appraisal.[143] Accordingly, the comparables on which Mr. Noble relied in his sales comparison approach do not support the concluded value. These errors were the result, at least in part, of the haste with which Mr. Noble was required to conduct the appraisal at the insistence of Paul Morabito.[144]

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[138] Exh. 276. Although another appraiser from Mr. Noble who is an MAI signed off on the appraisal report, no evidence was presented of his involvement in the assignment beyond reviewing and signing the report.

[139] Exh. 276, Trans. 11/6/18 , p. 32, ll. 3-13; p. 83, l. 23 – p. 84, l. 2; see Trans. 11/2/18, p. 16, l. 14-p. 18, l. 2 (Mr. Kimmel testifying that the cost approach is used to determine replacement cost by valuing the property and deducting depreciation, including physical depreciation, functional depreciation, and externalities such as economic factors.).

[140] Exh. 276, Trans. 11/6/18, p. 65, l. 2 – p. 65, l. 14.

[141] Trans. 11/6/18, p. 79, l. 18 – p. 80, l. 8.

[142] Id.; Trans. 11/6/18, p. 79, ll. 16-21.

[143] Trans. 11/6/18, p. 77, l. 3 – p. 78, l. 14; Ex. 277 at Superpumper 001124.

[144] Trans. 11/6/18, p. 83, l. 9 – p. 83, l. 8.

50. Moreover, the Court finds that Mr. Noble was focused on the undisputed significant cost of improvements to the Panorama Property, without regard to the devastated real estate market in October 2010. Indeed, in the cost approach, Mr. Noble's appraisal made no downward adjustment at all for functional obsolescence resulting from overimprovement or for external obsolescence, including the realities of the depressed real estate market at that time. Rather, Mr. Noble increased his conclusion of value by at least 25% more than the amount suggested by a calculation of replacement costs under the cost approach in order to arrive at a valuation of $4.3 million, an amount consistent with the value suggested to him by Paul Morabito.[145]

51. Consistent with the opinion of long-time Reno appraiser William Kimmel, MAI,[146] SREA,[147] the Court finds that the devastated local real estate market[148] had a greater impact on the valuation of real property in October 2010 than the cost of a home or its improvements.[149] The Court therefore agrees with Mr. Kimmel's appraisal of the Panorama Property, which relied primarily on the sales comparison approach,[150] determining a fair market value of $2,000,000 as of September 30, 2010, before deducting $1,028,864 in secured debt. The Court's finding is not based on, but is supported by, the subsequent sale of the Panorama Property for $2,584,000 to a third-party purchaser in December 2012.[151]

52. As part of the Real Property Agreement, Paul Morabito provided a credit to Bayuk in the amount of $45,000 for certain water rights associated with the Panorama Property and

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[145] Trans. 11/6/18, p. 70, l. 18 – p. 71, l. 2.

[146] Trans. 11/2/18, p. 7, ll. 5-6 (since 1968).

[147] Trans. 11/2/18, p. 7, ll. 8-9, 18 (Senior Residential Real Estate Analyst/Appraiser).

[148] Trans. 11/2/18, p. 17, ll. 14-15, and p. 21, l. 19- p. 22, l. 1.

[149] Trans. 11/2/18, p. 18, ll. 11-15; *see also* Trans. 11/2/18, p. 20, l. 1- p. 21, l. 6 (explaining that there were reported issues with the home in 2016; however, those did not change Mr. Kimmel's opinion of value because the reported condition of the improvements was communicated years after the October 1, 2010 retrospective date of valuation).

[150] Exh. 53; Trans. 11/2/18, p. 15, l. 16 – p. 19, l. 13; p. 85, ll. 5-8.

[151] Trans. 11/2/18, p. 22, ll. 8-15

$150,000 for theatre equipment purportedly located in the Panorama Property,[152] though neither Paul Morabito nor Bayuk obtained a valuation of the alleged water rights[153] or theatre equipment.[154]

53. Thus, Paul Morabito transferred his interests in the Laguna Properties worth $1,236,457.75 in exchange for Bayuk's interests in the Panorama Property worth only $291,340.80, plus $60,117.00,[155] resulting in a difference of $884,999.95.

4. Paul Morabito's 50% Equity Interest in Baruk Properties, LLC.

54. Prior to the Oral Ruling, Paul Morabito and Bayuk each owned 50% of a real estate holding company called Baruk Properties, LLC, a Nevada limited liability company ("Baruk LLC").[156] Baruk LLC owned four real properties (the "Baruk Properties"):

a. 1461 Glenneyre, Laguna Beach, CA ("1461 Glenneyre"), a commercial property with a stipulated appraised value of $1.4 million as of September 30, 2010;[157]

b. 570 Glenneyre, Laguna Beach, CA ("570 Glenneyre"), a commercial property with an appraised value of $2.5 million as of September 30, 2010, or $1,129,021 after deduction for the mortgage on property;[158]

c. 1254 Mary Fleming, Palm Springs, CA (the "Palm Springs Property"), a home with an appraised value of approximately $1,050,000 as of September 30, 2010, or $705,079 after deduction for the mortgage;[159] and

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[152] Ex. 247.

[153] Trans. 10/30/18, p. 158, ll. 2-19.

[154] Trans. 10/30/18, p. 158, l. 20 – p. 159, l. 7.

[155] Exhs. 46, 233.

[156] SF, ¶¶ 27, 29.

[157] SF, ¶¶ 27-28.

[158] *Id.*

[159] *Id.*

d. 49 Clayton Place, Sparks, NV (the "Clayton Property"), a vacant property with an appraised value of approximately $75,000 as of September 30, 2010.[160]

55. Accordingly, Paul Morabito's 50% interest in the Baruk Properties had a value of at least $1,654,550.

56. On October 1, 2010, Paul Morabito transferred his 50% membership interest in Baruk LLC to Bayuk pursuant to a Membership Interest Transfer Agreement (the "Baruk Transfer").[161]

57. Immediately after the Baruk Transfer, on October 4, 2010, Baruk LLC, a Nevada entity, was merged into a newly formed entity owned 100% by the Bayuk Trust called Snowshoe Properties, LLC, a California limited liability company ("Snowshoe Properties"),[162] thereby transferring the assets owned by Baruk Properties to Snowshoe Properties.

58. Snowshoe Properties is solely owned by the Bayuk Trust. Bayuk, through the Bayuk Trust, converted Snowshoe Properties from a California limited liability company to a Delaware limited liability company during the pendency of this litigation.[163]

59. On November 2, 2010, Bayuk transferred the Palm Springs Property from Snowshoe Properties to the Bayuk Trust.[164]

60. Following this series of transfers, the Bayuk Trust owned 100% of 1461 Glenneyre, 570 Glenneyre, and the Clayton Property indirectly through Snowshoe Properties, and directly owned 100% of the Palm Springs Property.[165]

61. The Membership Interest Transfer Agreement required that in exchange for Paul Morabito's 50% interest in Bayuk LLC, Bayuk deliver a promissory note in the principal amount

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[160] *Id.*

[161] SF, ¶ 30.

[162] SF, ¶¶ 31-32.

[163] Trans. 10/31/18, p. 26, ll. 1-14; p. 27, ll. 16-19.

[164] SF, ¶ 33.

[165] SF, ¶ 34.

of $1,617,050 to Paul Morabito (the "Baruk Note").[166] The terms of the Baruk Note required principal and interest payments in equal monthly installments of $7,720.04 over 360 months, accruing interest at 4.0%.[167]

62. There was no evidence of any payments corresponding with the terms of the Baruk Note. Bayuk's own records don't support alleged repayment. Specifically, Bayuk produced "ledgers" purporting to show payments to Paul Morabito under the Baruk Note.[168] These ledgers and supporting documents[169] are not credible as showing repayment of the Baruk Note for several reasons, including: (i) they include payments to Kim's Marble, Doheny Builder Supplier, Geo Technical, American Vector, Mark Paul Designs, Bead Painting, and Atlas Sheet Metal that were made for construction on Los Olivos after Paul Morabito's interests in the Real Properties were transferred,[170] (ii) $341,952.69 was credited for payment of the Chase mortgage on the Palm Springs Property, which was already taken into account in the valuation of the Palm Springs Property;[171] (iii) certain payments occurred or were applicable to expenses incurred prior to the date of the $1,617,050 Note;[172] (iv) Bayuk had no knowledge as to the purpose of $105,084.09 of payments for "Comerica" and believed it was on the ledger in error;[173] and (v) they include a $50,000 credit for the Clayton Property that was purportedly applied on October 4, 2010,[174] despite Bayuk's testimony that he did not recognize that the Clayton Property was owned by Baruk LLC until years later when it was used to settle a lawsuit from Desi Moreno against Paul Morabito.[175]

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[166] SF, ¶ 35.

[167] *Id.*

[168] Exhs. 71 and 73.

[169] Exh. 271.

[170] Trans. 10/31/18, p. 50, l. 20 – p. 52, l. 20; p. 56, l. 19 – p. 58, l. 2.

[171] Trans. 10/31/18, p. 52, l. 21 – p. 55, l. 19.

[172] Trans. 10/31/18, p. 56, l. 22 – p. 57, l. 15;

[173] Trans. 10/31/18, p.. 58, l. 10 – p. 59, l. 7.

[174] Exh. 73.

[175] Trans. 10/31/18, p. 64, l. 19 – p. 65, l. 1; p. 65, l. 14 – p. 66, l. 8.

63. On October 31, 2010, with an effective date of October 1, 2010, Paul Morabito assigned the Baruk Note to Woodland Heights, Ltd., a Canadian entity, and executed an allonge, purportedly in exchange for a 20% ownership interest in Woodland Heights, Ltd. (the "Woodland Assignment").[176] Bayuk purported to not even know of the Woodland Assignment, and testified he never paid payments pursuant to the Woodland Assignment.[177] Thus, it appears that the Woodland Assignment was a sham designed to further hinder the Herbst Parties from enforcing their judgment against Paul Morabito's interest in the $1,617,050 Note.

5. Watchmyblock.

64. On October 1, 2010, Paul Morabito also transferred his 90% interest in Watchmyblock LLC, a Nevada limited liability company, to Bayuk, the other 10% owner.[178]

65. Watchmyblock, LLC was a Nevada limited liability company at the time of transfer, but Bayuk changed it to a New York entity at the time of the transfer.[179]

66. Paul Morabito valued his equity in Watchmyblock, LLC at $2,250,000,[180] yet transferred that same equity to Bayuk in exchange for $1,000. Although Plaintiff is not seeking to avoid the Watchmyblock transfer in this case, the transfer is further evidence of Paul Morabito's motive and intent to move his assets out of the Herbst Parties' reach.

E. Paul Morabito Continued to Control the Transferred Interests After the Transfers.

67. Contrary to Defendants' denial of Paul Morabito's continuing interest and control over Superpumper and Snowshoe following the Superpumper Transfer, substantial evidence establishes that Paul Morabito retained control and continued to receive benefits. Beginning in October of 2015—over five years after Defendants allege Paul Morabito ceased to have any involvement or financial interest in Superpumper—and continuing through March 2018,

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[176] Exh. 68; *see also* Exh. 44, WL004540 (Salazar describes the assignment and purported value provided to Paul Morabito by Woodland Heights, Ltd. in return).

[177] Trans. 10/30/18, p. 81, ll. 1-8; p. 82, ll. 11-14.

[178] Trans. 10/31/18, p. 64, l. 24 – p. 65, l. 2; Exh. 163.

[179] Exh. 164; Trans. 10/31/18, p. 65, l. 3 – 4.

[180] Exhs. 42, 43.

Snowshoe paid more than $126,000 of Paul Morabito's personal legal expenses to the law firm of Robison, Sharp, Sullivan & Brust ("RSSB"), joint counsel to Paul Morabito and Defendants.[181] Indeed, the majority of Paul Morabito's legal fees in his personal bankruptcy case between May of 2017 and March of 2018 were paid by Snowshoe.[182]

68. Defendants attempted to conceal these payments. The centerpiece of Defendants' case-in-chief was Defendants' contention that the subject transfers were a "good faith" attempt to maintain separateness of Sam Morabito's and Bayuk's assets from those of Paul Morabito. As part and parcel of this defense, Defendants sought to minimize Paul Morabito's continued direction of Superpumper's business as mere "whiteboarding"[183] or an altruistic attempt to help Bayuk and Sam Morabito in their new endeavor. To maintain this fiction, Defendants failed to disclose the payments by Snowshoe during discovery or in trial, and Defendants' counsel actively avoided disclosing the payments until after the close of evidence.[184] During trial, Defendants testified that Paul Morabito had no interest or economic stake in Snowshoe, and Bayuk expressly denied that Snowshoe gave any money to Paul Morabito[185] or that Snowshoe paid any of Paul Morabito's attorneys' fees.[186]

69. Defendants Snowshoe, Superpumper, and Sam Morabito, along with their joint counsel, knew Bayuk's testimony was false both when it was offered[187] and when Defendants

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[181] Exhs. 308 (Detail Payment Transaction File List at RSSB_000001–RSSB_000002) and 309 (Declaration of Frank C. Gilmore).

[182] Exh. 308 at RSSB_000002.

[183] Trans. 10/31/18, p. 236, l. 21 – p. 237, l. 1; Trans. 11/1/18, p. 21, ll. 4-14; Trans., 11/6/18, p. 199, l. 3 – p. 200, l. 21.

[184] RSSB's billing records were the subject of a pending subpoena in Paul Morabito's bankruptcy case. Exh. 305 (Aug. 27, 2018 Subpoena to RSSB). RSSB failed to comply with the subpoena until an order compelling compliance was entered by the Bankruptcy Court. Exhs. 306 (Aug. 30, 2018 letter from F. Gilmore to M. Weisenmiller), 307 (Bankruptcy Court's order compelling RSSB's compliance).

[185] Trans. 10/29/18, p. 206, l. 3 – p. 207, l. 1.

[186] Trans. 10/29/18, p. 189, ll. 14-17;

[187] Snowshoe made the payments to RSSB for Paul Morabito's attorneys' fees, and RSSB, joint counsel to Defendants and Paul Morabito, accepted and applied the payments. Exh. 308, 309.

relied upon it in closing argument and post-trial submissions[188] in support of their contention that Paul Morabito had no interest or involvement in Snowshoe. Defendants offered no explanation for their false testimony after Plaintiff introduced evidence of the Snowshoe payments.

70. In addition to receiving concrete financial benefits from Snowshoe in the years following the Superpumper Transfer, substantial evidence established that prior to the subject transfers, Paul Morabito developed a scheme to continue to control the transferred assets and use them for his benefit while concealing his interest by having his brother and Bayuk hold title, and that following the transfers, he in fact retained significant control of the transferred assets (including Superpumper, the Baruk Properties, and Los Olivos) and used them for his benefit as if he still owned them.

71. Prior to the Superpumper Transfer, on September 21, 2010, Paul Morabito emailed his counsel, Vacco, and a third party potential business partner, Kevin Cross of Cerberus California, LLC, to advise that he "would no longer be actively seeking to accumulate assets in companies that [he was] a shareholder in, and instead would be acting as an advisor to amongst other entities, Snowshoe Petroleum LLC, a company to be owned and operated by [his] brother, Sam; Edward Bayuk, and Dennis Vacco…"[189]

72. Consistent with Paul Morabito's plan, following the Superpumper Transfer, Paul Morabito continued to utilize the transferred assets as if he still owned them. Paul Morabito remained active and involved with respect to the Superpumper business by, among other things, (1) providing advice; (2) directing Superpumper and Snowshoe's auditors and accountants with respect to handling questions related to Superpumper's financials, and (3) remaining a guarantor for the Spirit leases.[190]

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[188] Trans. 11/26/18, p. 132, ll. 5-15 (arguing that Paul Morabito received no payments following the Merger); [Defendants' Proposed] Findings of Fact, Conclusions of Law, and Judgment (submitted Nov. 26, 2018), at para. 101 ("After the merger and acquisition, Paul had no control, management, or economic stake in Snowshoe.").

[189] Exh. 30.

[190] Exh. 144; Trans. 10/29/18, p. 192, ll. 5-22; p. 202, ll. 2-10; p. 224, l. 24 – p. 225, l. 17.

73. On April 11, 2011, Paul Morabito sought to negotiate a sale on behalf of Snowshoe. Specifically, Snowshoe sought to acquire Nella Oil Company, LLC and Flyers LLC (the "Nella Deal").[191] Paul Morabito had commenced discussions with Nella prior to the Superpumper Transfer.[192] The April 11, 2011 proposal included the contribution of Snowshoe's 100% interest in Superpumper, "valued at $10,000,000." Despite having no ownership interest in Snowshoe, Paul Morabito negotiated on behalf of Snowshoe without the involvement of Bayuk or Sam Morabito, and admitted that he had simply changed the name on a loan required for the deal from CWC to Snowshoe.[193]

74. In August 2011, Paul Morabito retained Tim Haves, a real estate broker, on behalf of Superpumper Properties, LLC ("Superpumper Properties"), a company apparently owned by Paul Morabito which is distinct from Superpumper.[194] However, Vacco instructed Morabito, without copying Bayuk or Salvatore, to simply use Superpumper to make payment to conceal the payment from the Herbst Parties.[195]

75. In November 2011, despite previously transferring his interest in Baruk LLC to Bayuk, Paul Morabito sought to use the assets of Snowshoe Properties (the successor to Baruk LLC) to settle a lawsuit against him.[196]

76. When the sham of the sale to Bayuk became inconvenient, Paul Morabito advised Vacco to just undo it—to cancel the Baruk Note, convert it back into a 50% share interest in Snowshoe Properties, and to give Paul Morabito the right to trigger an option to split the assets so that Morabito would own 1461 Glenneyre and Bayuk would own 570 Glenneyre.[197]

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[191] Exhs. 131-133, 135

[192] *See* Exh. 30.

[193] Exh. 132.

[194] Trans. 10/31/18, p. 239, l. 17 – p. 240, l. 17.

[195] Exhs. 136, 137.

[196] Exhs 145, 146.

[197] Exh. 70

77. In February 2012, Paul Morabito, through Vacco and Timothy Haves, sought to negotiate a third-party sale of 1461 Glenneyre[198] and to prepare a master lease with the new buyer for Snowshoe Capital, a company owned by Paul Morabito, for the property,[199] without any involvement by Bayuk.

78. Later, in September 2012, in connection with a settlement of Paul Morabito's lawsuit with Bank of America, which had nothing to do with Bayuk, Paul Morabito caused a deed of trust to be placed on 1461 Glenneyre. Vacco simply instructed Bayuk when and where to sign for Paul Morabito, which Bayuk did.[200]

79. Similarly, in September of 2012, Bayuk instructed his and Paul Morabito's counsel that he would sign a second deed of trust Paul Morabito wanted to put on the Mary Fleming House[201] in connection with funding for Virsenet, an entity in which Bayuk and Paul Morabito held joint interests.[202]

80. On October 3, 2012, Morabito instructed Vacco and Christian Lovelace, another lawyer at LMWF, regarding negotiation of a $5 million loan to Snowshoe Properties—in which Morabito supposedly held no interest—without including Bayuk.[203]

81. Ultimately, Paul Morabito and Bayuk finalized the $5 million loan and a first deed of trust was placed on 1461 Glenneyre and a Second Deed of Trust was placed on 570 Glenneyre.[204]

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[198] Exh. 142.

[199] Exh. 142; Trans. 10/30/18, p. 28, l. 9 – p. 29, l.1.

[200] Exhs. 145-148, 225.

[201] Exh. 150.

[202] Trans. 10/31/18, p. 35, ll. 2-9.

[203] Exh. 151.

[204] Exh. 151; Trans. 10/30/18, p. 35, l. 5 – p. 38, l. 16.

82. The funds loaned, and secured by the Glenneyre Properties, were used, in part, to pay for Paul Morabito's obligations including over $700,000 to satisfy Paul Morabito's obligation to Bank of America.[205]

83. In March 2013, nearly three years after the Superpumper Transfer, Paul Morabito was still bargaining with Superpumper. For example, Paul Morabito proposed a settlement with the Herbst Parties whereby he would transfer Superpumper to the Herbst Parties in partial satisfaction of the judgment. Though Bayuk and Sam Morabito supposedly owned Superpumper at that point through Snowshoe, neither was included in these discussions.[206]

84. In March 2014, Paul Morabito caused Bayuk to transfer the Clayton Property to Desi Moreno without any value to Bayuk.[207]

85. Paul Morabito's continued control makes clear that the intent of the transfers was not to separate Sam Morabito's and Bayuk's interests from Paul Morabito's interests, as Bayuk and Sam Morabito now contend. There was never any separation that one would expect in an arms-length transaction; rather, the Parties remained very much intertwined, and the only difference following the transfers was that the transferred assets were now out of the Herbst Parties' reach.

F. Paul Morabito Rendered Himself Judgment-Proof.

86. By the transfers at issue in this action, along with other transfers, Paul Morabito effectively transferred all or substantially all of his assets prior to any enforceable judgment even being entered against him, which is confirmed by Michele Salazar's net worth report submitted in the punitive damages phase of the Herbst Litigation,[208] the subject transfers rendered Paul Morabito insolvent, unable to satisfy his obligation to the Herbst Parties.

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[205] Trans. 10/21/18, p. 68, ll. 13-15.

[206] Exh. 153.

[207] Trans. 10/30/18, p. 66, ll. 1-12.

[208] Exh. 44. Notably, the report was from March 2011, well after the subject transfers had been finalized. There is no evidence presented of any disclosure of Paul Morabito's holdings or the detail of the transfer prior to, or at the time of, the subject transfers.

87. Although there was testimony presented from Bayuk[209] and attorney Vacco[210] that the transfers of Paul Morabito's interests to Bayuk after the Oral Ruling were for the purpose of separating Bayuk's interests from Paul Morabito, that testimony is belied by the fact that Bayuk and Paul Morabito co-owned new companies subsequent to the Oral Ruling. For instance, as of April 2012, Bayuk was co-owner of a company with Paul Morabito called Virsenet.[211]

II.
CONCLUSIONS OF LAW

A. Plaintiff has standing to assert a claim for fraudulent transfer under NRS Ch. 112.

1. Paul Morabito became a "debtor" no later than December 3, 2007[212] and remains a debtor under NRS 112.150(6).[213]

2. The Herbst Parties were "creditors" under NRS 112.150(4) no later than December 3, 2007, and they were entitled to assert claims under NRS Chapter 112, the Uniform Fraudulent Transfer Act ("UFTA"), pursuant to NRS 112.210 when this action was commenced.

3. 11 U.S.C. § 544(a)(1) provides that a trustee has "the rights and powers of ... a creditor" as of the commencement of the bankruptcy case. Thus, Plaintiff has standing to sue to avoid and recover transfers under NRS 112.210 and is the proper party in interest under NRCP 17. Plaintiff stands in the shoes of the bankrupt debtor, Paul Morabito, under the Bankruptcy Code, including under 11 U.S.C. § 541, and at the same time stands in the shoes of Paul Morabito's creditors, inclusive of the Herbst Parties, in the pursuit of fraudulently transferred assets under 11

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[209] Trans. 10/29/18, p. 130, l. 9-24.

[210] Trans. 11/6/18, p. 105, l. 17 – p. 106, l. 23.

[211] Exh. 134, p. LMWF SUPP, p. 068536.

[212] A "debtor" under NRS 112.150(6) is "a person who is liable on a claim," and a "claim" means "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured" under NRS 112.150(3), which is derived from § 101(5) of the Bankruptcy Code. *See* UFTA, § 1, cmt. 3. A creditor has a "claim" if the injury giving rise to the right to payment manifests itself to the party holding the potential claim, even if both liability and damages are contested and unresolved. In re Flynn, 238 B.R. 742, 746 (Bankr. N.D. Ohio 1999) (citing Grady v. A.H. Robins Co., 839 F.2d 198, 202–03 (4th Cir. 1988), cert. dism'd 487 U.S. 1260, 109 S.Ct. 201, 101 L.Ed.2d 972 (1988). Thus, the Herbst Parties' claim against Paul Morabito and CNC arose prior to the date they commenced the State Court Action, or December 3, 2007.

[213] Exhs. 4, 21-23, 303.

U.S.C. § 544(b). See In re MortgageAmerica Corp., 714 F.2d 1266, 1275 (5th Cir. 1983) (section 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").

4. This court retains concurrent jurisdiction over claims by a trustee pursuant to 11 U.S.C. § 544(b) under 28 U.S.C. § 1334(b). See In re Rosenblum, 545 B.R. 846, 855-56 (Bankr. E.D. Pa. 2016); Hopkins v. Plant Insulation Co., 349 B.R. 805, 812 (N.D. Cal. 2006); In re Kaufman & Roberts, Inc., 188 B.R. 309, 314 (Bankr. S.D. Fla. 1995) ("[b]ecause of this Court's concurrent jurisdiction with the state court, the Trustee may intervene in the state court action"); In re CitX Corp., 302 B.R. 144, 161 n. 10 (Bankr. E.D. Pa. 2003) (citing Quality Tooling, Inc. v. United States, 47 F.3d 1569, 1573 (Fed. Cir. 1995)) (observing that, under 28 U.S.C. § 1334(b), "bankruptcy courts do not have exclusive jurisdiction over adversary proceedings, and such matters may be heard in a non-bankruptcy forum").

B. The Court Has Jurisdiction Over the Defendants.

5. Jurisdiction over a nonresident defendant is proper when the plaintiff shows that the existence of jurisdiction satisfies Nevada's long-arm statute and does not offend the principles of due process. Viega GmbH v. Eighth Jud. Dist. Ct., 130 Nev. 368, 374-75 (2014); Trump v. Eighth Judicial Dist. Court, 109 Nev. 687, 698 (1993); see also NRS 14.065(1).

6. "Due process requires that "minimum contacts" exist "between the defendant and the forum state 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice'". Consipio Holding, BV v. Carlberg, 128 Nev. 454, 458 (2012) (quoting Trump, 109 Nev. at 698). The defendant should "reasonably anticipate being haled into court" in the forum state due to its conduct and connection there. Id. at 458 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)). Ultimately, the Court applies a three part-inquiry to determine whether specific personal jurisdiction exists, which consists of: (1) whether the defendant purposely availed itself to the privilege of conducting business in the state, or purposefully directed its actions towards the state, (2) whether the cause of action arises out of

the defendant's forum-related activities, and (3) whether the exercise of jurisdiction over the defendant is reasonable. See Consipio, 128 Nev. at 458-459.

7. "A defendant's contacts with a state are sufficient to meet the due process requirement if either general personal jurisdiction or specific personal jurisdiction exists." Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court ex rel. County of Clark, 122 Nev. 509, 512 (2006) The Court has specific personal jurisdiction over any defendant when that defendant "purposefully enters the forum's market or establishes contacts in the forum and affirmatively directs conduct there, and the claims arise from that purposeful contact or conduct." Viega GmbH, 130 Nev. at 375.

8. In Nevada, a defendant who assists with fraudulent transfers or other efforts to impede satisfaction of a judgment is subject to personal jurisdiction. See Casentini v. Ninth Judicial Dist. Court of State In & For County of Douglas, 110 Nev. 721, 727 (1994). Further, intentional conduct occurring outside the forum state, but designed to cause harm in the forum state, may be a basis for finding minimum contacts. Calder v. Jones, 465 U.S. 783, 787-90 (1984) (holding that defendants must "reasonably anticipate[] being haled into court [in the forum state]" because "their intentional, and allegedly tortious, actions were expressly aimed at" the forum state, even though they occurred outside the forum state, and "they knew that the brunt of th[e] injury would be felt "in the forum state.").

9. The Court finds that based on Defendants' connections to Nevada, including that Bayuk and Sam Morabito are former residents of Reno, each Defendants' acceptance of fraudulent transfers of Nevada assets following a Nevada judgment, and Superpumper's merger with CWC, articles for which were filed in Nevada, it has jurisdiction over all Defendants.

10. With specific reference to Snowshoe, Paul Morabito held shares of CWC, a Nevada entity, which he fraudulently transferred to Snowshoe. Snowshoe is operated by Bayuk and Sam Morabito who are former Nevada residents. Snowshoe was formed with the specific purpose to accept a fraudulent transfer of the CWC shares. Defendants conceded that the Oral Judgment, announced in a Nevada court while Bayuk and Sam Morabito were present, was the impetus for the transfer to Snowshoe. Snowshoe, Bayuk, and Sam Morabito engaged in a business

transactions for the purpose of defrauding Nevada residents of a judgment won in a Nevada state court. Therefore, Snowshoe purposefully availed itself of Nevada jurisdiction and it could, along with the other Defendants, expect to be haled into court in Nevada. Snowshoe's contacts with Nevada were not the result of a unilateral act of a third party, nor were they random or fortuitous; they are the direct and intended consequence of the transfers in September 2010.

C. Nevada Has Adopted and Codified the UFTA in NRS Chapter 112.

11. The UFTA is designed to prevent a debtor from defrauding creditors by placing the subject property beyond the creditors' reach. Herup v. First Boston Fin., LLC, 123 Nev. 228 (2007); NRS Ch. 112. The underlying policy of both the fraudulent transfer provisions of the Bankruptcy Code and the UFTA are the same – "to preserve a debtor's assets ***for the benefit of creditors***." Id. at 235 (emphasis added).[214]

12. NRS 112.250 directs Nevada courts to apply and construe the UFTA "to effectuate its general purposes to make uniform the law with respect to the subject of this chapter among states enacting it." Herup, 123 Nev. at 237 (quoting NRS 112.250).[215] Fundamentally, the application of the UFTA should be consistent with its purpose of preventing and suppressing fraud. See Donell v. Kowell, 533 F.3d 762, 774 (9th Cir. 2008) (finding the terms of the UFTA are

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[214] The Nevada Supreme Court noted that it is appropriate to rely on cases interpreting 11 U.S.C. § 548 in light of the similarity of the underlying policy of both UFTA and the Bankruptcy Code of preserving the debtor's assets for the benefit of creditors and the similarity of the language of § 548 and the UFTA. Id., 123 Nev. at 235, 162 P.3d at 874, n. 15 (citing In re Tiger Petroleum Co., 319 B.R. 225, 232 (Bankr. N.D. Okla. 2004) (citing In re Grandote Country Club Company, Ltd., 252 F.3d 1146, 1152 (10th Cir. 2001); In re United Energy Corp., 944 F.2d 589, 594 (9th Cir. 1991); In re First Commercial Management Group, Inc., 279 B.R. 230, 240 (Bankr. N.D. Ill. 2002) ("Except for different statutes of limitations, the [Illinois] and federal statutes are functional equivalents, and the analysis applicable [under federal law] is also applicable [under Illinois law]."); In re Spatz, 222 B.R. 157, 164 (N.D. Ill. 1998) ("Because the provisions of the UFTA parallel § 548 of the Bankruptcy Code, findings made under the Bankruptcy Code are applicable to actions under the UFTA.")); see also Warfield v. Byron, 436 F.3d 551, 558 (5th Cir. 2006) (appropriate to rely on cases interpreting 11 U.S.C. § 548 where provision of UFTA at issue (which mirrored NRS 112.180(1)(a)) was "virtually identical" to 11 U.S.C. § 548 actual intent fraudulent transfer provision) (citing Ramirez Rodriguez v. Dunson (In re Ramirez Rodriguez), 209 B.R. 424 (Bankr. S.D. Tex. 1997); Cuthill v. Greenmark, LLC (In re World Vision Entm't, Inc.), 275 B.R. 641, 658 (Bankr. M.D. Fla. 2002); In re Carrozzella & Richardson, 286 B.R. 480, 485–86 (D. Conn. 2002)).

[215] Accordingly, it is appropriate for the Court to look to the application and construction of the UFTA by other courts. See, e.g., Sportsco Enters., 112 Nev. 625, 917 P.2d at 938 (citing to cases from other jurisdictions to support interpretation of Nevada's UFTA).

abstract in order to protect defrauded creditors, no matter what form a financial fraud might take) (citations omitted).

13. Further, the UFTA "is remedial and as such should be liberally construed." Cortez v. Vogt, 52 Cal.App.4th 917, 937, 60 Cal.Rptr.2d 841, 853 (Cal. App. 1997) (citing Lind v. O.N. Johnson Co., 204 Minn. 30, 40 (1938)); see also Landmark Community Bank, N.A. v. Klingelhutz, 874 N.W.2d 446 (Minn. Ct. App. 2016), review denied, (Apr. 27, 2016) (stating that the UFTA is remedial and meant to be construed broadly, applying Minnesota's enactment of the UFTA); Sigmon v. Goldman Sachs Mortg. Co., 539 B.R. 221 (S.D. N.Y. 2015) (same, applying Utah's enactment of the UFTA). The objective of UFTA "is to enhance and not to impair the remedies of the creditor." Id. at 937.

14. The UFTA provides that three types of transfers may be set aside: (1) transfers made with actual intent to hinder, delay, or defraud; (2) constructive fraudulent transfers; and (3) certain transfers by insolvent debtors. NRS 112.180(1)(a) (actual intent); NRS 112.180(1)(b) (constructive fraud); NRS 112.190 (transfers by an insolvent); Herup, 123 Nev. at 233. At issue here are NRS 112.180(1)(a) and NRS 112.180(1)(b).

15. Defendants contend that the subject transfers are not fraudulent under the UFTA because Bayuk and Sam Morabito had been "exonerated" by Judge Adams in the Herbst Litigation. But even if Judge Adam's ruling that Defendants were not liable to the Herbst Parties on the claims at issue in the Herbst Litigation was pertinent to Defendants' intent with respect to their receipt of transfers after the Oral Ruling, Defendants' intent is not relevant to the analysis of whether the transfers were made with actual intent to hinder, delay, or defraud, or were constructively fraudulent. Both the actual and constructive fraud provisions of the statute address the nature of

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the transfer and the intent of the *debtor*, rather than the transferee. Specifically, NRS 112.180(1)(a) provides:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . if ***the debtor*** made the transfer or incurred the obligation . . . [w]ith actual intent to hinder, delay or defraud any creditor of the debtor;

(Emphasis added.) NRS 112.180(1)(b) provides:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . if ***the debtor*** made the transfer or incurred the obligation . . . [w]ithout receiving a reasonably equivalent value . . . and ***the debtor***: (1) [w]as engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) [i]ntended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond his or her ability to pay as they became due.

(Emphasis added.) Thus, it is the debtor's intent, rather than the transferee's intent, which is relevant to whether a transfer is actually or constructively fraudulent under the UFTA. See Herup, 123 Nev. at 234 (NRS 112.180(1)(a) plainly provides that, for the district court to enter judgment in favor of a creditor under that statute, it must first determine whether the debtor "*actual[ly] inten[ded]* to hinder, delay or defraud any creditor of the debtor.") (emphasis in Herup); see also In re Nat'l Audit Def. Network, 367 B.R. 207, 221 (Bankr. D. Nev. 2007) ("It is key in this analysis that the required intent to hinder, delay or defraud is the debtor's; no collusion with the transferee is necessary.").

16. The transferee's knowledge becomes relevant under the good faith defense, which the transferee must prove. Herup, 123 Nev. at 236–37. Under Nevada law, determination of whether a transfer is fraudulent under NRS 112.180 is a prerequisite, but is separate and distinct, from remedies available to the creditor and whether the transferee is entitled to a good faith defense. Id. at 232, 237 (concluding that determination of whether a fraudulent transfer occurred under NRS 112.180(1)(a) is a prerequisite to setting aside the transfer or imposing damages and analysis of good faith defense, and instructing district court on remand to determine 1) whether the debtor made a fraudulent transfer under the UFTA, 2) whether the transferee acted in objective good faith in purchasing the business from the transferor, and 3) whether the transferee paid

reasonably equivalent value for the business for purposes of the good faith defense under NRS 112.220(1)).

D. The Transfers Were Made with Intent to Hinder, Delay, or Defraud the Herbst Parties.

17. The UFTA provides that a transfer made or obligation incurred by a debtor may be set aside if it is made or incurred by a debtor "with actual intent to hinder, delay or defraud any creditor of the debtor." NRS 112.180(1)(a); Herup, 123 Nev. at 231. "Traditionally, the intent required for actual fraudulent transfers is established by circumstantial evidence, since it will be the rare case in which the debtor testifies under oath that he or she intended to defraud creditors." See In re Nat'l Audit Def. Network, 367 B.R. at 219–20 (applying NUFTA) (citing Dahar v. Jackson (In re Jackson), 318 B.R. 5, 13 (Bankr. D. N.H. 2004). Intent may be established by circumstantial evidence or inferences drawn from the debtor's course of conduct. Id., 367 B.R. at 219 (citing Mazer v. Jones (In re Jones), 184 B.R. 377, 385 (Bankr. D. N.M. 1995)).

18. Moreover, the debtor's intent does not necessarily have to be to defraud a creditor. Rather, the "intent" element is satisfied if the debtor intends to hinder or delay or defraud a creditor. In re Nat'l Audit Def. Network, 367 B.R. at 221–22 ("Given the alternative phrasing of the requisite intent—a fraudulent transfer exists if there is an intent to hinder, delay *or* defraud—such transfers are also made with the requisite intent under Section 548(a)(1) and [NRS] 112.180.1(a)) (citations omitted). The debtor's knowledge that a transaction will operate to the detriment of creditors is sufficient to establish actual intent to defraud a creditor. Hayes v. Palm Seedlings Partners–A (In re Agric. Research & Tech. Group, Inc.), 916 F.2d 528, 535 (9th Cir. 1990) (quoting Coleman Am. Mov. Servs., Inc. v. First Nat'l Bank and Trust Co. (In re Am. Prop., Inc.), 14 B.R. 637, 643 (Bankr. D. Kan. 1981)). If the debtor has a motive of effecting the transaction to hinder a creditor, then the transaction is intentionally fraudulent even if the debtor also has non-fraudulent motives. See Bertram v. WFI Stadium, Inc., 41 A.3d 1239, 1247, 2012 WL 1427788 (D.C. 2012) (even if a debtor has at least one non-fraudulent motive for a transaction, the additional motive of effecting the transaction to hinder a creditor is a sufficient ground for an unassailable conclusion of fraudulent intent). Further, where the moving party proves fraudulent intent, the transfer is deemed

fraudulent, even if it is in exchange for valuable or full consideration. See In re Zeigler, 320 B.R. 362, 373 (Bankr. N.D. Ill. 2005) (applying Illinois enactment of UFTA).

19. NRS 112.180(2) sets forth the following non-exclusive list of factors (generally known as the "badges of fraud")[216] to be considered in determining actual intent:

a. the transfer or obligation was to an insider;

b. the debtor retained possession or control of the property transferred after the transfer;

c. the transfer or obligation was disclosed or concealed;

d. before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

e. the transfer was of substantially all the debtor's assets;

f. the debtor absconded;

g. the debtor removed or concealed assets;

h. the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

i. the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

j. the transfer occurred shortly before or shortly after a substantial debt was incurred; and

k. the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

This list is illustrative, not exhaustive, and none of the badges standing alone are necessary or sufficient as "the range of activities that fraudsters may use to commit fraud cannot and should not be definitively cataloged." In re Nat'l Audit Def. Network, 367 B.R. at 220.

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[216] See Nat'l Audit Def. Network, 367 B.R. at 220 (noting that the "badges of fraud" developed by the courts are recurring actions that historically have been associated with the actual intent to hinder, delay or defraud creditors) (citing Twyne's Case, 3 Coke 80b, 76 Eng. Rep. 809 (Star Chamber 1601) (developing early list of badges of fraud); Cuthill v. Greenmark, LLC (In re World Vision Entm't, Inc.), 275 B.R. 641, 656 (Bankr. M.D. Fla. 2002); Indianapolis Indiana Aamco Dealers Advertising Pool v. Anderson, 746 N.E.2d 383, 390 (Ind. App. Ct. 2001)).

20. The Nevada Supreme Court has also recognized the following indicia of fraud that will support a determination of actual fraudulent intent:

> lack of consideration for the conveyance, the transfer of the debtor's entire estate, relationship between transferor and transferee, the pendency or threat of litigation, secrecy or hurried transaction, insolvency or indebtedness of the transferor, departure from the usual method of business, the retention by the debtor of possession of the property, and the reservation of benefit to the transferor.

Sportsco Enters. v. Morris, 112 Nev. 625, 632 (1996) (citations omitted).

21. The UFTA list of "badges of fraud" provides neither a counting rule, nor a mathematical formula, and no minimum number of factors tips the scales toward actual intent. In re Beverly, 374 B.R. 221, 236 (B.A.P. 9th Cir. 2007), aff'd in part, dismissed in part, 551 F.3d 1092 (9th Cir. 2008) (applying the California enacted UFTA). The Ninth Circuit has explained that "[t]he presence of a single badge of fraud may spur mere suspicion; the confluence of several can constitute conclusive evidence of actual intent to defraud, absent 'significantly clear' evidence of a legitimate supervening purpose." In re Acequia, Inc., 34 F.3d 800 (9th Cir. 1994) (emphasis added); see also S. New England Tel. Co. v. Sahara & Arden, Inc., No. 2:09-CV-00534-RCJ-PAL, 2010 WL 2035330, at *4 (D. Nev. May 24, 2010) ("[a]lthough the 'presence of a single factor, i.e. a badge of fraud, may cast suspicion on the transferor's intent, the confluence of several in one transaction generally provides conclusive evidence of an actual intent to defraud.'") (quoting Gilchinsky v. Nat'l Westminster Bank, 159 N.J. 463, 732 A.2d 482, 490 (N.J. 1999)); In re Nat'l Audit Def., 367 B.R. at 220 ("Although none of the badges standing alone will establish fraud, the existence of several of them will raise a presumption of fraud."). In Nevada, as few as three badges have been found to establish clear and convincing evidence of actual fraudulent intent. See Sportsco Enters., 112 Nev. at 632.

22. Where the plaintiff establishes the existence of "indicia of 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." See Sportsco Enters., 112 Nev. at 632 (citing Territorial Sav. & Loan Ass'n v. Baird, 781 P.2d 452, 462 n. 18 (Utah Ct. App. 1989); see also Southern New England Telephone Co. v. Sahara & Arden, Inc., 2010 WL 2035330, *4-12 (D. Nev. May 24, 2010)

(applying the burden-shifting analysis under NRS 112.180(1)(a) and granting summary judgment to creditor).

23. The evidence relative to a confluence of at least a majority of the badges of fraud identified by Nevada statute and the Sportsco case amounts to clear and convincing evidence of Paul Morabito's actual intent to delay, hinder or defraud the Herbst Parties. See Lubbe v. Barba, 91 Nev. 596, 598 (1975) (establishing a requirement for proving contentions of fraud by clear and convincing evidence).

1. Paul Morabito's Actual Intent Is Apparent from His Own Statements and Actions.

24. The debtor made his intent clear through his actions and his own statements.

25. Immediately following the Oral Ruling, Paul Morabito transferred $6 million in cash off-shore.[217] Within two days of the Oral Ruling, he hired counsel for advice on how to evade the Herbst Parties' judgment and protect his assets from the Herbst Parties.[218] Recognizing that the transfers would be challenged, he explained his motive as depriving the Herbst Parties of a perceived "home court, good old boy advantage."[219] When he was advised by Gary Graber that the contemplated transfers may constitute fraudulent transfers, he terminated Mr. Graber's firm.[220] Paul Morabito then used his long-time counsel, Vacco, to implement a series of transactions that resulted in him being divested of most of his assets within a two-week period, before the FF&CL was even entered.

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[217] Exh. 37, p. 4, MORABITO (341).005352.

[218] *See* Exh. 25 (Hodgson Ross indicating they had a number of ideas, "including a possible marital split between Paul [Morabito] and [Bayuk] pursuant to which [Bayuk] could retain some of Paul [Morabito's] assets" and Vacco of LMWF following with discussion of Paul Morabito selling his interest in CWC to Bayuk and Sam Morabito); see also Trans. 11/1/18, p. 29, ll. 13-18 and p. 30, ll. 21-22; 11/1/18, p. 33, ll. 1-6; 11/1/18, p. 46, ll. 13-15; Exhs. 26 discussing moving to California) and 32 ("[Bayuk] and I plan on changing our primary residence from Reno to Laguna Beach.").

[219] Exh. 29.

[220] Trans. 11/1/18, p. 35, ll. 6-14.

26. Subsequent to the transfers, Paul Morabito acknowledged that he had stripped himself of any assets other than the Panorama Property and had effectively limited the Herbst Parties' collection attempts to the Panorama Property, telling Vacco:

> With the sale of the Reno house closing December 31st our friends in Las Vegas get a nice gift. They also acknowledge the change of ownership to just me. $1.5 million is [their] bounty. If we go past December 31st the only material asset that they can lay their hands on through me is access to Edward Bayuk and Virsenet - and that is now valued at $2.12 billion. After dilution Edward owns 72%. $85 million is 4% of the overall value. If they want to go after me and think that they can make a claim on him, then that's [their] value proposition. . . .[221]

27. On April 24, 2013, on the eve of Paul Morabito's default under the Forbearance Agreement with the Herbst Parties, he asked Vacco "How do you do this so that Herbst cannot ever access it?"[222]

28. Paul Morabito's communications with his counsel both before and after the transfers leave no doubt of his knowledge that the transactions would operate to the detriment of the Herbst Parties. The evidence presented at trial established the actual intent to hinder, delay, or defraud a creditor by clear and convincing evidence without any further consideration of the statutory or common-law badges of fraud. See Hayes, 916 F.2d at 535 (debtor's knowledge that a transaction will operate to the detriment of creditors is sufficient to establish actual intent).

29. Even if the court were to accept the story offered by Paul Morabito and Defendants (which this Court does not find credible) that the parties were seeking to separate their assets as a result of the Oral Ruling, a non-fraudulent motive will not "cure" a transaction effectuated with actual intent.[223] See Bertram, 41 A.3d at 1247 (transaction is intentionally fraudulent if debtor has a motive of effecting a transaction to hinder a creditor, even if the debtor also has non-fraudulent motives).

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[221] Exh. 161 (December 18, 2012 email from Paul Morabito to Dennis Vacco).

[222] Exh. 162.

[223] As noted above, the story that Paul Morabito was merely separating his assets from Bayuk and Sam Morabito in September 2010 is belied by the transfer of $6 million from Paul Morabito's account immediately following the Oral Ruling, along with Paul Morabito's continued involvement in their businesses as an "advisor."

2. The Presence of Multiple Badges of Fraud Compel a Determination of Paul Morabito's Intent to Hinder, Delay, or Defraud the Herbst Parties.

30. Even if Paul Morabito had not admitted his intent to hinder and delay the Herbst Parties, consideration of the badges of fraud compel the conclusion that Paul Morabito intended to hinder, delay, or defraud his creditors, the Herbst Parties.

a. The transfers were to insiders – NRS 112.180(2)(a).

31. The transfers at issue in this case were made to insiders. Under NUFTA, a relative of the debtor is an insider. NRS 112.150(7)(a)(1). Here, Sam Morabito is Paul Morabito's brother and, therefore, a relative of the debtor.

32. NRS 112.150(7)(d) further provides that a statutory insider includes an affiliate, or an insider of an affiliate as if the affiliate were the debtor. "Affiliate" is defined as:

> (b) A corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled or held with power to vote, by the debtor or a person who directly or indirectly owns, controls or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities: (1) As a fiduciary or agent without sole power to vote the securities; or (2) Solely to secure a debt, if the person has not in fact exercised the power to vote…

NRS 112.150(1)(b). Paul Morabito directly and indirectly owned and controlled 20% more of the outstanding voting securities of CWC, Superpumper, and Baruk LLC and therefore, they all constitute Paul Morabito's affiliates. If the affiliate is a corporation, an insider includes (1) a director of the affiliate, (2) an officer of the affiliate, or (3) a person in control of the affiliate. Here, Bayuk was a director and officer of CWC and Superpumper along with Paul Morabito and owned 50% of Baruk Properties with Paul Morabito. Therefore, Bayuk was therefore an insider of Paul Morabito's affiliates and, by extension, a statutory insider of Paul Morabito.

33. Furthermore, the "UFTA's definition of 'insider' is not intended to limit an insider to the …listed subjects. Instead, the drafters provided the list for purposes of exemplification." See In re Holloway, 955 F.2d 1008, 110 (5th Cir. 1992) (analyzing identical provision under Texas' adopted UFTA)); Landmark Cmty. Bank, N.A. v. Klingelhutz, 874 N.W.2d 446, 452, 2016 WL 363521 (Minn. Ct. App. 2016), review denied (Apr. 27, 2016) (finding that single-member LLC of spouse was an insider because the definition of "insider" is not limiting) (citing Citizens

State Bank Norwood Young Am. v. Brown, 849 N.W.2d 55, 62–63 (Minn. 2014) (finding that former spouse was an insider). When determining whether a transferee is a non-statutory insider two factors must be considered: (1) the closeness of the relationship between the transferee and the debtor, and (2) whether the transactions between them were conducted at arm's length. In re Emerson, supra at 707 (citing to In re Holloway, 955 F.2d 1008, 1011 (5th Cir. 1992)); In re Village at Lakeridge, LLC, 814 F.3d 993, 996 (9th Cir. 2016). "The true test of 'insider' status is whether one's dealings with the debtor cannot accurately be characterized as arm's-length." In re Craig Systems Corp., 244 B.R. 529, 539 (Bankr. D. Mass. 2000).

34. Paul Morabito and Bayuk were long-time companions and business partners who cohabitated for over a decade prior to the subject transfers, owned several properties together as tenants in common, and co-owned several businesses. Domestic partners, same-sex or otherwise, are, like spouses, insiders for the purposes of an avoidance analysis.[224] Given the nature of their relationship, and the nature of the subject transactions, the subject transactions between Paul Morabito and Bayuk were not entered arm's length with one another.

b. The debtor retained possession or control of the property transferred after the transfer – NRS 112.180(2)(b).

35. It was Paul Morabito's intent that he would continue to be involved in his businesses behind the scenes, but that he would not have assets titled in his name and his businesses would be titled in the names of Bayuk, Sam Morabito, and Dennis Vacco.[225]

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[224] See Bloom v. Camp, 336 Ga. App. 891, 895, 785 S.E.2d 573, 578, adopted, (Ga. Super. May 24, 2016) (finding same-sex partner to be an insider though same-sex marriages were not recognized in Georgia at the time of the transfer); In re Fisher, 296 F. App'x 494, 502, 2008 WL 4569946, at *5 (6th Cir. 2008) (though finding no fraudulent transfer occurred, finding that opposite-sex domestic partner was an insider); In re Tanner, 145 B.R. 672, 678 (Bankr. W.D. Wash. 1992) (same-sex partner who had cohabitated with debtor was an insider) (citing Matter of Montanino, 15 B.R. 307 (Bankr. D. N.J. 1981) (parents of debtor's live-in fiancé were insiders); In re Ribcke, 64 B.R. 663 (Bankr. D. Md. 1986) (parents of a debtor's deceased wife were insiders); In re O'Connell, 119 B.R. 311 (Bankr. M.D. Fla. 1990) (a good friend who had made numerous informal loans to a debtor was an insider); In re Standard Stores, Inc., 124 B.R. 318 (Bankr. C.D. Cal. 1991) (a corporate debtor's president's ex-brother-in-law was an insider with respect to a transfer five years after divorce from debtor's president's sister).

[225] Exh. 30 (9/21/2010 email to joint counsel, Vacco, and a third party representing that he "would no longer be actively seeking to accumulate assets in companies that [he was] a shareholder in, and instead would be acting as an advisor to amongst other entities, Snowshoe Petroleum LLC, a company to be owned and operated by [his] brother, Sam; Edward Bayuk, and Dennis Vacco…").

36. Consistent with his plan, following the transfers, Paul Morabito, Bayuk, and Sam Morabito maintained the *status quo*, with Paul Morabito retaining significant control of and continuing to use the transferred assets as if he still owned them. After the transfers, Bayuk and Sam Morabito funded Paul Morabito's lifestyle and Bayuk supplied Paul Morabito with money, credit card, a Mercedes, and a luxurious home. Paul Morabito continued to receive financial remuneration from Snowshoe, which paid $126,000 in Paul Morabito's personal legal expenses between October of 2015 and March of 2018—years after his financial interests were supposedly separated from those of his brother and Bayuk.[226]

37. Paul Morabito continued to negotiate deals using Superpumper as if he still owned it, and had general authority to speak on behalf of Snowshoe.[227] Among other examples of his continued control, in April 11, 2011, without any involvement by Bayuk or Sam Morabito, Paul Morabito proposed contributing Snowshoe's 100% interest in Superpumper in connection with the proposed Nella Deal, for which negotiations had commenced prior to the transfers.[228] In August 2011, Paul Morabito's and Defendants' joint counsel advised Paul Morabito (without copying Bayuk or Sam Morabito) to simply use Superpumper to make a payment to real estate broker Tim Haves in order to conceal the payment from the Herbst Parties.[229] In April of 2012, in response to inquiries by Superpumper's auditors regarding affiliate loans, Paul Morabito instructed Vacco "MY POSITION IS BELOW - PLEASE MAKE IT HAPPEN".[230] In March 2013, nearly three years after the Superpumper Transfer, Paul Morabito was still bargaining with Superpumper, proposing a settlement with the Herbst Parties whereby he would transfer Superpumper to the Herbst Parties in partial satisfaction of the judgment.[231] Though Bayuk and Sam Morabito

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[226] Exhs. 308, 309.

[227] Trans. 10/29/18, p. 224, l. 3 – p. 226, l. 20.

[228] Exhs. 131, 132 133; Trans. 11/2/18, p. 12, l. 23 – p. 16, l. 3; p. 16, l. 4 – p. 17, l. 19.

[229] Exhs. 136 and 137.

[230] Exh. 144.

[231] Exh. 153.

supposedly owned Superpumper at that point through Snowshoe, neither was included in these discussions.

38. Paul Morabito also continued to use Superpumper Properties, the successor to Baruk LLC, and its assets as if he still owned them. In November of 2011, Paul Morabito sought to use the assets of Snowshoe Properties (the successor to Baruk LLC) to settle a lawsuit against him. In February 2012, he sought to negotiate a third-party sale of 1461 Glenneyre and a master lease with the new buyer for Snowshoe Capital, a company owned by Paul Morabito, for the property, without any involvement by Bayuk.[232] Later, he caused a second deed of trust to be placed on 1461 Glenneyre in connection with a settlement of his lawsuit with Bank of America, which had nothing to do with Bayuk—Vacco simply instructed Bayuk when and where to sign for Paul Morabito.[233] Similarly, in September of 2012, Bayuk instructed their counsel that he would sign a second deed of trust on the Mary Fleming House in Palm Springs that Paul Morabito wanted in connection with funding for Virsenet, an entity in which Bayuk and Paul Morabito held joint interests.[234] When the sham of the sale of the Baruk LLC interest to Bayuk became inconvenient, Paul Morabito instructed Vacco to just undo it.[235] On October 3, 2012, Paul Morabito instructed Vacco and Lovelace regarding negotiation of a $5 million loan to Snowshoe Properties—in which Paul Morabito supposedly held no interest—without including Bayuk.[236] In March 2014, Paul Morabito caused Bayuk to transfer the Clayton Property to Desi Moreno without any value to Bayuk.[237]

39. Paul Morabito's continued control makes clear that the intent of the transfers was not to separate Sam Morabito's and Bayuk's interests from Paul Morabito's interests, as Bayuk

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[232] Exh. 142;Trans. 10/30/18, p. 28, l. 9 – p. 29, l.1.

[233] Exhs. 145, 147, 148, 152.

[234] Exh. 150; *see also* Exhs. 159 and 160.

[235] Exh. 70.

[236] Exh. 151.

[237] Trans. 10/30/18, p. 66, ll. 1-12.

and Sam Morabito now contend. There was never any separation one would expect in an arms' length transaction; rather, Paul Morabito viewed the transferred assets as if he still owned them. The only difference following the transfers was that the assets were out of the Herbst Parties' reach. While Bayuk and Sam Morabito often attempted to characterize Paul Morabito's representations regarding the assets and his continued use of the assets as mere "whiteboarding," neither of them ever repudiated Paul Morabito's representations regarding the assets or his attempts to sell, lien, or otherwise leverage them in connection with a transaction,[238] and, consistent with their unwavering support for Paul Morabito,[239] testified that they believed in his ability to put together a favorable transaction and would have agreed to a transaction negotiated by him.[240]

c. The transfers were concealed (NRS 112.180(2)(c)) and the debtor removed or concealed assets – NRS 112.180(2)(g).[241]

40. Judge Adams announced the Oral Ruling on September 13, 2010. By October 1, 2010, the transfers were largely complete. Neither Paul Morabito, his counsel, nor Defendants informed the Herbst Parties that the transfers were occurring, despite the fact that Paul Morabito and the Herbst Parties were in the midst of preparing for the punitive damages phase of the trial.

41. The Herbst Parties were not informed of the Baruk Transfer or the subsequent transfers of the Baruk Properties. Both the name and location of the entity owning the Baruk Properties was changed to Snowshoe Properties. By October 1, 2010, Bayuk had transferred the Palm Springs Property again, this time to the Bayuk Trust. Thereafter, the $1,617,500 Note was assigned to Woodland Heights, Ltd. so the Herbst Parties could not simply attach the proceeds to satisfy the Confessed Judgment.

42. The Herbst Parties were not informed of the Compass Loan, the distributions by Superpumper, the Matrix Valuation, or the Superpumper Agreement. Further, Paul Morabito

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[238] Nor did their counsel, Vacco.

[239] See Trans. 10/30/18, p. 98, l. 4 – p. 99, l. 7; p. 233, l. 15 – 235, l. 9

[240] Trans. 10/30/18, p. 239, l. 1-13.

[241] These badges of fraud are overlapping, and therefore are discussed together.

removed his assets from Nevada when he transferred his interest to Snowshoe, a new company incorporated in New York.

43. As Paul Morabito made clear in his communications with his counsel, removing and concealing assets in different jurisdictions was an intentional measure to ensure that the assets were out of the reach of the Nevada courts and to strip the Herbst Parties of a perceived "home court, good old boy" advantage in their collection efforts.

d. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit – NRS 112.180(2)(d), the transfer occurred shortly before or shortly after a substantial debt was incurred – NRS 112.180(2)(j), and the transfers were hurried – Sportsco Enterprises.

44. The presence of these related badges of fraud are the most obvious and compelling. Not only had Paul Morabito been sued by the Herbst Parties, but Judge Adams had announced an $85 million Oral Ruling against him on September 13, 2010.

45. The transfers were largely completed within the next two weeks, when the punitive damages phase of the litigation was just commencing. See Sportsco Enters., 112 Nev. at 632 (secrecy or a hurried transaction as indicative of fraud). By the time of Judge Adams' FF&CL, let alone entry of the Final Judgment on August 23, 2011, Paul Morabito's attachable assets were gone. It is not even necessary to infer that the Oral Ruling prompted the transfers, because Paul Morabito, Bayuk and Sam Morabito all admitted it.[242]

e. The transfer was of substantially all the debtor's assets – NRS 112.180(2)(e).

46. Within days after Judge Adams announced the Oral Ruling, Paul Morabito divested himself of almost all, if not all, of his assets: approximately $7 million in funds were transferred from his bank account, Paul Morabito's interest in the Laguna Properties was transferred, the 50% interest in Baruk LLC, and the 80% interests in Superpumper. He even transferred his furnishings

[242] Trans. 10/29/18, p. 132, ll. 6-16; *see also id.*, p. 132, ll. 17-19 (stipulating that Oral Ruling was the impetus for the transfers); Trans. 10/31/18, p. 150, l. 20 – p. 151, l. 3.

and personal property (including those he continued to use), to Bayuk. Paul Morabito was left with minimal tangible assets subject to execution by his creditors.

f. The value of the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred – NRS 112.180(2)(h), and there was lack of consideration for the transfers.[243]

47. Whether a debtor receives reasonably equivalent value is determined from the perspective of creditors. In Herup, the Nevada Supreme Court found that the underlying public policy of the Bankruptcy Code and the UFTA is the same: "to preserve a debtor's assets ***for the benefit of creditors***." Herup, 123 Nev. at 235 (emphasis added). Because the language of the UFTA and § 548 of the Bankruptcy Code are nearly identical and the purposes of the different laws are the same, cases applying § 548 of the Bankruptcy Code are persuasive authority. See id. (citing cases) (synthesizing authority for the conclusion that the bankruptcy code dictates "the appropriate standard to apply under Nevada's version of the UFTA.").

48. Likewise, the comments to the UFTA expressly state that the definition of "value" within the uniform act "is adapted from § 548(d)(2)(A) of the Bankruptcy Code.... The definition [ ]is not exclusive [and] is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors." UFTA § 3, cmt. 2. "***Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition.***" Id. (emphasis added).[244]

49. To constitute a cognizable benefit under the UFTA, (1) the benefit must be received by the debtor, such that the debtor's net worth is preserved ***to the exception of the interests of the creditors***; (2) such benefits must be for a cognizable value, including "property" and "satisfaction

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[243] The lack of reasonably equivalent value is both a badge of fraud under NRS 112.180(2)(h) and an element of a constructive fraudulent transfer under NRS 112.180(1)(b).

[244] Other jurisdictions have reached the same conclusion. See In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig., No. 211ML02265MRPMANX, 2013 WL 12148482, at *6 (C.D. Cal. June 7, 2013); Janvey v. Golf Channel, Inc., 792 F.3d 539, 544 (5th Cir. 2015), certified question answered, 487 S.W.3d 560 (Tex. 2016). California's UFTA, for example, "requires 'reasonably equivalent value' to be determined from the standpoint of the creditors," as contemplated under section 548. In re Prejean, 994 F.2d 706, 708 (9th Cir. 1993) (emphasis added); see In re Bay Plastics, Inc., 187 B.R. 315, 329 (Bankr. C.D. Cal. 1995) (noting that "under California law, reasonable equivalence must be determined from the standpoint of creditors"); see also In re Blixseth, 489 B.R. 154, 184 (Bankr. D. Mont. 2013), aff'd, 514 B.R. 871 (D. Mont. 2014), aff'd in part, rev'd in part, 679 F. App'x 611 (9th Cir. 2017).

or securing of a present or antecedent debt of the debtor;" and (3) the benefit must have been received by the debtor in exchange for the transfer or obligation.[245] The reasonably equivalent value of a given transfer under the UFTA is not determined relative to the transferee or the transferor, but relative to assets available for the benefit of creditors. Consideration is "reasonably equivalent" if it leaves *creditors* in the substantially the same position as before the transfers.

50. Here, Paul Morabito did not receive reasonably equivalent value in exchange for the assets he transferred.

a. Prior to the subject transfers, Paul Morabito owned (1) a 70% interest in the Panorama Property, a 75% interest in the El Camino Property, and a 50% interest in the Los Olivos Property, with a collective value of approximately $1,916,250; (2) a 50% interest in Baruk LLC, with a value of approximately $1,654,550, and (3) 80% of the equity of CWC, which held an 100% interest in Superpumper, with a value of $10,440,000. In addition, he owned personal property at the El Camino, Los Olivos, Panorama, and Mary Fleming Properties which he valued at $2,000,000.

b. After the transfers, Paul Morabito owned the Panorama Property, which had an equity value of only $971,136 (further reduced by credits for the theatre equipment and water rights that Bayuk retained), $60,000 in cash and nominal payments for the personal property, the $1,617,050 Note, the $492,937.30 Note, and a slew of payments as directed to the LMWF firm (who represented Paul Morabito and Defendants) and other third parties to support his lifestyle.

51. The evidence establishes because the bulk of the "value" received—the $1,617,050 and $492,937.30--Notes by Paul Morabito were illusory, and certainly did not result in tangible assets available for Paul Morabito's creditors. A promise is illusory when it appears "so insubstantial as to impose no obligation at all on the promisor – who says, in effect, 'I will if I want to.'" See Sateriale v. R.J. Reynolds Tobacco Co., 687 F.3d 1132, 1146 (9th Cir. 2012). Paul

[245] See In re Blixseth, 489 B.R. at 184; see also SE Prop. Holdings, LLC v. Braswell, 255 F. Supp. 3d 1187, 1198 (S.D. Ala. 2017) (citing UFTA and synthesizing similar bankruptcy authority for the conclusion that "reasonably equivalent value" is measured from the net effect of the transfer on the debtor's estate and the value of the transfer to the creditors at-issue).

Morabito's relationships with Bayuk and Sam Morabito were such that Bayuk's and Sam Morabito's obligations on the Notes were nothing more than "I will if I want to." Defendants have been unable to credibly account for payments on the Notes, the terms of which were never enforced and meaningless to the parties. While Paul Morabito transferred executable assets to the Defendants, he received only a fraction of the value in cash, illusory notes, and promises to maintain his lifestyle without regard for the terms of the notes or the agreements documenting the transfers.

A. The Transfers Were Constructively Fraudulent as to Creditors.

52. The evidence presented, the chronology of events and transfer of assets, and the other surrounding circumstances lead to the inescapable conclusion that the transfers to the Defendants were intentionally, willfully and fraudulently designed to evade collection by the Herbst Parties. But even if actual intent had not been established, the transfers would be avoidable as constructively fraudulent. Under Nevada's constructive fraud provision:

> [a] transfer made... by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made.. if the debtor made the transfer... [w]ithout receiving a reasonably equivalent value in exchange for the transfer..., and the debtor:
>
> (1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (2) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond his or her ability to pay as they became due."

NRS 112.180(1)(b).

53. While the creditor generally bears the burden of proof both with respect to the insolvency of the debtor and the inadequacy of consideration, as with the actual fraudulent transfer statute, "under [the] constructively fraudulent transfer statute, where 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 hinder, delay, or defraud the creditor. See Sportsco Enters., 112 Nev. at 632 (citing Territorial Sav. & Loan Ass'n v. Baird, 781 P.2d 452, 462 n. 18 (Utah Ct. App. 1989); Erjavec v. Herrick, 827 P.2d 615, 617 (Colo. Ct. App. 1992)); In

re Nat'l Audit Defense Network, 367 B.R. 207, 226 (Bankr. D. Nev. 2007) (applying burden shifting analysis to constructive fraud). While "[i]t may appear contradictory to consider facts used to infer actual intent to defraud in order to determine 'constructive' fraud," the "[f]actors relevant to determining actual intent to defraud, a higher culpability standard, should be equally probative where something less than actual intent will suffice." In re Soza, 542 F.3d 1060, 1066-67 (5th Cir. 2008).

54. To rebut an inference of fraud, the defendant must show either that the debtor was solvent at the time of the transfer and not rendered insolvent thereby or that the transfer was supported by fair consideration.[246] Sportsco Enters., 112 Nev. at 632 (citing Kirkland v. Risso, 98 Cal.App.3d 971, 159 Cal.Rptr. 798, 802 (Ct. App. 1980)).

55. A number of the badges of fraud are present in this case, giving rise to a presumption that the transfers were constructively fraudulent, thereby shifting the burden to Defendants to establish the transfers were not constructively fraudulent. Defendants have not offered evidence sufficient to overcome the presumption. As discussed in the context of actual intent under NRS 112.180(a)(1), Paul Morabito did not receive reasonably equivalent value in exchange for the subject transfers. Moreover, after the transfers, Paul Morabito was left with insufficient assets to even meet his basic expenses, relying on Bayuk and Sam Morabito to pay his living expenses. The transfers were made immediately following Judge Adams' Oral Ruling, but before entry of the Final Judgment. As of the Oral Ruling, Paul Morabito knew, or at the very least, should have known, that he would incur a debt to the Herbst Parties beyond his ability to pay as it came due. That insolvency was imminent upon entry of the final judgment was confirmed by Michele Salazar in her net worth expert report submitted in the Herbst Litigation.[247]

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[246] The term "fair consideration" derives from the Uniform Fraudulent Conveyance Act, 7A U.L.A. 427, 428 (1985), the predecessor to the UFTA. In re Bay Plastics, Inc., 187 B.R. 315, 322, 329 (Bankr. C.D. Cal. 1995). The UFTA replaced "fair consideration" with "reasonably equivalent value." Id. at 329.

[247] Exh. 44.

B. Plaintiff Is Entitled to Avoidance of the Transfers and Return of the Property or the Value Thereof.

56. Having determined that the transfers were actually or constructively fraudulent under NRS 112.180(a)(1) or (a)(2), the Court must evaluate the Defendants' good faith defense and the equable remedies under NRS 112.210 and NRS 112.220. See Herup, 123 Nev. at 232; Cadle Co. v. Woods & Erickson, LLP, 131 Nev 114, 119 (2015) (finding that Nevada's fraudulent transfer statute creates equitable remedies including avoidance, attachment, and, subject to principles of equity and the rules of civil procedure, injunction, receivership, or other relief under NRS 112.210 or payment for value under NRS 112.220).

57. Nevada law provides a complete defense to avoidance to a good faith transferee who pays reasonably equivalent value as follows:

> A transfer or obligation is not voidable under paragraph (a) of subsection 1 of NRS 112.180[248] against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

NRS 112.220(1). A partial defense is afforded to a good faith transferee under NRS 112.220(4), which provides:

> Notwithstanding voidability of a transfer or an obligation under this chapter, a transferee or obligee who took in good faith is entitled, to the extent of the value given the debtor for the transfer or obligation, to:
>
> (a) A lien on or a right to retain any interest in the asset transferred;
>
> (b) Enforcement of any obligation incurred; or
>
> (c) A reduction in the amount of the liability on the judgment.

Thus, under Nevada law, if the complete defense under subsection (1) of NRS 112.220 does not apply to a transfer made with actual intent because less than "reasonably equivalent value" was given, a good faith transferee may receive a lien, enforcement of any obligation incurred, and/or

[248] Transfers which are made with actual intent to hinder, delay, or defraud.

"a reduction in the amount of the liability on the judgment" to the extent of the value provided. See In re Nat'l Audit Def. Network, 367 B.R. at 223 (describing good faith defense).

58. Under either NRS 112.220(1) or (4), however, the transferee bears the burden of proof to establish that the transferee received the transfer in good faith. Herup, 123 Nev. at 236-237. Good faith is an indispensable element of the defense, and as such, even if a transferee gives reasonably equivalent value in exchange for the transfer avoided, the transferee may not recover such value if the exchange was not in good faith. In re Agric. Research & Tech. Group, Inc., 89-15416, 1990 WL 149820 (9th Cir. 1990) (applying Haw.Rev.Stat. § 651C–8 with Bankruptcy Code § 548(c) as persuasive authority) (citing In re Candor Diamond Corp., 76 B.R. 342, 351 (Bankr. S.D.N.Y. 1987); Dean v. Davis, 242 U.S. 438, 37 S.Ct. 130, 61 L.Ed. 419 (1917); In re Roco Corp., 701 F.2d 978, 984 (1st Cir. 1983); In re Health Gourmet, Inc., 29 B.R. 673, 677 (Bankr. D. Mass. 1983)).

59. "A majority of courts applying the UFTA hold that a transferee must prove that he received the transfer in ***objective*** good faith. That is, good faith must be determined on a case-by-case basis by examining whether the facts would have caused a reasonable transferee to inquire into whether the transferor's purpose in effectuating the transfer was to delay, hinder, or defraud the transferor's creditors." Herup, 123 Nev. at 236-237 (emphasis added) (adopting the objective standard of good faith applicable under the Bankruptcy Code and other states' adoption of UFTA and collecting cases). "[T]o establish a good faith defense to a fraudulent transfer claim, the transferee must show objectively that he or she did not know or had no reason to know of the transferor's fraudulent purpose to delay, hinder, or defraud the transferor's creditors." Id. at 237.

60. Under this objective, inquiry notice standard, transferees "have a duty to investigate if there is sufficient information to put the transferee on notice that something is wrong." Leonard v. Woods & Erickson, LLP (In re AVI, Inc.), 389 B.R. 721, 736 (B.A.P. 9th Cir. 2008) (applying objective standard of good faith under Bankruptcy Code § 550 that is similar to UFTA) (citing Bonded Fin. Servs., Inc. v. Eur. Am. Bank, 838 F.2d 890, 897–98 (7th Cir. 1988)).

61. Defendants contend that because they were, in their words, "exonerated" by Judge Adams in the Herbst Litigation, they are absolved of liability. However, whether Bayuk or Sam

Morabito were participants in the original fraud that resulted in the judgment does not mean they had no reason to know that Paul Morabito intended to hinder or delay enforcement of the Herbst Parties' judgment. Bayuk and Sam Morabito were present at the Oral Ruling when Judge Adams awarded the Herbst Parties $85 million in damages against Paul Morabito on the basis of actual fraud. In the Oral Ruling, Judge Adams not only awarded the Herbst Parties $85 million, but he expressly found by clear and convincing evidence that Paul Morabito knowingly and intentionally made material misrepresentations which "had no basis in reality."[249] Within the next two weeks, the Defendants received substantially all of Paul Morabito's assets. This alone put Defendants on notice that something was wrong.

62. Bayuk and Sam Morabito cannot demonstrate that they did not know or have reason to know of Paul Morabito's intent to hinder, delay, or defraud the Herbst Parties. They were aware of the Oral Ruling and Paul Morabito's obligations to the Herbst Parties at the time of the transfers. They utilized the same counsel to orchestrate the transfers. They participated in the actions to strip the value from Superpumper prior to Paul Morabito's transfer of the equity. They allowed Paul Morabito to continue using and controlling the assets transferred. They assisted in ensuring that the Notes were not paid in accordance with their terms, thereby hindering collection by the Herbst Parties. They continued to fund Paul Morabito's lifestyle to ensure that, after the assets were transferred, the Herbst Parties could not collect their judgment but Paul Morabito's high-flying lifestyle would not change. They did not receive the transfers in objective good faith. They were complicit in all respects.

63. Even if good faith could have been established, the transferee must still demonstrate that it has provided value in exchange for the transfer. A complete defense to a fraudulent transfer arises in favor of a good faith transferee only if reasonably equivalent value is provided in exchange. NRS 112.220(1). If the value provided is not "reasonably equivalent," the value

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[249] Exh. 1 (Sept. 13, 2010 Transcript of Judge Adams' Oral Ruling) at LMWF SUPP 23106, l. 14 – LMWF SUPP 23107, l. 6; LMWF SUPP 23117, ll. 11-22 (finding that Paul Morabito "knew firsthand from his own employees and from his own accountant that [the working capital estimate] was incorrect," that it "materially inflated and false inflated the value of the company," and that it had "no basis in reality, but it was contrary to what he knew firsthand to be the truth.")

provided a good faith transferee entitles the transferee to a lien or reduction in liability to the extent of the value given. NRS 112.220(4)

64. Prior to the transfers, Morabito owned interests in the Laguna Properties and Panorama Property with an aggregate value of approximately $1,916,250; (2) a 50% interest in Baruk, with a value of approximately $1,654,550, and (3) an indirect 80% interest in Superpumper, with a value of at least $10,440,000. After the transfers, Paul Morabito owned the Panorama Property, with a net value of only $971,136 and the sham Notes, and received no more than $60,000 in cash in connection with the Real Properties transfers and $1,035,068 in cash in connection with Superpumper. For the reasons discussed above, the total amounts received by Morabito are not reasonably equivalent to the more than $14 million in value transferred.

65. Because the Defendants did not take the transfers in good faith, the Court does not find they have established a good faith defense.

C. Plaintiff is Entitled to Avoidance of the Transfers and Return of the Property Transferred Under NRS 112.210(a) and 11 U.S.C. § 541(a), and Judgment Under NRS 112.220

1. <u>Remedies Available to Plaintiff Under Chapter 112.</u>

66. The equitable remedies under UFTA are found in NRS 112.210 and 112.220(2). NRS 112.210 provides:

> 1. In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in NRS 112.220, may obtain:
>
> (a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
>
> (b) An attachment or garnishment against the asset transferred or other property of the transferee pursuant to NRS 31.010 to 31.460, inclusive; and
>
> (c) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:
>
> (1) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;
>
> (2) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
>
> (3) Any other relief the circumstances may require.

> 2. If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

NRS 112.210. Subsection (2) of NRS 112.220 provides:

> Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under paragraph (a) of subsection 1 of NRS 112.210, the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection 3 of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:
>
> (a) The first transferee of the asset or the person for whose benefit the transfer was made; or
>
> (b) Any subsequent transferee other than a transferee who took in good faith for value or from any subsequent transferee.

67. Thus, under NRS 112.210(1)(a), the first remedy is actual avoidance of the transfers—undoing the transfer sued upon. NRS 112.150 expressly advises Nevada courts construing the UFTA to harmonize its ruling with other states' courts construing the UFTA. Courts in other states interpreting UFTA have found that avoidance operates as a reconveyance of the property to the transferor. See In re Sexton, 166 B.R. 421, 426 (Bankr. N.D. Cal. 1994) (applying California law, ". . . a creditor that succeeds in causing a fraudulent transfer to be avoided merely causes the property to be reconveyed to the transferor.") (citing Wagner v. Trout, 124 Cal.App.2d 248, 254, 268 P.2d 537 (1954); Wright v. Salzberger, 121 Cal.App. 639, 9 P.2d 860 (1932)); United States v. Ultra Dimensions, 803 F. Supp. 2d 596, 601 (E.D. Tex. 2011) (under the Texas UFTA, "a conveyance which is found to be fraudulent as to creditors is wholly null and void as to such creditors, and the legal as well as the equitable title remains in the debtor for the purpose of satisfying debts.'") (citing California Pipe Recycling, Inc. v. Southwest Holdings, Inc., 2010 WL 56053, at *5 (S.D. Tex. 2010).

68. Further, under NRS 112.210(1)(c), this Court has authority to issue an injunction "against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property." In addition to the power to grant injunctive relief under NRS 112.210(1)(c), the court is also vested with the power to issue injunctive relief pursuant to NRCP 65 and NRS 33.010. NRS 33.010(3) provides for injunctive relief when a party acts in "violation of the plaintiff's rights

respecting the subject of the action, and tending to render the judgment ineffectual." NRS 33.010(3). The Nevada Supreme Court has long held that "if the injury is likely to be irreparable, or if the defendant be insolvent, equity will always interpose its powers to protect a person from a threatened injury." Champion v. Sessions, 1 Nev. 478, 483 (1865) (emphasis added). Injunctive relief may be of either a mandatory or prohibitive nature, and is properly issued where "it is essential to preserve a business or property interests." Guion v. Terra Marketing of Nevada, Inc., 90 Nev. 237, 240; City of Reno v. Matley, 79 Nev. 49, 60 (1963).

69. In addition, NRS 112.220(2) allows a creditor to recover judgment for the value of the asset transferred," subject to adjustment as equities may require. Moreover, NRS 112.220 permits the plaintiff to recover judgment against the initial transferee or the person for whose benefit the transfer was made—in this case, Bayuk and Sam Morabito.

70. Finally, NRS 112.210(1)(c)(3) broadly permits the court to award "[a]ny other relief the circumstances may require" subject to principles of equity and the applicable rules of civil procedure.

71. The breadth and flexibility of these remedies is reflected in Altus Brands II, LLC v. Alexander, a Texas appellate decision discussing provisions of Texas's UFTA which are substantively identical to NRS 112.210 and 112.220. 435 S.W.3d 432 (Tex.App.--Dallas 2014, no pet.) (applying Chapter 24 of the Texas Business & Commerce Code and specifically, Tex. Bus. & Com. Code Ann., §§ 24.008 and 24.009). The Altus court described the purpose and remedial provisions of UFTA as follows:

> UFTA is intended to prevent debtors from defrauding creditors by moving assets out of reach. "[T]he focus of an UFTA claim is to ensure the satisfaction of a creditor's claim when the elements of a fraudulent transfer are proven."

Id. at 441.

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As to a particular remedy, the court stated:

> However, UFTA does not specify how a remedy is to be selected in a particular case. To the extent appellees contend UFTA limits a creditor who has obtained a judgment against the debtor to the remedy described in Subsection 24.008(b), i.e. execution on the asset transferred or its proceeds, the language of UFTA does not, on its face, state such a limitation. Further, appellees cite no case law supporting such a limitation, and we have found none.

Id. at 444 (internal citations omitted).[250]

72. The remedial provisions of UFTA are equitable in nature and intended to restore the creditor to the position he would have had if the fraudulent transfer had not occurred. The court has the equitable power to fashion a remedy that fully restores the creditor—in this case, the bankruptcy estate—to the position it would have held had the transfers not occurred.

73. Plaintiff is therefore entitled to avoidance of the transfers to the extent necessary to satisfy the claims of creditors against Paul Morabito's estate pursuant to NRS 112.210(a) and 11 U.S.C. § 544(b). It is undisputed that the combined value of the property transferred from September 13, 2010 to October 10, 2010 is less than the amount of the claims, inclusive of the Herbst Parties' claim arising from the Confessed Judgment. Therefore, Plaintiff is entitled to avoidance of the transfers in their entirety, such that all of the transferred assets are returned to the bankruptcy estate.[251]

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[250] See also Arriaga v. Cartmill, 407 S.W.3d 927, 933 (Tex.App.--Houston [14th Dist.] 2013, no pet.) (reversing trial court's award of judgment instead of execution on transferred property in light of debtor's evasion of prior judgment, finding that "the trial court's award of a money judgment effectively denies [plaintiff], the prevailing party, the equitable relief she sought—a result that is contrary to the purpose of the UFTA."); Matter of Galaz, 850 F.3d 800, 806 (5th Cir. 2017) (given the evidence of actual intent to defraud and the broad remedial authority conferred by authority to grant "any other relief the circumstances may require" and to make "adjustment as the equities may require" of UFTA, the trial court properly awarded creditor amount which would restore her to the position she would have had if the fraudulent transfer had not occurred, which included percentage of gross income after the date of the transfer, over transferee's objection the district court should have limited compensatory damages to the value of the royalty rights at the time of the transfer).

[251] Here, because Paul Morabito is a debtor under Chapter 7 of the Bankruptcy Code, all legal and equitable interests of Paul Morabito as of June 20, 2013 are property of the bankruptcy estate. 11 U.S.C. § 541(a). Reconveyance of the property to the transferor—Paul Morabito—therefore requires conveyance of the property to the bankruptcy estate.

2. Plaintiff Is Entitled to Avoid the Real Property Transfers and Recover Paul Morabito's Interest in the Laguna Properties, as well as Monetary Judgment Against Bayuk and the Bayuk Trust Based on the Real Property Transfers in the Amount of $1,236,458.

74. Bayuk and the Bayuk Trust continue to own the Laguna Properties. Therefore, under NRS 112.210(1)(a) and 11 U.S.C. § 541(a), the bankruptcy estate is entitled to a return of Paul Morabito's 75% interest in the El Camino Property and his 50% interest in the Los Olivos Property.

75. Plaintiff is also entitled to a monetary judgment equal to the value of the transferred asset as of the date of transfer. Paul Morabito's 75% interest in El Camino Property was valued at $808,981 at the time of the transfers, and his 50% interest in Los Olivos Property had a value of $427,477 at the time of the transfers, for a total interest in the Laguna Properties at the time of the transfers of $1,236,458.

3. Plaintiff Is Entitled to Avoid the Baruk Transfer and Recover the Equity Interest in Baruk LLC, and Monetary Judgment Against Bayuk and the Bayuk Trust Based on the Baruk Transfer in the Amount of $1,654,550.

76. Paul Morabito indirectly owned 50% of the Baruk Properties prior to the transfers through Baruk LLC. Bayuk testified that he transferred the interest in Baruk LLC acquired from Paul Morabito to Snowshoe Properties and the Bayuk Trust. Bayuk still owns and controls the transferred properties (except the Clayton Property)—the Bayuk Trust owns 100% of the Glenneyre Properties indirectly through Snowshoe Properties, and directly owns the Mary Fleming Property. While litigation has been pending, Bayuk converted Snowshoe Properties from a California company to a Delaware company.

77. Plaintiff is entitled to avoidance of the Baruk Transfer, thereby restoring Paul Morabito's 50% equity interest in the remaining Baruk Properties. However, as a result of the subsequent transfers, Plaintiff is not remedied with avoidance alone.

78. Plaintiff is entitled to a monetary judgment against Bayuk and the Bayuk Trust based on the Baruk Transfer in the amount of $1,654,550 under NRS 112.220(2). As evidenced by the valuations obtained by Paul Morabito and Defendants, and the appraisal of the Clayton Property which was not valued by Defendants at the time of the transfers, the total value of Baruk

LLC on September 30, 2010 was $3,309,100. Morabito's 50% interest, therefore, had a value of $1,654,550. As a result, the Trustee is entitled to judgment against Bayuk and the Bayuk Trust in the amount of $1,654,550.

4. Plaintiff Is Entitled to Monetary Judgments Against Bayuk, Sam Morabito, and Snowshoe Based on the Superpumper Transfers.

79. While this action was pending, Defendants sold Superpumper and therefore, avoidance of the Superpumper Transfer is an inadequate remedy. Under NRS 112.220(2), Plaintiff is entitled to a judgment against the Defendants in the amount of the value of Morabito's interest at the time of the transfers.

80. Between September 21 and 23, 2010, Morabito transferred $355,000 to Salvatore and $420,250 to Bayuk, purportedly in exchange for their interests in Raffles. However, the Raffles assets remained an asset of CWC and Snowshoe, demonstrating that the alleged transfer was intended solely to strip CWC of one of its two assets and thereby reduce the valuation of Superpumper. Plaintiff is entitled to judgment in the amount of $355,000 against Salvatore and $420,250 against Baruk for the fraudulently-transferred cash.

81. Furthermore, Morabito's 80% interest in Superpumper had a value of $10,440,000 (exclusive of Raffles). In exchange for his interest in Superpumper, Morabito received only $1,035,068 and the Superpumper Note, which was illusory and provided no benefit to Morabito's creditors. Snowshoe was the initial transferee of the Superpumper Transfer. Bayuk and Salvatore were the ultimate recipients of the equity interests in Superpumper and therefore, the persons for whose benefit the transfers were made. Accordingly, Plaintiff is entitled to a judgment against Snowshoe in the amount of $9,404,932, and judgments against each of Bayuk and Salvatore for $4,702,466.

5. Plaintiff Is Entitled to Injunctive Relief.

82. During the pendency of this action, Defendants sold Superpumper to a third party, and Bayuk converted Snowshoe Properties from a California company to a Delaware company. Defendants have demonstrated both the ability and the willingness to engage in shell games to prevent Paul Morabito's creditors and Plaintiff from recovering assets to satisfy their claims.

Absent injunctive relief, Defendants are likely to transfer assets in an attempt to evade the court's judgment in favor of the Plaintiff.

III.
JUDGMENT

Based upon the foregoing and good cause appearing,

IT IS HEREBY ORDERED that judgment is entered in favor of Plaintiff and against Bayuk and the Bayuk Trust, as follows:

1. Avoiding the transfer of the El Camino Property and the Los Olivos Property, and awarding Plaintiff damages in the amount of $884,999.95, with offset for amounts collected on account of the El Camino Property and the Los Olivos Property;
2. Avoiding the transfer of Baruk LLC and awarding Plaintiff damages in the amount of $1,654,550 with offset for amounts collected on account of Baruk LLC;
3. Avoiding the transfer of $420,250 and awarding Plaintiff damages in the amount of $420,250 with offset for amounts collected on account of the $420,250; and
4. Avoiding the Superpumper Transfer and awarding Plaintiff damages in the amount of $4,949,000 with offset for amounts collected on account of the Superpumper Transfer.

IT IS HEREBY FURTHER ORDERED that judgment is entered in favor of Plaintiff and against Sam Morabito as follows:

1. Avoiding the transfer of $355,000 and awarding Plaintiff damages in the amount of $355,000 with offset for amounts collected on account on account of the $355,000; and
2. Avoiding the Superpumper Transfer and awarding Plaintiff damages in the amount of $4,949,000 with offset for amounts collected on account of the Superpumper Transfer.

IT IS HEREBY FURTHER ORDERED that judgment is entered in favor of Plaintiff and against Snowshoe, avoiding the Superpumper Transfer and awarding Plaintiff damages in the amount of $9,898,000 with offset for amounts collected on account of the Superpumper Transfer.

IT IS HEREBY FURTHER ORDERED that Plaintiff is awarded pre-judgment interest on the amounts set forth above at the Nevada statutory rate from date of service of the summonses and complaint to the date of entry of this judgment.

IT IS HEREBY FURTHER ORDERED that Plaintiff is awarded post-judgment interest on the amounts set forth above at the Nevada statutory rate until the judgment is paid in full.

IT IS HEREBY FURTHER ORDERED that under NRCP 65, NRS 33.010, and NRS 112.210(1)(c), the Court hereby enjoins and restrains Defendants, and each of them, as well as their officers, directors, agents, servants, and attorneys, and those persons or entities in concern with them who receive actual notice of this Judgment, whether acting directly or indirectly, or through any third party, from concealing, transferring, disposing of, or encumbering the El Camino Property, the Los Olivos Property, the Baruk Properties (or their proceeds), Snowshoe Properties or any successor thereto, or any assets held for the benefit of Paul Morabito.

Dated this 28 day of March, 2019.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

CASE NO. CV13-02663

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 29 day of March, 2019, I filed the **FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

_____**Personal delivery to the following: [NONE]**

✓ **Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User Agreement.**

GABRIELLE HAMM, ESQ. for WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

MARK WEISENMILLER, ESQ. for WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

FRANK GILMORE, ESQ. for SNOWSHOE PETROLEUM, INC. et al

TERESA PILATOWICZ, ESQ. for WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

ERIKA TURNER, ESQ. for WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

_____**Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada: [NONE]**

_____**Placed a true copy in a sealed envelope for service via:**

_____ Reno/Carson Messenger Service – **[NONE]**

_____ Federal Express or other overnight delivery service **[NONE]**

DATED this 29 day of March, 2019.

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Jacqueline Bryant
Clerk of the Court
Transaction # 7411848 : yviloria

Exhibit 2

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Jacqueline Bryant
Clerk of the Court
Transaction # 7364866

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, vs. SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, and individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	**CASE NO.: CV13-02663** **DEPT. NO. 4**

ORDER DENYING DEFENDANTS' MOTIONS FOR NEW TRIAL AND/OR TO ALTER OR AMEND JUDGMENT

Defendants Superpumper, Inc. ("Superpumper"), Salvatore Morabito ("Morabito"), and Snowshoe Petroleum, Inc. ("Snowshoe") filed a *Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 50* on April 25, 2019 (the "Snowshoe Motion"), and Defendant Edward Bayuk, individually and as Trustee of the Edward William Bayuk Living Trust ("Bayuk," and collectively with Superpumper, Morabito, and Snowshoe, "Defendants") filed a *Motion for New Trial and/or to Alter or Amend Judgment* filed on April 26, 2019 (the "Bayuk Motion" and together with the Snowshoe Motion, the "Motions"). Plaintiff William A. Leonard, chapter 7 trustee for the bankruptcy estate of Paul A. Morabito ("Plaintiff") filed *Plaintiff's Opposition to Defendants' Motions for New Trial and/or to Alter or Amend Judgment* (the "Opposition") on May 7, 2019, and Superpumper, Snowshoe, and Morabito filed *Defendants' Reply in Support of Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60* (the "Snowshoe Reply") on May 14, 2019. The Snowshoe Motion was submitted for decision on May 14, 2019. Bayuk did not file a reply in support of the Bayuk Motion, and Plaintiff submitted the Bayuk Motion for decision on May 21, 2019.

The Court has reviewed and considered the arguments made in the Motions, the Opposition, and the Snowshoe Reply, the papers and pleadings on file with the Court in this action, the testimony and exhibits admitted during the trial, and the Court's Findings of Fact, Conclusions of Law, and Judgment, entered on March 29, 2019 (the "Judgment"). The Court, persuaded by the argument and authorities in Plaintiff's Opposition, along with the pleadings and papers on file, the trial record, and the findings and conclusions set forth in the Judgment, finds as follows:

1. Defendants' Motions identify no clerical mistakes, oversights, newly-discovered evidence, or any other grounds for relief from the Judgment under Rule 60 of the Nevada Rules of Civil Procedure ("NRCP"). See NRCP 60(a) and (b).

2. Defendants' Motions do not set forth grounds for relief under NRCP 52. The Court made specific findings of fact substantiated by the actual trial record and separately stated its conclusions of law, and the Court's findings and conclusions were set forth in a memorandum in the Judgment. See NRCP 52(a)(1). Defendants failed to set forth any basis for the Court to make additional findings or amend its findings. See NRCP 52(b).

3. Relief from a judgment or order under NRCP 59 is an extraordinary remedy available only upon a finding that an error occurred which materially affected the substantial rights of the movant. See NRCP 59(a)(1); see also Khoury v. Seastrand, 132 Nev. Adv. Op. 52, 377 P.3d 81, 94 (2016); Gunderson v. D.R. Horton, Inc., 130 Nev. 67, 74, 319 P.3d 606, 611 (2014). Here, there was no irregularity that denied Defendants a fair trial, nor an error in law over Defendants' objection that would justify a new trial or altering or amending the Judgment. Further, in light of the volume of evidence supporting the Court's findings regarding the multiple badges of fraud and Defendants' lack of good faith, Defendants cannot demonstrate that any error, if one occurred, was one that affected the outcome of the trial or materially affected their substantial rights.

Based on the foregoing, and good cause appearing,

IT IS HEREBY ORDERED that Defendants' Motions for New Trial and/or to Alter or Amend Judgment are DENIED.

Dated this 9 day of July, 2019.

Connie J. Steinheimer
DISTRICT JUDGE

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Exhibit 3

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, vs. SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, and individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	**CASE NO.: CV13-02663** **DEPT. NO.: 4**

ORDER GRANTING PLAINTIFF'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 68

Plaintiff William A. Leonard, chapter 7 trustee for the bankruptcy estate of Paul A. Morabito and judgment creditor in the above-entitled action (the "Plaintiff") filed an *Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68* (the "Application") on April 12, 2019. Superpumper, Inc., Salvatore Morabito, and Snowshoe Petroleum, Inc. (collectively, the "Responding Defendants") filed an *Opposition to the Application for Attorneys' Fees and Costs* (the "Opposition") on April 25, 2019. Plaintiff filed a *Reply in Support of the Application for Attorneys' Fees and Costs pursuant to NRCP 68* (the "Reply") on April 30, 2019. Edward Bayuk, individually and as trustee of the Edward William Bayuk Living Trust ("Bayuk," and together with the Responding Defendants, the "Defendants") did not oppose the Application. The Application was submitted for decision on May 1, 2019.

The Court has reviewed and considered the arguments made in the Application, the Opposition, and the Reply, the papers and pleadings on file with the Court in this action, including

the Memorandum of Costs filed by Trustee on April 11, 2019, the *Motion to Retax* (the "Motion to Retax") filed on May 1, 2019, the testimony and exhibits admitted during the trial, and the Court's Findings of Fact, Conclusions of Law, and Judgment, entered on March 29, 2019 (the "Judgment"). The Court, persuaded by the argument and authorities in Plaintiff's Application, along with the pleadings and papers on file, the trial record, and the findings and conclusions set forth in the Judgment, finds as follows:

1. Plaintiff served a valid apportioned offer of judgment in the amount of $3,000,000 on Defendants on May 31, 2016 (the "Offer of Judgment").

2. Defendants rejected the Offer of Judgment.

3. Plaintiff obtained a verdict in an amount greater than the Offer of Judgment after a trial on the merits.

4. Plaintiff's Offer of Judgement must be enforced under NRS 68(f) and consistent with the factors delineated in *Beattie vs. Thomas,* 99 Nev. 579, 668 P.2d 268 (1983):

a. Plaintiff's Offer of Judgment was a good faith offer premised on sound factual and legal bases.

b. Plaintiff's Offer of Judgment was reasonable and in good faith in timing and amount.

c. Defendants' rejection of the Offer of Judgment was unreasonable.

5. Plaintiff's attorney's fees are fair and reasonable and enforceable under the standards set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969):

a. The work required in connection with the case was difficult and time consuming and performed by skilled counsel.

b. The character of the work, time, and skill required justifies the fees requested.

c. The attorneys were successful in obtaining a favorable result for the Plaintiff

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///

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6. The Offer of Judgment justifies the award of fees and costs.

Based upon the foregoing, and good cause appearing:

IT IS HEREBY ORDERED that the Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68 is GRANTED.

IT IS HEREBY FURTHER ORDERED that the Plaintiff is awarded attorneys' fees incurred from June 1, 2016 through the date of the Judgment in the amount of $773,116.00.

IT IS HEREBY FURTHER ORDERED that the Plaintiff is awarded costs incurred from June 1, 2016 through the date of Judgment, which have not been otherwise reduced already by the *Order Granting in Part and Denying in Part Motion to Retax*, in the amount of $109,427.

IT IS HEREBY FURTHER ORDERED that the Defendants are ordered to pay Plaintiff's attorneys' fees in the amount of $773,116.00, less the $8,128.67 in sanctions already paid, for a total amount of $764,987.33 in attorneys' fees and $109,427 in costs.

IT IS HEREBY FURTHER ORDERED that this award of attorneys' fees and costs shall be added to the amount of the Judgment.

Dated this 9 day of July, 2019.

Connie J. Steinheimer
DISTRICT JUDGE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, vs. SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, and individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	**CASE NO.: CV13-02663** **DEPT. NO.: 4**

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO RETAX COSTS

Defendants Salvatore Morabito, Superpumper, Inc., and Snowshoe Petroleum, Inc. (collectively, the "Defendants") filed their *Motion to Retax Costs* ("Motion to Retax") on April 15, 2019. Plaintiff William A. Leonard, chapter 7 trustee for the bankruptcy estate of Paul A. Morabito and judgment creditor in the above-entitled action (the "Plaintiff") filed his *Opposition to Motion to Retax Costs* (the "Opposition") on April 18, 2019. Defendants filed their *Reply in Support of Motion to Retax Costs* (the "Reply") on April 22, 2018. The Motion to Retax was submitted for decision on May 1, 2019.

The Court has reviewed and considered the arguments made in the Motion, the Opposition, and the Reply, the papers and pleadings on file with the Court in this action, the testimony and

exhibits admitted during the trial, and the Court's Findings of Fact, Conclusions of Law, and Judgment, entered on March 29, 2019 (the "Judgment"). The Court, persuaded by the argument and authorities in Plaintiff's Opposition, along with the pleadings and papers on file, the trial record, and the findings and conclusions set forth in the Judgment, finds as follows:

1. Plaintiff filed his Memorandum of Costs and Disbursements (the "Memorandum") on April 11, 2019.

2. The four-day delay in filing the Memorandum is for good cause based on the Plaintiff's confusion regarding the application of NRCP Rule 68 and NRS 18.110.

3. The four-day delay in filing the Memorandum has not caused any prejudice to the Defendants.

4. The following reductions in the costs requested in the Memorandum are appropriate:

a. The costs of experts should be reduced from $77,201.80 to $75,505.90;

b. The costs of photocopies should be reduced from $17,961.67 to $17,772.17;

c. The costs for use of Odyssey in the amount of $200 are reduced to $0.00.

5. The remaining costs incurred for Plaintiff's experts were reasonably incurred and are reasonable under the circumstances of this case as modified from the Memorandum.

6. The remaining charges for photocopying were reasonably incurred and are reasonable under the circumstances of this case as modified from the Memorandum.

7. Plaintiff had no obligation to only retain local counsel and the costs associated with Plaintiff's chosen counsels' representation were reasonable and necessary.

8. There was no objection to the remaining costs in the Memorandum and they were authorized, reasonable, and actually incurred.

Based upon review of the entire file, the foregoing, and good cause appearing:

IT IS HEREBY ORDERED that the Motion to Retax is granted in part and denied in part.

IT IS HEREBY FURTHER ORDERED that the five-day deadline to file the Memorandum is extended up to and including April 11, 2019 and the Memorandum is therefore timely.

IT IS HEREBY FURTHER ORDERED that the costs listed in the Memorandum, as modified herein, in the amount of $152,856.84 are reasonable costs incurred in this matter pursuant to NRS § 18.110 and are awarded in Plaintiff's favor and against Defendants and Edward Bayuk, individually and as trustee of the Edward William Bayuk Living Trust.

IT IS HEREBY FURTHER ORDERED that this award of costs shall be added to the amount of the Judgment.

Dated this 9 day of July, 2019.

Connie J. Steinheimer
DISTRICT JUDGE

EXHIBIT 3

EXHIBIT 3

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Marquis Aurbach Coffing
Micah S. Echols, Esq.
Nevada Bar No. 8437
10001 Park Run Drive
Las Vegas, Nevada 89145
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mechols@maclaw.com
Attorneys for Defendants and Edward Bayuk, as Trustee for Non-Party the Edward Bayuk Living Trust

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Elizabeth A. Brown
Clerk of Supreme Court

IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, vs. 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, Defendants.	Case No.: CV13-02663 Dept. No.: 4

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

NOTICE OF APPEAL

Defendants, Superpumper, Inc.; Edward Bayuk, individually and as Trustee of the Edward Bayuk Living Trust; Edward Bayuk, as Trustee, for the benefit of Non-Party the Edward Bayuk Living Trust; Salvatore Morabito; and Snowshoe Petroleum, Inc., by and through their attorneys of record, Marquis Aurbach Coffing, hereby appeal to the Supreme Court of Nevada from: (1) the Order Denying [Morabito's] Claim of Exemption, which was filed on August 2, 2019 and is attached as **Exhibit 1**; (2) the Order Denying [Bayuk's] Claim of Exemption and Third Party Claim, which was filed on August 9, 2019 and is attached as **Exhibit 2**; and (3) the Order Denying Defendants' Motion to Make Amended or Additional Findings Under

Docket 80214 Document 2019-50614

NRCP 52(b), or, in the Alternative, Motion for Reconsideration and Denying Plaintiff's Countermotion for Fees and Costs Pursuant to NRS 7.085, which was filed on November 8, 2019 and is attached as **Exhibit 3**.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned affirms that the pleading or document now being presented to the Court in the above-entitled action does **not** contain any Personal Information (as defined in NRS 603A.040).

Dated this 6th day of December, 2019.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols
Micah S. Echols, Esq.
Nevada Bar No. 8437
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Defendants and Edward Bayuk, as Trustee for Non-Party the Edward Bayuk Living Trust

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF APPEAL** was submitted electronically for filing and/or service with the Second Judicial District Court on the 6th day of December, 2019. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:

ERIKA TURNER, ESQ.
for WILLIAM A. LEONARD, JR, TRUSTEE OF ESTATE OF PAUL A. MORABITO

FRANK GILMORE, ESQ.
for SALVATORE R. MORABITO, SNOWSHOE PETROLEUM, INC.,
and SUPERPUMPER, INC.

MARK WEISENMILLER, ESQ.
for WILLIAM A. LEONARD, JR, TRUSTEE OF ESTATE OF PAUL A. MORABITO

JEFFREY HARTMAN, ESQ.
for EDWARD WILLIAM BAYUK LIVING TRUST, and EDWARD BAYUK

TERESA PILATOWICZ, ESQ.
for WILLIAM A. LEONARD, JR, TRUSTEE OF ESTATE OF PAUL A. MORABITO

GABRIELLE HAMM, ESQ.
for WILLIAM A. LEONARD, JR, TRUSTEE OF ESTATE OF PAUL A. MORABITO

MICHAEL LEHNERS, ESQ.
for EDWARD WILLIAM BAYUK LIVING TRUST, and EDWARD BAYUK and
SALVATORE R. MORABITO

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

GERALD M. GORDON, ESQ.
Garman Turner Gordon LLP
650 White Drive, Ste. 100
Las Vegas, Nevada 89119
SPECIAL COUNSEL TO TRUSTEE

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

INDEX OF EXHIBITS

Exhibit No.	Document Description	No. of Pages
1	Order Denying [Morabito's] Claim of Exemption (filed 08/02/19)	3
2	Order Denying [Bayuk's] Claim of Exemption and Third Party Claim (filed 08/09/19)	5
3	Order Denying Defendants' Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration and Denying Plaintiff's Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 11/08/19)	10

MARQUIS AURBACH COFFING
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Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

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Exhibit 1

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IN THE SECOND JUDICIAL DISTRICT COURT OF

THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, vs. SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, and individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	CASE NO.: CV13-02663 DEPT. NO.: 4

ORDER DENYING CLAIM OF EXEMPTION

Before the Court is the *Notice of Claim of Exemption from Execution* (the "Claim of Exemption") filed on July 2, 2019 by Defendant Salvatore Morabito ("Morabito"). The Claim of Exemption is supported by the *Declaration of Salvatore Morabito Claiming Exemption from Execution* (the "Morabito Declaration"), also filed on July 2, 2019. *Plaintiff's Objection to Notice of Claim of Exemption from Execution Field by Salvatore Morabito and Request for Hearing* (the "Objection") was filed on July 16, 2019, and *Morabito's Reply to Plaintiff's Objection to Notice of Claim of Exemption from Execution* (the "Reply") was filed on July 18, 2019.

The Court held a hearing on the Claim of Exemption on July 22, 2019. Morabito appeared by and through counsel, Michael Lehners. Plaintiff appeared by and through counsel, Erika Pike Turner, Gerald M. Gordon and Teresa Pilatowicz of the law firm of Garman Turner Gordon LLP.

The Court has reviewed and considered the arguments made in the Claim of Exemption, the Objection, and the Reply, the papers and pleadings on file with the Court in this action, the testimony and exhibits admitted during the trial, the Court's Findings of Fact, Conclusions of Law, and Judgment, entered on March 29, 2019 (the "Judgment"), and the arguments of counsel made at the hearing. The Court is persuaded by the argument and authorities in Plaintiff's Objection and the arguments of Plaintiff's counsel at the hearing, along with the pleadings and papers on file, the trial record, and the findings and conclusions set forth in the Judgment. As such, the Court finds that Sam Morabito failed to meet his burden to show that there are assets in Nevada subject to exemption from execution.

Based on the foregoing, and good cause appearing:

IT IS HEREBY ORDERED that the Claim of Exemption filed by Salvatore Morabito is denied.

Dated this 2 day of August, 2019.

Connie J. Steinheimer
DISTRICT JUDGE

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Transaction # 7421482

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, vs. SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, and individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	CASE NO.: CV13-02663 DEPT. NO.: 4

ORDER DENYING CLAIM OF EXEMPTION AND THIRD PARTY CLAIM

Before the Court is the *Notice of Claim of Exemption from Execution* (the "Claim of Exemption") filed on June 28, 2019 by Edward Bayuk ("Bayuk"), individually and as trustee of the Edward William Bayuk Living Trust (the "Bayuk Trust"), and the *Third Party Claim to Property Levied Upon [NRS 31.070]* (the "Third Party Claim") filed on July 3, 2019 by the Bayuk Trust. The Claim of Exemption and Third Party Claim are supported by the *Declaration of Edward Bayuk Claiming Exemption from Execution* (the "Bayuk Declaration"), filed on July 2, 2019. *Plaintiff's Objection to (1) Declaration of Edward Bayuk Claiming Exemption From Execution and (2) Third Party Claim to Property Levied Upon, and Request for Hearing Pursuant to NRS 21.112 and 31.070(5)* (the "Objection") was filed on July 11, 2019, and Bayuk and the Bayuk Trust's *Reply to Objection to Claim of Exemption and Third Party Claim to Property Levied Upon* (the "Reply") was filed on July 17, 2019.

The Court held a hearing on the Claim of Exemption and Third Party Claim on July 22, 2019. Bayuk and the Bayuk Trust appeared by and through counsel, Michael Lehners and Jeffrey L. Hartman. Plaintiff appeared by and through counsel, Erika Pike Turner, Gerald M. Gordon, and Teresa Pilatowicz of the law firm of Garman Turner Gordon LLP.

The Court has reviewed and considered the arguments made in the Claim of Exemption and the Third Party Claim, the Objection, and the Reply, the Bayuk Declaration, the exhibits to all of the foregoing, the papers and pleadings on file with the Court in this action, the testimony and exhibits admitted during the trial, the Court's Findings of Fact, Conclusions of Law, and Judgment, entered on March 29, 2019 (the "Judgment"), and the arguments of counsel made at the hearing. The Court, persuaded by the argument and authorities in Plaintiff's Objection and the arguments of Plaintiff's counsel at the hearing, along with the pleadings and papers on file, the trial record, and the findings and conclusions set forth in the Judgment, finds as follows:

1. The court has subject matter jurisdiction over the claims asserted against Bayuk, as trustee of the Bayuk Trust.

2. Bayuk has transferred all of his personal assets to the Bayuk Trust since the Bayuk Trust was established in 1998. As set forth in the Judgment, the Bayuk Trust received fraudulently transferred property which was established by clear and convincing evidence.

3. The purported nature of the Bayuk Trust as a Nevada spendthrift trust was not disclosed prior to the Claim of Exemption. In response to discovery requests, in deposition, in subject deeds, and at trial prior to the Judgment, Bayuk and the Bayuk Trust produced contradictory evidence regarding the date and the purpose of the Bayuk Trust. With the Claim of Exemption, the Bayuk Trust clarifies that that there is, and has been, only one trust with the name "the Edward William Bayuk Living Trust" and that is the Bayuk Trust.

4. The Bayuk Trust does not meet the requirements for enforcement as a Nevada spendthrift trust under NRS 166.015 because Bayuk is the settlor and beneficiary during his lifetime of the Bayuk Trust, and neither Bayuk nor his co-trustee Paul Morabito are domiciles of Nevada. NRS 166.015(2). As established in the Judgment, Bayuk and Paul Morabito moved to California in September 2010.

5. Contrary to assertions by Bayuk, there was no credible evidence presented that the Bayuk Trust owns a burial plot in Nevada; but, even if such fact were established, the ownership of a burial plot in Nevada is insufficient to invoke the protections of NRS Chapter 166.

6. Even if the claims asserted against the Bayuk Trust were subject to the time periods under NRS 166.170, they were timely because the fraudulent transfer claim was brought (1) within two years after the fraudulent transfers were made and (2) also within six months of discovery of, or when Plaintiff reasonably should have discovered, the existence of the purported spendthrift trust. The subject fraudulent transfers occurred in September 2010 and thereafter. The Bayuk Trust executed a tolling agreement on November 30, 2011 to toll any statute of limitations applicable to the fraudulent transfer of property to the Bayuk Trust, which tolling agreement tolled the time period to file until June 18, 2013 and the Complaint was filed in December 2013. The purported nature of the Bayuk Trust as a spendthrift trust subject to NRS 166.170 was not disclosed until the Claim of Exemption. Moreover, any defenses based on NRS 166.170 have been waived as a result of the failure of Bayuk or the Bayuk Trust to raise such defenses prior to the Claim of Exemption.

Based upon review of the entire file, the foregoing, and good cause appearing:

IT IS HEREBY ORDERED that the June 28, 2019 Claim of Exemption filed by Edward Bayuk, individually and as trustee of the Edward William Bayuk Living Trust is DENIED.

IT IS HEREBY FURTHER ORDERED that the July 3, 2019 Third Party Claim to Property Levied Upon [NRS 31.070] filed by the Bayuk Trust is DENIED.

Dated this 9 day of August, 2019.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

CASE NO. CV13-02663

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 9 day of August, 2019, I filed the **ORDER DENYING CLAIM OF EXEMPTION AND THIRD PARTY CLAIM** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

_____**Personal delivery to the following: [NONE]**

✓ **Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User Agreement.**

ERIKA TURNER, ESQ. for WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

MICAH ECHOLS, ESQ. for EDWARD WILLIAM BAYUK LIVING TRUST et al

JEFFREY HARTMAN, ESQ. for EDWARD WILLIAM BAYUK LIVING TRUST, EDWARD BAYUK

MARK WEISENMILLER, ESQ. for WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

FRANK GILMORE, ESQ. for SNOWSHOE PETROLEUM, INC., SALVATORE R. MORABITO, SUPERPUMPER, INC.

MICHAEL LEHNERS, ESQ. for SALVATORE R. MORABITO

TERESA PILATOWICZ, ESQ. for WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

GABRIELLE HAMM, ESQ. for WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

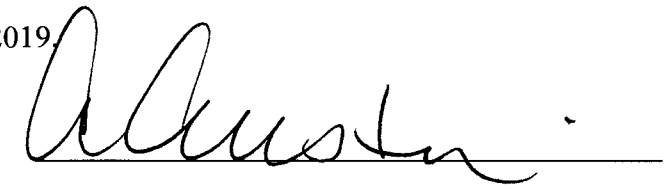
_____**Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada: [NONE]**

_____**Placed a true copy in a sealed envelope for service via:**

_____ Reno/Carson Messenger Service – **[NONE]**

_____ Federal Express or other overnight delivery service **[NONE]**

DATED this 9 day of August, 2019.



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Clerk of the Court
Transaction # 7625741 : yviloria

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Jacqueline Bryant
Clerk of the Court
Transaction # 7580677

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito, Plaintiff, vs. SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, and individual; and SNOWSHOE PETROLEUM, INC., a New York corporation, Defendants.	CASE NO.: CV13-02663 DEPT. NO.: 4

ORDER DENYING DEFENDANTS' MOTION TO MAKE AMENDED OR ADDITIONAL FINDINGS UNDER NRCP 52(B), OR, IN THE ALTERNATIVE, MOTION FOR RECONSIDERATION AND DENYING PLAINTIFF'S COUNTERMOTION FOR FEES AND COSTS PURSUANT TO NRS 7.085

On November 26, 2018, the Court concluded the nine day Non-Jury Trial and took the matter under advisement.

On January 30, 2019, Plaintiff William A. Leonard. Leonard, Trustee of the Bankruptcy Estate of Paul Anthony Morabito (hereinafter "Leonard"), by and through his attorney, Erika Pike Turner, Esq. Teresa M. Pilatowicz, Esq. and Gabrielle A. Hamm, Esq. of Garman Turner Gordan LLP, filed *Plaintiff's Motion to Reopen Evidence.* Also, on January 30, 2019, Leonard filed an *Errata to Plaintiff's Motion to Reopen Evidence,* and an *Ex Parte Motion for Order Shortening Time on Plaintiff's Motion to Reopen Evidence and for Expedited Hearing.* On February 4, 2019, the Court entered an *Order Shortening Time on Plaintiff's Motion to Reopen Evidence and Setting*

Expedited Hearing wherein the Court set forth the shortened briefing deadlines and scheduled a hearing on the motion to reopen evidence for February 8, 2019. Also, on February 4, 2019, Leonard filed a *Supplement to Plaintiff's Motion to Reopen Evidence.*

On February 6, 2019, Defendants Superpumper, Inc., Edward Bayuk, individually and as Trustee of the Edward William Bayuk Living Trust, Salvatore Morabito and Snowshoe Petroleum, Inc. (hereinafter collectively "Superpumper Defendants"), by and through their attorney, Frank C. Gilmore, Esq. of Robison, Sharp, Sullivan & Brust, filed *Defendants' Response to Motion to Reopen Evidence.*

On February 7, 2019, Leonard filed *Plaintiff's Reply to Defendants' Response to Motion to Reopen Evidence.*

On February 8, 2019, Erika Turner, Esq. appeared on behalf of Leonard, and Frank Gilmore, Esq. appeared on behalf of the Superpumper Defendants at the scheduled hearing on Leonard's Motion to Reopen Evidence. After hearing the arguments of the parties, the Court granted Leonard's motion to reopen evidence and set an ongoing non-jury trial wherein the Superpumper Defendants would have the opportunity to present rebuttal evidence for March 1, 2019.

On February 28, 2019, an *Amended Stipulation to Vacate March 1, 2019 Hearing* was filed wherein the Superpumper Defendants waived any rebuttal to the evidence admitted at the February 8, 2019 hearing, Trial Exhibits 305, 306, 307, 308 and 309, and the parties stipulated to vacating the March 1, 2019 ongoing non-jury trial. Thereafter, on February 28, 2019, the Court entered an *Order Granting Amended Stipulation to Vacate March 1, 2019 Hearing.*

On March 6, 2019, Leonard filed *[Plaintiff's Proposed] Findings of Fact, Conclusions of Law, and Judgment.* On March 8, 2019, the Superpumper Defendants filed *[Defendants' Proposed Amended] Findings of Fact, Conclusions of Law and Judgment.*

On March 29, 2019, the Court entered its *Findings of Fact, Conclusions of Law and Judgment.* Also, on March 29, 2019, Leonard filed a *Notice of Entry of Findings of Fact, Conclusions of Law and Judgment.*

On April 11, 2019, Leonard filed *Plaintiff's Memorandum of Costs and Disbursements.* On April 12, 2019, Leonard filed an *Application for Attorneys' Fees and Costs Pursuant to NRCP 68.* On May 15, 2019, the Superpumper Defendants filed a *Motion to Retax Costs.* On April 17, 2019, *Plaintiff's Opposition to Motion to Retax Costs* was filed. On April 22, 2019, the Superpumper Defendants filed their *Reply in Support of Motion to Retax Costs.* On April 25, 2019, the Superpumper Defendants filed their *Opposition to Application for Attorneys' Fees and Costs.*

On April 25, 2019, Jeffrey L. Hartman, Esq. and the law firm of Hartman & Hartman, substituted in the place and stead of Frank Gilmore, Esq. and Robison, Sharp, Sullivan & Brust, as attorney of record for Defendant Edward Bayuk, individually and as Trustee of the Edward William Bayuk Living Trust (hereinafter "Bayuk")

Also, on April 25, 2019, Defendants Salvatore Morabito, Snowshoe Petroleum, Inc. and Superpumper, Inc. (hereinafter the "Morabito Defendants") filed a *Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59 and 60.* On April 26, 2019, Bayuk filed a *Motion for New Trial and/or to Alter or Amend Judgment.*

On April 30, 2019, *Plaintiff's Reply in Support of Application for Attorneys' Fees and Costs Pursuant to NRCP 68* was filed. On May 1, 2019, Leonard submitted his Application for Attorneys' Fees and Costs Pursuant to NRCP 68 and the Superpumper Defendants' Motion to Retax Costs for the Court's consideration.

On May 7, 2019, *Plaintiff's Opposition to Defendants' Motions for New Trial and/or to Alter or Amend Judgment* was filed. On May 14, 2019, the Morabito Defendants filed *Defendants' Reply in Support of Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59 and 60,* and submitted the motion for the Court's consideration. After the time to file a reply had expired, Leonard submitted Defendant Bayuk's Motion for New Trial and/or to Alter or Amend Judgment for the Court's consideration on May 21, 2019.

On June 24, 2019, the Court held a telephonic hearing on its decision concerning the submitted motions of Leonard's application for attorneys' fees and costs, the motion to retax costs and the Morabito Defendants' and Bayuk's motions for new trial and/or alter or amend judgment wherein Erika Turner, Esq., Teresa Pilatowicz, Esq. and Gabrielle Hamm, Esq. appeared on behalf

of Leonard, Jeffrey Hartman, Esq. appeared on behalf of Bayuk, and Frank Gilmore, Esq. appeared on behalf of the Morabito Defendants.

At the hearing, the Court stated that it was persuaded by a majority of the arguments of Leonard; therefore, it was granting in part and denying in part the Motion to Retax Costs. As a result, the Court found that reasonable costs were incurred in the amount of $152,856.84. As to Leonard's motion for attorneys' fees and costs, the Court found that Bayuk and the Morabito Defendants' rejection of the offer of judgment was unreasonable, and ordered costs incurred from June 1, 2016 which were reduced by the decision in the motion to retax costs, and that Bayuk and the Morabito Defendants were to pay Leonard's attorneys' fees in the amount of $773,116.00, less $8,128.87 for sanctions previously paid.

Next, the Court turned its attention to Bayuk and the Morabito Defendants' motions for new trial and/or to amend or alter judgment. Having reviewed all the pleadings filed related to the motions, the entire file, and presided over the trial, the Court found it was persuaded by a majority of the arguments of Leonard, and found that there were no clerical mistakes, oversights or newly discovered evidence or any other reason to justify relief from the judgment pursuant to NRCP 60, that NRCP 52 does not support modification of the judgment as written, and that there were no irregularities that denied Bayuk and the Morabito Defendants a fair trial nor error in law over defendants' objections that would justify a new trial and/or altering the judgment pursuant to NRCP 59, and that in light of the evidence supporting the Court's finding regarding multiple badges of fraud and lack of good faith by Bayuk and the Morabito Defendants, they could not demonstrate that any error materially affected their substantial rights or affected the outcome of the trial. As such, the Court denied Bayuk's and the Morabito Defendants' Motions for New Trial and/or Alter or Amend Judgment Pursuant to NRCP 52, 59 and 60.

On July 2, 2019, Salvatore Morabito filed a *Notice of Claim of Exemption from Execution* and a *Declaration of Salvatore Morabito Claiming Exemption from Execution.* On July 3, 2019, Edward Bayuk filed a *Third-Party Claim to Property Levied Upon NRS 31, 070.*

On July 10, 2019, the written *Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment* was entered. Also, on July 10, 2019, the written *Order Granting in Part*

and Denying in Part Motion to Retax Costs and the written *Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68* were entered.

On July 11, 2019, Leonard filed *Plaintiff's Objection to (1) Claim of Exemption from Execution and (2) Third Party Claim to Property Levied Upon, and Request for Hearing Pursuant to NRS 21.112 and 31.070(5).*

On July 16, 2019, Leonard filed a *Notice of Hearing on Plaintiff's Objection to (1) Claim of Exemption from Execution and (2) Third Party Claim to Property Levied Upon, and Request for Hearing Pursuant to NRS 21.112 and 31.070(5)* wherein the hearing on the claims of exemption was scheduled for July 22, 2019. Also, on July 16, 2019, *Plaintiff's Objection to Notice of Claim of Exemption from Execution filed by Salvatore Morabito and Request for Hearing* was filed. Additionally, on July 16, 2019, Leonard filed notices of entry of orders concerning the Order Denying Defendants' Motion for New Trial and/or Alter or Amend Judgment, Order Granting in Part and Denying in Part Motion to Retax Costs, and the Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68.

On July 17, 2019, Bayuk filed his *Reply to Objection to Claim of Exemption and Third-Party Claim to Property Levied Upon.*

On July 18, 2019, Michael Lehners, Esq. filed a *Notice of Appearance* as attorney of record on behalf of Salvatore Morabito, and associating as co-counsel for Bayuk. Also, on July 18, 2019, Salvatore Morabito filed his *Reply to Plaintiff's Objection to Notice of Claim from Exemption from Execution.* Also, on July 18, 2019, Leonard filed a *Notice of Hearing on Plaintiff's Objection to Notice of Claim of Execution Filed by Salvatore Morabito* was filed setting the hearing on Salvatore Morabito's claims of exemption for July 22, 2019.

On July 22, 2019, Erika Turner, Esq. and Teresa Pilatowicz, Esq. appeared on behalf of Leonard, Jeffrey Hartman, Esq. appeared with Defendant Edward Bayuk, and Michael Lehners, Esq. appeared as co-counsel on behalf of Edward Bayuk, and counsel for Salvatore Morabito at the scheduled hearing on the objections to claims of exemption. After hearing argument of the parties, the Court found that there were not sufficient factors in the case to create trust protections. Neither a trustee or beneficiary of the Edward William Bayuk Living Trust live in the State of

Nevada, the Court does have the necessary jurisdiction to rule in the case, and the objection was waived by the Defendants as it was not raised during the course of the trial. As such, the Court denied the claims of exemption. Additionally, the Court heard argument on Mr. Lehner's oral motion for stay of proceedings pending appeal, and a motion for leave to supplement record as to the burial plot. After hearing argument of the parties, the Court denied the request to supplement the record with testimony of Edward Bayuk regarding the burial plot, and denied the motion to stay proceedings with leave to renew once written decision is entered regarding the request for exemption. Finally, the Court rendered its oral decision denying Edward William Bayuk Living Trust's third-party claim.

On August 5, 2019, Micah S. Echols, Esq. and Kathleen A. Wilde, Esq. of Marquis Aurbach Coffing filed a *Notice of Appearance* as attorney of record on behalf of Defendants Superpumper, Inc., Bayuk, Salvatore Morabito and Snowshoe Petroleum, Inc. Additionally, on August 5, 2019, Defendants Superpumper, Inc., Edward Bayuk, Salvatore Morabito and Snowshoe Petroleum, Inc., by and through the law firm of Marquis Aurbach Coffing, filed a *Notice of Appeal* concerning the Findings of Fact, Conclusions of Law, and Judgment filed March 29, 2019, the Order Denying Defendants' Motion for New Trial and/or to Alter or Amend Judgment filed July 10, 2019, the Order Granting in Part and Denying in Part Motion to Retax Costs, filed July 10, 2019, and the Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68 filed July 10, 2019.

Also, on August 5, 2019, Bayuk, by and through Jeffrey Hartman, Esq. and Michael Lehner, Esq. filed a *Notice of Appeal* of eight orders entered in the instant matter from August 17, 2014 to July 20, 2019.

On August 19, 2019, Bayuk and the Superpumper Defendants filed a *Motion to Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration.*

On August 30, 2019, Bayuk and the Superpumper Defendants filed an *Errata to Motion to Make Amended or Additional Findings under NRCP 52(b), or in the Alternative, Motion for Reconsideration.* On August 30, 2019, Leonard filed *Plaintiff's Opposition to Motion to Make Amended or Additional Findings Under NRCP 52(b), or in the Alternative, Motion for*

Reconsideration, and Countermotion for Fees and Costs Pursuant to NRS 7.085. Thereafter, also on August 30, 2019, Leonard filed an *Errata to Plaintiff's Opposition to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration and Countermotion for Fees and Costs Pursuant to NRS 7.085.*

On September 4, 2019, Bayuk and the Superpumper Defendants filed their *Reply in Support of Motion to Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration and Opposition to Countermotion for Fees and Costs,* and submitted their motion for the Court's consideration.

The Court has considered the pleadings noted above, in addition to all exhibits, papers and pleadings on file in the case; the record of the trial including trial transcripts and exhibits, the Court's Findings of Fact, Conclusion of Law and Judgment dated March 29, 2019, and the record of the July 22, 2019 hearing.

Based upon the above, the Court finds no basis in law or fact to support amending or supplementing the Court's previously entered orders or findings.

Good cause appearing,

IT IS HEREBY ORDERED that Defendants' Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration is DENIED.

IT IS HEREBY FURTHER ORDERED that Plaintiff's Countermotion for Fees and Costs Pursuant to NRS 7.085 is DENIED.

Dated this 8 day of November, 2019.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

CASE NO. CV13-02663

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 8 day of November, 2019, I filed the **ORDER DENYING DEFENDANTS' MOTION TO MAKE AMENDED OR ADDITIONAL FINDINGS UNDER NRCP 52(B), OR, IN THE ALTERNATIVE, MOTION FOR RECONSIDERATION AND DENYING PLAINTIFF'S COUNTERMOTION FOR FEES AND COSTS PURSUANT TO NRS 7.085** with the Clerk of the Court.

I FURTHER CERTIFY THAT I TRANSMITTED A TRUE AND CORRECT COPY OF THE FOREGOING DOCUMENT BY THE METHOD(S) NOTED BELOW:

_____PERSONAL DELIVERY TO THE FOLLOWING: [NONE]

_____ELECTRONICALLY FILED WITH THE CLERK OF THE COURT, USING THE EFLEX SYSTEM WHICH CONSTITUTES EFFECTIVE SERVICE FOR ALL EFILED DOCUMENTS PURSUANT TO THE EFILE USER AGREEMENT.

GABRIELLE HAMM, ESQ. FOR WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

JEFFREY HARTMAN, ESQ. FOR EDWARD WILLIAM BAYUK LIVING TRUST, EDWARD BAYUK

TERESA PILATOWICZ, ESQ. FOR WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

TOM STEWART, ESQ. FOR EDWARD WILLIAM BAYUK LIVING TRUST ET AL

ERIKA TURNER, ESQ. FOR WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

MARK WEISENMILLER, ESQ. FOR WILLIAM A. LEONARD, JR, TRSTEE OF ESTATE OF PAUL A. MORABITO

KATHLEEN WILDE, ESQ. FOR EDWARD WILLIAM BAYUK LIVING TRUST ET AL

MICHAEL LEHNERS, ESQ. FOR SALVATORE R. MORABITO

MICAH ECHOLS, ESQ. FOR EDWARD WILLIAM BAYUK LIVING TRUST ET AL

FRANK GILMORE, ESQ. FOR SALVATORE R. MORABITO, SUPERPUMPER, INC., SNOWSHOE PETROLEUM, INC.

____**TRANSMITTED DOCUMENT TO THE SECOND JUDICIAL DISTRICT COURT MAILING SYSTEM IN A SEALED ENVELOPE FOR POSTAGE AND MAILING BY WASHOE COUNTY USING THE UNITED STATES POSTAL SERVICE IN RENO, NEVADA: [NONE]**

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DATED this 8 day of November, 2019.