

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER BEAVOR, AN
INDIVIDUAL,

Appellant,

vs.

JOSHUA L. TOMSHECK, AN
INDIVIDUAL,

Respondent.

Supreme Court Case No. 81964
District Court No. A-19-792405-C
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APPELLANT'S APPENDIX – VOLUME II OF III

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CHRONOLOGICAL TABLE OF CONTENTS TO
APPELLANT'S APPENDIX

| <u>Date</u> | <u>Description</u> | <u>Vol.</u> | <u>Bates No.</u> |
|--------------------|--|--------------------|-------------------------|
| 4/21/19 | Complaint | I | AA 1-7 |
| 4/30/19 | Acceptance of Service | I | AA 8-9 |
| 5/16/19 | Joshua Tomsheck's Answer and Third-Party Complaint | I | AA 10-17 |
| 8/19/19 | Joint Case Conference Report | I | AA 18-29 |
| 9/12/19 | Court Minutes – September 12, 2019 | I | AA 30-31 |
| 10/10/19 | Minute Order – October 10, 2019 | I | AA 32 |
| 3/9/20 | Joshua Tomsheck's Motion for Summary Judgment | I | AA 33-142 |
| 3/10/20 | Confidential Settlement and Mutual Release Agreement, Exhibit "A" to Joshua Tomsheck's Motion for Summary Judgment | I | AA 143-148 |
| 3/11/20 | Errata to Joshua Tomsheck's Motion for Summary Judgment | I | AA 149-169 |
| 3/11/20 | Third-Party Marc Saggese's Motion to Dismiss, or Alternatively, Motion for Summary Judgment | I | AA 170-214 |
| 03/27/20 | Opposition to Joshua Tomsheck's Motion for Summary Judgment | II | AA 215-256 |
| 4/24/20 | Stipulation and Order to Strike | II | AA 257-263 |

| <u>Date</u> | <u>Description</u> | <u>Vol.</u> | <u>Bates No.</u> |
|--------------------|---|--------------------|-------------------------|
| 4/27/20 | Defendant/Third-Party Plaintiff Joshua Tomsheck's Opposition to Third-Party Defendant Marc Saggese's Motion to Dismiss, or Alternatively, Motion for Summary Judgment, and Tomsheck's Request for NRCP 56(d) Relief | II | AA 264-448 |
| 4/30/20 | Defendant/Third-Party Plaintiff Joshua Tomsheck's Supplement to His Opposition to Third-Party Defendant Marc Saggese's Motion to Dismiss, or Alternatively, Motion for Summary Judgment, and Tomsheck's Request for NRCP 56(d) Relief | II | AA 449-493 |
| 4/30/20 | Joshua Tomsheck's Reply to Plaintiff's Opposition to Motion for Summary Judgment | III | AA 494-534 |
| 4/30/20 | Third-Party Defendant Marc Saggese's Reply in Support of Motion to Dismiss/Motion to Quash, or Alternatively, Motion for Summary Judgment | III | AA 535-544 |
| 5/5/20 | Third-Party Defendant Marc Saggese's Motion to Strike Supplemental Opposition of Third-Party Plaintiff Joshua Tomsheck on Order Shortening time | III | AA 545-551 |
| 6/2/20 | NOE re: Stipulation and Order re: Briefing Schedule | III | AA 552-557 |

| <u>Date</u> | <u>Description</u> | <u>Vol.</u> | <u>Bates No.</u> |
|--------------------|--|--------------------|-------------------------|
| 6/8/20 | Defendant/Third-Party Plaintiff Joshua Tomsheck's Opposition to Third-Party Defendant Marc Saggese's Motion to Strike Supplemental Opposition of Third-Party Plaintiff Joshua Tomsheck on Order Shortening Time and Countermotion to Allow Supplementation of the Record on Marc Saggese, Esq.'s Motion for Summary Judgment | III | AA 558-574 |
| 6/18/20 | Third-Party Defendant Marc Saggese's Reply in Support of Motion to Strike Supplemental Opposition of Third-Party Plaintiff Joshua Tomsheck and Opposition to Countermotion to Allow Supplementation of the Record | III | AA 575-580 |
| 6/25/20 | Minutes – June 25, 2020 | III | AA 581 |
| 7/10/20 | NOE re: Order and Findings of Fact and Conclusions of Law | III | AA 582-599 |
| 8/7/20 | Plaintiff's Motion to Alter or Amend Pursuant to NRCP 52(b) and 59(e) | III | AA 600-615 |
| 8/21/20 | Defendant/Third-Party Plaintiff Joshua Tomsheck's Opposition to Plaintiff's Motion to Alter or Amend Pursuant to NRCP 52(b) and 59(e) | III | AA 616-638 |
| 8/27/20 | Minutes – August 27, 2020 | III | AA 639 |

| <u>Date</u> | <u>Description</u> | <u>Vol.</u> | <u>Bates No.</u> |
|---------------------------|---|--------------------|-------------------------|
| 8/28/20 | Third-Party Defendant Marc Saggese's Substantive Joinder to Defendant/Third-Party Plaintiff Joshua Tomsheck's Opposition to Plaintiff's Motion to Alter or Amend Pursuant to NRCp 52(b) and 59(e) | III | AA 640-645 |
| 9/11/20 | Reply to Defendant/Third-Party Plaintiff Joshua Tomsheck's Opposition to Plaintiff's Motion to Alter or Amend and Third-Party Defendant's Substantive Joinder | III | AA 646-659 |
| 9/14/20 | NOE re: Order Granting Plaintiff's Motion to Retax or Deny and Denying Defendant's Motion for Costs and Motion for Fees | III | AA 660-667 |
| 9/14/20 | Minutes – September 14, 2020 | III | AA 668-669 |
| 9/17/20 | NOE re: Order Denying Plaintiff's Motion to Alter or Amend | III | AA 670-680 |
| 10/16/20 | Notice of Appeal | III | AA 681-683 |
| <u>TRANSCRIPTS</u> | | | |
| 3/16/21 | Court Transcript – June 25, 2020 [Motion for Summary Judgment] | III | AA 684-702 |

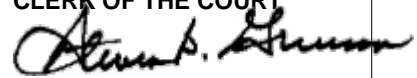
ALPHABETICAL TABLE OF CONTENTS TO APPELLANT’S APPENDIX

| <u>Date</u> | <u>Description</u> | <u>Vol.</u> | <u>Bates No.</u> |
|--------------------|---|--------------------|-------------------------|
| 4/30/19 | Acceptance of Service | I | AA 8-9 |
| 4/21/19 | Complaint | I | AA 1-7 |
| 3/10/20 | Confidential Settlement and Mutual Release Agreement, Exhibit “A” to Joshua Tomsheck’s Motion for Summary Judgment | I | AA 143-148 |
| 9/12/19 | Court Minutes – September 12, 2019 | I | AA 30-31 |
| 3/16/21 | Court Transcript – June 25, 2020 [Motion for Summary Judgment] | III | AA 684-702 |
| 8/21/20 | Defendant/Third-Party Plaintiff Joshua Tomsheck’s Opposition to Plaintiff’s Motion to Alter or Amend Pursuant to NRCP 52(b) and 59(e) | III | AA 616-638 |
| 4/27/20 | Defendant/Third-Party Plaintiff Joshua Tomsheck’s Opposition to Third-Party Defendant Marc Saggese’s Motion to Dismiss, or Alternatively, Motion for Summary Judgment, and Tomsheck’s Request for NRCP 56(d) Relief | II | AA 264-448 |

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|--------------------|--|--------------------|-------------------------|
| 6/8/20 | Defendant/Third-Party Plaintiff Joshua Tomsheck's Opposition to Third-Party Defendant Marc Saggese's Motion to Strike Supplemental Opposition of Third-Party Plaintiff Joshua Tomsheck on Order Shortening Time and Countermotion to Allow Supplementation of the Record on Marc Saggese, Esq.'s Motion for Summary Judgment | III | AA 558-594 |
| 4/30/20 | Defendant/Third-Party Plaintiff Joshua Tomsheck's Supplement to His Opposition to Third-Party Defendant Marc Saggese's Motion to Dismiss, or Alternatively, Motion for Summary Judgment, and Tomsheck's Request for NRCP 56(d) Relief | II | AA 449-493 |
| 3/11/20 | Errata to Joshua Tomsheck's Motion for Summary Judgment | I | AA 149-169 |
| 8/19/19 | Joint Case Conference Report | I | AA 18-29 |
| 5/16/19 | Joshua Tomsheck's Answer and Third-Party Complaint | I | AA 10-17 |
| 3/9/20 | Joshua Tomsheck's Motion for Summary Judgment | I | AA 33-142 |
| 4/30/20 | Joshua Tomsheck's Reply to Plaintiff's Opposition to Motion for Summary Judgment | III | AA 494-534 |
| 10/10/19 | Minute Order – October 10, 2019 | I | AA 32 |
| 8/27/20 | Minutes – August 27, 2020 | III | AA 639 |

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|--------------------|--|--------------------|-------------------------|
| 6/25/20 | Minutes – June 25, 2020 | III | AA 581 |
| 9/14/20 | Minutes – September 14, 2020 | III | AA 668-689 |
| 7/10/20 | NOE re: Order and Findings of Fact and Conclusions of Law | III | AA 582-599 |
| 9/17/20 | NOE re: Order Denying Plaintiff's Motion to Alter or Amend | III | AA 670-680 |
| 9/14/20 | NOE re: Order Granting Plaintiff's Motion to Retax or Deny and Denying Defendant's Motion for Costs and Motion for Fees | III | AA 660-667 |
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| 10/16/20 | Notice of Appeal | III | AA 681-683 |
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| 8/7/20 | Plaintiff's Motion to Alter or Amend Pursuant to NRCP 52(b) and 59(e) | III | AA 600-615 |
| 9/11/20 | Reply to Defendant/Third-Party Plaintiff Joshua Tomscheck's Opposition to Plaintiff's Motion to Alter or Amend and Third-Party Defendant's Substantive Joinder | III | AA 646-659 |
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| 3/11/20 | Third-Party Marc Saggese's Motion to Dismiss, or Alternatively, Motion for Summary Judgment | I | AA 170-214 |



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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual,

Plaintiff,

Case No.: A-19-793405-C
Dept. No.: XXIV

vs.

JOSHUA TOMSHECK, an individual;
DOES I-X; ROE ENTITIES I-X,

Defendants.

ALL RELATED CLAIMS.

OPPOSITION TO JOSHUA TOMSHECK'S MOTION FOR SUMMARY JUDGMENT¹

COMES NOW, Plaintiff Christopher Beavor, by and through his attorneys of record,
Charles ("CJ") Barnabi, Jr., Esq and Kevin M. Johnson, Esq., of the firms The Barnabi Law Firm,

¹ This Opposition was filed following the ordinary deadline, by agreement with the moving party's counsel.

1 PLLC and Cohen Johnson Parker Edwards respectively, and hereby opposes Defendant Joshua
2 Tomsheck's Motion for Summary Judgment. This Motion is based upon the memorandum of
3 points and authorities contained herein, all paper and pleadings of file, and any oral arguments the
4 Court entertains in this matter.

5 Dated this 27th day of March, 2020.

6 **THE BARNABI LAW FIRM, PLLC**

7
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Defendant's Motion relies on two arguments to seek dismissal of this action. First, that Plaintiff's cause of action is not assignable and secondly, that this matter was untimely. Both of these arguments are undermined by Nevada law and the facts of this case. Evaluating Defendant's first argument, Defendant overlooks a key distinction. Plaintiff's cause of action was not assigned at all. Rather, Plaintiff assigned his recovery in this action to another party as explicitly permitted by Nevada law. Plaintiff remains in complete control of this matter and will remain in control for the duration of this matter. Defendant's second argument ignores the "litigation tolling rule" and the fact that as a practical matter, the damages in a malpractice matter cannot be ascertained until that matter has concluded. For these reasons, Defendant's Motion should be denied in its entirety.

II.

STATEMENT OF UNDISPUTED FACTS

1. This case is a legal malpractice case which stems from Defendant's complete failure to oppose a motion for a new trial. Complaint, generally. A true and correct copy of the Complaint filed on April 23, 2019 is attached hereto as Exhibit 1.

2. Plaintiff was the defendant in an underlying contractual dispute, *Yakov Hefetz, et al. v. Christopher Beavor, et al.*, Clark County District Court, State of Nevada, Case No. A-11-645353-C. Exhibit 1, ¶5.

3. The *Hefetz v. Beavor* matter proceeded to trial and Plaintiff prevailed. *Id.* at ¶¶7-8.

4. Thereafter, the Defendant in that matter filed a Motion for a new trial. *Id.* at ¶9.

5. Plaintiff retained Defendant Tomscheck to oppose this Motion. *Id.* at ¶11.

6. Defendant Tomscheck, who was inexperienced in civil matters, failed to file an

1 opposition which addressed the matters contained in the Motion. Accordingly, the Court granted
2 the Motion holding that it was unopposed. The Court held that had that Motion been opposed, it
3 would have been denied. *Id.* at ¶¶12-17.

4 7. Due to Defendant Tomsheck's failure to oppose that motion, Plaintiff had to pay
5 the costs associated with continued litigation which included further discovery, a motion for
6 summary judgment, an appeal of that motion, further litigation, and preparations for a second trial.²
7 *Id.* at ¶¶25, 35; Exhibit 2, Case Docket for Case No. A-11-645353-C.

8 8. The underlying matter was settled mere days before the second trial was to begin,
9 on March 13, 2019 when the Stipulation to Dismiss with Prejudice was filed. Exhibit 3.

10 9. This settlement was comprised of a financial payment and the assignment of the
11 recovery of this malpractice case. Exhibit 4, Settlement Agreement executed by Plaintiff on
12 February 15, 2019. This settlement agreement is subject to a protective order, but states in relevant
13 part that:

14 Beavor agrees to prosecute any malpractice and/or any other claims he may have against
15 his former counsel,... H. Stan Johnson will serve as counsel for Beavor in his prosecution
16 of said claims. In order to permit H. Stan Johnson to serve as counsel, Beavor and H. Stan
17 Johnson will execute any required conflict waivers. Beavor represents and warrants that he
18 will fully pursue and cooperate in the prosecution of the above referenced claims; that he
19 will take any and all reasonable actions as reasonably requested by counsel to prosecute
20 the above actions; and that he will do nothing intentional to limit or harm the value of any
21 recovery related to the above referenced cases. Within thirty (30) days from the Effective
22 Date of this Settlement Agreement, Beavor shall provide... copies of any documents or
23 correspondence that Beavor believes relate to the above referenced malpractice actions....
24 [Defendant] agrees to indemnify and hold harmless Beavor from any attorney fees or costs
25 that may be incurred in pursuing the above referenced claims and any and all invoices for
26 attorneys' fees or costs shall be issued directly to [Defendant] with [Defendant] bearing
27 sole responsibility for payment thereof. Beavor further irrevocably assigns any recovery or
28 proceeds to [Defendant] from the above referenced actions and agrees to take any actions
necessary to ensure that any recovery or damages are paid to [Defendant] pursuant to the

² The anticipated malpractice case was so evident, that Defendant Tomsheck's malpractice carrier was involved in these underlying settlement discussions. Exhibit 1, ¶26; Exhibit G to Defendant's Motion for Summary Judgment, Tolling Agreement dated March 28, 2016 (stating that notice to Mr. Tomsheck should be provided to "Max Corrick OLSON CANNON, GORMLEY, ANGULO & STOBERSKI...") p. 2, Section 6, JT000706.

Agreement. Any and all costs of recovery or attempted recovery, including any attorneys' fees attributable thereto, are to be paid by [Defendant] and are [Defendant's] sole responsibility...

Exhibit 4, Section 4, PLTF002-03.

10. There is nothing in the settlement agreement that gives any third-party control over Plaintiff's malpractice claim. Exhibit 4; Declaration of Christopher Beavor, attached herein as Exhibit 5.

11. Following the execution of the Settlement Agreement in January 2019, the Complaint a few months afterwards on April 23rd, 2019. Exhibit 1.

III.

LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. NRCP 56(c). A material fact is one that affects the outcome of the suit under the governing law. *Wood v. Safeway*, 121 Nev. 724, 730 (2005)(quoting *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). A factual dispute is genuine "when a rational trier of fact could return a verdict for the nonmoving party," however, factual disputes that are irrelevant or unnecessary are not considered in determining summary judgment. *Id.* at 730-31 (internal citations omitted). The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact. *Cuzze v. University and Community College System of Nevada*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). While a party is not entitled to "build a case on the gossamer threads of whimsy, speculation, and conjecture," the facts must be taken in a light most favorable to the non-moving party, a non-moving party. *Id.*

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IV.

LEGAL ARGUMENT**A. Nevada Law Expressly Allows for the Assignment of a Recovery in a Malpractice Suit.**

Nevada Courts have long held that there is a “meaningful legal distinction” between assigning a recovery and assigning the rights to an action. *Edward J. Achrem, Chtd. v. Expressway Plaza Ltd. Pshp.*, 112 Nev. 737, 741, 917 P.2d 447, 449 (1996)(recognizing this distinction in the context of tort cases). This distinction is logical, as “...when only the proceeds are assigned, the original party maintains control over the case. When an entire claim is assigned, a new party gains control over the case...” *Tower Homes, LLC v. Heaton*, 377 P.3d 118, 122, 132 Nev. Adv. Rep. 62 (2016). *Id.* The determining factor is “the retention of control.” *Id.* This principle permeates our legal system and allows for contingency arrangements between clients and attorneys. *Achrem*, 112 Nev. at 741, 917 P.2d at 449.

It is this principle that undermines Defendant’s extensive reliance on *Tower Homes, LLC*. In *Tower Homes, LLC*, the Court does not prohibit the assignment of the recovery in a malpractice claim. 377 P.3d 118, 122, 132 Nev. Adv. Rep. 62 (2016). The Court sidesteps the issue entirely, stating “even if an assignment of the claim is distinguished from a right to proceeds in the legal malpractice context, **the 2013 bankruptcy stipulation and order constitute an assignment of the entire claim.**” *Id.* This fact distinguished *Tower Homes* entirely from this case, in *Tower* the court found that complete control of the case had been assigned to another party, here only the recovery has been assigned.

In *Tower Homes*, the Court evaluated a failed condominium project which had entered chapter 11 bankruptcy protection. *Id.* at 120. As part of the plan and confirmation order, the chapter 11 trustee and bankruptcy estate retained all legal claims of the debtor, including a legal malpractice claim. *Id.* Recognizing that he did not have the funds to pursue this malpractice claim,

1 the trustee entered into a stipulation with a group of creditors which allowed them to pursue this
2 malpractice claim in Tower Homes' name. *Id.* The bankruptcy court subsequently entered an order
3 giving force to this stipulation. *Id.* Thereafter, the creditors filed the malpractice matter in Tower
4 Home's name. *Id.* The Order relied on by the creditors reads in pertinent part:

5
6 **“[T]his Order authorizes the Trustee to permit the [creditors] to pursue any and all**
7 **claims on behalf of Tower Homes, LLC (the “Debtor”). . . which shall specifically**
8 **include . . . pursuing the [mal practice] action currently filed in the Clark County District**
9 **Court styled as Tower Homes, LLC v[.] William H. Heaton et al. . . .**

10 . . . [T]his Court hereby authorizes the [creditors] . . . to recover any and all earnest money
11 deposits, damages, attorneys fees and costs, and interest thereon on behalf of Debtor and
12 [creditors] and that any such recoveries shall be for the benefit of the Tower Homes
13 Purchasers.” *Id. Emphasis added.*

14 Based upon these facts, principally that “the entire claim [was] assigned...” and a “new
15 party gain[ed] control over the case, the Court held that the “...2013 bankruptcy stipulation and
16 court order express the bankruptcy court's and the bankruptcy trustee's present intention to allow
17 the purchasers to control the legal malpractice case.” *Id.*

18 Plaintiff's Motion dances around but cannot address this fundamental factual distinction
19 between the cases. In *Tower*, the creditors were given complete control of the litigation. The case
20 passed figuratively from the debtor, to the trustee, and eventually to a group of creditors. The
21 requisite control was completely lost. Here, Beaver still maintains complete control of his case.
22 *See Exhibit 5, Declaration of Christopher Beavor.* In an attempt to address this key difference
23 between the two cases, Defendant points to the following aspects of the settlement agreement:

- 24 • That Plaintiff agreed to use H. Stan Johnson, Esq. as counsel
- 25 • That Plaintiff warranted that he will fully pursue and cooperate in the prosecution of the
26 malpractice claim
- 27 • That Plaintiff would not intentionally limit or harm the value of the case
- 28 • That Plaintiff would share any documentation required with the attorneys to pursue the
claim

- A third party will pay the legal fees incurred in this matter.

In Defendant's Motion, these excerpts amount to a "shocking" level of control by a third party over Plaintiff. This hyperbole is required because there is nothing in the settlement agreement that gives any third party any control over Plaintiff's case. To compare these clauses, which only insure that Beavor actually file his claim, to the complete control given to creditors in *Tower* is absurd. Plaintiff does not give any party any control of his case. In fact, he promises that he himself, and no other party, will pursue this matter. See Exhibits 4 and 5, respectively the Settlement Agreement and Declaration of Christopher Beavor. Further, the fact that third party is paying for this case, is immaterial and commonplace.

Unlike in *Tower*, Plaintiff still maintains complete control of his case. Plaintiff has the ability to dismiss it at any point; he can settle his case at any point for any amount. Doing so would of course have consequences under the settlement agreement, but he has the legal authority to do so as any other client would. This is the exactly the opposite of *Tower* where the original Plaintiff had lost control of his case entirely to the trustee, who later passed it to a group of creditors.³ It was those creditors that then decided which claims to bring and when to bring them. The only thing that has been assigned in this matter is the recovery. Plaintiff cites no case law supporting the contention that assigning only the recovery is prohibited under Nevada law. This is because there is no caselaw that prohibits such an assignment.

³ These facts also make this case highly distinguishable from *Oceania Ins. Corp. v. Cogan*, 457 P.3d 276 (Nev. App. 2020) which dismissal was upheld following hearing of the petition, which affirmed the prior dismissal by the district court because, " By virtue of the federal court's order assigning a majority of Oceania's shares to Alutiiq, that company—as majority shareholder (and represented by the same counsel that litigated the federal case on its behalf)—is essentially controlling the litigation in this case." That level of control is not present in this case, and Plaintiff has and continues to remain in "control."

Further, Defendant has not presented any evidence to support his contention that Plaintiff is not in control of his case. It is Plaintiff who has counseled extensively with counsel about this matter and assisted in the writing of the Complaint in this matter. *See Declaration of Christopher Beavor at 5*. It was Plaintiff who has been consulted about the strategic decisions in this case. *See Declaration of Christopher Beavor at 6*. Finally, it is Plaintiff that will ultimately accept or reject any settlement in this matter. *See Declaration of Christopher Beavor at 7*. Accepting Plaintiff's testimony as true as the court is bound to do at this stage in the proceedings and considering the fact that Defendant has not presented any evidence to counter it, the Court must deny this motion.

As the facts of this case vary so widely from *Tower* Defendant's lengthy discussion of this case is a wasted effort. Defendant's entire motion is little more than a last-minute hail mary designed to escape liability in this matter. While Defendant may find it "difficult to conceive of a more obvious assignment of a legal malpractice claim-explicit or *de facto*- than the one before the court..." it is clear to any impartial observer that Plaintiff retains complete control of this case and the only thing assigned here, was the recovery. *See Motion 14:26-27*. Defendant has cited to no authority to support the concept that the recovery cannot be assigned. Accordingly, Defendant's Motion should be denied entirely.

B. Even if the Court Finds the Assignment of Proceeds is Invalid or the Settlement Agreement is a Defacto Assignment of the Malpractice Claim the Case Should Not be Dismissed.

If the Court finds the assignment of proceeds is against public policy or that the Settlement Agreement is a defacto assignment of the legal malpractice case; then the Settlement Agreement is unenforceable or invalid and any attempted assignment merely reverts back to Beavor. The malpractice claim that Beavor has does not just disappear into thin air. Although the Plaintiff does not concede the application of *Tower* in this matter; the rule in *Tower Homes* prohibits the assignment of malpractice claims from one party to another. *Tower Homes* does not require the

1 dismissal of the claim so that no party can assert the claim. In fact, Tower specifically cites *Tate*
2 *v. Goins, Underkofler, Crawford & Langdon*, 24 S.W. 3d 627, 634 (Tex. App. 2000) “The
3 plaintiffs right to bring his own cause of action for malpractice in not vitiated by an invalid
4 assignment of that claim.” *Tower* further makes it clear that its holding to bar the legal malpractice
5 action is limited to the “specific facts and circumstances” of the *Tower* case and is **not** the general
6 rule adapted by the Nevada Supreme Court.
7

8 Other courts have also found the same. *Botma v. Huser*, 39 P.3d 538 (Ariz. Ct. App. 2002)
9 (Regardless of the invalidity of the assignment the malpractice claim does survive the invalid
10 assignment.); *Weiss v. Leatherberry*, 863 So.2d 368 (Fla. Dist. Ct. App. 2003) (The invalidity of
11 the agreement has no effect on the underlying cause of action for legal malpractice.); *Weston v.*
12 *Cowty*, 163 Mich. App. 238, 243, 414 N.W. 2d 165, 167 (1987) (Even if there had been an invalid
13 assignment, this would not warrant dismissal of the lawsuit. The assignment would be void, but
14 the underlying action would survive.); *Scott v. Davis*, 2015 Ky. Unpub. Lexis 36. (In accordance
15 with general assignment law, Davis’s underlying malpractice claim remained valid despite the
16 void assignment.); *Henry S. Miller Commer. Co. v. Newsom, Terry & Newsom, LLP*, 2016 Tex.
17 App. Lexis 10136. (Plaintiff’s right to bring its own cause of action for malpractice is not vitiated
18 by the assignment to its judgment creditors.)
19

20 Parties have a right to contract and as long as that contract is not against public policy it
21 should be enforced. In this case Beavor has the right to assign the proceeds from his malpractice
22 action as an asset to fund a settlement agreement with a third party that settles a matter that
23 subjected him to millions of dollars of liability. This is not a case of collusion to create an end
24 run around *Tower Homes*, this is a legitimate arm’s length third party agreement that legitimately
25 allows Beavor to assign an asset to partially fund a settlement agreement of a matter that was
26 pending since 2013 and had cost hundreds of thousands of dollars to litigate including an appeal
27
28

1 to the Supreme Court.

2 There is no basis for dismissal of the action against the Defendant. The Plaintiff, Beavor
3 has the right to pursue the matter directly against the Defendant. To rule that the matter must be
4 dismissed at this stage in the litigation is premature and is not based on the law or logic.

5 The basic holding of *Tower Homes* is that a claim for legal malpractice cannot be assigned
6 from one entity to another because such a claim derives from an attorney-client relationship whose
7 fundamental attributes—the duties of loyalty and confidentiality—always stay with the original
8 client. This is the law in a number of other states as well. *Cf. Davis v. Scott*, 320 S.W.2d 87 (Ky.
9 2010); *Edens Techs. LLC v. Kile Goekjian Reed & McManus PLLC*, 675 F. Supp. 2d 75, 79-82
10 (D. D.C. 2009); *Gurski v. Rosenblum & Filan LLC*, 276 Conn. 257, 885 A.2d 163 (Conn. 2005);
11 *Gen. Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP*, 357 F. Supp. 2d 951 (E.D.Va. 2005);
12 *Kommavongsa v. Haskell*, 149 Wn.2d 288, 67 P.3d 1068 (Wash. 2003); *Alcman Servs. Corp. v.*
13 *Samuel H. Bullock, P.C.*, 925 F. Supp. 252 (D. N.J. 1996); *Picadilly Inc. v. Raikos*, 582 N.E.2d
14 338, 343 (Ind. 1991); Okla. Stat. tit. 12, § 2017 (D) (1984).

15 If the assignment of proceeds is invalid, any of the assigned rights must revert back to the
16 Plaintiff Beavor. If the rights revert back to Beavor and he continues to assert the claim in his own
17 name, *Tower Homes* is no longer applicable to what happens next in this litigation. Everyone must
18 concede that the claim either currently belongs to Beavor or it would revert back to Beavor.
19 Despite this obvious fact, the Defendant wants the Court to rely upon *Tower Homes* to invalidate
20 the claim. This is, fundamentally circular: it's using *Tower Homes* to prevent Beavor from
21 asserting a claim that reverted back to him via *Tower Homes*. If the Court dismisses the action
22 brought by Beavor, the party who always owned the claim; the Court is not unraveling an
23 assignment but is committing clear error. The rule in *Tower* is that the right party should assert
24 the malpractice claim; not that no one should assert the claim.

1 **C. Defendant’s Statute of Limitations Argument is Frivolous and Contradicted by the**
2 **“Litigation Malpractice Tolling Rule.”**

3 Defendant’s statute of limitation’s argument is once again a last-ditch effort to avoid
4 liability for obvious malpractice. NRS 11.207(1) lays out the limitations period for malpractice
5 claims. However, Nevada has adopted a special tolling rule, “for when the malpractice is alleged
6 to have occurred during an attorney's representation of a client in active litigation,” known
7 colloquially as the “litigation malpractice tolling rule.” *Kim v. Dickinson Wright, PLLC*, 442 P.3d
8 1070, 1074-1075, 135 Nev. Adv. Rep. 20, (2019). Quoting *Branch Banking & Trust Co. v.*
9 *Douglas D*, 432 P.3d 736, 738, 134 Nev. Adv. Rep. 106 (2018) This rule tolls the statute of
10 limitations until “the underlying litigation is resolved, and damages are certain.” *Id.*

11
12 The public policy supporting this rule is strong. The rule’s “purpose is to ensure that
13 plaintiffs do not prematurely file malpractice claims because, if a party appeals from the final order
14 of a case wherein the malpractice was alleged to occur, any resulting damages may be reduced or
15 resolved by the appellate court's decision.” *Id.* In addition, the “material facts that pertain to the
16 damages still evolve as the acts of the offending attorney may increase, decrease, or eliminate the
17 damages that the malpractice caused.”

18
19 Here, Defendant essentially argues that the parties entered into an agreement tolling the
20 statute of limitations for only the pendency of the appeal and accordingly, this case is now
21 untimely. The “litigation malpractice tolling rule” clearly dictates that the applicable statute of
22 limitations was tolled until Plaintiff could know what his exact damages were. In this case, this
23 necessitated pursuing the case through a motion for summary judgment, an appeal, and further
24 litigation leading up to a settlement reached on the eve of a second trial. Plaintiff did not know all
25 the material facts pertaining to his damages until the underlying case had been completely settled,
26 and that case was dismissed in March 2019. *See* Exhibit 3. Accordingly, the statute did not begin
27 to run until that matter was completely settled in January of 2019. This case was filed in 2019,
28

1 well within the relevant statute of limitations. NRS 11.207(1) (action may be filed against attorney
2 for malpractice within four years of damages or two years after reasonable discovery, whichever
3 is earlier). As the matter was timely filed, and the Tolling Agreement did not waive the “litigation
4 tolling rule” Defendants’ argument lacks merit.

5
6 **V.**

7 **CONCLUSION**

8 Defendant’s Motion cannot save him from the evident malpractice. Plaintiff has brought
9 an open and shut case of legal malpractice. Plaintiff has assigned the recovery in this matter, as is
10 permitted by Nevada law, to a third party. Defendant has produced nothing to support his
11 contention that Plaintiff is not in control. Likewise, the statute of limitations for this matter has not
12 run. Accordingly, Defendant’s Motion should be denied entirely.

13 Dated this 27th day of March, 2020.

14 **THE BARNABI LAW FIRM, PLLC**

15
16
17 By: /s/ CJ Barnabi
18 CHARLES (“CJ”) E. BARNABI JR., ESQ.
19 Nevada Bar No. 14477
375 E. Warm Springs Road, Ste. 104
Las Vegas, NV 89119

20 **COHEN JOHNSON PARKER EDWARDS**
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March 2020, I served a copy of the foregoing document upon each of the parties via Odyssey E-Filing System pursuant to NRCP 5(b)(2)(D) and EDCR 8.05, which have complied with said rules in providing their requested emails addresses for electronic service.

Christopher Beavor:

H Johnson (calendar@cohenjohnson.com)

H Johnson (sjohnson@cohenjohnson.com)

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Charles ("CJ") Barnabi Jr. (cj@barnabilaw.com)

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Marie Twist (marie@barnabilaw.com)

Joshua Tomsheck:

Max Corrick (mcorrick@ocgas.com)

Jane Hollingsworth (jhollingsworth@ocgas.com)

Other Service Contacts not associated with a party on the case:

Susana Nutt (snutt@lipsonneilson.com)

Brenda Correa (bcorrea@lipsonneilson.com)

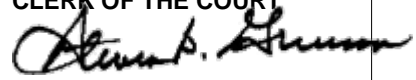
Megan Hummel (mhummel@lipsonneilson.com)

DATED this 27th day March 2020.

/s/ CJ Barnabi

An employee of The Barnabi Law Firm, PLLC

EXHIBIT 1



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CASE NO: A-19-793405-C
 Department 8

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Attorneys for Plaintiff

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual;

 Plaintiff,

Case No.:
 Dept. No.:

vs.

JOSHUA TOMSHECK, an individual; DOES I-
 X; ROE ENTITIES, I-X;

 Defendants.

**(Exempt from Arbitration: Damages in
 Excess of \$50,00)**

COMPLAINT

Plaintiff Christopher Beavor ("Beavor"), by and through his counsel, hereby complains
 and alleges against defendant Joshua Tomscheck ("Tomscheck") as follows:

I.

THE PARTIES, JURISDICTION AND VENUE

1. At all material times herein, Defendant Tomscheck was and remains an individual

1 residing in the County of Clark in the State of Nevada doing business as a local attorney.

2 2. At all material times herein, Plaintiff Beavor was and remains an individual
3 residing in the County of Clark in the State of Nevada.

4 3. Plaintiff does not know the true names of the individuals, corporations,
5 partnerships and entities sued and identified in fictitious names as DOES I through X and ROE
6 CORPORATIONS I through X, inclusive. Plaintiff allege that such Defendants are responsible
7 for damages suffered by Plaintiff as more fully discussed under the claims set forth below.
8 Plaintiff will request leave of this Honorable Court to amend this Complaint to show the true
9 names and capacities of each such fictitious Defendants at such time Plaintiff discovers such
10 information.

11 4. Jurisdiction and venue of this Court is proper because the injuries, events, harm
12 and damages incurred occurred in Clark County, Nevada and Tomsheck resides in Clark County,
13 Nevada.

14 II.

15 PERTINENT FACTS AND ALLEGATIONS

16 5. On July 21, 2011, Yacov Hefetz ("Hefetz") commenced an action against Beavor
17 by filing a complaint with a single claim for breach of guaranty.

18 6. Hefetz's claim was tried to a jury from February 25, 2013 through March 1, 2013.

19 7. Ultimately, Hefetz's breach of guaranty claim was submitted to the jury and the
20 jury returned a verdict in favor of Beavor.

21 8. On May 21, 2013, the District Court entered a judgment on the jury verdict.

22 9. On June 10, 2013, Hefetz filed a Motion for New Trial (the "New Trial Motion").

23 10. The New Trial Motion was based on two grounds: (1) *Lioce* challenges based on
24 alleged remarks concerning Hefetz; and (2) that the jury misunderstood the issues in Bankruptcy
25 Court and therefore ignored the Jury Instructions.
26
27
28

1 11. On or about June 19, 2013, Beavor retained Tomsheck for the purposes of
2 defending him as his attorney in the Hefetz claim (the "Agreement").

3 12. On June 20, 2013, Tomsheck filed an opposition to the New Trial Motion (the
4 "Opposition"). In the Opposition, Tomsheck failed to substantively oppose the request for a new
5 trial. Tomsheck did not respond to either of the two substantive arguments, that reasonably
6 appeared to have merit, presented by Hefetz in the New Trial Motion.

7 13. Instead, Tomsheck's Opposition solely argued that Hefetz failed to timely file the
8 New Trial Motion.

9 14. In his Reply, Hefetz clearly explained why his New Trial Motion was timely and
10 sought to have his New Trial Motion granted pursuant to EDCR 2.20 because Tomsheck failed
11 to file a substantive opposition to the New Trial Motion.

12 15. On August 7, 2013, the District Court heard arguments on the New Trial Motion.

13 16. During argument on the New Trial Motion, the trial court stated that it would not
14 have granted the New Trial Motion if Tomsheck had filed a substantive written opposition on the
15 merits of the New Trial Motion.

16 17. The Court noted that Tomsheck only filed an opposition regarding the timeliness
17 of the New Trial Motion and that Tomsheck was incorrect regarding his calculation of
18 timeliness. Without Tomsheck having filed any substantive opposition to the New Trial Motion,
19 the Court granted the New Trial Motion as unopposed, as permitted by the Judge's discretion and
20 local rules of practice (commonly known and enforced).

21 18. Tomsheck then compounded his error by filing a Petition for Writ of Mandamus
22 (the "Petition") on or about May 13, 2014, rather than taking a direct appeal from the Court's
23 order on the New Trial Motion.

1 19. On or about September 16, 2014, the Nevada Supreme Court entered an order
2 denying Tomsheck' s Petition, noting that writ relief was unavailable because a direct appeal was
3 the proper course of action to challenge the trial court's ruling on the New Trial Motion.

4 20. However, by that time the Petition was filed more than thirty days after entry of
5 the District Court order granting the New Trial Motion, the Petition could not be converted into
6 an appeal.

7 21. Additionally, Tomsheck made no attempt to convert the Petition into an appeal or
8 to concurrently file an appeal contesting the Court's order granting the New Trial Motion .

9 22. As a result of Tomsheck' s errors, the judgment on the jury verdict in Beavor's
10 favor was vacated and Hefetz's action against Beavor continued.

11 23. Tomsheck withdrew as counsel for Beavor on November 5, 2014.

12 24. On January 21, 2015, Gordon Silver filed a Notice of Appearance on behalf of
13 Beavor, which representation was later continued by Dickinson Wright..

14 25. Over the following several years, Beavor incurred legal fees in defending against
15 Hefetz's breach of guaranty claim.

16 26. In the meantime, on or about September 16, 2015, Tomsheck was expressly
17 placed on notice that Beavor intended to pursue his claims of malpractice. In March 2016 the
18 parties further agreed to toll the statute of limitations for the claims of malpractice until the
19 expiration of 180 days following an appeal or final resolution.

20 27. Hefetz's claim against Beavor was recently resolved on or about March 13, 2019
21 with the filing of a stipulation to dismiss with prejudice being filed.

22 28. Beavor now brings these claims against Tomsheck, which is timely per the
23 written agreement of Beavor and Tomsheck to toll the applicable statute of limitations.

III.**CLAIMS FOR RELIEF****FIRST CLAIM FOR RELIEF****(Professional Negligence)**

29. Beavor repeats and realleges and every allegation contained in the foregoing paragraphs as though fully set forth herein.

30. Beavor and Tomsheck entered into an attorney-client relationship.

31. As part of that relationship, Tomsheck owed a duty to Beavor to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake.

32. Tomsheck breached his duty to Beavor, at least in part, by failing to substantively oppose the New Trial Motion, but instead relying solely on a clearly erroneous procedural argument, by failing to file a direct appeal of the Court's order on the New Trial Motion, by instead filing the Petition, by filing the Petition outside the thirty day appeal window such that it could not be converted to an appeal, and/or by failing to even attempt to convert the Petition into an appeal.

33. The District Court has expressly stated that, but for Tomsheck's failure to substantively oppose the New Trial Motion, the New Trial Motion would have been denied.

34. Rather, despite a jury finding in favor of Beavor initially and the dismissal of the action being achieved, Beavor was compelled to defend the action for several years, which was eventually resolved in March 2019.

35. The legal fees, efforts, costs and other damages would not have been incurred but for the actions of Tomsheck.

36. As a result of Tomsheck's breach of his duty to Beavor, Beavor has had to incur additional legal fees and damages in excess of \$50,000 in defending against Hefetz's claim.

37. It has been necessary for Beavor to retain counsel, and Beavor is entitled to an award of attorney's fees and costs incurred in the litigation of this claim.

SECOND CLAIM FOR RELIEF

(Breach of Fiduciary Duty / Breach of Duty of Loyalty)

38. Beavor repeats and realleges and every allegation contained in the foregoing paragraphs as though fully set forth herein.

39. Beavor's attorney, Tomsheck, attorney, owed a continuing fiduciary duty and duty of loyalty to him.

40. A fiduciary relationship exists when one has a right to expect trust and confidence in the integrity and fidelity of another.

41. Attorneys owe a fiduciary duty to their clients and a duty of loyalty

42. As Beavor's attorney, Tomsheck breached these duties as described herein.

43. That these breaches of duties caused Beavor significant damages in excess of \$50,000.

WHEREFORE, Beavor prays for relief as follows:

1. For an award against Tomsheck, in favor of Beavor, in an amount in excess of \$50,000.00;
2. For pre-judgment interest at the applicable legal rate;
3. For an award to Beavor of his costs;
4. For an award to Beavor of his reasonable attorneys' fees; and

///

///

5. For such other and further relief that the Court deems just and proper.

Dated this 23rd day of April 2019.

THE BARNABI LAW FIRM, PLLC

By: /s/ CJ Barnabi

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Las Vegas, Nevada 89119
Attorneys for Plaintiff

EXHIBIT 2

REGISTER OF ACTIONS**CASE NO. A-11-645353-C****Yacov Hefetz, Plaintiff(s) vs. Christopher Beavor, Defendant(s)**§
§
§
§
§
§
§
§
§
§

Case Type: **Breach of Contract**
 Subtype: **Guarantee**
 Date Filed: **07/21/2011**
 Location: **Department 28**
 Cross-Reference Case Number: **A645353**
 Supreme Court No.: **68438**
68843
70327

PARTY INFORMATION**Lead Attorneys****Defendant Beavor, Christopher**

Joel Z. Schwarz
Retained
 702-608-3720(W)

Plaintiff Hefetz, Yacov Jack

Harold Stanley Johnson
Retained
 702-823-3500(W)

EVENTS & ORDERS OF THE COURT**DISPOSITIONS**

06/26/2012 **Order of Dismissal** (Judicial Officer: Israel, Ronald J.)
 Debtors: Christopher Beavor (Defendant), Samantha Beavor (Defendant)
 Creditors: Alis Cohen (Plaintiff)
 Judgment: 06/26/2012, Docketed: 07/05/2012

03/01/2013 **Verdict** (Judicial Officer: Israel, Ronald J.)
 Debtors: Yacov Jack Hefetz (Plaintiff)
 Creditors: Christopher Beavor (Defendant)
 Judgment: 03/01/2013, Docketed: 03/05/2013

05/21/2013 **Judgment Upon the Verdict** (Judicial Officer: Israel, Ronald J.)
 Debtors: Yacov Jack Hefetz (Plaintiff)
 Creditors: Christopher Beavor (Defendant)
 Judgment: 05/21/2013, Docketed: 05/29/2013

06/17/2015 **Order of Dismissal Without Prejudice** (Judicial Officer: Israel, Ronald J.)
 Debtors: Yacov Jack Hefetz (Plaintiff)
 Creditors: Christopher Beavor (Defendant), Samantha Beavor (Defendant)
 Judgment: 06/17/2015, Docketed: 06/18/2015

09/01/2015 **Order** (Judicial Officer: Israel, Ronald J.)
 Debtors: Yacov Jack Hefetz (Plaintiff)
 Creditors: Christopher Beavor (Defendant)
 Judgment: 09/01/2015, Docketed: 09/09/2015
 Total Judgment: 15,338.48

04/21/2016 **Order of Dismissal With Prejudice** (Judicial Officer: Israel, Ronald J.)
 Debtors: Christopher Beavor (Counter Claimant), Samantha Beavor (Counter Claimant)
 Creditors: Alis Cohen (Counter Defendant), Yacov Jack Hefetz (Counter Defendant)
 Judgment: 04/21/2016, Docketed: 04/28/2016

04/29/2016 **Clerk's Certificate** (Judicial Officer: Israel, Ronald J.)
 Debtors: Yacov Jack Hefetz (Plaintiff)
 Creditors: Christopher Beavor (Defendant)
 Judgment: 04/29/2016, Docketed: 05/06/2016
 Comment: Supreme Court No 68438 - "APPEAL DISMISSED"
 Debtors: Yacov Jack Hefetz (Plaintiff)
 Creditors: Christopher Beavor (Defendant)
 Judgment: 04/29/2016, Docketed: 05/06/2016

Comment: Supreme Court No 68843 - "APPEAL DISMISSED"

08/10/2017 **Clerk's Certificate** (Judicial Officer: Israel, Ronald J.)
Debtors: Christopher Beavor (Defendant)
Creditors: Yacov Jack Hefetz (Plaintiff)
Judgment: 08/10/2017, Docketed: 08/17/2017
Comment: Supreme Court No. 70327 APPEAL REVERSED AND VACATED

03/13/2019 **Order of Dismissal With Prejudice** (Judicial Officer: Israel, Ronald J.)
Debtors: Christopher Beavor (Defendant)
Creditors: Yacov Jack Hefetz (Plaintiff)
Judgment: 03/13/2019, Docketed: 03/14/2019

OTHER EVENTS AND HEARINGS

07/21/2011 **Case Opened**

07/21/2011 **Document Filed**
Verified Complaint

07/22/2011 **Initial Appearance Fee Disclosure**
Initial Appearance Fee Disclosure

09/21/2011 **Affidavit of Service**
Affidavit of Service of Christopher Beavor

09/27/2011 **Affidavit of Service**
Affidavit of Service of Samantha Beavor

10/21/2011 **Answer and Counterclaim**
Defendants' Answer to Complaint and Counterclaim

10/21/2011 **Initial Appearance Fee Disclosure**
Initial Appearance Fee Disclosure

11/01/2011 **Reply to Counterclaim**
Reply to Counterclaim

11/28/2011 **Demand for Jury Trial**
Demand for Jury Trial

12/12/2011 **Joint Case Conference Report**
Joint Case Conference Report

12/16/2011 **Commissioners Decision on Request for Exemption - Granted**
Commissioner's Decision On Request For Exemption - Granted

12/28/2011 **Scheduling Order**
Scheduling Order

12/30/2011 **Order Setting Civil Jury Trial**
Order Setting Civil Jury Trial

02/21/2012 **Motion for Leave to File**
Defendants' / Counterclaimants' Motion for Leave to Amend Counterclaim

02/22/2012 **Certificate of Service**
Certificate of Service

02/27/2012 **Notice of Change of Address**
Notice of Change of Address

03/01/2012 **Arbitration File**
Arbitration File

03/27/2012 **Motion to Amend** (3:00 AM) (Judicial Officer Israel, Ronald J.)
Defendants' / Counterclaimants' Motion for Leave to Amend Counterclaim
[Minutes](#)

Result: Granted

04/09/2012 **Counterclaim**
First Amended Counterclaim

04/23/2012 **Reply to Counterclaim**
Reply to First Amended Counterclaim

05/16/2012 **Affidavit of Service**
Affidavit of Service - Gary Frey

05/29/2012 **Stipulation and Order to Extend Discovery Deadlines**
Stipulation and Order to Extend Discovery Deadlines

06/06/2012 **CANCELED Status Check** (9:15 AM) (Judicial Officer Israel, Ronald J.)
Vacated - per Stipulation and Order
S&O To Extend Discovery rec'd in Dept. 5/24/12./sj

06/08/2012 **Order Setting Civil Jury Trial**
Order Re-Setting Civil Jury Trial

06/26/2012 **Stipulation and Order for Dismissal**
Stipulation and Order

06/29/2012 **Notice of Entry**
Notice of Entry

07/03/2012 **Notice of Entry of Order**
Notice of Entry of Order

08/13/2012 **CANCELED Pre Trial Conference** (9:30 AM) (Judicial Officer Israel, Ronald J.)
Vacated - per Stipulation and Order
S&O To Extend Discovery rec'd in Dept. 5/24/12./sj

08/15/2012 **Status Check** (9:45 AM) (Judicial Officer Israel, Ronald J.)
[Parties Present](#)
[Minutes](#)

Result: Matter Heard

08/15/2012 **Order Setting Settlement Conference**
Order Setting Settlement Conference

08/27/2012 **CANCELED Calendar Call** (9:30 AM) (Judicial Officer Gates, Lee A.)
Vacated - per Stipulation and Order
S&O To Extend Discovery rec'd in Dept. 5/24/12./sj

09/04/2012 **CANCELED Jury Trial** (1:30 PM) (Judicial Officer Israel, Ronald J.)
Vacated - per Stipulation and Order
S&O To Extend Discovery rec'd in Dept. 5/24/12./sj

09/10/2012 **Status Check: Status of Case** (9:00 AM) (Judicial Officer Israel, Ronald J.)
[Parties Present](#)
[Minutes](#)
 Result: Matter Heard

09/11/2012 **Motion for Partial Summary Judgment**
Plaintiff's Motion for Partial Summary Judgment

09/21/2012 **Settlement Conference** (9:00 AM) (Judicial Officer Bonaventure, Joseph T.)
[Minutes](#)
 Result: Matter Heard

10/09/2012 **Opposition to Motion**
Defendants' / Counterclaimants' Opposition to Motion for Partial Summary Judgment

10/11/2012 **Stipulation and Order**
Stipulation & Order to Continue Plaintiff's Motion for Partial Summary Judgment

10/12/2012 **Notice of Entry of Stipulation and Order**
Notice of Entry of Stipulation & Order

10/16/2012 **Reply in Support**
Plaintiff's Reply in Support of Motion for Partial Summary Judgment

10/19/2012 **Supplemental**
Supplement to Defendants'/Counterclaimants' Opposition to Plaintiff's Motion for Partial Summary Judgment

10/19/2012 **Response**
Defendants'/Counterclaimants' Response to Plaintiff's Reply to Opposition to Motion for Partial Summary Judgment

10/22/2012 **Pre Trial Conference** (9:30 AM) (Judicial Officer Israel, Ronald J.)
 Result: Matter Heard

10/22/2012 **Motion for Partial Summary Judgment** (9:30 AM) (Judicial Officer Israel, Ronald J.)
Plaintiff's Motion for Partial Summary Judgment
10/15/2012 Reset by Court to 10/22/2012
 Result: Motion Denied

10/22/2012 **Status Check** (9:30 AM) (Judicial Officer Israel, Ronald J.)
STATUS CHECK: OUTCOME OF SETTLEMENT CONFERENCE
10/15/2012 Reset by Court to 10/22/2012
 Result: Matter Heard

10/22/2012 **All Pending Motions** (9:30 AM) (Judicial Officer Israel, Ronald J.)
[Parties Present](#)
[Minutes](#)
 Result: Matter Heard

11/01/2012 **Notice of Change of Address**
Notice of Change of Address

11/05/2012 **Calendar Call** (9:30 AM) (Judicial Officer Israel, Ronald J.)
[Parties Present](#)
[Minutes](#)
 Result: Matter Heard

11/12/2012 **Notice of Entry of Order**
Notice of Entry of Order

11/13/2012 **CANCELED Jury Trial** (1:30 PM) (Judicial Officer Israel, Ronald J.)
Vacated - per Judge

11/21/2012 **Order Setting Civil Jury Trial**
Order Re-Setting Civil Jury Trial

01/15/2013 **Pre Trial Conference** (9:30 AM) (Judicial Officer Israel, Ronald J.)
[Parties Present](#)
[Minutes](#)
 Result: Matter Heard

01/29/2013 **Calendar Call** (9:30 AM) (Judicial Officer Israel, Ronald J.)
01/29/2013, 01/31/2013
[Parties Present](#)
[Minutes](#)
 Result: Matter Continued

02/08/2013 **Pre-trial Memorandum**
Joint Pretrial Memorandum

02/25/2013 **Jury Trial** (9:30 AM) (Judicial Officer Israel, Ronald J.)
02/25/2013, 02/26/2013, 02/27/2013, 02/28/2013, 03/01/2013
[Parties Present](#)
[Minutes](#)
02/04/2013 Reset by Court to 02/25/2013
 Result: Trial Continues

02/25/2013 **Brief**
Plaintiff's EDCR 7.27 Brief

02/25/2013 **Jury List**

02/27/2013 **Transcript of Proceedings**
Excerpt of Jury Trial - Day 1 Defendant's Opening Statement

03/01/2013 **Jury List**
Amended Jury List

03/01/2013 **Verdict**

03/01/2013 **Jury Instructions**

Court's Instructions To the Jury
 03/01/2013 **Proposed Jury Instructions Not Used At Trial**
Plaintiff's Proposed Jury Instructions Not Used At Trial
 03/04/2013 **Order to Statistically Close Case**
Civil Order To Statistically Close Case
 03/06/2013 **Motion for Judgment**
Plaintiff Motion for Judgment
 03/19/2013 **Substitution of Attorney**
Substitution of Counsel
 03/25/2013 **Withdrawal of Attorney**
Notice of Withdrawal of Attorney
 04/16/2013 **Status Check: Settlement Documents** (9:00 AM) (Judicial Officer Israel, Ronald J.)
Status Check: Settlement Documents re: Samantha Beavor
[Parties Present](#)
[Minutes](#)
 Result: Matter Heard
 05/15/2013 **Status Check: Settlement Documents** (3:00 AM) (Judicial Officer Israel, Ronald J.)
05/15/2013, 06/13/2013, 07/09/2013, 08/08/2013
STATUS CHECK: SETTLEMENT DOCUMENTS / DISMISSAL OF SAMANTHA BEAVOR//STATUS OF CASE
[Parties Present](#)
[Minutes](#)
06/20/2013 Reset by Court to 07/09/2013
 Result: Matter Continued
 05/21/2013 **Judgment**
 05/21/2013 **Notice of Entry of Judgment**
 06/07/2013 **Recorders Transcript of Hearing**
Transcript of Proceedings Jury Trial - Day 3 February 27, 2013
 06/07/2013 **Recorders Transcript of Hearing**
Transcript of Proceedings Jury Trial - Day 5 March 1, 2013
 06/07/2013 **Recorders Transcript of Hearing**
Transcript of Proceedings Jury Trial - Day 2 February 26, 2013
 06/10/2013 **Motion for New Trial**
Motion for New Trial or in the Alternative Motion for Judgment Notwithstanding Verdict (JNOV)
 06/20/2013 **Opposition**
Defendant Christopher Beavor's Opposition to Plaintiff's Motion for New Trial or in the Alternative Motion for Judgment Notwithstanding Verdict (JNOV)
 07/02/2013 **Reply to Opposition**
Reply to Defendant Christopher Beavor's Opposition to Plaintiff's Motion for New Trial or in the Alternative Motion for Judgment Notwithstanding Verdict (JNOV)
 08/07/2013 **Motion for New Trial** (3:00 AM) (Judicial Officer Israel, Ronald J.)
Plaintiff's Motion for New Trial or in the Alternative Motion for Judgment Notwithstanding Verdict (JNOV)
[Minutes](#)
07/17/2013 Reset by Court to 08/07/2013
 Result: Granted
 08/07/2013 **Motion for Attorney Fees**
Defendant's Motion for Attorney Fees
 08/28/2013 **Motion to Reconsider**
Defendant Christopher Beavor's Motion for Reconsideration
 08/29/2013 **Status Check: Trial Setting** (9:00 AM) (Judicial Officer Israel, Ronald J.)
[Parties Present](#)
[Minutes](#)
 Result: Trial Date Set
 08/29/2013 **CANCELED All Pending Motions** (9:00 AM) (Judicial Officer Israel, Ronald J.)
Vacated - On in Error
All Pending Motions (08/29/13)
 09/04/2013 **Order Setting Civil Jury Trial**
Order Setting Civil Jury Trial
 09/05/2013 **Order Granting Motion**
Order
 09/09/2013 **Notice of Entry of Order**
Notice of Entry of Order
 09/17/2013 **Opposition to Motion**
Opposition to Defendant's Motion for Reconsideration
 09/24/2013 **Certificate of Service**
Certificate of Service
 09/25/2013 **Opposition to Motion**
Opposition to Defendant Samantha Beavor's Motion for Attorneys Fees
 09/26/2013 **Motion for Attorney Fees** (9:00 AM) (Judicial Officer Israel, Ronald J.)
09/26/2013, 10/24/2013
Defendant's Motion for Attorney Fees
09/11/2013 Reset by Court to 09/26/2013
 Result: Matter Continued
 09/26/2013 **Motion For Reconsideration** (9:00 AM) (Judicial Officer Israel, Ronald J.)
Defendant Christopher Beavor's Motion for Reconsideration
10/09/2013 Reset by Court to 09/26/2013
 Result: Denied
 09/26/2013 **All Pending Motions** (9:00 AM) (Judicial Officer Israel, Ronald J.)
All Pending Motions (09/26/13)

| | |
|------------|---|
| | Parties Present |
| | Minutes |
| | Result: Matter Heard |
| 10/04/2013 | Supplement <i>Supplement to Defendant Samantha Beavor Motion for Attorney's Fees</i> |
| 10/04/2013 | Certificate of Service <i>Certificate of Service</i> |
| 10/21/2013 | Opposition <i>Opposition to Supplement to Defendants Samantha Beavor's Motion for Attorney's Fees</i> |
| 10/24/2013 | Status Check (9:00 AM) (Judicial Officer Israel, Ronald J.) <i>Status Check: Dismissal /S. Beavor</i> |
| | Result: Matter Heard |
| 10/24/2013 | All Pending Motions (9:00 AM) (Judicial Officer Israel, Ronald J.) <i>All Pending Motions (10/24/13)</i> |
| | Parties Present |
| | Minutes |
| | Result: Matter Heard |
| 11/14/2013 | Findings of Fact, Conclusions of Law and Order <i>Findings of Fact, Conclusion of Law and Order</i> |
| 11/14/2013 | Order <i>Order</i> |
| 11/15/2013 | Notice of Entry of Order <i>Notice of Entry of Order</i> |
| 11/15/2013 | Notice of Entry of Order <i>Notice of Entry of Order</i> |
| 11/25/2013 | Motion to Stay <i>Defendant Christopher Beavor's Motion for Stay of Proceedings</i> |
| 01/07/2014 | Motion For Stay (9:00 AM) (Judicial Officer Israel, Ronald J.) <i>Defendant Christopher Beavor's Motion for Stay of Proceedings</i> |
| | Parties Present |
| | Minutes |
| | Result: Granted |
| 01/07/2014 | Notice of Stay <i>Stay proceedings 01/07/14</i> |
| 02/20/2014 | CANCELED Pre Trial Conference (9:30 AM) (Judicial Officer Israel, Ronald J.) <i>Vacated - per Judge</i> |
| 03/11/2014 | CANCELED Calendar Call (9:30 AM) (Judicial Officer Israel, Ronald J.) <i>Vacated - per Judge</i> |
| 03/17/2014 | CANCELED Jury Trial (1:30 PM) (Judicial Officer Israel, Ronald J.) <i>Vacated - per Judge</i> |
| 05/13/2014 | Status Check: Status of Case (9:00 AM) (Judicial Officer Israel, Ronald J.) 05/13/2014, 08/13/2014, 11/12/2014, 12/11/2014 <i>Status Check: Status of Case//Resetting Trial</i> |
| | Parties Present |
| | Minutes |
| | <i>09/03/2014 Reset by Court to 11/12/2014</i> |
| | Result: Matter Continued |
| 10/01/2014 | Motion to Withdraw As Counsel <i>Notice of Motion to Withdraw as Counsel for Defendant Christopher Beavor</i> |
| 11/05/2014 | Motion to Withdraw as Counsel (3:00 AM) (Judicial Officer Israel, Ronald J.) <i>Hoffland & Tomscheck's Motion to Withdraw as Counsel for Defendant Christopher Beavor</i> |
| | Minutes |
| | Result: Granted |
| 12/30/2014 | Order Setting Civil Jury Trial <i>Order Re-Setting Civil Jury Trial</i> |
| 01/20/2015 | Pre Trial Conference (9:30 AM) (Judicial Officer Israel, Ronald J.) |
| | Parties Present |
| | Minutes |
| | Result: Matter Heard |
| 01/21/2015 | Notice of Appearance <i>Notice of Appearance</i> |
| 01/27/2015 | Order Setting Civil Jury Trial <i>Order Re-Setting Civil Jury Trial</i> |
| 01/27/2015 | Order Setting Settlement Conference <i>Order Setting Settlement Conference</i> |
| 02/03/2015 | CANCELED Calendar Call (9:30 AM) (Judicial Officer Israel, Ronald J.) <i>Vacated - per Judge</i> |
| 02/09/2015 | CANCELED Jury Trial (1:30 PM) (Judicial Officer Israel, Ronald J.) <i>Vacated - per Judge</i> |
| 02/26/2015 | Settlement Conference (1:00 PM) (Judicial Officer Scotti, Richard F.) |
| | Parties Present |
| | Minutes |
| | Result: Matter Heard |
| 03/05/2015 | Motion in Limine <i>Plaintiff's Motion in Limine Concerning The Exclusion Of The Contents Of Settlement Negotiations</i> |
| 03/05/2015 | Motion in Limine <i>Plaintiff's Motion in Limine Concerning The Exclusion of References To National Origins And Religious Beliefs.</i> |

03/25/2015 **Opposition to Motion in Limine**
Opposition to Plaintiff's Motion in Limine Concerning the Exclusion of the Contents of Settlement Negotiations

03/25/2015 **Response**
Response to Plaintiff's Motion in Limine Concerning the Exclusion of References to National Origins and Religious Beliefs

03/30/2015 **Transcript of Proceedings**
Transcript of Proceedings Jury Trial - Day 1 February 25, 2013

03/30/2015 **Transcript of Proceedings**
Transcript of Proceedings Jury Trial - Day 4 February 28, 2013

03/31/2015 **Pre Trial Conference** (9:30 AM) (Judicial Officer Israel, Ronald J.)
[Parties Present](#)
[Minutes](#)
Result: Matter Heard

04/01/2015 **Reply in Support**
Plaintiff's Reply In Support Of The Motion In Limine Concerning The Exclusion Of The Contents Of Settlement Negotiations

04/06/2015 **Notice**
Notice of Disassociation of Counsel

04/06/2015 **Pre-Trial Disclosure**
Plaintiff's Pre-Trial Disclosures Pursuant To NRCP 16.1(A)(3)

04/07/2015 **Motion in Limine** (9:00 AM) (Judicial Officer Israel, Ronald J.)
Plaintiff's Motion in Limine Concerning The Exclusion Of The Contents Of Settlement Negotiations
Result: Denied

04/07/2015 **Motion in Limine** (9:00 AM) (Judicial Officer Israel, Ronald J.)
Plaintiff's Motion in Limine Concerning The Exclusion of References To National Origins And Religious Beliefs.
Result: Granted

04/07/2015 **All Pending Motions** (9:00 AM) (Judicial Officer Israel, Ronald J.)
All Pending Motions (04/07/15)
[Parties Present](#)
[Minutes](#)
Result: Matter Heard

04/07/2015 **Order Setting Civil Jury Trial**
Order Re-Setting Civil Jury Trial

04/14/2015 **CANCELED Calendar Call** (9:30 AM) (Judicial Officer Becker, Nancy)
Vacated - per Judge

04/20/2015 **CANCELED Jury Trial** (1:30 PM) (Judicial Officer Israel, Ronald J.)
Vacated - per Judge

05/07/2015 **Motion to Dismiss**
Defendant's Motion to Dismiss Pursuant to NRS 40.435

05/08/2015 **Order Granting Motion**
Order Granting Plaintiff's Motion In Limine Concerning National Origins and Religious Beliefs

05/08/2015 **Order Denying Motion**
Order Denying Plaintiff's Motion In Limine Concerning the Exclusion of the Contents of Settlement Negotiations

05/08/2015 **Motion**
Defendant Christopher Beavor's Motion to Reopen Dispositive Motion Deadline

05/08/2015 **Order Setting Settlement Conference**
Order Setting Settlement Conference

05/11/2015 **Notice of Entry of Order**
Notice of Entry of Order

05/11/2015 **Notice of Entry of Order**
Notice of Entry of Order

05/14/2015 **Settlement Conference** (10:30 AM) (Judicial Officer Kishner, Joanna S.)
[Parties Present](#)
[Minutes](#)
Result: Not Settled

05/19/2015 **Opposition to Motion to Dismiss**
Plaintiff's Opposition To Defendant's Motion To Dismiss Pursuant To NRS 40.435

05/20/2015 **Opposition to Motion**
Plaintiff's Opposition To Defendant's Motion To Reopen Dispositive Motion Deadline

06/02/2015 **Reply in Support**
Defendant's Reply in Support of Motion to Dismiss Pursuant to NRS 40.435

06/02/2015 **Reply in Support**
Defendant Christopher Beavor's Reply in Support of Motion to Reopen Dispositive Motion Deadline

06/04/2015 **Notice of Change of Address**
Notice of Change of Firm Affiliation and Address

06/09/2015 **Motion to Dismiss** (9:00 AM) (Judicial Officer Israel, Ronald J.)
Defendant's Motion to Dismiss Pursuant to NRS 40.435
Result: Granted Without Prejudice

06/09/2015 **Motion** (9:00 AM) (Judicial Officer Israel, Ronald J.)
Defendant Christopher Beavor's Motion to Reopen Dispositive Motion Deadline
Result: Moot

06/09/2015 **All Pending Motions** (9:00 AM) (Judicial Officer Israel, Ronald J.)
All Pending Motions (06/09/15)
[Parties Present](#)
[Minutes](#)
Result: Matter Heard

06/10/2015 **Order to Statistically Close Case**
Civil Order To Statistically Close Case

06/17/2015 **Order For Dismissal Without Prejudice**
Order: (1) Granting Defendant's Motion to Dismiss Pursuant to NRS 40.435; and (2) Vacating as Moot Defendant's Motion for Leave to Reopen Dispositive Motion Deadline

06/18/2015 **Notice of Entry of Order**

| | |
|------------|---|
| | <i>Notice of Entry of Order</i> |
| 06/19/2015 | Motion <i>Plaintiff's Motion To Re-Open The Case And For Reconsideration Of An Order Of Dismissal Without Prejudice</i> |
| 06/23/2015 | Notice of Change of Hearing <i>Notice of Change of Hearing</i> |
| 06/25/2015 | Memorandum of Costs and Disbursements <i>Memorandum of Costs and Disbursements</i> |
| 07/07/2015 | Opposition to Motion <i>Defendant's Opposition to Plaintiff's Motion to Re-Open the Case and for Reconsideration of an Order of Dismissal without Prejudice</i> |
| 07/08/2015 | Motion for Attorney Fees <i>Defendant Christopher Beavor's Motion for Attorneys' Fees and Costs</i> |
| 07/14/2015 | Notice of Appeal <i>Notice of Appeal</i> |
| 07/14/2015 | Case Appeal Statement <i>Case Appeal Statement</i> |
| 07/14/2015 | Reply in Support <i>Plaintiff's Reply In Support Of The Motion To Re-Open The Case And For Reconsideration Of An Order Of Dismissal Without Prejudice</i> |
| 07/16/2015 | Motion <i>Defendant's Motion for Leave to Strike Reply; or, in the Alternative, Motion to File Sur-Reply</i> |
| 07/18/2015 | Opposition to Motion <i>Plaintiff's Opposition To Defendant's Motion For An Award Of Attorneys' Fees and Costs</i> |
| 07/21/2015 | Opposition to Motion <i>Plaintiff's Opposition to Defendant's Motion for Leave to Strike Reply; or, in the alternative, Motion to File Sur-Reply</i> |
| 07/22/2015 | Motion (3:00 AM) (Judicial Officer Israel, Ronald J.) <i>Plaintiff's Motion To Re-Open The Case And For Reconsideration Of An Order Of Dismissal Without Prejudice</i> Minutes <i>07/21/2015 Reset by Court to 07/22/2015</i> Result: Denied |
| 07/23/2015 | Order Denying Motion <i>Order</i> |
| 07/23/2015 | Posting of Appeal Bond <i>Notice Of Posting Appeal Bond</i> |
| 07/24/2015 | Notice of Entry of Order <i>Notice of Entry of Order</i> |
| 08/12/2015 | Reply in Support <i>Defendant Christopher Beavor's Reply in Support of Motion for Attorneys' Fees and Costs</i> |
| 08/17/2015 | Supplemental <i>Defendant Christopher Beavor's Supplement to Reply in Support of Motion for Attorneys' Fees and Costs</i> |
| 08/19/2015 | Motion for Attorney Fees and Costs (3:00 AM) (Judicial Officer Israel, Ronald J.) Minutes Result: Granted |
| 09/01/2015 | Order Granting Motion <i>Order Granting Defendant Christopher Beavor's Motion for Attorneys Fees and Costs</i> |
| 09/03/2015 | Notice of Entry of Order <i>Notice of Entry of Order</i> |
| 09/15/2015 | Notice of Appeal <i>Notice of Appeal</i> |
| 09/22/2015 | CANCELED Pre Trial Conference (9:30 AM) (Judicial Officer Israel, Ronald J.) <i>Vacated - per Judge</i> |
| 09/22/2015 | Case Appeal Statement <i>Case Appeal Statement</i> |
| 09/23/2015 | Posting of Appeal Bond <i>Notice Of Posting Appeal Bond</i> |
| 10/06/2015 | CANCELED Calendar Call (9:30 AM) (Judicial Officer Thompson, Charles) <i>Vacated - per Judge</i> |
| 10/12/2015 | CANCELED Jury Trial (1:30 PM) (Judicial Officer Israel, Ronald J.) <i>Vacated - per Judge</i> |
| 10/13/2015 | Amended Certificate of Service <i>Amended Certificate Of Service</i> |
| 11/18/2015 | Recorders Transcript of Hearing <i>Transcript of Proceedings Defendant Christopher Beavor's Motion for Reconsideration September 26, 2013 Defendant's Motion for Attorney Fees</i> |
| 01/22/2016 | Recorders Transcript of Hearing <i>Transcript of Proceedings Defendant's Motion to Dismiss Pursuant to NRS 40.435 Defendant Christopher Beavor's Motion to Reopen Dispositive Motion Deadline</i> |
| 02/04/2016 | Request <i>Request For Transcript Of Proceedings</i> |
| 04/05/2016 | Order Scheduling Status Check <i>Order Scheduling Status Check: Supreme Court Order Dismissing Appeals and Status of Case</i> |
| 04/21/2016 | Status Check (9:00 AM) (Judicial Officer Israel, Ronald J.) <i>Status Check: Supreme Court Order Dismissing Appeals and Status of Case</i> Parties Present Minutes Result: Matter Heard |
| 04/21/2016 | Order Granting Motion <i>Order Granting Plaintiff's Rule 50(a) Motion</i> |
| 04/21/2016 | Notice of Entry of Order <i>Notice of Entry of Order</i> |
| 04/29/2016 | NV Supreme Court Clerks Certificate/Judgment - Dismissed <i>Nevada Supreme Court Clerk's Certificate Judgment - Dismissed</i> |
| 04/29/2016 | Notice of Appeal <i>Notice of Appeal</i> |

| | |
|------------|--|
| 05/08/2016 | Case Appeal Statement <i>Case Appeal Statement</i> |
| 08/01/2017 | Order <i>Order Scheduling Hearing: At Request of Court - Further Proceedings RE: Supreme Court Order Filed July 6, 2017</i> |
| 08/07/2017 | Notice <i>Defendant Christopher Beavor's Notice of Renewal of Motion to Reopen Dispositive Motion Deadline</i> |
| 08/10/2017 | NV Supreme Court Clerks Certificate/Judgment - Reversed <i>Nevada Supreme Court Clerk's Certificate Judgment - Reversed and Vacated in Part</i> |
| 08/15/2017 | Opposition <i>Plaintiff Yacov Hefetz's Notice of Limited Opposition to Defendant Christopher Beavor's Notice of Renewal of Motion to Reopen Dispositive Motion Deadline</i> |
| 08/17/2017 | At Request of Court (9:00 AM) (Judicial Officer Israel, Ronald J.) <i>Order Scheduling Hearing: At Request of Court - Further Proceedings RE: Supreme Court Order Filed July 6, 2017</i> Parties Present Minutes Result: Matter Heard |
| 09/12/2017 | Motion (9:00 AM) (Judicial Officer Israel, Ronald J.) 09/12/2017, 11/14/2017 <i>Defendant Christopher Beavor's Notice of Renewal of Motion to Reopen Dispositive Motion Deadline</i> Minutes Result: Matter Continued |
| 09/12/2017 | Stipulation and Order <i>Stipulation and Order Regarding Reopening Dispositive Motion Deadline and Briefing Schedule for Dispositive Motions</i> |
| 09/12/2017 | Notice of Entry of Stipulation and Order <i>Notice of Entry of Order</i> |
| 09/29/2017 | Motion for Summary Judgment <i>Defendant Christopher Beavor's Motion for Summary Judgment</i> |
| 10/20/2017 | Countermotion For Summary Judgment <i>Plaintiff's Opposition to Defendant Christopher Beavor's Motion for Summary Judgment and Plaintiff's Counter-Motion for Summary Judgment</i> |
| 10/20/2017 | Miscellaneous Filing <i>Fee Disclosure</i> |
| 10/24/2017 | Errata <i>Errata to Opposition to Defendant Christopher Beavor's Motion for Summary Judgment and Plaintiff's Counter-Motion for Summary Judgment</i> |
| 11/03/2017 | Reply in Support <i>DEFENDANT CHRISTOPHER BEAVOR S: (1) REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND (2) MOTION TO STRIKE, OR IN THE ALTERNATIVE, OPPOSITION TO, PLAINTIFF YACOV HEFETZ S COUNTERMOTION FOR SUMMARY JUDGMENT</i> |
| 11/06/2017 | Opposition <i>Plaintiff's Opposition to Motion to Strike, or in the Alternative, Reply to Defendant's Opposition to Plaintiff's Countermotion for Summary Judgment</i> |
| 11/07/2017 | Motion for Summary Judgment (9:00 AM) (Judicial Officer Israel, Ronald J.) <i>Defendant Christopher Beavor's Motion for Summary Judgment</i> Result: Off Calendar |
| 11/07/2017 | Opposition and Countermotion (9:00 AM) (Judicial Officer Israel, Ronald J.) <i>Plaintiff's Opposition to Defendant Christopher Beavor's Motion for Summary Judgment and Plaintiff's Counter-Motion for Summary Judgment</i> Result: Off Calendar |
| 11/07/2017 | All Pending Motions (9:00 AM) (Judicial Officer Israel, Ronald J.) <i>All Pending Motions (11/07/17)</i> Parties Present Minutes Result: Matter Heard |
| 11/08/2017 | Order Setting Civil Jury Trial <i>Order Setting Civil Jury Trial</i> |
| 11/17/2017 | Order Setting Settlement Conference <i>Order Setting Settlement Conference</i> |
| 01/16/2018 | Order Setting Settlement Conference <i>Amended Order Setting Settlement Conference</i> |
| 01/23/2018 | Order Setting Settlement Conference <i>Second Amended Order Setting Settlement Conference</i> |
| 02/06/2018 | CANCELED Settlement Conference (1:30 PM) () <i>Vacated - Superseding Order</i> |
| 02/15/2018 | Order Setting Settlement Conference <i>Third Amended Order Setting Settlement Conference</i> |
| 02/27/2018 | CANCELED Settlement Conference (10:30 AM) () <i>Vacated</i> |
| 04/02/2018 | Settlement Conference (1:30 PM) (Judicial Officer Barker, David) Minutes <i>04/02/2018 Reset by Court to 04/02/2018</i> Result: Not Settled |
| 05/03/2018 | Notice of Motion <i>Defendant Christopher Beavor's Notice of Renewal of Motion for Summary Judgment</i> |
| 05/21/2018 | Opposition <i>Plaintiff's Limited Opposition To Defendant Christopher Beavor's Notice of Renewal of Motion for Summary Judgment</i> |
| 06/06/2018 | Notice <i>Urgent Notice of Rescheduling Of Hearing</i> |
| 07/05/2018 | Order <i>Order Scheduling Pre Trial Conference: At Request of Court - Reset Trial Date</i> |
| 07/10/2018 | CANCELED Pre Trial Conference (9:30 AM) (Judicial Officer Israel, Ronald J.) <i>Vacated</i> |
| 07/10/2018 | Pre Trial Conference (9:30 AM) (Judicial Officer Israel, Ronald J.) <i>Pre Trial Conference // At Request of Court - Reset Trial Date</i> Parties Present |

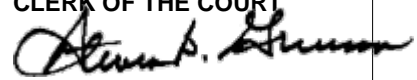
| | |
|------------|---|
| | Minutes |
| | Result: Trial Date Set |
| 07/21/2018 | Supplement to Opposition |
| | <i>Supplemental Legal Authority in Support of Plaintiff's Opposition to Motion for Summary Judgment</i> |
| 07/24/2018 | CANCELED Pretrial/Calendar Call (9:30 AM) (Judicial Officer Israel, Ronald J.) |
| | <i>Vacated</i> |
| 07/24/2018 | Motion for Summary Judgment (9:00 AM) (Judicial Officer Israel, Ronald J.) |
| | <i>Defendant Christopher Deavor's Notice of Renewal of Motion for Summary Judgment</i> |
| | <i>06/05/2018 Reset by Court to 06/07/2018</i> |
| | <i>06/07/2018 Reset by Court to 07/24/2018</i> |
| | <i>07/24/2018 Reset by Court to 07/24/2018</i> |
| | Result: Denied |
| 07/24/2018 | CANCELED Calendar Call (9:30 AM) (Judicial Officer Israel, Ronald J.) |
| | <i>Vacated - per Judge</i> |
| 07/24/2018 | Counter-motion (9:00 AM) (Judicial Officer Israel, Ronald J.) |
| | <i>Plaintiff's Limited Opposition To Defendant Christopher Beavor's Notice of Renewal of Motion for Summary Judgment</i> |
| | Result: Denied |
| 07/24/2018 | All Pending Motions (9:00 AM) (Judicial Officer Israel, Ronald J.) |
| | Parties Present |
| | Minutes |
| | Result: Matter Heard |
| 07/30/2018 | CANCELED Jury Trial (1:30 PM) (Judicial Officer Israel, Ronald J.) |
| | <i>Vacated - per Judge</i> |
| 08/01/2018 | Transcript of Proceedings |
| | <i>Transcript of Proceedings Defendant's Notice of Renewal of Motion for Summary Judgment 7/24/18</i> |
| 08/03/2018 | Order Denying Motion |
| | <i>Order Denying: (1) Defendant Christopher Beavor s Motion for Summary Judgment; and (2) Plaintiff Yacov Jack Hefetz s Counter-motion for Summary Judgment</i> |
| 08/07/2018 | Notice of Entry of Order |
| | <i>Notice of Entry of Order Denying: (1) Defendant Christopher Beavor s Motion for Summary Judgment; and (2) Plaintiff Yacov Jack Hefetz s Counter-motion for Summary Judgment</i> |
| 08/14/2018 | Pre Trial Conference (9:30 AM) (Judicial Officer Israel, Ronald J.) |
| | Parties Present |
| | Minutes |
| | Result: Matter Heard |
| 08/28/2018 | Calendar Call (9:30 AM) (Judicial Officer Israel, Ronald J.) |
| | Parties Present |
| | Minutes |
| | Result: Trial Date Set |
| 08/30/2018 | Order |
| | <i>Order RE: Jury Instructions, PreTrial Memorandum And Exhibits</i> |
| 09/07/2018 | Motion for Sanctions |
| | <i>Defendant Christopher Beavor's: (1) Emergency Motion for Sanctions for Plaintiff's Failure to Serve NRCP 16.1(a)(3) Pretrial Disclosures; and (2) Application for Order Shortening Time</i> |
| 09/10/2018 | Supplement |
| | <i>Supplement to Defendant Christopher Beavor's Motion for Sanctions on Order Shortening Time</i> |
| 09/10/2018 | Opposition to Motion |
| | <i>Opposition to Defendant Christopher Beavor's Emergency Motion for Sanctions for Plaintiff's Failure to Serve NRCP 16.1(a)(3) Pretrial Disclosures; and Application for Order Shortening Time</i> |
| 09/10/2018 | Pre-trial Memorandum |
| | <i>Defendant Christopher Beavor's Pretrial Memorandum</i> |
| 09/10/2018 | Pre-trial Memorandum |
| | <i>Plaintiff's Pre-trial Memorandum</i> |
| 09/11/2018 | Motion for Sanctions (9:00 AM) (Judicial Officer Israel, Ronald J.) |
| | <i>Defendant Christopher Beavor's: (1) Emergency Motion for Sanctions for Plaintiff's Failure to Serve NRCP 16.1(a)(3) Pretrial Disclosures; and (2) Application for Order Shortening Time</i> |
| | Parties Present |
| | Minutes |
| | Result: Denied |
| 09/13/2018 | Jury Trial (10:00 AM) (Judicial Officer Israel, Ronald J.) |
| | Parties Present |
| | Minutes |
| | <i>09/04/2018 Reset by Court to 09/12/2018</i> |
| | <i>09/12/2018 Reset by Court to 09/13/2018</i> |
| | Result: Case Settled |
| 10/11/2018 | Status Check: Settlement Documents (3:00 AM) (Judicial Officer Israel, Ronald J.) |
| | 10/11/2018, 11/06/2018, 12/04/2018, 01/08/2019, 02/05/2019, 02/19/2019 |
| | <i>Status Check: Settlement Documents // Case Closure</i> |
| | Parties Present |
| | Minutes |
| | Result: Matter Continued |
| 03/13/2019 | Stipulation and Order for Dismissal With Prejudice |
| | <i>Stipulation and Order for Dismissal with Prejudice</i> |
| 03/13/2019 | Notice of Entry of Stipulation and Order |
| | <i>Notice of Entry of Order</i> |

10/18/2019 **Recorders Transcript of Hearing**
Defendant Christopher Beavor's Motion for Stay of Proceedings

FINANCIAL INFORMATION

| | | | |
|--------------------------------------|-------------------------------------|-----------------------------|------------------------------|
| Defendant Beavor, Christopher | | | |
| | Total Financial Assessment | | 423.00 |
| | Total Payments and Credits | | 423.00 |
| | Balance Due as of 03/27/2020 | | 0.00 |
| 10/24/2011 | Transaction Assessment | | 223.00 |
| 10/24/2011 | Efile Payment | Receipt # 2011-120243-CCCLK | Beavor, Christopher (223.00) |
| 09/29/2017 | Transaction Assessment | | 200.00 |
| 09/29/2017 | Efile Payment | Receipt # 2017-75546-CCCLK | Beavor, Christopher (200.00) |
| Defendant Beavor, Samantha | | | |
| | Total Financial Assessment | | 30.00 |
| | Total Payments and Credits | | 30.00 |
| | Balance Due as of 03/27/2020 | | 0.00 |
| 10/24/2011 | Transaction Assessment | | 30.00 |
| 10/24/2011 | Efile Payment | Receipt # 2011-120244-CCCLK | Beavor, Samantha (30.00) |
| Plaintiff Hefetz, Yacov Jack | | | |
| | Total Financial Assessment | | 772.00 |
| | Total Payments and Credits | | 772.00 |
| | Balance Due as of 03/27/2020 | | 0.00 |
| 07/22/2011 | Transaction Assessment | | 300.00 |
| 07/22/2011 | Payment (Window) | Receipt # 2011-29041-FAM | Iglody Law Offices (300.00) |
| 09/11/2012 | Transaction Assessment | | 200.00 |
| 09/11/2012 | Efile Payment | Receipt # 2012-113623-CCCLK | Hefetz, Yacov Jack (200.00) |
| 07/14/2015 | Transaction Assessment | | 24.00 |
| 07/14/2015 | Efile Payment | Receipt # 2015-73396-CCCLK | Hefetz, Yacov Jack (24.00) |
| 09/15/2015 | Transaction Assessment | | 24.00 |
| 09/15/2015 | Efile Payment | Receipt # 2015-97115-CCCLK | Hefetz, Yacov Jack (24.00) |
| 04/29/2016 | Transaction Assessment | | 24.00 |
| 04/29/2016 | Efile Payment | Receipt # 2016-42133-CCCLK | Hefetz, Yacov Jack (24.00) |
| 10/20/2017 | Transaction Assessment | | 200.00 |
| 10/20/2017 | Efile Payment | Receipt # 2017-80693-CCCLK | Hefetz, Yacov Jack (200.00) |

EXHIBIT 3



COHEN|JOHNSON|PARKER|EDWARDS
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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

YACOV JACK HEFETZ,

Plaintiff/Counterdefendant,

v.

CHRISTOPHER BEAVOR,

Defendant/Counterclaimant.

Case No.: A-11-645353-C

Dept. No.: 28

NOTICE OF ENTRY OF ORDER

NOTICE IS HEREBY GIVEN that a Stipulation and Order for Dismissal with Prejudice was entered on the 8th day of March, 2019. A copy of said Order is attached hereto.

Dated this 13th day of March, 2019.

COHEN|JOHNSON|PARKER|EDWARDS

By: /s/ H. Stan Johnson
H. Stan Johnson, Esq.
Nevada Bar No. 365
375 East Warm Springs Road
Las Vegas, Nevada 89119
Attorneys for Plaintiff/Counterdefendant

CERTIFICATE OF SERVICE

I hereby certify that, on March 13, 2019, I caused a true and correct copy of the foregoing
NOTICE OF ENTRY OF ORDER to be served on all interested parties, as registered with the
Court's E-Filing and E-Service System.

/s/ Sarah Gondek
An employee of Cohen|Johnson|Parker|Edwards

1 **SAO**
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10 Las Vegas, Nevada 89119
11 Telephone: (702) 823-3500
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13 *Attorneys for Plaintiff/Counterdefendant*

8
9 **EIGHTH JUDICIAL DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 YACOV JACK HEFETZ,
12 Plaintiff/Counterdefendant,
13 vs.
14 CHRISTOPHER BEAVOR,
15 Defendant/Counterclaimant.

Case No. A-11-645353-C
Dept. No. 28

STIPULATION AND ORDER FOR
DISMISSAL WITH PREJUDICE

16 Plaintiff/Counterdefendant Yacov Jack Hefetz, by and through his counsel of record, the
17 law firm of Cohen Johnson Parker Edwards, and Defendant/Counterclaimant Christopher
18 Beavor, by and through his counsel of record, the law firm of Dickinson Wright, PLLC, hereby
19 stipulate that this case shall be dismissed with prejudice, each party to bear his attorney's fees
20 and costs incurred.

21 DATED this 5th day of March, 2019.

22 **COHEN JOHNSON PARKER EDWARDS**

23 
24 H. STAN JOHNSON, ESQ.
25 Nevada Bar No. 265
26 sjohnson@cohenjohnson.com
27 KEVIN M. JOHNSON, ESQ.
28 Nevada Bar No. 14551
kjohnson@cohenjohnson.com
375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
Telephone: (702) 823-3500

| | |
|--|--|
| <input type="checkbox"/> Voluntary Dismissal | <input type="checkbox"/> Summary Judgment |
| <input type="checkbox"/> Involuntary Dismissal | <input type="checkbox"/> Stipulated Judgment |
| <input checked="" type="checkbox"/> Stipulated Dismissal | <input type="checkbox"/> Default Judgment |
| <input type="checkbox"/> Motion to Dismiss by Deft(s) | <input type="checkbox"/> Judgment of Arbitration |

Page 1 of 2

Facsimile: (702) 823-3400
Attorneys for Plaintiff/Counterdefendant

DATED this 1st day of March, 2019.

DICKINSON WRIGHT, PLLC



JOEL Z. SCHWARZ, ESQ.
Nevada Bar No. 9181
jschwarz@dickinsonwright.com
GABRIEL A. BLUMBERG, ESQ.
Nevada Bar No. 12332
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113
Telephone: (702) 382-4002
Facsimile: (702) 6706009
Attorneys for Defendant/Counterclaimant

ORDER

The Court has received and reviewed the parties' foregoing Stipulation for Dismissal with Prejudice and, good cause appearing, the Stipulation is GRANTED and this case is hereby DISMISSED WITH PREJUDICE, each party to bear his attorney's fees and costs incurred.

IT IS SO ORDERED.

Dated this 8 day of March, 2019.



DISTRICT COURT JUDGE MF

RONALD J. ISRAEL

A-11-645353-C

EXHIBIT 4

[Provided to Judge for in Chambers Review]

EXHIBIT 5

DECLARATION OF CHRISTOPHER BEAVOR

I, CHRISTOPHER BEAVOR, DECLARE as follows:

1. I am over the age of 18 and competent to testify in this matter. I am the Plaintiff in case number A-190793405-C and have personal knowledge of the case and the events therein.

2. As partial consideration for a settlement agreement with a third party in another case, I agreed to assign the proceeds from any recovery in this matter, and only any proceeds from any recovery to that third party.

3. I have not assigned any cause of action to any third party for any action against Joshua Tomsheck, his firm, or any other attorney.

3. I am pursuing this matter as the Plaintiff and have been an active participant and in frequent contact with my counsel since the beginning of this matter by phone and email. I have met in person with my counsel as well.

4. I also agreed to use H. Stan Johnson, Esq. as counsel, and Charles "CJ" Barnabi, Esq. has also been retained to represent me in this matter. As in any legal matter I have the right to use other counsel and replace my current counsel if I decided to do so.

5. I consulted with my counsel to aid in the matter and to draft the initial complaint.

6. I have also been consulted with by my counsel regarding the strategic decisions in my case.

7. It will ultimately be my decision, and my decision alone to accept or reject any settlement offers that are made.

///

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8. I have not assigned any party the right to pursue this, or any other matter, on my behalf.

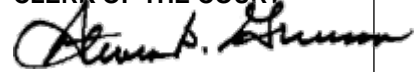
FURTHER, THE DECLARANT SAITH NOT.

I declare under penalty of perjury that the foregoing is true and correct.¹

Executed this 27th day of March, 2020.

_____/s/ Christopher Beavor_____
Christopher Beavor

¹ No notary stamp required per NRS 53.045



LIPSON NEILSON P.C.
JOSEPH P. GARIN, ESQ.
Nevada Bar No. 6653
MEGAN H. HUMMEL, ESQ.
Nevada Bar No. 12404
AMANDA A. EBERT, ESQ.
Nevada Bar No. 12731
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jgarin@lipsonneilson.com
mhummel@lipsonneilson.com
aebert@lipsonneilson.com
Attorneys for Third-Party Defendant,
Marc Saggese, Esq.

DISTRICT COURT
CLARK COUNTY, NEVADA

* * *

| | | |
|--------------------------------------|---|---------------------------------|
| CHRISTOPHER BEAVOR, an individual, |) | Case No: A-19-793405-C |
| |) | Dept. No.: 24 |
| Plaintiff, |) | |
| v. |) | STIPULATION AND ORDER TO |
| |) | STRIKE |
| JOSHUA TOMSHECK, an individual; DOES |) | |
| I-X, inclusive, |) | |
| |) | |
| Defendants. |) | |
| <hr/> | | |
| JOSHUA TOMSHECK, an individual, |) | |
| |) | |
| Third-Party Plaintiff, |) | |
| v. |) | |
| |) | |
| MARC SAGGESE, ESQ. |) | |
| |) | |
| Third-Party Defendant. |) | |
| <hr/> | | |

The parties, by and through their undersigned counsel and pursuant to Rule 12(f) of the Nevada Rules of Civil Procedure, stipulate and agree to strike "Defendant/Third-Party Plaintiff Joshua Tomscheck's Opposition to Third-Party Defendant Marc Saggese's Motion to Dismiss, or Alternatively, Motion for Summary Judgment, and Tomscheck's Request for NRCP 56(d) Relief" (the "Opposition") filed April 3, 2020.

Exhibit D to the Opposition is an affidavit of process server Robert Howard regarding service on Mr. Saggese and related documents related to said service. Exhibit D contains sensitive personal information regarding Mr. Saggese, including his home address and photographs of his personal residence. Due to Mr. Saggese's status as a prominent criminal defense attorney, the public availability of this personal information may pose a threat to his personal safety, as well as to the personal safety of his family members. As such, the parties have agreed to strike the Opposition from the public record in its entirety.

The parties also stipulate that the Opposition shall be re-filed by Mr. Tomscheck's counsel no later than April 30, 2020, with Exhibit D redacted as to Mr. Saggese's home address and photos of the residence. The re-filing of the Opposition shall not change the current deadlines in place regarding Mr. Saggese's Motion to Dismiss.

It is so stipulated.

| | |
|---|--|
| <p>OLSON CANNON GORMLEY & STOBERSKI</p> <p><u>/s/ Max. E. Corrick, II</u> MAX E. CORRICK, II, ESQ. 9950 W. Cheyenne Ave. Las Vegas, NV 89129 mcorrick@ocgas.com Attorneys for Joshua Tomscheck</p> | <p>THE BARNABI LAW FIRM, PLLC</p> <p><u>/s/ Charles E. Barnabi Jr.</u> CHARLES ("CJ") E. BARNABI JR., ESQ. 375 E. Warm Springs Road, Suite 104 Las Vegas, NV 89119 cj@barnabilaw.com</p> <p>H. Stan Johnson, Esq. COHEN JOHNSON PARKER EDWARDS 375 E. Warm Springs Rd., Suite 104 Las Vegas, NV 89119 sjohnson@cohenjohnson.com Attorneys for Plaintiff</p> |
| <p>LIPSON NEILSON PC</p> <p><u>/s/ Amanda A. Ebert</u> JOSEPH P. GARIN, ESQ. Nevada Bar No. 6653 MEGAN H. HUMMEL, ESQ. Nevada Bar No. 12404 AMANDA A. EBERT, ESQ. Nevada Bar No. 12731 9900 Covington Cross Drive, Suite 120 Las Vegas, Nevada 89144 Attorneys for Third-Party Defendant Marc Saggese, Esq.</p> | |

ORDER

For good cause shown by the parties, this Court orders that Joshua Tomscheck's Opposition filed April 3, 2020 in the above-captioned matter is stricken from public access. Mr. Tomscheck may re-file the Opposition with the personal information of Mr. Saggese redacted by April 30, 2020. The re-filed version of the Opposition will not impact the existing deadlines in place in this matter.

Dated this 24th day of April, 2020


DISTRICT COURT JUDGE JIM CROCKETT

Respectfully Submitted By:

/s/ Amanda A. Ebert

JOSEPH P. GARIN, ESQ
Nevada Bar No. 6653
MEGAN H. HUMMEL, ESQ.
Nevada Bar No. 12404
AMANDA A. EBERT, ESQ.
Nevada Bar No. 12731
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
*Attorneys for Third-Party Defendant,
Marc Saggese, Esq.*

Sydney Ochoa

From: Amanda Ebert
Sent: Thursday, April 23, 2020 2:50 PM
To: Sydney Ochoa
Subject: Fwd: A793405- Beavor v. Tomsheck et al; Stipulation to Strike Pleading

Sent from my iPhone

Begin forwarded message:

From: CJ Barnabi <cj@barnabilaw.com>
Date: April 22, 2020 at 6:06:29 PM PDT
To: Amanda Ebert <AEbert@lipsonneilson.com>, Max Corrick <mcorrick@ocgas.com>
Cc: Marie Twist <marie@barnabilaw.com>, Megan Hummel <MHummel@lipsonneilson.com>, Joe Garin <JGarin@lipsonneilson.com>
Subject: RE: A793405- Beavor v. Tomsheck et al; Stipulation to Strike Pleading

Yes, just please change my address to the below; and you may use my e-signature as well.

Charles ("CJ") E. Barnabi Jr., Esq.

THE BARNABI LAW FIRM

375 E. Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
Tel. 702.475.8903
Fax 702.966.3718
cj@barnabilaw.com

Tax Advice Disclosure: Nothing in the above message shall constitute legal advice regarding the Internal Revenue Code, or is reasonably meant to provide such service. If you have tax questions, please consult a professional.

Also, this communication is CONFIDENTIAL and protected by the Attorney-Client and/or the Attorney Work Product Privileges. It is intended solely for the addressees listed above. Anyone not listed above, or who is not an agent authorized to receive it for delivery to an addressee, is not authorized to read, disseminate, forward, copy, distribute, or discuss its contents, or any part thereof. Anyone else must immediately delete the message, and reply to the sender only, confirming you have done so.

From: Amanda Ebert <AEbert@lipsonneilson.com>
Sent: Wednesday, April 22, 2020 6:05 PM
To: Max Corrick <mcorrick@ocgas.com>
Cc: CJ Barnabi <cj@barnabilaw.com>; Marie Twist <marie@barnabilaw.com>; Megan Hummel <MHummel@lipsonneilson.com>; Joe Garin <JGarin@lipsonneilson.com>
Subject: RE: A793405- Beavor v. Tomsheck et al; Stipulation to Strike Pleading

Thanks for catching that- CJ, does this look good?



Amanda A. Ebert, Esq.
9900 Covington Cross Drive, Suite 120
Las Vegas, NV 89144
(702) 382-1500
(702) 382-1512 (fax)
Email: AEbert@lipsonneilson.com
Website: www.lipsonneilson.com

OFFICES IN NEVADA, MICHIGAN, ARIZONA, AND COLORADO

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From: Max Corrick <mcorrick@ocgas.com>
Sent: Wednesday, April 22, 2020 6:03 PM
To: Amanda Ebert <AEbert@lipsonneilson.com>
Cc: CJ Barnabi <cj@barnabilaw.com>; Marie Twist <marie@barnabilaw.com>; Megan Hummel <MHummel@lipsonneilson.com>; Joe Garin <JGarin@lipsonneilson.com>
Subject: RE: A793405- Beavor v. Tomsheck et al; Stipulation to Strike Pleading

Remove Angulo and the commas from my firm name and you have the green light from me.

Thanks.

Sent from my Sprint Samsung Galaxy S10e.

----- Original message -----

From: Amanda Ebert <AEbert@lipsonneilson.com>
Date: 4/22/20 5:57 PM (GMT-08:00)
To: Max Corrick <mcorrick@ocgas.com>
Cc: CJ Barnabi <cj@barnabilaw.com>, Marie Twist <marie@barnabilaw.com>, Megan Hummel <MHummel@lipsonneilson.com>, Joe Garin <JGarin@lipsonneilson.com>
Subject: RE: A793405- Beavor v. Tomsheck et al; Stipulation to Strike Pleading

All,

I have attached a draft of our proposed stip- please let me know if you have any changes to make. I included a "due date" for Tomscheck's re-filed opposition, since the court will probably require that. Max, will April 30 be enough time to get your opp redacted and re-filed?

If you don't have any changes to make, please respond to this e-mail with consent for esignature and we will get the draft to the court in the morning. I appreciate everyone's cooperation on this- please let me know if there are any questions.

Lipson|Neilson

Amanda A. Ebert, Esq.
9900 Covington Cross Drive, Suite 120
Las Vegas, NV 89144
(702) 382-1500
(702) 382-1512 (fax)
Email: AEbert@lipsonneilson.com
Website: www.lipsonneilson.com

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From: Max Corrick <mcorrick@ocgas.com>
Sent: Wednesday, April 22, 2020 4:26 PM
To: Amanda Ebert <AEbert@lipsonneilson.com>
Cc: CJ Barnabi <cj@barnabilaw.com>; Marie Twist <marie@barnabilaw.com>; Megan Hummel <MHummel@lipsonneilson.com>; Joe Garin <JGarin@lipsonneilson.com>
Subject: RE: A793405- Beavor v. Tomscheck et al; Stipulation to Strike Pleading

Agreed.

Sent from my Sprint Samsung Galaxy S10e.

----- Original message -----

From: Amanda Ebert <AEbert@lipsonneilson.com>
Date: 4/22/20 4:22 PM (GMT-08:00)
To: Max Corrick <mcorrick@ocgas.com>
Cc: CJ Barnabi <cj@barnabilaw.com>, Marie Twist <marie@barnabilaw.com>, Megan Hummel <MHummel@lipsonneilson.com>, Joe Garin <JGarin@lipsonneilson.com>
Subject: A793405- Beavor v. Tomscheck et al; Stipulation to Strike Pleading

Hello Max,

Thank you for taking my call this afternoon. Just to confirm our conversation, we recently realized that Mr. Saggese's personal information, including his home address and photographs of his residence, are included on documents attached as exhibits to Mr. Tomsheck's April 3, 2020 opposition to Mr. Saggese's motion to dismiss. Specifically, the issue is with Exhibit D to the opposition, seen at pages 140-153. As we discussed, we are concerned about safety issues pertaining to Mr. Saggese and his family due largely in part to his status as a criminal defense attorney, and need to take steps to eliminate this sensitive information from the public record.

I understand that you agree to this, and am grateful for your professional courtesy regarding this situation. I also reached out to CJ to keep him apprised, and have copied him on this e-mail. I believe that the best way to handle this is to submit a stipulation striking the opposition from the record, with the agreement that your office will re-file the opposition with the personal information indicated above redacted. We agree that this will not impact the timeliness of the opposition; we will treat the re-filed opposition as if it had been filed on April 3, and this will not impact the reply brief due dates. I also understand that, once the stipulation and order is circulated and approved, we may affix your electronic signature prior to submittal to the department.

Please confirm that this is your understanding. I will circulate a stipulation as soon as possible. Thank you again.

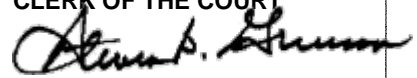


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Website: www.lipsonneilson.com

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OPMD
MAX E. CORRICK, II
Nevada Bar No. 6609
OLSON CANNON GORMLEY & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, NV 89129
702-384-4012
702-383-0701 fax
mcorrick@ocgas.com
Attorneys for Defendant/Third-Party Plaintiff
JOSHUA TOMSHECK

DISTRICT COURT
CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual,

Plaintiff,

v.

JOSHUA TOMSHECK, an individual;
DOES I-X, inclusive,

Defendants.

CASE NO. A-19-793405-C
DEPT. NO. XXIV

**DEFENDANT/THIRD-PARTY PLAINTIFF
JOSHUA TOMSHECK'S OPPOSITION TO
THIRD-PARTY DEFENDANT MARC
SAGGESE'S MOTION TO DISMISS, OR
ALTERNATIVELY, MOTION FOR
SUMMARY JUDGMENT, AND
TOMSHECK'S REQUEST FOR NRCP
56(d) RELIEF**

JOSHUA TOMSHECK, an individual,

Third-Party Plaintiff,

v.

MARC SAGGESE, ESQ., an individual,

Third-Party Defendant.

Date of Hearing: May 7, 2020

Time of Hearing: 9:00 a.m.

COMES NOW Defendant/Third-Party Plaintiff JOSHUA TOMSHECK ("Tomscheck"), by and through his attorneys of record, OLSON CANNON GORMLEY & STOBERSKI, and hereby submits his opposition to Third-Party Defendant Marc Saggese's motion to dismiss, or alternatively, motion for summary judgment.

Law Offices of
OLSON CANNON GORMLEY & STOBERSKI
A Professional Corporation
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
(702) 384-4012 Telecopier (702) 383-0701

1 This opposition is made and based upon all the papers, pleadings and records on file herein,
2 the attached points and authorities, and such oral argument, testimony and evidence which may be
3 presented upon the hearing of this motion.

4 Furthermore, this opposition includes, to the extent necessary, Tomsheck's NRCP 56(d)
5 request for relief and denial of the motion for summary judgment in order to allow Tomsheck to
6 conduct specific discovery concerning the claims raised in both the third-party complaint and the
7 new defenses raised by the instant motion.

8 DATED this 23rd day of April, 2020.

9 OLSON CANNON GORMLEY
10 & STOBERSKI

11 /s/ Max E. Corrick, II
12 MAX E. CORRICK, II
13 Nevada Bar No. 6609
14 9950 West Cheyenne Avenue
15 Las Vegas, NV 89129
16 Attorneys for Defendant/Third-Party
17 Plaintiff JOSHUA TOMSHECK
18
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28

DECLARATION OF ATTORNEY MAX E. CORRICK, II

STATE OF NEVADA)
)
COUNTY OF CLARK) ss:

MAX E. CORRICK, II declares and states as follows:

1. That I am a Shareholder with the law firm of Olson Cannon Gormley & Stoberski, and am duly licensed to practice law before all of the Courts in the State of Nevada.

2. I am an attorney retained to represent Tomscheck in this matter and have personal knowledge of the contents of this Declaration.

3. The documents attached as Exhibits A through I to this opposition to the instant motion to dismiss, or alternatively, motion for summary judgment, are true and accurate copies of those documents.



MAX E. CORRICK, II

POINTS AND AUTHORITIES

I.

SUMMARY OF THE ARGUMENT

This is a legal malpractice claim whereby Plaintiff Christopher Beavor (“Beavor”) is seeking recover the attorneys fees and costs he incurred, as well as the settlement amount he paid to the underlying plaintiff Yacov Hefetz (“Hefetz”), as a result of what the Nevada Supreme Court held was Beavor’s failure to plead the one-action rule as an affirmative defense to Hefetz’s lawsuit against him.¹ The only attorney responsible for raising that dispositive affirmative defense was third-party defendant Marc Saggese, Esq. (“Saggese”).²

¹ See *Hefetz v. Beavor*, 133 Nev. 323, 397 P.3d 472 (2017).

² Saggese is Beavor’s close, personal friend and business partner. He provided legal advice, in an attorney-client capacity, to Beavor concerning the limited legal matters Tomscheck was retained to provide. See Exhibit A, *Deposition of Joshua Tomscheck, Esq.*, pp. 15:3 - 18:8 (Saggese’s involvement with responding to the motion for new trial); 21:11 - 22:15 (Saggese assisting in deciding and advising how to respond to the motion for new trial); 23:8-17 (same);

1 Rather than sue the lawyer who caused all of his damages, Beavor decided to only sue
2 Tomsheck – the lawyer who stepped in for Saggese, at Saggese’s request, for the limited purpose
3 of opposing a motion for new trial premised upon Saggese’s alleged anti-Semitic comments in
4 front of Judge Ronald Israel and a jury.³ The damages being asserted by Beavor against Tomsheck
5 in this case, however, are the exact damages caused by Saggese. Therefore, Tomsheck is entitled to
6 contribution from the person who caused those same damages: Saggese. *See* NRS 17.225.

7 Consequently, Tomsheck filed a third-party complaint against Saggese for contribution. For
8 reasons known only to Saggese, he chose to avoid personal service of process. However, Saggese
9 was ultimately served pursuant to NRS 14.090 by virtue of service upon his gated community’s
10 guard. Now, Saggese ironically seeks to quash service and/or dismiss the third-party complaint
11 against him – essentially seeking reward for his efforts at slipping personal service.

12 In this respect, Saggese relies upon his misrepresentation of how service was effectuated
13 upon him to support his unreasonable interpretation of NRS 14.090 and NRCP 12(b)(4).⁴ In short,
14 Saggese’s arguments in support of quashing service here are unavailing, and this Court should
15 deny his request to quash service or dismiss the third-party complaint pursuant to NRCP 12(b)(4),
16 NRCP 4(e)(2), or NRS 14.090.

17 Similarly, Saggese’s alternative motion to dismiss/motion for summary judgment, must be
18

19
20 29:10 - 30:12 (Saggese’s involvement with the motion for reconsideration and order granting
21 motion for new trial); 38:12 - 39:6 (discussions with opposing counsel, and Beavor, regarding
22 the opposition to the motion for new trial); 48:6 - 51:10 (communications between Saggese,
23 Tomsheck, and Beavor regarding legal strategy of how to handle the district court’s in
24 chambers ruling on the motion for new trial); 61:24 - 62:15 (Beavor and Saggese’s involvement
25 with the decision to file a writ or appeal); 63:17 - 22 (same); 82:18 - 84:22 (Saggese’s
26 involvement with the opposition to the motion for new trial); 86:18-21 (Saggese and Beavor’s
27 involvement in deciding how to frame the motion for reconsideration and what to argue).
28 Saggese also continued to officially represent Beavor’s wife, Samantha Beavor, during the
relevant time frame. He maintains a lucrative, steadfast attorney-client and business relationship
with Beavor to this day. *See* Exhibits B and C, *CAI Investments, LLC Profiles of Christopher
Beavor and Marc Saggese, Esq. downloaded from www.caicap.com*, last accessed on March 26,
2020.

³ Complicating matters, Tomsheck and Saggese were themselves friends at the time.

⁴ *See* Exhibit D, *Affidavit of Robert Howard and Affidavit of Service*.

1 denied for several other reasons. *First*, under clear Nevada law all of the factual allegations
2 contained within the third-party complaint must be taken as true. *Hynds Plumbing & Heating Co.*
3 *v. Clark County School District*, 94 Nev. 776, 587 P.2d 1331 (1978). Therefore, at this stage of the
4 litigation this Court must presume Saggese's actions make him liable for Beavor's damages.⁵ With
5 that mandatory presumption against Saggese in place, this Court must deny Saggese's request for
6 dismissal pursuant to NRCP 12(b)(5) at this time.

7 *Second*, to the extent Saggese is asking for dismissal or summary judgment based upon a
8 theory that Nevada law prohibits contribution claims against a predecessor attorney who is
9 responsible for the damages incurred by his client, Saggese's arguments are not supported by
10 Nevada law in the slightest.⁶ Rather, Saggese's attempt to apply inapposite case law to shield
11 himself from his own malfeasance runs contrary to the underlying policies of allowing for
12 contribution claims in Nevada. Several other jurisdictions have held the same. This Court should
13 not overextend a non-binding decision well beyond what it actually holds, particularly where the
14 Nevada Supreme Court has already ruled that Saggese's failure to plead the one-action rule
15 affirmative defense allowed Hefetz to avoid dismissal of the underlying case in its entirety. At
16 bottom, Saggese was the cause of the damages for which Beavor (and by extension Saggese) is
17 now trying to get Tomsheck's insurance to pay. This is inequitable, contrary to Nevada law, and
18 should not be condoned by this Court.

19 *Third*, to the extent Saggese is asking for summary judgment based upon the argument that
20 his legal malpractice did not proximately cause all of Beavor's damages, his argument is unique,
21 ill-founded, and premature. The self-serving affidavits submitted by Beavor and Saggese, intended
22 to insulate Saggese from his own actions, lack any corroborating evidence. Indeed, a reasonable
23

24 ⁵ In fact, the evidence in this case already tends to show Beavor's damages were not
25 proximately caused by Tomsheck at all. After discovery is completed and further information
26 obtained through Beavor, Saggese, and others, a reasonable fact finder will be able to reach the
same conclusion, particularly that Beavor's damages were proximately caused by Saggese.

27 ⁶ Saggese has failed to comply with NRCP 56(c) insofar as he has not demonstrated the
28 absence of any material factual dispute concerning his defenses to Tomsheck's contribution
claim. As set forth herein, including through the exhibits attached, the factual predicates which
underpin Saggese's defense to the contribution claim are all strongly disputed.

1 fact finder can and will be able to conclude these longtime friends, in a longstanding attorney-
2 client relationship and currently working as business partners, are protecting Saggese from liability
3 because, among other things, he does not carry malpractice insurance.⁷ Regardless, Saggese's
4 summary judgment request is premature because Tomsheck is entitled to conduct specific
5 discovery relative, *inter alia*, to the Saggese/Beavor partnership's shared defense as outlined in the
6 Affidavit of Max E. Corrick, II pursuant to NRCP 56(d).⁸ The motion must be denied on those
7 grounds as well.

8 *Fourth*, this Court can deny Saggese's motion in its entirety as being moot. Tomsheck's
9 pending motion for summary judgment is also scheduled for hearing on May 7, 2020. It is rooted in
10 controlling Nevada law and should be granted upon either of its two bases: Beavor's impermissibly
11 assigned legal malpractice to Hefetz, or the running of the statute of limitation. Once Tomsheck's
12 motion is granted, Saggese's arguments would be rendered moot and this Court can deny
13 Saggese's motion accordingly.

14 In summary, Saggese's motion is fundamentally flawed on multiple levels. This Court
15

16 ⁷ The Beavor/Saggese affidavits are remarkable insofar as they establish – if somehow
17 corroborated at a later date – that Beavor is responsible for his own damages in this case. At a
18 minimum though, those affidavits (both curiously on Saggese's attorneys' pleading paper)
19 suggest collusion by Saggese and Beavor to protect Saggese because he has no insurance to
20 cover for his apparent errors. *See* Exhibit E, *Affidavit of Joshua Tomsheck, Esq.* And as this
21 Court is aware from Tomsheck's pending motion for summary judgment, on file herein and
22 incorporated by reference, Beavor has already colluded with the underlying plaintiff (Hefetz) to
23 assign the proceeds of Beavor's legal malpractice claim to Hefetz at no risk to Beavor. As it
24 stands, as noted below, if this Court grants Tomsheck's motion for summary judgment, that
25 decision would render Saggese's motion moot – in no small part due to Beavor's collusion with
26 Hefetz.

27 ⁸ *See* Exhibit F, *Affidavit of Max E. Corrick, II*. As set forth therein, the Saggese/Beavor
28 partnership's curious defense to Tomsheck's contribution claim is only predicated upon self-
serving, uncorroborated affidavits. It is not supported by any independent testimony and/or
documentation, or cross-examination of the Saggese/Beavor partnership. Discovery, once
allowed, will show that there is no independent evidence Beavor was told of the one-action rule
defense until he hired the Dickinson Wright law firm after Tomsheck withdrew. That law firm
aggressively prosecuted the one-action rule defense on Beavor's behalf, and the vast majority of
Beavor's damages – all of which would have been avoided if Saggese had only raised the one-
action rule – are the attorneys fees Beavor allegedly paid that law firm to do: raise the one-
action rule defense for the first time.

1 should deny Saggese's motion to quash, deny his motion to dismiss, and deny his motion for
2 summary judgment at this time. Or this Court should determine that all of them are moot in light of
3 how this Court should rule on Tomsheck's motion for summary judgment.

4 II.

5 STANDARD OF REVIEW

6 A motion to dismiss for failure to state a claim is procedural and tests the sufficiency of the
7 complaint or third-party action. The standard of review for a dismissal under NRCP 12(b)(5) is
8 rigorous as this Court must construe the pleading liberally, take all factual allegations in the third-
9 party complaint as true, and draw every fair inference in favor of the nonmoving party. *Vacation*
10 *Village v. Hitachi America*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). Dismissing a third-party
11 complaint is appropriate "only if it appears beyond a doubt that [the third-party plaintiff] could
12 prove no set of facts, which, if true, would entitle that [third-party plaintiff] to relief." *Buzz Stew,*
13 *Ltd. Liab. Co. v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).⁹

14 Furthermore, summary judgment is only proper where the pleadings, depositions, answers
15 to interrogatories, admissions and affidavits on file, show that there exists no genuine issue as to
16 any material fact and that the moving party is entitled to a judgment as a matter of law. *Villescas v.*
17 *CNA Ins. Cos.*, 109 Nev. 1075, 864 P.2d 288 (1993). In determining whether summary judgment is
18 proper, the non-moving party is entitled to have the evidence and all reasonable inferences
19 accepted as true. *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 774 P.2d 432 (1989).

20 As it pertains to a Rule 56(d) request for additional time to conduct discovery, a district
21 court's refusal to allow a continuance and grant of summary judgment is an abuse of discretion.
22 *Harrison v. Falcon Prods., Inc.*, 103 Nev 558, 746 P.2d 642 (1987) (where less than two years had
23 passed from the filing of the complaint to the granting of summary judgment and request for
24
25
26

27 ⁹ Although not a hard and fast rule – especially where full discovery has been conducted
28 and it has been established that no claim may proceed as a matter of law – Nevada law favors
trials on the merits. *See, e.g. Home Sav. Ass'n v. Aetna Cas. & Surety*, 854 P.2d 851 (Nev.
1993).

1 additional time was supported by specific discovery requests).¹⁰

2 III.

3 ARGUMENT

4 A. Saggese's motion to dismiss/motion to quash should be denied because
5 Saggese was served with the third-party action pursuant to NRS 14.090
6 despite Saggese's illegitimate attempts to avoid service

7 Nevada law provides that people who reside in gated communities, such as Saggese, may
8 be served with any legal process by leaving a copy with the guard. NRS 14.090 states:

9 NRS 14.090 *Service of process at residence accessible only through gate.*

10 1. A person who resides at a location to which access is not reasonably available
11 except through a gate may be lawfully served with any legal process in the manner
12 provided in this section. If there is:

13 (a) A guard posted at the gate and the guard denies access to the residence for
14 service of process, service of process is effective upon leaving a copy thereof with
15 the guard.

16 ...

17 Nevada Revised Statute, Section 14.090. As set forth in the Affidavit of Service, along with the
18 Affidavit of the process server (Robert Howard), Saggese avoided personal service at his office and
19 at the Regional Justice Center.¹¹ Mr. Howard then made several attempts – all while lawfully

20 ¹⁰ To the extent Saggese relies upon *Boesiger v. Desert Appraisals, LLC*, 135 Nev. 192,
21 444 P.3d 436 (2019), that reliance is misplaced for multiple reasons. Those reasons include, but
22 are not limited to, the fact that summary judgment was granted in *Boesiger* after two years of
23 discovery, and was premised upon the plaintiff's failure to designate an expert witness to
24 establish the relevant standard of care to support the plaintiff's claims. In this case, as noted in
25 Exhibit F, *Affidavit of Max E. Corrick, II*, initial expert disclosures have not come due as of the
26 filing of this opposition. Saggese has provided no discovery in the case yet, and Tomscheck has
27 not had the opportunity to take depositions or obtain documents from Saggese and Beavor
28 relative to their collusive defense of Saggese. Administrative Order 20-09 in response to
COVID-19, however, prevents that in large part. Regardless, Beavor has not produced any
documents to Tomscheck which are specific to Saggese, the subject of the Beavor/Saggese
affidavits, and the issues which predominate Tomscheck's counterclaim as of the filing of this
opposition. There are pending Rule 34 requests out to Beavor in this regard, and Beavor has his
own independent obligation to produce those documents pursuant to NRCP 16.1. Moreover,
Tomscheck has retained a legal malpractice expert, Dennis Kennedy, Esq., who is prepared to
opine, based upon the information currently available, that Beavor's damages were not
proximately caused by Tomscheck, but rather by Saggese. *Id.*

¹¹ See Exhibit D.

1 within Saggese's guard gated community – to serve Saggese at his home. Saggese refused to open
2 the door and refused to respond to Mr. Howard's request for Saggese to contact him to coordinate
3 service of legal process upon him personally.¹²

4 Finally, in the afternoon of August 21, 2019, the process server successfully delivered the
5 third-party complaint and summons to Saggese's community guard.¹³ That guard, the one who
6 allowed the process server into the community, attempted to refuse to accept service of legal
7 process despite being obligated by law to do so. Notwithstanding, the process server successfully
8 placed the legal process in that guard's vehicle with the guard in it. Thus, pursuant to the letter of
9 NRS 14.090, proper service was effectuated upon Saggese despite both his, and the community
10 guard's, attempts to shirk their responsibility to accept service.

11 Turning to Saggese's arguments, less than 120 days passed between the time the third-party
12 complaint was filed. The third-party complaint was filed on May 16, 2019, and service was
13 effectuated on August 21, 2019. That amounts to 98 days, well within the requirements of NRCP
14 4(e)(1). Saggese's claim that service was untimely is counterfactual and should be disregarded.¹⁴

15 Next, Saggese's claim that the process server was trespassing is without merit. Saggese,
16 who lacks personal knowledge of how the process server was provided explicit access to the
17 community by the guard, has no foundation to make such argument and his unfounded opinion as
18 to how the process server was able to gain access within his community is conclusively rebutted by
19 the process server himself. The process server was given permission to enter the community by the
20 guard at the gate. That is not trespassing in any sense.

21
22 ¹² As a licensed attorney, the Court can infer Saggese knew that he could be served either
23 personally, through his wife at their residence, or through the guards in his guard gated
24 community (within Red Rock Country Club). The Court may also infer Saggese's efforts to
25 avoid service were not made in good faith and were intended to "unreasonably and vexatiously
extend[] a civil action or proceeding." *See* NRS 7.085(1)(b).

26 ¹³ *See* Exhibit D.

27 ¹⁴ From a practical perspective, even if this Court were to quash service or dismiss the
28 third-party complaint based upon any issues with service, Tomscheck could simply re-file his
contribution claim at any time within one year of any final judgment or settlement. *See* NRS
17.285. In this respect, Saggese's arguments inspire judicial waste and inefficiency.

1 Finally, Saggese's argument that a guard has to be physically within the guard station in
2 order to be served pursuant to NRS 14.090 is both unreasonable and not supported by the language
3 of the statute. As set forth in the process server's affidavit, the same guard who was stationed at the
4 guard gate and who let the process server into the community is the one who encountered the
5 process server in front of Saggese's residence. NRS 14.090 does not require that guard to be served
6 only when he/she is in their guard shack; nothing in the statute remotely supports Saggese's
7 reading of the statute. Furthermore, the purpose behind NRS 14.090 – allowing for legal service of
8 process upon people who are trying to keep the rest of the world away from them – would be
9 entirely frustrated if that is how the statute was intended to be read. Moreover, Saggese's reliance
10 upon the words "lives with" in the Affidavit of Service as a reason to quash service elevates form
11 over substance to an absurd degree.

12 In summary, Saggese seeks special treatment from this Court because he chose to live in a
13 guard gated community and because he ducked personal service for no good reason at all. He
14 should know better than to claim that he was not served legal process of the third-party complaint
15 pursuant to NRS 14.090 – and he should be thankful Tomsheck did not take a default (and default
16 judgment) against him when Saggese failed to timely file an Answer. This Court should deny
17 Saggese's motion to quash/motion to dismiss pursuant to NRCP 12(b)(4) in its entirety.

18 **B. Saggese is presumed to be the cause of, and therefore liable for,**
19 **Beavor's alleged damages at this stage of the litigation, and Nevada law**
20 **allows for a contribution claim in a legal malpractice case against a**
21 **predecessor attorney, especially where the evidence tends to show that**
22 **predecessor attorney is the proximate cause of all of the plaintiff's**
23 **damages**

- 24 **i. NRS 17.225 permits contribution claims against a person**
25 **who is liable in tort for the same damages – and therefore**
26 **at this stage of the litigation Saggese must be treated as**
27 **having caused the damages Beavor is seeking against**
28 **Tomsheck, thereby preventing dismissal or summary**
judgment in Saggese's favor at this time

At the motion to dismiss stage, this Court must construe the third-party complaint liberally,
take all factual allegations in the third-party complaint as true, and draw every fair inference in
favor of Tomsheck and against Saggese. *Vacation Village v. Hitachi America*, 110 Nev. 481, 484,
874 P.2d 744, 746 (1994). In that respect, this Court must start with the premise that Tomsheck's

1 potential liability to Beavor is “based on...the negligence and/or fault of” Saggese.¹⁵ Here, Beavor
2 is seeking to recover the attorneys fees and costs he incurred after Saggese withdrew as recognized
3 counsel of record.¹⁶ Those fees include any settlement funds Beavor agreed to pay Hefetz, as well
4 as the legal fees he claims he allegedly incurred along the way to settling with Hefetz.

5 This Court can even go further than rely upon the *Vacation Village* line of cases and also
6 look to the Nevada Supreme Court decision in *Hefetz v. Beavor*, 133 Nev. 323, 397 P.3d 472
7 (2017), as a basis for concluding – at this stage – that Saggese is the only cause of Beavor’s alleged
8 damages. Such conclusion makes it entirely inequitable to prevent Tomsheck from seeking
9 contribution from the person upon whom the *Hefetz* decision necessarily lays the correct blame,
10 Saggese.¹⁷

11 In *Hefetz* – long after Tomsheck had withdrawn as counsel – the lower court dismissed
12 Hefetz’s claims against Beavor based upon the one-action rule upon arguments made by Beavor’s
13 successor counsel (Joel Schwarz Esq. of the Dickinson Wright law firm). Hefetz appealed that
14 decision and the Nevada Supreme Court ruled that the one-action rule would have barred all of

15 ¹⁵ See Exhibit G, *Answer and Third-Party Complaint filed May 16, 2019*.

16 ¹⁶ See Exhibit H, *Complaint*, ¶¶ 34-36.

17 ¹⁷ To the extent Saggese may attempt to unfairly raise a new argument in his reply
18 concerning NRS 17.305 (“17.225 to 17.305, inclusive, do not apply to breaches of trust or of
19 other fiduciary obligation”), that statute does not apply to bar Tomsheck’s contribution claim
20 against Saggese for two important reasons. First, Tomsheck is not seeking contribution from
21 Saggese for damages caused by Tomsheck’s alleged breach of any fiduciary duty owed to
22 Beavor. Rather, Tomsheck is entitled to contribution for the damages caused by Saggese –
23 which happen to be all of Beavor’s alleged damages. Second, no court in Nevada or any other
24 jurisdiction has interpreted NRS 17.305 or any similar statute derived from the Uniform
25 Contribution Among Tortfeasors Act § 1(g) (“This Act shall not apply to breaches of trust or of
26 other fiduciary obligation”) to conclude that it applies to bar a contribution claim in a legal
27 malpractice against a predecessor, successor, or concurrent counsel. Instead, as correctly noted
28 by the court in *Manning v. Fort Deposit Bank*, 619 F.Supp. 1357,1332 (W.D. Tenn. 1985), in
an action for contribution for damages due to legal malpractice, “such action is based upon
principles of negligence and may be contrasted to actions to which the attorney is sued on
grounds of fraud or breach of fiduciary duty...no express or implied trust is involved and it is
not alleged that [third-party defendant lawyer] used the attorney-client relationship to its
advantage. Accordingly...no breach of “trust or of other fiduciary obligation” by [third-party
defendant lawyer] is alleged...,” thereby rendering Tennessee’s analogous statute inapplicable.
The same result should follow in this case.

1 Hefetz's claims against Beavor, but "[b]ecause Beavor failed to assert the one action rule as a
2 defense in his responsive pleadings, he failed to timely interpose the one-action rule as required by
3 NRS 40.435(2) and NRCP 8(c). Therefore, the district court erred by granting Beavor's motion to
4 dismiss and we reverse the district court's order." *Id.* at 330, 397 P.3d at 478.

5 As set forth in Tomsheck's deposition and his Affidavit, Tomsheck was not responsible for
6 raising any affirmative defenses in any responsive pleading.¹⁸ Tomsheck's scope of representation
7 was limited to only filing an opposition to the motion for new trial, and neither Saggese nor Beavor
8 told him the one-action rule was even an option. Rather, Saggese was exclusively responsible for
9 raising that defense and he failed to do so. Thus, this Court must presume at this stage that
10 Saggese's failure to raise the one-action rule defense caused Beavor to incur all of his attorneys
11 fees and costs thereafter.

12 Applying Nevada's contribution statute at this stage of the litigation, this Court must treat
13 as true the damages Beavor is seeking from Tomsheck are the same damages Beavor would have
14 avoided but for Saggese not asserting the one-action rule defense in any responsive pleading. NRS
15 17.225 explicitly allows for a contribution claim amongst tortfeasors. NRS 17.225 *Right to*
16 *contribution*, provides as follows:

17 1. Except as otherwise provided in this section and NRS 17.235 to 17.305,
18 inclusive, where two or more persons become jointly or severally liable in tort for
19 the same injury to person or property or for the same wrongful death, there is a right
of contribution among them even though judgment has not been recovered against
all or any of them.

20 2. The right of contribution exists only in favor of a tortfeasor who has paid
21 more than his or her equitable share of the common liability, and the tortfeasor's
22 total recovery is limited to the amount paid by the tortfeasor in excess of his or her
equitable share. No tortfeasor is compelled to make contribution beyond his or her
own equitable share of the entire liability.

23 ...

24 Nevada Revised Statutes, Section 17.225. Once again, taking as true the conclusion that if Saggese
25 had properly raised the one-action rule affirmative defense then Beavor would have incurred no
26 legal fees, costs, or damages *vis a vis* Hefetz (which are the damages Beavor now seeks against
27

28 ¹⁸ See Exhibit A, *Deposition of Joshua Tomsheck, Esq.*, and Exhibit E, *Affidavit of Joshua Tomsheck, Esq.*

1 Tomscheck), anything Tomscheck might pay to Beavor in this case would be “more than his or her
2 equitable share of the common liability”. There is absolutely no question, as provided by NRS
3 17.225, that Tomscheck is entitled to assert a claim for contribution from Saggese at this stage of
4 the litigation.

5 **ii. Saggese’s reliance upon *Mirch v. Frank*, a non-binding**
6 **decision from the United States District Court of Nevada**
7 **which the Nevada Supreme Court has never endorsed, is**
8 **completely misplaced because Tomscheck is not seeking**
9 **contribution from a successor attorney**

10 Saggese relies heavily upon the United States District Court of Nevada decision *Mirch v.*
11 *Frank*, 295 F.Supp.2d 1180 (2003), for the proposition that Saggese is immunized from any
12 contribution claim brought by Tomscheck despite the fact Saggese caused all of Beavor’s alleged
13 damages.¹⁹ *Mirch* says no such thing. Rather, *Mirch* involves an entirely different set of
14 circumstances which are not present here, and *Mirch* reaches a legal conclusion not remotely at
15 issue in this case. Furthermore, the Nevada Supreme Court has never adopted the *Mirch* rationale –
16 let alone even cited the case – for any proposition whatsoever, thus making its conclusion, which is
17 entirely contrary to a specific statute (NRS 17.225), extremely dubious and unreliable.

18 To begin with, *Mirch* involved a proposed contribution claim against a successor attorney,
19 which is not the case here. As noted above, Tomscheck is seeking contribution from his predecessor
20 attorney. The alone renders the *Mirch* decision inapposite, as it has nothing to say about
21 contribution claims against predecessor attorneys who actually caused the damages being sought.

22 On the contrary, *Mirch* instead held contribution claims against successor counsel violate
23 public policy, but still allowed for a future offset based upon the successor attorney’s alleged
24 malpractice based upon the unique facts of that case because successor counsel “did not owe
25 [predecessor counsel] a duty to mitigate [predecessor counsel’s] malpractice damages...”. *Id.* at
26 1185. In attempting to guess at what the Nevada Supreme Court might decide as to contribution
27 claims against successor counsel in that regard, the *Mirch* Court recognized that some jurisdictions

28 ¹⁹ A copy of the *Mirch v. Frank* decision is attached as Exhibit I for the Court’s benefit so
that it can recognize it is a spotted dog opinion which does not come close to barring
Tomscheck’s right of contribution from Saggese – the predecessor attorney whom this Court
must presume at this stage actually caused all of Beavor’s damages.

1 allow for contribution claims against successor counsel while others do not.

2 Despite acknowledging that “the policy issues cut both ways”, the *Mirch* Court relied upon
3 the rationale set out by what the Restatement (Third) of the Law Governing Lawyers § 53(I) (2000)
4 stated – not anything the Nevada Supreme Court had held – in trying to fashion a middle ground
5 for when successor counsel has caused the underlying plaintiff’s damages:

6 “[t]he first lawyer, however, may not seek contribution or indemnity from
7 the successor lawyer in the same action in which the successor lawyer represents the
8 client, for that would allow the first lawyer to create or exacerbate a conflict of
9 interest for the second lawyer and force withdrawal of the second lawyer from the
10 action. The first lawyer may, however, dispute liability in the negligence or
11 fiduciary breach action for the portion of damages caused by the second lawyer on
the ground that the conditions of Restatement Second, Torts § 447 are not satisfied.
The client may then choose whether to accept the possibility of such a reduction in
damages or to assert a second claim against successor counsel, with the resultant
necessity of retaining a third lawyer to proceed against the first two.”

12 *Mirch*, 295 F.Supp.2d at 1185, *quoting* Restatement (Third) of the Law Governing Lawyers § 53(I)
13 (2000). Thus, the *Mirch* Court landed on its Solomon-like decision, preventing the successor
14 attorney from being held liable for contribution while leaving intact the ability to seek an offset and
15 allowing argument to the jury that the successor counsel’s conduct was the cause of the disputed
16 damages. That *ad hoc* decision, as the Court noted, could have lead for the need to “retain[] a third
17 lawyer to proceed against the first two.” *Id.*

18 Not only does the *Mirch* rationale create the likelihood of more, not less, litigation, it is
19 unwieldy and completely ignores the rights to contribution bestowed by the Nevada Legislature in
20 NRS 17.225. In this respect, *Mirch* specifically withheld any comment on whether a separate
21 action for contribution would be barred pursuant to NRS 17.285 – a statute which expressly allows
22 for the enforcement of a contribution claim in a separate action. *See id.* at 1186, fn 3.

23 In a nutshell, *Mirch*’s factual and legal issues, along with its strained rationale, are far afield
24 from the facts and legal issues involved in this case and the clear statement of Tomsheck’s right to
25 contribution found in NRS 17.225. It is a wonder why Saggese would ask this Court to rely upon it
26 at all; no other appellate court in Nevada has done so.

27 Rather, this Court should decline Saggese’s invitation to distort Nevada’s contribution
28 statutes in service to an inapposite, non-binding decision which has never been followed by any

1 appellate court in Nevada. In its place, this Court should instead rely upon the policies behind our
2 contribution statutes which allow Tomsheck to seek contribution from the person who caused all of
3 Beavor's damages. It is both illogical and unfair to allow one party to be held accountable for the
4 acts and damages caused by another. Nevada has never subscribed to such inequity – though
5 Saggese asks just that.

6 As further support for rejecting Saggese's dangerous view of Nevada's contribution
7 statutes, other courts have relied upon the principles which undergird contribution statutes and
8 have expressly concluded that contribution claims against predecessor counsel in legal malpractice
9 cases are permitted and should be treated just like any other contribution claim. For instance, the
10 Supreme Court of West Virginia in *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 209
11 W.Va. 318, 547 S.E.2d 256 (2001), held that a predecessor attorney can be held liable for
12 contribution if that predecessor attorney's "first act of negligence sets off a chain of events or
13 creates a situation ultimately resulting in injury" and that "such negligence may very well
14 constitute the proximate cause of said injury, even if intervening negligence occurs." *Id.* at 332,
15 547 S.E.2d at 270.²⁰ Both elements have been met here: (1) Saggese's failure to assert the one-
16 action rule defense set off a chain which caused Beavor to incur attorneys fees and costs, along
17 with the settlement amount he paid to Hefetz; and (2) Saggese's conduct is the proximate cause of
18 those Beavor's damages – but for Saggese's conduct, Beavor incurs no attorneys fees, costs or has
19 to enter into any settlement with Hefetz.²¹

20 The *Sheetz, Inc.* Court further noted that "many courts have taken the position that is

21 ²⁰ See also *Parler and Wobber v. Miles and Stockbridge*, 359 Md. 671, 686, 756 A.2d 526,
22 534 (holding that "the unfairness of allowing a plaintiff the power to pick and choose whom to
23 sue for damages was alleviated by providing the defendant with the right to implead a
24 responsible third party to share in the liability. This 'distribute[s] the burden of responsibility
25 equitably among those who are jointly liable'", quoting *Montgomery County v. Valk Mfg. Co.*,
26 317 Md. 185, 189-190, 562 A.2d 1246, 1248 (1989)). Succinctly put, "[C]ontribution rests on
27 common liability, not on joint negligence or joint tort. Common liability exists when two or
28 more actors are liable to an injured party for the same damages, even if their liability may rest
on different grounds." *Id.* at 686, 756 A.2d at 534.

²¹ Whether Tomsheck owed or breached any duty to Beavor (both of which are disputed)
is irrelevant because the damage was already done by Saggese and, therefore, Tomsheck could
not have caused Beavor any more harm than Saggese already had.

1 adopted in *Parler*, and recognized that a defendant attorney may make a third-party contribution
2 claim against a plaintiff's subsequent, current, or former attorney." *Id.* at 331, 547 S.E.2d at 269;
3 and see *Goran v. Glieberman*, 76 Ill.App.3d 590, 597 (1995) ("Illinois law is clear that an attorney
4 may seek contribution for a legal malpractice claim."); *Brown v. LaChance*, 165 Wis.2d 52, 64,
5 477 N.W.2d 296, 302 (Ct.App. 1991) (holding that predecessor attorney could be held liable for
6 contribution by successor attorney); *Musser v. Provencher*, 28 Cal.4th 274, 48 P.3d 408 (2002)
7 (holding that concurrent counsel may seek contribution from each other for damages attributable
8 their co-counsel).²²

9 In light of the overwhelming public policy allowing a contribution claim against a party
10 who has caused a plaintiff's damages – particularly when that plaintiff strategically chooses not to
11 sue the predecessor attorney because of their personal and ongoing business relationship and
12 alleged lack of insurance – coupled with the explicit language of NRS 17.225, this Court should
13 disregard Saggese's forced application of *Mirch* to the facts of this case. Not trying to fit the
14 *Mirch* square peg into this round hole is the just result at this early stage. This is especially true
15 where Saggese has yet to answer the third-party complaint and produced no evidence to overcome
16 the heavy presumption that he was the cause of Beavor's damages. This Court should deny
17 Saggese's motion to dismiss/motion for summary judgment to the extent it relies upon inapplicable
18 case law and is contrary to Nevada statutory law.

19 C. **Notwithstanding Saggese's self-serving affidavits and improper**
20 **vouching, he is presumed at this stage to be liable for Beavor's alleged**
21 **damages and Tomsheck is entitled to conduct Rule 56(d) discovery to**
22 **further support the reasonable conclusion that the fact finder will**
determine Saggese is responsible for Beavor's damages based upon all
the admissible evidence to be presented

23 Saggese has not formally participated in this case to date. He has filed no answer, and has
24 produced no documents to Tomsheck pursuant to NRCP 16.1 which support his defenses to

25 ²² As noted in both Tomsheck's deposition and Affidavit, Saggese continued to provide
26 legal advice to Beavor relative to the opposition to the motion for new trial, and provided legal
27 guidance on the post-trial motion practice decisions which Saggese asked Tomsheck to handle
28 because of Saggese's alleged anti-Semitic remarks. Thus, not only is Saggese predecessor
counsel responsible for all of Beavor's damages, at this stage he is arguably concurrent counsel
from whom Tomsheck is entitled to seek contribution.

1 Tomscheck's contribution claim. He has identified no witnesses supporting any of his defenses
2 pursuant to NRCP 16.1, nor has he responded to any Discovery concerning his failure to plead the
3 one-action rule on behalf of his close friend and current business partner. He has not yet been
4 deposed – and in light of COVID-19 and Administrative Order 20-09 that deposition may not take
5 place for some time.

6 In spite of the above, Saggese relies upon self-serving affidavits which stand
7 uncorroborated by any actual evidence. Those self-serving affidavits, and the plaudits Beavor's
8 tailored affidavit throws his business partner's way, are insufficient to warrant summary judgment
9 in Saggese's favor with so much Discovery yet to be done. As noted above and within the Affidavit
10 of Max E. Corrick, II pursuant to NRCP 56(d), Saggese is currently presumed to have caused all of
11 Beavor's damages and Tomscheck is entitled to conduct Discovery as to Saggese, Discovery into
12 his very curious defense to Tomscheck's contribution claim, and Discovery into the relationship
13 between the colluding Beavor and Saggese.²³ Furthermore, Tomscheck has retained a legal
14 malpractice expert, Dennis Kennedy, Esq., who is prepared to opine, *inter alia*, that based upon the
15 information already available (the deposition of Tomscheck, the underlying *Hefetz v. Beavor* filings,
16 the *Hefetz v. Beavor* Nevada Supreme Court decision, and the disclosures made by both Tomscheck
17 and Beavor in this case) Saggese is the proximate cause of all of Beavor's damages. Discovery
18 from Saggese will almost certainly provide even more evidentiary support for Mr. Kennedy's
19 expert opinions and Tomscheck's third-party complaint.²⁴

20 Needless to say, while Saggese and Beavor may think they can manufacture a way out of
21 this case for Saggese before the screws are turned even further upon him, it would be an abuse of
22

23 ²³ See Exhibit F, *Affidavit of Max E. Corrick, II*.

24 ²⁴ Mr. Kennedy's initial expert report was due on April 13, 2020, however that initial
25 disclosure date has been stayed as a result of Administrative Order 20-09 and counsel for
26 Tomscheck, Beavor, and Saggese have agreed that said initial expert disclosure is currently
27 stayed pursuant to that Administrative Order. The attorneys have also discussed the fact that if
28 this Court denies Saggese's motion for any reason other than mootness, a new discovery
schedule would have to be put in place and the current trial date and deadlines would have to be
extended. Tomscheck would have no objection to that if his summary judgment motion is
denied.

1 discretion to prevent Tomsheck from doing Rule 56(d) Discovery relative to the Saggese issues at
2 this time. Accordingly, in addition to the arguments concerning the absolute viability of
3 Tomsheck's contribution claim at this stage, this Court should deny Saggese's motion for summary
4 judgment pursuant to NRCP 56(d).

5 **D. This Court can deny Saggese's motion in its entirety as being moot**
6 **because Tomsheck is entitled to summary judgment against Beavor due**
7 **to the impermissible assignment of Beavor's legal malpractice claim to**
8 **Hefetz, as well as the running of the statute of limitation of that claim**
9 **against Tomsheck**

10 Tomsheck filed his motion for summary judgment on Beavor's claims on March 9, 2020. It
11 is set for hearing on May 7, 2020 – the same date as the hearing on Saggese's motion. Tomsheck
12 hereby incorporates by reference the arguments and exhibits set forth therein. To summarize those
13 arguments, Beavor impermissibly assigned both the proceeds and control over his lawsuit against
14 Tomsheck to Beavor's former adversary, Hefetz. That assignment violates Nevada law and
15 compels summary judgment against Beavor. *See Tower Homes, LLC v. Heaton*, 132 Nev. 628, 377
16 P.3d 118 (2016).

17 Additionally, Beavor and Tomsheck contractually waived the litigation malpractice tolling
18 rule by entering into their separate tolling agreement which was tied specifically to the date of the
19 outcome of Supreme Court Case No. 68438 (c/w 68843). Pursuant to their legal and enforceable
20 written agreement, Beavor agreed that the statute of limitation for any legal malpractice claim he
21 might have against Tomsheck would expire on or before September 26, 2018. Beavor waited until
22 April 23, 2019 to file his legal malpractice lawsuit against Tomsheck, however. Pursuant to their
23 written tolling agreement and NRS 11.207, Beavor's lawsuit was untimely. Tomsheck is entitled to
24 summary judgment as a result.

25 If this Court grants Tomsheck's motion on either basis (or even both), Saggese's motion
26 would be rendered moot. Therefore, this Court can deny Saggese's motion as moot by applying
27 compelling Nevada precedent and granting Tomsheck's motion for summary judgment.

28 **IV.**

CONCLUSION

Saggese was properly served with the third-party complaint, well within the time frame

1 afforded by NRCP 4. He was served through both the letter and spirit of NRS 14.090. He has
2 obvious notice of the claim against him and has held such knowledge for months. His motion to
3 quash or dismiss pursuant to NRCP 12(b)(4) must be denied.

4 Saggese's failure to assert the one-action rule as a defense in the underlying *Hefetz v.*
5 *Beavor* litigation is presumed to be (and the evidence shows actually was) the proximate cause of
6 all of the damages Beavor is trying to exact from Tomsheck. This court must treat these factual
7 allegations as true at this stage. Furthermore, Nevada law does not prohibit Tomsheck from
8 seeking contribution from Saggese under the facts of this case. Far to the contrary, NRS 17.225
9 expressly allows for that contribution claim because the damages Beavor is seeking from
10 Tomsheck are the exact damages Saggese caused. Saggese's motion to dismiss/motion for
11 summary judgment must be denied.

12 Next, Tomsheck is entitled to conduct Discovery on the very issues raised by Saggese's and
13 Beavor's uncorroborated affidavits at this time. Tomsheck has made a proper Rule 56(d) request,
14 and it would be an abuse of discretion for this court to grant Saggese's motion in the face of that
15 Rule 56(d) request. Saggese's motion for summary judgment must be denied on those grounds as
16 well.

17 Finally, Saggese's motion can be denied as moot if this Court grants Tomsheck's pending
18 motion for summary judgment.

19 WHEREFORE, JOSHUA TOMSHECK respectfully requests that this Court enter an Order
20 denying Saggese's motion in its entirety for any of the reasons stated herein.

21 DATED this 23rd day of April, 2020.

22 OLSON CANNON GORMLEY
23 & STOBERSKI

24 /s/ Max E. Corrick, II
25 MAX E. CORRICK, II
26 Nevada Bar No. 6609
27 9950 West Cheyenne Avenue
28 Las Vegas, NV 89129
Attorneys for Defendant/Third-Party
Plaintiff JOSHUA TOMSHECK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of April, 2020, I sent via e-mail a true and correct copy of the above and foregoing **DEFENDANT/THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK'S OPPOSITION TO THIRD-PARTY DEFENDANT MARC SAGGESE'S MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT, AND TOMSHECK'S REQUEST FOR NRCP 56(d) RELIEF** on the Clark County E-File Electronic Service List (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

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& STOBERSKI

EXHIBIT A

DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual,

Plaintiff,

vs.

CASE NO.
A-19-793405-C

JOSHUA TOMSHECK, an individual;
DOES I-X, inclusive,

Defendants.

///

DEPOSITION OF JOSHUA TOMSHECK, ESQ.

Taken at the offices of The Barnabi Law Firm, PLLC

on Monday, March 9, 2020

at 11:13 a.m.

at 375 East Warm Springs Road, Suite 104
Las Vegas, Nevada

Reported by: Denise R. Kelly, CCR #252, RPR

1 JOSHUA TOMSHECK, an individual;
2 Third-Party Plaintiff,
3 vs.
4 MARC SAGGESE, ESQ., an individual,
5 Third-Party Defendant.
6 _____/

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1 APPEARANCES:

2 For the Plaintiff:

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Also present:

CHRISTOPHER BEAVOR
MARC SAGGESE

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25

INDEX

| WITNESS | PAGE |
|----------------------------|------|
| JOSHUA TOMSHECK, ESQ. | |
| Examination by Mr. Barnabi | 9 |

INFORMATION TO BE SUPPLIED

None

EXHIBITS

| DESCRIPTION | PAGE |
|--|------|
| Exhibit 1 - Complaint | |
| Case No. A-19-793405-C | 14 |
| Exhibit 2 - Joshua Tomsheck's Answer | |
| and Third-Party Complaint | |
| Case No. A-19-793405-C | 16 |
| Exhibit 3 - Lawyer-Client Retainer | |
| Agreement | |
| JT000709-711 | 16 |
| Exhibit 4 - Notice of Entry of Judgment, | |
| dated 5/21/13 | |
| Case No. A-11-645353-C | 18 |

| | | |
|----|--|------|
| 1 | EXHIBITS (CONTINUED) | |
| 2 | DESCRIPTION | PAGE |
| 3 | Exhibit 5 - Motion for New Trial or | |
| 4 | in the Alternative Motion | |
| 5 | for Judgment Notwithstanding | |
| 6 | Verdict | |
| 7 | Case No. A-11-645353-C | |
| 8 | JT000017-26 | 19 |
| 9 | Exhibit 6 - Defendant Christopher Beavor's | |
| 10 | Opposition to Plaintiff's | |
| 11 | Motion for New Trial or | |
| 12 | in the Alternative Motion | |
| 13 | for Judgment Notwithstanding | |
| 14 | Verdict | |
| 15 | Case No. A-11-645353-C | 20 |
| 16 | Exhibit 7 - Reply to Defendant | |
| 17 | Christopher Beavor's | |
| 18 | Opposition to Plaintiff's | |
| 19 | Motion for New Trial or | |
| 20 | in the Alternative Motion | |
| 21 | for Judgment Notwithstanding | |
| 22 | Verdict | |
| 23 | Case No. A-11-645353-C | 25 |
| 24 | Exhibit 8 - Court Minutes, dated 8/7/13 | |
| 25 | Case No. A-11-645353-C | 28 |

| 1 | EXHIBITS (CONTINUED) | |
|----|---|------|
| 2 | DESCRIPTION | PAGE |
| 3 | Exhibit 9 - Notice of Entry of Order, | |
| 4 | dated 9/9/13 | |
| 5 | Case No. A-11-645353-C | 31 |
| 6 | Exhibit 10 - Defendant Christopher | |
| 7 | Beavor's Motion for | |
| 8 | Reconsideration | |
| 9 | Case No. A-11-645353-C | 31 |
| 10 | Exhibit 11 - Opposition to Defendant's | |
| 11 | Motion for Reconsideration | |
| 12 | Case No. A-11-645353-C | 36 |
| 13 | Exhibit 12 - Court Minutes, dated 9/26/13 | |
| 14 | Case No. A-11-645353-C | 41 |
| 15 | Exhibit 13 - Transcript of Proceedings, | |
| 16 | dated 9/26/13 | |
| 17 | Case No. A-11-645353-C | 42 |
| 18 | Exhibit 14 - Email, dated 9/26/13 | |
| 19 | SAG000514-515 | 47 |
| 20 | Exhibit 15 - Notice of Entry of Order, | |
| 21 | dated 11/15/13 | |
| 22 | Case No. A-11-645353-C | 53 |
| 23 | /// | |
| 24 | /// | |
| 25 | /// | |

| 1 | EXHIBITS (CONTINUED) | |
|----|---|------|
| 2 | DESCRIPTION | PAGE |
| 3 | Exhibit 16 - Defendant Christopher | |
| 4 | Beavor's Motion for | |
| 5 | Stay of Proceedings | |
| 6 | Case No. A-11-645353-C | 54 |
| 7 | Exhibit 17 - Court Minutes, dated 1/7/14 | |
| 8 | Case No. A-11-645353-C | 56 |
| 9 | Exhibit 18 - Petition for Writ of | |
| 10 | Mandamus | |
| 11 | Docket 65656 | 58 |
| 12 | Exhibit 19 - Order Denying Petition | |
| 13 | for Writ of Mandamus | |
| 14 | Docket 65656 | 61 |
| 15 | Exhibit 20 - Email, dated 9/16/14 | |
| 16 | SAG000011 | 66 |
| 17 | Exhibit 21 - Notice of Motion to | |
| 18 | Withdraw as Counsel | |
| 19 | for Defendant Christopher | |
| 20 | Beavor | |
| 21 | Case No. A-11-645353-C | 70 |
| 22 | Exhibit 22 - Court Minutes, dated 11/5/14 | |
| 23 | Case No. A-11-645353-C | 71 |
| 24 | /// | |
| 25 | /// | |

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| EXHIBITS (CONTINUED) | | |
|----------------------|---|------|
| | DESCRIPTION | PAGE |
| | Exhibit 23 - Joshua Tomsheck, Esq.'s Responses to Plaintiff's First Set of Requests for Admissions Case No. A-19-793405-C | 90 |
| | Exhibit 24 - Joshua Tomsheck, Esq.'s Responses to Plaintiff's First Set of Interrogatories Case No. A-19-793405-C | 91 |

1 LAS VEGAS, NEVADA, MONDAY, MARCH 9, 2020,

2 11:13 A.M.

3 * * * * *

4
5 JOSHUA TOMSHECK, ESQ.,
6 having been first duly sworn, was
7 examined and testified as follows:

8
9 (Prior to the commencement of
10 the deposition, all counsel
11 present agreed to waive
12 statements by the court
13 reporter pursuant to
14 Rule 30(b)(4) of the NRC.P.)

15
16 EXAMINATION

17 BY MR. BARNABI:

18 Q. Thanks for being here today, Mr. Tomsheck.
19 We are here in regards to your deposition
20 noticed in the Beavor versus Tomsheck case, Case No.
21 A-19-793405-C.

22 Have you ever had your deposition taken
23 before?

24 A. I have.

25 Q. May I ask how many times?

1 A. Don't know. At least one that I can
2 recall.

3 Q. Have you taken depositions before?

4 A. I have.

5 Q. About how many?

6 A. Not a clue.

7 Q. More than 50?

8 A. No.

9 Q. So between 25 and 40?

10 A. Could be.

11 Q. Are you familiar with the rules?

12 A. I am.

13 Q. Would you like me to go over them?

14 A. I think I've got them. Thank you.

15 Q. I think you probably would.

16 Is there any reason why today you couldn't
17 provide your best testimony?

18 A. None whatsoever.

19 Q. Are you under the influence of any
20 medications, drugs, prescription or otherwise, that
21 might influence your testimony today?

22 A. I am not.

23 Q. Are you aware that you under oath?

24 A. I am.

25 Q. As if you were in front of a court of law?

1 A. Completely understand.

2 Q. Did you prepare for today's deposition?

3 A. Not really.

4 Q. Did you review any documents?

5 A. A few.

6 Q. May I ask what those were?

7 A. The Complaint, Answer, Third-Party
8 Complaint, discovery responses.

9 Q. And those discovery responses, could you
10 tell me their approximate date?

11 A. Not without looking at them.

12 Q. Were those discovery responses served in I
13 believe it was January of this year, do you recall?

14 A. My attorney would know better than I.

15 Q. Okay.

16 A. Sounds right.

17 Q. We will go over them as we go through the
18 case.

19 Would you provide your educational
20 background starting from college.

21 A. I have a Bachelor's degree from
22 St. Ambrose University in Davenport, Iowa, with a
23 major in finance and a minor in economics.

24 Q. What year?

25 A. December of 1999.

1 I graduated from Drake Law School in 2004.

2 Q. Would you say that law school again,
3 please.

4 A. Drake, D-r-a-k-e, in Des Moines, Iowa.

5 Q. Did you take the Bar in Iowa?

6 A. I did not.

7 Q. Where have you taken the Bar exam?

8 A. Nevada.

9 Q. Are you only licensed to practice in
10 Nevada?

11 A. That is correct.

12 Q. And could you describe your employment
13 currently?

14 A. I'm a criminal defense attorney.

15 Q. And the firm you work for?

16 A. Hofland & Tomscheck.

17 Q. And how long have you been with Hofland &
18 Tomscheck?

19 A. Since May of 2011.

20 Q. Let me back up a moment.

21 What year did you receive your license to
22 practice in Nevada?

23 A. I think I received my license in January
24 of 2005.

25 Q. And were you employed during that time in

1 2005?

2 A. I was.

3 Q. And with whom?

4 A. I was an associate. At the time the firm
5 was Hofland & Manning, it's my current partner now,
6 Bradley Hofland, until March of 2005. Then I went to
7 work for the Clark County District Attorney's office.

8 Q. How long did you work for the Clark County
9 DA's office?

10 A. Until May of 2011.

11 Q. And where were you employed after May of
12 2011?

13 A. Same place I am now.

14 Q. So there has been no breaks in employment
15 then?

16 A. Correct.

17 Q. Okay. And you mentioned that you do
18 criminal defense work?

19 A. Primarily, yes.

20 Q. What other areas do you practice in?

21 A. Occasionally personal injury. There may
22 be an outlier here or there of other types of
23 practice, but it's predominantly criminal defense.

24 Q. So you do some PI. Are there some areas
25 that you also occasionally delve into?

1 A. Not with any consistency, no.

2 Q. What are those areas? I know you said you
3 are not consistent with other areas, but what are
4 those other areas that you are not consistently in?

5 A. I couldn't tell you. I mean, my practice
6 is criminal defense. If someone asked me to do a
7 favor and help them out with a case, I may. Recently
8 did a breach of contract case. But that would be far
9 from the norm.

10 Q. Okay. So you mentioned that you reviewed
11 the Complaint that was filed in this matter in
12 preparation of your deposition today; is that correct?

13 A. Summarily.

14 Q. What do you mean by "summarily"?

15 A. Just glanced through it. I've read it in
16 the past.

17 Q. Okay. We will take a look at that first
18 right now. We will mark as Exhibit 1 the Complaint
19 filed on April 23rd, 2019 filed in this matter.

20 (Deposition Exhibit 1 marked.)

21 BY MR. BARNABI:

22 Q. You have the Complaint filed as Exhibit 1
23 in front of you; is that correct?

24 A. I do.

25 Q. So let's start at around the general

1 facts. Now, in regards to this matter, do you recall
2 when you were -- let me back up.

3 In this matter you were retained by
4 Mr. Beavor; is that correct?

5 A. I was.

6 Q. And do you recall about what time that
7 was?

8 A. June of 2013.

9 Q. How did you come into the case? Let me
10 give you a better question.

11 Were you referred this matter by another
12 individual?

13 A. I was.

14 Q. And whom was that?

15 A. Marc Saggese.

16 Q. And how did that start?

17 A. Mr. Saggese and I have known each other
18 for years. He contacted me and indicated he had tried
19 a case to a jury verdict and there was a Motion for a
20 New Trial. It was making certain allegations
21 concerning him and things that he had done during
22 trial.

23 And he asked if I could help him out and
24 file the Opposition to that Motion for a New Trial.

25 Q. And just so we can all reference them

1 together, I'll give you what we will mark as
2 Exhibit 2. And that will be the Answer and
3 Third-Party Complaint filed in this matter on
4 May 16th, 2019.

5 (Deposition Exhibit 2 marked.)

6 MR. BARNABI: And we will also mark
7 Exhibit No. 3, which is the Lawyer-Client Retainer
8 Agreement dated June 18th of 2013.

9 (Deposition Exhibit 3 marked.)

10 MR. CORRICK: And just so the record is
11 clear, you've attached to Exhibit 3 a copy of the
12 credit card receipt.

13 MR. BARNABI: Yes, that's correct.

14 MR. CORRICK: And it's JT000711 is what
15 has been added to the Lawyer-Client Retainer
16 Agreement.

17 MS. HUMMEL: I'm sorry. Do you have an
18 additional copy of Exhibit 3?

19 MR. BARNABI: Let's take a break.

20 (Brief pause in the proceedings.)

21 BY MR. BARNABI:

22 Q. So in regards to your representation, you
23 mentioned that it's your recollection that you were
24 retained by Mr. Beavor in June of 2013?

25 A. Correct.

1 Q. And Exhibit 3, which we've had marked,
2 entitled Lawyer-Client Retainer Agreement, does that
3 agreement refresh your recollection as to the
4 agreement that was executed by you and Mr. Beavor in
5 regards to that representation?

6 A. I don't know that I needed my recollection
7 refreshed as to it, but that is the agreement.

8 Q. And so it mentions in the first page under
9 the Scope of Services, that you were going to provide
10 representation as the Opposition for the Motion for a
11 New Trial; is that correct? It's in section
12 paragraph 2.

13 A. Do you want it verbatim? I think it
14 speaks for itself.

15 Q. No, I wasn't asking verbatim. But that
16 was at that point in time your scope of
17 representation?

18 A. Correct.

19 Q. Okay. And did you end up filing an
20 Opposition?

21 A. I did.

22 Q. Let me back up.

23 I'll back up a little bit. You mentioned
24 that you had had discussions with Mr. Saggese in
25 regards to your representing Mr. Beavor and

1 specifically filing an opposition to the motion
2 mentioned in Exhibit 3.

3 A. I think it's pronounced Saggese.

4 Q. Saggese. Sorry.

5 A. He could probably tell us best, but that's
6 how I've always said it.

7 Yes, I did have conversations with him
8 about that.

9 Q. Did he provide you a copy of the Judgment
10 that was filed in that matter?

11 A. I do not know. I don't recall. May have.
12 May not have. No idea.

13 MR. BARNABI: We will have marked as
14 Exhibit 4 the Notice of Entry of Judgment from what
15 I'll refer to as the underlying case, Hefetz versus
16 Beavor, Case No. A-11-645353-C.

17 (Deposition Exhibit 4 marked.)

18 BY MR. BARNABI:

19 Q. Mr. Tomsheck, do you recall seeing this
20 document?

21 A. I don't. But that certainly doesn't mean
22 I didn't. I have no independent recollection of
23 seeing it, but I certainly may have.

24 MR. BARNABI: We will have marked as
25 Exhibit 5 the Motion for New Trial or In The

1 Alternative Motion for Judgment Notwithstanding
2 Verdict that was filed in the underlying case.

3 (Deposition Exhibit 5 marked.)

4 MR. CORRICK: For the record, Exhibit 4
5 does not appear to have any Bates stamp markings on
6 it, but I imagine you took this from public record.
7 So I don't have any objection with respect to that.

8 Exhibit 5, the Motion for New Trial does
9 have Bates range JT000017 through 26.

10 MR. BARNABI: And Exhibit 5 is without the
11 exhibits as well.

12 BY MR. BARNABI:

13 Q. Mr. Tomsheck, have you had a moment to
14 look at Exhibit 5, the motion mentioned?

15 A. I have.

16 Q. And is that the motion for which you were
17 asked to file an opposition to?

18 MR. CORRICK: And again, Counsel, per your
19 representation to the extent it doesn't have the
20 exhibits.

21 MR. BARNABI: Yes.

22 THE WITNESS: It appears to be, yes.

23 BY MR. BARNABI:

24 Q. And did you end up filing opposition to
25 that motion?

1 A. I did.

2 MR. BARNABI: We will have marked as
3 Exhibit 6, Christopher Beavor's Opposition to the
4 Plaintiff's Motion for New Trial or In The Alternative
5 Motion for Judgment Notwithstanding the Verdict from
6 the underlying case.

7 (Deposition Exhibit 6 marked.)

8 MR. CORRICK: And for the record, what we
9 had marked as Exhibit 6 is not a Bates stamped
10 version. I do believe that we have in fact produced
11 this in the litigation. And I note on the last two
12 pages of Exhibit 6 you have fax transmittal cover
13 sheets indicating the document was faxed to
14 Stan Johnson and to Brian Morris by Mr. Tomsheck.

15 Again, I don't believe that you would have
16 gotten the last two documents from the public record.
17 But, nevertheless, I don't have any objection to you
18 asking questions with respect to this.

19 MR. BARNABI: With respect to your
20 comments, I believe it was from the public record.
21 But we will probably end up producing the entirety of
22 the document notwithstanding.

23 MR. CORRICK: I appreciate that, Counsel.
24 I'm just making sure that there aren't going to be any
25 documents that are being used as documents in this

1 deposition which have not been previously produced by
2 any of the parties in the case up to this point. But
3 by all means, you can go ahead and ask Mr. Tomsheck
4 any questions you have with respect to this document.

5 MR. BARNABI: Very well.

6 BY MR. BARNABI:

7 Q. Mr. Tomsheck, I believe you mentioned that
8 Exhibit 6 was the Opposition that you filed in regards
9 to the representation of Mr. Beavor; is that correct?

10 A. Correct.

11 Q. In regards to your Opposition as filed,
12 what did you identify as the arguments made in
13 opposition?

14 MR. CORRICK: I'm going to object to the
15 form. The document speaks for itself.

16 But you can go ahead and answer the
17 question.

18 THE WITNESS: There were ultimately a
19 number of different arguments raised. In this
20 particular document the issue that was raised was
21 timeliness of the Motion for New Trial.

22 BY MR. BARNABI:

23 Q. What did you believe, if you can recall,
24 what was your argument in regard to the timeliness of
25 the motion?

1 A. It wasn't just my argument. There was a
2 Motion for New Trial filed. Mr. Saggese contacted me
3 and made specific representations about his feelings
4 about the Court in the case, and that there was
5 allegations that he had made comments that were, I
6 think the way he put it was anti-Semitic. He didn't
7 agree with that assessment; nor did I, frankly. But
8 that's what his belief was that the Court had
9 believed. And those were the issues raised in the
10 Motion for a New Trial.

11 When I was retained, it was after talking
12 to Mr. Saggese and after talking to Mr. Beavor, who
13 had provided a number of points in writing to me
14 regarding his thoughts on the timeliness of the Motion
15 for New Trial.

16 I then had conversations with opposing
17 counsel about that stance. And based on the totality
18 of those things, filed the opposition as you see in
19 front of you.

20 Q. So those conversations that you mentioned
21 raised anti-Semitic comments or any other issues, did
22 you raise those in the Opposition?

23 A. I raised them eventually in front of the
24 Court. And this particular Opposition, the issue we
25 agreed to file the Opposition on was related to

1 timeliness only; with a caveat and a footnote that if
2 the Court wanted further briefing, then we would
3 provide it.

4 And I had that same discussion with
5 opposing counsel and that was our agreement; that if
6 the Court wanted argument on the merits, we would be
7 allowed to provide that.

8 Q. Now, you mentioned that there is an
9 agreement between you, Mr. Beavor, and are you
10 referring to Mr. Saggese also that you would only file
11 in regards to timeliness and then reserve?

12 A. I discussed that issue with all of them.
13 Mr. Beavor and I had specific discussions both
14 verbally and in writing that's what we were going to
15 do. But more specifically, I had conversations with
16 opposing counsel about filing the Opposition as you
17 see it in Exhibit 6.

18 Q. And that opposing counsel, to whom are you
19 referring?

20 A. Brian Morris.

21 Q. And could you tell me what specific
22 conversations or the content of the specific
23 conversations that you had with Mr. Morris?

24 A. Sure. And they are referenced throughout
25 the pleadings as well.

1 I spoke to Mr. Morris upon being retained
2 in the case, because I had a preexisting relationship
3 with him and knew him both personally and
4 professionally. I said, "Hey, I have been retained
5 for this limited purpose. In talking to my client, it
6 appears to me as if you are untimely in your Motion
7 for New Trial."

8 We discussed that in detail. He agreed
9 with me. And I let him know that our thought process
10 was if it was untimely, it was untimely, and the Court
11 wouldn't have jurisdiction to decide anything over it.
12 That we would file an Opposition in that vein. And if
13 the Court wanted further briefing or argument on the
14 merits, then we would address those substantively at
15 the Court's request.

16 And I put that in the motion with a
17 footnote, and told him I would be doing exactly that,
18 and that was our agreement, that he specifically would
19 not oppose that.

20 Q. And did you put that agreement to writing
21 with Mr. Morris?

22 A. I did not.

23 Q. So it was basically just a verbal
24 agreement that if the Court believed that you were
25 correct on the timeliness issue, that other -- excuse

1 me, let me back up.

2 So your agreement with Mr. Morris, just so
3 I could characterize it correctly, is if the Motion
4 for New Trial was untimely, that it would basically be
5 withdrawn; is that correct?

6 A. I'm not understanding your question at
7 all.

8 Q. So in regards to the -- well, you
9 mentioned that the agreement about supplemental
10 briefing, it wasn't reduced to writing with
11 Mr. Morris, right?

12 A. That's true.

13 Q. Okay. And were there any emails that
14 confirmed the agreements?

15 A. No. Just telephone call.

16 Q. And they filed a reply; is that correct?

17 A. They did.

18 Q. And we'll have the reply entered in and
19 filed in the underlying matter as Exhibit 7.

20 (Deposition Exhibit 7 marked.)

21 MR. CORRICK: Once again, Counsel, just
22 for the record, Exhibit 7 is not Bates stamped. But
23 to the extent you may have taken this from the public
24 record, I don't have any objection to you asking
25 questions about it.

1 MR. BARNABI: Yes, it was from the public
2 record.

3 BY MR. BARNABI:

4 Q. So, Mr. Tomsheck, does this reply, does
5 this look like the one that was filed in response to
6 the opposition in support of the Motion for a New
7 Trial?

8 A. Appears to be.

9 Q. And in regards to that reply, was it your
10 anticipated -- were you anticipating that they would
11 not be arguing the timeliness of the -- the timeliness
12 argument that you submitted your opposition on?

13 A. They would not be arguing the timeliness?

14 Q. Right.

15 A. Well, we raised the issue of timeliness.

16 Q. Let me back up and ask you a better
17 question.

18 So in the reply -- have you had a moment
19 to look at it?

20 A. Sure.

21 Q. They state or counsel for Mr. Hefetz at
22 the time, he mentioned that, he described that the
23 Motion for New Trial that had been filed was timely
24 based on their calculations; is that correct?

25 A. What they're stating in this document?

1 Q. Yes.

2 A. The document is what it is. Do you want
3 to refer me to a page and line?

4 Q. Is that your understanding, that they were
5 disputing the timeliness argument that you had raised?

6 A. Yes.

7 Q. And so this matter was their oral argument
8 on the motions and opposition and the reply?

9 A. It was not.

10 Q. And did you submit any other briefing in
11 support of your opposition during that time?

12 A. In support of my briefing?

13 Q. Did you file any additional documents
14 opposing the Motion for New Trial?

15 A. Eventually, yes.

16 Q. Well, during this timeframe up until the
17 reply, had you filed any additional documents in
18 support of the opposition that you filed?

19 A. No.

20 Q. Okay. And so the matter was heard in
21 chambers then?

22 A. I don't think it was heard. I think it
23 was decided in chambers.

24 Q. And did you get a copy of the Court
25 minutes?

1 A. At some point thereafter. It was not
2 provided to me by the Court.

3 MR. BARNABI: We will have marked as
4 Exhibit 8 the Court minutes from the underlying
5 matter, dated August 7th, 2013.

6 (Deposition Exhibit 8 marked.)

7 MR. CORRICK: Again, Counsel, for the
8 record, Exhibit 8 has been produced without Bates
9 stamps. Again, I believe we would represent that this
10 was something that was taken from the public record.
11 And, therefore, at this point in time I'm not going to
12 object to you asking him questions about it.

13 MR. BARNABI: Very well.

14 BY MR. BARNABI:

15 Q. So, Mr. Tomsheck, do you recall when you
16 first received these, the Court minutes that's been
17 marked as Exhibit 8?

18 A. I don't recall a specific date.

19 Q. Do you believe it would have been sometime
20 around August of 2013?

21 A. Probably would have been late August.

22 Q. And it mentions in the minutes, it's a
23 line underneath the journal entries, I'll just read it
24 into the record. It says:

25 "Upon review of all the papers and

1 pleadings on file in this matter, Court notes
2 Defendant's opposition only addressed the
3 timeliness of Plaintiff's Motion for New
4 Trial and Defendant's were incorrect as to
5 the proper procedure pursuant to EDCR."

6 Now at that time did you have any
7 conversations with Mr. Beavor in regards to what the
8 Court had ruled?

9 A. At what time?

10 Q. In late August of 2013 when you believe
11 you may have seen these minutes?

12 A. I think the first time I saw these
13 minutes, I think they were provided to me by
14 Mr. Saggese's office upon request because we hadn't
15 received them.

16 My recollection is that we happened to
17 notice at some point in August that there had been a
18 status check set and requested the minutes. And they
19 were provided to us I think probably a day before that
20 status check, if I had to guess.

21 But when I became aware that the motion
22 had been granted, I had conversations with Mr. Saggese
23 and Mr. Beavor.

24 Q. And if you can recall, what were the
25 content of those conversations?

1 A. That the Court had decided in the fashion
2 that it had, that I thought it was incorrect, and we
3 would be filing a Motion to Reconsider.

4 Q. Did it ever come up in those conversations
5 that perhaps that more than just the timeliness
6 argument should have been raised in the Opposition?

7 A. No. With Mr. Beavor?

8 Q. With those conversations with Mr. Beavor
9 or Mr. Saggese?

10 A. Potentially with Mr. Saggese. I don't
11 remember the specifics of those conversations. But
12 not with Mr. Beavor.

13 Q. And during those course of conversations,
14 was there any outcome or goal that was set by the
15 parties of what was going to happen next?

16 A. We were going to file a Motion to
17 Reconsider.

18 Q. And did you end up filing a Motion for
19 Reconsideration?

20 A. We did.

21 Q. But before that time, the order was
22 entered in regards to the Motion for a New Trial; is
23 that correct?

24 A. I don't know.

25 MR. BARNABI: We will have marked into the

1 record as Exhibit 9 the Notice of Entry of Order,
2 filed on September 9th, 2013 in the underlying case.

3 (Deposition Exhibit 9 marked.)

4 MR. CORRICK: And, Counsel, same as
5 before, the document you've attached as Exhibit 9 is
6 not Bates stamped, but I imagine that you would have
7 taken this from the public record. And, therefore, at
8 this point, I'm not going to object to any questioning
9 on this document.

10 MR. BARNABI: Very well.

11 BY MR. BARNABI:

12 Q. In regards to Exhibit 9, Mr. Tomsheck,
13 based on your recollection, does that reflect the
14 Notice of Entry of Order that was entered in regards
15 to the Motion for New Trial?

16 A. It's what it says.

17 Q. And in that order was -- strike that.
18 So you mentioned that you did file a
19 Motion for Reconsideration; is that correct?

20 A. Yes.

21 MR. BARNABI: We will have marked into the
22 record as Exhibit 10 the Motion for Reconsideration
23 filed in the underlying case on August 28th of 2013.

24 (Deposition Exhibit 10 marked.)

25 MR. CORRICK: Counsel, do you have one for

1 me?

2 MR. BARNABI: Oh, yes.

3 MR. CORRICK: Thank you.

4 BY MR. BARNABI:

5 Q. Mr. Tomsheck --

6 MR. CORRICK: One second. Hold on.

7 I apologize, Counsel. So again with
8 Exhibit 10, this document has not been provided with
9 Bates stamps. I presume that you have taken this from
10 the public record. And, therefore, at this point in
11 time, I'm not going to object to you asking any
12 questions with respect to it.

13 MR. BARNABI: Very well.

14 BY MR. BARNABI:

15 Q. Mr. Tomsheck, was this the Motion for
16 Reconsideration that you were referring to a moment
17 ago?

18 A. Yes.

19 Q. And in this Motion for Reconsideration,
20 you did mention the agreement that you referred to
21 with Mr. Morris; is that correct?

22 A. Yes.

23 Q. And could you -- I know I asked you
24 before, could you describe again what the agreement
25 was with Mr. Morris that you were trying to convey to

1 the Court in this Motion for Reconsideration?

2 A. Different than what is actually written in
3 the document?

4 Q. Yes. As you sit here today.

5 A. I can read it. Do you want me to read it?

6 Q. If you need to be familiar with the
7 document, take some time if you need to.

8 A. I don't. You're asking me if this
9 document discusses the agreement. Yes, it does. It's
10 on page 4.

11 Q. And could you tell me what that agreement
12 was with Mr. Morris?

13 A. Sure. I contacted him according to this
14 on June 20th, which would be consistent with when the
15 Opposition and Motion for New Trial was filed.

16 I discussed it with him. He agreed with
17 me that the motion appeared to be time barred and
18 indicated that he would have to talk to his
19 supervisor, who was Stan Johnson. And if in fact
20 Mr. Johnson agreed with him, he believed that they
21 would withdraw the motion.

22 I indicated to him that I would file the
23 Opposition as we had discussed, including the footnote
24 that I testified to you about earlier. And then I
25 filed the opposition.

1 Thereafter, if you continue on to page 5
2 of the motion, he contacted me. He indicated he had
3 reviewed the calendar and spoke to Mr. Johnson. And
4 he was then of the opinion that the motion had been
5 timely filed.

6 I told him I had already filed the
7 Opposition based on our earlier conversation. And we
8 discussed that if the Court wanted further briefing,
9 we would provide it.

10 And he indicated to me that he would have
11 no objection to me doing so. It was after that
12 conversation that he filed, that Mr. Johnson filed the
13 reply.

14 Q. And during that conversation with
15 Mr. Morris, after he got back to you after he had
16 spoken to Mr. Johnson, did you offer to supplement
17 your then filed Opposition to include any further
18 arguments?

19 A. We discussed it. We talked about the fact
20 that I had put in the opposition that if the Court
21 wanted briefing, further briefing, that it would be
22 provided. And he said he would have no objection to
23 that if that was the Court's instruction.

24 Q. But did you specifically ask if you could
25 supplement your opposition prior to the hearing on the

1 motion?

2 A. Ask who?

3 Q. Mr. Morris?

4 A. As I just mentioned, we discussed that in
5 the Opposition. I had included language that if the
6 Court wanted further briefing on the merits, it would
7 be provided, and his stance was that they would not
8 object to that.

9 Q. But you didn't have any intention to
10 supplement the Opposition prior to the motion being
11 heard?

12 A. The motion was never heard.

13 Q. Heard in chambers?

14 A. It wasn't heard in chambers either. It
15 was decided in chambers.

16 Q. Well, decided in chambers. There was --
17 let me back up.

18 So you did not supplement your Opposition
19 prior to the Motion for New Trial being heard in
20 chambers?

21 A. Nothing was heard in chambers.

22 Q. Excuse me. You did not supplement your
23 Opposition prior to the matter being considered in
24 chambers?

25 A. I don't know when it was first considered

1 in chambers. Looking backwards, we certainly know
2 when it was decided and when that minute order issued.
3 But did I supplement it prior to that? No.

4 Q. Okay. Very well.

5 MR. BARNABI: We will have entered in as
6 Exhibit 11 the opposition to the Motion for
7 Reconsideration filed in the underlying case on
8 September 17th, 2013.

9 (Deposition Exhibit 11 marked.)

10 MR. CORRICK: Just again for the record,
11 what you have had marked as Exhibit 11 has been
12 provided without Bates stamps. I presume this is
13 something that you took from the public record. And,
14 therefore, I'm not going to object to you asking any
15 questions with respect to this document.

16 MR. BARNABI: Very well.

17 BY MR. BARNABI:

18 Q. Mr. Tomsheck, do you recall this
19 Opposition being filed in the underlying case?

20 A. I do.

21 Q. And in that Opposition, do you recall your
22 agreement with Mr. Morris being mentioned?

23 A. I do.

24 Q. And what do you recall?

25 A. That there is an affidavit attached as an

1 exhibit from Brian Morris.

2 Q. And that declaration, what do you recall
3 it saying?

4 A. What declaration?

5 Q. You said -- sorry. You said affidavit,
6 correct?

7 A. The document says affidavit.

8 Q. And what do you recall that affidavit
9 saying in regards to the agreement you mentioned
10 before with Mr. Morris?

11 A. Do you want me to read it?

12 Q. No. Just if you have any specific
13 recollections other than what it says.

14 A. Well, it's attached as Exhibit 3. And it
15 is written, what I would describe, as clearly in the
16 English language. If you want me to read it, I would
17 be happy to.

18 Q. No. Just if you have any independent
19 recollection like I mentioned.

20 A. I remember reading it. It says what it
21 says.

22 Q. So in paragraphs 11 through 13, it
23 mentions that Mr. Morris believed that there is an
24 error in the calculations for the deadlines.

25 Could you describe in your own words what

1 you believed that error was?

2 A. It doesn't say anything about Mr. Morris
3 in paragraphs 11 through -- did you say 16?

4 Q. His affidavit. Let me ask you a different
5 question.

6 When you calculated the time for them to
7 file their Motion for a New Trial, did you consider in
8 your calculation that there was a holiday,
9 specifically Memorial Day, during that timeframe?

10 A. In the original calculation, I don't
11 remember.

12 Q. Do you remember having any discussions
13 with Mr. Morris of what impact Memorial Day would have
14 on those calculations?

15 A. I remember initially discussing it. The
16 affidavit lays it out pretty clearly that on
17 June 20th of 2013, I spoke to Mr. Morris in a phone
18 call that I initiated. We talked about the date. He
19 agreed with me that they had a problem. That's at
20 paragraph 7. Thanked me for bringing it to his
21 attention.

22 I filed the opposition, as I discussed and
23 previously testified today. Thereafter, it appears as
24 if Mr. Morris spoke with Mr. Johnson, and Mr. Johnson
25 indicated there was an error in, as it says in the

1 affidavit, in Mr. Tomsheck's calculations. That this
2 was an issue that both me and Mr. Morris had arrived
3 at together, which was prompted on written
4 communication from Mr. Beavor that it was his position
5 that their motion was untimely.

6 I then filed the motion. He spoke to me
7 later. Indicated he had talked to Mr. Johnson, as I
8 just described. And that in his affidavit he says
9 that Mr. Tomsheck did not account for Memorial Day in
10 his calculations. That is what is contained within
11 the affidavit.

12 Q. But your position was still that you had
13 calculated the time to file the -- your calculations
14 to file the Motion for New Trial was still not timely,
15 that was still your position?

16 A. After talking to Mr. Morris, we had
17 decided that the opposition had been filed with the
18 inclusion that we could provide supplemental briefing
19 on the merits if the Court wanted it, and that I
20 wasn't going to file anything further. That was an
21 agreement between us.

22 And that if the Court wanted further
23 briefing, they would have no opposition to me
24 providing it.

25 Q. So when Mr. Morris states in paragraph 18

1 and he says:

2 "That I agreed that we would follow
3 the Court's guidance should additional
4 briefing be requested by the Honorable Court
5 (sic), but that the motion was most
6 definitely filed on time."

7 Is that statement accurate in regards to
8 the conversation you had?

9 A. That statement is accurate in that the way
10 it was conveyed to me wasn't that Mr. Morris would
11 follow the Court's guidance should additional briefing
12 be requested. He said, "Hey, I don't have an
13 opposition to it. I know you filed your Opposition
14 with us both believing that our motion was untimely.
15 If the Court asks for additional briefing, I don't
16 oppose it.

17 Q. And do you recall your Motion for
18 Reconsideration being heard?

19 A. I do.

20 Q. And do you recall about what time that
21 was?

22 A. I don't.

23 Q. When you filed your Motion for
24 Reconsideration, did you ask to have it heard by the
25 Court?

1 A. Yes. I believe so.

2 MR. BARNABI: And we will have entered in
3 as Exhibit 12 the Court minutes, dated September 26th
4 of 2013 in regards to the Motion for Reconsideration.

5 (Deposition Exhibit 12 marked.)

6 MR. CORRICK: Before you get started,
7 Counsel, again Exhibit 12 has been produced and
8 provided without Bates stamps. But I presume this was
9 taken from the Court's public record. Therefore, I
10 don't have any objection to you asking any questions
11 about this particular document.

12 MR. BARNABI: Thank you.

13 BY MR. BARNABI:

14 Q. So as memorialized in the Court minutes,
15 do you recall being present and arguing your Motion
16 for Reconsideration on September 26th of 2013?

17 A. If that was the date. I mean, I remember
18 being there and arguing.

19 Q. And could you state what your argument
20 essentially was to the Court the best you can recall?

21 A. It would be contained within the briefing
22 and the transcript. I don't remember what I said. I
23 believe there is a transcript and a recording of it,
24 however.

25 MR. BARNABI: And we will have marked as

1 Exhibit 13 the transcript from the September 26th,
2 2013 hearing on the Motion for Reconsideration.

3 (Deposition Exhibit 13 marked.)

4 MR. CORRICK: Counsel, after you get done
5 with this particular exhibit, we've been going for
6 almost an hour, if it would be a logical point just
7 take a break and then come back.

8 MR. BARNABI: Sure.

9 MR. CORRICK: For the record, Exhibit 13
10 is Bates stamped JT435 through JT449.

11 BY MR. BARNABI:

12 Q. Mr. Tomsheck, I believe you mentioned --
13 well, I asked if you had any specific recollection in
14 regards to the hearing on the Motion for Consideration
15 (sic) and you mentioned it was just contained in the
16 transcript and the briefings; is that correct?

17 A. The Motion for Reconsideration?

18 Q. Right.

19 A. Yes.

20 Q. And do you have any independent
21 recollection of what was argued at the time of that
22 motion?

23 A. I remember being there and arguing. I
24 don't remember what was said without reading it or
25 watching it.

1 Q. Did you argue about the timeliness --
2 timeliness arguments that were raised in the
3 Opposition to the Motion for New Trial?

4 A. I believe so.

5 Q. But you don't specifically recall what
6 your arguments were at the time of that hearing?

7 A. Do I recall what I said six-and-a-half
8 years ago? No.

9 MR. BARNABI: We will take a break.

10 (Recessed from 12:05 p.m. to 12:17 p.m.)

11 (Mr. Beavor not present.)

12 MR. BARNABI: We can go back on the
13 record.

14 BY MR. BARNABI:

15 Q. I think we left off looking at Exhibit 13,
16 the transcript from the Motion for Reconsideration
17 heard on September 26th, 2013.

18 Do you have that in front of you,
19 Mr. Tomsheck?

20 A. It is.

21 Q. So during the hearing, the issue in
22 regards to timeliness of the Motion for a New Trial
23 was addressed again by the Court; is that correct?

24 A. I believe so.

25 Q. And what do you recall the Court's opinion

1 being in regards to that argument?

2 A. That it was timely.

3 Q. That the Motion for New Trial was timely?

4 A. Correct.

5 Q. And do you recall any rulings from the
6 Court or comments from the Court addressing whether
7 you could reserve further arguments for a later date?

8 A. I don't.

9 Q. If you could please turn to page 8, around
10 line 6. And I'll just read it into the record. It
11 says:

12 "The Court: Well, I'm -- first of
13 all, this is the first time somebody has
14 thrown in all their chips on a timeliness and
15 not addressed it. And it does exactly what
16 we're here for which is going over this a
17 second time for no reason. And that's what
18 bothers me. You can't just say I'm reserving
19 my rights. Sorry, it doesn't work that way."

20 I know it states for the record in the
21 transcript what you mentioned before, but did you
22 continue to argue that you could reserve your rights
23 without having a written agreement or do you recall?
24 Do you recall?

25 A. Do I recall what?

1 Q. Do you recall further arguments that you
2 provided the Court stating that you could reserve your
3 rights to argue the Motion for New Trial?

4 A. I don't recall it expressed as whether you
5 could or could not reserve your rights. As I read the
6 transcript, I certainly talk about the agreement from
7 opposing counsel, that that's how we would handle it.

8 Q. And the Court questioned whether you had
9 that agreement in writing; is that correct?

10 A. I think the Court said, "Well, if that's
11 in writing, that certainly would have helped."

12 Q. And so do you recall what the Court's
13 conclusion was in regards to your Motion for
14 Reconsideration?

15 A. The Motion for Reconsideration?

16 Q. Yes.

17 A. It was denied.

18 Q. And did you communicate the denial of that
19 Motion for Reconsideration to Mr. Beavor or
20 Mr. Saggese?

21 A. Mr. Saggese was there. He is referenced
22 in the transcript.

23 Q. And did you have conversations with
24 Mr. Saggese after the hearing on the matter?

25 A. I'm quite certain I did.

1 Q. Do you recall the content of those
2 conversations?

3 A. No.

4 Q. And after that hearing, did you have any
5 communications with Mr. Beavor in regards to what the
6 Court ruled?

7 A. Yes.

8 Q. And do you remember the specific content
9 of those conversations?

10 A. I don't. It's my recollection that we had
11 asked the Court for a stay. That's referenced in the
12 transcript on page 12 into 13, which was denied. And
13 then we later filed a Motion for Stay with the idea
14 that we would be taking it to the Supreme Court. And
15 I discussed that with Mr. Saggese and Mr. Beavor.

16 Q. So you mentioned a Motion to Stay. So you
17 made an oral Motion to Stay at that time?

18 A. Correct.

19 Q. Which was denied?

20 A. Correct.

21 Q. And you mentioned that you had
22 conversations with Mr. Saggese and Mr. Beavor
23 following. And we will mark into the record as
24 Exhibit 14 an email from you to Chris Beavor and
25 Marc A. Saggese.

1 (Deposition Exhibit 14 marked.)

2 MR. CORRICK: And for the record, Counsel,
3 what you've had marked as Exhibit 14 is a two-page
4 document with the Bates stamp SAG000514 and 515. I
5 don't recall this has been produced in the case. I
6 certainly don't believe that I have produced any
7 documents with the label SAG.

8 To the extent I'm wrong, the record will
9 correct me. I would ask you to represent to the Court
10 for the record where you obtained this document, just
11 so we can determine whether there may be any
12 authenticity issues.

13 MR. BARNABI: They were produced in
14 regards to a subpoena. We will produce all the
15 entirety of the records.

16 MR. CORRICK: The subpoena you're
17 referring to, Counsel, I'm imagining that's the
18 subpoena that you issued to Mr. Saggese for documents
19 and there was a previously vacated custodian of
20 records deposition.

21 MR. BARNABI: Correct.

22 MR. CORRICK: Okay. But those documents
23 as of this date have not yet been produced; is that
24 correct?

25 MR. BARNABI: That's correct. We will

1 produce all those in the ordinary course.

2 MR. CORRICK: Can we go off the record for
3 a moment then?

4 MR. BARNABI: Sure.

5 (Discussion held off the record.)

6 MR. CORRICK: Back on the record.

7 Counsel, based upon my review of what
8 you've marked as Exhibit 14, in order to expedite
9 matters, I'm not going to object to you asking any
10 questions with respect to this particular document,
11 despite the fact it has not produced in the litigation
12 at this time.

13 MR. BARNABI: Thank you.

14 BY MR. BARNABI:

15 Q. Do you recall sending this email?

16 A. I don't.

17 Q. The email address at the top of
18 Exhibit 14, Joshua.Tomsheck@gmail.com. Is that an
19 email address that you have?

20 A. It is.

21 Q. And is it one that you use frequently?

22 A. No.

23 Just to clarify. Typically when I was --
24 I'm not in any way disputing that this is an email
25 that I sent, nor do I mind at all if you ask me

1 questions about it. It certainly reads as if I wrote
2 it.

3 Typically when I send an email, it would
4 come from by Hoflandlaw.com email address. This one
5 is different. I can't tell you why it would have a
6 different email address, but I don't dispute that it's
7 something that I said. And it's certainly time
8 consistent with when the hearing occurred.

9 Q. Thank you for that explanation.

10 It mentions in the underlined portion.
11 I'll just read it into the record. It says:

12 "In hindsight, given the result, Marc
13 is right that I should have opposed their
14 motion differently... Although I sincerely
15 believe I had a good basis to handle the
16 matter in the way I did... And without the
17 benefit of hindsight I likely wouldn't have
18 handled it any differently."

19 Now, you mentioned in that first portion
20 that, "Marc is right that I should have opposed their
21 motion differently." Were you referring to a
22 different conversation that you had had with Marc?

23 A. Yes.

24 Q. And do you recall when that conversation
25 was?

1 A. In August of 2013. Prior to filing the
2 Opposition to the Motion for New Trial, we all
3 discussed it. It was Mr. Beavor that actually brought
4 it to Marc and I's attention. Because I think Marc
5 was cc'd on all -- when I say Marc, I mean
6 Mr. Saggese -- I think he was cc'd on almost all
7 correspondence between myself and Mr. Beavor.

8 I didn't have a preexisting relationship
9 with Mr. Beavor. I was representing him on a limited
10 basis. It was my understanding they still had a
11 lawyer/client relationship elsewhere. If you'll
12 notice from the minutes on the --

13 Q. What minutes are you referring to?

14 A. The ones that you have previously entered
15 as Exhibit 8. The Court minutes for the Motion for
16 New Trial. It was placed into the attorney folder of
17 Marc Saggese, Esquire, Saggese & Associates. I didn't
18 get a copy of it.

19 Sometime in August of 2013, Mr. Beavor
20 contacted Mr. Saggese because he had been contacted by
21 Mr. Hefetz discussing settling the case. Marc then
22 contacted me and we had discussions about how the case
23 potentially could have been handled differently. He
24 was quite upset. I discussed that with him and
25 Mr. Beavor at that time.

1 I think I was out of town for an unrelated
2 case. When I got to a place I could talk, I spoke to
3 both of them.

4 I indicated that this was what was
5 happening and we'd file the Motion for
6 Reconsideration, how it would be addressed. They were
7 both kept in the loop on that.

8 This email is dated the same date as the
9 transcript that you just read from. It's me giving
10 them the Court's ruling.

11 Q. So after that sentence that we read into
12 the record, it says:

13 "That being said, I intend to fully
14 litigate this through until the right result
15 is reached."

16 Do you specifically recall making that
17 representation?

18 A. It says it there. I don't recall writing
19 that. But I recall discussing that with Mr. Saggese
20 and with Mr. Beavor.

21 Q. And so you agreed that whatever you needed
22 to do to, I guess in your words, reach the right
23 result, that you would undertake those efforts?

24 A. Sure. I mean, our position collectively
25 is Judge Israel, and I still believe this, made a very

1 bad call, and that didn't sit well with any of us.

2 Q. At that time did you discuss filing a
3 direct appeal to the Supreme Court?

4 A. At that time I didn't, because I had
5 orally requested a stay. I later filed a Motion for a
6 Stay. My recollection is that I never got a final
7 order. So that's why the decision was made to request
8 a stay and do it as a writ.

9 Q. And so at that point in time when you
10 agreed that you would try to undertake other efforts
11 to reverse the ruling that Judge Israel made, were you
12 in fact changing the scope of your representation with
13 Mr. Beavor?

14 A. I don't think changing the scope, I think
15 extending it. It was that same issue. We were going
16 to follow it all the way through.

17 Q. Okay.

18 A. Certainly if Mr. Saggese had wanted to
19 file something different or if Mr. Beavor wanted to
20 retain someone else to undertake that, I wouldn't have
21 had a problem with that.

22 Q. But at that time you don't specifically
23 recall filing a direct appeal in regards to that
24 motion?

25 A. I never filed a document entitled Direct

1 Appeal, no.

2 Q. Did you file a document called an Appeal?

3 A. No.

4 MR. BARNABI: We will put in and we will
5 have it marked as Exhibit 15, the Notice of Entry of
6 Order, dated November 15, 2013, filed in the
7 underlying case.

8 (Deposition Exhibit 15 marked.)

9 MR. CORRICK: So the record is clear, this
10 is a document that's been marked as Exhibit 15 does
11 not bear any Bates stamps. However, I'm going to
12 presume that this was something taken from the public
13 record. And, therefore, I'll allow you to ask
14 questions about it.

15 MR. BARNABI: Yes, it was.

16 BY MR. BARNABI:

17 Q. Mr. Tomsheck, do you recall seeing that
18 document that's been marked as Exhibit 15?

19 A. I don't. I may have, I just don't recall
20 it.

21 Q. But it was your recollection that the
22 Motion for Reconsideration was denied; is that
23 correct?

24 A. Oh, yeah.

25 Q. And you mentioned a few moments ago that

1 you filed a Motion to Stay those proceedings?

2 A. I did.

3 Q. And we will have marked into the record as
4 Exhibit 16 the Motion to Stay filed in the underlying
5 case on November 25th of 2013.

6 (Deposition Exhibit 16 marked.)

7 BY MR. BARNABI:

8 Q. Mr. Tomsheck --

9 MR. CORRICK: One second.

10 Again, for the purposes of Exhibit 16, I
11 note that this is a document that has not been
12 provided with Bates stamps. However, I presume that
13 this is something that you took from the public
14 record. And I believe we may have even produced a
15 copy of this with Bates stamps.

16 But be that as it may, I have no objection
17 to you asking questions on this document.

18 MR. BARNABI: Very well.

19 BY MR. BARNABI:

20 Q. Mr. Tomsheck, do you recall filing this
21 document?

22 A. I don't recall filing it, no. But I know
23 that it was filed.

24 Q. So when you asked the -- strike that.
25 So you mentioned before that you had

1 launched an oral Motion to Stay before Judge Israel on
2 September 26th of 2013 and that was denied, correct?

3 A. Correct.

4 Q. And you followed up with filing this
5 Motion to Stay that's been marked as Exhibit 16,
6 correct?

7 A. Yes.

8 Q. And do you recall if there was an
9 Opposition filed?

10 A. There was not.

11 Q. So the Motion to Stay, what was your
12 objective in filing the Motion to Stay, just in your
13 own words based on your recollection?

14 A. To stop the proceedings so that we could
15 have the Supreme Court intervene on the decisions by
16 Judge Israel.

17 Q. And to this point you had not filed an
18 appeal with the Supreme Court in regards to the order
19 granting the Motion for a New Trial?

20 A. True.

21 Q. And that order granting a new trial, that
22 was filed with the Court in September of 2013; is that
23 correct?

24 A. I don't know.

25 Q. But it is your testimony that you hadn't

1 filed an appeal to that point in the proceedings?

2 A. True.

3 Q. And that more than 30 days had expired
4 since the Notice of Entry of Order Granting the Motion
5 for New Trial had been filed on September 9th of 2013?

6 A. 30 days between that date and what?

7 Q. And your Motion to Stay.

8 A. Sure. We also filed a Motion for
9 Reconsideration, litigating that, there was a number
10 of things that happened.

11 Q. And I believe you mentioned that the
12 Motion to Stay was not opposed; is that correct?

13 A. Correct.

14 Q. Do you recall receiving the Court minutes
15 from that Motion to Stay?

16 A. No.

17 MR. BARNABI: We will have marked as
18 Exhibit 17 the Court minutes dated January 7th, 2014
19 in regards to the Motion to Stay.

20 (Deposition Exhibit 17 marked.)

21 MR. CORRICK: And, Counsel, same as
22 before. The document that has been marked as
23 Exhibit 17 is not provided with Bates stamps.
24 However, I presume this was taken from the public
25 record. And, therefore, at this point in time, I

1 don't have any objection to you asking him questions
2 regarding this document.

3 MR. BARNABI: All right. Thank you.

4 BY MR. BARNABI:

5 Q. So in regards to Exhibit 17, the Court
6 minutes dated January 7, 2014, do you recall seeing a
7 copy of this document?

8 A. I don't have any recollection of seeing
9 it. I'm not saying I didn't. It was January of 2014.
10 I don't remember everything I saw then.

11 Q. Sure. Do you recall drafting an order
12 granting your Motion to Stay?

13 A. I don't.

14 Q. So you're unsure if any order was entered
15 whatsoever in regards to your Motion to Stay?

16 A. I don't recall.

17 Q. So as mentioned in your Motion to Stay, it
18 was your intention to file a Petition for Writ of
19 Mandamus; is that correct?

20 A. Correct.

21 Q. And do you recall when you filed your Writ
22 of Mandamus?

23 A. I don't. I know I filed one, I just can't
24 tell you when.

25 MR. BARNABI: We will have marked as

1 Exhibit 18 the Petition for Writ of Mandamus filed
2 with the Supreme Court in the State of Nevada in the
3 underlying case.

4 (Deposition Exhibit 18 marked.)

5 MR. CORRICK: For the record, Exhibit 18
6 has been provided without Bates stamps. However, I
7 presume this was something that was taken from the
8 public record. And, therefore, I'm not going to
9 object to you asking any questions with respect to it
10 at this time.

11 MR. BARNABI: Thank you.

12 BY MR. BARNABI:

13 Q. Mr. Tomsheck, in regards to the Motion to
14 Stay, you had filed a Motion to Stay on
15 November 25th of 2013, correct?

16 A. Correct.

17 Q. And at what point in time did you become
18 aware that your Motion to Stay hadn't been granted?

19 A. I don't know.

20 Q. In regards to the Petition for Writ of
21 Mandamus, it says it was filed on May 13th of 2014.
22 Do you have any reason to dispute that it was filed on
23 that date?

24 A. No.

25 Q. In regards to filing that Petition for

1 Writ of Mandamus, do you recall why it took
2 approximately five months to get that one filed before
3 the Supreme Court?

4 A. I don't.

5 Q. Did you draft this petition?

6 A. I did.

7 Q. Did you have any assistance?

8 A. I don't recall.

9 Q. So essentially your petition was asking
10 for the Supreme Court to reconsider the timeliness
11 arguments that you had mentioned in the Opposition to
12 the Motion for a New Trial?

13 MR. CORRICK: I'm going to object to the
14 form. I think it misstates the document.

15 THE WITNESS: I think --

16 BY MR. BARNABI:

17 Q. What is your recollection of what this
18 document states then, Mr. Tomsheck?

19 A. Well, it speaks for itself. It presents
20 certain issues, which were:

21 "Whether EDCR 2.20 requires a District
22 Court to grant a motion when a party files a
23 limited opposition and indicates the
24 willingness to provide further briefing; and,
25 (2), whether a Court should allow the parties

1 to appear and argue on a Motion for New Trial
2 rather than deciding the matter on a chambers
3 calendar; and, (3), whether the District
4 Court improperly computed the time allowed in
5 which to file a Motion for a New Trial.

6 And then it discusses why a Writ should
7 issue, 7, 8, 9, 10, and 11.

8 Q. And did you submit appendices or an
9 appendix for this filing, if you recall?

10 A. I believe I did. This petition indicates
11 that I did.

12 Q. And do you recall what the outcome was in
13 regards to this petition?

14 A. It was denied.

15 Q. Upon filing the petition, did you ask for
16 oral arguments to be presented?

17 A. I don't recall.

18 Q. Following the denial of the petition, did
19 you ask for a type of reconsideration or rehearing?

20 A. I did not.

21 Q. At any time did you try to convert the
22 Petition for Writ of Mandamus to a direct appeal?

23 A. I did not.

24 MR. BARNABI: We will have marked into the
25 record as Exhibit 19 the Order Denying Petition for

1 Writ of Mandamus filed in the related underlying case
2 before the Supreme Court.

3 (Deposition Exhibit 19 marked.)

4 MR. CORRICK: For the record, Exhibit 19
5 has not been provided in the version that has Bates
6 stamps. However, I believe it would have taken -- I
7 presume you took this from the public record. And,
8 therefore, I have no objections to you asking any
9 questions about this document at this time.

10 MR. BARNABI: Thank you.

11 BY MR. BARNABI:

12 Q. Mr. Tomsheck, do you recall receiving this
13 document?

14 A. I do.

15 Q. And it mentions at the last sentence on
16 the first page, it says:

17 "Because a direct appeal is available
18 from an order granting or denying a new trial
19 NRAP 3A(b)(2), petitioner had an adequate
20 legal remedy in the form of an appeal."

21 You previously testified, though, that you
22 did not file an appeal in this matter?

23 A. That's true.

24 Q. Did you take any efforts to file an appeal
25 following the entry of this order?

1 A. Do you want the short answer or the
2 complete answer?

3 Q. I want the complete answer.

4 A. All right. So at this point in time, I
5 mean, it's fairly evident looking in hindsight that
6 the entirety of this case is kind of a mess.

7 I think we all know based on other issues
8 from the Supreme Court, that all of this is immaterial
9 if at the time answering and responsive pleadings are
10 filed by Mr. Saggese at the outset of the litigation
11 the one action rule was raised. It wasn't.

12 So by this point in time, there has been
13 other discussion. I believe Mr. Beavor was talking to
14 other attorneys. He was certainly talking to
15 Mr. Saggese.

16 Obviously, the Supreme Court could have
17 converted the request for a writ to a direct appeal,
18 they didn't.

19 At the time this order came down, I had a
20 conversation with Mr. Beavor. He had asked for all
21 the documentation related to the case and was going to
22 go a different route.

23 There was a number of intervening things
24 that happened in the meantime. I had done above and
25 beyond what I had indicated I would do in the

1 representation. And we agreed that I would file a
2 motion to withdraw and provide him with the file. It
3 was my understanding he had already been consulting
4 with other appellate counsel at that time.

5 Q. And do you recall who those counsels were?

6 A. As I recall, his daughter was involved in
7 an automobile accident with Dan Polsenberg, and his
8 daughter had conversations him and he had
9 conversations with Mr. Polsenberg.

10 And I had indicated to him early in on in
11 the case if he wished Mr. Polsenberg to file things or
12 represent him that way, it would certainly be right in
13 his wheelhouse.

14 Q. And did you have any communications with
15 Mr. Polsenberg directly?

16 A. I did not.

17 Q. Were there any other attorneys that you
18 recall that Mr. Beavor was discussing this case with
19 at that time?

20 A. Mr. Saggese.

21 Q. And other than Mr. Saggese?

22 A. No.

23 Q. So Mr. Polsenberg and Mr. Saggese were the
24 only attorneys that you believe he was consulting with
25 at the time?

1 A. The scope of the representation was Marc
2 had represented Mr. Beavor at trial. There was some
3 allegations made against Mr. Saggese that he didn't
4 think were appropriate or founded.

5 My review of the record was consistent
6 with his, that it appeared as if Judge Israel wasn't
7 going to make a fair call on the case as it related to
8 Mr. Saggese's representation.

9 I agreed to file some documents in
10 conjunction with that representation and I did that.

11 Q. You also represented that you would, I
12 forgot how you phrased it in your email, that, and
13 you're speaking here:

14 "I intend to fully litigate this
15 through until the right result is reached."
16 End quote.

17 Is that correct?

18 A. That I wrote that?

19 Q. Yes.

20 A. I believe I wrote that, yes. That wasn't
21 the entirety of the communication between all of us,
22 though.

23 Q. So are you saying that you already
24 fulfilled all your obligations under the Retainer
25 Agreement and based on that statement?

1 A. Well, I certainly had done that. I was
2 retained to oppose the motion.

3 Q. But you later filed the Petition for Writ
4 of Mandamus?

5 A. Sure.

6 Q. And that wasn't specifically mentioned in
7 the Retainer Agreement, right?

8 A. Neither was the Motion for
9 Reconsideration. Nor did I believe Judge Israel would
10 grant a Motion for a New Trial on a chambers calendar.
11 I don't believe anyone would believe that would
12 happen.

13 Q. And throughout the entirety, you still
14 going through after this was denied, I believe you
15 indicated that there was still no appeal filed?

16 A. At the time this order came in September
17 of 2014, there was a decision made that I wasn't going
18 to represent Mr. Beavor any longer, and I filed the
19 Motion to Withdraw and provided him with the contents
20 of his file.

21 Q. But before that time, you never filed an
22 appeal on his behalf?

23 A. We filed the Petition for Writ of
24 Mandamus.

25 Q. But you did not file an appeal?

1 A. I believe I've already answered that.

2 Q. Okay. So you mentioned that you did
3 withdraw?

4 A. Correct.

5 Q. And the only filing you submitted to the
6 Supreme Court was the Petition for Writ of Mandamus on
7 the appendices; is that correct?

8 A. I don't know. It may very well may be.

9 MR. BARNABI: We will mark into the record
10 Exhibit 20, and it's an email dated September 16th
11 from Josh Tomsheck to Mr. Beavor, Mr. Saggese, and a
12 few other parties.

13 (Deposition Exhibit 20 marked.)

14 MR. CORRICK: Counsel, do you have a copy
15 for me?

16 MR. BARNABI: Oh, yes.

17 MR. CORRICK: Thank you.

18 And before you get started. Counsel, this
19 is a document marked as Exhibit 20, which bears the
20 Bates stamp SAG00011.

21 As I previously indicated with respect to
22 Exhibit 14, I don't believe I have been using that
23 abbreviation for Bates stamping, so I don't believe
24 this is a document that we've actually produced in
25 this litigation up to this point.

1 However, in order to fast track things, if
2 you have any other documents which do not -- or do
3 bear the Bates stamp SAG and you want me to review
4 them in one batch, we can determine whether you will
5 be permitted to go forward in asking questions on it.
6 It may very well be the case. And I would like the
7 opportunity to look at it and confer with my client.

8 So other than Exhibit 20, do you have any
9 other documents that bear the Bates stamp SAG
10 abbreviation?

11 MR. BARNABI: No.

12 MR. CORRICK: If we could have a moment
13 and we will clear this up.

14 MR. BARNABI: Off the record.

15 (Brief pause in the proceedings.)

16 MR. CORRICK: Counsel have had a chance to
17 review Exhibit 20. And in order to make this a more
18 efficient process, I don't have any objections to you
19 asking any questions, and my client testify with
20 respect to Exhibit 20 at this time.

21 MR. BARNABI: All right. Thank you.

22 BY MR. BARNABI:

23 Q. Mr. Tomsheck, in regards to Exhibit 20, do
24 you recall sending that email?

25 A. I don't have an independent recollection,

1 but certainly appears as if that is an email that I
2 sent. It's consistent with what I would have said.

3 I notice it doesn't have a signature line
4 or box at the bottom. But that could be because it
5 was edited out. I don't know. But it appears to be
6 an email that I sent. I don't dispute its contents at
7 all.

8 Q. So at that time, this would have been the
9 same day, September 16th, 2014, that the Supreme Court
10 had denied the Petition for Writ of Mandamus; is that
11 correct?

12 A. Yes.

13 Q. So subsequently you withdrew from the
14 matter, correct?

15 A. Well, I got the order from the Supreme
16 Court. I contacted Mr. Beavor, discussed its contents
17 with him. Discussed specifically the fact that it was
18 denied because it was titled as Petition for Writ as
19 opposed to an appeal. Discussed with him the
20 potential of converting it to an appeal. We reached
21 the mutual decision that he wanted to go a different
22 route going forward and I would be withdrawing, and
23 then I did subsequently file a written withdrawal.

24 Q. So you're saying that it was -- there was
25 an agreement reached between you and Mr. Beavor that

1 you would not convert the Petition for Writ of
2 Mandamus to an appeal?

3 A. Correct.

4 Q. And that he would essentially go in a
5 different direction --

6 A. Right.

7 Q. -- with new counsel? And then at that
8 time you would withdraw?

9 A. That was my assumption. We discussed
10 whether or not he wanted to have Marc represent him if
11 it went forward as a retrial, because Marc represented
12 him in the initial trial.

13 I don't recall if I spoke to Mr. Saggese
14 on the 16th of September of 2014. I know he is cc'd
15 on this email as he was, I think, on all
16 communications.

17 (Mr. Beavor re-enters the proceedings.)

18 BY MR. BARNABI:

19 Q. Do you recall specifically withdrawing
20 from the case then?

21 A. I do recall withdrawing. I don't have a
22 specific memory of drafting a document or filing it,
23 but I know it happened.

24 MR. BARNABI: We will have marked as
25 Exhibit 21 the Notice of Motion to Withdraw as Counsel

1 for Defendant Christopher Beavor, which was filed in
2 the underlying case.

3 (Deposition Exhibit 21 marked.)

4 MR. CORRICK: And, Counsel, as before, the
5 document you've had marked as Exhibit 21 does not bear
6 any Bates stamps. However, I presume this was taken
7 from the public record. And, therefore, at this point
8 in time, I will not object to you asking questions or
9 my client testifying with respect to this document.

10 BY MR. BARNABI:

11 Q. So, Mr. Tomscheck, I believe you mentioned
12 that you didn't have any specific recollection in
13 regards to filing the Motion to Withdraw; is that
14 correct?

15 A. True.

16 Q. Does this document help refresh your
17 recollection?

18 A. I remember that the document was filed, I
19 just don't have a specific memory of doing it or
20 asking someone to do it. I know it was done.

21 Q. And based on your recollection, do you
22 believe that was granted?

23 A. Yes.

24 Q. And we will move on and mark what will be
25 Exhibit 22, the Court minutes dated November 5th of

1 2014 in regards to Hofland & Tomsheck's Motion to
2 Withdraw as Counsel for Defendant Christopher Beavor.
3 (Deposition Exhibit 22 marked.)

4 MR. CORRICK: Counsel, before you ask any
5 questions, the same as before. This is a document,
6 Exhibit 22, which has been produced without Bates
7 stamps. However, I presume that this is something
8 that you would have taken down from the public record.
9 And so for purposes of the deposition, I don't have
10 any objection to you asking any questions or my client
11 testifying as to this document.

12 MR. BARNABI: Thank you.

13 BY MR. BARNABI:

14 Q. Do you recall receiving these court
15 minutes, Mr. Tomsheck?

16 A. If you're asking whether or not I have an
17 independent recollection of receiving this, I don't.
18 But it certainly appears to be the court minutes
19 granting that motion.

20 Q. Did you, following these minutes, do you
21 recall filing an actual order granting your withdrawal
22 from the case?

23 A. I don't know if that was done or not.

24 Q. So you're unsure whether that was done or
25 not?

1 A. I don't recall.

2 Q. If you could go back to Exhibit 1. And we
3 will be cross-referencing Exhibits 1 and 2.

4 Now, after you withdraw from the matter,
5 did you have any further conversations with Mr. Beavor
6 or Mr. Saggese in regards to this matter?

7 A. Oh, sure.

8 Q. And what do you recall from those
9 conversations?

10 A. With Mr. Beavor, I don't know that we ever
11 discussed anything other than he was going to go a
12 different route. He asked for his file to be provided
13 to him in Dropbox form, I believe that it was. I
14 think the copy of the Motion to Withdraw was mailed to
15 him.

16 Mr. Saggese and I had passing
17 conversations about it for years.

18 Q. Do you remember any specifics from any of
19 those conversations?

20 A. Nothing of note.

21 Q. What do you mean nothing of note?

22 A. Just reference to it.

23 Q. And at what point in time, if you recall,
24 were you put on notice of a potential malpractice
25 claim?

1 A. I don't know.

2 Q. Do you recall agreeing to have the statute
3 of limitations tolled or anything like that?

4 A. I do.

5 Q. What do you recall?

6 MR. CORRICK: Well, hold on a second.

7 To the extent your question may call for
8 attorney/client privileged communications, I'm going
9 to instruct my client not to answer the question.

10 Otherwise, you can go ahead and answer to
11 the best you can.

12 THE WITNESS: I mean, any discussions
13 about the Tolling Agreement would have been between my
14 attorney and I.

15 I think he is directing me not to answer
16 that.

17 MR. CORRICK: It's implicit, yes. I'll
18 make it explicit to the extent anything calls for
19 attorney/client privilege, I'm instructing you not to
20 answer going forward.

21 MR. BARNABI: Off the record.

22 (Discussion held off the record.)

23 (Recessed from 1:01 p.m. to 1:07 p.m.)

24 MR. BARNABI: We'll go back on the record.

25 ///

1 BY MR. BARNABI:

2 Q. So, Mr. Tomsheck, at this point in time
3 in, we will say, September of 2014 when the Petition
4 for Writ of Mandamus was denied, how many petitions
5 for Writ of Mandamus had you filed with the Nevada
6 Supreme Court?

7 A. I don't know.

8 Q. How many appeals had you filed with the
9 Nevada Supreme Court up to this time?

10 A. I don't know.

11 Q. Have you ever filed a civil appeal to the
12 Nevada Supreme Court up to this time?

13 A. I don't know.

14 Q. Had you filed a Petition for Writ of
15 Mandamus with the Supreme Court up until this time
16 except for the one that we discussed today?

17 A. I'm certain at some point.

18 Q. But you have no mention of like how many
19 or?

20 A. No.

21 Q. More than one?

22 A. I don't know.

23 Q. So you have no independent estimation as
24 you sit here today?

25 A. No.

1 Q. At Hofland & Tomscheck, does your firm file
2 many petitions for Writ of Mandamus?

3 A. I don't know what Mr. Hofland files.

4 Q. So in regards to your practice and what
5 Mr. Hofland files, are your practices basically
6 divided under the same name?

7 A. We don't -- we very rarely work together
8 on cases. It happens occasionally. Very rare.

9 Q. Going back to Exhibits 1 and 2. Exhibit 2
10 is your Answer and Third-Party Complaint. And
11 Exhibit 1 is the Complaint filed in this instant
12 matter for which you're being deposed today.

13 I'll have you turn to page 5 of Exhibit 1.
14 And you can reference Exhibit 2 starting at page 2.
15 Now, it mentions at paragraph 30 of Exhibit 1 of the
16 Complaint it states:

17 "Beavor and Tonscheck entered into an
18 attorney/client relationship."

19 Which in Exhibit 2 you state that you deny
20 that allegation.

21 A. It says Beavor and Tonscheck.

22 Q. Excuse me. Well, you're aware of what it
23 mentions. Do you deny that allegation?

24 A. That Beavor and Tonscheck entered into
25 attorney/client relationship?

1 Q. Do you deny the content of that
2 allegation?

3 MR. CORRICK: So the record is clear,
4 Counsel, you're asking whether the answer in
5 Affirmative Defense -- excuse me -- in the Answer
6 Exhibit 2, paragraph 6 on page 2, as it pertains to
7 paragraph 30, you're asking whether that response at
8 that point in time was incorrect?

9 MR. BARNABI: Yes, I asked him if he
10 denied the allegation.

11 MR. CORRICK: If you are asking whether
12 he's denied the allegation, Exhibit 2 speaks for
13 itself.

14 BY MR. BARNABI:

15 Q. All right. Moving forward then. Did
16 you -- you don't believe you entered into an
17 attorney/client relationship with Mr. Beavor?

18 MR. CORRICK: I'm going to object at this
19 point in time to the form. It's vague as to the
20 extent of the attorney/client relationship.

21 BY MR. BARNABI:

22 Q. Did you enter into a written retainer
23 agreement on June 18th of 2013 with Mr. Beavor?

24 A. I did.

25 Q. And the allegation in your Answer, you

1 denied that there was an attorney/client relationship;
2 is that correct?

3 MR. CORRICK: And, again, the document in
4 Exhibit 2 speaks for itself. I'll object to the form.

5 THE WITNESS: I agree with you that's what
6 paragraph 6 on page 2 of Exhibit 2 says.

7 BY MR. BARNABI:

8 Q. Is your denial based on the typo for
9 Tomsheck in regards to paragraph 30?

10 A. I didn't draft this document.

11 MR. CORRICK: Again, to the extent you're
12 asking for attorney/client privileged communications,
13 I'm going to instruct the witness not to respond.

14 Outside of that, you can answer.

15 THE WITNESS: I didn't draft this
16 document.

17 BY MR. BARNABI:

18 Q. Do you believe when you signed the
19 Retainer Agreement with Mr. Beavor that you had formed
20 an attorney/client relationship?

21 A. With limited scope.

22 Q. And that scope was extended based on your
23 email as you previously testified; is that correct?

24 A. No. I never testified to that, nor was it
25 extended based on it.

1 Q. So you didn't say that you would take
2 further efforts to obtain the -- I believe, let me
3 look at the -- so when you said, and this is from
4 Exhibit 14, quote:

5 "That being said, I intend to fully
6 litigate this through until the right result
7 is reached." End quote.

8 You don't believe that altered your scope
9 of representation?

10 A. I don't believe that altered anything.
11 That was a communication, a small part of a large
12 communication between myself and my client, his other
13 attorney, regarding what was going to happen going
14 forward. It wasn't a mystery about that.

15 No one anticipated Judge Israel granting
16 the Motion for a New Trial on a chambers calendar.
17 Thus, as a result, we litigated a Motion for
18 Reconsideration that we didn't anticipate. Subsequent
19 to that, there was litigation regarding the Petition
20 for Writ of Mandamus that none of us anticipated.
21 Subsequent to that, Mr. Beavor decided to go a
22 different route.

23 Q. And the Petition for Writ of Mandamus that
24 you filed, that also wasn't mentioned in the Retainer
25 Agreement?

1 A. No, it was not. Didn't envision that
2 occurring.

3 Q. So during this time when you're
4 undertaking all these efforts in regards to
5 Mr. Beavor, did you believe that you had an
6 attorney/client relationship with him?

7 MR. CORRICK: Object. Can you read that
8 question back.

9 (Record read.)

10 MR. CORRICK: Vague as to the term "these
11 efforts." So I'll object to the form.

12 THE WITNESS: Which period of time?

13 BY MR. BARNABI:

14 Q. Let me answer your question and then we'll
15 let it go.

16 From the time that you filed or had
17 executed the Retainer Agreement marked as Exhibit 3
18 through the time of your withdrawal in the case.

19 A. Did I have an attorney/client relationship
20 with him?

21 Q. Yes.

22 A. Yes.

23 Q. And as your client, do you believe that
24 you're under an ethical obligation to make sure his
25 interests were protected?

1 A. Sure.

2 Q. And so you -- let me back up. May I ask
3 how long you have been practicing?

4 A. You already did.

5 Q. But how many years? I think I asked the
6 timeframe. You said '99 was when you were barred,
7 right?

8 A. No.

9 Q. Well, how long have you been practicing?

10 A. Since January of 2015 -- I mean, sorry,
11 2005.

12 Q. And what do you believe are the general
13 duties owed by an attorney to his client?

14 A. There is a lot.

15 Q. Well?

16 MR. CORRICK: Object to the form. Can you
17 be more specific?

18 BY MR. BARNABI:

19 Q. Do you believe you have a fiduciary duty
20 to your client?

21 A. Sure.

22 Q. Do you have a duty of loyalty?

23 A. Of course.

24 Q. A duty of competence?

25 A. Yes.

1 Q. A duty of ordinary skill?

2 MR. CORRICK: I'm going to object to the
3 form. It's vague as to the term "ordinary skill."

4 THE WITNESS: I'm not sure what that
5 means.

6 BY MR. BARNABI:

7 Q. Well, I think the duty of competence would
8 fully cover that anyway.

9 A. Then we can move on, I guess.

10 Q. So looking back on the matter, do you
11 believe that you should have filed a different
12 opposition than you filed in regards to the Motion for
13 New Trial?

14 A. With the benefit of what we know today,
15 looking back at the entirety of this case, we can all
16 agree things should have been done differently by a
17 lot of people involved. I mean, all of this is
18 immaterial, if Mr. Saggese just raises the affirmative
19 defense of the One-Action Rule, we never get here.

20 Once the case goes to trial, if the judge
21 involved doesn't call, essentially call Mr. Saggese an
22 anti-Semite, which I just want to be clear on the
23 record, I don't believe he is, and he wasn't treated
24 unfairly at that juncture, he wouldn't have had to ask
25 someone else to oppose the Motion for a New Trial.

1 Because of the stance that the record put
2 Mr. Saggese in, he asked me to file that Opposition on
3 behalf of what he purported to be his friend and
4 client. I chose to do that.

5 In hindsight, I would have waited until
6 after the follow-up conversation with Mr. Morris.
7 None of us anticipated that that would be an issue.
8 None of us anticipated that Judge Israel would grant a
9 Motion for New Trial on a week-long jury trial from a
10 chambers calendar. It's unheard of.

11 Subsequent to that, there are probably
12 other things that could have been done differently.
13 For instance, I could have changed the title or
14 alternatively titled the Petition for Writ of
15 Mandamus. We weren't aware that was going to be an
16 issue either at the time that I filed it. In
17 hindsight, this case has a lot of issues.

18 Q. Do you believe you had an independent duty
19 to file an Opposition which was based on not just the
20 timeliness issue?

21 A. At the time I filed it? No, I don't. I
22 talked to my client about it. He is the one that
23 actually brought it to my attention based on his
24 conversations with Mr. Saggese. But that's me writing
25 it at the time I was retained. Those emails have been

1 produced in discovery.

2 Based on that, I contacted Mr. Morris, and
3 Mr. Morris and I had an agreement that it was
4 untimely. He agreed with me at the time I filed that
5 Opposition.

6 So no, I don't believe at the time I filed
7 the Opposition that anything should have been done
8 differently. With the benefit of hindsight, I know a
9 lot of things should have been done differently.

10 Q. So based on your conversation with
11 Mr. Beavor and Mr. Saggese, you didn't believe that
12 you had to file something differently as opposed to
13 what you actually filed in the arguments that you made
14 in that opposition?

15 A. Based on what conversation?

16 Q. Well, you mentioned that you filed that
17 opposition based on conversations with your client and
18 Mr. Saggese; is that correct?

19 A. Sure.

20 Q. Do you believe that you had an independent
21 duty to make sure that that was the right motion to
22 put in front of the Court?

23 A. I didn't file a motion.

24 Q. Excuse me. The Opposition?

25 A. So, again, I was contacted by Mr. Saggese.

1 Q. My question is, did you have -- do you
2 feel you had any independent duty to look into this
3 matter and file an opposition, which addressed not
4 only the timeliness issue but the other arguments that
5 were raised in the Motion for New Trial?

6 A. So I talked to Mr. Saggese, talked to
7 Mr. Beavor. Mr. Beavor prior to filing that
8 Opposition sent me very detailed, he clearly had done
9 his homework on what he believed the important issues
10 were.

11 First and foremost was the timeliness
12 issue. I discussed that with him. I discussed it
13 with Mr. Saggese. And then before I filed anything, I
14 discussed it with opposing counsel, who agreed with me
15 that they, quote, had a problem.

16 I then filed the Opposition after covering
17 my bases and saying: Hey, if the Court wants to hear
18 further on the other issues, I would be happy to
19 provide that, but we agreed that's how it would be
20 filed.

21 I don't know how I can answer it more
22 clearly than that.

23 Q. Well, I don't think you're answering the
24 question.

25 Is it your contention then that you could

1 basically substitute your judgment on what you believe
2 you should do after you had discussions with
3 Mr. Saggese and Mr. Beavor?

4 MR. CORRICK: I'm going to object to the
5 form.

6 Go ahead.

7 THE WITNESS: I could substitute -- that I
8 should substitute mine?

9 BY MR. BARNABI:

10 Q. Let me ask you a different way.

11 A. You file an Opposition based on everything
12 you know at the time. I discussed those issues with
13 my client, his former and I believe still current
14 counsel, just I was appearing for this limited
15 purpose, and the opposing party on the case who agreed
16 with me.

17 So my judgment at that time, when the
18 other side is acquiescing that that information is
19 correct, is to file exactly what we did.

20 It was thereafter that they said: Hey,
21 you know what, we were wrong too.

22 Q. So you basically just went along with what
23 you believe everyone had agreed to?

24 MR. CORRICK: Object to the form. It's
25 argumentative.

1 THE WITNESS: I don't know that everyone
2 agreed to it. We didn't ask you at the time.

3 BY MR. BARNABI:

4 Q. Well, everyone that you had mentioned.

5 But in any regard, you didn't file any
6 more subsequent arguments in your opposition other
7 than the timeliness argument; is that correct?

8 A. Filed them all in the Motion for
9 Reconsideration at the first juncture I had to address
10 it to the Court.

11 Hypothetically, if Judge Israel had put a
12 motion such as that on the Court calendar, we all
13 would have walked in and said: Hey, here's the issue.
14 We agreed that it was untimely when we filed it, we
15 think there needs to be further briefing. Mr. Morris
16 would have agreed with that and it would have been
17 done. But it was done on a chambers calendar.

18 So the first opportunity I had to address
19 the substantive arguments was the Motion for
20 Reconsideration, which I also discussed with
21 Mr. Beavor and Mr. Saggese.

22 Q. So you couldn't have addressed it in the
23 Opposition that you filed previously?

24 A. At the time that wasn't the decision that
25 was made.

1 Q. But you could have addressed the other
2 issues that were raised subsequent that you mentioned
3 in the Motion for Reconsideration directly in the
4 Opposition?

5 A. Could have raised other issues too.

6 Q. So you could have raised other issues; is
7 that your testimony?

8 A. Sure. I could have made a request for
9 attorney's fees. I could have asked for Rule 11
10 sanctions. I could have done lots of different things
11 that I didn't do.

12 Q. You could have argued the merits of the
13 actual motion which was in front of the Court?

14 A. Which we did.

15 Q. At the Motion for Consideration hearing;
16 is that correct?

17 A. Do you mean Reconsideration?

18 Q. Reconsideration, yes.

19 A. Correct.

20 Q. Okay. So moving on to paragraph 39 of the
21 Complaint. We will look at paragraphs 39 through 41.
22 So I believe it was your testimony earlier that you
23 testified that attorneys do owe clients a fiduciary
24 relationship -- or excuse me, a fiduciary duty?

25 A. I have a fiduciary duty to my clients.

1 Q. And in your own words, how would you
2 describe the fiduciary relationship between an
3 attorney and client?

4 A. Probably look up the rule of professional
5 conduct and read it to you.

6 Q. Well, in your own words, to the best of
7 your ability, would you do so?

8 A. I would look up the rule of professional
9 conduct and read it to you.

10 Q. So the rule about how it would outline
11 fiduciary duty to the client, you would agree that you
12 owed whatever the rule said in regards to that. You
13 would owe those same duties to Mr. Beavor in this
14 matter?

15 A. Sure.

16 Q. And you would also owe him a duty of
17 loyalty?

18 A. Of course.

19 Q. And you would also owe him a duty of
20 competency?

21 A. Sure.

22 Q. Would that also include a duty to exercise
23 your best judgment on his behalf while you're
24 representing him?

25 A. Of course.

1 MR. BARNABI: Let's go off the record for
2 a second.

3 (Discussion held off the record.)

4 BY MR. BARNABI:

5 Q. So getting back to the Complaint, and the
6 Answer that you filed. Do you believe that you
7 fulfilled your obligations, your ethical obligations
8 in regards to your representation of Mr. Beavor in
9 this matter?

10 A. Of course.

11 Q. And the only things that you would change
12 at this point were things that you would change as a
13 benefit of hindsight?

14 A. That I would change about this case?

15 Q. Well, change about what actions you took
16 during the course of representation?

17 A. I made the decisions that I did based on
18 the information that was available at the time.

19 Q. So at that time you believe that you were
20 acting in the best interest of your client based on
21 the information that you had; is that your testimony?

22 A. At this time I feel I was acting in the
23 best interest of my client with the information we had
24 at the time.

25 MR. BARNABI: We will have marked into

1 evidence Exhibit 23.

2 (Deposition Exhibit 23 marked.)

3 BY MR. BARNABI:

4 Q. Now, these are the responses that were
5 served on your behalf by your counsel on
6 January 13th of 2020. We will go through a few of
7 your responses.

8 Specifically in regards to Request No. 7,
9 you state:

10 "Admit that you were hired by Beavor
11 for the purposes of defending him in Case No.
12 A-11-645353-C."

13 You mentioned:

14 "Deny as phrased."

15 Could you clarify what you meant by that?

16 A. It speaks for itself.

17 MR. CORRICK: To the extent it may call
18 for attorney/client protected communications, I'm
19 going to instruct the witness not to answer.

20 However, if there is something outside of
21 attorney/client, you can provide a response.

22 BY MR. BARNABI:

23 Q. I'll ask you like this. You admit that
24 you represented Christopher Beavor in regards to this
25 matter; is that correct?

1 A. My representation of Mr. Beavor was
2 limited to the purposes outlined within the Scope of
3 Services section of Exhibit 3 that you previously
4 asked me about today.

5 So for purposes of defending him in the
6 case as a whole, I would have to deny that as phrased.
7 I didn't write the question. I can only answer the
8 question presented.

9 MR. BARNABI: Well, I think we will just
10 take a short break if that's okay, and then I think
11 I'm going to finish up in a little bit.

12 MR. CORRICK: Short break sure. Short
13 break being what?

14 MR. BARNABI: Maybe 10 minutes.

15 MR. CORRICK: Perfect.

16 (Recessed from 1:33 p.m. to 1:37 p.m.)

17 MR. BARNABI: We will move on to what is
18 going to be marked as Exhibit 24. And it's Joshua
19 Tomsheck's Responses to Plaintiff's First Set of
20 Interrogatories served on January 13th of 2020 in this
21 case.

22 (Deposition Exhibit 24 marked.)

23 BY MR. BARNABI:

24 Q. Mr. Tomsheck, if you will, do you recall
25 reviewing the interrogatories mentioned in this

1 response?

2 A. I do.

3 MR. CORRICK: And just so the record is
4 clear, Counsel, the copy for Exhibit 24 you provided
5 does not have the verification, which I believe we
6 have provided to you.

7 To the extent that there may be any
8 question with respect to that, I believe your office
9 already has the signed verification.

10 MR. BARNABI: That was my question,
11 because when I pulled up the service, it was not
12 verified. But I will ask Mr. Tomsheck.

13 BY MR. BARNABI:

14 Q. Do you recall verifying these
15 interrogatories?

16 A. I verified interrogatories, yes. I'm
17 assuming they are the same.

18 MR. BARNABI: I think that's all I have
19 for now. And when the deposition is continued, if we
20 have any further questions, we will do it at that
21 time.

22 MS. HUMMEL: Before we go off the record,
23 I do have questions. But because Mr. Saggese has not
24 yet filed a Response to the Third-Party Complaint,
25 we're going to reserve our right to call you back,

1 Mr. Tomsheck. I understand your counsel has no
2 objection.

3 MR. CORRICK: I have no objection to that.

4 And to address your comment, Mr. Barnabi,
5 with respect to keeping the deposition open for your
6 purposes. To the extent that those questions may flow
7 from questions that are asked by Mr. Saggese's counsel
8 at a future date, I will have no objection with
9 respect to that. However, if you intend to go into
10 areas beyond those, then we will have to have a
11 discussion.

12 MR. BARNABI: Agreed.

13 MS. HUMMEL: Thank you.

14 COURT REPORTER: Ms. Hummel, would you
15 like a copy of today's deposition transcript?

16 MS. HUMMEL: Please. Thank you.

17 MR. CORRICK: Can I have a copy. And what
18 is your expedite?

19 COURT REPORTER: When would you like it?

20 MR. CORRICK: Could I get it within, say,
21 a week?

22 COURT REPORTER: Yes.

23 MR. CORRICK: A week would be good.

24 COURT REPORTER: So next Monday?

25 MR. CORRICK: Correct. You have my email.

1 Regular, mini. I have all the exhibits. They will
2 just come as a package anyway. That's fine.

3 COURT REPORTER: Ms. Hummel, would you
4 like your copy expedited also?

5 MS. HUMMEL: Yes, I think so, please.
6 Thank you.

7 COURT REPORTER: Mr. Barnabi, would you
8 like your copy expedited also?

9 MR. BARNABI: Yes, sure.

10 (Whereupon, the deposition adjourned at 1:42 p.m.)
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I further certify that I am not a relative

1 or employee of counsel or of any of the parties
2 involved in the proceeding, nor a person financially
3 interested in the proceeding.

4 IN WITNESS WHEREOF, I have set my hand in my
5 office in the County of Clark, State of Nevada, this
6 12th day of March, 2020.

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13 Denise R. Kelly
14 CCR #252, RPR
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| Exhibits | | | | |
|---|---|---|--|---|
| Tomscheck Ex 1 4:15 14:18,20,22 72:2 75:11,13,15 | Tomscheck Ex 17 7:7 56:18,20,23 57:5 | 12 6:13 41:3,5,7 46:12 | 91:16 | 23 8:3 90:1,2 |
| Tomscheck Ex 2 4:17 16:2,5 75:9, 14,19 76:6,12 77:4,6 | Tomscheck Ex 18 7:9 58:1,4,5 | 12:05 43:10 | 1:42 94:10 | 23rd 14:19 |
| Tomscheck Ex 3 4:20 16:7,9,11,18 17:1 18:2 37:14 79:17 91:3 | Tomscheck Ex 19 7:12 60:25 61:3,4 | 12:17 43:10 | 2 | 24 8:8 91:18,22 92:4 |
| Tomscheck Ex 4 4:23 18:14,17 19:4 | Tomscheck Ex 20 7:15 66:10,13,19 67:8,17,20,23 | 13 6:15 37:22 42:1,3, 9 43:15 46:12 | 2 16:2,5 17:12 72:3 75:9,14,19 76:6, 12 77:4,6 | 25 10:9 |
| Tomscheck Ex 5 5:3 18:25 19:3,8, 10,14 | Tomscheck Ex 21 7:17 69:25 70:3,5 | 13th 58:21 90:6 91:20 | 2.20 59:21 | 25th 54:5 58:15 |
| Tomscheck Ex 6 5:9 20:3,7,9,12 21:8 23:17 | Tomscheck Ex 22 7:22 70:25 71:3,6 | 14 6:18 46:24 47:1,3 48:8,18 66:22 78:4 | 20 7:15 66:10,13,19 67:8,17,20,23 | 26 19:9 |
| Tomscheck Ex 7 5:16 25:19,20,22 | Tomscheck Ex 23 8:3 90:1,2 | 15 6:20 53:5,6,8,10, 18 | 2004 12:1 | 26th 41:3,16 42:1 43:17 55:2 |
| Tomscheck Ex 8 5:24 28:4,6,8,17 50:15 | Tomscheck Ex 24 8:8 91:18,22 92:4 | 16 7:3 38:3 54:4,6,10 55:5 | 2005 12:24 13:1,6 80:11 | 28th 31:23 |
| Tomscheck Ex 9 6:3 31:1,3,5,12 | (| 16th 16:4 66:10 68:9 69:14 | 2011 12:19 13:10,12 | 3 |
| Tomscheck Ex 10 6:6 31:22,24 32:8 | (2) 59:25 | 17 7:7 56:18,20,23 57:5 | 2013 15:8 16:8,24 28:5, 20 29:10 31:2,23 36:8 38:17 41:4, 16 42:2 43:17 50:1,19 53:6 54:5 55:2,22 56:5 58:15 76:23 | 3 16:7,9,11,18 17:1 18:2 37:14 79:17 91:3 |
| Tomscheck Ex 11 6:10 36:6,9,11 | (3) 60:3 | 17th 36:8 | 2014 56:18 57:6,9 58:21 65:17 68:9 69:14 71:1 74:3 | 30 56:3,6 75:15 76:7 77:9 |
| Tomscheck Ex 12 6:13 41:3,5,7 | 1 | 18 7:9 39:25 58:1,4,5 | 2015 80:10 | 30(b)(4) 9:14 |
| Tomscheck Ex 13 6:15 42:1,3,9 43:15 | 14:18,20,22 72:2, 3 75:9,11,13,15 | 18th 16:8 76:23 | 2019 14:19 16:4 | 31 6:5,9 |
| Tomscheck Ex 14 6:18 46:24 47:1,3 48:8,18 66:22 78:4 | 11/7/14 7:7 | 19 7:12 60:25 61:3,4 | 2020 9:1 90:6 91:20 | 36 6:12 |
| Tomscheck Ex 15 6:20 53:5,8,10,18 | 10 6:6 31:22,24 32:8 60:7 91:14 | 1999 11:25 | 20th 33:14 38:17 | 39 87:20,21 |
| Tomscheck Ex 16 7:3 54:4,6,10 55:5 | 11 6:10 36:6,9,11 37:22 38:3 60:7 87:9 | 1:01 73:23 | 21 7:17 69:25 70:3,5 | 3a(b)(2) 61:19 |
| | 11/15/13 6:21 | 1:07 73:23 | 22 7:22 70:25 71:3,6 | 4 |
| | 11/5/14 7:22 | 1:33 91:16 | | 4 18:14,17 19:4 33:10 |
| | 11:13 9:2 | 1:37 | | 40 10:9 |

| | | | | |
|--|---|--|---|---|
| 41 6:14 87:21 | 7:21 | about 10:5 15:6 18:8 22:3,4,17 23:16 25:9,25 28:12 33:24 34:19 38:2, 18 40:20 41:11 43:1 45:6 49:1 50:22 53:14 61:9 72:17 73:13 78:14 82:22 88:10 89:14,15 91:4 | addressing 44:6 | 68:25 73:13 76:23 77:19 78:25 79:17 83:3 |
| 42 6:17 | 7:23 | 71 | adequate 61:19 | agreements 25:14 |
| 47 6:19 | 7th 28:5 56:18 | | adjourned 94:10 | ahead 21:3,16 73:10 85:6 |
| <hr/> 5 <hr/> | <hr/> 8 <hr/> | | Admissions 8:6 | all 9:10 15:25 21:3 23:12 25:7 28:25 44:13,14 47:14 48:1,25 50:2,5,6 52:16 57:3 62:4,7, 8,20 64:21,24 67:21 68:7 69:15 76:15 79:4 81:15, 17 86:8,12 92:18 94:1 |
| 5 18:25 19:3,8,10, 14 34:1 75:13 | 8 28:4,6,8,17 44:9 50:15 60:7 | | admit 90:10,23 | allegation 75:20,23 76:2,10, 12,25 |
| 50 10:7 | <hr/> 9 <hr/> | above 62:24 | affidavit 36:25 37:5,7,8 38:4,16 39:1,8,11 | allegations 15:20 22:5 64:3 |
| 515 47:4 | 9 6:3 9:1 31:1,3,5, 12 60:7 | accident 63:7 | affirmative 76:5 81:18 | allow 53:13 59:25 |
| 53 6:22 | 9/16/14 7:15 | according 33:13 | after 13:11 22:11,12 34:11,15 39:16 42:4 45:24 46:4 51:11 65:14 72:4 82:6 84:16 85:2 | allowed 23:7 60:4 |
| 54 7:6 | 9/26/13 6:13,16,18 | account 39:9 | again 12:2 19:18 20:15 25:21 28:7,9 32:7, 24 36:10 41:7 43:23 54:10 77:3, 11 83:25 | almost 42:6 50:6 |
| 56 7:8 | 9/9/13 6:4 | accurate 40:7,9 | against 64:3 | along 85:22 |
| 58 7:11 | 90 8:7 | acquiescing 85:18 | agree 22:7 77:5 81:16 88:11 | already 34:6 63:3 64:23 66:1 80:4 92:9 |
| 5th 70:25 | 91 8:11 | acting 89:20,22 | agreed 9:11 22:25 24:8 33:16,20 38:19 40:2 51:21 52:10 63:1 64:9 83:4 84:14,19 85:15,23 86:2,14,16 93:12 | altered 78:8,10 |
| <hr/> 6 <hr/> | 99 80:6 | action 62:11 | agreeing 73:2 | Alternative 19:1 20:4 |
| 6 20:3,7,9,12 21:8 23:17 44:10 76:6 77:6 | 9th 31:2 56:5 | actions 89:15 | agreement 16:8,16 17:2,3,4,7 23:5,9 24:18,20, 24 25:2,9 32:20, 24 33:9,11 36:22 37:9 39:21 44:23 45:6,9 64:25 65:7 | alternatively 82:14 |
| 61 7:14 | <hr/> A <hr/> | actual 71:21 87:13 | | Although 49:14 |
| 65656 7:11,14 | A-11-645353-C 6:5,9,12,14,17,22 7:6,8,21,23 18:16 90:12 | actually 33:2 50:3 66:24 82:23 83:13 | | always 18:6 |
| 66 7:16 | A-19-793405-C 8:7,11 9:21 | added 16:15 | | Ambrose |
| <hr/> 7 <hr/> | A.M. 9:2 | additional 16:18 27:13,17 40:3,11,15 | | |
| 7 25:19,20,22 38:20 57:6 60:7 90:8 | abbreviation 66:23 67:10 | address 24:14 48:17,19 49:4,6 86:9,18 93:4 | | |
| 70 | ability 88:7 | addressed 29:2 43:23 44:15 51:6 84:3 86:22 87:1 | | |

| | | | | |
|--|--|---|--|---|
| 11:22 | appeared 33:17 64:6 | 59:11 60:16 83:13 84:4 86:6,19 | attorney 11:14 12:14 50:16 73:14 78:13 80:13 88:3 | Barnabi 9:17 14:21 16:6, 13,19,21 18:13, 18,24 19:10,12, 21,23 20:2,19 21:5,6,22 26:1,3 28:3,13,14 30:25 31:10,11,21 32:2, 4,13,14 36:5,16, 17 41:2,12,13,25 42:8,11 43:9,12, 14 47:13,21,25 48:4,13,14 53:4, 15,16 54:7,18,19 56:17 57:3,4,25 58:11,12 59:16 60:24 61:10,11 66:9,16 67:11,14, 21,22 69:18,24 70:10 71:12,13 73:21,24 74:1 76:9,14,21 77:7, 17 79:13 80:18 81:6 85:9 86:3 89:1,4,25 90:3,22 91:9,14,17,23 92:10,13,18 93:4, 12 94:7,9 |
| another 15:11 | appearing 85:14 | around 14:25 28:20 44:9 | attorney's 13:7 87:9 | barred 33:17 80:6 |
| answer 11:7 16:2 21:16 62:1,2,3 73:9,10, 15,20 75:10 76:4, 5,25 77:14 79:14 84:21 89:6 90:19 91:7 | appears 19:22 24:6 26:8 38:23 68:1,5 71:18 | arrived 39:2 | attorney/client 73:8,19 75:18,25 76:17,20 77:1,12, 20 79:6,19 90:18, 21 | based 22:17 26:24 31:13 34:7 48:7 55:13 62:7 64:25 70:21 77:8,22,25 82:19, 23 83:2,10,15,17 85:11 89:17,20 |
| answered 66:1 | appellate 63:4 | ask 9:25 11:6 21:3 26:16 34:24 35:2 38:4 40:24 47:9 48:25 53:13 60:15,19 71:4 80:2 81:24 85:10 86:2 90:23 92:12 | attorneys 62:14 63:17,24 87:23 | bases 84:17 |
| answering 62:9 84:23 | appendices 60:8 66:7 | asked 14:6 15:23 19:17 32:23 42:13 46:11 54:24 62:20 72:12 76:9 80:5 82:2 87:9 91:4 93:7 | August 28:5,20,21 29:10, 17 31:23 50:1,19 | basically 24:23 25:4 75:5 85:1,22 |
| anti-semite 81:22 | appendix 60:9 | asking 17:15 20:18 25:24 28:12 32:11 33:8 36:14 41:10 48:9 54:17 57:1 58:9 59:9 61:8 67:5,19 70:8,20 71:10,16 76:4,7,11 77:12 | authenticity 47:12 | basis 49:15 50:10 |
| anti-semitic 22:6,21 | appreciate 20:23 | asks 40:15 | automobile 63:7 | batch 67:4 |
| anticipate 78:18 | appropriate 64:4 | assessment 22:7 | available 61:17 89:18 | Bates 19:5,9 20:9 25:22 28:8 31:6 32:9 36:12 41:8 42:10 47:4 53:11 54:12, |
| anticipated 26:10 78:15,20 82:7,8 | approximate 11:10 | assessments 59:7 | aware 10:23 29:21 58:18 75:22 82:15 | |
| anticipating 26:10 | approximately 59:2 | assistance 59:7 | B | |
| anyone 65:11 | April 14:19 | associate 13:4 | Bachelor's 11:21 | |
| anything 24:11 38:2 39:20 72:11 73:3,18 78:10 83:7 84:13 | areas 13:20,24 14:2,3,4 93:10 | Associates 50:17 | back 12:20 15:2 17:22, 23 25:1 26:16 34:15 35:17 42:7 43:12 48:6 72:2 73:24 75:9 79:8 80:2 81:10,15 89:5 92:25 | |
| anyway 81:8 94:2 | argue 43:1 44:22 45:3 60:1 | assuming 92:17 | background 11:20 | |
| apologize 32:7 | argued 42:21 87:12 | assumption 69:9 | backwards 36:1 | |
| appeal 52:3,23 53:1,2 55:18 56:1 60:22 61:17,20,22,24 62:17 65:15,22,25 68:19,20 69:2 74:11 | arguing 26:11,13 41:15,18 42:23 | attached 16:11 31:5 36:25 37:14 | bad 52:1 | |
| appeals 74:8 | argument 21:24 22:1 23:6 24:13 26:12 27:5, 7 30:6 41:19 44:1 86:7 | attention 38:21 50:4 82:23 | Bar 12:5,7 | |
| appear 19:5 60:1 | argumentative 85:25 | | | |
| | arguments 21:12,19 34:18 43:2,6 44:7 45:1 | | | |

| | | | | |
|--|---|---|--|---|
| 15 56:23 58:6 61:5 66:20,23 67:3,9 70:6 71:6 | 22:8 | box 68:4 | 53:2 | 71:18 |
| bear 53:11 67:3,9 70:5 | believe 11:13 20:10,15,20 21:7,23 28:9,19 29:10 41:1,23 42:12 43:4,24 47:6 49:15 51:25 54:14 56:11 60:10 61:6 62:13 63:24 64:20 65:9,11,14 66:1,22,23 70:11, 22 72:13 76:16 77:18 78:2,8,10 79:5,23 80:12,19 81:11,23 82:18 83:6,11,20 85:1, 13,23 87:22 89:6, 19 92:5,8 | Bradley 13:6 | calls 73:18 | chambers 27:21,23 35:13, 14,15,16,20,21,24 36:1 60:2 65:10 78:16 82:10 86:17 |
| bears 66:19 | | breach 14:8 | came 62:19 65:16 | chance 67:16 |
| Beavor 7:20 9:20 15:4 16:24 17:4,25 18:16 21:9 22:12 23:9,13 29:7,23 30:7,8,12 39:4 43:11 45:19 46:5, 15,22,24 50:3,7,9, 19,25 51:20 52:13,19 62:13,20 63:18 64:2 65:18 66:11 68:16,25 69:17 70:1 71:2 72:5,10 75:17,21, 24 76:17,23 77:19 78:21 79:5 83:11 84:7 85:3 86:21 88:13 89:8 90:10, 24 91:1 | believed 22:9 24:24 33:20 37:23 38:1 84:9 | break 16:19 42:7 43:9 91:10,12,13 | can 10:1 15:25 21:3, 16,23 29:24 33:5 41:20 43:12 47:11 48:2 67:4 73:10, 11 75:14 77:14 79:7 80:16 81:9, 15 84:21 90:21 91:7 93:17 | change 89:11,12,14,15 |
| Beavor's 6:7 7:4 20:3 | believing 40:14 | breaks 13:14 | can't 44:18 49:5 57:23 | changed 82:13 |
| became 29:21 | benefit 49:17 81:14 83:8 89:13 | Brian 20:14 23:20 37:1 | card 16:12 | changing 52:12,14 |
| because 24:2 29:14 50:4, 20 52:4 61:17 68:4,18 69:11 82:1 92:11,23 | best 10:17 18:5 41:20 73:11 88:6,23 89:20,23 | brief 16:20 67:15 | case 6:5,9,12,14,17,22 7:6,8,21,23 8:7,11 9:20 11:18 14:7,8 15:9,19 18:15,16 19:2 20:6 21:2 22:4 24:2 31:2,23 36:7,19 47:5 50:21,22 51:2 53:7 54:5 58:3 61:1 62:6,21 63:11,18 64:7 67:6 69:20 70:2 71:22 79:18 81:15,20 82:17 85:15 89:14 90:11 91:6,21 | characterize 25:3 |
| become 58:17 | better 11:14 15:10 26:16 | briefings 42:16 | cases 75:8 | check 29:18,20 |
| before 9:23 10:3 29:19 30:21 31:5 32:24 37:10 41:6 44:21 54:25 55:1 56:22 59:2 61:2 65:21 66:18 70:4 71:4,5 84:13 92:22 | between 10:9 23:9 39:21 50:7 56:6 64:21 68:25 73:13 78:12 88:2 | bringing 38:20 | caveat 23:1 | chips 44:14 |
| behalf 65:22 82:3 88:23 90:5 | beyond 62:25 93:10 | brought 50:3 82:23 | cc'd 50:5,6 69:14 | chose 82:4 |
| belief | bit 17:23 91:11 | calendar 34:3 60:3 65:10 78:16 82:10 86:12,17 | certain 15:20 45:25 59:20 74:17 | Chris 46:24 |
| | both 23:13 24:3 39:2 40:14 51:3,7 | calculations 26:24 37:24 38:14 39:1,10,13 | certainly 18:21,23 36:1 45:6,11 47:6 49:1, 7 52:18 62:14 63:12 65:1 68:1 | Christopher 6:6 7:3,19 20:3 70:1 71:2 90:24 |
| | bothers 44:18 | called | | civil 74:11 |
| | bottom 68:4 | | | claim 72:25 |
| | | | | clarify 48:23 90:15 |
| | | | | Clark 13:7,8 |
| | | | | clear 16:11 53:9 67:13 76:3 81:22 92:4 |
| | | | | clearly 37:15 38:16 84:8, 22 |
| | | | | client 24:5 67:7,19 70:9 71:10 73:9 78:12 79:23 80:13,20 |

| | | | | |
|---|--|---|--|---|
| 82:4,22 83:17 85:13 88:3,11 89:20,23 | conduct 88:5,9 | 49:22,24 62:20 82:6 83:10,15 | 20:8,23 21:14 25:21 28:7 31:4, 25 32:3,6 36:10 41:6 42:4,9 47:2, 16,22 48:2,6 53:9 54:9 56:21 58:5 59:13 61:4 66:14, 17 67:12,16 70:4 71:4 73:6,17 76:3, 11,18 77:3,11 79:7,10 80:16 81:2 85:4,24 90:17 91:12,15 92:3 93:3,17,20, 23,25 | 74:6,9,12,15 83:22 84:17 86:10,12 87:13 93:14,19,22,24 94:3,7 |
| clients 87:23,25 | confer 67:7 | conversations 18:7 22:16,20 23:15,22,23 29:7, 22,25 30:4,8,11, 13 45:23 46:2,9, 22 63:8,9 72:5,9, 17,19 82:24 83:17 | counsel 7:18 9:10 19:18 20:23 22:17 23:5, 16,18 25:21 26:21 28:7 31:4,25 32:7 41:7 42:4 45:7 47:2,17 48:7 56:21 63:4 66:14, 18 67:16 69:7,25 70:4 71:2,4 76:4 84:14 85:14 90:5 92:4 93:1,7 | Court's 24:15 34:23 40:3, 11 41:9 43:25 45:12 51:10 |
| clue 10:6 | confirmed 25:14 | convert 60:21 69:1 | cover 20:12 81:8 | covering 84:16 |
| collectively 51:24 | conjunction 64:10 | converted 62:17 | credit 16:12 | criminal 12:14 13:18,23 14:6 |
| college 11:20 | consider 38:7 | converting 68:20 | counsels 63:5 | cross-referencing 72:3 |
| commencement 9:9 | Consideration 42:14 87:15 | convey 32:25 | County 13:7,8 | current 13:5 85:13 |
| comment 93:4 | considered 35:23,25 | conveyed 40:10 | course 30:13 48:1 80:23 88:18,25 89:10,16 | currently 12:13 |
| comments 20:20 22:5,21 44:6 | consistency 14:1 | copy 16:11,18 18:9 27:24 50:18 54:15 57:7 66:14 72:14 92:4 93:15,17 94:4,8 | court 6:13 7:7,22 9:12 10:25 22:4,8,24 23:2,6 24:10,13, 24 27:24 28:2,4, 16 29:1,8 30:1 33:1 34:8,20 35:6 39:19,22 40:4,15, 25 41:3,14,20 43:23 44:6,12 45:2,8,10 46:6,11, 14 47:9 50:15 52:3 55:15,18,22 56:14,18 57:5 58:2 59:3,10,22, 25 60:4 61:2 62:8, 16 66:6 68:9,16 70:25 71:14,18 | custodian 47:19 |
| communicate 45:18 | consistent 14:3 33:14 49:8 64:5 68:2 | correct 12:11 13:16 14:12,23 15:4 16:13,25 17:11,18 21:9,10 24:25 25:5,16 26:24 30:23 31:19 32:21 37:6 42:16 43:23 44:4 45:9 46:18, 20 47:9,21,24,25 53:23 55:2,3,6,23 56:12,13 57:19,20 58:15,16 64:17 66:4,7 68:11,14 69:3 70:14 77:2, 23 83:18 85:19 86:7 87:16,19 90:25 93:25 | DA's 13:9 | D |
| communication 39:4 64:21 78:11, 12 | consistently 14:4 | confer 67:7 | D-R-A-K-E 12:4 | |
| communications 46:5 63:14 69:16 73:8 77:12 90:18 | consulting 63:3,24 | content 23:22 29:25 46:1, 8 76:1 | Dan 63:7 | |
| competence 80:24 81:7 | contacted 15:18 22:2 33:13 34:2 50:20,22 68:16 83:2,25 | contention 84:25 | date 11:10 28:18 38:18 41:17 44:7 47:23 51:8 56:6 58:23 93:8 | |
| competency 88:20 | contained 39:10 41:21 42:15 | contents 65:19 68:6,16 | dated 6:4,13,16,18,21 7:7,15,22 16:8 28:5 41:3 51:8 53:6 56:18 57:6 66:10 70:25 | |
| Complaint 11:7,8 14:11,18, 22 16:3 75:10,11, 16 87:21 89:5 92:24 | content 23:22 29:25 46:1, 8 76:1 | continue 34:1 44:22 | | |
| complete 62:2,3 | contention 84:25 | continued 6:1 7:1 8:1 92:19 | | |
| Completely 11:1 | contents 65:19 68:6,16 | contract 14:8 | | |
| computed 60:4 | continue 34:1 44:22 | conversation 34:7,12,14 40:8 | | |
| concerning 15:21 | continued 6:1 7:1 8:1 92:19 | | | |
| conclusion 45:13 | contract 14:8 | | | |
| | conversion 34:7,12,14 40:8 | | | |
| | | CORRICK 16:10,14 19:4,18 | | |

| | | | | |
|---|--|--|---|--|
| daughter 63:6,8 | denial 45:18 60:18 77:8 | different 21:19 33:2 38:4 49:5,6,22 52:19 62:22 68:21 69:5 72:12 78:22 81:11 85:10 87:10 | District 13:7 59:21 60:3 | 27:11,16 30:13 34:14 38:9 43:21 79:3 89:16 |
| Davenport 11:22 | denied 45:17 46:12,19 53:22 55:2 60:14 65:14 68:10,18 74:4 76:10,12 77:1 | differently 49:14,18,21 50:23 81:16 82:12 83:8, 9,12 | divided 75:6 | duties 80:13 88:13 |
| day 29:19 38:9,13 39:9 68:9 | deny 75:19,23 76:1 90:14 91:6 | direct 52:3,23,25 60:22 61:17 62:17 | Docket 7:11,14 | duty 80:19,22,24 81:1, 7 82:18 83:21 84:2 87:24,25 88:11,16,19,22 |
| days 56:3,6 | denying 7:12 60:25 61:18 | directing 73:15 | document 18:20 20:13,22 21:4,15,20 26:25 27:2 31:5,9 32:8 33:3,7,9 36:15 37:7 41:11 47:4, 10 48:10 52:25 53:2,10,18 54:11, 17,21 56:22 57:2, 7 59:14,18 61:9, 13 66:19,24 69:22 70:5,9,16,18 71:5, 11 77:3,10,16 | <hr/> E <hr/> |
| deadlines 37:24 | deposed 75:12 | direction 69:5 | documentation 62:21 | each 15:17 |
| December 11:25 | deposition 9:10,19,22 11:2 14:12,20 16:5,9 18:17 19:3 20:7 21:1 25:20 28:6 31:3,24 36:9 41:5 42:3 47:1,20 53:8 54:6 56:20 58:4 61:3 66:13 70:3 71:3,9 90:2 91:22 92:19 93:5,15 94:10 | directly 63:15 87:3 | documents 11:4 20:16,25 27:13,17 47:7,18, 22 64:9 67:2,9 | earlier 33:24 34:7 87:22 |
| decide 24:11 | depositions 10:3 | discovery 11:8,9,12 83:1 | done 15:21 42:4 62:24 65:1 70:20 71:23, 24 81:16 82:12 83:7,9 84:8 86:17 87:10 | early 63:10 |
| decided 27:23 30:1 35:15, 16 36:2 39:17 78:21 | Des 12:4 | discuss 52:2 | down 62:19 71:8 | economics 11:23 |
| deciding 60:2 | describe 12:12 32:24 37:15,25 88:2 | discussed 23:12 24:8 33:16, 23 34:8,19 35:4 38:22 46:15 50:3, 24 68:16,17,19 69:9 72:11 74:16 84:12,14 85:12 86:20 | draft 59:5 77:10,15 | EDCR 29:5 59:21 |
| decision 52:7 65:17 68:21 86:24 | described 26:22 39:8 | discusses 33:9 60:6 | drafting 57:11 69:22 | edited 68:5 |
| decisions 55:15 89:17 | DESCRIPTION 6:2 7:2 8:2 | discussing 38:15 50:21 51:19 63:18 | Drake 12:1,4 | educational 11:19 |
| declaration 37:2,4 | despite 48:11 | discussion 23:4 48:5 62:13 73:22 89:3 93:11 | Dropbox 72:13 | efficient 67:18 |
| Defendant 6:6 7:3,19 70:1 71:2 | detail 24:8 | discussions 17:24 23:13 38:12 50:22 73:12 85:2 | drugs 10:20 | efforts 51:23 52:10 61:24 78:2 79:4,11 |
| Defendant's 6:10 29:2,4 | detailed 84:8 | dispute 49:6 58:22 68:6 | duly 9:6 | either 35:14 82:16 |
| defending 90:11 91:5 | determine 47:11 67:4 | disputing 27:5 48:24 | during 12:25 15:21 | elsewhere 50:11 |
| defense 12:14 13:18,23 14:6 76:5 81:19 | | | | email 6:18 7:15 46:24 48:15,17,19,24 49:3,4,6 51:8 64:12 66:10 67:24 68:1,6 69:15 77:23 93:25 |
| definitely 40:6 | | | | emails 25:13 82:25 |
| degree 11:21 | | | | employed |
| delve 13:25 | | | | |

| | | | | |
|--|---|---|--|---|
| 12:25 13:11 employment 12:12 13:14 end 17:19 19:24 20:21 30:18 64:16 78:7 English 37:16 enter 76:22 entered 25:18 30:22 31:14 36:5 41:2 50:14 57:14 75:17,24 76:16 entirety 20:21 47:15 62:6 64:21 65:13 81:15 entitled 17:2 52:25 entries 28:23 entry 6:3,20 18:14 31:1, 14 53:5 56:4 61:25 envision 79:1 error 37:24 38:1,25 ESQ 9:5 Esq.'s 8:3,8 Esquire 50:17 essentially 41:20 59:9 69:4 81:21 estimation 74:23 ethical 79:24 89:7 even 54:14 | eventually 22:23 27:15 ever 9:22 30:4 72:10 74:11 everyone 85:23 86:1,4 everything 57:10 85:11 evidence 90:1 evident 62:5 exactly 24:17 44:15 85:19 exam 12:7 EXAMINATION 9:16 examined 9:7 except 74:16 excuse 24:25 35:22 75:22 76:5 83:24 87:24 executed 17:4 79:17 exercise 88:22 exhibit 6:3,6,10,13,15,18, 20 7:3,7,9,12,15, 17,22 8:3,8 14:18, 20,22 16:2,5,7,9, 11,18 17:1 18:2, 14,17,25 19:3,4,8, 10,14 20:3,7,9,12 21:8 23:17 25:19, 20,22 28:4,6,8,17 31:1,3,5,12,22,24 32:8 36:6,9,11 37:1,14 41:3,5,7 42:1,3,5,9 43:15 46:24 47:1,3 48:8, 18 50:15 53:5,8, 10,18 54:4,6,10 | 55:5 56:18,20,23 57:5 58:1,4,5 60:25 61:3,4 66:10,13,19,22 67:8,17,20,23 69:25 70:3,5,25 71:3,6 72:2 75:9, 11,13,14,15,19 76:6,12 77:4,6 78:4 79:17 90:1,2 91:3,18,22 92:4 exhibits 6:1 7:1 8:1 19:11, 20 72:3 75:9 94:1 expedite 48:8 93:18 expedited 94:4,8 expired 56:3 explanation 49:9 explicit 73:18 expressed 45:4 extended 77:22,25 extending 52:15 extent 19:19 25:23 47:8 73:7,18 76:20 77:11 90:17 92:7 93:6 <hr/> F <hr/> fact 20:10 33:19 34:19 48:11 52:12 68:17 facts 15:1 fair 64:7 fairly 62:5 | familiar 10:11 33:6 far 14:8 fashion 30:1 fast 67:1 favor 14:7 fax 20:12 faxed 20:13 feel 84:2 89:22 feelings 22:3 fees 87:9 few 11:5 53:25 66:12 90:6 fiduciary 80:19 87:23,24,25 88:2,11 file 15:24 19:17 22:25 23:10 24:12 27:13 29:1 30:16 31:18 33:22 38:7 39:13, 14,20 51:5 52:19 53:2 57:18 60:5 61:22,24 63:1,2, 11 64:9 65:20,25 68:23 72:12 75:1 82:2,19 83:12,23 84:3 85:11,19 86:5 filed 14:11,19,22 16:3 18:10 19:2 21:8, 11 22:2,18 25:16, 19 26:5,23 27:17, 18 31:2,23 33:15, 25 34:5,6,12,17 36:7,19 38:22 39:6,17 40:6,13, | 23 46:13 52:5,25 53:6 54:1,4,23 55:9,17,22 56:1,5, 8 57:21,23 58:1, 14,21,22 59:2 61:1 62:10 65:3, 15,18,21,23 70:1, 18 74:5,8,11,14 75:11 78:24 79:16 81:11,12 82:16,21 83:4,6,13,16 84:13,16,20 86:8, 14,23 89:6 92:24 files 59:22 75:3,5 filing 17:19 18:1 19:24 23:16 30:3,18 50:1 52:2,23 54:20,22 55:4,12 58:25 60:9,15 66:5 69:22 70:13 71:21 84:7 final 52:6 finance 11:23 fine 94:2 finish 91:11 firm 12:15 13:4 75:1 first 8:5,10 9:6 14:17 17:8 28:16 29:12 35:25 44:12,13 49:19 61:16 84:11 86:9,18 91:19 five 59:2 flow 93:6 folder 50:16 follow 40:2,11 52:16 |
|--|---|---|--|---|

| | | | | |
|---|---|---|--|---|
| follow-up 82:6 | 23:2 24:13 34:8, 17,21 35:6 39:20, 22 44:7 45:1 | guess 29:20 51:22 81:9 | 24:4 40:12 84:17 85:20 86:13 | imagining 47:17 |
| followed 55:4 | 59:24 72:5 78:2 84:18 86:15 92:20 | guidance 40:3,11 | hindsight 49:12,17 62:5 82:5,17 83:8 89:13 | immaterial 62:8 81:18 |
| following 46:23 60:18 61:25 71:20 | future 93:8 | H | hired 90:10 | impact 38:13 |
| follows 9:7 | G | handle 45:7 49:15 | Hofland 12:16,17 13:5,6 71:1 75:1,3,5 | implicit 73:17 |
| footnote 23:1 24:17 33:23 | general 14:25 80:12 | handled 49:18 50:23 | Hoflandlaw.com 49:4 | important 84:9 |
| foremost 84:11 | get 27:24 41:6 42:4 50:18 59:2 66:18 81:19 93:20 | happen 30:15 65:12 78:13 | hold 32:6 73:6 | improperly 60:4 |
| forgot 64:12 | getting 89:5 | happened 29:16 56:10 62:24 69:23 | holiday 38:8 | include 34:17 88:22 |
| form 21:15 59:14 61:20 72:13 76:19 77:4 79:11 80:16 81:3 85:5,24 | give 15:10 16:1 | happening 51:5 | homework 84:9 | included 35:5 |
| formed 77:19 | given 49:12 | happens 75:8 | Honorable 40:4 | including 33:23 |
| former 85:13 | giving 51:9 | happy 37:17 84:18 | hour 42:6 | inclusion 39:18 |
| forward 67:5 68:22 69:11 73:20 76:15 78:14 | glanced 14:15 | hear 84:17 | however 41:24 53:11 54:12 56:24 58:6 61:6 67:1 70:6 71:7 90:20 93:9 | incorrect 29:4 30:2 76:8 |
| founded 64:4 | goal 30:14 | heard 27:20,22 35:11, 12,13,14,19,21 40:18,24 43:17 | Hummel 16:17 92:22 93:13,14,16 94:3, 5 | independent 18:22 37:18 42:20 67:25 71:17 74:23 82:18 83:20 84:2 |
| frankly 22:7 | good 49:15 93:23 | hearing 34:25 42:2,14 43:6,21 45:24 46:4 49:8 87:15 | Hypothetically 86:11 | indicated 15:18 33:18,22 34:2,10 38:25 39:7 51:4 62:25 63:10 65:15 66:21 |
| frequently 48:21 | got 10:14 34:15 51:2 52:6 68:15 | Hefetz 18:15 26:21 50:21 | I | indicates 59:23 60:10 |
| friend 82:3 | gotten 20:16 | held 48:5 73:22 89:3 | I's 50:4 | indicating 20:13 |
| front 10:25 14:23 22:19,23 43:18 83:22 87:13 | graduated 12:1 | help 14:7 15:23 70:16 | idea 18:12 46:13 | individual 15:12 |
| fulfilled 64:24 89:7 | grant 59:22 65:10 82:8 | helped 45:11 | identify 21:12 | influence 10:19,21 |
| fully 51:13 64:14 78:5 81:8 | granted 29:22 58:18 70:22 | here 9:18,19 13:22 33:4 44:16 64:13 74:24 81:19 | imagine 19:6 31:6 | information 85:18 89:18,21,23 |
| further | granting 55:19,21 56:4 57:12 61:18 71:19,21 78:15 | Hey | | initial 69:12 |
| | | | | initially |

| | | | | |
|--|---|---|---|--|
| 38:15 initiated 38:18 injury 13:21 instance 82:13 instant 75:11 instruct 73:9 77:13 90:19 instructing 73:19 instruction 34:23 intend 51:13 64:14 78:5 93:9 intention 35:9 57:18 interest 89:20,23 interests 79:25 interrogatories 8:10 91:20,25 92:15,16 intervene 55:15 intervening 62:23 involved 63:6 81:17,21 Iowa 11:22 12:4,5 Israel 51:25 52:11 55:1, 16 64:6 65:9 78:15 82:8 86:11 issue 21:20 22:24 23:12 24:25 26:15 39:2 43:21 52:15 60:7 82:7,16,20 84:4, 12 86:13 | issued 36:2 47:18 issues 22:9,21 47:12 59:20 62:7 82:17 84:9,18 85:12 87:2,5,6 itself 17:14 21:15 59:19 76:13 77:4 90:16 <hr/> J <hr/> January 11:13 12:23 56:18 57:6,9 80:10 90:6 91:20 Johnson 20:14 33:19,20 34:3,12,16 38:24 39:7 Josh 66:11 Joshua 8:3,8 9:5 91:18 Joshua. tomsheck@gmail. com. 48:18 journal 28:23 JT000017 19:9 JT000711 16:14 JT435 42:10 JT449 42:10 judge 51:25 52:11 55:1, 16 64:6 65:9 78:15 81:20 82:8 86:11 judgment 18:9,14 19:1 20:5 85:1,17 88:23 | juncture 81:24 86:9 June 15:8 16:8,24 33:14 38:17 76:23 jurisdiction 24:11 jury 15:19 82:9 <hr/> K <hr/> keeping 93:5 kept 51:7 kind 62:6 knew 24:3 know 10:1 11:14 14:2 17:6 18:11 24:9 30:24 32:23 35:25 36:1 40:13 44:20 54:22 55:24 57:23 58:19 62:7 66:8 68:5 69:14,23 70:20 71:23 72:10 73:1 74:7,10,13, 22 75:3 81:14 83:8 84:21 85:12, 21 86:1 known 15:17 <hr/> L <hr/> label 47:7 language 35:5 37:16 large 78:11 LAS 9:1 last | 20:11,16 61:15 late 28:21 29:10 later 39:7 44:7 46:13 52:5 65:3 launched 55:1 law 10:25 12:1,2 Lawyer-client 16:7,15 17:2 lawyer/client 50:11 lays 38:16 least 10:1 left 43:15 legal 61:20 license 12:21,23 licensed 12:9 like 10:13 26:5 37:19 67:6 73:3 74:18 90:23 93:15,19 94:4,8 likely 49:17 limitations 73:3 limited 24:5 50:9 59:23 77:21 85:14 91:2 line 27:3 28:23 44:10 68:3 litigate 51:14 64:14 78:6 litigated | 78:17 litigating 56:9 litigation 20:11 48:11 62:10 66:25 78:19 little 17:23 91:11 logical 42:6 long 12:17 13:8 80:3,9 longer 65:18 look 14:17 19:14 26:5, 19 67:7 78:3 84:2 87:21 88:4,8 looking 11:11 36:1 43:15 62:5 81:10,15 loop 51:7 lot 80:14 81:17 82:17 83:9 lots 87:10 loyalty 80:22 88:17 <hr/> M <hr/> made 21:12 22:3,5 46:17 51:25 52:7, 11 64:3 65:17 83:13 86:25 87:8 89:17 mailed 72:14 major 11:23 make 64:7 67:17 73:18 79:24 83:21 |
|--|---|---|---|--|

| | | | | |
|---|--|--|--|--|
| making 15:20 20:24 51:16 | 90:25 | might 10:21 | most 40:5 | N |
| malpractice 72:24 | matters 48:9 | mind 48:25 | motion 6:7,11 7:4,17 15:19,24 17:10 18:1,25 19:1,8,14, 16,25 20:4,5 21:21,25 22:2,10, 14 24:6,16 25:3 26:6,23 27:14 29:3,21 30:3,16, 18,22 31:15,19,22 32:15,19 33:1,15, 17,21 34:2,4 35:1, 10,12,19 36:6 38:7 39:5,6,14 40:5,14,17,23 41:4,15 42:2,14, 17,22 43:3,16,22 44:3 45:3,13,15, 19 46:13,16,17 49:14,21 50:2,15 51:5 52:5,24 53:22 54:1,4 55:1, 5,11,12,19 56:4,7, 8,12,15,19 57:12, 15,17 58:13,14,18 59:12,22 60:1,5 63:2 65:2,8,10,19 69:25 70:13 71:1, 19 72:14 78:16,17 81:12,25 82:9 83:21,23 84:5 86:8,12,19 87:3, 13,15 | name 75:6 |
| Mandamus 7:10,13 57:19,22 58:1,21 59:1 60:22 61:1 65:4, 24 66:6 68:10 69:2 74:4,5,15 75:2 78:20,23 82:15 | mean 14:5,14 18:21 41:17 50:5 51:24 62:5 72:21 73:12 80:10 81:17 87:17 | mine 85:8 | | need 33:6,7 |
| Manning 13:5 | means 21:3 81:5 | mini 94:1 | | needed 17:6 51:21 |
| Marc 15:15 46:25 49:12,20,22 50:4, 5,17,21 64:1 69:10,11 | meant 90:15 | minor 11:23 | | needs 86:15 |
| March 9:1 13:6 | meantime 62:24 | minute 36:2 | | Neither 65:8 |
| mark 14:18 16:1,6 46:23 66:9 70:24 | medications 10:20 | minutes 6:13 7:7,22 27:25 28:4,16,22 29:11, 13,18 41:3,14 50:12,13,15 56:14,18 57:6 70:25 71:15,18,20 91:14 | | Nevada 9:1 12:8,10,22 58:2 74:5,9,12 |
| marked 14:20 16:5,9 17:1 18:13,17,24 19:3 20:2,7,9 25:20 28:3,6,17 30:25 31:3,21,24 36:9, 11 41:5,25 42:3 47:1,3 48:8 53:5, 8,10,18 54:3,6 55:5 56:17,20,22 57:25 58:4 60:24 61:3 66:13,19 69:24 70:3,5 71:3 79:17 89:25 90:2 91:18,22 | Memorial 38:9,13 39:9 | misstates 59:14 | | never 35:12 52:6,25 65:21 77:24 81:19 |
| markings 19:5 | memorialized 41:14 | Moines 12:4 | | nevertheless 20:17 |
| matter 14:11,19 15:1,3, 11 16:3 18:10 25:19 27:7,20 28:5 29:1 35:23 45:24 49:16 60:2 61:22 68:14 72:4, 6 75:12 81:10 84:3 88:14 89:9 | memory 69:22 70:19 | moment 12:20 19:13 26:18 32:16 48:3 67:12 | | new 15:20,24 17:11 18:25 19:8 20:4 21:21 22:2,10,15 24:7 25:4 26:6,23 27:14 29:3 30:22 31:15 33:15 35:19 38:7 39:14 43:3, 22 44:3 45:3 50:2, 16 55:19,21 56:5 59:12 60:1,5 61:18 65:10 69:7 78:16 81:13,25 82:9 84:5 |
| | mention 32:20 74:18 | moments 53:25 | | next 30:15 93:24 |
| | mentioned 13:17 14:10 16:23 17:23 18:2 19:14 21:7 22:20 23:8 25:9 26:22 31:18 35:4 36:22 37:9, 19 42:12,15 44:21 46:16,21 49:19 53:25 54:25 56:11 57:17 59:11 65:6 66:2 70:11 78:24 83:16 86:4 87:2 90:13 91:25 | Monday 9:1 93:24 | | nor 22:7 48:25 65:9 77:24 |
| | mentions 17:8 28:22 37:23 49:10 61:15 75:15,23 | months 59:2 | | norm 14:9 |
| | merits 23:6 24:14 35:6 39:19 87:12 | more 10:7 23:15 30:5 56:3 67:17 74:21 80:17 84:21 86:6 | | note 20:11 54:11 72:20,21 |
| | mess 62:6 | Morris 20:14 23:20,23 24:1,21 25:2,11 32:21,25 33:12 34:15 35:3 36:22 37:1,10,23 38:2, 13,17,24 39:2,16, 25 40:10 82:6 83:2,3 86:15 | motions 27:8 | notes 29:1 |
| | | | move 70:24 81:9 91:17 | |
| | | | moving 76:15 87:20 | |
| | | | mutual 68:21 | |
| | | | myself 50:7 78:12 | |
| | | | mystery 78:14 | |

| | | | | |
|--|--|--|--|--|
| nothing 35:21 72:20,21 | obtain 78:2 | 85:15 | outcome 30:14 60:12 | 59:22 85:15 |
| notice 6:3,20 7:17 18:14 29:17 31:1,14 50:12 53:5 56:4 68:3 69:25 72:24 | obtained 47:10 | opposition 6:10 15:24 17:10, 20 18:1 19:17,24 20:3 21:8,11,13 22:18,22,24,25 23:16 24:12 26:6, 12 27:8,11,18 29:2 30:6 33:15, 23,25 34:7,17,20, 25 35:5,10,18,23 36:6,19,21 38:22 39:17,23 40:13 43:3 50:2 55:9 59:11,23 81:12 82:2,19 83:5,7,14, 17,24 84:3,8,16 85:11 86:6,23 87:4 | outlier 13:22 | passing 72:16 |
| noticed 9:20 | Obviously 62:16 | | outline 88:10 | past 14:16 |
| notwithstanding 19:1 20:5,22 | occasionally 13:21,25 75:8 | | outlined 91:2 | pause 16:20 67:15 |
| November 53:6 54:5 58:15 70:25 | occurred 49:8 | | outset 62:10 | people 81:17 |
| NRAP 61:19 | occurring 79:2 | | outside 77:14 90:20 | Perfect 91:15 |
| NRCP 9:14 | offer 34:16 | | owe 87:23 88:13,16,19 | perhaps 30:5 |
| number 21:19 22:13 56:9 62:23 | office 13:7,9 29:14 92:8 | | owed 80:13 88:12 | period 79:12 |
| <hr/> O <hr/> | one 10:1 26:5 31:25 32:6 48:21 49:4 54:9 57:23 59:2 62:11 67:4 74:16, 21 78:15 82:22 | oral 27:7 46:17 55:1 60:16 | <hr/> P <hr/> | permitted 67:5 |
| oath 10:23 | One-action 81:19 | orally 52:5 | p.m. 43:10 73:23 91:16 94:10 | personal 13:21 |
| object 21:14 28:12 31:8 32:11 35:8 36:14 48:9 58:9 59:13 70:8 76:18 77:4 79:7,11 80:16 81:2 85:4,24 | ones 50:14 | order 6:3,20 7:12 30:21 31:1,14,17 36:2 48:8 52:7 53:6 55:18,21 56:4 57:11,14 60:25 61:18,25 62:19 65:16 67:1,17 68:15 71:21 | package 94:2 | personally 24:3 |
| objection 19:7 20:17 25:24 34:11,22 41:10 54:16 57:1 71:10 93:2,3,8 | only 12:9 23:1,10 29:2 63:24 66:5 84:4 89:11 91:7 | ordinary 48:1 81:1,3 | pages 20:12 | pertains 76:6 |
| objections 61:8 67:18 | open 93:5 | original 38:10 | papers 28:25 | petition 7:9,12 57:18 58:1, 20,25 59:5,9 60:10,13,15,18, 22,25 65:3,23 66:6 68:10,18 69:1 74:3,14 78:19,23 82:14 |
| objective 55:12 | opinion 34:4 43:25 | other 13:20,22 14:3,4 15:17 22:21 24:25 27:10 37:13 52:10 62:7,13,14 63:4, 17,21 66:12 67:2, 8,9 72:11 78:12 82:12 84:4,18 85:18 86:6 87:1,5, 6 | paragraph 17:12 38:20 39:25 75:15 76:6,7 77:6, 9 87:20 | petitioner 61:19 |
| obligation 79:24 | opportunity 67:7 86:18 | otherwise 10:20 73:10 | paragraphs 37:22 38:3 87:21 | petitions 74:4 75:2 |
| obligations 64:24 89:7 | oppose 24:19 40:16 65:2 81:25 | | part 78:11 | phone 38:17 |
| | opposed 49:13,20 56:12 68:19 83:12 | | particular 21:20 22:24 41:11 42:5 48:10 | phrased 64:12 90:14 91:6 |
| | opposing 22:16 23:5,16,18 27:14 45:7 84:14 | | parties 21:2 30:15 59:25 66:12 | PI 13:24 |
| | | | partner 13:5 | place 13:13 51:2 |
| | | | party | placed |

| | | | | |
|--|--|---|---|--|
| 50:16 | 9:11 41:15 43:11 | 71:6 83:1 | 9:13 29:5 | rather 60:2 |
| Plaintiff's 8:4,9 20:4 29:3 91:19 | presented 60:16 91:8 | producing 20:21 | put 22:6 24:16,20 34:20 53:4 72:24 82:1 83:22 86:11 | re-enters 69:17 |
| pleadings 23:25 29:1 62:9 | presents 59:19 | professional 88:4,8 | | reach 51:22 |
| point 17:16 21:2 28:1, 11 29:17 31:8 32:10 42:6 52:9 55:17 56:1,25 58:17 62:4,12 66:25 70:7 72:23 74:2,17 76:8,19 89:12 | presume 32:9 36:12 41:8 53:12 54:12 56:24 58:7 61:7 70:6 71:7 | professionally 24:4 | Q | reached 51:15 64:15 68:20,25 78:7 |
| points 22:13 | pretty 38:16 | prompted 39:3 | question 15:10 21:17 25:6 26:17 38:5 73:7,9 79:8,14 84:1,24 91:7,8 92:8,10 | read 14:15 28:23 33:5 37:11,16 44:10 45:5 49:11 51:9, 11 79:7,9 88:5,9 |
| Polenberg 63:7,9,11,15,23 | previously 21:1 38:23 47:19 50:14 61:21 66:21 77:23 86:23 91:3 | pronounced 18:3 | questioned 45:8 | reading 37:20 42:24 |
| portion 49:10,19 | Primarily 13:19 | proper 29:5 | questioning 31:8 | reads 49:1 |
| position 39:4,12,15 51:24 | prior 9:9 34:25 35:10, 19,23 36:3 50:1 84:7 | protected 79:25 90:18 | questions 20:18 21:4 25:25 28:12 32:12 36:15 41:10 48:10 49:1 53:14 54:17 57:1 58:9 61:9 67:5,19 70:8 71:5,10 92:20,23 93:6,7 | really 11:3 |
| potential 68:20 72:24 | privilege 73:19 | provided 22:13 28:2 29:13, 19 32:8 34:22 35:7 36:12 41:8 45:2 54:12 56:23 58:6 61:5 65:19 72:12 92:4,6 | quite 45:25 50:24 | reason 10:16 44:17 58:22 |
| potentially 30:10 50:23 | privileged 73:8 77:12 | providing 39:24 | quote 64:16 78:4,7 84:15 | recall 10:2 11:13 15:1,6 18:11,19 21:23 28:15,18 29:24 36:18,21,24 37:2, 8 40:17,20 41:15, 20 43:5,7,25 44:5, 23,24,25 45:1,4, 12 46:1 47:5 48:15 49:24 51:16,18,19 52:23 53:17,19 54:20,22 55:8 56:14 57:6, 11,16,21 59:1,8 60:9,12,17 61:12 63:5,6,18 67:24 69:13,19,21 71:14,21 72:1,8, 23 73:2,5 91:24 92:14 |
| practice 12:9,22 13:20,23 14:5 75:4 | probably 10:15 18:5 20:21 28:21 29:19 82:11 88:4 | public 19:6 20:16,20 25:23 26:1 28:10 31:7 32:10 36:13 41:9 53:12 54:13 56:24 58:8 61:7 70:7 71:8 | R | |
| practices 75:5 | problem 38:19 52:21 84:15 | pulling 92:11 | raise 22:22 | |
| practicing 80:3,9 | procedure 29:5 | purported 82:3 | raised 21:19,20 22:9,21, 23 26:15 27:5 30:6 43:2 62:11 84:5 87:2,5,6 | |
| predominantly 13:23 | proceedings 6:15 7:5 16:20 54:1 55:14 56:1 67:15 69:17 | purpose 24:5 85:15 | raises 81:18 | |
| preexisting 24:2 50:8 | process 24:9 67:18 | purposes 54:10 71:9 90:11 91:2,5 93:6 | range 19:9 | receipt 16:12 |
| preparation 14:12 | produce 47:14 48:1 | pursuant | rare 75:8 | receive 12:21 |
| prepare 11:2 | produced 20:10 21:1 28:8 41:7 47:5,6,13,23 48:11 54:14 66:24 | | rarely 75:7 | received 12:23 28:16 29:15 |
| prescription 10:20 | | | | |
| present | | | | |

| | | | | |
|--|--|---|--|---|
| receiving 56:14 61:12 71:14,17 Recently 14:7 recessed 43:10 73:23 91:16 recollection 16:23 17:3,6 18:22 29:16 31:13 37:19 42:13,21 46:10 52:6 53:21 55:13 57:8 59:17 67:25 70:12,17,21 71:17 recollections 37:13 reconsider 30:3,17 59:10 reconsideration 6:8,11 30:19 31:19,22 32:16,19 33:1 36:7 40:18, 24 41:4,16 42:2, 17 43:16 45:14, 15,19 51:6 53:22 56:9 60:19 65:9 78:18 86:9,20 87:3,17,18 record 16:10 19:4,6 20:8, 16,20 25:22,24 26:2 28:8,10,24 31:1,7,22 32:10 36:10,13 41:9 42:9 43:13 44:10, 20 46:23 47:2,8, 10 48:2,5,6 49:11 51:12 53:9,13 54:3,14 56:25 58:5,8 60:25 61:4, 7 64:5 66:9 67:14 70:7 71:8 73:21, 22,24 76:3 79:9 81:23 82:1 89:1,3 92:3,22 recording 41:23 records 47:15,20 | reduced 25:10 refer 18:15 27:3 reference 15:25 72:22 75:14 referenced 23:24 45:21 46:11 referred 15:11 32:20 referring 23:10,19 32:16 47:17 49:21 50:13 reflect 31:13 refresh 17:3 70:16 refreshed 17:7 regard 21:24 86:5 regarding 22:14 57:2 78:13, 19 regards 9:19 15:1 16:22 17:5,25 21:8,11 23:11 25:8 26:9 29:7 30:22 31:12, 14 37:9 40:7 41:4 42:14 43:22 44:1 45:13 46:5 47:14 52:23 55:18 56:19 57:5,15 58:13,20, 25 60:13 67:23 70:13 71:1 72:6 75:4 77:9 79:4 81:12 88:12 89:8 90:8,24 Regular 94:1 rehearing 60:19 related 22:25 61:1 62:21 64:7 | relationship 24:2 50:8,11 75:18,25 76:17,20 77:1,20 79:6,19 87:24 88:2 remedy 61:20 remember 30:11 37:20 38:11,12,15 41:17,22 42:23,24 46:8 57:10 70:18 72:18 reply 25:16,18 26:4,9, 18 27:8,17 34:13 reporter 9:13 93:14,19,22, 24 94:3,7 represent 28:9 47:9 63:12 65:18 69:10 representation 16:22 17:5,10,17 19:19 21:9 51:17 52:12 63:1 64:1,8, 10 78:9 89:8,16 91:1 representations 22:3 represented 64:2,11 69:11 90:24 representing 17:25 50:9 88:24 request 24:15 29:14 52:7 62:17 87:8 90:8 requested 29:18 40:4,12 52:5 Requests 8:5 requires 59:21 reserve 23:11 44:7,22 | 45:2,5 92:25 reserving 44:18 respect 19:7 20:18,19 21:4 32:12 36:15 48:10 58:9 66:21 67:20 70:9 92:8 93:5,9 respond 77:13 response 26:5 76:7 90:21 92:1,24 responses 8:4,9 11:8,9,12 90:4,7 91:19 responsive 62:9 result 49:12 51:14,23 64:15 78:6,17 retain 52:20 retained 15:3 16:24 22:11 24:1,4 65:2 82:25 retainer 16:7,15 17:2 64:24 65:7 76:22 77:19 78:24 79:17 retrial 69:11 reverse 52:11 review 11:4 28:25 48:7 64:5 67:3,17 reviewed 14:10 34:3 reviewing 91:25 right 11:16 14:18 25:11 26:14 42:18 49:13,20 51:14,22 | 57:3 62:4 63:12 64:15 65:7 67:21 69:6 76:15 78:6 80:7 83:21 92:25 rights 44:19,22 45:3,5 route 62:22 68:22 72:12 78:22 rule 9:14 62:11 81:19 87:9 88:4,8,10,12 ruled 29:8 46:6 rules 10:11 ruling 51:10 52:11 rulings 44:5 <hr/> <p style="text-align: center;">S</p> <hr/> SAG 47:7 67:3,9 SAG000011 7:16 SAG00011 66:20 SAG000514 47:4 SAG000514-515 6:19 Saggese 15:15,17 17:24 18:3,4 22:2,12 23:10 29:22 30:9, 10 45:20,21,24 46:15,22,25 47:18 50:6,17,20 51:19 52:18 62:10,15 63:20,21,23 64:3 66:11 69:13 72:6, 16 81:18,21 82:2, 24 83:11,18,25 84:6,13 85:3 86:21 92:23 |
|--|--|---|--|---|

| | | | | |
|--|---|--|--|---|
| Saggese's 29:14 64:8 93:7 | sheets 20:13 | specific 22:3 23:13,21,22 28:18 37:12 42:13 46:8 69:22 70:12, 19 80:17 | statement 40:7,9 64:25 | 86:12 |
| sanctions 87:10 | short 62:1 91:10,12 | | statements 9:12 | summarily 14:13,14 |
| school 12:1,2 | sic 40:5 42:15 | specifically 18:1 23:15 24:18 34:24 38:9 43:5 51:16 52:22 65:6 68:17 69:19 90:8 | states 39:25 44:20 59:18 75:16 | supervisor 33:19 |
| scope 17:9,16 52:12,14 64:1 77:21,22 78:8 91:2 | side 85:18 | | stating 26:25 45:2 | supplement 34:16,25 35:10, 18,22 36:3 |
| second 32:6 44:17 54:9 73:6 89:2 | signature 68:3 | specifics 30:11 72:18 | status 29:18,20 | supplemental 25:9 39:18 |
| section 17:11 91:3 | signed 77:18 92:9 | spoke 24:1 34:3 38:17, 24 39:6 51:2 69:13 | statute 73:2 | support 26:6 27:11,12,18 |
| seeing 18:19,23 53:17 57:6,8 | sincerely 49:14 | spoken 34:16 | stay 7:5 46:11,13,16, 17 52:5,6,8 54:1,4 55:1,5,11,12 56:7, 12,15,19 57:12, 15,17 58:14,18 | Supreme 46:14 52:3 55:15, 18 58:2 59:3,10 61:2 62:8,16 66:6 68:9,15 74:6,9,12, 15 |
| seen 29:11 | sit 33:4 52:1 74:24 | St 11:22 | still 39:12,14,15 50:10 51:25 65:13,15 85:13 | sure 20:24 23:24 26:20 33:13 42:8 48:4 51:24 56:8 57:11 65:5 72:7 79:24 80:1,21 81:4 83:19,21 87:8 88:15,21 91:12 94:9 |
| send 49:3 | skill 81:1,3 | stamp 19:5 47:4 66:20 67:3,9 | stop 55:14 | sworn 9:6 |
| sending 48:15 67:24 | small 78:11 | stamped 20:9 25:22 31:6 42:10 | strike 31:17 54:24 | |
| sent 48:25 68:2,6 84:8 | somebody 44:13 | stamping 66:23 | submit 27:10 60:8 | T |
| sentence 51:11 61:15 | someone 14:6 52:20 70:20 81:25 | stamps 28:9 32:9 36:12 41:8 53:11 54:12, 15 56:23 58:6 61:6 70:6 71:7 | submitted 26:12 66:5 | |
| September 31:2 36:8 41:3,16 42:1 43:17 55:2, 22 56:5 65:16 66:10 68:9 69:14 74:3 | something 28:10 36:13 49:7 52:19 53:12 54:13 58:7 71:7 83:12 90:20 | Stan 20:14 33:19 | subpoena 47:14,16,18 | taking 46:14 |
| served 11:12 90:5 91:20 | sometime 28:19 50:19 | stance 22:17 35:7 82:1 | subsequent 78:18,21 82:11 86:6 87:2 | talk 33:18 45:6 51:2 |
| service 92:11 | sorry 16:17 18:4 37:5 44:19 80:10 | start 14:25 15:16 | subsequently 68:13,23 | talked 34:19 38:18 39:7 82:22 84:6 |
| Services 17:9 91:3 | Sounds 11:16 | started 41:6 66:18 | substantive 86:19 | talking 22:11,12 24:5 39:16 62:13,14 |
| set 8:5,10 29:18 30:14 91:19 | speaking 64:13 | starting 11:20 75:14 | substantively 24:14 | telephone 25:15 |
| settling 50:21 | speaks 17:14 21:15 59:19 76:12 77:4 90:16 | state 26:21 41:19 58:2 75:19 90:9 | substitute 85:1,7,8 | term 79:10 81:3 |
| | | | such | |

| | | | | |
|---|--|---|---|--|
| <p>testified 9:7 33:24 38:23 61:21 77:23,24 87:23</p> <p>testify 67:19</p> <p>testifying 70:9 71:11</p> <p>testimony 10:17,21 55:25 87:7,22 89:21</p> <p>Thank 10:14 32:3 41:12 48:13 49:9 57:3 58:11 61:10 66:17 67:21 71:12 93:13,16 94:6</p> <p>Thanked 38:20</p> <p>Thanks 9:18</p> <p>thereafter 28:1 34:1 38:23 85:20</p> <p>therefore 28:11 31:7 32:10 36:14 41:9 53:13 56:25 58:8 61:8 70:7</p> <p>things 15:21 22:18 56:10 62:23 63:11 67:1 81:16 82:12 83:9 87:10 89:11,12</p> <p>think 10:14,15 12:23 17:13 18:3 22:6 27:22 29:12,13,19 43:15 45:10 50:4, 6 51:1 52:14 59:14,15 62:7 64:4 69:15 72:14 73:15 80:5 81:7 84:23 86:15 91:9, 10 92:18 94:5</p> <p>Third-party 11:7 16:3 75:10 92:24</p> | <p>though 61:21 64:22</p> <p>thought 24:9 30:2</p> <p>thoughts 22:14</p> <p>through 11:17 14:15 19:9 37:22 38:3 42:10 51:14 52:16 64:15 65:14 78:6 79:18 87:21 90:6</p> <p>throughout 23:24 65:13</p> <p>thrown 44:14</p> <p>Thus 78:17</p> <p>time 12:25 13:4 15:6 17:16 26:22 27:11 28:11 29:6,9,12 30:21 32:11 33:7, 17 38:6 39:13 40:6,20 42:21 43:6 44:13,17 46:17 48:12 49:7 50:25 52:2,4,9,22 56:25 58:10,17 60:4,21 61:9 62:4, 9,12,19 63:4,19, 25 65:16,21 67:20 68:8 69:8 70:8 72:23 74:2,9,12, 15 76:8,19 79:3, 12,16,18 82:16, 21,25 83:4,6 85:12,17 86:2,24 89:18,19,22,24 92:21</p> <p>timeframe 27:16 38:9 80:6</p> <p>timeliness 21:21,24 22:14 23:1,11 24:25 26:11,13,15 27:5 29:3 30:5 43:1,2, 22 44:14 59:10 82:20 84:4,11 86:7</p> | <p>timely 26:23 34:5 39:14 44:2,3</p> <p>times 9:25</p> <p>title 82:13</p> <p>titled 68:18 82:14</p> <p>today 9:18 10:16,21 14:12 33:4 38:23 74:16,24 75:12 81:14 91:4</p> <p>today's 11:2 93:15</p> <p>together 16:1 39:3 75:7</p> <p>told 24:17 34:6</p> <p>toll 73:3</p> <p>Tolling 73:13</p> <p>Tomsheck 8:3,8 9:5,18,20 12:16,18 18:19 19:13 20:14 21:3, 7 26:4 28:15 31:12 32:5,15 36:18 39:9 42:12 43:19 53:17 54:8, 20 58:13 59:18 61:12 66:11 67:23 70:11 71:15 74:2 75:1 77:9 91:24 92:12 93:1</p> <p>Tomsheck's 39:1 71:1 91:19</p> <p>Tonsheck 75:17,21,24</p> <p>took 19:6 36:13 54:13 59:1 61:7 89:15</p> <p>top 48:17</p> | <p>totality 22:17</p> <p>town 51:1</p> <p>track 67:1</p> <p>transcript 6:15 41:22,23 42:1,16 43:16 44:21 45:6,22 46:12 51:9 93:15</p> <p>transmittal 20:12</p> <p>treated 81:23</p> <p>trial 15:20,22,24 17:11 18:25 19:8 20:4 21:21 22:2,10,15 24:7 25:4 26:7,23 27:14 29:4 30:22 31:15 33:15 35:19 38:7 39:14 43:3, 22 44:3 45:3 50:2, 16 55:19,21 56:5 59:12 60:1,5 61:18 64:2 65:10 69:12 78:16 81:13,20,25 82:9 84:5</p> <p>tried 15:18</p> <p>true 25:12 55:20 56:2 61:23 70:15</p> <p>try 52:10 60:21</p> <p>trying 32:25</p> <p>turn 44:9 75:13</p> <p>two 20:11,16</p> <p>two-page 47:3</p> <p>type 60:19</p> | <p>types 13:22</p> <p>Typically 48:23 49:3</p> <p>typo 77:8</p> <hr/> <p>U</p> <hr/> <p>ultimately 21:18</p> <p>under 10:19,23 17:8 64:24 75:6 79:24</p> <p>underlined 49:10</p> <p>underlying 18:15 19:2 20:6 25:19 28:4 31:2, 23 36:7,19 53:7 54:4 58:3 61:1 70:2</p> <p>underneath 28:23</p> <p>understand 11:1 93:1</p> <p>understanding 25:6 27:4 50:10 63:3</p> <p>undertake 51:23 52:10,20</p> <p>undertaking 79:4</p> <p>unfairly 81:24</p> <p>unheard 82:10</p> <p>University 11:22</p> <p>unrelated 51:1</p> <p>unsure 57:14 71:24</p> <p>until 13:6,10 27:16</p> |
|---|--|---|---|--|

| | | | | |
|--|---|--|--|---------------------------|
| 51:14 64:15 74:15 78:6 82:5 | 9:20 18:15 | 59:24 | 39:10 41:21 91:2 93:20 | yet 47:23 92:24 |
| untimely 24:6,10 25:4 39:5 40:14 83:4 86:14 | <hr/> W <hr/> | wished 63:11 | without 11:11 19:10 28:8 36:12 41:8 42:24 44:23 49:16 58:6 71:6 | |
| upon 24:1 28:25 29:14 48:7 60:15 | waited 82:5 | with 10:11 11:22 12:17 13:3 14:1,3,7 17:24 18:7 19:7 20:18,19 21:4 22:7,16 23:1,4,12, 15,23 24:3,9,16, 21 25:2,10 29:7, 22 30:7,8,10,12 32:7,8,12,21,25 33:6,12,14,16,20 34:14 36:15,22 37:10 38:13,19,24 39:17 40:14 42:5 45:23 46:5,13,15, 22 47:4,7 48:10 49:8,22 50:9,24 51:19,20 52:1,12, 21 54:12,15 55:4, 18,22 56:23 58:2, 9 62:20 63:2,4,7, 9,14,18,24 64:6, 10 65:19 66:21 67:7,19 68:2,17, 19 69:7 70:9 72:5, 10 74:5,8,15 76:17,23 77:5,19, 21 79:6,20 81:14 82:6,24 83:4,8,10, 17 84:12,13,14 85:2,12,16,22 86:16,20 89:23 92:8 93:5,8 | witness 19:22 21:18 59:15 73:12 77:5,13,15 79:12 81:4 85:7 86:1 90:19 | |
| upset 50:24 | waive 9:11 | | words 37:25 51:22 55:13 88:1,6 | |
| use 48:21 | walked 86:13 | | work 12:15 13:7,8,18 44:19 75:7 | |
| used 20:25 | want 17:13 27:2 33:5 37:11,16 62:1,3 67:3 81:22 | | writ 7:9,13 52:8 57:18, 21 58:1,20 59:1 60:6,22 61:1 62:17 65:3,23 66:6 68:10,18 69:1 74:4,5,14 75:2 78:20,23 82:14 | |
| using 66:22 | wanted 23:2,6 24:13 34:8, 21 35:6 39:19,22 52:18,19 68:21 69:10 | | write 91:7 | |
| <hr/> V <hr/> | wants 84:17 | | writing 22:13 23:14 24:20 25:10 45:9,11 51:18 82:24 | |
| vacated 47:19 | watching 42:25 | | written 33:2 37:15 39:3 44:23 68:23 76:22 | |
| vague 76:19 79:10 81:3 | week 93:21,23 | withdraw 7:18 33:21 63:2 65:19 66:3 69:8, 25 70:13 71:2 72:4,14 | wrong 47:8 85:21 | |
| VEGAS 9:1 | week-long 82:9 | withdrawal 68:23 71:21 79:18 | wrote 49:1 64:18,20 | |
| vein 24:12 | whatever 51:21 88:12 | withdrawing 68:22 69:19,21 | <hr/> Y <hr/> | |
| verbal 24:23 | whatsoever 10:18 57:15 | withdrawn 25:5 | year 11:13,24 12:21 | |
| verbally 23:14 | wheelhouse 63:13 | withdrew 68:13 | years 15:18 43:8 72:17 80:5 | |
| verbatim 17:13,15 | whereupon 94:10 | within | | |
| verdict 15:19 19:2 20:5 | whether 44:6 45:4,8 47:11 59:21,25 60:3 67:4 69:10 71:16, 24 76:4,7,11 | | | |
| verification 92:5,9 | whole 91:6 | | | |
| verified 92:12,16 | whom 13:3 15:14 23:18 | | | |
| verifying 92:14 | willingness | | | |
| version 20:10 61:5 | | | | |
| versus | | | | |

EXHIBIT B

[HOME](#)[THE TEAM](#)[UPCOMING PROJECTS](#)[DEVELOPMENT PROJECTS](#)[DST 1031 EXCHANGE](#)[COMPLETED DEVELOPMENTS](#)[PRESS](#)[CONTACT US](#)

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(702) 853-7902

(888) 488-2441

9325 West Sahara Avenue

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ABOUT US

Cai Investments finances, develops, and manages properties across key markets in the United States. We are a fully integrated company with approximately 20 employees, managing the entire real estate development process.

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CHRISTOPHER BEAVOR Manager



Christopher Beavor is the CEO and founder of CAI Investments, LLC ("CAI"). CAI's mission statement is "Developing Trust Through Transparency and Vision". Mr. Beavor embodies that statement. He manages and controls the Sponsor and manages and controls the Manager. CAI is based in Las Vegas, the hotel capital of the world. Early in his career, in the late 1990s, he was involved with the development of the Luxor Hotel and

Mandalay Bay resorts and projects including the Gold Strike Hotel and Casino in Tunica, Mississippi. In the mid-2000s, Mr. Beavor was involved in the \$800 million Hard Rock Hotel condominium development in Las Vegas. As a principal from 2005 to current, Mr. Beavor was involved in the development of a wide range of projects, such as a 72-unit luxury condominium hotel project called the Ski Lofts in Brian Head Utah,

a luxury condominium with 45-units in Toluca Lake, California, and entitled and zoned the largest tourist hotel, gaming and marina in Europe. Mr. Beavor, by way of CAI, repositioned the Sheraton Bay Point Resort, which won the 2016 Marriott International North America reward for best reposition, receiving a 4-star rating for its \$30 million renovation. The 300-plus acre resort is one of the largest in the United States and is located in Panama City, Florida. The Bay Point consists of 320-rooms, a private beach, two 18-hole golf courses designed by (Jack) Nicklaus Design, and a state-of-the-art 40,000 sq. ft. convention center. Locally in Las Vegas, CAI also entitled and sold a hotel project adjacent to the Las Vegas NASCAR speedway.

In addition to hotels, Mr. Beavor develops national brand NNN-leased retail throughout the southwest and is the founder of a successful real estate brokerage firm that manages property for institutional investors. In Q4 2016, CAI purchased a 10-acre unimproved property zoned for a resort use from the Lehman Brothers Estate next to the Palms Hotel and Casino. CAI fast tracked the entitling and subdividing of the property (now under construction). The \$200-plus million development consists of national retailers, an 18-story international branded hotel and 287 high end apartments. Mr. Beavor has crafted a network of relationships with real estate investors, sellers and brokers, allowing him (as the Sponsor) to acquire and complete over hundreds of real estate transactions over the past 10 years under the Sponsor umbrella. Having handled thousands of completed real estate transactions over the course of the past decade, Mr. Beavor has been an advisor and operating partner in the identification, acquisition, repositioning, and managing of real estate assets and properties for numerous companies, including Fannie Mae, Archbay Capital, Freddie Mac, and GTIS Partners. Mr. Beavor has developed over hundreds of millions of dollars in projects within the United States and Europe. He and his companies manage over 1,000 real estate assets for hundreds of clients, ranging from large NYC-based institutional investment funds to high net worth family offices and individuals. In addition to hotels, CAI acquires and develops NNN-leased, income properties nationally through DST Reg D offerings.

EXHIBIT C

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COMPLETED DEVELOPMENTS PRESS CONTACT US

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(702) 853-7902
(888) 488-2441

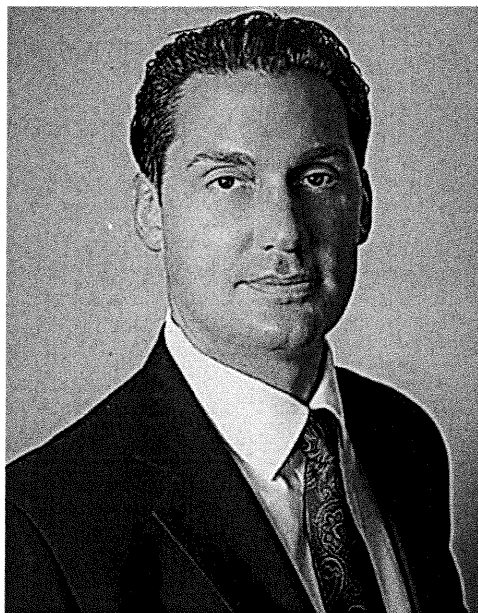
9325 West Sahara Avenue
Las Vegas, NV 89117

ABOUT US

Cai Investments finances, develops, and manages properties across key markets in the United States. We are a fully integrated company with approximately 20 employees, managing the entire real estate development process.

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MARC ANTHONY SAGGESE, ESQ.



Marc Anthony Saggese is the founder of the Law Offices of Saggese & Associates and began practicing law in Las Vegas in 1999. He has a Bachelor of Arts degree in Political Science from the State University of New York where he graduated with honors. He earned his Juris Doctor degree from the Catholic University of America, Columbus School of Law, in Washington, DC in

1999.

Marc was admitted to the Judge Advocate General's Corps in 2000 where he served as a Captain in the United States Army, undertaking litigation work for the Department of Justice.

Marc has worked on many projects with Christopher Beavor since 2003 and has extensive knowledge of Sponsors organization and complex transaction structuring.

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EXHIBIT D

AFFIDAVIT

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, Robert Howard, being first duly sworn, depose and state as follows:

1. I am over the age of eighteen years old and Citizen of the United States.

2. I am a licensed Process Server and Private Investigator PILB# R-2018-03569. My duties include locating individuals, conducting investigations, and serving individuals and businesses with legal process.

3. I received the within assignment for service on July 23, 2019.

4. My first attempt of service on July 31, 2019 at 723 S. Sixth Street #201, Las Vegas NV 89101 at 10:25am. I spoke with the receptionist a Caucasian blond woman in her 40's approximately 5'5"-5'7" between 190lbs-210lbs. She stated the defendant was not available at the moment and asked If there was something else she could do for me so I asked if I could set an appointment and she said yes and took my Information and asked what it was in regards to. I told her I am a process server that has papers for the defendant and we have been trying to reach him. She stated she would pass the Information to the defendant and he should call me back soon. I never received a phone call from the defendant or his office at any point in time.

5. On August 7, 2019 I attempted service a second time total, at 1980 Alcova Ridge Dr., Las Vegas, NV 89135 at 10:24am. I spoke with Phyllis a Caucasian female in her 70s with dyed black hair approximately 5'2"-5'5" tall and approximately 120 pounds to 150 pounds. She stated the defendant moved out about two years ago, but she knows for a fact that he lives in this community she just does not know where. I then went back to the main gate with the information that I was just told by Phyllis. At first the gate guard was hesitant to cooperate with me and then

1 I explained to him that NRS 14.090(a) states, a guard posted at the gate and the guard denies access
2 to the residence for service of process, service of process is effective upon leaving a copy thereof
3 with the guard. At this point I was given the address **REDACTED**
4 as a confirmed address by gate security as the current address for the defendant and was permitted
5 to enter. There was a silver Honda Accord Nevada License plate **REDACTED** parked in front of the
6 residence. I attempted to ring the Ring doorbell multiple times and knocked on the door with no
7 response.
8

9 6. On August 8, 2019 I attempted service a third time total, at **REDACTED**
10 **REDACTED** at 07:06am. I pulled up to the gate and spoke with a gate guard and
11 explained to him that I was a process server and I was permitted onto the property without issue.
12 I knocked on the door multiple times ringing the Ring doorbell with no response. I left a notice
13 card with my contact information posted in the front door.
14

15 7. On August 21, 2019 I attempted service a fourth time total and the third time at this
16 address **REDACTED** at 05:05am by conducting a surveillance
17 of the property. I arrived at the residence at 05:05am for a surveillance to try and serve the
18 defendant. At 06:21am the blinds to the left of the front door as seen from the curb were opened
19 by someone within the residence. I departed the property at 07:23am as the defendant was on the
20 docket to appear in court as counsel in Regional Justice Center courtroom 8C.
21

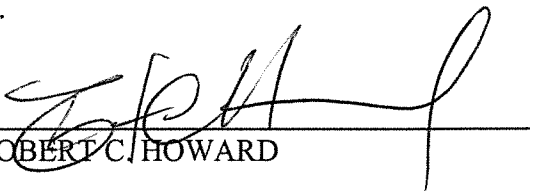
22 8. On August 21, 2019 I attempted service at 200 Lewis Ave, Las Vegas, NV 89101.
23 I arrived at the courtroom 8C at 08:05am. I checked with the Marshall and asked if the defendant
24 had signed in and was told not yet, but he always does eventually. At 08:45am the case the
25 defendant was supposed to be representing was called and another attorney from the defendants
26 practice appeared in his place.
27
28

1 9. On August 21, 2019 I attempted service a sixth time total and the fourth time at this
2 address **REDACTED**. When I arrived at the gate there was a
3 line that almost extended to the main road for the guest entrance. When I was about third in line
4 there was a gate guard who was outside of the hut that was prescreening cars before they reached
5 the hut. I had spoken with this guard in the past and I explained I was back attempting the same
6 service and he waived me through the right lane bypassing the visitor entrance and the rest of the
7 line. I arrived at the residence at 16:00 and parked in front of the Neighbors residence at **REDACTED**
8 **REDACTED** and put my sun shade up in my front window in a way
9 that I was able to see the front of the defendants residence, but I was out of their view. a silver
10 Honda accord NV license plate **REDACTED** was parked in front of the residence that was not present
11 earlier in the morning. At 16:33 the Neighbor at **REDACTED** came out and began
12 questioning me as to why I was there and then stated she was going to call security. At 16:43 a
13 guard from the front gate arrived in a white Toyota Tacoma. I exited my vehicle and approached
14 the passenger window of the vehicle as he never exited his truck. He let me know that he was
15 there to escort me out the front gate. I explained to the guard why I was at the residence, and he
16 stated that I still needed to leave the community. I explained to him NRS 14.090(a) states a guard
17 posted at the gate and the guard denies access to the residence for service of process, service of
18 process is effective upon leaving a copy thereof with the guard. He stated he was not going to
19 accept the papers and I removed my cover page, at which time the truck began to move forward,
20 and I dropped it on the passenger seat of the truck. I got into my vehicle and departed the
21 community without any further contact with security. The guard followed my vehicle until I had
22 fully exited the community and he was at the guard hut at the main gate.
23
24
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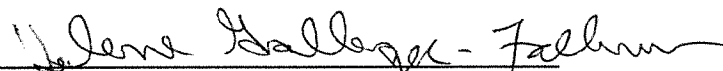
1 10. Throughout all my attempts of service at Mr. Saggese's office and home I was
2 unable to establish contact with him or his wife. At the residence **REDACTED** I was
3 unable to confirm by sight or sound that the house was occupied other than the silver Honda accord
4 NV license plate **REDACTED** being present or not during an attempt of service. Furthermore, at no
5 point in time have I ever been trespassed by the Red Rock Country Club community or any other
6 entity for any property. The only contact I have had with the security outside of entering the
7 community was the final attempt where the security guard had received a complaint from the
8 resident of **REDACTED** and asked me to follow him out of the community. At no time
9 was I informed I was being trespassed from the property, as I was conducting lawful business
10 attempting service on a resident of the community.
11

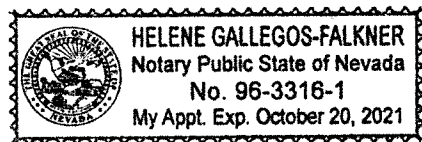
12
13 FURTHER AFFIANT SAYETH NAUGHT.

14 DATED this 2 day of MARCH 2020.

15
16 
17 ROBERT C. HOWARD

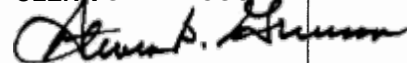
18 SUBSCRIBED AND SWORN to before
19 me this 2 day of MARCH, 2020.

20 
21 Notary Public in and for the State and County aforesaid.



DISTRICT COURT
CLARK COUNTY, NEVADA

Electronically Filed
8/26/2019 2:55 PM
Steven D. Grierson
CLERK OF THE COURT



Christopher Beavor,
Plaintiff(s),

CASE NO: A-19-793405-C

DEPT NO: VIII

VS.

Joshua Tomscheck,
Defendant(s),

AFFIDAVIT OF SERVICE

STATE OF NEVADA }
COUNTY OF CLARK } ss.

Robert Howard, being duly sworn, states that at all times herein Affiant was and is over 18 years of age, not a party to nor interested in the proceeding in which this affidavit is made. Affiant is a licensed process server whose license number is stated below.

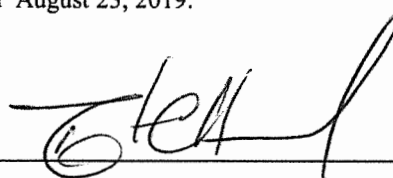
That Affiant received a copy of the Third Party Summons; Joshua Tomscheck's Answer And Third Party Complaint on July 23, 2019. That Affiant personally served Marc Saggese with a copy of the above stated documents on August 21, 2019 at 6:48 PM.

By delivering and leaving a copy with John Doe Gate Guard who is a person of suitable age and discretion that lives with the above stated party at REDACTED

That the description of the person actually served is as follows: Gender: Male Skin: White Age: 18 - 25 Height: 5'1 - 5'6" Weight: 181 -- 200 Hair: Brown Eyes: Brown Marks:

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated August 23, 2019.



Robert Howard
Signature of Affiant
State License# R-2018-03569
Clark County Process Service LLC
720 E Charleston Blvd, Suite 140
Las Vegas, NV 89104
State License# 2031C



Order #:CC21682
Their File 1325-30301

| | | | |
|--|--|---|---|
| ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address) Max E. Corrick, II Olson, Cannon, Gormley, Angulo & Stoberski Law Firm 9950 W. Cheyenne Ave. Las Vegas, NV 89129 TELEPHONE NO.: (702) 384-4012 x 158 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): | | SBN: 6609 FAX NO.: Client File # 1325-30301 | FOR COURT USE ONLY CASE NUMBER: A-19-793405-C |
| DISTRICT COURT STREET ADDRESS: 200 LEWIS AVENUE CITY AND ZIP CODE: LAS VEGAS, NV 89115 | | | |
| PLAINTIFF/PETITIONER: Christopher Beavor DEFENDANT/RESPONDENT: Joshua Tomscheck | | | |
| DECLARATION OF DILIGENCE | | | |

I received the within assignment for filing and/or service on July 23, 2019 and that after due and diligent effort I have not been able to serve said person. I attempted service on this servee on the following dates and times:

Servee: **Marc Saggese**

Documents: **Third Party Summons; Joshua Tomscheck's Answer And Third Party Complaint;**

As enumerated below:

7/31/2019 -- 10:25 AM 723 S. Sixth Street #201, Las Vegas, NV 89101

I spoke with the receptionist a Caucasian blond woman in her 40's approximately 5'5"-5'7" between 190lbs-210lbs. She stated the defendant was not available at the moment and asked if there was something else she could do for me so I asked if I could set an appointment and she said yes and took my information and asked what it was in regards to and I told her I am a process server that has papers for the defendant and we have been trying to reach him. She stated she would pass the information to the defendant and he should call me back soon.
Robert Howard

8/7/2019 -- 10:24 AM **REDACTED**

I spoke with Phyllis a Caucasian female in her 70s with dyed black hair approximately 5'2" to 5'5" tall and approximately 120 pounds to 150 pounds. She stated the defendant moved out about two years ago but she knows for a fact that he lives in this community she just does not know where.
Robert Howard

8/7/2019 -- 10:46 AM **REDACTED**
REDACTED

was confirmed by the gate security as the current address for the defendant there is a silver Honda accord Nevada license plate **REDACTED** parked in front of the residence. I attempted to ring the ring doorbell multiple times and knocked on the door with no response.
Robert Howard

Continued on Next Page



Registration No.: **R-2018-03569**
Clark County Process Service LLC
720 E Charleston Blvd, Suite 140
Las Vegas, NV 89104
State License #2031C



I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Signature: _____

Robert Howard

DECLARATION OF DILIGENCE

Order#: CC21682/DIIFormat.mdl

| | | | |
|--|--|--|--|
| ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address) Max E. Corrick, II Olson, Cannon, Gormley, Angulo & Stoberski Law Firm 9950 W. Cheyenne Ave. Las Vegas, NV 89129 TELEPHONE NO.: (702) 384-4012 x 158 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): | | SBN: 6609 FAX NO.: Client File #1325-30301 | FOR COURT USE ONLY CASE NUMBER: A-19-793405-C |
| DISTRICT COURT STREET ADDRESS: 200 LEWIS AVENUE CITY AND ZIP CODE: LAS VEGAS, NV 89115 | | | |
| PLAINTIFF/PETITIONER: Christopher Beavor DEFENDANT/RESPONDENT: Joshua Tomscheck | | | |
| DECLARATION OF DILIGENCE | | | |

I received the within assignment for filing and/or service on July 23, 2019 and that after due and diligent effort I have not been able to serve said person. I attempted service on this servee on the following dates and times:

Servee: **Marc Saggese**

Documents: **Third Party Summons; Joshua Tomscheck's Answer And Third Party Complaint;**

As enumerated below:

Continued from Previous Page

8/8/2019 -- 7:06 AM **REDACTED**

I attempted the front door multiple times ringing the ring doorbell with no response I left a notice card with my contact information posted in the front door
Robert Howard

8/21/2019 -- 7:25 AM **REDACTED**

I arrived at the residence at 05:05am for a surveillance to try and serve the defendant. At 06:21 the blinds to the left of the front door as seen from the curb were opened. I departed the property at 07:23 as the defendant was on the docket to appear in court as counsel in RJC courtroom 8C.
Robert Howard

8/21/2019 -- 8:50 AM 200 Lewis Ave, Las Vegas, NV 891016300

I arrived at the courtroom 8C at 08:05. I checked with the Marshall and asked if the defendant had signed in and was told not yet but he always does eventually. At 08:45 the case the defendant was supposed to be representing was called and another attorney from the defendants practice appeared in his place.
Robert Howard

8/21/2019 -- 4:55 PM **REDACTED**

I arrived at the residence at 16:00 and a silver Honda accord NV license plate **REDACTED** was parked in front of the residence that was not present earlier in the morning. At 16:33 the Neighbor at **REDACTED** came out and began questioning me as to why I was there and then stated she was going to call security. At 16:43 a guard from the front gate arrived in a white Toyota Tacoma. I exited my vehicle and he stated that he was there to escort me out the front gate.
Robert Howard



Registration No.: R-2018-03569
 Clark County Process Service LLC
 720 E Charleston Blvd, Suite 140
 Las Vegas, NV 89104
 State License #2031C

Continued on Next Page



I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Signature: _____

Robert Howard

DECLARATION OF DILIGENCE

Order#: CC21682/DIIFormat.mdl

| | | | |
|--|--|---|--|
| ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address) Max E. Corrick, II Olson, Cannon, Gormley, Angulo & Stoberski Law Firm 9950 W. Cheyenne Ave. Las Vegas, NV 89129 TELEPHONE NO.: (702) 384-4012 x 158 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): | | SBN: 6609 FAX NO.: Client File # 1325-30301 | FOR COURT USE ONLY CASE NUMBER: A-19-793405-C |
| DISTRICT COURT STREET ADDRESS: 200 LEWIS AVENUE CITY AND ZIP CODE: LAS VEGAS, NV 89115 | | | |
| PLAINTIFF/PETITIONER: Christopher Beavor DEFENDANT/RESPONDENT: Joshua Tomscheck | | | |
| DECLARATION OF DILIGENCE | | | |

I received the within assignment for filing and/or service on July 23, 2019 and that after due and diligent effort I have not been able to serve said person. I attempted service on this servee on the following dates and times:

Servee: **Marc Saggese**

Documents: **Third Party Summons; Joshua Tomscheck's Answer And Third Party Complaint;**

As enumerated below:

Continued from Previous Page

8/21/2019 -- 4:55 PM **REDACTED**

I complied and served him the papers according to NRS 14.090 (a) A guard posted at the gate and the guard denies access to the residence for service of process, service of process is effective upon leaving a copy thereof with the guard. As he was removing me from the property.
Robert Howard



Registration No.: R-2018-03569
Clark County Process Service LLC
720 E Charleston Blvd, Suite 140
Las Vegas, NV 89104
State License #2031C



I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Signature: _____

Robert Howard

DECLARATION OF DILIGENCE

Order#: CC21682/DilFormat.mdl

AA 411

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

EXHIBIT E

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SS:

4. During the course of my limited scope representation of Mr. Beavor, Mr. Saggese and Mr. Beavor remained involved in the decision making regarding the filing of, along with the contents and argument to be made in, the Opposition to the Motion for New Trial, as well as

1 other filings with the Court. Both Mr. Beavor and Mr. Saggese were generally carbon copied on
2 all my correspondence related to the case.

3 5. Based upon my communications with Mr. Saggese and Mr. Beavor, along with
4 my personal knowledge of Mr. Saggese, whom I have known for many years on both a personal
5 and professional basis, I have been lead to believe by Mr. Saggese that he and Mr. Beavor
6 continued to maintain an attorney-client relationship despite Mr. Saggese's withdrawal as Mr.
7 Beavor's counsel on March 25, 2013 in the *Hefetz v. Beavor* litigation. I have also been lead to
8 believe by Mr. Saggese that he continued to maintain an attorney-client relationship as of the
9 filing of Mr. Beavor's lawsuit against me. I have been advised and believe that Mr. Saggese
10 currently maintains an attorney-client relationship with Mr. Beavor as of the date of this
11 Affidavit.
12

13
14 6. Prior to the filing of Mr. Beavor's lawsuit against me, as well as after, Mr.
15 Saggese told me that he did not carry malpractice insurance which would cover any claim
16 against him arising out of his representation of Mr. Beavor in the *Hefetz* case, including any
17 claims arising out of Mr. Saggese's failure to plead the One Action Rule as an affirmative
18 defense to the *Hefetz* lawsuit.
19

20 FURTHER AFFIANT SAYETH NAUGHT.

21 DATED this 2 day of April, 2020.

22
23 
24 JOSHUA TOMSHECK, ESQ.

25 SUBSCRIBED AND SWORN to before
26 me this 2 day of 04, 2020.

27 
28 Notary Public in and for the State and County aforesaid.



EXHIBIT F

AFFIDAVIT OF MAX E. CORRICK, II IN SUPPORT OF OPPOSITION TO MARC SAGGESE'S MOTION TO DISMISS/MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR NRCP 56(d) RELIEF

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, MAX E. CORRICK, II, being first duly sworn, depose and state as follows:

1. I am a resident of the State of Nevada, I am older than 18 years old, I am an attorney licensed to practice in the State of Nevada, and I am competent to offer this Affidavit based upon my personal knowledge, observations and information. I am the attorney retained to represent defendant Joshua Tomsheck in the lawsuit styled *Beavor v. Tomsheck* (Case No. A793405). All information contained in this Affidavit is true and correct to the best of my knowledge.

2. This is a legal malpractice case. Defendant Tomsheck, an attorney hired by Christopher Beavor for a limited purpose, has a legitimate, good faith contribution claim against Saggese. This is based upon, *inter alia*, Saggese's failure to assert the one-action rule as a defense in the underlying *Hefetz v. Beavor* case, as directly addressed by the Nevada Supreme Court decision *Hefetz v. Beavor*, 133 Nev. 323, 397 P.3d 472 (2017). Discovery conducted between Beavor and Tomsheck already strongly supports that contribution claim.

3. Based upon the novel arguments and unsubstantiated claims made by Saggese in his motion to dismiss/motion for summary judgment, additional Discovery specific to Saggese is warranted to further cement Saggese's liability for all of the damages Beavor is attempting to recover from Tomsheck. To date, Saggese has not participated in this case as a party other than to file his motion. He has filed no answer, and he has produced no documents to Tomsheck.

1 pursuant to NRCP 16.1 which he contends support his defenses to Tomsheck's contribution
2 claim. Saggese has identified no witnesses supporting any of his defenses pursuant to NRCP
3 16.1, nor has he responded to any Discovery concerning his failure to plead the one-action rule
4 on behalf of his close friend and current business partner. Saggese has not yet been deposed –
5 and in light of COVID-19 and Administrative Order 20-09 that deposition may not take place for
6 some time.

8 4. Beavor served a subpoena upon Saggese on or about December 18, 2018,
9 requesting the production of various documents. Those documents, however, have not been
10 provided by Beavor to Tomsheck as of the filing of this opposition. Further subpoenas and/or
11 Rule 34 requests for production of documents will be necessary to ensure all relevant documents
12 to the litigation have been produced by Saggese above and beyond his NRCP 16.1 obligations.

14 5. Tomsheck has served request for production of documents upon Beavor specific
15 to, *inter alia*, Beavor's relationship with Saggese as it pertains to the underlying *Hefetz v. Beavor*
16 matter, their current personal and professional relationship, and the affidavit each submitted in
17 support of Saggese's motion. Those requests for production have not yet come due for response
18 – and the time for such responses is currently stayed pursuant to Administrative Order 20-09.

20 6. Tomsheck has requested, both in writing and verbally, to take the depositions of,
21 *inter alia*, Beavor and Saggese. No deposition dates have been scheduled yet due to COVID-19
22 and the pending Tomsheck motion for summary judgment. The deposition of Joel Schwarz, Esq.
23 may also be necessary for purposes of further establishing the illegitimacy of Beavor's claims
24 and damages, and Saggese's defense to Tomsheck's contribution claim. Based upon Saggese's
25 NRCP 16.1 disclosures and responses to future Discovery, additional depositions and follow-up
26 Discovery may be necessary as well.

7. Tomsheck has retained an expert in legal malpractice claims, Dennis Kennedy, Esq., who is prepared to opine, *inter alia*, that based upon the information already available (the deposition of Tomsheck, the underlying *Hefetz v. Beavor* filings, the *Hefetz v. Beavor* Nevada Supreme Court decision, and the disclosures made by both Tomsheck and Beavor in this case) Saggese is the proximate cause of all of Beavor's damages. Additional Discovery from Saggese will be provided to Mr. Kennedy for purposes of his expert opinions in this case.

8. The factual predicates which underpin Saggese's motion for summary judgment, furthermore, remain genuinely disputed. No corroborating evidence has been produced to date by any party to this litigation which remotely supports Saggese and Beavor's self-serving affidavits with respect to Saggese's failure to raise the one-action rule as a defense in the underlying *Hefetz v. Beavor* case. Discovery from both Saggese and Beavor – and anyone who would have any information to substantiate or refute the contents of their questionable March 2020 affidavits – along with their relationship is necessary as well.

9. This Affidavit is not intended to create any undue delay and is made in good faith based upon all information currently available.

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 2nd day of April, 2020.


MAX E. CORRICK, II

SUBSCRIBED AND SWORN to before
me this 2nd day of April, 2020.

E. Gene Hollingsworth
Notary Public in and for the State and County aforesaid.

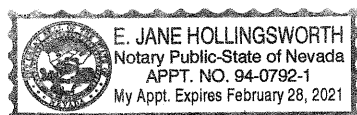
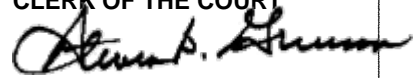


EXHIBIT G



1 **ANS**
2 MAX E. CORRICK, II
3 Nevada Bar No. 6609
4 OLSON, CANNON, GORMLEY
5 ANGULO & STOBERSKI
6 9950 West Cheyenne Avenue
7 Las Vegas, NV 89129
8 702-384-4012
9 702-383-0701 fax
10 mcorrick@ocgas.com
11 Attorneys for JOSHUA TOMSHECK

7 DISTRICT COURT

8 CLARK COUNTY, NEVADA

9
10 CHRISTOPHER BEAVOR, an individual,
11
12 Plaintiff,

12 v.

13 JOSHUA TOMSHECK, an individual;
14 DOES I-X, inclusive,
15 Defendants.

CASE NO. A-19-793405-C
DEPT. NO. VIII

**JOSHUA TOMSHECK'S ANSWER AND
THIRD-PARTY COMPLAINT**

16
17 JOSHUA TOMSHECK, an individual,
18 Third-Party Plaintiff,

19 v.

20 MARC SAGGESE, ESQ., an individual,
21 Third-Party Defendant.

22
23 COMES NOW Defendant JOSHUA TOMSHECK, (hereinafter referred to as
24 "Defendant"), by and through their attorneys of record, OLSON, CANNON, GORMLEY,
25 ANGULO & STOBERSKI, and hereby answer Plaintiff's Complaint and admits, denies and
26 alleges as follows:
27
28

Law Offices of
OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI
A Professional Corporation
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
(702) 384-4012, Telecopier (702) 383-0701

I.

THE PARTIES, JURISDICTION AND VENUE

1. Answering Paragraph 1, this answering Defendant admits the allegations contained therein.

2. Answering Paragraphs 2, 3, and 4, this answering Defendant is without sufficient information or knowledge to form a belief as to the truth or falsity of the allegations contained in said paragraphs, and upon said ground, denies each and every allegation contained therein.

II.

PERTINENT FACTS AND ALLEGATIONS

3. Answering Paragraphs 12, 13, 14, 26, and 28, this answering Defendant denies the allegations contained therein.

4. Answering Paragraphs 5, 6, 7, 8, 9, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 27, this answering Defendant is without sufficient information or knowledge to form a belief as to the truth or falsity of the allegations contained in said paragraphs, and upon said ground, denies each and every allegation contained therein.

III.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Professional Negligence)

5. Answering Paragraph 29 of Plaintiff's Complaint, this answering Defendant repeats and realleges each and every answer in above as if fully set forth at length herein.

6. Answering Paragraphs 30, 31, 32, 34, 35, 36, and 37, this answering Defendant denies the allegations contained therein.

7. Answering Paragraph 33, this answering Defendant is without sufficient information or knowledge to form a belief as to the truth or falsity of the allegations contained in said paragraphs, and upon said ground, denies each and every allegation contained therein.

SECOND CLAIM FOR RELIEF

(Breach of Fiduciary Duty / Breach of Duty of Loyalty)

8. Answering Paragraph 38 of Plaintiff's Complaint, this answering Defendant repeats and realleges each and every answer in above as if fully set forth at length herein.

9. Answering Paragraphs 40 and 41, this answering Defendant admits the allegations contained therein.

10. Answering Paragraphs 39, 42 and 43, this answering Defendant denies the allegations contained therein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim against this answering Defendant upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The Complaint is barred by application of the relevant statute of limitations.

THIRD AFFIRMATIVE DEFENSE

Any injury that Plaintiff may have sustained, if any, was not caused by any negligence or want of care on the part of this answering Defendant, but rather through the design, negligence or want of care, or failure of an unknown third person or persons over whom this answering Defendant had no control or responsibility in law or fact.

FOURTH AFFIRMATIVE DEFENSE

Any injury that Plaintiff may have sustained, if any, was not directly and proximately caused and/or contributed to by the negligence, carelessness or fault of other parties, and therefore this answering Defendant is entitled to contribution in proportion to the percentage of fault attributed to other parties.

FIFTH AFFIRMATIVE DEFENSE

Any claim by Plaintiff against this answering Defendant is barred by the equitable doctrine of *in pari delicto*.

SIXTH AFFIRMATIVE DEFENSE

Any claim by Plaintiff against this answering Defendant is barred by the equitable doctrine of *laches*.

SEVENTH AFFIRMATIVE DEFENSE

Any claim by Plaintiff against this answering Defendant is barred by the equitable doctrine of *unclean hands*.

EIGHTH AFFIRMATIVE DEFENSE

If Plaintiff sustained any injuries, economic or otherwise, said injuries were proximately caused by his failure to mitigate his damages, if any, and/or take corrective action. Accordingly, any and all recovery is barred or should be limited to the extent or degree of Plaintiff's failure to mitigate his damages, if any.

NINTH AFFIRMATIVE DEFENSE

All services provided by this answering Defendant during the relevant times were provided within the standard of care for similar attorneys providing similar services in the community at the time and place the legal services were provided.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's claims against this answering Defendant are barred because the Plaintiff's alleged damages were the result of the intervening, superseding conduct of others.

ELEVENTH AFFIRMATIVE DEFENSE

No attorney-client relationship existed between Plaintiff and this answering Defendant which obligated this answering Defendant to provide the services described in the Complaint.

TWELFTH AFFIRMATIVE DEFENSE

Each and all of Plaintiff's rights, claims, and obligations as set forth in the Complaint, has, or have, by conduct, agreement or otherwise been waived.

THIRTEENTH AFFIRMATIVE DEFENSE

The loss, injuries and damages which Plaintiff alleges, if any, were directly and proximately caused and/or contributed to by the negligence, carelessness or fault of Plaintiff, which is greater

1 than the alleged negligence, carelessness or fault, if any, of this answering Defendant, and therefore
2 Plaintiff's claims against this answering Defendant is barred.

3 **FOURTEENTH AFFIRMATIVE DEFENSE**

4 The loss, injuries and damages, if any, which Plaintiff alleges in the Complaint were
5 directly and proximately caused and/or contributed to by the negligence, carelessness or fault of
6 Plaintiff, and therefore this answering Defendant are entitled to contribution in proportion to the
7 percentage of negligence attributed to the Plaintiff.

8 **FIFTEENTH AFFIRMATIVE DEFENSE**

9 Plaintiff's claim is barred for failure to name an indispensable party as a defendant to this
10 litigation.

11 **SIXTEENTH AFFIRMATIVE DEFENSE**

12 That pursuant to NRCP 11, as amended, all possible affirmative defenses may not have
13 been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the
14 filing of these Defendant's Answer. This answering Defendant reserves the right to amend his
15 Answer to allege additional affirmative defenses if subsequent investigation warrants.

16 WHEREFORE, this answering Defendant prays as follows:

- 17 1. That Plaintiff take nothing by reason of the Complaint on file herein:
18 2. For reasonable attorney's fees;
19 3. For costs of suit incurred and to be incurred herein; and
20 4. For such other and further relief as to the Court may deem just and proper in the
21 premises.

1 DATED this _____ day of May, 2019.

2 OLSON, CANNON, GORMLEY
3 ANGULO & STOBERSKI

4
5 MAX E. CORRICK, II
6 Nevada Bar No. 6609
7 9950 West Cheyenne Avenue
8 Las Vegas, NV 89129
9 Attorneys for JOSHUA TOMSHECK

10 **THIRD-PARTY COMPLAINT**

11 COMES NOW Defendant/Third-Party Plaintiff JOSHUA TOMSHECK ("Tomsheck"), by
12 and through his attorneys of record, OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI,
13 and for its Third-Party Complaint against MARC SAGGESE, ESQ., complains, alleges and states
14 as follows:

15 1. Tomsheck was and is a resident of Clark County, Nevada for all relevant times
16 stated herein.

17 2. MARC SAGGESE, ESQ. was and is a resident of Clark County, Nevada for all
18 relevant times stated herein, and provided legal services to Plaintiff Christopher Beavor.

19 3. On or about April 23, 2019, Plaintiff Christopher Beavor filed his Complaint
20 naming Tomsheck as a defendant. That Complaint alleges, *inter alia*, professional negligence and
21 breach of fiduciary duty against Tomsheck.

22 4. Tomsheck has denied such allegations and alleged in his Answer pertinent
23 Affirmative Defenses.

24 **FIRST CAUSE OF ACTION**

25 **Contribution (against MARC SAGGESE, ESQ.)**

26 5. Tomsheck repeats and realleges each and every allegation contained in Paragraphs 1
27 through 4, inclusive, as though fully set forth herein.

28 6. Tomsheck alleges that in the event he is found to be liable to Plaintiff or to
any party for damages or payment is made to Plaintiff or to any other party as a result of the

1 incidents or occurrences described in the Complaint, then Tomsheck's liability or payment is based
2 on the acts and/or omissions including, without limitation, the negligence and/or fault of MARC
3 SAGGESE, ESQ., individually, and therefore Tomsheck is entitled to Contribution from MARC
4 SAGGESE, ESQ. for his proportionate share of all such loss or damage pursuant to NRS 17.225.

5 7. Tomsheck has been forced to retain an attorney to bring this Third-Party Complaint,
6 and therefore Tomsheck is entitled to recover his reasonable attorney's fees and costs for the
7 necessity of instituting this action.

8 WHEREFORE, Tomsheck prays for relief as follows:

- 9 1. For Contribution from MARC SAGGESE, ESQ.;
- 10 2. For an award of reasonable attorneys fees and costs; and
- 11 3. For all other such relief as the Court deems just and proper.

12 DATED this 16 day of May, 2019.

13 OLSON, CANNON, GORMLEY
14 ANGULO & STOBERSKI

15
16 

17 MAX E. CORRICK, II
18 Nevada Bar No. 6609
19 9950 West Cheyenne Avenue
20 Las Vegas, NV 89129
21 Attorneys for JOSHUA TOMSHECK
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of May, 2019, I sent via e-mail a true and correct copy of the above and foregoing **ANSWER AND THIRD-PARTY COMPLAINT** on the Clark County E-File Electronic Service List (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

H. Stan Johnson, Esq.
Cohen Johnson Parker Edwards
375 East Warm Springs Road, Suite 104
Las Vegas, NV 89119
702-823-3500
702-823-3400 fax
sjohnson@cohenjohnson.com

and

Charles ("CJ") E. Barnabi, Jr., Esq.
The Barnabi Law Firm, PLLC
375 East Warm Springs Road, Suite 204
Las Vegas, NV 89119
702-475-8903
702-966-3718 fax
cj@barnabilaw.com
Attorneys for Plaintiff


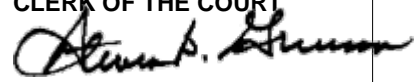

An Employee of OLSON, CANNON, GORMLEY,
ANGULO & STOBERSKI

EXHIBIT H



COHEN|JOHNSON|PARKER|EDWARDS
H. STAN JOHNSON, ESQ.
 Nevada Bar No. 00265
 375 East Warm Springs Road, Ste. 104
 Las Vegas, Nevada 89119
 Email: sjohnson@cohenjohnson.com
 Telephone: (702) 823-3500
 Facsimile: (702) 823-3400

CASE NO: A-19-793405-C
 Department 8

THE BARNABI LAW FIRM, PLLC
CHARLES ("CJ") E. BARNABI JR., ESQ.
 Nevada Bar No. 14477
 8981 W. Sahara Ave., Ste. 120
 Las Vegas, Nevada 89117
 Email: cj@barnabilaw.com
 Telephone: (702) 475-8903
 Facsimile: (702) 966-3718

Attorneys for Plaintiff

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual;
 Plaintiff,

Case No.:
 Dept. No.:

vs.

JOSHUA TOMSHECK, an individual; DOES I-
 X; ROE ENTITIES, I-X;
 Defendants.

**(Exempt from Arbitration: Damages in
 Excess of \$50,00)**

COMPLAINT

Plaintiff Christopher Beavor ("Beavor"), by and through his counsel, hereby complains
 and alleges against defendant Joshua Tomscheck ("Tomscheck") as follows:

I.

THE PARTIES, JURISDICTION AND VENUE

1. At all material times herein, Defendant Tomscheck was and remains an individual

1 residing in the County of Clark in the State of Nevada doing business as a local attorney.

2 2. At all material times herein, Plaintiff Beavor was and remains an individual
3 residing in the County of Clark in the State of Nevada.

4 3. Plaintiff does not know the true names of the individuals, corporations,
5 partnerships and entities sued and identified in fictitious names as DOES I through X and ROE
6 CORPORATIONS I through X, inclusive. Plaintiff allege that such Defendants are responsible
7 for damages suffered by Plaintiff as more fully discussed under the claims set forth below.
8 Plaintiff will request leave of this Honorable Court to amend this Complaint to show the true
9 names and capacities of each such fictitious Defendants at such time Plaintiff discovers such
10 information.

11 4. Jurisdiction and venue of this Court is proper because the injuries, events, harm
12 and damages incurred occurred in Clark County, Nevada and Tomsheck resides in Clark County,
13 Nevada.

14 II.

15 PERTINENT FACTS AND ALLEGATIONS

16 5. On July 21, 2011, Yacov Hefetz ("Hefetz") commenced an action against Beavor
17 by filing a complaint with a single claim for breach of guaranty.

18 6. Hefetz's claim was tried to a jury from February 25, 2013 through March 1, 2013.

19 7. Ultimately, Hefetz's breach of guaranty claim was submitted to the jury and the
20 jury returned a verdict in favor of Beavor.

21 8. On May 21, 2013, the District Court entered a judgment on the jury verdict.

22 9. On June 10, 2013, Hefetz filed a Motion for New Trial (the "New Trial Motion").

23 10. The New Trial Motion was based on two grounds: (1) *Lioce* challenges based on
24 alleged remarks concerning Hefetz; and (2) that the jury misunderstood the issues in Bankruptcy
25 Court and therefore ignored the Jury Instructions.
26
27
28

1 11. On or about June 19, 2013, Beavor retained Tomsheck for the purposes of
2 defending him as his attorney in the Hefetz claim (the "Agreement").

3 12. On June 20, 2013, Tomsheck filed an opposition to the New Trial Motion (the
4 "Opposition"). In the Opposition, Tomsheck failed to substantively oppose the request for a new
5 trial. Tomsheck did not respond to either of the two substantive arguments, that reasonably
6 appeared to have merit, presented by Hefetz in the New Trial Motion.

7
8 13. Instead, Tomsheck's Opposition solely argued that Hefetz failed to timely file the
9 New Trial Motion.

10 14. In his Reply, Hefetz clearly explained why his New Trial Motion was timely and
11 sought to have his New Trial Motion granted pursuant to EDCR 2.20 because Tomsheck failed
12 to file a substantive opposition to the New Trial Motion.

13 15. On August 7, 2013, the District Court heard arguments on the New Trial Motion.

14 16. During argument on the New Trial Motion, the trial court stated that it would not
15 have granted the New Trial Motion if Tomsheck had filed a substantive written opposition on the
16 merits of the New Trial Motion.

17 17. The Court noted that Tomsheck only filed an opposition regarding the timeliness
18 of the New Trial Motion and that Tomsheck was incorrect regarding his calculation of
19 timeliness. Without Tomsheck having filed any substantive opposition to the New Trial Motion,
20 the Court granted the New Trial Motion as unopposed, as permitted by the Judge's discretion and
21 local rules of practice (commonly known and enforced).

22 18. Tomsheck then compounded his error by filing a Petition for Writ of Mandamus
23 (the "Petition") on or about May 13, 2014, rather than taking a direct appeal from the Court's
24 order on the New Trial Motion.

1 19. On or about September 16, 2014, the Nevada Supreme Court entered an order
2 denying Tomsheck' s Petition, noting that writ relief was unavailable because a direct appeal was
3 the proper course of action to challenge the trial court's ruling on the New Trial Motion.

4 20. However, by that time the Petition was filed more than thirty days after entry of
5 the District Court order granting the New Trial Motion, the Petition could not be converted into
6 an appeal.

7 21. Additionally, Tomsheck made no attempt to convert the Petition into an appeal or
8 to concurrently file an appeal contesting the Court's order granting the New Trial Motion .

9 22. As a result of Tomsheck' s errors, the judgment on the jury verdict in Beavor's
10 favor was vacated and Hefetz's action against Beavor continued.

11 23. Tomsheck withdrew as counsel for Beavor on November 5, 2014.

12 24. On January 21, 2015, Gordon Silver filed a Notice of Appearance on behalf of
13 Beavor, which representation was later continued by Dickinson Wright..

14 25. Over the following several years, Beavor incurred legal fees in defending against
15 Hefetz's breach of guaranty claim.

16 26. In the meantime, on or about September 16, 2015, Tomsheck was expressly
17 placed on notice that Beavor intended to pursue his claims of malpractice. In March 2016 the
18 parties further agreed to toll the statute of limitations for the claims of malpractice until the
19 expiration of 180 days following an appeal or final resolution.

20 27. Hefetz's claim against Beavor was recently resolved on or about March 13, 2019
21 with the filing of a stipulation to dismiss with prejudice being filed.

22 28. Beavor now brings these claims against Tomsheck, which is timely per the
23 written agreement of Beavor and Tomsheck to toll the applicable statute of limitations.

III.**CLAIMS FOR RELIEF****FIRST CLAIM FOR RELIEF****(Professional Negligence)**

29. Beavor repeats and realleges and every allegation contained in the foregoing paragraphs as though fully set forth herein.

30. Beavor and Tomsheck entered into an attorney-client relationship.

31. As part of that relationship, Tomsheck owed a duty to Beavor to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake.

32. Tomsheck breached his duty to Beavor, at least in part, by failing to substantively oppose the New Trial Motion, but instead relying solely on a clearly erroneous procedural argument, by failing to file a direct appeal of the Court's order on the New Trial Motion, by instead filing the Petition, by filing the Petition outside the thirty day appeal window such that it could not be converted to an appeal, and/or by failing to even attempt to convert the Petition into an appeal.

33. The District Court has expressly stated that, but for Tomsheck's failure to substantively oppose the New Trial Motion, the New Trial Motion would have been denied.

34. Rather, despite a jury finding in favor of Beavor initially and the dismissal of the action being achieved, Beavor was compelled to defend the action for several years, which was eventually resolved in March 2019.

35. The legal fees, efforts, costs and other damages would not have been incurred but for the actions of Tomsheck.

36. As a result of Tomsheck's breach of his duty to Beavor, Beavor has had to incur additional legal fees and damages in excess of \$50,000 in defending against Hefetz's claim.

37. It has been necessary for Beavor to retain counsel, and Beavor is entitled to an award of attorney's fees and costs incurred in the litigation of this claim.

SECOND CLAIM FOR RELIEF

(Breach of Fiduciary Duty / Breach of Duty of Loyalty)

38. Beavor repeats and realleges and every allegation contained in the foregoing paragraphs as though fully set forth herein.

39. Beavor's attorney, Tomsheck, attorney, owed a continuing fiduciary duty and duty of loyalty to him.

40. A fiduciary relationship exists when one has a right to expect trust and confidence in the integrity and fidelity of another.

41. Attorneys owe a fiduciary duty to their clients and a duty of loyalty

42. As Beavor's attorney, Tomsheck breached these duties as described herein.

43. That these breaches of duties caused Beavor significant damages in excess of \$50,000.

WHEREFORE, Beavor prays for relief as follows:

1. For an award against Tomsheck, in favor of Beavor, in an amount in excess of \$50,000.00;
2. For pre-judgment interest at the applicable legal rate;
3. For an award to Beavor of his costs;
4. For an award to Beavor of his reasonable attorneys' fees; and

///

///

5. For such other and further relief that the Court deems just and proper.

Dated this 23rd day of April 2019.

THE BARNABI LAW FIRM, PLLC

By: /s/ CJ Barnabi

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Attorneys for Plaintiff

EXHIBIT I

 KeyCite Yellow Flag - Negative Treatment
Declined to Extend by [Sierra v. Desert Palace, Inc.](#), D.Nev., February 27, 2013

295 F.Supp.2d 1180
United States District Court, D. Nevada.

Kevin **MIRCH**, Plaintiff,
v.
Kenneth **FRANK**, Advanced Physicians Products,
Inc., Defendants.

No. CV-N-01-0443-ECR RAM.
|
Dec. 11, 2003.

Synopsis

Background: Attorney brought action against former clients seeking recovery of unpaid attorney fees allegedly owed under contingency fee agreement. Clients filed counterclaims for legal malpractice and breach of fiduciary duty, and attorney filed third party claim against clients' current attorney and law firm seeking indemnity or contribution for any damage caused by malpractice.

[Holding:] On law firm's motion to dismiss, the District Court, Edward C. Reed, Jr., J., held that attorney could not recover indemnity or contribution from successor counsel.



Motion granted.

West Headnotes (8)

- [1] **Federal Courts**
 Substance or procedure; determinativeness

In diversity action, district court should apply substantive law of forum state.

[3 Cases that cite this headnote](#)

- [2] **Federal Courts**
 Highest court
Federal Courts
 State constitutions, statutes, regulations, and ordinances

In interpreting state law, federal courts are bound by pronouncements of state's highest court.

[1 Cases that cite this headnote](#)

- [3] **Federal Courts**
 Anticipating or predicting state decision

In absence of controlling state supreme court decision, federal court applying state law must apply law as it believes state supreme court would apply it.

[3 Cases that cite this headnote](#)

- [4] **Contribution**
 Particular Torts or Wrongdoers

Under Nevada law, as predicted by the district court, former attorney may not seek contribution for legal malpractice from successor attorney in same action, but may seek to reduce damages by portion of liability attributable to successor lawyer. [Restatement \(Third\) of the Law Governing Lawyers § 53](#) comment.

[5 Cases that cite this headnote](#)

- [5] **Indemnity**
 Torts, in general

Under Nevada law, as predicted by the district court, predecessor attorney could not recover indemnity or contribution from successor

counsel for liability arising out of clients' legal malpractice claim, even if successor counsel failed to mitigate predecessor attorney's malpractice liability, where successor counsel did not breach specific duty of professional practice or engage in gross malpractice, and successor counsel did not exacerbate damages that predecessor's malpractice allegedly caused. [Restatement \(Third\) of the Law Governing Lawyers § 53](#) comment.

2 Cases that cite this headnote

[6]

Attorney and Client

🔑 [Elements of malpractice or negligence action in general](#)

Under Nevada law, required elements of malpractice are: (1) attorney-client relationship; (2) duty owed to client by attorney to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing tasks which they undertake; (3) breach of that duty; (4) breach being proximate cause of client's damages; and (5) actual loss or damage resulting from negligence.

[Cases that cite this headnote](#)

[7]

Attorney and Client

🔑 [Duties and liabilities to adverse parties and to third persons](#)

Under Nevada law, successor counsel's duty runs to its client, not to predecessor attorney.

[Cases that cite this headnote](#)

[8]

Attorney and Client

🔑 [Duties and liabilities to adverse parties and to third persons](#)

Under Nevada law, successor counsel has no duty to predecessor counsel to lessen damages

resulting from predecessor counsel's negligence.

[Cases that cite this headnote](#)

Attorneys and Law Firms

*1181 Kevin J. [Mirch](#), [Mirch](#) & [Mirch](#), Reno, NV, for Plaintiff.

[Leigh T. Goddard](#), McDonald Carano Wilson, and [Kent R. Robison](#), Robison Belaustegui Sharp & Low, Reno, NV, [Marilyn Bulloch](#), [Jeffrey A. Dickerson](#), Judy [Frank](#) and Kenneth [Frank](#), [Leigh T. Goddard](#), McDonald Carano Wilson, Reno, NV, and [Kent R. Robison](#), Robison Belaustegui Sharp & Low, Reno, NV, for Advanced Physicians Products, Inc., defendant. [Bruce R. Laxalt](#), Laxalt & Nomura, Ltd., Reno, NV, Gary Hill, [Gary J. Hill](#), Hill & Associates, Santa Barbara, CA, for Leigh Goddard, Pat Lundvall, and Mc Donald Carano Wilson McCune, defendant.

ORDER

[EDWARD C. REED, JR.](#), District Judge.

The order of the court (# 177) dated October 24, 2003, and filed on October 27, 2003, is amended to read as follows:

This action arises from unpaid attorneys' fees that defendants Dr. Kenneth [Frank](#) ("[Frank](#)") and Advanced Physicians Products, Inc. ("APPI") allegedly owe plaintiff Kevin J. [Mirch](#) ("[Mirch](#)") pursuant to a contingency fee agreement. [Mirch](#) represented APPI and [Frank](#) in a lawsuit, which resulted in a default judgment in favor of APPI, and [Mirch](#) claims that APPI and [Frank](#) failed to pay [Mirch's](#) legal fees.

Defendants [Frank](#) and APPI filed a counterclaim (# 113) against [Mirch](#) for legal malpractice and for breach of fiduciary duty. [Mirch](#) then filed a third party claim (# 116) against the defendants'/counterclaimants' counsel, Pat Lundvall, Leigh Goddard, and McDonald, Carano,

Wilson LLP (collectively “McDonald Carano”), alleging indemnity for a “set off” for the amount of damages attributable to the malpractice of McDonald Carano.¹ McDonald Carano then filed a Motion to Dismiss (# 126). **Mirch** filed an Opposition (# 154) and McDonald Carano Replied (# 156).

BACKGROUND

The background of this case dates back to 1991 when Universal Sales, Inc. filed a lawsuit against APPI claiming that APPI breached the parties’ exclusive marketing agreement. Soon after, **Mirch** was engaged to represent Dr. **Frank** and APPI in the lawsuit, *Universal Sales, Inc. v. Advanced Physicians’ Prods., Inc., et al.*, CV–N–91–0375–ECR(VPC), (hereinafter the *Universal Sales* case).

The parties dispute the fee agreement for **Mirch’s** representation. **Mirch** asserts that in accordance with his engagement letter dated January 9, 1992, the parties agreed he would be paid \$25 as an hourly fee to defend claims and that he would be entitled to recover 40% of any judgment obtained. **Mirch** asserts that the parties entered into a written contingency fee agreement memorializing these terms. Defendants deny there was any such agreement either written or otherwise and assert that the parties agreed upon an hourly payment. It is undisputed that defendants would reimburse **Mirch** for costs incurred.

Although the *Universal Sales* case was scheduled for trial on January 24, 1995, *1182 the opposing party, the Brooks, did not appear. A default judgment was entered on behalf of defendants and Stephen Cherniske, who has since assigned his rights to the judgment to defendants. **Mirch** appeared at a prove-up hearing where he established damages on behalf of defendants. **Mirch** did not argue for attorneys’ fees although the contract might have called for them. Originally, the court accepted **Mirch’s** proposed damage amount and awarded defendants \$3,439,868.77. In 2000, upon a motion by the Brooks, the court set aside the judgment as to Dr. and Mrs. **Frank** and reduced the total award by \$1.1 million to exclude damages for emotional distress and personal losses on behalf of the **Franks**.

In 1999, Dr. **Frank** engaged a collection agency, RC International, to locate assets of the Brooks to satisfy the *Universal Sales* judgment. To pay for these services, Dr.

Frank assigned a portion of his rights to the judgment to RC International. The assignment agreement gave RC International rights to 50% of any assets they recovered. RC International located \$1.8 million in assets, which have since been deposited with this court and are the subject of an interpleader action, Case No. CV–N–00–0580–ECR(VPC). **Mirch** intervened in that action and filed an attorneys’ lien.

He also instituted a lawsuit, alleging that Dr. **Frank** and APPI breached the contingency fee agreement that the parties entered into whereby **Mirch** would be entitled to 40% of any recovery earned in the *Universal Sales* case by fraudulently assigning **Mirch’s** rights to the proceeds to RC International. **Mirch** also charges that Judy **Frank** and defendant Marilyn Bulloch intentionally interfered with this contract by making misrepresentations about the fraudulent assignment. Last, he asserts that the **Franks** and Bulloch’s actions with regard to the assignment were part of a conspiracy to improperly deprive **Mirch** of his interest in the judgment.

Frank and APPI counterclaimed against **Mirch** for, amongst other things, legal malpractice. Specifically, the counterclaimants allege that **Mirch**: (a) failed to reasonably prepare for the damages claim at the prove-up hearing, (b) failed to request attorneys’ fees, (c) failed to keep his client reasonably informed, (d) abandoned his clients and failed to collect on the judgment, (e) represented a client against counter-claimants in substantially the same matter, (f) claimed a contingency fee when the parties never agreed to such a fee. Counterclaim at ¶ 20.

Mirch responded to the counterclaim by filing a third party claim against the counterclaimants’ attorneys, McDonald Carano. **Mirch’s** third party claim against McDonald Carano can be pared down to a claim for indemnity or contribution for any damage caused by malpractice that McDonald Carano might have committed in representing **Mirch’s** former clients, **Frank** and APPI.² In essence, **Mirch** is claiming that McDonald Carano’s malpractice exacerbated the injuries suffered by **Frank** and APPI, and, if **Mirch** has to pay any damages, McDonald Carano should bear its share of the costs. McDonald Carano responds that this third party claim is not allowed under Nevada law.

STANDARDS—Motion to Dismiss under 12(b)(6)

A motion to dismiss under Fed.R.Civ.P. 12(b)(6) will only be granted if it appears beyond doubt that “plaintiff can prove no *1183 set of facts in support of his claim which would entitle him to relief.” *Lewis v. Tel. Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir.1996). The review is limited to the complaint, and all allegations of material fact are taken as true and viewed in the light most favorable to the non-moving party. *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403 (9th Cir.1996). However, although courts generally assume the facts alleged are true, courts do not “assume the truth of legal conclusions merely because they are cast in the form of factual allegations.” *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.1981).

Dismissal for failure to state a claim is proper only if it is clear that no relief may be granted under any set of facts that could be proved consistent with the allegations of the complaint. *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir.2000). Review is limited to the contents of the complaint; if matters outside the pleadings are submitted, the motion to dismiss may be treated as one for summary judgment if the district court relies on the materials. *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir.1996); *Allarcom Pay Television, Ltd. v. Gen. Instrument Corp.*, 69 F.3d 381, 385 (9th Cir.1995).

On a motion to dismiss, we presume that general allegations embrace those specific facts that are necessary to support the claim. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (quotation omitted). However, conclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss. *In re Stac Elecs. Sec. Litig.*, 89 F.3d at 1403.

ANALYSIS

[1] [2] [3] In a diversity action, the district court should apply the substantive law of the forum state. *St. Paul Fire & Marine Ins. Co. v. Weiner*, 606 F.2d 864, 867 (9th Cir.1979). In interpreting state law, federal courts are bound by the pronouncements of the state’s highest court. *Dyack v. Commonwealth of N. Mariana Islands*, 317 F.3d 1030, 1034 (9th Cir.2003). In the absence of a controlling state Supreme Court decision, a federal court applying state law must apply the law as it believes the state Supreme Court would apply it. *Gravquick A/S v. Trimble Navigation Intn’l. Ltd.*, 323 F.3d 1219, 1222 (9th Cir.2003). In other words, a federal district court in diversity cases must predict how the Nevada Supreme

Court would decide unresolved issues of state law, using statutes and decisions from other jurisdictions as interpretive aids. *Id.* Therefore, since Nevada is the forum state, this court must apply Nevada substantive law as it predicts the Nevada Supreme Court would apply it.

The main issue in this motion to dismiss is whether an attorney defending a malpractice suit should be permitted to implead his former client’s current counsel in order to seek indemnity or contribution for the current counsel’s alleged malpractice. As counsel for both parties have ably pointed out, although a majority of states do not allow such a suit, the issue is unsettled in Nevada and many states have split on its resolution. See *Stone v. Satriana*, 41 P.3d 705, 712 (Colo.2002) (en banc) (not allowing third party suit because successor counsel owed no duty to former counsel); *Holland v. Thacher*, 199 Cal.App.3d 924, 245 Cal.Rptr. 247 (1988) (rejecting a case-by-case approach and foreclosing third-party action against successor attorney); *Goldfisher v. Superior Ct.*, 133 Cal.App.3d 12, 183 Cal.Rptr. 609 (1982) (not allowing on public policy grounds); *Waldman v. Levine*, 544 A.2d 683 (D.C.1988) (not allowing on public policy grounds); *Hughes v. Housley*, 599 P.2d 1250 (Utah 1979) (finding successor counsel had no duty to former *1184 counsel and not allowing suit on public policy grounds); *Roberts v. Heilgeist*, 124 Ill.App.3d 1082, 80 Ill.Dec. 546, 465 N.E.2d 658 (1984) (not allowing suit for case specific reasons but expressing approval of public policy rationale disallowing suit); *Melrose Floor Co. v. Lechner*, 435 N.W.2d 90 (Minn.Ct.App.1989) (not allowing suit on public policy grounds); *Olds v. Donnelly*, 150 N.J. 424, 696 A.2d 633 (1997) (not allowing impleader but exempting claim from preclusion rules to allow subsequent, separate suit against successor attorney); but see *Parler & Wobber v. Miles & Stockbridge, P.C.*, 359 Md. 671, 756 A.2d 526 (2000) (discussing competing public policies and permitting suit); *Goran v. Gliberman*, 276 Ill.App.3d 590, 213 Ill.Dec. 426, 659 N.E.2d 56 (1995) (allowing suit because alternative would leave successor attorney free from liability); *Pappas v. Holloway*, 114 Wash.2d 198, 787 P.2d 30 (1990) (en banc) (implicitly approving of third party practice in attorney malpractice situation without policy discussion); *Schauer v. Joyce*, 54 N.Y.2d 1, 444 N.Y.S.2d 564, 429 N.E.2d 83 (1981) (holding that attorney’s third party claim against successor attorney is sufficient to withstand motion to dismiss without discussion of policy issues); *Maddocks v. Ricker*, 403 Mass. 592, 531 N.E.2d 583 (1988) (allowing claim for contribution against successor attorney because alternative would leave successor counsel free from liability); compare *Parker v. Morton*, 117 Cal.App.3d 751, 173 Cal.Rptr. 197 (1981) (allowing suit if attorney malpractice constituted non-discretionary

function as opposed to a choice of reasonable alternatives), with *Austin v. Superior Ct.*, 72 Cal.App.4th 1126, 85 Cal.Rptr.2d 644 (1999) (calling *Parker* into doubt and not allowing suit).

While the Federal Rules of Civil Procedure expressly authorize a plaintiff sued on a counterclaim to implead joint tortfeasors, see Fed.R.Civ.P. 14(b); see also *Finley v. U.S.*, 490 U.S. 545, 560, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989) (Stevens, J., dissenting), the special policy considerations present in the attorney-client relationship and the possibility of bad faith allegations present a substantive state interest in whether a former attorney can implead a successor attorney.

It is a close issue under Nevada state substantive law whether a successor attorney is a joint tortfeasor with the former attorney, and if so, whether the former attorney can implead the successor attorney given the public policy considerations inherent in the attorney-client relationship. The split in state law warrants a closer analysis of this issue in order to predict which line of reasoning the Nevada Supreme Court would adopt.

A few public policy issues predominate. First, the attorney accused of malpractice can use impleader as a nefarious litigation tactic by spreading chaos in the opposing camp and creating a conflict of interest that would force the client's current counsel to withdraw or be disqualified. *Stone v. Satriana*, 41 P.3d 705, 709 (Colo.2002) (en banc). Second, such an action would interfere with the attorney-client confidences of the client. *Id.* Third, the use of impleader in this circumstance could interfere with the ability of the client to pursue such a malpractice claim as a successor attorney, wary of a potential impleader claim for malpractice brought by the former attorney, might not act in the best interests of the client in pursuing the claim. *Id.* This might have a chilling effect on malpractice claims. *Id.* Fourth, the attorney's duty runs to the client, and not the former attorney, and to subject the successor attorney to a suit by the former attorney would force the successor attorney to confront "potential conflicts of interest in trying to serve two masters." *Hughes v. Housley*, 599 P.2d 1250, 1254 (Utah 1979).

*1185 There are also policy concerns that weigh in favor of allowing former counsel to implead successor counsel. First, a successor counsel could escape liability if a former attorney was prohibited from using impleader to hold the successor attorney accountable for malpractice. *Parler & Wobber v. Miles & Stockbridge, P.C.*, 359 Md. 671, 756 A.2d 526, 539 (2000). Second, it would be unfair to allow the client to sue former counsel for

malpractice and yet, at the same time, claim attorney-client privilege with the successor counsel, thereby limiting former counsel's access to relevant evidence. *Id.* at 538–39. Third, the successor counsel's "position of trust with and influence over the client ... could create a situation ripe for mischief and manipulation" if the successor counsel fails to disclose his own negligence to the client. *Id.* at 544. Finally, disallowing the use of impleader could dull the successor counsel's incentives to act as carefully and diligently for the client since the successor counsel would be less likely to face malpractice liability after replacing former counsel.

^[4] Although the policy issues cut both ways, we believe that the Nevada Supreme Court would adopt the view held by a majority of jurisdictions and the Restatement. The *Restatement (Third) of the Law Governing Lawyers* § 53(i) (2000) strikes a balance between the competing policy interests by stating that the former attorney may not seek contribution from the successor attorney in the same action, but may seek to reduce the damages by the portion of the liability attributable to the successor lawyer. Specifically, the Restatement expresses that:

"[t]he first lawyer, however, may not seek contribution or indemnity from the successor lawyer in the same action in which the successor lawyer represents the client, for that would allow the first lawyer to create or exacerbate a conflict of interest for the second lawyer and force withdrawal of the second lawyer from the action. The first lawyer may, however, dispute liability in the negligence or fiduciary breach action for the portion of damages caused by the second lawyer on the ground that the conditions of *Restatement Second, Torts* § 447 are not satisfied. The client may then choose whether to accept the possibility of such a reduction in damages or to assert a second claim against successor counsel, with the resultant necessity of retaining a third lawyer to proceed against the first two."

Restatement (Third) of the Law Governing Lawyers § 53(i) (2000).

^[5] The court finds the rationale of the Restatement to be persuasive under the facts of this case. McDonald Carano did not owe a duty to **Mirch** to mitigate **Mirch's** malpractice damages nor was **Mirch** in privity with McDonald Carano. The successor lawyer should not be required to face a potential conflict between the course "which is in his client's best interest and the course which would minimize his exposure to the cross-complaint" of the former lawyer. *Goldfisher v. Superior Ct.*, 183 Cal.Rptr. at 612. As the court expressed in *Goldfisher*, "to encourage claims of indemnification where two lawyers successively represent the same client is not for the benefit of the client" and these "differences between lawyer and client respecting malpractice should be limited to themselves." *Id.* at 615.

The view offered by the Restatement closely comports to that of California and would allow **Mirch** to offer McDonald Carano's malpractice as an affirmative defense in order to reduce his liability for damages. *Id.*; *Holland*, 245 Cal.Rptr. at 250. If **Mirch** presented a valid affirmative defense of malpractice on the part of McDonald Carano, then it would be up to *1186 APPI and **Frank** to decide whether to join McDonald Carano or risk losing that portion of its claimed damages. This course of action would place the course of the litigation and the ultimate waiver of attorney-client privilege in the hands of the aggrieved client. *Holland*, 245 Cal.Rptr. at 251 (putting the client to an election to either waive the attorney-client privilege, sue the successor counsel, or risk losing a portion of his damages when presented with an affirmative defense of successor counsel's malpractice). The court finds that Nevada's Supreme Court would decide that the client, and not the former attorney, should decide who to sue for malpractice.³

Under the facts of this specific case, it is worth noting that the policies favoring such a suit—allowing successor counsel to escape liability for even gross malpractice—do not seem to be present in this case. The complaint does not allege actionable malpractice that McDonald Carano breached a "specific duty of professional practice." *Melrose*, 435 N.W.2d at 92. In fact, it appears that **Mirch** is alleging that McDonald Carano simply failed to exercise proper judgment, which is not actionable malpractice. *Id.* (citing *Rosner v. Paley*, 65 N.Y.2d 736, 492 N.Y.S.2d 13, 481 N.E.2d 553 (1985)). Thus, even if the court found that the Nevada Supreme Court would allow the use of impleader against a successor attorney, **Mirch's** third-party complaint has not stated a sufficient case of malpractice against McDonald Carano to override

the public policy concerns previously highlighted.

^[6] Under Nevada law, the required elements of malpractice are: (1) an attorney-client relationship; (2) a duty owed to the client by the attorney to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake; (3) a breach of that duty; (4) the breach being the proximate cause of client's damages; and (5) actual loss or damage resulting from the negligence. *Day v. Zubel*, 112 Nev. 972, 976, 922 P.2d 536, 538 (1996). Even those states that allow the use of impleader against successor attorneys do so with an eye towards taking "practical judicial methods to balance the contribution right against the attorney-client privilege." *Parler & Wobber*, 756 A.2d at 540; *Maddocks*, 531 N.E.2d at 589 (advising courts to rule on the impleader issue early to minimize conflicts "if the merits of the claim for contribution can be addressed and ruled on immediately").

Upon closer examination of **Mirch's** claims, it does not appear that McDonald Carano's alleged malpractice was sufficiently related to **Mirch's** alleged malpractice for McDonald Carano to have exacerbated the damages that **Mirch's** malpractice allegedly caused. See *Roberts v. Heilgeist*, 80 Ill.Dec. 546, 465 N.E.2d at 661–62 (finding that contribution requires a common injury and alleged malpractice of successor counsel did not cause same injury). **Mirch** has failed to properly allege a cognizable breach of a duty or relate any breach of duty to a proximate cause of a common injury to **Frank** or APPI.

Frank and APPI alleged that **Mirch's** malpractice involved **Mirch's** conduct both before and after the *Universal Sales* case, including failing to prepare for the damage prove-up hearing, failing to request attorneys' fees, and failing to keep his clients reasonably informed. The damages flowing from such malpractice will likely involve some portion of damages—including attorneys' fees not petitioned for—that **Mirch's** malpractice cost **Frank** and APPI *1187 during the *Universal Sales* case as well as possibly mitigating the attorneys' fees that **Frank** and APPI allegedly owe **Mirch**. **Mirch** is apparently alleging that McDonald Carano committed malpractice by advising **Frank** and APPI to sue **Mirch** for malpractice, thereby subjecting the *Universal Sales* damage award to collateral attack.

^[7] ^[8] However, McDonald Carano's duty runs to its client and not **Mirch**. *Day*, 112 Nev. at 976, 922 P.2d at 538. If McDonald Carano has a choice between alternatives, then McDonald Carano is under no duty to **Mirch** to lessen the damages resulting from predecessor counsel's negligence.

Waldman v. Levine, 544 A.2d at 692. The successor attorney must take the course of conduct that is in the client's best interest. *Id.* There is no indication that McDonald Carano breached a duty to its client by suing **Mirch** for malpractice or advising **Frank** and APPI to waive the attorney client privilege. Just because McDonald Carano is successor counsel should not automatically subject the McDonald Carano defendants to a claim for contribution.

Furthermore, it is not clear how McDonald Carano's alleged malpractice could have contributed to the damages deriving from **Mirch's** alleged malpractice. **Mirch** has alleged no breach of duty to **Frank** or APPI that would exacerbate the damages proximately caused by **Mirch's** malpractice, which involved **Mirch's** lack of preparation at the initial damage prove-up hearing. McDonald Carano was under no duty to its clients to seek attorneys' fees for **Mirch** or to overcome **Mirch's** alleged lack of preparation at the prove-up hearing. This is especially true with regard to the attorneys' fees, which **Mirch** himself failed to seek in the first instance.

Also, to the extent **Mirch** is claiming that McDonald Carano took actions that made **Mirch's** potential malpractice liability greater—in essence, by waiving attorney client privilege and alleging misconduct by **Mirch** that might have subjected the damage judgment to attack—this contention does not state a claim. It does not appear that **Mirch** is claiming that McDonald Carano breached any duty to **Frank** and APPI. Therefore, even taking the allegations in the third party complaint as true, **Mirch** has failed to state a cognizable claim that

McDonald Carano has committed malpractice against its clients, and, therefore, his contribution or indemnity claim against McDonald Carano fails to state a claim under which relief can be granted.

In conclusion, the court finds that the Nevada Supreme Court would not allow a former attorney to file a third-party complaint for contribution or indemnity against his successor attorney in a malpractice action. **Mirch's** claims also fail to state a claim under which relief can be granted because he does not allege that McDonald Carano breached a duty to **Frank** and APPI that proximately caused an increase in **Mirch's** potential malpractice damages. McDonald Carano had a duty to work in the best interests of its clients. Failing to mitigate **Mirch's** malpractice liability does not constitute malpractice as to **Frank** and APPI.

THEREFORE, IT IS HEREBY ORDERED THAT, as addressed above, McDonald Carano's Motion to Dismiss (# 126) is **GRANTED**. **Mirch's** third party complaint against McDonald, Carano, Wilson LLP, Pat Lundvall, and Leigh Goddard is dismissed.

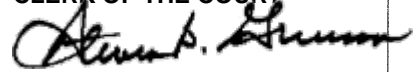
IT IS FURTHER ORDERED THAT the hearing set for Motion to Dismiss (# 126) on November 5, 2003, at 10:00 a.m. is **VACATED**.

All Citations

295 F.Supp.2d 1180

Footnotes

- ¹ **Mirch** has limited his claim to one of indemnity arising from the portion of the damages attributable to McDonald Carano's alleged malpractice. See **Mirch's** Opposition (# 154), p. 4, ln. 25.
- ² Although **Mirch** uses the phrase "indemnity," the court will interpret **Mirch's** claim as one for either contribution or indemnity because different courts have used the terms interchangeably and the relief—a "set off" of damages—requested by **Mirch** is probably best analyzed as an action in contribution.
- ³ We do not comment on whether **Mirch** can later bring a separate action for contribution under [Nevada Revised Statute Section 17.285](#).



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DISTRICT COURT
CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual,

Plaintiff,

v.

JOSHUA TOMSHECK, an individual;
DOES I-X, inclusive,

Defendants.

CASE NO. A-19-793405-C
DEPT. NO. XXIV

**DEFENDANT/THIRD-PARTY PLAINTIFF
JOSHUA TOMSHECK'S SUPPLEMENT
TO HIS OPPOSITION TO THIRD-PARTY
DEFENDANT MARC SAGGESE'S
MOTION TO DISMISS, OR
ALTERNATIVELY, MOTION FOR
SUMMARY JUDGMENT, AND
TOMSHECK'S REQUEST FOR NRC
56(d) RELIEF**

JOSHUA TOMSHECK, an individual,

Third-Party Plaintiff,

v.

MARC SAGGESE, ESQ., an individual,

Third-Party Defendant.

Date of Hearing: May 7, 2020

Time of Hearing: 9:00 a.m.

COMES NOW Defendant/Third-Party Plaintiff JOSHUA TOMSHECK ("Tomscheck"), by and through his attorneys of record, OLSON CANNON GORMLEY & STOBERSKI, and hereby submits his supplement to his opposition to Third-Party Defendant Marc Saggese's motion to dismiss, or alternatively, motion for summary judgment.

1 This supplement is based upon new documents produced by Plaintiff Christopher Beavor
2 on April 24, 2020, and demonstrate that Saggese's motion must be denied and that Tomsheck
3 should be permitted, both legally and equitably, to enforce his statutory right to seek contribution
4 from Saggese.

5 DATED this 30th day of April, 2020.

6 OLSON CANNON GORMLEY
7 & STOBERSKI

8 /s/ Max E. Corrick, II
9 MAX E. CORRICK, II
10 Nevada Bar No. 6609
11 9950 West Cheyenne Avenue
12 Las Vegas, NV 89129
13 Attorneys for Defendant/Third-Party
14 Plaintiff JOSHUA TOMSHECK
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DECLARATION OF ATTORNEY MAX E. CORRICK, II

STATE OF NEVADA)
)
COUNTY OF CLARK) ss:

MAX E. CORRICK, II declares and states as follows:

1. That I am a Shareholder with the law firm of Olson Cannon Gormley & Stoberski, and am duly licensed to practice law before all of the Courts in the State of Nevada.

2. I am an attorney retained to represent Tomsheck in this matter and have personal knowledge of the contents of this Declaration.

3. The documents attached as Exhibits A through D to this supplement opposition to the instant motion to dismiss, or alternatively, motion for summary judgment, are true and accurate copies of those documents. These documents were produced by Plaintiff on April 24, 2020, after the filing of Tomsheck's opposition. They demonstrate, conclusively, that Tomsheck is entitled to seek contribution from Marc Saggese, Esq., and that the affidavits of Mr. Saggese and Plaintiff Christopher Beavor are contrary to fact such that this Court cannot rely upon them as a basis for granting any aspect of Saggese's motion.

4. The undersigned has advised Mr. Saggese's counsel of this supplement and has offered to allow Mr. Saggese additional time in which to submit his reply brief on his pending motion.



MAX E. CORRICK, II

POINTS AND AUTHORITIES

I.

On April 24, 2020, Plaintiff Christopher Beavor served his Second Supplemental NRCP 16.1 Disclosure and 16.1(a)(3) Trial Disclosure. Therein, Plaintiff disclosed 1,900+ new documents, not previously made available to Tomsheck, which strongly support the conclusion that Tomsheck should be permitted to seek contribution from Saggese pursuant to NRS 17.225. In fact, the newly produced documents demonstrate facts so contrary to the affidavits submitted by

1 Plaintiff and Saggese in support of Saggese's motion that those affidavits cannot be relied upon in
2 good faith.

3 **A. The New NRCP 16.1 Computation of Damages**

4 *First*, Plaintiff's April 24, 2020 disclosure was the first instance in which Plaintiff offered
5 up a computation of damages.¹ Those damages include \$10,000.00 for an alleged payment,
6 undated, to Marc Saggese, Esq. Given the fact Mr. Saggese claims he withdrew as counsel prior to
7 Tomscheck's involvement with the case, this payment suggests Mr. Saggese continued to serve as
8 Plaintiff's attorney and continued to provide him legal advice concerning the post-trial motion
9 practice. Tomscheck has already testified about Mr. Saggese's continued involvement in Plaintiff's
10 decisions as to how to address the post-trial motions.

11 This alleged payment appears to corroborate Tomscheck's testimony and Affidavit regarding
12 Mr. Saggese's in-depth involvement with the post-trial motion practice decisions. It signals that
13 Mr. Saggese was not just Plaintiff's prior counsel at the time of Tomscheck's alleged misconduct,
14 he was co-counsel actively participating in the alleged misconduct. Tomscheck is entitled to
15 contribution from him as a result. *See Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*,
16 209 W.Va. 318, 547 S.E.2d 256 (2001); *Parler and Wobber v. Miles and Stockbridge*, 359 Md.
17 671, 686, 756 A.2d 526, 534 (holding that "the unfairness of allowing a plaintiff the power to pick
18 and choose whom to sue for damages was alleviated by providing the defendant with the right to
19 implead a responsible third party to share in the liability. This 'distribute[s] the burden of
20 responsibility equitably among those who are jointly liable'", *quoting Montgomery County v. Valk*
21 *Mfg. Co.*, 317 Md. 185, 189-190, 562 A.2d 1246, 1248 (1989)); *Musser v. Provencher*, 28 Cal.4th
22 274, 48 P.3d 408 (2002) (holding that concurrent counsel may seek contribution from each other
23 for damages attributable their co-counsel).

24 **B. Plaintiff's Motion to Reopen Dispositive Motion Deadline**

25 *Second*, in his Friday afternoon document dump Plaintiff also buried documents which
26 factually bolster Tomscheck's contribution claim and cast serious doubt on the veracity of the self-
27 serving affidavits of Mr. Saggese and Plaintiff submitted in support of Mr. Saggese's motion. For
28

¹ See Exhibit A, p. 13-14.

1 instance, Plaintiff disclosed various documents from the Dickinson Wright law firm – the attorneys
2 who first raised the one-action rule defense in 2015. Within those documents was Plaintiff’s
3 motion to reopen the dispositive motion deadline filed on May 8, 2015.² Plaintiff wanted to file a
4 motion for summary judgment on the newly discovered one-action rule defense. Plaintiff argued
5 that his prior counsel – Mr. Saggese – failed to raise two clear legal issues that were “ripe for
6 determination prior to the [first] trial.”³ Plaintiff argued that Mr. Saggese “failed to meet his
7 professional obligations, thereby constituting excusable neglect sufficient to form good cause to
8 reopen the deadline, when he failed to move for summary judgment on any grounds.”⁴ Plaintiff
9 even characterized it as follows: “...but for Beavor’s prior counsel’s failure to raise them, would
10 have obviated the need for even the first trial.”⁵

11 Beavor called Mr. Saggese’s failures “especially troubling” and noted that Mr. Saggese
12 “failed in his duties by not moving for relief...”⁶ Beavor then dedicated three full paragraphs
13 blaming Saggese for Beavor’s problems.⁷ He first called it “excusable neglect”, while at the same
14 time citing Nevada Rule of Professional Conduct 3.2(a), which Beavor said “[a]s a result, Beavor
15 had to endure not only one trial, but now likely two trials...” He accused Mr. Saggese of not
16 “vigilantly pursuing Beavor’s defense and meeting his obligations to expedite the litigation.” And
17 to top it off, he said “[i]t was inexcusable for Beavor’s prior counsel to not move for summary
18 judgment...”

19 The import of Plaintiff’s position in the underlying matter is clear: this was all Mr.
20 Saggese’s fault. If Mr. Saggese had told Plaintiff about the option of pleading the one-action rule
21 as an affirmative defense at the outset and winning the case outright because of it, Plaintiff never

22 ² See Exhibit B.

23 ³ *Id.* at 3:6-11.

24 ⁴ *Id.*

25 ⁵ *Id.*

26 ⁶ *Id.* at 6:8-13; and see 6:21-25 (describing Mr. Saggese’s trial errors which, if not made,
27 would have resolved the matter entirely).

28 ⁷ *Id.* at 8:18 - 9:16

1 would have taken the position he did in his motion to reopen the dispositive motion deadline in the
2 underlying case. The only reasonable interpretation of Plaintiff's arguments in the underlying
3 matter and Mr. Saggese's affidavit now is that one made a false representation.

4 Tomsheck must be permitted to bring his contribution claim against Mr. Saggese because
5 even the Plaintiff knew back in 2015 that all of Plaintiff's damages were not caused by Tomsheck.
6 They were caused by Mr. Saggese, whom Plaintiff won't sue now because they are close friends
7 and business partners.⁸

8 **C. Plaintiff's Answering Brief for the Appeal on the Underlying Case**

9 *Third*, in the same document dump Plaintiff produced his Answering Brief for the Appeal
10 of the underlying case. It was filed on September 6, 2016.⁹ Recall that the district court dismissed
11 Hefetz's case against the Plaintiff by virtue of the same one-action rule Plaintiff's attorneys blamed
12 Mr. Saggese for not filing. The Nevada Supreme Court reversed that decision, finding that Mr.
13 Saggese's failure to raise the one-action rule as an affirmative defense constituted a waiver of that
14 defense.

15 In his Answering Brief, just as he had before, Plaintiff blamed Mr. Saggese and took the
16 position that he had never even heard of the one-action rule before. He told the Nevada Supreme
17 Court that:

18 Hefetz completely ignores the fact that the errors of Beavor's former counsel not
19 only prevented Beavor from asserting the defense at an earlier stage of the case, but
20 also allowed Hefetz an opportunity for a second trial when there was no valid
ground for a second trial.¹⁰

21 Plaintiff even doubled down on laying all of his damages on Mr. Saggese:

22 [t]he simple fact is that Beavor is not an attorney nor was he familiar with Nevada's
23 One Action Rule. Instead, Beavor reasonably relied upon his former counsel
24 [Saggese], who clearly erred in not raising a host of legal defenses, including the
One Action Rule. Hefetz can hardly cry foul when the defense: (1) was timely

25 ⁸ One must wonder if Mr. Saggese was actually aware that the Plaintiff was taking such a
26 harsh position concerning the quality of his legal services in the underlying matter.

27 ⁹ See Exhibit C. Tomsheck is not producing the entire brief here, but rather only the
28 pertinent pages to the issues before this Court.

¹⁰ *Id.* at fn. 4 [PLTF 1233].

1 asserted per the express language of NRS 40.435(3); and (2) when, **but for the**
2 **errors of Beavor's counsel, his claim against Beavor would never have made it**
3 **to a first trial, let alone survived a jury verdict in Beavor's favor.**¹¹

4 Again, the positions Plaintiff took in the underlying matter are completely contrary to those
5 contained in both his and Mr. Saggese's affidavits supporting the Saggese motion. Either Mr.
6 Saggese prevented Plaintiff from raising the one-action rule as a defense, or Mr. Saggese was
7 prevented by Plaintiff from raising it. From the looks of what Plaintiff told the Nevada Supreme
8 Court (and the district court), it appears it was the former...and the latter is pure fiction.

9 **D. The Email between Plaintiff and Mr. Saggese dated July 23, 2015**

10 *Fourth*, Plaintiff's document dump also produced a telling email between him and Mr.
11 Saggese dated July 23, 2015.¹² This email was sent two months before Plaintiff put Tomsheck's
12 insurance carrier on notice of a potential claim against him. It speaks volumes to Plaintiff's plan to
13 insulate Mr. Saggese and to try to leave Tomsheck left holding the bag for Mr. Saggese's mistake.

14 In the email, Plaintiff has just received good news about the underlying case. The district
15 court judge had dismissed Hefetz's claims against Plaintiff because of the one-action rule and had
16 denied Hefetz's motion for reconsideration of that ruling. He writes:

17 Just got back from walk thru any day now...fyi see attached I think the case is finally
18 over judge Israel is on my side now..read it. **Josh insurance carrier needs to pay**
me now... don't need an affidavit or try to prove what Israel would have ruled if
19 Josh would have filed proper documents read this it will blow your. Mind..fyi your
20 money is next week¹³

21 A reasonable juror would be able to conclude that:

- 22 (1) Plaintiff knew that Mr. Saggese committed legal malpractice and caused all of
23 Plaintiff's damages - this is demonstrated in Exhibits B and D, for instance.
24 (2) Plaintiff likely knew that Mr. Saggese did not have insurance to cover his legal
25 malpractice - this is demonstrated by the Affidavit of Josh Tomsheck in support of
26 the opposition to the Saggese motion.

27 ¹¹ *Id.* at fn. 8 [PLTF 1238].

28 ¹² *See* Exhibit D.

¹³ *Id.*

- (3) Plaintiff, not wanting to collect from Saggese directly because he might be judgment proof (or because they are close friends and business partners), decided that Tomsheck's insurance carrier should pay for Mr. Saggese's mistakes despite the fact Plaintiff told the district court it was all Mr. Saggese's fault, and told the Nevada Supreme Court he had never even heard of the one-action rule before 2015. Tomsheck's insurance carrier is put on notice months later.
- (4) Plaintiff sued Tomsheck, but not his friend/business partner Mr. Saggese, and before discovery could be taken each provided an Affidavit to keep Mr. Saggese insulated from liability (for which he has no insurance). Those Affidavits conveniently state that Mr. Saggese told Plaintiff as far back as 2011 about the one-action rule, that Plaintiff understood it and verbally instructed Mr. Saggese to not raise it as an affirmative defense.
- (5) The Affidavits of Plaintiff and Mr. Saggese concerning the one-action rule are contrary to Plaintiff's legal positions taken in the underlying matter, they demonstrate bias to protect Mr. Saggese and, at a minimum, are unreliable.

In summary, if this Court does not grant Tomsheck's motion for summary judgment – which it should both on its merits and on this new evidence showing that Plaintiff has committed a fraud upon the Court – both Nevada law and equity demand that Tomsheck be permitted to assert his contribution claim against Mr. Saggese. At this stage of the case, Mr. Saggese's motion must be denied in its entirety.

DATED this 30th day of April, 2020.

OLSON CANNON GORMLEY
& STOBERSKI

/s/ Max E. Corrick, II
MAX E. CORRICK, II
Nevada Bar No. 6609
9950 West Cheyenne Avenue
Las Vegas, NV 89129
Attorneys for Defendant/Third-Party
Plaintiff JOSHUA TOMSHECK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of April, 2020, I sent via e-mail a true and correct copy of the above and foregoing **DEFENDANT/THIRD-PARTY PLAINTIFF JOSHUA TOMSHECK'S SUPPLEMENT TO HIS OPPOSITION TO THIRD-PARTY DEFENDANT MARC SAGGESE'S MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT, AND TOMSHECK'S REQUEST FOR NRCP 56(d) RELIEF** on the Clark County E-File Electronic Service List (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

H. Stan Johnson, Esq.
Cohen Johnson Parker Edwards
375 East Warm Springs Road, Suite 104
Las Vegas, NV 89119
702-823-3500
702-823-3400 fax
sjohnson@cohenjohnson.com

and

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/s/Jane Hollingsworth

An Employee of OLSON CANNON GORMLEY
& STOBERSKI

EXHIBIT A

SUPP
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*Attorneys for Plaintiff***EIGHTH JUDICIAL DISTRICT COURT****CLARK COUNTY, NEVADA**

CHRISTOPHER BEAVOR, an individual,

Plaintiff,

vs.

JOSHUA TOMSHECK, an individual;
DOES I-X; ROE ENTITIES I-X,

Defendants.

Case No.: A-19-793405-C
Dept. No.: VIII

**PLAINTIFF'S SECOND SUPPLEMENTAL
NRCP 16.1 DISCLOSURE AND 16.1(a)(3)
TRIAL DISCLOSURE**

JOSHUA TOMSHECK, an individual,

Third-Party Plaintiff,

vs.

MARC SAGGESE, ESQ., an individual,

Third-Party Defendant.

COMES NOW Plaintiff Christopher Beavor, by and through his counsel of record H. Stan

Johnson, Esq. of the law firm of Cohen Johnson Parker Edwards and Charles ("CJ") E. Barnabi Jr. Esq. of The Barnabi Law Firm, PLLC, and hereby submits this supplemental NRCP 16.1 Disclosure of Witnesses and Documents as follows:

I.

WITNESSES

1. Christopher Beavor
c/o Cohen Johnson Parker Edwards
375 E. Warm Springs Rd., Ste. 104
Las Vegas, Nevada 89119
Telephone: (702) 823-3500

and

The Barnabi Law Firm, PLLC
375 E. Warm Springs Rd., Ste. 104
Las Vegas, Nevada 89119
Telephone: (702) 475-8903

Mr. Beavor is expected to testify as to his knowledge of the facts and circumstances regarding the subject litigation and the allegations contained within the Complaint.

2. Joshua Tomsheck, Esq.
c/o Max E. Corrick, II
Olson, Cannon, Gormley, Angulo & Stoberski
9950 W. Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 384-4012

Mr. Tomsheck is expected to testify as to his knowledge of the facts and circumstances regarding the subject litigation and the allegations contained within the Complaint.

3. Marc Saggese, Esq.
c/o Lipson Neilson
9900 Covington Cross Drive, Ste. 120
Las Vegas, Nevada 89144
Telephone: (702) 382-1500

Mr. Saggese is expected to testify as to his knowledge of the facts and circumstances regarding the subject litigation and the allegations contained within the Complaint.

4. Joel Schwarz, Esq.
701 N. Green Valley Pkwy, Ste 200
Henderson, Nevada 89074

Telephone: (702) 608-5913

Mr. Schwarz is expected to testify as to his knowledge of the facts and circumstances regarding the subject litigation and the allegations contained within the Complaint.

Plaintiff reserves the right to supplement this list of witnesses as discovery continues, and additionally reserves the right to call any witness who may be listed by any other party to this action.

II.

DOCUMENTS

1. All documents listed by Mr. Tomsheck in his NRCP Initial Disclosure of Witnesses and Documents served on July 23, 2019.

2. CONFIDENTIAL AND FOR ATTORNEY'S EYES ONLY¹ Confidential Settlement and Mutual Release between Yacov Jack Hefetz and Christopher Beavor, identified as documents PLTF001 – 6;

3. Emails between Joel Schwarz and Max Corrick regarding mediation, identified as document PLTF007;

4. Emails between Joel Schwarz and Max Corrick regarding a settlement conference, identified as PLTF008;

5. Emails between Joel Schwarz and Max Corrick regarding mediation, identified as PLTF009 – 12;

6. Emails between Max Corrick, Gabriel Blumberg, and Joel Schwarz scheduling the settlement conference, identified as PLTF013 – 17;

7. September 16, 2015 letter from Joel Schwarz to Joshua Tomsheck regarding notice

¹ Pursuant to and in compliance with the Stipulated Protective Order.

1 of claim, identified as PLTF018 – 30;

2 8. Tolling Agreement between Christopher Beavor and Joshua Tomsheck dated
3 March 14, 2016, identified as PLTF031 – 34;

4 9. Gordon Silver Account Statements for Christopher Beavor from February
5 2015 through August 2015, identified as PLTF035 - 48²;

6 10. Receipt of Copy for documents in response to the subpoena duces tecum sent
7 to Saggese & Associates, LTD., identified as PLTF049;

8 11. February 13, 2020 letter from Lipson Neilson regarding the subpoena duces
9 tecum sent to Saggese & Associates, identified as PLTF050 – 51³;

10 12. Email chain between Josh Tomsheck and Chris Beavor dated February 20,
11 2014, identified as PLTF052 – 54;

12 13. Email chain between Chris Beavor, Marc Saggese and Joel Schwarz dated
13 July 23, 2015, identified as PLTF055 - 56;

14 14. July 23, 2015 Order in case no. A-11-645353-C, identified as PLTF057 – 61;

15 15. Email chain between Josh Tomsheck, Chris Beavor, Marc Saggese, Lucy
16 Bouza, and Olivia Campbell dated September 16, 2017, identified as PLTF062 – 64;

17 16. October 21, 2011 unfiled copy of Defendants' Answer to Complaint and
18 Counterclaim and Initial Appearance Fee Disclosure in case no. A-11-645353-C, identified
19 as PLTF065 – 83;

20 17. November 28, 2011 unfiled copy of Demand for Jury Trial in case no. A-11-

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25 ² These documents were provided by Gordon Silver at the request of Mr. Beavor. The related
26 subpoena and deposition duces tecum were vacated, but Plaintiff is still awaiting the certificate of
custodian of records.

27 ³ Documents identified as PLTF050-566, are the same documents as identified in the correspondence
28 as SAG000001-SAG000515, as provided on the referenced CD. These documents were disclosed
pursuant to a prior subpoena and as requested by Mr. Beavor.

1 645353-C, identified as PLTF084 – 86;

2 18. February 21, 2012 unfled copy of Defendants'/Counterclaimants' Motion for
3 Leave to Amend Counterclaim in case no. A-11-645353-C, identified as PLTF087 – 94;

4 19. February 21, 2012 unfled copy of First Amended Counterclaim in case no. A-
5 11-645353-C, identified as PLTF095 – 110;

6 20. April 9, 2012 unfled copy of the First Amended Counterclaim in case no. A-
7 11-645353-C, identified as PLTF111 – 124;

8 21. May 10, 2012 Subpoena Duces Tecum to Gary Frey in case no. A-11-645353-
9 C, identified as PLTF125 – 129;

10 22. May 10, 2012 Notice of Taking Deposition of Gary Frey in case no. A-11-
11 645353-C, identified as PLTF130 – 132;

12 23. May 21, 2012 Notice of Vacating Deposition of Gary Frey in case no. A-11-
13 645353-C, identified as PLTF133 - 135;

14 24. September 13, 2012 Confidential Settlement Brief in case no. A-11-645353-C,
15 identified as PLTF136 – 143;

16 25. October 9, 2012 unfled copy of Defendants'/Counterclaimants' Opposition to
17 Motion for Partial Summary Judgment in case no. A-11-645353-C, identified as PLTF144 –
18 220;

19 26. October 5, 2012 unfled copy of Stipulation and Order to Continue Plaintiff's
20 Motion for Partial Summary Judgment in case no. A-11-645353-C, identified as PLTF221 –
21 223;

22 27. October 12, 2012 unfled copy of Notice of Entry of Order in case no. A-11-
23 645353-C, identified as PLTF224 – 226;

24 28. October 19, 2012 unfled copy of Supplement to

Defendants'/Counterclaimants' Opposition to Plaintiff's to Motion for Partial Summary Judgment in case no. A-11-645353-C, identified as PLTF227 – 234;

29. October 19, 2012 unfiled copy of Defendants'/Counterclaimants' Response to Plaintiff's Reply to Opposition of Motion for Partial Summary Judgment in case no. A-11-645353-C, identified as PLTF235 – 240;

30. Order Denying Motion for Partial Summary Judgment and Granting Motion to Strike signed by Mark Saggese in case no. A-11-645353-C, identified as PLTF241 – 242;

31. February 8, 2013 unfiled copy of Joint Pre-Trial Memorandum in case no. A-11-645353-C, identified as PLTF243 – 253;

32. February 21, 2013 unfiled copy of Defendants/Counterclaimants' Proposed Jury Voir Dire Questions in case no. A-11-645353-C, identified as PLTF254 – 260;

33. March 25, 2013 unfiled copy of Notice of Withdrawal of Attorney in case no. A-11-645353-C, identified as PLTF261 – 262;

34. May 2013 unfiled copies of Judgment in case no. A-11-645353-C, identified as PLTF0263 – 276;

35. August 7, 2013 unfiled copy of Defendants' Motion for Attorney's Fees in case no. A-11-645353-C, identified as PLTF277 – 283;

36. October 4, 2013 filed and unfiled copies of Supplement to Defendant Samantha Beavor Motion for Attorney's Fees in case no. A-11-645353-C, identified as PLTF284 – 301;

37. October 4, 2013 Certificate of Service in case no. A-11-645353-C, identified as PLTF303;

38. August 7, 2013 Defendants' Motion for Attorney's Fees in case no. A-11-645353-C, identified as PLTF304 – 310;

39. October 4, 2013 Supplement to Defendant Samantha Beavor Motion for

1 Attorney's Fees in case no. A-11-645353-C, identified as PLTF311 – 323;

2 40. September 24, 2016 Certificate of Service in case no. A-11-645353-C, identified
3 as PLTF324 – 332;

4 41. August 28, 2013 Defendant Christopher Beavor's Motion for Reconsideration
5 in case no. A-11-645353-C, identified as PLTF333 – 372;

6 42. September 16, 2014 Order Denying Petition for Writ of Mandamus in case no.
7 65656, identified as PLTF373 – 374;

8 43. March 9, 2012 Defendants' Responses to Plaintiffs' First Set of Requests for
9 Admissions in case no. A-11-645353-C, identified as PLTF375 – 380;

10 44. March 15, 2012 Defendants' Responses to Plaintiffs' First Set of
11 Interrogatories in case no. A-11-645353-C, identified as PLTF381 – 396;

12 45. March 9, 2012 Defendants' Responses to Plaintiffs' First Set of Requests for
13 Production of Documents in case no. A-11-645353-C, identified as PLTF397 – 506;

14 46. July 10, 2012 Deposition Transcript for Yakov Hefetz in case no. A-11-645353-
15 C, identified as PLTF507 – 548;

16 47. Loan and Note Purchase Agreement identified as PLTF549 – 554;

17 48. Allonge and Assignment identified as PLTF555 – 560;

18 49. Settlement Agreement and Release identified as PLTF561 – 563;

19 50. September 4, 2013 Signed Receipt of Copy for Motion for Attorney Fees in
20 case no. A-11-645353-C, identified as PLTF564;

21 51. September 26, 2013 Tomsheck e-mail to Chris Beavor and Marc Saggese
22 regarding hearing results in case no. A-11-645353-C, identified as PLTF565 – 566;

23 52. 2015 - 2016 Service Notification Emails in case no. A-11-645353-C, identified
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1 as PLTF567 – 624⁴;

2 53. 2017 Service Notifications in case no. A-11-645353-C, identified as PLTF625
3 – 674;

4 54. 2018 Draft Order Denying Motions for Summary Judgment in case no. A-11-
5 645353-C, identified as PLTF675 – 676;

6 55. 2018 Service Notifications in case no. A-11-645353-C, identified as PLTF677 –
7 711;

8 56. April 26, 2012 Deposition of Christopher Beavor in case no. A-11-645353-C,
9 identified as PLTF712 – 851;

10 57. April 26, 2012 Christopher Beavor’s Deposition Exhibits in case no. A-11-
11 645353-C, identified as PLTF852 – 1120;

12 58. February 25, 2013 Exhibit D-13 Declaration of Beavor in Opposition to Motion
13 to Modify in case no. A-11-645353-C, identified as PLTF1121 – 1127;

14 59. June 26, 2015 Dickinson Wright New File History, identified as PLTF1128;

15 60. July 8, 2015 Beavor’s Motion for Attorneys’ Fees and Costs in case no. A-11-
16 645353-C, identified as PLTF1129 – 1156;

17 61. July 31, 2015 Opening Checklist for CAI Investments, identified as PLTF1157;

18 62. September 16, 2015 Dickinson Wright to Tomsheck re Notice of Malpractice
19 Claim, identified as PLTF1158 – 1170;

20 63. October 13, 2015 Service Notification for Amended Certificate of Service in
21 case no. A-11-645353-C, identified as PLTF1171 – 1172;

22 64. November 6, 2015 Email from Mindi Hecht to Bobbye Donaldson regarding
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27 ⁴ Documents identified as PLTF567-1924 were produced by Dickinson Wright pursuant to a prior
28 subpoena and as requested by Mr. Beavor.

1 counsel being assigned to Tomsheck, identified as PLTF1173;

2 65. November 16, 2015 Email from Joel Schwarz to Max Corrick regarding
3 Mediation Participation, identified as PLTF1174 - 1176;

4 66. November 18, 2015 Matter Opening Checklist for The Lofts at Brian Head,
5 identified as PLTF1177 – 1178;

6 67. November 30, 2015 Matter Opening Checklist for CAI Investments Series
7 1000, identified as PLTF1179 - 1180;

8 68. February 16, 2016 Declaration of Christopher Beavor in case no. A-11-645353-
9 C, identified as PLTF1181 - 1188;

10 69. March 14, 2016 Tolling Agreement signed by Tomsheck, identified as
11 PLTF1189 – 1192;

12 70. Communications between Christopher Beavor and Counsel, identified as
13 PLTF1193 – 1203;

14 71. March 29, 2016 Email from Max Corrick to Blumberg identified as PLTF1204
15 - 1208;

16 72. April 12, 2016 Deposition Notice for Christopher Beavor, identified as
17 PLTF1209 – 1210;

18 73. September 6, 2016 Christopher Beavor's Answering Brief on Appeal,
19 identified as PLTF1211 – 1255;

20 74. Internal firm communications identified as PLTF1256 - 1257;

21 75. March 10, 2017 correspondence regarding unrelated matter, identified as
22 PLTF1258-1302;

23 76. August 7, 2017 Beavor's Notice of Renewal of Motion to Reopen Dispositive
24 Motion Deadline in case no. A-11-645353-C, identified as PLTF1303 – 1396;

- 1 77. August 24, 2017 Joel Schwarz to Max Corrick identified as PLTF1397;
- 2 78. August 31, 2017 Max Corrick to Joel Schwarz identified at PLTF1398 – 1400;
- 3 79. September 19, 2017 Joel Schwarz to Max Corrick identified as PLTF1401 –
- 4 1404;
- 5 80. Draft attorney work product, identified as PLTF1405 – 1413;
- 6 81. October 24, 2017 Errata to Plaintiff’s Opposition to Beavor’s Motion for
- 7 Summary Judgment and Counter-Motion for Summary Judgment identified as PLTF1414
- 8 – 1606;
- 9
- 10 82. October 24, 2017 email from Nina Little to Bobbye Donaldson identified as
- 11 PLTF1607 -1608;
- 12 83. October 24, 2017 email from Nina Little to Bobbye Donaldson identified as
- 13 PLTF1609 – 1610;
- 14 84. October 24, 2017 Notification of Service identified as PLTF1611 – 1612;
- 15 85. November 6, 2017 Notification of Service identified as PLTF 1613 – 1614;
- 16 86. November 17, 2017 Order Setting Settlement Conference identified as PLTF
- 17 1615 – 1618;
- 18 87. Attorney/Client Communications, identified as PLTF1619;
- 19 88. December 21, 2017 email from Max Corrick to Gabriel Blumberg identified
- 20 as PLTF1620;
- 21 89. Attorney/Client Communications, identified as PLTF1621;
- 22 90. January 17, 2018 email from Gabriel Blumberg to Max Corrick identified as
- 23 PLTF1622 – 1623;
- 24 91. January 17, 2018 email from Max Corrick to Gabriel Blumberg identified as
- 25 PLTF1624 – 1625;
- 26
- 27
- 28

1 **92. January 18, 2018 email from Joel Schwarz to Max Corrick and Gabriel**
2 **Blumberg identified as PLTF1626 – 1628;**

3 **93. January 22, 2018 email from Max Corrick to Joel Schwarz and Gabriel**
4 **Blumberg identified as PLTF1629 – 1632;**

5 **94. January 22, 2018 email from Joel Schwarz to Max Corrick and Gabriel**
6 **Blumberg identified as PLTF1633 – 1636;**

7 **95. January 22, 2018 email from Joel Schwarz to Max Corrick and Gabriel**
8 **Blumberg identified as PLTF1637 – 1641;**

9 **96. January 22, 2018 Second Amended Order Setting Settlement Conference**
10 **identified as PLTF1642 – 1645;**

11 **97. January 24, 2018 email from Gabriel Blumberg to Max Corrick and Joel**
12 **Schwarz identified as PLTF1646 – 1650;**

13 **98. January 24, 2018 email from Max Corrick to Gabriel Blumberg and Joel**
14 **Schwarz identified as PLTF1651 – 1655;**

15 **99. Attorney/Client Communications, identified as PLTF1656;**

16 **100. February 22, 2018 email from Max Corrick to Gabriel Blumberg and Joel**
17 **Schwarz identified as PLTF1657 – 1661;**

18 **101. February 22, 2018 email from Max Corrick to Joel Schwarz identified as**
19 **PLTF 1662 – 1667;**

20 **102. February 22, 2018 email from Joel Schwarz to Max Corrick identified as**
21 **PLTF1668 – 1673;**

22 **103. February 22, 2018 email from Joel Schwarz to Max Corrick identified as**
23 **PLTF1674 – 1678;**

24 **104. May 3, 2018 Defendant Christopher Beavor’s Notice of Renewal of Motion for**
25
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Summary Judgment identified as PLTF1679 – 1792;

105. June 29, 2018 Notification of Service identified as PLTF1793 – 1794;

106. August 3, 2018 Filing Submitted notice identified as PLTF1795 – 1796;

107. Attorney/Client Communications, identified as PLTF1797 – 1798;

108. August 7, 2018 Notice of Entry of Order Denying Motions for Summary Judgment identified as PLTF1799 – 1803;

109. September 6, 2018 Draft of Defendant Christopher Beavor's Emergency Motion for Sanctions for Plaintiff's Failure to Server NRCP 16.1(a)(3) and Application for Order Shortening Time identified as PLTF1804 – 818;

110. September 6, 2018 Draft of Christopher Beavor's Emergency Motion for Sanctions for Plaintiff's Failure to Server NRCP 16.1(a)(3) and Application for Order Shortening Time identified as PLTF819 – 833;

111. September 6, 2018 Notification of Service identified as PLTF1834 – 1835;

112. September 10, 2018 Christopher Beavor's Objection to Plaintiff's Proposed Jury Instructions and Voir Dire identified as PLTF1836 – 1838;

113. September 10, 2018 Defendant Christopher Beavor's Proposed Voir Dire identified as LTF1839 – 1842;

114. September 10, 2018 Christopher Beavor's Pretrial Memorandum identified as PLTF1843 – 1854;

115. August 17, 2015 Christopher Beavor's Supplement to Reply In Support of Motion for Attorneys' Fees and Costs identified as PLTF1855 – 1870;

116. September 10, 2018 Opposition to Defendant Christopher Beavor's Emergency Motion for Sanctions for Plaintiff's Failure to Serve NRCP 16.1(a)(3) Pretrial Disclosures; and Application for Order Shortening Time and related emails, identified as PLTF1871 –

1891;

117. September 7, 2018 Proof of Service identified as PLTF1892;

118. September 10, 2018 Christopher Beavor's Objection to Plaintiff's Proposed Jury Instructions and Voir Dire identified as PLTF1893 – 1895;

119. Attorney/Client Communications, identified as PLTF1896-1898;

120. Account Statement for Christopher Beavor identified as PLTF1899;

121. Attorney/Client Communications, identified as PLTF1900-1903;

122. March 13, 2019 Notification of Service identified as PLTF1904 – 1905;

123. Draft attorney work product, identified as PLTF1906-1912⁵; and

124. Without waving any evidentiary objections, each and every document designated by any party to this action.

125. Plaintiff reserves the right to supplement this list of exhibits as discovery continues. Plaintiff further reserves the right to submit any exhibit as may be necessary for purposes of rebuttal or impeachment, and to list additional exhibits as the same become known and/or available.

III.

DAMAGES

The following matrix is a list of all attorney's fees and costs, which have been confirmed or partially confirmed, to date:

| | | |
|-----------------------------------|--------------|---------------------|
| Dickinson Wright | \$110,321.95 | See PLTF1899 - 1901 |
| Settlement Payments Due to Hefetz | \$300,000.00 | See PLTF0001 - 0006 |
| Gordon Silver | \$61,464.73 | See PLTF0035 – 0048 |

⁵ Plaintiff's Privilege Log is attached herein as Exhibit 1.

| | | |
|----------------------------|---------------------|--------------------|
| Saggese & Associates, LTD. | \$10,000.00 | See PLTF0050 |
| Hofland & Tomsheck | \$3,000.00 | See JT000709 – 711 |
| TOTAL | \$484,786.68 | |

Plaintiff also believes he is entitled to additional damages in addition to these prior attorney's fees and costs expended due to the allegations in the Complaint, in amount at least equivalent to the applicable policy limits, which is believed to be \$1,000,000, plus further awards based on the determination of the jury and/or the trial judge.

Alternatively, in the event that Plaintiff is unable to timely pay the amounts due to Hefetz, he is obligated to repay \$2,000,000 based on a confession of judgment.

IV.

INSURANCE

Defendant is insured by ProAssurance, policy number 15MCNV000006 with a Limit of Liability of \$1,000,000.00 each claim.

Dated this 24th day of April 2020.

THE BARNABI LAW FIRM, PLLC

By: /s/ CJ Barnabi

CHARLES ("CJ") E. BARNABI JR., ESQ.
Nevada Bar No. 14477
375 East Warm Springs Road, Suite 104
Las Vegas, Nevada 89119

COHEN JOHNSON PARKER EDWARDS
H. STAN JOHNSON, ESQ.
Nevada Bar No. 00265
sjohnson@cohenjohnson.com
375 East Warm Springs Road, Suite 104
Las Vegas, Nevada 89119
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April 2020, I caused a true and complete copy of the foregoing **PLAINTIFF'S SECOND SUPPLEMENTAL NRCP 16.1 DISCLOSURE AND 16.1(a)(3) TRIAL DISCLOSURE** upon each of the parties via Odyssey E-Filing System pursuant to NRCP 5(b)(2)(D) and EDCR 8.05, which have complied with said rules in providing their requested emails addresses for electronic service.

Party: Christopher Beavor - Plaintiff:

Charles ("CJ") E. Barnabi Jr. cj@barnabilaw.com

Sarah Gondek sgondek@cohenjohnson.com

H S Johnson calendar@cohenjohnson.com

H Stan Johnson sjohnson@cohenjohnson.com

Michael B. Morrison mbm@cohenjohnson.com

Kevin M. Johnson kjohnson@cohenjohnson.com

Marie Twist marie@flangasbarnabi.com

Party: Joshua Tomsheck - Defendant:

Julie Brown jbrown@ocgas.com

Max E. Corrick mcorrick@ocgas.com

Jane Hollingsworth jhollingsworth@ocgas.com

Dated this 24th day of April 2020.

/s/ Marie Twist

An employee of The Barnabi Law Firm, PLLC

EXHIBIT 1***Christopher Beavor v. Joshua Tomsheck, et al.***
Eighth Judicial District Court, Clark County Nevada
Case No.: A-19-793405-C**PLAINTIFF'S PRIVILEGE LOG****Privilege Key:**

- 1 - Attorney/Client Privilege
- 2- Attorney Work Product
- 3 -Proprietary information not reasonably calculated to lead to the discovery of admissible evidence
- 4- Irrelevant information not reasonably calculated to lead to the discovery of admissible evidence.
- 5- Information pertaining to offers in compromise
- 6 - Private information pertaining to non-parties which cannot be released without permission
- 7 - Accountant-Client Privilege

| Bates No. | Date | Author | Description (Type, Subject Matter, Purpose) | Privilege |
|---------------------|------------------|---|---|------------|
| PLTF035 - 48 | 2/3/15 – 8/19/15 | Dickinson Wright | Invoices - Redacted | 1, 2, 3, 4 |
| PLTF136 - 143 | 9/13/12 | Marc Saggese | Confidential Settlement Brief | 1, 2, 4, 5 |
| PLTF561 – 563 | 10/2013 | Unknown | Settlement Agreement and Release Re: Samantha Beavor | 5 |
| PLTF1150-1154, 1156 | 4/16 – 6/15 | Dickinson Wright | Invoices - Redacted | 1, 2, 3, 4 |
| PLTF1193-1203 | 3/28/16 | Beavor / Dickinson Wright | Communications between Client and Attorney | 1, 2 |
| PLTF1209-1210 | 3/29/16 | Alvarez & Gilbert, PLLC | Notice of Deposition in unrelated case | 4 |
| PLTF1256 – 1257 | 3/10/17 | Dickinson Wright | Internal firm communications | 2, 4 |
| PLTF1258-1302 | 3/10/2017 | Dickinson Wright | Correspondence regarding unrelated real estate matter | 1, 4 |
| PLTF1405-1413 | Undated | Dickinson Wright | Draft attorney work product | 2 |
| PLTF1619 | 11/28/17 | Dickinson Wright | Communications between Client and Attorney | 1, 2 |
| PLTF1621 | 1/11/18 | Dickinson Wright | Communications between Client and Attorney for unrelated matter | 1, 2, 4 |
| PLTF1656 | 2/2/18 | Dickinson Wright | Communications between Client and Attorney for unrelated matter | 1, 2, 4 |
| PLTF1797-1798 | 8/3/2018 | Dickinson Wright | Communications between Client and Attorney | 1, 2 |
| PLTF1888-1891 | 9/7/2018 | Cohen Johnson Parker Edwards / Dickinson Wright | Email exchange Re: Possible settlement and pre-trial matters | 4, 5 |
| PLTF1896-1898 | 2/15/2019 | Dickinson Wright | Communications between Client and Attorney for unrelated matter | 1, 2, 4 |
| PLTF1900- | 10/18 – | Dickinson | Communications between Client and | 1, 2, 4 |

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|-------------------|-----------------|---------------------|---|---|
| 1903 | 11/18; 11/15 | Wright | Attorney for related and unrelated matter | |
| PLTF1906- 1923 | Undated | Dickinson Wright | Draft attorney work product | 2 |

EXHIBIT B



CLERK OF THE COURT

1 **MOT**
2 GORDON SILVER
3 JOEL Z. SCHWARZ
4 Nevada Bar No. 9181
5 Email: jschwarz@gordonsilver.com
6 GABRIEL A. BLUMBERG
7 Nevada Bar No. 12332
8 Email: gblumberg@gordonsilver.com
9 3960 Howard Hughes Pkwy., 9th Floor
10 Las Vegas, Nevada 89169
11 Tel: (702) 796-5555
12 Fax: (702) 369-2666
13 Attorneys for Christopher Beavor

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 YACOV JACK HEFETZ,

11 Plaintiff,

12 vs.

13 CHRISTOPHER BEAVOR,

14 Defendant,

CASE NO. A-11-645353-C
DEPT. XXVIII

**DEFENDANT CHRISTOPHER
BEAVOR'S MOTION TO REOPEN
DISPOSITIVE MOTION DEADLINE**

Date of Hearing:
Time of Hearing:

15
16
17 Defendant Christopher Beavor ("Beavor"), by and through his counsel of record, the law
18 firm of Gordon Silver, hereby moves the Court to reopen the dispositive motion deadline due to
19 Beavor's prior counsel's excusable neglect in failing to file a motion for summary judgment
20 relating to dispositive issues of law which would have precluded the first trial in this action and
21 which will eliminate the need for a second trial.

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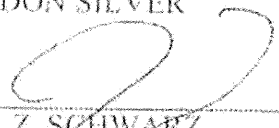
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1 This Motion is made and based on the following Memorandum of Points and Authorities;
2 the declaration of Christopher Beavor attached hereto as Exhibit 1, the declaration of Joel Z.
3 Schwarz attached hereto as Exhibit 2 and the exhibits attached thereto; Beavor's proposed
4 motion for summary judgment attached hereto as Exhibit 3; the papers and pleadings already on
5 file herein; and any oral argument the Court may permit at the hearing of this matter.

6 Dated this 8th day of May, 2015.

7 GORDON SILVER


8
9 
10 JOEL Z. SCHWARZ
11 Nevada Bar No. 9181
12 GABRIEL A. BLUMBERG
13 Nevada Bar 12332
14 3960 Howard Hughes Pkwy., 9th Floor
15 Las Vegas, Nevada 89169
16 Tel: (702) 796-5555
17 Fax: (702) 369-2666
18 Attorneys for Christopher Beavor

19 NOTICE OF MOTION

20 YOU, AND EACH OF YOU, will please take notice that the undersigned will bring the
21 above and foregoing Motion on for hearing before this Court on the 9 day of JUNE,
22 2015, at the hour of 9:00 AM o'clock a.m., of said day, or as soon thereafter as counsel can be
23 heard in Department No. XXVIII.

24 Dated this 8th day of May, 2015.

25 GORDON SILVER

26 
27 JOEL Z. SCHWARZ
28 Nevada Bar No. 9181
GABRIEL A. BLUMBERG
Nevada Bar No. 12332
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
Tel: (702) 796-5555
Fax: (702) 369-2666
Attorneys for Christopher Beavor

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This Court should reopen the dispositive motion deadline in order to avoid wasting its precious resources on a second needless trial. Beavor's prior counsel failed to meet his professional obligations, thereby constituting excusable neglect sufficient to form good cause to reopen the deadline, when he failed to move for summary judgment on any grounds. More specifically, two clear issues were ripe for determination prior to the last trial and, but for Beavor's prior counsel's failure to raise them, would have obviated the need for even the first trial.

The first issue is that Plaintiff Yacov Jack Hefetz ("Plaintiff") is absolutely barred from recovering under the doctrine of double recovery. Court documents reveal that the Herbert Frey Revocable Family Trust dated November 22, 1982 ("Lender"), who assigned the subject guaranty to Plaintiff, had previously had his claim against Beavor satisfied in the Toluca Lake Vintage, LLC ("Toluca Vintage" or "Borrower") bankruptcy. As a result, any recovery by Plaintiff against Beavor on this same guaranty would constitute an impermissible double recovery.

Second, even if Plaintiff was not seeking a double recovery, he still would be precluded from recovering on the guaranty because Beavor has the option to declare the guaranty void due to Lender's violation of Nevada's mortgage banking statutes. Lender conducted activities which rendered him a mortgage banker under Nevada law, but Lender was not a licensed mortgage banker. Under NRS 645E.920, a party subject to a transaction with an unlicensed mortgage broker has the right to declare any agreements void. Here, Beavor entered into a guaranty with Lender in conjunction with Lender's mortgage banking activities and therefore Beavor has the right to declare the guaranty void.

Lastly, the provisions of NRS 40.459(1)(c) clearly limit Plaintiff's maximum recovery to ten dollars in this matter. This law, in effect at the time of the first trial, limits Plaintiff's

1 recovery on the Beavor guaranty to the amount of consideration he paid to obtain the right to
2 pursue Beavor. The uncontroverted evidence demonstrates that Plaintiff only paid ten dollars to
3 obtain the right to sue Beavor on his guaranty. Thus, Plaintiff's maximum recovery at trial is
4 only ten dollars.

5 Based on these reasons, and as further detailed below, Beavor requests that this Court
6 reopen the dispositive motion deadline to allow him to file the attached motion for summary
7 judgment.

8 II.

9 STATEMENT OF RELEVANT FACTS

10 A. Background

11 On March 29, 2007, Toluca Vintage entered into a loan agreement with the Lender, in the
12 principal amount of \$4.4 million (the "Loan"). *See* Complaint at ¶ 8. Proceeds of the Loan were
13 used to purchase real property in Los Angeles County, California, as well as, engineering,
14 marketing and architectural services for a planned development of the property. *See* Beavor
15 Declaration at ¶ 3.

16 Beavor personally guaranteed repayment of the Loan and an additional \$1.6 million (a
17 total of \$6 million). *See id.* at ¶ 4. Lender, however, fully understood that Beavor did not have
18 \$6 million and the only way it would be possible for Borrower to repay the Loan or Beavor to
19 pay on his guaranty was if the development of the property was successful. *See id.* at ¶ 5.

20 The Loan was only part of Borrower's funding for development of the Toluca Lake real
21 estate project, with a significantly larger loan coming from Chinatrust Bank, secured by the
22 project. *See id.* at ¶ 6. After eighteen months of construction on the project, Herbert Frey
23 refused to execute an option to further fund the Loan, and Chinatrust Bank ceased funding its
24 larger loan, which halted all construction. *See id.* at ¶ 7.

25 On May 13, 2009, Lender appointed Star Development, LLC ("Star Development"), of
26 which Plaintiff was Manager and co-owner, as Manager of Toluca Vintage. *See id.* at ¶ 8. The
27 following day, Star Development caused Toluca Vintage to file a Chapter 11 bankruptcy
28 petition, which in turn caused Toluca Vintage to default on the Loan, which thus became

1 immediately due and payable to Lender. *See id.* However, as set forth above, based on prior
2 discussions with Lender and Plaintiff's agents, Beavor understood this was all part of the plan in
3 dealing with Toluca Vintage's liability to Chinatrust Bank, and that he would be released from
4 all obligations and personal guarantees under the Loan after the filing of the bankruptcy. *See id.*
5 at ¶ 9.

6 In the Toluca Village bankruptcy proceedings, Toluca Vintage filed affidavits with the
7 bankruptcy court stating that Beavor had reached a global settlement agreement with Chinatrust
8 Bank, when Beavor had never been briefed on the issue and had never been presented with the
9 purported settlement documents for review. *See id.* at ¶ 10. Upon learning this information,
10 Beavor contacted the counsel retained by Lender on his behalf and advised counsel of the false
11 affidavits. *See id.* Moreover, upon reviewing the documents regarding the "global settlement"
12 to which Beavor was purportedly a party, Beavor discovered that the settlement documents
13 released him from obligations to Chinatrust Bank, but not his personal guarantee to Lender,
14 contrary to his prior agreement with Lender. *See id.*

15 In December 2010, Beavor was contacted by Wayne Krygier, another Manager of Star
16 Development, and advised that settlement release documents had been drafted by Lender's legal
17 counsel to release all potential claims by Beavor against Lender, and in exchange releasing
18 Beavor from his guaranty of the Loan. *See id.* at ¶ 11. Beavor reviewed and signed the
19 settlement agreement and release documents, pursuant to which he agreed to pay twenty three
20 thousand dollars (\$23,000.00) for payment of associated legal fees. *See id.*

21 In January 2011, Beavor personally delivered all executed settlement and release
22 documents and tendered payment of the \$23,000.00 for legal fees to Lender. *See id.* at ¶ 12.
23 Plaintiff was in Lender's office at the time of Beavor's arrival, and took the settlement agreement
24 from Beavor and stated that he would not allow Lender to sign the settlement documents. *See id.*
25 Beavor then received a call from Plaintiff, during which Plaintiff stated that he was going to
26 force Lender to assign him the outstanding debt under the Loan, from which Beavor would never
27 be released. *See id.*

28 ...

1 **B. Procedural History**

2 On or about July 6, 2011, in exchange for a payment of \$10.00, Plaintiff and his sister
3 Alis Cohen were purportedly assigned Lender's rights under Beavor's guaranty of the Loan. On
4 July 21, 2011, Plaintiff commenced the instant action by filing a complaint with a single claim
5 for breach of guaranty.

6 In response to Plaintiff's complaint, Beavor filed an answer and counterclaims. At no
7 time, however, did Beavor's previous counsel file a summary judgment motion on any issue.
8 This is especially troubling given the current state of the law regarding deficiency actions at the
9 time of trial in this matter. Assembly Bill 273 had already been passed and in effect for more
10 than a year before the initial deadline to file dispositive motions. Assembly Bill 273
11 substantially altered the rights of debtors in matters where the right to pursue them had been sold
12 and severely limited their liability. Given the dramatic changes to NRS 40.459(1)(c), Beavor's
13 prior counsel failed in his duties by not moving for relief based on the newly enacted limitations.

14 The parties' claims were tried to a jury from February 25, 2013 through March 1, 2013.
15 *See* Exhibit 2 at ¶ 3. The parties stipulated to the admissibility of all trial exhibits. One of the
16 stipulated trial exhibits was a Notice of Motion and Motion for Final Decree Closing Chapter 11
17 Case; Memorandum of Points and Authorities and Declaration of Victor A. Sahn in Support
18 Thereof [11 U.S.C. § 350(a); Fed. R. Bankr. P. 3022 and Loc. Bankr. R. 3020-1(d)] ("Exhibit
19 D15"). *See id.* at ¶ 4. In Exhibit D15, it was clearly revealed that Frey's "claim was satisfied
20 pursuant to the Confirmed Plan" as a result of the Settlement Agreement. *See* Exhibit 2-A at
21 4:11-15. Despite this exhibit being stipulated into evidence by the parties, Beavor's prior
22 counsel failed to move for judgment as a matter of law on the basis that Frey's claim, and
23 therefore Plaintiff's instant claim, had previously been satisfied and could not be pursued. *See*
24 Exhibit 2 at ¶ 6. This was yet another clear issue which Beavor's prior counsel failed to address
25 but which could have resolved this matter in its entirety.

26 Ultimately, Plaintiff's breach of guaranty claim was submitted to the jury and the jury
27 returned a verdict in favor of Beavor. On May 21, 2013, the Court entered a judgment on the
28 jury verdict.

1 On June 10, 2013, Plaintiff filed a Motion for New Trial, which Beavor's then-counsel
2 failed to substantively oppose, resulting in the Court ordering a new trial. Beavor's then-counsel
3 then failed to properly appeal the granting of a new trial, instead filing a writ petition which was
4 denied by the Nevada Supreme Court. Plaintiff's breach of guaranty claim is now once again
5 scheduled for trial—a trial which can, and should, be obviated by a motion for summary
6 judgment.

7 III.

8 LEGAL ARGUMENT

9 A. Legal Standard

10 A request to extend discovery deadlines may be granted if the moving party demonstrates
11 that the failure to act was the result of excusable neglect. EDCR 2.35. The term excusable
12 neglect is a failure “because of some unexpected or unavoidable hindrance or accident *or*
13 *because of reliance on the care and vigilance of the party's counsel* or on a promise made by the
14 adverse party.” Black's Law Dictionary 1133 (9th ed. 2009) (emphasis added). The Nevada
15 Supreme Court has specifically held that “[c]ounsel's failure to meet his professional obligations
16 constitutes excusable neglect.” *Passarelli v. J-Mar Development, Inc.*, 102 Nev. 283, 286, 720
17 P.2d 1221, 1224 (1986).

18 B. Good Cause

19 Good cause exists to reopen the dispositive motion deadline because multiple clear issues
20 of law preclude Plaintiff from being able to prevail at trial. First, it is apparent that Plaintiff
21 lacks standing to bring the instant claim. As evidenced by the bankruptcy records, Lender's
22 claim against Beavor was satisfied during the Toluca Vintage bankruptcy. Therefore, Plaintiff
23 has no standing to bring the current claim because he is unlawfully seeking double recovery. *See*
24 *Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. Adv. Op. 43, 245 P.3d 547, 549 (2010)
25 (“satisfaction of the plaintiff's damages for an injury bars further recovery for that injury”).

26 Second, even if Plaintiff did have standing to pursue this matter, Beavor has the statutory
27 right to void the guaranty because Frey conducted mortgage banking activities in violation of
28 NRS 645E. Nevada has very stringent rules regarding the practice of mortgage banking. A

1 mortgage banker is any person who holds himself out as being able to make loans secured by
2 liens on real property using his own money. NRS 645E.100(1)(a). "It is unlawful for any person
3 to offer or provide any of the services of a mortgage banker . . . without first obtaining a license
4 as a mortgage banker pursuant to this chapter." NRS 645E.900. If a person violates NRS
5 645E.900, "any contracts entered into by that person for the mortgage transaction are voidable by
6 the other party to the contract." NRS 645E.920.

7 Here, Frey performed acts which rendered him a mortgage banker. In March 2007, he
8 made a loan to Toluca Vintage using his own money which was secured by a lien on real
9 property. This Loan was secured by, *inter alia*, a deed of trust encumbering the Toluca Lake
10 Property and deeds of trust encumbering certain residential real property owned by Beavor. In
11 addition, Beavor entered into a contract with Frey in the form of a guaranty.¹ The guaranty was
12 executed in conjunction with the Loan and therefore was part of Frey's mortgage banker activity.
13 It is undisputed that at the time Frey made the Loan, though, he was not licensed as a mortgage
14 banker. Thus, by making the Loan in 2007 and entering into the guarantee with Beavor, Frey
15 violated NRS 645E.900 because he engaged in mortgage banking activities without the
16 necessary license. Beavor is thus entitled to void the guaranty pursuant to NRS 645E.920 and
17 obviate the need for a trial in this matter.

18 C. Excusable Neglect

19 Here, Beavor's prior counsel failed to meet his professional obligations when he did not
20 move for summary judgment on Plaintiff's instant breach of guaranty claim. As evidenced
21 above, Beavor's prior counsel had multiple grounds on which to have this case decided at the
22 summary judgment stage as a matter of law. Instead of vigilantly pursuing Beavor's defense and
23 meeting his obligations to expedite the litigation, Beavor's prior counsel failed to move for
24 summary judgment on any of the above issues. See NRPC 3.2(a) ("A lawyer shall make
25 reasonable efforts to expedite litigation consistent with the interests of the client"). As a result,
26 Beavor had to endure not only one trial, but now likely two trials, unless the dispositive motion

27
28 ¹ It is this very contract which underlies Plaintiff's sole cause of action in this matter.

1 deadline is reopened.

2 The double recovery issue presented by satisfaction of Lender's claim, and thus the debt
3 upon which Plaintiff's claim is based, was clearly recognized in the bankruptcy proceedings. It
4 was these very same bankruptcy proceedings which the parties' stipulated to admitting into
5 evidence at trial and which clearly should have alerted Beavor's prior counsel that Plaintiff had
6 no basis to bring the breach of guaranty action. Beavor's prior counsel's failure to move for
7 summary judgment or judgment as a matter of law on this basis alone constituted a failure to
8 meet his professional obligations. As the Nevada Supreme Court has recognized, this type of
9 failure equates to excusable neglect and justifies this Court's reopening of the dispositive motion
10 deadline to conserve judicial resources and avoid an unnecessary trial wherein Plaintiff simply
11 cannot prevail as a matter of law.

12 Similarly, Beavor's prior counsel failed to meet his obligations by failing to articulate
13 that the subject transactions are voidable as a matter of law because Frey was engaging in the
14 practice of mortgage banking without a license. It was inexcusable for Beavor's prior counsel
15 not to move for summary judgment on these grounds because Beavor is entitled as a matter of
16 law to void the relevant transactions which allegedly give rise to Plaintiff's claim for liability.

17 Alternatively, the dispositive motion deadline should be reopened because although
18 Assembly Bill 273 had been implemented by the time of trial, the implications of NRS
19 40.459(1)(c) were not fully appreciated until the Nevada Supreme Court issued its decision in
20 *Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 87, 313 P.3d 849 (2013). The
21 *Sandpointe* decision, which was issued following the dispositive motion deadline here, clarified
22 that Plaintiff's damages will be severely limited in this second trial. It is now clear that Plaintiff
23 will be limited to a maximum potential recovery of ten dollars if he has any basis to proceed with
24 his claims. The evidence in the record reveals that Plaintiff paid only ten dollars to obtain the
25 rights to pursue Beavor for breach of contract. Therefore, even assuming the fair market value of
26 the property securing the loan is zero, the maximum amount Plaintiff can recover in this action is
27 ten dollars. See NRS 40.459(1)(c). Thus, the Court should reopen the dispositive motion
28 deadline to avoid wasting its precious resources in analyzing damages in a second trial where

1 damages are now clearly limited to such a miniscule amount.

2 IV.

3 CONCLUSION

4 Based on the foregoing, Beavor respectfully requests that this Court reopen the
5 dispositive motion deadline in order to allow him to file the attached motion for summary
6 judgment.

7 Dated this 3rd day of May, 2015.

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CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 8th day of May, 2015, she caused a copy of the foregoing **Defendant's Motion to Reopen Dispositive Motion Deadline**, by electronic service in accordance with Administrative Order 14.2, to all interested parties, through the Court's Odyssey E-File & Serve system addressed to:

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EXHIBIT C

IN THE SUPREME COURT OF NEVADA

YACOV JACK HEFETZ,

Appellant,

vs.

CHRISTOPHER BEAVOR,

Respondent.

Electronically Filed
Sep 06 2016 03:32 p.m.
Tracie K. Lindeman
Clerk of Supreme Court
Supreme Court No. 70327
District Court Case No. A-11-61533-C

RESPONDENT CHRISTOPHER BEAVOR'S

ANSWERING BRIEF ON APPEAL

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accelerate the timeline for interposing the One Action Rule defense in contravention of the language and legislative intent of NRS 40.435(3), Hefetz argues that Beavor's One Action Rule defense had to be asserted in a pleading, irrespective of the fact that it was litigated before final judgment.

Hefetz is incorrect in each of these arguments and there is no basis for rewriting statutory provisions for the expediency of Hefetz's untenable claim against Beavor.⁴

1. The Plain Language of NRS 40.495(5)(d) Prohibits a Waiver of the One Action Rule.

The rules of statutory construction are straightforward. *Cty. of Clark v. Doumani*, 114 Nev. 46, 52, 952 P.2d 13, 16 (1998) (superseded by statute on other grounds as stated in *Kay v. Nunez*, 122 Nev. 1100 (2006)). When interpreting a statute, the Court looks first to its plain language. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 370, 252 P.3d 206, 209 (2011) (citing *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 513 (2000)). This Court must give a

⁴ Several times in his Opening Brief, Hefetz cites to the prejudice he has supposedly suffered due to the fact that Beavor was allowed to assert a One Action Rule defense. See, e.g., Opening Brief at p. 28. Hefetz completely ignores the fact that the errors of Beavor's former counsel not only prevented Beavor from asserting the defense at an earlier stage in the case, but also allowed Hefetz an opportunity for a second trial when there was no valid ground for a second trial. APP001157. Indeed, Hefetz is perfectly happy with his second bite at the apple, but would deny Beavor the opportunity to assert applicable legal defenses such as the One Action Rule.

residences was relocated to its current position in NRS 40.495, *See* A.B. 557 (1989).

That same year, the Nevada legislature also enacted S.B. 479, which is now NRS 40.435. In remarks before the Senate Judiciary Committee, attorney Michael Buckley,⁷ on behalf of the State Bar of Nevada Business Law Committee—the drafters of S.B. 479—, said with regard to NRS 40.435(3):

The second new provision, Section 3, is probably the heart of our proposal. . . . ***Litigation decisions made in error should be rectifiable so long as no final judgment is entered.*** The Committee believes this is consistent with California case law and modern civil procedure.

Hearing on S.B. 479 before the Senate Judiciary Committee (May 30, 1989) (emphasis added).⁸

⁷ This Court previously has relied on remarks submitted during legislative meetings when interpreting NRS Chapter 40. *See Lowe Enterprises Residential Partners v. District Court*, 118 Nev. 92, 103, 40 P.3d 405, 412 (2002).

⁸ If any case exemplifies “litigation decisions made in error,” it is the instant action, and it was the intention of the Nevada legislature that litigants such as Beavor would be afforded the opportunity to rectify prior errors (by counsel) before entry of final judgment. As much as Hefetz would like to impugn Beavor, characterizing his delay in the assertion of the One Action Rule defense as “indolent” and a “cavalier disregard of the Court’s scheduling order,” the simple fact is that Beavor is not an attorney nor was he familiar with Nevada’s One Action Rule. Instead, Beavor reasonably relied upon his former counsel, who clearly erred in not raising a host of legal defenses, including the One Action Rule. Hefetz can hardly cry foul when the defense: (1) was timely asserted per the express language of NRS 40.435(3); and (2) when, but for the errors of Beavor’s counsel, his claim against Beavor would never have made it to a first trial, let alone survived a jury verdict in Beavor’s favor.

EXHIBIT D

From: Chris Beavor <Chris@ssrinow.com>
Sent: Thursday, July 23, 2015 10:36 PM
To: Marc A. Saggese <Marc@maxlawnv.com>
Subject: Fwd: Order denying Hefetz Motion for Reconsideration

Just got back from walk thru any day now.. fyi see attached I think the case is finally over judge Israel is on my side now..read it. Josh insurance carrier needs to pay me now... don't need an affidavit or try to prove what Israel would have ruled if Josh would have filed proper documents read this it will blow your. Mind.. fyi your money is next week

Sent from my Verizon Wireless 4G LTE smartphone

----- Original message -----

From: "Joel Z. Schwarz" <JSchwarz@dickinson-wright.com>
Date: 07/23/2015 2:36 PM (GMT-08:00)
To: Chris Beavor <Chris@ssrinow.com>, Chris Beavor -SSRIPM <Chris@ssripm.com>
Cc: "Gabriel A. Blumberg" <GBlumberg@dickinson-wright.com>, "Bobbie J. Donaldson"