

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD BAYUK LIVING TRUST; SALVATORE MORABITO, an individual; and SNOWSHOE PETROLEUM, INC., a New York corporation,

Petitioners,

vs.

THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE CONNIE J. STEINHEIMER,

Respondents,

and

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito,

Real Party in Interest.

Case No.

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**PETITIONERS' APPENDIX,**  
**VOLUME 11**  
**(Nos. 1724–1825)**

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## **INDEX TO PETITIONERS' APPENDIX**

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
Complaint (filed 12/17/2013)		Vol. 1, 1–17
Declaration of Salvatore Morabito in Support of Snowshoe Capital's Motion to Dismiss for Lack of Personal Jurisdiction (filed 05/12/2014)		Vol. 1, 18–21
Defendant Snowshoe Petroleum, Inc.'s Motion to Dismiss Complaint for Lack of Personal Jurisdiction NRCP 12(b)(2) (filed 05/12/2014)		Vol. 1, 22–30
JH, Inc., Jerry Herbst, and Berry Hinckley Industries Opposition to Motion to Dismiss (filed 05/29/2014)		Vol. 1, 31–43
<b>Exhibits to Opposition to Motion to Dismiss</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Affidavit of John P. Desmond (filed 05/29/2014)	Vol. 1, 44–48
2	Fifth Amendment and Restatement of the Trust Agreement for the Arcadia Living Trust (dated 09/30/2010)	Vol. 1, 49–88
3	Unanimous Written Consent of the Directors and Shareholders of CWC (dated 09/28/2010)	Vol. 1, 89–92
4	Unanimous Written Consent of the Board of Directors and Sole Shareholder of Superpumper (dated 09/28/2010)	Vol. 1, 93–102
5	Plan of Merger of Consolidated Western Corporation with and into Superpumper, Inc. (dated 09/28/2010)	Vol. 1, 103–107
6	Articles of Merger of Consolidated Western Corporation with and into Superpumper, Inc. (dated 09/29/2010)	Vol. 1, 108–110
7	2009 Federal Income Tax Return for P. Morabito	Vol. 1, 111–153

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Opposition to Motion to Dismiss (cont.)</b>		
8	May 21, 2014 printout from New York Secretary of State	Vol. 1, 154–156
9	May 9, 2008 Letter from Garrett Gordon to John Desmond	Vol. 1, 157–158
10	Shareholder Interest Purchase Agreement (dated 09/30/2010)	Vol. 1, 159–164
11	Relevant portions of the January 22, 2010 Deposition of Edward Bayuk	Vol. 1, 165–176
13	Relevant portions of the January 11, 2010 Deposition of Salvatore Morabito	Vol. 1, 177–180
14	October 1, 2010 Grant, Bargain and Sale Deed	Vol. 1, 181–187
15	Order admitting Dennis Vacco (filed 02/16/2011)	Vol. 1, 188–190
JH, Inc., Jerry Herbst, and Berry Hinckley Industries, Errata to Opposition to Motion to Dismiss (filed 05/30/2014)		Vol. 2, 191–194
<b>Exhibit to Errata to Opposition to Motion to Dismiss</b>		
<b>Exhibit</b>	<b>Document Description</b>	
12	Grant, Bargain and Sale Deed for APN: 040-620-09, dated November 10, 2005	Vol. 2, 195–198
Answer to Complaint of P. Morabito, individually and as trustee of the Arcadia Living Trust (filed 06/02/2014)		Vol. 2, 199–208
Defendant, Snowshow Petroleum, Inc.’s Reply in Support of Motion to Dismiss Complaint for Lack of Personal Jurisdiction NRCP 12(b)(2) (filed 06/06/2014)		Vol. 2, 209–216

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibit to Reply in Support of Motion to Dismiss Complaint for Lack of Personal Jurisdiction NRCP 12(b)(2)</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Declaration of Salvatore Morabito in Support of Snowshow Petroleum, Inc.'s Reply in Support of Motion to Dismiss Complaint for Lack of Personal Jurisdiction (filed 06/06/2014)	Vol. 2, 217–219
Defendant, Superpumper, Inc.'s Motion to Dismiss Complaint for Lack of Personal Jurisdiction NRCP 12(b)(2) (filed 06/19/2014)		Vol. 2, 220–231
<b>Exhibit to Motion to Dismiss Complaint for Lack of Personal Jurisdiction NRCP 12(b)(2)</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Declaration of Salvatore Morabito in Support of Superpumper, Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction (filed 06/19/2014)	Vol. 2, 232–234
JH, Inc., Jerry Herbst, and Berry Hinckley Industries, Opposition to Motion to Dismiss (filed 07/07/2014)		Vol. 2, 235–247
<b>Exhibits to Opposition to Motion to Dismiss</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Affidavit of Brian R. Irvine (filed 07/07/2014)	Vol. 2, 248–252
2	Fifth Amendment and Restatement of the Trust Agreement for the Arcadia Living Trust (dated 09/30/2010)	Vol. 2, 253–292
3	BHI Electronic Funds Transfers, January 1, 2006 to December 31, 2006	Vol. 2, 293–294

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Opposition to Motion to Dismiss (cont.)</b>		
4	Legal and accounting fees paid by BHI on behalf of Superpumper; JH78636-JH78639; JH78653-JH78662; JH78703-JH78719	Vol. 2, 295–328
5	Unanimous Written Consent of the Directors and Shareholders of CWC (dated 09/28/2010)	Vol. 2, 329–332
6	Unanimous Written Consent of the Board of Directors and Sole Shareholders of Superpumper (dated 09/28/2010)	Vol. 2, 333–336
7	Plan of Merger of Consolidated Western Corporation with and into Superpumper, Inc. (dated 09/28/2010)	Vol. 2, 337–341
8	Articles of Merger of Consolidated Western Corporation with and into Superpumper, Inc. (dated 09/29/2010)	Vol. 2, 342–344
9	2009 Federal Income Tax Return for P. Morabito	Vol. 2, 345–388
10	Relevant portions of the January 22, 2010 Deposition of Edward Bayuk	Vol. 2, 389–400
11	Grant, Bargain and Sale Deed for APN: 040-620-09, dated November 10, 2005	Vol. 2, 401–404
12	Relevant portions of the January 11, 2010 Deposition of Salvatore Morabito	Vol. 2, 405–408
13	Printout of Arizona Corporation Commission corporate listing for Superpumper, Inc.	Vol. 2, 409–414
Defendant, Superpumper, Inc.’s Reply in Support of Motion to Dismiss Complaint for Lack of Personal Jurisdiction NRCP 12(b)(2) (filed 07/15/2014)		Vol. 3, 415–421
Order Denying Motion to Dismiss as to Snowshoe Petroleum, Inc.’s (filed 07/17/2014)		Vol. 3, 422–431

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
Notice of Entry of Order Denying Motion to Dismiss as to Snowshoe Petroleum, Inc.'s (filed 07/17/2014)		Vol. 3, 432–435
<b>Exhibit to Notice of Entry of Order Denying Motion to Dismiss as to Snowshoe Petroleum, Inc.'s</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Order Denying Motion to Dismiss as to Snowshoe Petroleum, Inc.'s	Vol. 3, 436–446
Order Denying Superpumper, Inc.'s Motion to Dismiss Complaint for Lack of Personal Jurisdiction NRCP 12(b)(2) (filed 07/22/2014)		Vol. 3, 447–457
Notice of Entry of Order Denying Superpumper, Inc.'s Motion to Dismiss Complaint for Lack of Personal Jurisdiction NRCP 12(b)(2) (filed 07/22/2014)		Vol. 3, 458–461
<b>Exhibit to Notice of Entry of Order Denying Superpumper, Inc.'s Motion to Dismiss Complaint</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Order Denying Superpumper, Inc.'s Motion to Dismiss Complaint for Lack of Personal Jurisdiction NRCP 12(b)(2) (filed 07/22/2014)	Vol. 3, 462–473
Answer to Complaint of Superpumper, Inc., and Snowshoe Petroleum, Inc. (filed 07/28/2014)		Vol. 3, 474–483
Answer to Complaint of Defendants, Edward Bayuk, individually and as trustee of the Edward William Bayuk Living Trust, and Salvatore Morabito (filed 09/29/2014)		Vol. 3, 484–494
Notice of Bankruptcy of Consolidated Nevada Corporation and P. Morabito (filed 2/11/2015)		Vol. 3, 495–498

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
Supplemental Notice of Bankruptcy of Consolidated Nevada Corporation and P. Morabito (filed 02/17/2015)		Vol. 3, 499–502
<b>Exhibits to Supplemental Notice of Bankruptcy of Consolidated Nevada Corporation and P. Morabito</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Involuntary Petition; Case No. BK-N-13-51236 (filed 06/20/2013)	Vol. 3, 503–534
2	Involuntary Petition; Case No. BK-N-13-51237 (06/20/2013)	Vol. 3, 535–566
3	Order for Relief Under Chapter 7; Case No. BK-N-13-51236 (filed 12/17/2014)	Vol. 3, 567–570
4	Order for Relief Under Chapter 7; Case No. BK-N-13-51237 (filed 12/17/2014)	Vol. 3, 571–574
Stipulation and Order to File Amended Complaint (filed 05/15/2015)		Vol. 4, 575–579
<b>Exhibit to Stipulation and Order to File Amended Complaint</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	First Amended Complaint	Vol. 4, 580–593
William A. Leonard, Trustee for the Bankruptcy Estate of P. Morabito, First Amended Complaint (filed 05/15/2015)		Vol. 4, 594–607
Stipulation and Order to Substitute a Party Pursuant to NRCP 17(a) (filed 05/15/2015)		Vol. 4, 608–611
Substitution of Counsel (filed 05/26/2015)		Vol. 4, 612–615
Defendants' Answer to First Amended Complaint (filed 06/02/2015)		Vol. 4, 616–623

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
Amended Stipulation and Order to Substitute a Party Pursuant to NRCP 17(a) (filed 06/16/2015)		Vol. 4, 624–627
Motion to Partially Quash, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery Protected by the Attorney-Client Privilege (filed 03/10/2016)		Vol. 4, 628–635
<b>Exhibits to Motion to Partially Quash, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery Protected by the Attorney-Client Privilege</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	March 9, 2016 Letter from Lippes	Vol. 4, 636–638
2	Affidavit of Frank C. Gilmore, Esq., (dated 03/10/2016)	Vol. 4, 639–641
3	Notice of Issuance of Subpoena to Dennis Vacco (dated 01/29/2015)	Vol. 4, 642–656
4	March 10, 2016 email chain	Vol. 4, 657–659
Minutes of February 24, 2016 Pre-trial Conference (filed 03/17/2016)		Vol. 4, 660–661
Transcript of February 24, 2016 Pre-trial Conference		Vol. 4, 662–725
Plaintiff's (Leonard) Opposition to Defendants' Motion to Partially Quash, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery Protected by the Attorney-Client Privilege (filed 03/25/2016)		Vol. 5, 726–746
<b>Exhibits to Opposition to Motion to Partially Quash or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery Protected by the Attorney-Client Privilege</b>		



<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibit</b>	<b>Document Description</b>	
1	Declaration of Teresa M. Pilatowicz in Support of Plaintiff's Opposition to Defendants' Motion to Partially Quash (filed 03/25/2016)	Vol. 5, 747–750
2	Application for Commission to take Deposition of Dennis Vacco (filed 09/17/2015)	Vol. 5, 751–759
3	Commission to take Deposition of Dennis Vacco (filed 09/21/2015)	Vol. 5, 760–763
4	Subpoena/Subpoena Duces Tecum to Dennis Vacco (09/29/2015)	Vol. 5, 764–776
5	Notice of Issuance of Subpoena to Dennis Vacco (dated 09/29/2015)	Vol. 5, 777–791
6	Dennis C. Vacco and Lippes Mathias Wexler Friedman LLP, Response to Subpoena (dated 10/15/2015)	Vol. 5, 792–801
7	Condensed Transcript of October 21, 2015 Deposition of Dennis Vacco	Vol. 5, 802–851
8	Transcript of the Bankruptcy Court's December 22, 2015, oral ruling; Case No. BK-N-13-51237	Vol. 5, 852–897
9	Order Granting Motion to Compel Responses to Deposition Questions; Case No. BK-N-13-51237 (filed 02/03/2016)	Vol. 5, 898–903
10	Notice of Continued Deposition of Dennis Vacco (filed 02/18/2016)	Vol. 5, 904–907
11	Debtor's Objection to Proposed Order Granting Motion to Compel Responses to Deposition Questions; Case No. BK-N-13-51237 (filed 01/22/2016)	Vol. 5, 908–925

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
Reply in Support of Motion to Modify Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery Protected by the Attorney-Client Privilege (filed 04/06/2016)		Vol. 6, 926–932
Plaintiff’s Motion to Compel Production of Documents (filed 04/08/2016)		Vol. 6, 933–944
<b>Exhibits to Plaintiff’s Motion to Compel Production of Documents</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Declaration of Teresa M. Pilatowicz in Support of Plaintiff’s Motion to Compel (filed 04/08/2016)	Vol. 6, 945–948
2	Bill of Sale – 1254 Mary Fleming Circle (dated 10/01/2010)	Vol. 6, 949–953
3	Bill of Sale – 371 El Camino Del Mar (dated 10/01/2010)	Vol. 6, 954–958
4	Bill of Sale – 370 Los Olivos (dated 10/01/2010)	Vol. 6, 959–963
5	Personal financial statement of P. Morabito as of May 5, 2009	Vol. 6, 964–965
6	Plaintiff’s First Set of Requests for Production of Documents to Edward Bayuk (dated 08/14/2015)	Vol. 6, 966–977
7	Edward Bayuk’s Responses to Plaintiff’s First Set of Requests for Production (dated 09/23/2014)	Vol. 6, 978–987
8	Plaintiff’s First Set of Requests for Production of Documents to Edward Bayuk, as trustee of the Edward William Bayuk Living Trust (dated 08/14/2015)	Vol. 6, 988–997

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Plaintiff's Motion to Compel Production of Documents (cont.)</b>		
9	Edward Bayuk, as trustee of the Edward William Bayuk Living Trust's Responses to Plaintiff's First Set of Requests for Production (dated 09/23/2014)	Vol. 6, 998–1007
10	Plaintiff's Second Set of Requests for Production of Documents to Edward Bayuk (dated 01/29/2016)	Vol. 6, 1008–1015
11	Edward Bayuk's Responses to Plaintiff's Second Set of Requests for Production (dated 03/08/2016)	Vol. 6, 1016–1020
12	Plaintiff's Second Set of Requests for Production of Documents to Edward Bayuk, as trustee of the Edward William Bayuk Living Trust (dated 01/29/2016)	Vol. 6, 1021–1028
13	Edward Bayuk, as trustee of the Edward William Bayuk Living Trust's Responses to Plaintiff's Second Set of Requests for Production (dated 03/08/2016)	Vol. 6, 1029–1033
14	Correspondences between Teresa M. Pilatowicz, Esq., and Frank Gilmore, Esq. (dated 03/25/2016)	Vol. 6, 1034–1037
Opposition to Plaintiff's Motion to Compel Production of Documents (filed 04/25/2016)		Vol. 7, 1038–1044
Reply in Support of Plaintiff's Motion to Compel Production of Documents (filed 05/09/2016)		Vol. 7, 1045–1057
<b>Exhibits to Reply in Support of Plaintiff's Motion to Compel Production of Documents</b>		

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibit</b>	<b>Document Description</b>	
1	Declaration of Gabrielle A. Hamm, Esq., in Support of Reply in Support of Plaintiff's Motion to Compel (filed 05/09/2016)	Vol. 7, 1058–1060
2	Amended Findings, of Fact and Conclusion of Law in Support of Order Granting Motion for Summary Judgment; Case No. BK-N-13-51237 (filed 12/22/2014)	Vol. 7, 1061–1070
3	Order Compelling Deposition of P. Morabito dated March 13, 2014, in <i>Consolidated Nevada Corp., et al v. JH. et al.</i> ; Case No. CV07-02764 (filed 03/13/2014)	Vol. 7, 1071–1074
4	Emergency Motion Under NRCP 27(e); Petition for Writ of Prohibition, <i>P. Morabito v. The Second Judicial District Court of the State of Nevada in and for the County of Washoe</i> ; Case No. 65319 (filed 04/01/2014)	Vol. 7, 1075–1104
5	Order Denying Petition for Writ of Prohibition; Case No. 65319 (filed 04/18/2014)	Vol. 7, 1105–1108
6	Order Granting Summary Judgment; Case No. BK-N-13-51237 (filed 12/17/2014)	Vol. 7, 1109–1112
Recommendation for Order RE: <i>Defendants' Motion to Partially Quash</i> , filed on March 10, 2016 (filed 06/13/2016)		Vol. 7, 1113–1124
Confirming Recommendation Order from June 13, 2016 (filed 07/06/2016)		Vol. 7, 1125–1126
Recommendation for Order RE: <i>Plaintiff's Motion to Compel Production of Documents</i> , filed on April 8, 2016 (filed 09/01/2016)		Vol. 7, 1127–1133

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
Confirming Recommendation Order from September 1, 2016 (filed 09/16/2016)		Vol. 7, 1134–1135
Plaintiff's Application for Order to Show Cause Why Defendant, Edward Bayuk Should Not Be Held in Contempt of Court Order (filed 11/21/2016)		Vol. 8, 1136–1145
<b>Exhibits to Plaintiff's Application for Order to Show Cause Why Defendant, Edward Bayuk Should Not Be Held in Contempt of Court Order</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Order to Show Cause Why Defendant, Edward Bayuk Should Not Be Held in Contempt of Court Order (filed 11/21/2016)	Vol. 8, 1146–1148
2	Confirming Recommendation Order from September 1, 2016 (filed 09/16/2016)	Vol. 8, 1149–1151
3	Recommendation for Order RE: <i>Plaintiff's Motion to Compel Production of Documents</i> , filed on April 8, 2016 (filed 09/01/2016)	Vol. 8, 1152–1159
4	Plaintiff's Motion to Compel Production of Documents (filed 04/08/2016)	Vol. 8, 1160–1265
5	Opposition to Plaintiff's Motion to Compel Production of Documents (filed 04/25/2016)	Vol. 8, 1266–1273
6	Reply in Support of Plaintiff's Motion to Compel Production of Documents (filed 05/09/2016)	Vol. 8, 1274–1342
7	Correspondences between Teresa M. Pilatowicz, Esq., and Frank Gilmore, Esq. (dated 09/22/2016)	Vol. 8, 1343–1346
8	Edward Bayuk's Supplemental Responses to Plaintiff's Second Set of Requests for Production (dated 10/25/2016)	Vol. 8, 1347–1352

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
Opposition to Plaintiff's Application for Order to Show Cause Why Defendant Should Not Be Held in Contempt of Court Order (filed 12/19/2016)		Vol. 9, 1353–1363
<b>Exhibits to Opposition to Plaintiff's Application for Order to Show Cause Why Defendant Should Not Be Held in Contempt of Court Order</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Declaration of Edward Bayuk in Support of Opposition to Plaintiff's Application for Order to Show Cause (filed 12/19/2016)	Vol. 9, 1364–1367
2	Declaration of Frank C. Gilmore, Esq., in Support of Opposition to Plaintiff's Application for Order to Show Cause (filed 12/19/2016)	Vol. 9, 1368–1370
3	Redacted copy of the September 6, 2016, correspondence of Frank C. Gilmore, Esq.	Vol. 9, 1371–1372
Order to Show Cause Why Defendant, Edward Bayuk Should Not Be Held in Contempt of Court Order (filed 12/23/2016)		Vol. 9, 1373–1375
Response: (1) to Opposition to Application for Order to Show Cause Why Defendant Should Not Be Held in Contempt of Court Order and (2) in Support of Order to Show Cause (filed 12/30/2016)		Vol. 9, 1376–1387
Minutes of January 19, 2017 Deposition of Edward Bayuk in RE: insurance policies (filed 01/19/2017)		Vol. 9, 1388
Minutes of January 19, 2017 hearing on Order to Show Cause (filed 01/30/2017)		Vol. 9, 1389
Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP (filed 07/18/2017)		Vol. 9, 1390–1404

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Correspondence between Teresa M. Pilatowicz, Esq., and Frank Gilmore, Esq., dated March 8, 2016	Vol. 9, 1405–1406
2	Correspondence between Teresa M. Pilatowicz, Esq., and Frank Gilmore, Esq., dated March 8, 2016, with attached redlined discovery extension stipulation	Vol. 9, 1407–1414
3	Jan. 3 – Jan. 4, 2017, email chain from Teresa M. Pilatowicz, Esq., and Frank Gilmore, Esq.	Vol. 9, 1415–1416
4	Declaration of Frank C. Gilmore, Esq., in Support of Motion to Quash (filed 07/18/2017)	Vol. 9, 1417–1420
5	January 24, 2017 email from Teresa M. Pilatowicz, Esq.,	Vol. 9, 1421–1422
6	Jones Vargas letter to HR and P. Morabito, dated August 16, 2010	Vol. 9, 1423–1425
7	Excerpted Transcript of July 26, 2011 Deposition of Sujata Yalamanchili, Esq.	Vol. 9, 1426–1431
8	Letter dated June 17, 2011, from Hodgson Russ (“HR”) to John Desmond and Brian Irvine on Morabito related issues	Vol. 9, 1432–1434
9	August 9, 2013, transmitted letter to HR	Vol. 9, 1435–1436
10	Excerpted Transcript of July 23, 2014 Deposition of P. Morabito	Vol. 9, 1437–1441
11	Lippes Mathias Wexler Friedman LLP, April 3, 2015 letter	Vol. 9, 1442–1444

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Motion to Quash Subpoena (cont.)</b>		
12	Lippes Mathias Wexler Friedman LLP, October 20, 2010 letter RE: Balance forward as of bill dated 09/19/2010 and 09/16/2010	Vol. 9, 1445–1454
13	Excerpted Transcript of June 25, 2015 Deposition of 341 Meeting of Creditors	Vol. 9, 1455–1460
(1) Opposition to Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP; and (2) Countermotion for Sanctions and to Compel Resetting of 30(b)(3) Deposition of Hodgson Russ LLP (filed 07/24/2017)		Vol. 10, 1461–1485
<b>Exhibits to (1) Opposition to Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP; and (2) Countermotion for Sanctions and to Compel Resetting of 30(b)(3) Deposition of Hodgson Russ LLP</b>		
<b>Exhibit</b>	<b>Document Description</b>	
A	Declaration of Teresa M. Pilatowicz, Esq., in Support of (1) Opposition to Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP (filed 07/24/2017)	Vol. 10, 1486–1494
A-1	Defendants' NRCP Disclosure of Witnesses and Documents (dated 12/01/2014)	Vol. 10, 1495–1598
A-2	Order Granting Motion to Compel Responses to Deposition Questions; Case No. BK-N-13-51237 (filed 02/03/2016)	Vol. 10, 1599–1604



<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to (1) Opposition to Motion to Quash Subpoena; and (2) Countermotion for Sanctions (cont.)</b>		
A-3	Recommendation for Order RE: <i>Defendants' Motion to Partially Quash</i> , filed on March 10, 2016 (filed 06/13/2016)	Vol. 10, 1605–1617
A-4	Confirming Recommendation Order from September 1, 2016 (filed 09/16/2016)	Vol. 10, 1618–1620
A-5	Subpoena – Civil (dated 01/03/2017)	Vol. 10, 1621–1634
A-6	Notice of Deposition of Person Most Knowledgeable of Hodgson Russ LLP (filed 01/03/2017)	Vol. 10, 1635–1639
A-7	January 25, 2017 Letter to Hodgson Russ LLP	Vol. 10, 1640–1649
A-8	Stipulation Regarding Continued Discovery Dates (Sixth Request) (filed 01/30/2017)	Vol. 10, 1650–1659
A-9	Stipulation Regarding Continued Discovery Dates (Seventh Request) (filed 05/25/2017)	Vol. 10, 1660–1669
A-10	Defendants' Sixteenth Supplement to NRCP Disclosure of Witnesses and Documents (dated 05/03/2017)	Vol. 10, 1670–1682
A-11	Rough Draft Transcript of Garry M. Graber, Dated July 12, 2017 (Job Number 394849)	Vol. 10, 1683–1719
A-12	Sept. 15-Sept. 23, 2010 emails by and between Hodgson Russ LLP and Other Parties	Vol. 10, 1720–1723
Reply in Support of Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP, and Opposition to Motion for Sanctions (filed 08/03/2017)		Vol. 11, 1724–1734

<u><b>DOCUMENT DESCRIPTION</b></u>		<u><b>LOCATION</b></u>
Reply in Support of Countermotion for Sanctions and to Compel Resetting of 30(b)(6) Deposition of Hodgson Russ LLP (filed 08/09/2017)		Vol. 11, 1735–1740
Minutes of August 10, 2017 hearing on Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP, and Opposition to Motion for Sanctions (filed 08/11/2017)		Vol. 11, 1741–1742
Recommendation for Order RE: <i>Defendants’ Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP</i> , filed on July 18, 2017 (filed 08/17/2017)		Vol. 11, 1743–1753
Motion for Partial Summary Judgment (filed 08/17/2017)		Vol. 11, 1754–1796
Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment (filed 08/17/2017)		Vol. 11, 1797–1825
<b>Exhibits to Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Declaration of Timothy P. Herbst in Support of Separate Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment	Vol. 12, 1826–1829
2	Findings of Fact, Conclusions of Law, and Judgment in <i>Consolidated Nevada Corp., et al v. JH. et al.</i> ; Case No. CV07-02764 (filed 10/12/2010)	Vol. 12, 1830–1846
3	Judgment in <i>Consolidated Nevada Corp., et al v. JH. et al.</i> ; Case No. CV07-02764 (filed 08/23/2011)	Vol. 12, 1847–1849

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Statement of Undisputed Facts (cont.)</b>		
4	Excerpted Transcript of July 12, 2017 Deposition of Garry M. Graber	Vol. 12, 1850–1852
5	September 15, 2015 email from Yalamanchili RE: Follow Up Thoughts	Vol. 12, 1853–1854
6	September 23, 2010 email between Garry M. Graber and P. Morabito	Vol. 12, 1855–1857
7	September 20, 2010 email between Yalamanchili and Eileen Crotty RE: Morabito Wire	Vol. 12, 1858–1861
8	September 20, 2010 email between Yalamanchili and Garry M. Graber RE: All Mortgage Balances as of 9/20/2010	Vol. 12, 1862–1863
9	September 20, 2010 email from Garry M. Graber RE: Call	Vol. 12, 1864–1867
10	September 20, 2010 email from P. Morabito to Dennis and Yalamanchili RE: Attorney client privileged communication	Vol. 12, 1868–1870
11	September 20, 2010 email string RE: Attorney client privileged communication	Vol. 12, 1871–1875
12	Appraisal of Real Property: 370 Los Olivos, Laguna Beach, CA, as of Sept. 24, 2010	Vol. 12, 1876–1903
13	Excerpted Transcript of March 21, 2016 Deposition of P. Morabito	Vol. 12, 1904–1919
14	P. Morabito Redacted Investment and Bank Report from Sept. 1 to Sept. 30, 2010	Vol. 12, 1920–1922
15	Excerpted Transcript of June 25, 2015 Deposition of 341 Meeting of Creditors	Vol. 12, 1923–1927
16	Excerpted Transcript of December 5, 2015 Deposition of P. Morabito	Vol. 12, 1928–1952

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Statement of Undisputed Facts (cont.)</b>		
17	Purchase and Sale Agreement between Arcadia Trust and Bayuk Trust entered effective as of Sept. 27, 2010	Vol. 12, 1953–1961
18	First Amendment to Purchase and Sale Agreement between Arcadia Trust and Bayuk Trust entered effective as of Sept. 28, 2010	Vol. 12, 1962–1964
19	Appraisal Report providing market value estimate of real property located at 8355 Panorama Drive, Reno, NV as of Dec. 7, 2011	Vol. 12, 1965–1995
20	An Appraisal of a vacant .977± Acre Parcel of Industrial Land Located at 49 Clayton Place West of the Pyramid Highway (State Route 445) Sparks, Washoe County, Nevada and a single-family residence located at 8355 Panorama Drive Reno, Washoe County, Nevada 89511 as of October 1, 2010 a retrospective date	Vol. 13, 1996–2073
21	APN: 040-620-09 Declaration of Value (dated 12/31/2012)	Vol. 14, 2074–2075
22	Sellers Closing Statement for real property located at 8355 Panorama Drive, Reno, NV 89511	Vol. 14, 2076–2077
23	Bill of Sale for real property located at 8355 Panorama Drive, Reno, NV 89511	Vol. 14, 2078–2082
24	Operating Agreement of Baruk Properties LLC	Vol. 14, 2083–2093
25	Edward Bayuk, as trustee of the Edward William Bayuk Living Trust's Answer to Plaintiff's First Set of Interrogatories (dated 09/14/2014)	Vol. 14, 2094–2104
26	Summary Appraisal Report of real property located at 1461 Glenneyre Street, Laguna Beach, CA 92651, as of Sept. 25, 2010	Vol. 14, 2105–2155

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Statement of Undisputed Facts (cont.)</b>		
27	Appraisal of Real Property as of Sept. 23, 2010: 1254 Mary Fleming Circle, Palm Springs, CA 92262	Vol. 15, 2156–2185
28	Appraisal of Real Property as of Sept. 23, 2010: 1254 Mary Fleming Circle, Palm Springs, CA 92262	Vol. 15, 2186–2216
29	Membership Interest Transfer Agreement between Arcadia Trust and Bayuk Trust entered effective as of Oct. 1, 2010	Vol. 15, 2217–2224
30	PROMISSORY NOTE [Edward William Bayuk Living Trust (“Borrower”) promises to pay Arcadia Living Trust (“Lender”) the principal sum of \$1,617,050.00, plus applicable interest] (dated 10/01/2010)	Vol. 15, 2225–2228
31	Certificate of Merger dated Oct. 4, 2010	Vol. 15, 2229–2230
32	Articles of Merger Document No. 20100746864-78 (recorded date 10/04/2010)	Vol. 15, 2231–2241
33	Excerpted Transcript of September 28, 2015 Deposition of Edward William Bayuk	Vol. 15, 2242–2256
34	Grant Deed for real property 1254 Mary Fleming Circle, Palm Springs, CA 92262; APN: 507-520-015 (recorded 11/04/2010)	Vol. 15, 2257–2258
35	General Conveyance made as of Oct. 31, 2010 between Woodland Heights Limited (“Vendor”) and Arcadia Living Trust (“Purchaser”)	Vol. 15, 2259–2265
36	Appraisal of Real Property as of Sept. 24, 2010: 371 El Camino Del Mar, Laguna Beach, CA 92651	Vol. 15, 2266–2292

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Statement of Undisputed Facts (cont.)</b>		
37	Excerpted Transcript of December 6, 2016 Deposition of P. Morabito	Vol. 15, 2293–2295
38	Page intentionally left blank	Vol. 15, 2296–2297
39	Ledger of Edward Bayuk to P. Morabito	Vol. 15, 2298–2300
40	Loan Calculator: Payment Amount (Standard Loan Amortization)	Vol. 15, 2301–2304
41	Payment Schedule of Edward Bayuk Note in Favor of P. Morabito	Vol. 15, 2305–2308
42	November 10, 2011 email from Vacco RE: Baruk Properties, LLC/P. Morabito/Bank of America, N.A.	Vol. 15, 2309–2312
43	May 23, 2012 email from Vacco to Steve Peek RE: Formal Settlement Proposal to resolve the Morabito matter	Vol. 15, 2313–2319
44	Excerpted Transcript of March 12, 2015 Deposition of 341 Meeting of Creditors	Vol. 15, 2320–2326
45	Shareholder Interest Purchase Agreement between P. Morabito and Snowshoe Petroleum, Inc. (dated 09/30/2010)	Vol. 15, 2327–2332
46	P. Morabito Statement of Assets & Liabilities as of May 5, 2009	Vol. 15, 2333–2334
47	March 10, 2010 email from Naz Afshar, CPA to Darren Takemoto, CPA RE: Current Personal Financial Statement	Vol. 15, 2335–2337
48	March 10, 2010 email from P. Morabito to Jon RE: ExxonMobil CIM for Florida and associated maps	Vol. 15, 2338–2339

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Statement of Undisputed Facts (cont.)</b>		
49	March 20, 2010 email from P. Morabito to Vacco RE: proceed with placing binding bid on June 22nd with ExxonMobil	Vol. 15, 2340–2341
50	P. Morabito Statement of Assets & Liabilities as of May 30, 2010	Vol. 15, 2342–2343
51	June 28, 2010 email from P. Morabito to George R. Garner RE: ExxonMobil Chicago Market Business Plan Review	Vol. 15, 2344–2345
52	Plan of Merger of Consolidated Western Corp. with and into Superpumper, Inc. (dated 09/28/2010)	Vol. 15, 2346–2364
53	Page intentionally left blank	Vol. 15, 2365–2366
54	BBVA Compass Proposed Request on behalf of Superpumper, Inc. (dated 12/15/2010)	Vol. 15, 2367–2397
55	Business Valuation Agreement between Matrix Capital Markets Group, Inc. and Superpumper, Inc. (dated 09/30/2010)	Vol. 15, 2398–2434
56	Expert report of James L. McGovern, CPA/CFF, CVA (dated 01/25/2016)	Vol. 16, 2435–2509
57	June 18, 2014 email from Sam Morabito to Michael Vanek RE: SPI Analysis	Vol. 17, 2510–2511
58	Declaration of P. Morabito in Support of Opposition to Motion of JH, Inc., Jerry Herbst, and Berry-Hinckley Industries for Order Prohibiting Debtor from Using, Acquiring, or Disposing of or Transferring Assets Pursuant to 11 U.S.C. §§ 105 and 303(f) Pending Appointment of Trustee; Case No. BK-N-13-51237 (filed 07/01/2013)	Vol. 17, 2512–2516

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Statement of Undisputed Facts (cont.)</b>		
59	State of California Secretary of State Limited Liability Company – Snowshoe Properties, LLC; File No. 201027310002 (filed 09/29/2010)	Vol. 17, 2517–2518
60	PROMISSORY NOTE [Snowshoe Petroleum (“Maker”) promises to pay P. Morabito (“Holder”) the principal sum of \$1,462,213.00] (dated 11/01/2010)	Vol. 17, 2519–2529
61	PROMISSORY NOTE [Superpumper, Inc. (“Maker”) promises to pay Compass Bank (the “Bank” and/or “Holder”) the principal sum of \$3,000,000.00] (dated 08/13/2010)	Vol. 17, 2530–2538
62	Excerpted Transcript of October 21, 2015 Deposition of Salvatore R. Morabito	Vol. 17, 2539–2541
63	Page intentionally left blank	Vol. 17, 2542–2543
64	Edward Bayuk’s Answers to Plaintiff’s First Set of Interrogatories (dated 09/14/2014)	Vol. 17, 2544–2557
65	October 12, 2012 email from Stan Bernstein to P. Morabito RE: 2011 return	Vol. 17, 2558–2559
66	Page intentionally left blank	Vol. 17, 2560–2561
67	Excerpted Transcript of October 20, 2015 Deposition of Dennis C. Vacco	Vol. 17, 2562–2564
68	Snowshoe Petroleum, Inc.’s letter of intent to set out the framework of the contemplated transaction between: Snowshoe Petroleum, Inc.; David Dwelle, LP; Eclipse Investments, LP; Speedy Investments; and TAD Limited Partnership (dated 04/21/2011)	Vol. 17, 2565–2572



<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Statement of Undisputed Facts (cont.)</b>		
69	Excerpted Transcript of July 10, 2017 Deposition of Dennis C. Vacco	Vol. 17, 2573–2579
70	April 15, 2011 email from P. Morabito to Christian Lovelace; Gregory Ivancic; Vacco RE: \$65 million loan offer from Cerberus	Vol. 17, 2580–2582
71	Email from Vacco to P. Morabito RE: \$2 million second mortgage on the Reno house	Vol. 17, 2583–2584
72	Email from Vacco to P. Morabito RE: Tim Haves	Vol. 17, 2585–2586
73	Settlement Agreement, Loan Agreement Modification & Release dated as of Sept. 7, 2012, entered into by Bank of America and P. Morabito	Vol. 17, 2587–2595
74	Page intentionally left blank	Vol. 17, 2596–2597
75	February 10, 2012 email from Vacco to Paul Wells and Timothy Haves RE: 1461 Glenneyre Street, Laguna Beach – Sale	Vol. 17, 2598–2602
76	May 8, 2012 email from P. Morabito to Vacco RE: Proceed with the corporate set-up with Ray, Edward and P. Morabito	Vol. 17, 2603–2604
77	September 4, 2012 email from Vacco to Edward Bayuk RE: Second Deed of Trust documents	Vol. 17, 2605–2606
78	September 18, 2012 email from P. Morabito to Edward Bayuk RE: Deed of Trust	Vol. 17, 2607–2611
79	October 3, 2012 email from Vacco to P. Morabito RE: Term Sheet on both real estate deal and option	Vol. 17, 2612–2614
80	March 14, 2013 email from P. Morabito to Vacco RE: BHI Hinckley	Vol. 17, 2615–2616
81	Page intentionally left blank	Vol. 17, 2617–2618

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Statement of Undisputed Facts (cont.)</b>		
82	November 11, 2011 email from Vacco to P. Morabito RE: Trevor's commitment to sign	Vol. 17, 2619–2620
83	November 28, 2011 email string RE: Wiring \$560,000 to Lippes Mathias	Vol. 17, 2621–2623
84	Page intentionally left blank	Vol. 17, 2624–2625
85	Page intentionally left blank	Vol. 17, 2626–2627
86	Order for Relief Under Chapter 7; Case No. BK-N-13-51236 (filed 12/22/2014)	Vol. 17, 2628–2634
87	Report of Undisputed Election (11 U.S.C § 702); Case No. BK-N-13-51237 (filed 01/23/2015)	Vol. 17, 2635–2637
88	Amended Stipulation and Order to Substitute a Party to NRCP 17(a) (filed 06/11/2015)	Vol. 17, 2638–2642
89	Membership Interest Purchase Agreement, entered into as of Oct. 6, 2010 between P. Morabito and Edward Bayuk	Vol. 17, 2643–2648
90	Complaint; Case No. BK-N-13-51237 (filed 10/15/2015)	Vol. 17, 2649–2686
91	Fifth Amendment and Restatement of the Trust Agreement for the Arcadia Living Trust (dated 09/30/2010)	Vol. 17, 2687–2726
Objection to Recommendation for Order filed August 17, 2017 (filed 08/28/2017)		Vol. 18, 2727–2734
<b>Exhibit to Objection to Recommendation for Order</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Plaintiff's counsel's Jan. 24, 2017, email memorializing the discovery dispute agreement	Vol. 18, 2735–2736

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
Opposition to Objection to Recommendation for Order filed August 17, 2017 (filed 09/05/2017)		Vol. 18, 2737–2748
<b>Exhibit to Opposition to Objection to Recommendation for Order</b>		
<b>Exhibit</b>	<b>Document Description</b>	
A	Declaration of Teresa M. Pilatowicz, Esq., in Support of Opposition to Objection to Recommendation for Order (filed 09/05/2017)	Vol. 18, 2749–2752
Reply to Opposition to Objection to Recommendation for Order filed August 17, 2017 (dated 09/15/2017)		Vol. 18, 2753–2758
Defendants’ Opposition to Plaintiff’s Motion for Partial Summary Judgment (filed 09/22/2017)		Vol. 18, 2759–2774
Defendants’ Separate Statement of Disputed Facts in Support of Opposition to Plaintiff’s Motion for Partial Summary Judgment (filed 09/22/2017)		Vol. 18, 2775–2790
<b>Exhibits to Defendants’ Separate Statement of Disputed Facts in Support of Opposition to Plaintiff’s Motion for Partial Summary Judgment</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Judgment in <i>Consolidated Nevada Corp., et al v. JH. et al.</i> ; Case No. CV07-02764 (filed 08/23/2011)	Vol. 18, 2791–2793
2	Excerpted Transcript of October 20, 2015 Deposition of Dennis C. Vacco	Vol. 18, 2794–2810
3	Order Denying Motion to Dismiss Involuntary Chapter 7 Petition and Suspending Proceedings Pursuant to 11 U.S.C §305(a)(1); Case No. BK-N-13-51237 (filed 12/17/2013)	Vol. 18, 2811–2814

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Defendants' Separate Statement of Disputed Facts (cont.)</b>		
4	Excerpted Transcript of March 21, 2016 Deposition of P. Morabito	Vol. 18, 2815–2826
5	Excerpted Transcript of September 28, 2015 Deposition of Edward William Bayuk	Vol. 18, 2827–2857
6	Appraisal	Vol. 18, 2858–2859
7	Budget Summary as of Jan. 7, 2016	Vol. 18, 2860–2862
8	Excerpted Transcript of March 24, 2016 Deposition of Dennis Banks	Vol. 18, 2863–2871
9	Excerpted Transcript of March 22, 2016 Deposition of Michael Sewitz	Vol. 18, 2872–2879
10	Excerpted Transcript of April 27, 2011 Deposition of Darryl Noble	Vol. 18, 2880–2883
11	Copies of cancelled checks from Edward Bayuk made payable to P. Morabito	Vol. 18, 2884–2892
12	CBRE Appraisal of 14th Street Card Lock Facility (dated 02/26/2010)	Vol. 18, 2893–2906
13	Bank of America wire transfer from P. Morabito to Salvatore Morabito in the amount of \$146,127.00; and a wire transfer from P. Morabito to Lippes for \$25.00 (date 10/01/2010)	Vol. 18, 2907–2908
14	Excerpted Transcript of October 21, 2015 Deposition of Christian Mark Lovelace	Vol. 18, 2909–2918
15	June 18, 2014 email from Sam Morabito to Michael Vanek RE: Analysis of the Superpumper transaction in 2010	Vol. 18, 2919–2920
16	Excerpted Transcript of October 21, 2015 Deposition of Salvatore R. Morabito	Vol. 18, 2921–2929

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Defendants' Separate Statement of Disputed Facts (cont.)</b>		
17	PROMISSORY NOTE [Snowshoe Petroleum ("Maker") promises to pay P. Morabito ("Holder") the principal sum of \$1,462,213.00] (dated 11/01/2010)	Vol. 18, 2930–2932
18	TERM NOTE [P. Morabito ("Borrower") promises to pay Consolidated Western Corp. ("Lender") the principal sum of \$939,000.00, plus interest] (dated 09/01/2010)	Vol. 18, 2933–2934
19	SUCCESSOR PROMISSORY NOTE [Snowshoe Petroleum ("Maker") promises to pay P. Morabito ("Holder") the principal sum of \$492,937.30, plus interest] (dated 02/01/2011)	Vol. 18, 2935–2937
20	Edward Bayuk's wire transfer to Lippes in the amount of \$517,547.20 (dated 09/29/2010)	Vol. 18, 2938–2940
21	Salvatore Morabito Bank of Montreal September 2011 Wire Transfer	Vol. 18, 2941–2942
22	Declaration of Salvatore Morabito (dated 09/21/2017)	Vol. 18, 2943–2944
23	Edward Bayuk bank wire transfer to Superpumper, Inc., in the amount of \$659,000.00 (dated 09/30/2010)	Vol. 18, 2945–2947
24	Edward Bayuk checking account statements between 2010 and 2011 funding the company with transfers totaling \$500,000	Vol. 18, 2948–2953
25	Salvatore Morabito's wire transfer statement between 2010 and 2011, funding the company with \$750,000	Vol. 18, 2954–2957
26	Payment Schedule of Edward Bayuk Note in Favor of P. Morabito	Vol. 18, 2958–2961

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Defendants' Separate Statement of Disputed Facts (cont.)</b>		
27	September 15, 2010 email from Vacco to Yalamanchili and P. Morabito RE: Follow Up Thoughts	Vol. 18, 2962–2964
Reply in Support of Motion for Partial Summary Judgment (dated 10/10/2017)		Vol. 19, 2965–2973
Order Regarding Discovery Commissioner's Recommendation for Order dated August 17, 2017 (filed 12/07/2017)		Vol. 19, 2974–2981
Order Denying Motion for Partial Summary Judgment (filed 12/11/2017)		Vol. 19, 2982–2997
Defendants' Motions in Limine (filed 09/12/2018)		Vol. 19, 2998–3006
<b>Exhibits to Defendants' Motions in Limine</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Plaintiff's Second Supplement to Amended Disclosures Pursuant to NRCP 16.1(A)(1) (dated 04/28/2016)	Vol. 19, 3007–3016
2	Excerpted Transcript of March 25, 2016 Deposition of William A. Leonard	Vol. 19, 3017–3023
3	Plaintiff, Jerry Herbst's Responses to Defendant Snowshoe Petroleum, Inc.'s Set of Interrogatories (dated 02/11/2015); and Plaintiff, Jerry Herbst's Responses to Defendant, Salvatore Morabito's Set of Interrogatories (dated 02/12/2015)	Vol. 19, 3024–3044
Motion in Limine to Exclude Testimony of Jan Friederich (filed 09/20/2018)		Vol. 19, 3045–3056

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Motion in Limine to Exclude Testimony of Jan Friederich</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Defendants' Rebuttal Expert Witness Disclosure (dated 02/29/2016)	Vol. 19, 3057–3071
2	Condensed Transcript of March 29, 2016 Deposition of Jan Friederich	Vol. 19, 3072–3086
Opposition to Defendants' Motions in Limine (filed 09/28/2018)		Vol. 19, 3087–3102
<b>Exhibits to Opposition to Defendants' Motions in Limine</b>		
<b>Exhibit</b>	<b>Document Description</b>	
A	Declaration of Teresa M. Pilatowicz, Esq. in Support of Opposition to Defendants' Motions in Limine (filed 09/28/2018)	Vol. 19, 3103–3107
A-1	Plaintiff's February 19, 2016, Amended Disclosures Pursuant to NRCP 16.1(A)(1)	Vol. 19, 3108–3115
A-2	Plaintiff's January 26, 2016, Expert Witnesses Disclosures (without exhibits)	Vol. 19, 3116–3122
A-3	Defendants' January 26, 2016, and February 29, 2016, Expert Witness Disclosures (without exhibits)	Vol. 19, 3123–3131
A-4	Plaintiff's August 17, 2017, Motion for Partial Summary Judgment (without exhibits)	Vol. 19, 3132–3175
A-5	Plaintiff's August 17, 2017, Statement of Undisputed Facts in Support of his Motion for Partial Summary Judgment (without exhibits)	Vol. 19, 3176–3205
Defendants' Reply in Support of Motions in Limine (filed 10/08/2018)		Vol. 20, 3206–3217

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibit to Defendants' Reply in Support of Motions in Limine</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Chapter 7 Trustee, William A. Leonard's Responses to Defendants' First Set of Interrogatories (dated 05/28/2015)	Vol. 20, 3218–3236
Defendants' Opposition to Plaintiff's Motions in Limine to Exclude the Testimony of Jan Friederich (filed 10/08/2018)		Vol. 20, 3237–3250
<b>Exhibits to Defendants' Opposition to Plaintiff's Motions in Limine to Exclude the Testimony of Jan Friederich</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Excerpt of Matrix Report (dated 10/13/2010)	Vol. 20, 3251–3255
2	Defendants' Rebuttal Expert Witness Disclosure (dated 02/29/2016)	Vol. 20, 3256–3270
3	November 9, 2009 email from P. Morabito to Daniel Fletcher; Jim Benbrook; Don Whitehead; Sam Morabito, etc. RE: Jan Friederich entered consulting agreement with Superpumper	Vol. 20, 3271–3272
4	Excerpted Transcript of March 29, 2016 Deposition of Jan Friederich	Vol. 20, 3273–3296
Defendants' Objections to Plaintiff's Pretrial Disclosures (filed 10/12/2018)		Vol. 20, 3297–3299
Objections to Defendants' Pretrial Disclosures (filed 10/12/2018)		Vol. 20, 3300–3303
Reply to Defendants' Opposition to Plaintiff's Motion in Limine to Exclude the Testimony of Jan Friederich (filed 10/12/2018)		Vol. 20, 3304–3311



<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
Minutes of September 11, 2018, Pre-trial Conference (filed 10/19/2018)		Vol. 20, 3312
Stipulated Facts (filed 10/29/2018)		Vol. 20, 3313–3321
Defendants’ Points and Authorities RE: Objection to Admission of Documents in Conjunction with the Depositions of P. Morabito and Dennis Vacco (filed 10/30/2018)		Vol. 20, 3322–3325
Plaintiff’s Points and Authorities Regarding Authenticity and Hearsay Issues (filed 10/31/2018)		Vol. 20, 3326–3334
Clerk’s Trial Exhibit List (filed 02/28/2019)		Vol. 21, 3335–3413
<b>Exhibits to Clerk’s Trial Exhibit List</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Certified copy of the Transcript of September 13, 2010 Judge’s Ruling; Case No. CV07-02764	Vol. 21, 3414–3438
2	Findings of Fact, Conclusions of Law, and Judgment; Case No. CV07-02764 (filed 10/12/2010)	Vol. 21, 3439–3454
3	Judgment; Case No. CV07-0767 (filed 08/23/2011)	Vol. 21, 3455–3456
4	Confession of Judgment; Case No. CV07-02764 (filed 06/18/2013)	Vol. 21, 3457–3481
5	November 30, 2011 Settlement Agreement and Mutual Release	Vol. 22, 3482–3613
6	March 1, 2013 Forbearance Agreement	Vol. 22, 3614–3622

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Clerk's Trial Exhibit List (cont.)</b>		
8	Order Denying Motion to Dismiss Involuntary Chapter 7 Petition and Suspending Proceedings, Case 13-51237. ECF No. 94, (filed 12/17/2013)	Vol. 22, 3623–3625
19	Report of Undisputed Election– Appointment of Trustee, Case No. 13-51237, ECF No. 220	Vol. 22, 3626–3627
20	Stipulation and Order to Substitute a Party Pursuant to NRCPP 17(a), Case No. CV13-02663, May 15, 2015	Vol. 22, 3628–3632
21	Non-Dischargeable Judgment Regarding Plaintiff's First and Second Causes of Action, Case No. 15-05019-GWZ, ECF No. 123, April 30, 2018	Vol. 22, 3633–3634
22	Memorandum & Decision; Case No. 15-05019-GWZ, ECF No. 124, April 30, 2018	Vol. 22, 3635–3654
23	Amended Findings of Fact, Conclusions of Law in Support of Judgment Regarding Plaintiff's First and Second Causes of Action; Case 15-05019-GWZ, ECF No. 122, April 30, 2018	Vol. 22, 3655–3679
25	September 15, 2010 email from Yalamanchili to Vacco and P. Morabito RE: Follow Up Thoughts	Vol. 22, 3680–3681
26	September 18, 2010 email from P. Morabito to Vacco	Vol. 22, 3682–3683
27	September 20, 2010 email from Vacco to P. Morabito RE: Spirit	Vol. 22, 3684–3684
28	September 20, 2010 email between Yalamanchili and Crotty RE: Morabito -Wire	Vol. 22, 3685–3687
29	September 20, 2010 email from Yalamanchili to Graber RE: Attorney Client Privileged Communication	Vol. 22, 3688–3689

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Clerk's Trial Exhibit List (cont.)</b>		
30	September 21, 2010 email from P. Morabito to Vacco and Cross RE: Attorney Client Privileged Communication	Vol. 22, 3690–3692
31	September 23, 2010 email chain between Graber and P. Morabito RE: Change of Primary Residence from Reno to Laguna Beach	Vol. 22, 3693–3694
32	September 23, 2010 email from Yalamanchili to Graber RE: Change of Primary Residence from Reno to Laguna Beach	Vol. 22, 3695–3696
33	September 24, 2010 email from P. Morabito to Vacco RE: Superpumper, Inc.	Vol. 22, 3697–3697
34	September 26, 2010 email from Vacco to P. Morabito RE: Judgment for a fixed debt	Vol. 22, 3698–3698
35	September 27, 2010 email from P. Morabito to Vacco RE: First Amendment to Residential Lease executed 9/27/2010	Vol. 22, 3699–3701
36	November 7, 2012 emails between Vacco, P. Morabito, C. Lovelace RE: Attorney Client Privileged Communication	Vol. 22, 3702–3703
37	Morabito BMO Bank Statement – September 2010	Vol. 22, 3704–3710
38	Lippes Mathias Trust Ledger History	Vol. 23, 3711–3716
39	Fifth Amendment & Restatement of the Trust Agreement for the Arcadia Living Trust dated September 30, 2010	Vol. 23, 3717–3755
42	P. Morabito Statement of Assets & Liabilities as of May 5, 2009	Vol. 23, 3756–3756

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Clerk's Trial Exhibit List (cont.)</b>		
43	March 10, 2010 email chain between Afshar and Takemoto RE: Current Personal Financial Statement	Vol. 23, 3757–3758
44	Salazar Net Worth Report (dated 03/15/2011)	Vol. 23, 3759–3772
45	Purchase and Sale Agreement	Vol. 23, 3773–3780
46	First Amendment to Purchase and Sale Agreement	Vol. 23, 3781–3782
47	Panorama – Estimated Settlement Statement	Vol. 23, 3783–3792
48	El Camino – Final Settlement Statement	Vol. 23, 3793–3793
49	Los Olivos – Final Settlement Statement	Vol. 23, 3794–3794
50	Deed for Transfer of Panorama Property	Vol. 23, 3795–3804
51	Deed for Transfer for Los Olivos	Vol. 23, 3805–3806
52	Deed for Transfer of El Camino	Vol. 23, 3807–3808
53	Kimmel Appraisal Report for Panorama and Clayton	Vol. 23, 3809–3886
54	Bill of Sale – Panorama	Vol. 23, 3887–3890
55	Bill of Sale – Mary Fleming	Vol. 23, 3891–3894
56	Bill of Sale – El Camino	Vol. 23, 3895–3898
57	Bill of Sale – Los Olivos	Vol. 23, 3899–3902
58	Declaration of Value and Transfer Deed of 8355 Panorama (recorded 12/31/2012)	Vol. 23, 3903–3904
60	Baruk Properties Operating Agreement	Vol. 23, 3905–3914
61	Baruk Membership Transfer Agreement	Vol. 24, 3915–3921
62	Promissory Note for \$1,617,050 (dated 10/01/2010)	Vol. 24, 3922–3924

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Clerk's Trial Exhibit List (cont.)</b>		
63	Baruk Properties/Snowshoe Properties, Certificate of Merger (filed 10/04/2010)	Vol. 24, 3925–3926
64	Baruk Properties/Snowshoe Properties, Articles of Merger	Vol. 24, 3927–3937
65	Grant Deed from Snowshoe to Bayuk Living Trust; Doc No. 2010-0531071 (recorded 11/04/2010)	Vol. 24, 3938–3939
66	Grant Deed – 1461 Glenneyre; Doc No. 2010000511045 (recorded 10/08/2010)	Vol. 24, 3940–3941
67	Grant Deed – 570 Glenneyre; Doc No. 2010000508587 (recorded 10/08/2010)	Vol. 24, 3942–3944
68	Attorney File re: Conveyance between Woodland Heights and Arcadia Living Trust	Vol. 24, 3945–3980
69	October 24, 2011 email from P. Morabito to Vacco RE: Attorney Client Privileged Communication	Vol. 24, 3981–3982
70	November 10, 2011 email chain between Vacco and P. Morabito RE: Baruk Properties, LLC/Paul Morabito/Bank of America, N.A.	Vol. 24, 3983–3985
71	Bayuk First Ledger	Vol. 24, 3986–3987
72	Amortization Schedule	Vol. 24, 3988–3990
73	Bayuk Second Ledger	Vol. 24, 3991–3993
74	Opposition to Motion for Summary Judgment and Declaration of Edward Bayuk; Case No. 13-51237, ECF No. 146 (filed 10/03/2014)	Vol. 24, 3994–4053
75	March 30, 2012 email from Vacco to Bayuk RE: Letter to BOA	Vol. 24, 4054–4055

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Clerk's Trial Exhibit List (cont.)</b>		
76	March 10, 2010 email chain between P. Morabito and <a href="mailto:jon@aim13.com">jon@aim13.com</a> RE: Strictly Confidential	Vol. 24, 4056–4056
77	May 20, 2010 email chain between P. Morabito, Vacco and Michael Pace RE: Proceed with placing a Binding Bid on June 22nd with ExxonMobil	Vol. 24, 4057–4057
78	Morabito Personal Financial Statement May 2010	Vol. 24, 4058–4059
79	June 28, 2010 email from P. Morabito to George Garner RE: ExxonMobil Chicago Market Business Plan Review	Vol. 24, 4060–4066
80	Shareholder Interest Purchase Agreement	Vol. 24, 4067–4071
81	Plan of Merger of Consolidated Western Corporation with and Into Superpumper, Inc.	Vol. 24, 4072–4075
82	Articles of Merger of Consolidated Western Corporation with and Into Superpumper, Inc.	Vol. 24, 4076–4077
83	Unanimous Written Consent of the Board of Directors and Sole Shareholder of Superpumper, Inc.	Vol. 24, 4078–4080
84	Unanimous Written Consent of the Directors and Shareholders of Consolidated Western Corporation	Vol. 24, 4081–4083
85	Arizona Corporation Commission Letter dated October 21, 2010	Vol. 24, 4084–4091
86	Nevada Articles of Merger	Vol. 24, 4092–4098
87	New York Creation of Snowshoe	Vol. 24, 4099–4103
88	April 26, 2012 email from Vacco to Afshar RE: Ownership Structure of SPI	Vol. 24, 4104–4106
90	September 30, 2010 Matrix Retention Agreement	Vol. 24, 4107–4110

<u><b>DOCUMENT DESCRIPTION</b></u>		<u><b>LOCATION</b></u>
<b>Exhibits to Clerk's Trial Exhibit List (cont.)</b>		
91	McGovern Expert Report	Vol. 25, 4111–4189
92	Appendix B to McGovern Report – Source 4 – Budgets	Vol. 25, 4190–4191
103	Superpumper Note in the amount of \$1,462,213.00 (dated 11/01/2010)	Vol. 25, 4192–4193
104	Superpumper Successor Note in the amount of \$492,937.30 (dated 02/01/2011)	Vol. 25, 4194–4195
105	Superpumper Successor Note in the amount of \$939,000 (dated 02/01/2011)	Vol. 25, 4196–4197
106	Superpumper Stock Power transfers to S. Morabito and Bayuk (dated 01/01/2011)	Vol. 25, 4198–4199
107	<i>Declaration of P. Morabito in Support of Opposition to Motion of JH, Inc., Jerry Herbst, and Berry- Hinckley Industries for Order Prohibiting Debtor from Using, Acquiring or Transferring Assets Pursuant to 11 U.S.C. §§ 105 and 303(f) Pending Appointment of Trustee, Case 13-51237, ECF No. 22 (filed 07/01/2013)</i>	Vol. 25, 4200–4203
108	October 12, 2012 email between P. Morabito and Bernstein RE: 2011 Return	Vol. 25, 4204–4204
109	Compass Term Loan (dated 12/21/2016)	Vol. 25, 4205–4213
110	P. Morabito – Term Note in the amount of \$939,000.000 (dated 09/01/2010)	Vol. 25, 4214–4214
111	Loan Agreement between Compass Bank and Superpumper (dated 12/21/2016)	Vol. 25, 4215–4244
112	Consent Agreement (dated 12/28/2010)	Vol. 25, 4245–4249
113	Superpumper Financial Statement (dated 12/31/2007)	Vol. 25, 4250–4263

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Clerk's Trial Exhibit List (cont.)</b>		
114	Superpumper Financial Statement (dated 12/31/2009)	Vol. 25, 4264–4276
115	Notes Receivable Interest Income Calculation (dated 12/31/2009)	Vol. 25, 4277–4278
116	Superpumper Inc. Audit Conclusions Memo (dated 12/31/2010)	Vol. 25, 4279–4284
117	Superpumper 2010 YTD Income Statement and Balance Sheets	Vol. 25, 4285–4299
118	March 12, 2010 Management Letter	Vol. 25, 4300–4302
119	Superpumper Unaudited August 2010 Balance Sheet	Vol. 25, 4303–4307
120	Superpumper Financial Statements (dated 12/31/2010)	Vol. 25, 4308–4322
121	Notes Receivable Balance as of September 30, 2010	Vol. 26, 4323
122	Salvatore Morabito Term Note \$2,563,542.00 as of December 31, 2010	Vol. 26, 4324–4325
123	Edward Bayuk Term Note \$2,580,500.00 as of December 31, 2010	Vol. 26, 4326–4327
125	April 21, 2011 Management letter	Vol. 26, 4328–4330
126	Bayuk and S. Morabito Statements of Assets & Liabilities as of February 1, 2011	Vol. 26, 4331–4332
127	January 6, 2012 email from Bayuk to Lovelace RE: Letter of Credit	Vol. 26, 4333–4335
128	January 6, 2012 email from Vacco to Bernstein	Vol. 26, 4336–4338
129	January 7, 2012 email from Bernstein to Lovelace	Vol. 26, 4339–4343
130	March 18, 2012 email from P. Morabito to Vacco	Vol. 26, 4344–4344



<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Clerk's Trial Exhibit List (cont.)</b>		
131	April 21, 2011 Proposed Acquisition of Nella Oil	Vol. 26, 4345–4351
132	April 15, 2011 email chain between P. Morabito and Vacco	Vol. 26, 4352
133	April 5, 2011 email from P. Morabito to Vacco	Vol. 26, 4353
134	April 16, 2012 email from Vacco to Morabito	Vol. 26, 4354–4359
135	August 7, 2011 email exchange between Vacco and P. Morabito	Vol. 26, 4360
136	August 2011 Lovelace letter to Timothy Halves	Vol. 26, 4361–4365
137	August 24, 2011 email from Vacco to P. Morabito RE: Tim Haves	Vol. 26, 4366
138	November 11, 2011 email from Vacco to P. Morabito RE: Getting Trevor's commitment to sign	Vol. 26, 4367
139	November 16, 2011 email from P. Morabito to Vacco RE: Vacco's litigation letter	Vol. 26, 4368
140	November 28, 2011 email chain between Vacco, S. Morabito, and P. Morabito RE: \$560,000 wire to Lippes Mathias	Vol. 26, 4369–4370
141	December 7, 2011 email from Vacco to P. Morabito RE: Moreno	Vol. 26, 4371
142	February 10, 2012 email chain between P. Morabito Wells, and Vacco RE: 1461 Glenneyre Street - Sale	Vol. 26, 4372–4375
143	April 20, 2012 email from P. Morabito to Bayuk RE: BofA	Vol. 26, 4376
144	April 24, 2012 email from P. Morabito to Vacco RE: SPI Loan Detail	Vol. 26, 4377–4378

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Clerk's Trial Exhibit List (cont.)</b>		
145	September 4, 2012 email chain between Vacco and Bayuk RE: Second Deed of Trust documents	Vol. 26, 4379–4418
147	September 4, 2012 email from P. Morabito to Vacco RE: Wire	Vol. 26, 4419–4422
148	September 4, 2012 email from Bayuk to Vacco RE: Wire	Vol. 26, 4423–4426
149	December 6, 2012 email from Vacco to P. Morabito RE: BOA and the path of money	Vol. 26, 4427–4428
150	September 18, 2012 email chain between P. Morabito and Bayuk	Vol. 26, 4429–4432
151	October 3, 2012 email chain between Vacco and P. Morabito RE: Snowshoe Properties, LLC	Vol. 26, 4433–4434
152	September 3, 2012 email from P. Morabito to Vacco RE: Wire	Vol. 26, 4435
153	March 14, 2013 email chain between P. Morabito and Vacco RE: BHI Hinckley	Vol. 26, 4436
154	Paul Morabito 2009 Tax Return	Vol. 26, 4437–4463
155	Superpumper Form 8879-S tax year ended December 31, 2010	Vol. 26, 4464–4484
156	2010 U.S. S Corporation Tax Return for Consolidated Western Corporation	Vol. 27, 4485–4556
157	Snowshoe form 8879-S for year ended December 31, 2010	Vol. 27, 4557–4577
158	Snowshoe Form 1120S 2011 Amended Tax Return	Vol. 27, 4578–4655
159	September 14, 2012 email from Vacco to P. Morabito	Vol. 27, 4656–4657

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Clerk's Trial Exhibit List (cont.)</b>		
160	October 1, 2012 email from P. Morabito to Vacco RE: Monday work for Dennis and Christian	Vol. 27, 4658
161	December 18, 2012 email from Vacco to P. Morabito RE: Attorney Client Privileged Communication	Vol. 27, 4659
162	April 24, 2013 email from P. Morabito to Vacco RE: BHI Trust	Vol. 27, 4660
163	Membership Interest Purchases, Agreement – Watch My Block (dated 10/06/2010)	Vol. 27, 4661–4665
164	Watch My Block organizational documents	Vol. 27, 4666–4669
174	October 15, 2015 Certificate of Service of copy of Lippes Mathias Wexler Friedman's Response to Subpoena	Vol. 27, 4670
175	Order Granting Motion to Compel Responses to Deposition Questions ECF No. 502; Case No. 13- 51237-gwz (filed 02/03/2016)	Vol. 27, 4671–4675
179	Gursey Schneider LLP Subpoena	Vol. 28, 4676–4697
180	Summary Appraisal of 570 Glenneyre	Vol. 28, 4698–4728
181	Appraisal of 1461 Glenneyre Street	Vol. 28, 4729–4777
182	Appraisal of 370 Los Olivos	Vol. 28, 4778–4804
183	Appraisal of 371 El Camino Del Mar	Vol. 28, 4805–4830
184	Appraisal of 1254 Mary Fleming Circle	Vol. 28, 4831–4859
185	Mortgage – Panorama	Vol. 28, 4860–4860
186	Mortgage – El Camino	Vol. 28, 4861
187	Mortgage – Los Olivos	Vol. 28, 4862
188	Mortgage – Glenneyre	Vol. 28, 4863

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Clerk's Trial Exhibit List (cont.)</b>		
189	Mortgage – Mary Fleming	Vol. 28, 4864
190	Settlement Statement – 371 El Camino Del Mar	Vol. 28, 4865
191	Settlement Statement – 370 Los Olivos	Vol. 28, 4866
192	2010 Declaration of Value of 8355 Panorama Dr	Vol. 28, 4867–4868
193	Mortgage – 8355 Panorama Drive	Vol. 28, 4869–4870
194	Compass – Certificate of Custodian of Records (dated 12/21/2016)	Vol. 28, 4871–4871
196	June 6, 2014 Declaration of Sam Morabito – Exhibit 1 to Snowshoe Reply in Support of Motion to Dismiss Complaint for Lack of Personal Jurisdiction – filed in Case No. CV13-02663	Vol. 28, 4872–4874
197	June 19, 2014 Declaration of Sam Morabito – Exhibit 1 to Superpumper Motion to Dismiss Complaint for Lack of Personal Jurisdiction – filed in Case No. CV13-02663	Vol. 28, 4875–4877
198	September 22, 2017 Declaration of Sam Morabito – Exhibit 22 to Defendants' SSOF in Support of Opposition to Plaintiff's MSJ – filed in Case No. CV13-02663	Vol. 28, 4878–4879
222	Kimmel – January 21, 2016, Comment on Alves Appraisal	Vol. 28, 4880–4883
223	September 20, 2010 email from Yalamanchili to Morabito	Vol. 28, 4884
224	March 24, 2011 email from Naz Afshar RE: telephone call regarding CWC	Vol. 28, 4885–4886
225	Bank of America Records for Edward Bayuk (dated 09/05/2012)	Vol. 28, 4887–4897

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Clerk's Trial Exhibit List (cont.)</b>		
226	June 11, 2007 Wholesale Marketer Agreement	Vol. 29, 4898–4921
227	May 25, 2006 Wholesale Marketer Facility Development Incentive Program Agreement	Vol. 29, 4922–4928
228	June 2007 Master Lease Agreement – Spirit SPE Portfolio and Superpumper, Inc.	Vol. 29, 4929–4983
229	Superpumper Inc 2008 Financial Statement (dated 12/31/2008)	Vol. 29, 4984–4996
230	November 9, 2009 email from P. Morabito to Bernstein, Yalaman RE: Jan Friederich – entered into Consulting Agreement	Vol. 29, 4997
231	September 30, 2010, Letter from Compass to Superpumper, Morabito, CWC RE: reducing face amount of the revolving note	Vol. 29, 4998–5001
232	October 15, 2010, letter from Quarles & Brady to Vacco RE: Revolving Loan Documents and Term Loan Documents between Superpumper and Compass Bank	Vol. 29, 5002–5006
233	BMO Account Tracker Banking Report October 1 to October 31, 2010	Vol. 29, 5007–5013
235	August 31, 2010 Superpumper Inc., Valuation of 100 percent of the common equity in Superpumper, Inc on a controlling marketable basis	Vol. 29, 5014–5059
236	June 18, 2014 email from S. Morabito to Vanek (WF) RE: Analysis of Superpumper Acquisition in 2010	Vol. 29, 5060–5061
241	Superpumper March 2010 YTD Income Statement	Vol. 29, 5062–5076

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Clerk's Trial Exhibit List (cont.)</b>		
244	Assignment Agreement for \$939,000 Morabito Note	Vol. 29, 5077–5079
247	July 1, 2011 Third Amendment to Forbearance Agreement Superpumper and Compass Bank	Vol. 29, 5080–5088
248	Superpumper Cash Contributions January 2010 thru September 2015 – Bayuk and S. Morabito	Vol. 29, 5089–5096
252	October 15, 2010 Letter from Quarles & Brady to Vacco RE: Revolving Loan documents and Term Loan documents between Superpumper Prop. and Compass Bank	Vol. 29, 5097–5099
254	Bank of America – S. Morabito SP Properties Sale, SP Purchase Balance	Vol. 29, 5100
255	Superpumper Prop. Final Closing Statement for 920 Mountain City Hwy, Elko, NV	Vol. 29, 5101
256	September 30, 2010 Raffles Insurance Limited Member Summary	Vol. 29, 5102
257	Equalization Spreadsheet	Vol. 30, 5103
258	November 9, 2005 Grant, Bargain and Sale Deed; Doc #3306300 for Property Washoe County	Vol. 30, 5104–5105
260	January 7, 2016 Budget Summary – Panorama Drive	Vol. 30, 5106–5107
261	Mary 22, 2006 Compilation of Quotes and Invoices Quote of Valley Drapery	Vol. 30, 5108–5116
262	Photos of 8355 Panorama Home	Vol. 30, 5117–5151
263	Water Rights Deed (Document #4190152) between P. Morabito, E. Bayuk, Grantors, RCA Trust One Grantee (recorded 12/31/2012)	Vol. 30, 5152–5155

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Clerk's Trial Exhibit List (cont.)</b>		
265	October 1, 2010 Bank of America Wire Transfer –Bayuk – Morabito \$60,117	Vol. 30, 5156
266	October 1, 2010 Check #2354 from Bayuk to P. Morabito for \$29,383 for 8355 Panorama funding	Vol. 30, 5157–5158
268	October 1, 2010 Check #2356 from Bayuk to P. Morabito for \$12,763 for 370 Los Olivos Funding	Vol. 30, 5159–5160
269	October 1, 2010 Check #2357 from Bayuk to P. Morabito for \$31,284 for 371 El Camino Del Mar Funding	Vol. 30, 5161–5162
270	Bayuk Payment Ledger Support Documents Checks and Bank Statements	Vol. 31, 5163–5352
271	Bayuk Superpumper Contributions	Vol. 31, 5353–5358
272	May 14, 2012 email string between P. Morabito, Vacco, Bayuk, and S. Bernstein RE: Info for Laguna purchase	Vol. 31, 5359–5363
276	September 21, 2010 Appraisal of 8355 Panorama Drive Reno, NV by Alves Appraisal	Vol. 32, 5364–5400
277	Assessor's Map/Home Comparisons for 8355 Panorama Drive, Reno, NV	Vol. 32, 5401–5437
278	December 3, 2007 Case Docket for CV07-02764	Vol. 32, 5438–5564
280	May 25, 2011 Stipulation Regarding the Imposition of Punitive Damages; Case No. CV07-02764 (filed 05/25/2011)	Vol. 33, 5565–5570
281	Work File for September 24, 2010 Appraisal of 8355 Panorama Drive, Reno, NV	Vol. 33, 5571–5628
283	January 25, 2016 Expert Witness Report Leonard v. Superpumper Snowshoe	Vol. 33, 5629–5652

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Clerk's Trial Exhibit List (cont.)</b>		
284	February 29, 2016 Defendants' Rebuttal Expert Witness Disclosure	Vol. 33, 5653–5666
294	October 5, 2010 Lippes, Mathias Wexler Friedman, LLP, Invoices to P. Morabito	Vol. 33, 5667–5680
295	P. Morabito 2010 Tax Return (dated 10/16/2011)	Vol. 33, 5681–5739
296	December 31, 2010 Superpumper Inc. Note to Financial Statements	Vol. 33, 5740–5743
297	December 31, 2010 Superpumper Consultations	Vol. 33, 5744
300	September 20, 2010 email chain between Yalmanchili and Graber RE: Attorney Client Privileged Communication	Vol. 33, 5745–5748
301	September 15, 2010 email from Vacco to P. Morabito RE: Tomorrow	Vol. 33, 5749–5752
303	Bankruptcy Court District of Nevada Claims Register Case No. 13-51237	Vol. 33, 5753–5755
304	April 14, 2018 email from Allen to Krausz RE: Superpumper	Vol. 33, 5756–5757
305	Subpoena in a Case Under the Bankruptcy Code to Robison, Sharp, Sullivan & Brust issued in Case No. BK-N-13-51237-GWZ	Vol. 33, 5758–5768
306	August 30, 2018 letter to Mark Weisenmiller, Esq., from Frank Gilmore, Esq.,	Vol. 34, 5769
307	Order Granting Motion to Compel Compliance with the Subpoena to Robison, Sharp, Sullivan & Brust filed in Case No. BK-N-13-51237-GWZ	Vol. 34, 5770–5772
308	Response of Robison, Sharp, Sullivan & Brust's to Subpoena filed in Case No. BK-N-13-51237-GWZ	Vol. 34, 5773–5797



<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Clerk's Trial Exhibit List (cont.)</b>		
309	Declaration of Frank C. Gilmore in support of Robison, Sharp, Sullivan & Brust's Opposition to Motion for Order Holding Robison in Contempt filed in Case No. BK-N-13-51237-GWZ	Vol. 34, 5798–5801
Minutes of October 29, 2018, Non-Jury Trial, Day 1 (filed 11/08/2018)		Vol. 35, 5802–6041
Transcript of October 29, 2018, Non-Jury Trial, Day 1		Vol. 35, 6042–6045
Minutes of October 30, 2018, Non-Jury Trial, Day 2 (filed 11/08/2018)		Vol. 36, 6046–6283
Transcript of October 30, 2018, Non-Jury Trial, Day 2		Vol. 36, 6284–6286
Minutes of October 31, 2018, Non-Jury Trial, Day 3 (filed 11/08/2018)		Vol. 37, 6287–6548
Transcript of October 31, 2018, Non-Jury Trial, Day 3		Vol. 37, 6549–6552
Minutes of November 1, 2018, Non-Jury Trial, Day 4 (filed 11/08/2018)		Vol. 38, 6553–6814
Transcript of November 1, 2018, Non-Jury Trial, Day 4		Vol. 38, 6815–6817
Minutes of November 2, 2018, Non-Jury Trial, Day 5 (filed 11/08/2018)		Vol. 39, 6818–7007
Transcript of November 2, 2018, Non-Jury Trial, Day 5		Vol. 39, 7008–7011
Minutes of November 5, 2018, Non-Jury Trial, Day 6 (filed 11/08/2018)		Vol. 40, 7012–7167
Transcript of November 5, 2018, Non-Jury Trial, Day 6		Vol. 40, 7168–7169

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
Minutes of November 6, 2018, Non-Jury Trial, Day 7 (filed 11/08/2018)		Vol. 41, 7170–7269
Transcript of November 6, 2018, Non-Jury Trial, Day 7		Vol. 41, 7270–7272 Vol. 42, 7273–7474
Minutes of November 7, 2018, Non-Jury Trial, Day 8 (filed 11/08/2018)		Vol. 43, 7475–7476
Transcript of November 7, 2018, Non-Jury Trial, Day 8		Vol. 43, 7477–7615
Minutes of November 26, 2018, Non-Jury Trial, Day 9 (filed 11/26/2018)		Vol. 44, 7616
Transcript of November 26, 2018, Non-Jury Trial – Closing Arguments, Day 9		Vol. 44, 7617–7666 Vol. 45, 7667–7893
Plaintiff’s Motion to Reopen Evidence (filed 01/30/2019)		Vol. 46, 7894–7908
<b>Exhibits to Plaintiff’s Motion to Reopen Evidence</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Declaration of Gabrielle A. Hamm, Esq. in Support of Plaintiff’s Motion to Reopen	Vol. 46, 7909–7913
1-A	September 21, 2017 Declaration of Salvatore Morabito	Vol. 46, 7914–7916
1-B	Defendants’ Proposed Findings of Fact, Conclusions of Law, and Judgment (Nov. 26, 2018)	Vol. 46, 7917–7957
1-C	Judgment on the First and Second Causes of Action; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 123 (April 30, 2018)	Vol. 46, 7958–7962

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Plaintiff's Motion to Reopen Evidence (cont.)</b>		
1-D	Amended Findings of Fact and Conclusions of Law in Support of Judgment Regarding Plaintiffs' First and Second Causes of Action; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 126 (April 30, 2018)	Vol. 46, 7963–7994
1-E	Motion to Compel Compliance with the Subpoena to Robison Sharp Sullivan Brust; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 191 (Sept. 10, 2018)	Vol. 46, 7995–8035
1-F	Order Granting Motion to Compel Compliance with the Subpoena to Robison Sharp Sullivan Brust; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 229 (Jan. 3, 2019)	Vol. 46, 8036–8039
1-G	Response of Robison, Sharp, Sullivan & Brust[] To Subpoena (including RSSB_000001 – RSSB_000031) (Jan. 18, 2019)	Vol. 46, 8040–8067
1-H	Excerpts of Deposition Transcript of Sam Morabito as PMK of Snowshoe Petroleum, Inc. (Oct. 1, 2015)	Vol. 46, 8068–8076
Errata to: Plaintiff's Motion to Reopen Evidence (filed 01/30/2019)		Vol. 47, 8077–8080
<b>Exhibit to Errata to: Plaintiff's Motion to Reopen Evidence</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Plaintiff's Motion to Reopen Evidence	Vol. 47, 8081–8096

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
Ex Parte Motion for Order Shortening Time on Plaintiff's Motion to Reopen Evidence and for Expedited Hearing (filed 01/31/2019)		Vol. 47, 8097–8102
Order Shortening Time on Plaintiff's Motion to Reopen Evidence and for Expedited Hearing (filed 02/04/2019)		Vol. 47, 8103–8105
Supplement to Plaintiff's Motion to Reopen Evidence (filed 02/04/2019)		Vol. 47, 8106–8110
<b>Exhibits to Supplement to Plaintiff's Motion to Reopen Evidence</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Supplemental Declaration of Gabrielle A. Hamm, Esq. in Support of Plaintiff's Motion to Reopen Evidence (filed 02/04/2019)	Vol. 47, 8111–8113
1-I	Declaration of Frank C. Gilmore in Support of Robison, Sharp Sullivan & Brust's Opposition to Motion for Order Holding Robison in Contempt; Case No. 15-05019-GWZ (Bankr. D. Nev.), ECF No. 259 (Jan. 30, 2019)	Vol. 47, 8114–8128
Defendants' Response to Motion to Reopen Evidence (02/06/2019)		Vol. 47, 8129–8135
Plaintiff's Reply to Defendants' Response to Motion to Reopen Evidence (filed 02/07/2019)		Vol. 47, 8136–8143
Minutes of February 7, 2019 hearing on Motion to Reopen Evidence (filed 02/28/2019)		Vol. 47, 8144
Rough Draft Transcript of February 8, 2019 hearing on Motion to Reopen Evidence		Vol. 47, 8145–8158

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
[Plaintiff's Proposed] Findings of Fact, Conclusions of Law, and Judgment (filed 03/06/2019)		Vol. 47, 8159–8224
[Defendants' Proposed Amended] Findings of Fact, Conclusions of Law, and Judgment (filed 03/08/2019)		Vol. 47, 8225–8268
Minutes of February 26, 2019 hearing on Motion to Continue ongoing Non-Jury Trial (Telephonic) (filed 03/11/2019)		Vol. 47, 8269
Findings of Fact, Conclusions of Law, and Judgment (filed 03/29/2019)		Vol. 48, 8270–8333
Notice of Entry of Findings of Fact, Conclusions of Law, and Judgment (filed 03/29/2019)		Vol. 48, 8334–8340
Memorandum of Costs and Disbursements (filed 04/11/2019)		Vol. 48, 8341–8347
<b>Exhibit to Memorandum of Costs and Disbursements</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Ledger of Costs	Vol. 48, 8348–8370
Application for Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 04/12/2019)		Vol. 48, 8371–8384
<b>Exhibits to Application for Attorneys' Fees and Costs Pursuant to NRCP 68</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Declaration of Teresa M. Pilatowicz In Support of Plaintiff's Application for Attorney's Fees and Costs Pursuant to NRCP 68 (filed 04/12/2019)	Vol. 48, 8385–8390
2	Plaintiff's Offer of Judgment to Defendants (dated 05/31/2016)	Vol. 48, 8391–8397

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
3	Defendant's Rejection of Offer of Judgment by Plaintiff (dated 06/15/2016)	Vol. 48, 8398–8399
4	Log of time entries from June 1, 2016 to March 28, 2019	Vol. 48, 8400–8456
5	Plaintiff's Memorandum of Costs and Disbursements (filed 04/11/2019)	Vol. 48, 8457–8487
Motion to Retax Costs (filed 04/15/2019)		Vol. 49, 8488–8495
Plaintiff's Opposition to Motion to Retax Costs (filed 04/17/2019)		Vol. 49, 8496–8507
<b>Exhibits to Plaintiff's Opposition to Motion to Retax Costs</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Declaration of Teresa M. Pilatowicz In Support of Opposition to Motion to Retax Costs (filed 04/17/2019)	Vol. 49, 8508–8510
2	Summary of Photocopy Charges	Vol. 49, 8511–8523
3	James L. McGovern Curriculum Vitae	Vol. 49, 8524–8530
4	McGovern & Greene LLP Invoices	Vol. 49, 8531–8552
5	Buss-Shelger Associates Invoices	Vol. 49, 8553–8555
Reply in Support of Motion to Retax Costs (filed 04/22/2019)		Vol. 49, 8556–8562
Opposition to Application for Attorneys' Fees and Costs Pursuant to NRCPP 68 (filed 04/25/2019)		Vol. 49, 8563–8578
<b>Exhibit to Opposition to Application for Attorneys' Fees and Costs Pursuant to NRCPP 68</b>		

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibit</b>	<b>Document Description</b>	
1	Plaintiff's Bill Dispute Ledger	Vol. 49, 8579–8637
	Defendants, Salvatore Morabito, Snowshoe Petroleum, Inc., and Superpumper, Inc.'s Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60 (filed 04/25/2019)	Vol. 49, 8638–8657
	Defendant, Edward Bayuk's Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60 (filed 04/26/2019)	Vol. 50, 8658–8676
	<b>Exhibits to Edward Bayuk's Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCP 52, 59, and 60</b>	
<b>Exhibit</b>	<b>Document Description</b>	
1	February 27, 2019 email with attachments	Vol. 50, 8677–8768
2	Declaration of Frank C. Gilmore in Support of Edward Bayuk's Motion for New Trial (filed 04/26/2019)	Vol. 50, 8769–8771
3	February 27, 2019 email from Marcy Trabert	Vol. 50, 8772–8775
4	February 27, 2019 email from Frank Gilmore to <a href="mailto:eturner@Gtg.legal">eturner@Gtg.legal</a> RE: Friday Trial	Vol. 50, 8776–8777
	Plaintiff's Reply in Support of Application of Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 04/30/2019)	Vol. 50, 8778–8790
	<b>Exhibit to Plaintiff's Reply in Support of Application of Attorneys' Fees and Costs Pursuant to NRCP 68</b>	
<b>Exhibit</b>	<b>Document Description</b>	
1	Case No. BK-13-51237-GWZ, ECF Nos. 280, 282, and 321	Vol. 50, 8791–8835

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
Plaintiff's Opposition to Defendants' Motions for New Trial and/or to Alter or Amend Judgment (filed 05/07/2019)		Vol. 51, 8836–8858
Defendants, Salvatore Morabito, Snowshoe Petroleum, Inc., and Superpumper, Inc.'s Reply in Support of Motion for New Trial and/or to Alter or Amend Judgment Pursuant to NRCp 52, 59, and 60 (filed 05/14/2019)		Vol. 51, 8859–8864
Declaration of Edward Bayuk Claiming Exemption from Execution (filed 06/28/2019)		Vol. 51, 8865–8870
<b>Exhibits to Declaration of Edward Bayuk Claiming Exemption from Execution</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Copy of June 22, 2019 Notice of Execution and two Write of Executions	Vol. 51, 8871–8896
2	Declaration of James Arthur Gibbons Regarding his Attestation, Witness and Certification on November 12, 2005 of the Spendthrift Trust Amendment to the Edward William Bayuk Living Trust (dated 06/25/2019)	Vol. 51, 8897–8942
Notice of Claim of Exemption from Execution (filed 06/28/2019)		Vol. 51, 8943–8949
Edward Bayuk's Declaration of Salvatore Morabito Claiming Exemption from Execution (filed 07/02/2019)		Vol. 51, 8950–8954
<b>Exhibits to Declaration of Salvatore Morabito Claiming Exemption from Execution</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Las Vegas June 22, 2019 letter	Vol. 51, 8955–8956
2	Writs of execution and the notice of execution	Vol. 51, 8957–8970



<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
Minutes of June 24, 2019 telephonic hearing on Decision on Submitted Motions (filed 07/02/2019)		Vol. 51, 8971–8972
Salvatore Morabito’s Notice of Claim of Exemption from Execution (filed 07/02/2019)		Vol. 51, 8973–8976
Edward Bayuk’s Third Party Claim to Property Levied Upon NRS 31.070 (filed 07/03/2019)		Vol. 51, 8977–8982
Order Granting Plaintiff’s Application for an Award of Attorneys’ Fees and Costs Pursuant to NRCP 68 (filed 07/10/2019)		Vol. 51, 8983–8985
Order Granting in part and Denying in part Motion to Retax Costs (filed 07/10/2019)		Vol. 51, 8986–8988
Plaintiff’s Objection to (1) Claim of Exemption from Execution and (2) Third Party Claim to Property Levied Upon, and Request for Hearing Pursuant to NRS 21.112 and 31.070(5) (filed 07/11/2019)		Vol. 52, 8989–9003
<b>Exhibits to Plaintiff’s Objection to (1) Claim of Exemption from Execution and (2) Third Party Claim to Property Levied Upon, and Request for Hearing Pursuant to NRS 21.112 and 31.070(5)</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Declaration of Gabrielle A. Hamm, Esq.	Vol. 52, 9004–9007
2	11/30/2011 Tolling Agreement – Edward Bayuk	Vol. 52, 9008–9023
3	11/30/2011 Tolling Agreement – Edward William Bayuk Living Trust	Vol. 52, 9024–9035
4	Excerpts of 9/28/2015 Deposition of Edward Bayuk	Vol. 52, 9036–9041

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Plaintiff's Objection (cont.)</b>		
5	Edward Bayuk, as Trustee of the Edward William Bayuk Living Trust's Responses to Plaintiff's First Set of Requests for Production, served 9/24/2015	Vol. 52, 9042–9051
6	8/26/2009 Grant Deed (Los Olivos)	Vol. 52, 9052–9056
7	8/17/2018 Grant Deed (El Camino)	Vol. 52, 9057–9062
8	Trial Ex. 4 (Confession of Judgment)	Vol. 52, 9063–9088
9	Trial Ex. 45 (Purchase and Sale Agreement, dated 9/28/2010)	Vol. 52, 9089–9097
10	Trial Ex. 46 (First Amendment to Purchase and Sale Agreement, dated 9/29/2010)	Vol. 52, 9098–9100
11	Trial Ex. 51 (Los Olivos Grant Deed recorded 10/8/2010)	Vol. 52, 9101–9103
12	Trial Ex. 52 (El Camino Grant Deed recorded 10/8/2010)	Vol. 52, 9104–9106
13	Trial Ex. 61 (Membership Interest Transfer Agreement, dated 10/1/2010)	Vol. 52, 9107–9114
14	Trial Ex. 62 (\$1,617,050.00 Promissory Note)	Vol. 52, 9115–9118
15	Trial Ex. 65 (Mary Fleming Grant Deed recorded 11/4/2010)	Vol. 52, 9119–9121
Notice of Entry of Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment (filed 07/16/2019)		Vol. 52, 9122–9124

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibit to Notice of Entry of Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Order Denying Defendants' Motions for New Trial and/or to Alter or Amend Judgment (filed 07/10/2019)	Vol. 52, 9125–9127
Notice of Entry of Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 07/16/2019)		Vol. 52, 9128–9130
<b>Exhibit to Notice of Entry of Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Order Granting Plaintiff's Application for an Award of Attorneys' Fees and Costs Pursuant to NRCP 68 (filed 07/10/2019)	Vol. 52, 9131–9134
Notice of Entry of Order Granting in Part and Denying in Part Motion to Retax Costs (filed 07/16/2019)		Vol. 52, 9135–9137
<b>Exhibit to Notice of Entry of Order Granting in Part and Denying in Part Motion to Retax Costs</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Order Granting in Part and Denying in Part Motion to Retax Costs (filed 07/10/2019)	Vol. 52, 9138–9141
Plaintiff's Objection to Notice of Claim of Exemption from Execution Filed by Salvatore Morabito and Request for Hearing (filed 07/16/2019)		Vol. 52, 9142–9146
Reply to Objection to Claim of Exemption and Third Party Claim to Property Levied Upon (filed 07/17/2019)		Vol. 52, 9147–9162

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Reply to Objection to Claim of Exemption and Third Party Claim to Property Levied Upon</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	March 3, 2011 Deposition Transcript of P. Morabito	Vol. 52, 9163–9174
2	Mr. Bayuk’s September 23, 2014 responses to Plaintiff’s first set of requests for production	Vol. 52, 9175–9180
3	September 28, 2015 Deposition Transcript of Edward Bayuk	Vol. 52, 9181–9190
Reply to Plaintiff’s Objection to Notice of Claim of Exemption from Execution (filed 07/18/2019)		Vol. 52, 9191–9194
Declaration of Service of Till Tap, Notice of Attachment and Levy Upon Property (filed 07/29/2019)		Vol. 52, 9195
Notice of Submission of Disputed Order Denying Claim of Exemption and Third Party Claim (filed 08/01/2019)		Vol. 52, 9196–9199
<b>Exhibits to Notice of Submission of Disputed Order Denying Claim of Exemption and Third Party Claim</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Plaintiff’s Proposed Order Denying Claim of Exemption and Third-Party Claim	Vol. 52, 9200–9204
2	Bayuk and the Bayuk Trust’s proposed Order Denying Claim of Exemption and Third-Party Claim	Vol. 52, 9205–9210
3	July 30, 2019 email evidencing Bayuk, through counsel Jeffrey Hartman, Esq., requesting until noon on July 31, 2019 to provide comments.	Vol. 52, 9211–9212

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Notice of Submission of Disputed Order (cont.)</b>		
4	July 31, 2019 email from Teresa M. Pilatowicz, Esq. Bayuk failed to provide comments at noon on July 31, 2019, instead waiting until 1:43 p.m. to send a redline version with proposed changes after multiple follow ups from Plaintiff's counsel on July 31, 2019	Vol. 52, 9213–9219
5	A true and correct copy of the original Order and Bayuk Changes	Vol. 52, 9220–9224
6	A true and correct copy of the redline run by Plaintiff accurately reflecting Bayuk's proposed changes	Vol. 52, 9225–9229
7	Email evidencing that after review of the proposed revisions, Plaintiff advised Bayuk, through counsel, that Plaintiff agree to certain proposed revisions, but the majority of the changes were unacceptable as they did not reflect the Court's findings or evidence before the Court.	Vol. 52, 9230–9236
Objection to Plaintiff's Proposed Order Denying Claim of Exemption and Third Party Claim (filed 08/01/2019)		Vol. 53, 9237–9240
<b>Exhibits to Objection to Plaintiff's Proposed Order Denying Claim of Exemption and Third-Party Claim</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Plaintiff's Proposed Order Denying Claim of Exemption and Third-Party Claim	Vol. 53, 9241–9245
2	Defendant's comments on Findings of Fact	Vol. 53, 9246–9247
3	Defendant's Proposed Order Denying Claim of Exemption and Third-Party Claim	Vol. 53, 9248–9252

<u><b>DOCUMENT DESCRIPTION</b></u>		<u><b>LOCATION</b></u>
Minutes of July 22, 2019 hearing on Objection to Claim for Exemption (filed 08/02/2019)		Vol. 53, 9253
Order Denying Claim of Exemption (filed 08/02/2019)		Vol. 53, 9254–9255
Bayuk’s Case Appeal Statement (filed 08/05/2019)		Vol. 53, 9256–9260
Bayuk’s Notice of Appeal (filed 08/05/2019)		Vol. 53, 9261–9263
Defendants, Superpumper, Inc., Edward Bayuk, Salvatore Morabito; and Snowshoe Petroleum, Inc.’s, Case Appeal Statement (filed 08/05/2019)		Vol. 53, 9264–9269
Defendants, Superpumper, Inc., Edward Bayuk, Salvatore Morabito; and Snowshoe Petroleum, Inc.’s, Notice of Appeal (filed 08/05/2019)		Vol. 53, 9270–9273
<b>Exhibits to Defendants, Superpumper, Inc., Edward Bayuk, Salvatore Morabito; and Snowshoe Petroleum, Inc.’s, Notice of Appeal</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Findings of Fact, Conclusions of Law, and Judgment (filed 03/29/2019)	Vol. 53, 9274–9338
2	Order Denying Defendants’ Motions for New Trial and/or to Alter or Amend Judgment (filed 07/10/2019)	Vol. 53, 9339–9341
3	Order Granting in Part and Denying in Part Motion to Retax Costs (filed 07/10/2019)	Vol. 53, 9342–9345
4	Order Granting Plaintiff’s Application for an Award of Attorneys’ Fees and Costs Pursuant to NRCF 68 (filed 07/10/2019)	Vol. 53, 9346–9349

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
Plaintiff's Reply to Defendants' Objection to Plaintiff's Proposed Order Denying Claim of Exemption and Third-Party Claim		Vol. 53, 9350–9356
Order Denying Claim of Exemption and Third-Party Claim (08/09/2019)		Vol. 53, 9357–9360
Notice of Entry of Order Denying Claim of Exemption and Third-Party Claim (filed 08/09/2019)		Vol. 53, 9361–9364
<b>Exhibit to Notice of Entry of Order Denying Claim of Exemption and Third-Party Claim</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Order Denying Claim of Exemption and Third-Party Claim (08/09/2019)	Vol. 53, 9365–9369
Notice of Entry of Order Denying Claim of Exemption (filed 08/12/2019)		Vol. 53, 9370–9373
<b>Exhibit to Notice of Entry of Order Denying Claim of Exemption</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Order Denying Claim of Exemption (08/02/2019)	Vol. 53, 9374–9376
Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration (filed 08/19/2019)		Vol. 54, 9377–9401
<b>Exhibits to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Order Denying Claim of Exemption and Third Party Claim (filed 08/09/19)	Vol. 54, 9402–9406

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Motion to Make Amended (cont.)</b>		
2	Spendthrift Trust Amendment to the Edward William Bayuk Living Trust (dated 11/12/05)	Vol. 54, 9407–9447
3	Spendthrift Trust Agreement for the Arcadia Living Trust (dated 10/14/05)	Vol. 54, 9448–9484
4	Fifth Amendment and Restatement of the Trust Agreement for the Arcadia Living Trust (dated 09/30/10)	Vol. 54, 9485–9524
5	P. Morabito's Supplement to NRCP 16.1 Disclosures (dated 03/01/11)	Vol. 54, 9525–9529
6	Transcript of March 3, 2011 Deposition of P. Morabito	Vol. 55, 9530–9765
7	Documents Conveying Real Property	Vol. 56, 9766–9774
8	Transcript of July 22, 2019 Hearing	Vol. 56, 9775–9835
9	Tolling Agreement JH and P. Morabito (partially executed 11/30/11)	Vol. 56, 9836–9840
10	Tolling Agreement JH and Arcadia Living Trust (partially executed 11/30/11)	Vol. 56, 9841–9845
11	Excerpted Pages 8–9 of Superpumper Judgment (filed 03/29/19)	Vol. 56, 9846–9848
12	Petitioners' First Set of Interrogatories to Debtor (dated 08/13/13)	Vol. 56, 9849–9853
13	Tolling Agreement JH and Edward Bayuk (partially executed 11/30/11)	Vol. 56, 9854–9858
14	Tolling Agreement JH and Bayuk Trust (partially executed 11/30/11)	Vol. 56, 9859–9863
15	Declaration of Mark E. Lehman, Esq. (dated 03/21/11)	Vol. 56, 9864–9867



<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Motion to Make Amended (cont.)</b>		
16	Excerpted Transcript of October 20, 2015 Deposition of Dennis C. Vacco	Vol. 56, 9868–9871
17	Assignment and Assumption Agreement (dated 07/03/07)	Vol. 56, 9872–9887
18	Order Denying Morabito’s Claim of Exemption (filed 08/02/19)	Vol. 56, 9888–9890
Errata to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration (filed 08/20/2019)		Vol. 57, 9891–9893
Plaintiff’s Opposition to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 08/30/2019)		Vol. 57, 9894–9910
Errata to Plaintiff’s Opposition to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 08/30/2019)		Vol. 57, 9911–9914
<b>Exhibits to Errata to Plaintiff’s Opposition to Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs Pursuant to NRS 7.085</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Declaration of Gabrielle A. Hamm, Esq.	Vol. 57, 9915–9918
2	Plaintiff’s Amended NRCP 16.1 Disclosures (February 19, 2016)	Vol. 57, 9919–9926

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
<b>Exhibits to Errata (cont.)</b>		
3	Plaintiff's Fourth Supplemental NRCP 16.1 Disclosures (November 15, 2016)	Vol. 57, 9927–9930
4	Plaintiff's Fifth Supplemental NRCP 16.1 Disclosures (December 21, 2016)	Vol. 57, 9931–9934
5	Plaintiff's Sixth Supplemental NRCP 16.1 Disclosures (March 20, 2017)	Vol. 57, 9935–9938
Reply in Support of Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs (filed 09/04/2019)		Vol. 57, 9939–9951
<b>Exhibits to Reply in Support of Motion to Make Amended or Additional Findings Under NRCP 52(b), or, In the Alternative, Motion for Reconsideration, and Countermotion for Fees and Costs</b>		
<b>Exhibit</b>	<b>Document Description</b>	
19	Notice of Submission of Disputed Order Denying Claim of Exemption and Third Party Claim (filed 08/01/19)	Vol. 57, 9952–9993
20	Notice of Submission of Disputed Order Denying Claim of Exemption and Third Party Claim (filed 08/01/19)	Vol. 57, 9994–10010
Order Denying Defendants' Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration and Denying Plaintiff's Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 11/08/2019)		Vol. 57, 10011–10019
Bayuk's Case Appeal Statement (filed 12/06/2019)		Vol. 57, 10020–10026

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
Bayuk's Notice of Appeal (filed 12/06/2019)		Vol. 57, 10027–10030
<b>Exhibits to Bayuk's Notice of Appeal</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Order Denying [Morabito's] Claim of Exemption (filed 08/02/19)	Vol. 57, 10031–10033
2	Order Denying [Bayuk's] Claim of Exemption and Third Party Claim (filed 08/09/19)	Vol. 57, 10034–10038
3	Order Denying Defendants' Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration and Denying Plaintiff's Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 11/08/19)	Vol. 57, 10039–10048
Notice of Entry of Order Denying Defendants' Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration and Denying Plaintiff's Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 12/23/2019)		Vol. 57, 10049–10052
<b>Exhibit to Notice of Entry of Order</b>		
<b>Exhibit</b>	<b>Document Description</b>	
A	Order Denying Defendants' Motion to Make Amended or Additional Findings Under NRCP 52(b), or, in the Alternative, Motion for Reconsideration and Denying Plaintiff's Countermotion for Fees and Costs Pursuant to NRS 7.085 (filed 11/08/19)	Vol. 57, 10053–10062

<b><u>DOCUMENT DESCRIPTION</u></b>		<b><u>LOCATION</u></b>
District Court Docket Case No. CV13-02663		Vol. 57, 10063–10111
Notice of Claim of Exemption and Third-Party Claim to Property Levied Upon, Case No. CV13-02663 (filed 08/25/2020)		Vol. 58, 10112–10121
<b>Exhibits to Notice of Claim of Exemption and Third-Party Claim to Property Levied Upon</b>		
<b>Exhibit</b>	<b>Document Description</b>	
1	Writ of Execution, Case No. CV13-02663 (filed 07/21/2020)	Vol. 58, 10123–10130
2	Superior Court of California, Orange County Docket, Case No. 30-2019-01068591-CU-EN-CJC	Vol. 58, 10131–10139
3	Spendthrift Trust Amendment to the Edward William Bayuk Living Trust (dated 11/12/2005)	Vol. 58, 10140–10190

1 **3795**  
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10 Attorneys for Defendants Snowshoe Petroleum,  
11 Inc., Superpumper, Inc., Edward Bayuk, individually  
12 and as Trustee of the Edward William Bayuk Living  
13 Trust, and Salvatore Morabito.

14 **IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA**  
15 **IN AND FOR THE COUNTY OF WASHOE**

16 WILLIAM A. LEONARD, Trustee for the  
17 Bankruptcy Estate of Paul Anthony Morabito

CASE NO.: CV13-02663

DEPT. NO.: B1

18 Plaintiffs,

19 vs.

20 SUPERPUMPER, INC., an Arizona corporation;  
21 EDWARD BAYUK, individually and as Trustee  
22 of the EDWARD WILLIAM BAYUK LIVING  
23 TRUST; SALVATORE MORABITO, an  
24 individual; and SNOWSHOE PETROLEUM,  
25 INC., a New York corporation,

26 Defendants.

27 **REPLY IN SUPPORT OF MOTION TO QUASH SUBPOENA, OR, IN THE**  
28 **ALTERNATIVE, FOR A PROTECTIVE ORDER PRECLUDING TRUSTEE FROM**  
**SEEKING DISCOVERY FROM HODGSON RUSS LLP, AND OPPOSITION TO**  
**MOTION FOR SANCTIONS**

29 Defendants SUPERPUMPER, INC., EDWARD BAYUK, individually and as Trustee of  
30 the EDWARD WILLIAM BAYUK LIVING TRUST, SALVATORE MORABITO, and  
31 SNOWSHOE PETROLEUM, INC. (collectively, "Defendants") hereby reply in support of their  
32 Motion to quash the subpoena, or, in the alternative, enter a protective order regarding the  
33 subpoena issued to non-party HODGSON RUSS LLP ("HR") by plaintiff WILLIAM A.

Robison, Belaustegui,  
Sharp & Low  
71 Washington St.  
Reno, NV 89503  
(775) 329-3151

1 LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito ("Trustee"). Defendants  
2 also oppose the Trustee's Motion for Sanctions. This Reply is made and supported by the  
3 Memorandum of Points and Authorities, and the Declaration of Salvatore Morabito.

4 **MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY**

5 **I. INTRODUCTION**

6 Nearly everything the Trustee argued in his Opposition memorandum is either plainly false,  
7 or completely misses the point of the Defendants' Motion. Months prior to the close of discovery,  
8 the Trustee was in possession of considerable evidence that Hodgson Russ ("HR") was involved in  
9 the transfers. The Trustee ignored that information, or deemed it not important. Either way, it is  
10 the Trustee's job to exercise diligence in discovery to subpoena and examine all evidence the  
11 Trustee deems important. That duty never shifts to the Defendants.

12 Second, a foundational principle of an attorney's role as an officer of the Court is to  
13 vigilantly protect the agreements made between counsel, not to sand-bag, or bait-and-switch.  
14 Counsel made an enforceable agreement to limit the HR depositions. Everything that was filed and  
15 served after the agreement was subject to that agreement. Defendants had no reason to object to the  
16 amended notice or the stipulation, because the scope of the HR deposition was already set by  
17 agreement. Had no agreement been reached in January, the Motion for Protective Order would  
18 have been immediately filed and nothing further would have occurred.

19 Third, the Trustee's argument the Defendants lack standing to move to quash the subpoena  
20 is plainly ridiculous. Any party to litigation has standing to seek redress from a discovery abuse,  
21 which this certainly is. NRCP 26(c). Under the Trustee's reading of the Rules, even the most  
22 blatant disregard of the close of discovery could not be remedied by a motion by the other parties.  
23 Such a contention has no basis in common sense. Certainly a party aggrieved by untimely  
24 discovery has standing to request the Court intervene and prevent the discovery abuses. If, as the  
25 Trustee contends, the Defendants (who are the only other parties in the case) don't have standing to  
26 address discovery violations, it begs the question who the Trustee would contend does have  
27 standing.

28 The ridiculousness of the Trustee's position aside, it is undisputed that the Trustee noticed

1 the HR deposition after the close of discovery. This is not a run-of-the-mill subpoena objection  
2 under Rule 45. It is undisputed that the limitation on the extension of discovery was for only those  
3 things which the Trustee could not have investigated prior to the close of discovery. NRCP 26(c)  
4 expressly authorizes a party to seek a protective order to avoid “annoyance, embarrassment,  
5 oppression, or undue burden or expense,” which this certainly has become. Noticing a deposition  
6 after the close of discovery qualifies as undue burden and expense under Rule 26.

7 In sum, the Trustee cannot deny – and does not even try to deny – that he was in possession  
8 of the information which identified HR as a potential witness, and that the Trustee ignored the  
9 information or deemed it immaterial. Either way, the Trustee failed to exercise requisite diligence  
10 prior to the close of discovery. When Defendants objected to the subpoena and demanded a meet  
11 and confer, the agreement was reached between counsel in order to avoid motion practice on the  
12 untimely-served subpoena. Now, despite an email confirmation of the agreement reached in the  
13 meet and confer, the Trustee shockingly disavows the agreement, and goes so far to claim that  
14 Defendants were dilatory in their objections. The Motion to Quash should be granted.

15 A. **The Trustee’s Excuse that “HR’s involvement in the fraudulent transfers was**  
16 **not disclosed until production of the Vacco Emails” is absolutely, patently, and**  
**demonstrably false.**

17 The Trustee’s primary contention that “HR’s involvement in the fraudulent transfers was  
18 not disclosed until production of the Vacco Emails” is absolutely, patently, and demonstrably false.  
19 (Opposition, p.3:12-14). On July 10, 2015, months before discovery closed, undersigned counsel  
20 transmitted pages of Lippes billing records filled with references to Hodgson Russ, Sujata  
21 Yalamanchili, and Gary Graber’s involvement in the transfers. See EXHIBIT 12 to the Motion  
22 (LMWF 000533-535, 540). The Trustee ignored the records until after the close of discovery. This  
23 is the crux of the entire dispute, and a point which the Trustee entirely ignores in his Opposition. It  
24 is not the Defendants’ obligation to spoon-feed the Trustee with what may or may not be important  
25 to the Trustee’s case. The Rules of Civil Procedure, and the authorities applying it are clear on this  
26 point: the plaintiff has the duty to exercise reasonable diligence in pursuing the entire discovery that  
27 the Trustee deems important. The Trustee now asks the Court to excuse the lack of diligence  
28 without any just cause.

1                   1.     *The Trustee, and Not Defendants, Maintains the Obligation to Conduct the*  
2                             *Discovery He Deems Important.*

3             Subpoenas are a form of discovery that must be exercised during the discovery period. See  
4     *Integra Life Sciences i, Ltd. v. Merk KGaA*, 190 F.R.D. 556, 561 (S. D. Ca. 1999). In the present  
5     case, discovery closed on March 31, 2016, with a limited extension agreed upon to allow for  
6     discovery of information that could not have been reasonably known or knowable prior to the  
7     disclosure of the Vacco documents and testimony. Accordingly, the parties' were not permitted to  
8     serve subpoenas or any other form of discovery past March 31, 2016, unless for the purpose of  
9     obtaining information that could not have been reasonably known or knowable prior to the  
10    disclosure of the Vacco documents. A party is required to "exercise diligence" in regards to the  
11    discovery process and the pretrial schedule. *Id.* at 559–61. In *Integra*, that Court found that an  
12    important piece of information, a 1984 article, which was not formally disclosed, but was provided  
13    in the mix of discovery, did *not* entitle the party to an extension of the close of discovery. *Id.* at  
14    560. The Court in *Integra* found that the information at issue was "well known" to the parties  
15    because, prior to the close of discovery, the article was cited and referred to in various discovery  
16    disclosed. *Id.* The court further held that a party is not entitled to an extension of discovery due  
17    only to inattentiveness to the discovery provided to it, which could have been reviewed for  
18    information but was not. *Id.* at 560–61.

19            In the present case, like in *Integra*, HR's identity and involvement was disclosed to the  
20    Trustee far in advance of the close of discovery and through multiple sources; this information was  
21    or should have been "well known" to the Trustee. Further, the Trustee was required to exercise due  
22    diligence in reviewing the discovery information provided to it, during the discovery period.

23                   2.     *Defendants Were Unaware of HR's Involvement in the Transfers and Would*  
24                             *Not Have Had Any Reason to Identify HR as a Potential Witness.*

25            Hodgson Russ never represented the Defendants in their individual capacity. (See  
26    Declaration of Salvatore Morabito, ¶3)("Salvatore Decl."). From approximately 2002-2007, HR  
27    was corporate counsel for companies in which Bayuk and Sam Morabito held minority interests,  
28    but HR was not their personal counsel, and Defendants never discussed issues related to the



1 transfers with any attorney at HR. *Id.* at ¶4. Lippes was the Defendants' counsel that assisted with  
2 the transfers.. *Id.* at ¶5. HR was Paul Morabito's counsel, and the Trustee knew that. See Exhibits  
3 5-12 to the Motion. Defendants were not aware of HR's role in the transfers until recently and had  
4 no reason to include HR as potential witnesses in the case. Salvatore Decl., ¶6. Importantly, the  
5 Defendants have never been under an affirmative obligation to investigate the Trustee's case for  
6 him.

7 The Nevada Rules of Civil Procedure ("NRCPP") do not require Defendants to do the  
8 Trustee's work for them; instead it requires Defendants to provide the names of individuals "then  
9 known or reasonably known to have knowledge of any facts relevant." NRCPP 16.1(b)(5). Parties  
10 must supplement these disclosures if a party learns that the disclosure was incomplete. NRCPP 26  
11 (e)(1). Information to correct any shortcomings of the initial disclosures made known during the  
12 discovery process "will provide the functional equivalent of the information required" See *Poitra*  
13 *v. School Dis. No. 1 in the County of Denver*, 311 F. R. D. 659, 666 (D. Colo 2015)(applying FRCP  
14 26).

15 The facts show that there was no failure to comply with the NRCPP, including NRCPP 16.1.  
16 The Defendants effectively supplemented their disclosures in regards to HR when HR's identity  
17 and involvement was disclosed to the Defendants in productions to the Trustee. Defendants were  
18 not themselves involved with HR, and therefore did not know the extent of HR's involvement.  
19 Nonetheless, even if Defendants did not fully effectuate the initial disclosures, that does not provide  
20 a sufficient basis to warrant an extension of discovery in this case because the Trustee knew -- or  
21 could have known with review of the discovery -- the identity and likely the involvement of HR.  
22 Where a party failed to comply with a 16.1 requirement, but that failure did not inhibit the opposing  
23 party's ability to try its case, the Court found that the opposing party's rights were not substantially  
24 affected. *Pizarro-Ortega v. Cervantes-Lopez; Avarca*, 133 Nev., Adv. Op. 37, 2 (2017). In  
25 *Pizarro-Ortega*, a party failed to provide a computation of future medical expenses before having a  
26 doctor testify as to them, but the Court found that because the same information could be obtained  
27 through opposing party's own expert doctor there was not a material effect to opposing party's  
28 substantial rights. *Id.*, at 8. Thus, where a party can obtain important information outside of the

1 disclosures, an inadvertent failure to formally update one's disclosures does not substantially harm  
2 or afford opposing party additional privileges.

3 Here, like in *Pizarro-Ortega*, Defendants did not initially disclose HR as an entity likely to  
4 have discoverable information. And, like in *Pizarro-Ortega*, the Trustee had alternative methods to  
5 obtain this information outside of the initial disclosures, through even cursory examination of the  
6 documents in his possession.

7 Moreover, the Trustee's recited facts on this issue are plainly wrong. The Initial Disclosures  
8 first provided by Defendants was on December 1, 2014 – not 2015, as the Trustee contends.  
9 (Opposition, p.4 ¶2). The Plaintiffs conducted no discovery on the case between December 2014  
10 and June 2015, because the Herbst parties (who filed the action after they commenced the  
11 involuntary bankruptcy), were awaiting appointment of their Trustee to substitute in as the Plaintiff.  
12 Paul Morabito was never an active Defendant in the case because the bankruptcy §362 Automatic  
13 Stay prevented the Herbst from pursuing him at any point in time. In June 2015, Paul Morabito  
14 was formally dismissed from the case. The case has always been managed by the Defendants, who  
15 had no knowledge of HR's involvement, and had no reason or obligation to identify HR on their list  
16 of witnesses. The Trustee, on the other hand, has no such excuse. The Trustee was provided ample  
17 proof of HR's involvement, which the Trustee could have, and should have followed-up had he  
18 deemed it necessary. This failure of diligence was on the Trustee, and not on the Defendants.

19 **B. The Trustee's Contentions About Defendants' Failure to Timely Object To the**  
20 **HR Subpoena Is So Disingenuous as to Be Sanctionable.**

21 The only three facts that matter here are: (1) when the Trustee served the HR subpoena,  
22 Defendants counsel immediately sent an email, "Please explain why this deposition is being noticed  
23 in violation of the close of discovery" and demanded a meet and confer; (2) counsel met and  
24 conferred about the subpoena and the deposition and Trustee's counsel agreed to provide the emails  
25 she intended to use in the deposition; (3) the parties reached an agreement when Defendants had no  
26 objection to the "e-mails that [Trustee] intend to discuss at the deposition of Hodgson Russ."  
27 (Exhibit 5 to the Motion). Once the parties reached an agreement as to the limitation of the  
28 deposition, Defendants had no need nor desire to object to the subpoena or the Notice of

1 Deposition, or the stipulations extending discovery. All of those were served and filed AFTER the  
2 meet and confer agreement. Why should Defendants object to the formalities of the subpoena and  
3 deposition if there was an agreement in place as to the appropriate scope? The Trustee's argument  
4 makes no sense in this regard. The Trustee's arguments about the deposition being scheduled  
5 without Defendants' objections, or objections to the limited stipulation to extend discovery, are all  
6 irrelevant. The Trustee and the Defendants reached an enforceable agreement as to the limitation of  
7 the scope of the deposition in order to avoid motion practice. Everything that was filed or served  
8 after the agreement was part and parcel to the agreement.

9 C. **The Defendants Did Not Suspend the Deposition On the Issue of Attorney-**  
10 **Client Privilege and Defendants Did Not Instruct Any Witness Not to Answer**  
11 **Any Questions. Defendants Entered the Objection Merely to Preserve the**  
12 **Record.**

13 In an unprecedented ruling which has no support in the law, nor the support of any reported  
14 cases anywhere in the Ninth Circuit, Judge Zive of the United States Bankruptcy Court, waived  
15 Paul Morabito's personal attorney-client privilege as to Lippes Mathias. See Recommendation for  
16 Order, June 13, 2016, citing Judge Zive's February 3, 2016, Order. Based on that ruling, the  
17 Trustee invaded the privilege and obtained testimony and documents from Lippes. Judge Zive's  
18 Order did not include waiver of Paul Morabito's privilege as to HR. Instead, the Trustee carries  
19 around the Order waiving the Lippes privilege, which was obtained based on the Court's  
20 examination of specific facts related to Lippes, and the Trustee uses that to claim that all the  
21 privileges held by Morabito are waived. The Orders notwithstanding, the Defendants do not intend  
22 to concede that the waiver was appropriate, or that the waiver will not, at some point when the  
23 appellate issues are available, be reversed by the Ninth Circuit or the Supreme Court of the State of  
24 Nevada. Accordingly, it behooves Defendants to enter their objections for the record to preserve  
25 their objections pending appeal. Defendants maintain the objection and will raise it at the  
26 appropriate appellate level.

27 Defendants do not seek a protective order on the basis of the attorney-client privilege, and  
28 the Defendants did not suspend the deposition on that basis, and the Trustee knows this. See  
Opposition Ex. A-11, p.17.

1           **D.    Defendants' Suspension of the Deposition was Justified; No Sanction Against**  
2           **Defendants is Warranted.**

3           The Trustee sandbagged the Defendants. Of this there can be no genuine dispute.  
4           Sandbagging often works because the opposing parties and counsel know that the price of objecting  
5           to unscrupulous sand-bagging conduct can be high. This is particularly true where the parties have  
6           traveled long distances for the deposition and the risk of imprudently suspending a deposition  
7           comes with it the likelihood of sanctions. Notwithstanding these risks, the Defendants were  
8           compelled to suspend the deposition. Where, as here, counsel had reached an agreement, solidified  
9           in an undisputed email, as to the scope of the deposition, and then made clear that she did not feel  
10          bound by the agreement to limit the deposition according to the agreement, Defendants were well  
11          within their rights to object. Defendants should not be punished or exercising the right to require  
12          the Trustee to maintain his meet and confer agreement. The deposition was suspended not because  
13          of the fear of any testimony being elicited – else Defendants would have objected to the Deposition  
14          back in January irrespective of the scope – but because the Trustee confirmed his intent to exceed  
15          the agreed-upon scope when counsel inquired about the 30(b)(6) topic areas which were clearly  
16          outside the scope of the limitation agreement. No sanctions are warranted against Defendants. To  
17          the contrary, if a limited scope deposition is to occur, the Trustee should be compelled to cover the  
18          Defendants' costs so that the appropriate scope deposition, which the parties agreed to, can occur.

19          **III.    CONCLUSION**

20          For the foregoing reasons, Defendants respectfully request that this Court enter an order  
21          quashing the HR subpoena, or in the alternative, enter a protective order, limiting the scope of the  
22          HR deposition pursuant to the meet and confer, along with an award of costs and fees to Defendants  
23          associated with another trip to Buffalo to complete the HR depositions.

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**AFFIRMATION**  
**Pursuant to NRS 239B.030**

The undersigned does hereby affirm that this document does not contain the social security number of any person.

DATED this 3<sup>rd</sup> day of August, 2017.

ROBISON, BELAUSTEGUI, SHARP & LOW  
A Professional Corporation  
71 Washington Street  
Reno, Nevada 89503

/s/ Frank C. Gilmore  
FRANK C. GILMORE, ESQ.  
Attorneys for Defendants Snowshoe Petroleum,  
Inc., Superpumper, Inc., Edward Bayuk, individually  
and as Trustee of the Edward William Bayuk Living  
Trust, and Salvatore Morabito

1  
2 **DECLARATION OF SALVATORE MORABITO IN SUPPORT OF REPLY IN SUPPORT**  
3 **OF MOTION TO QUASH SUBPOENA, OR, IN THE ALTERNATIVE, FOR A**  
4 **PROTECTIVE ORDER PRECLUDING TRUSTEE FROM SEEKING DISCOVERY**  
5 **FROM HODGSON RUSS LLP, AND OPPOSITION TO MOTION FOR SANCTIONS**

6 I, SALVATORE MORABITO, being first duly sworn under penalty of perjury, depose and  
7 say:

8 1. I am an individual above the age of 18 and make the following statements on my  
9 own personal knowledge, except where stated to be on my information and belief.

10 2. I am one of the Defendants in this case and am represented by Frank C. Gilmore,  
11 Esq. and Robison, Belaustegui, Sharp & Low.

12 3. Hodgson Russ ("HR") never represented me or Edward Bayuk in our individual  
13 capacities.

14 4. HR was corporate counsel for companies in which Bayuk and I held minority  
15 interests from approximately, on information and belief, 2002 until the sale of Berry-Hinckley in  
16 2007, but HR was not my personal counsel, and I never discussed issues related to the transfers  
17 with any attorney at HR.

18 5. Lippes Mathias Wexler Friedman were my counsel that assisted me with the  
19 transfers.

20 6. I was not aware of HR's role in the transfers during the discovery period, and I had  
21 no reason to identify HR as potential witnesses in the case prior to the close of discovery.

22 Dated this 3 day of August, 2017.

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25 SALVATORE MORABITO  
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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Robison, Belaustegui, Sharp & Low, and that on this date I caused to be served a true copy of the REPLY IN SUPPORT OF MOTION TO QUASH SUBPOENA, OR, IN THE ALTERNATIVE, FOR A PROTECTIVE ORDER PRECLUDING TRUSTEE FROM SEEKING DISCOVERY FROM HODGSON RUSS LLP, AND OPPOSITION TO MOTION FOR SANCTIONS

all parties to this action by the method(s) indicated below:

\_\_\_\_\_ by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

Gerald Gordon, Esq.  
Mark M. Weisenmiller, Esq.  
Teresa M. Pilatowicz, Esq.  
GARMAN TURNER GORDON  
650 White Drive, Suite 100  
Las Vegas, Nevada 89119  
*Attorneys for Plaintiff*

✓ \_\_\_\_\_ by using the Court's CM/ECF Electronic Notification System addressed to:

Gerald Gordon, Esq.  
Email: [ggordon@Gtg.legal](mailto:ggordon@Gtg.legal)  
Mark M. Weisenmiller, Esq.  
Email: [mweisenmiller@Gtg.legal](mailto:mweisenmiller@Gtg.legal)  
Teresa M. Pilatowicz, Esq.  
Email: [tpilatowicz@Gtg.legal](mailto:tpilatowicz@Gtg.legal)

\_\_\_\_\_ by personal delivery/hand delivery addressed to:

\_\_\_\_\_ by email addressed to:

Gerald Gordon, Esq.  
Email: [ggordon@Gtg.legal](mailto:ggordon@Gtg.legal)  
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\_\_\_\_\_ by facsimile (fax) addressed to:

\_\_\_\_\_ by Federal Express/UPS or other overnight delivery addressed to:

DATED: This 3<sup>rd</sup> day of August, 2017.



3795  
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*Attorneys for William A. Leonard, Trustee*

IN THE SECOND JUDICIAL DISTRICT COURT OF  
THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE

WILLIAM A. LEONARD, Trustee for the  
Bankruptcy Estate of Paul Anthony  
Morabito,

Plaintiff,

vs.

SUPERPUMPER, INC., an Arizona  
corporation; EDWARD BAYUK,  
individually and as Trustee of the EDWARD  
WILLIAM BAYUK LIVING TRUST;  
SALVATORE MORABITO, and individual;  
and SNOWSHOE PETROLEUM, INC., a  
New York corporation,

Defendants.

CASE NO.: CV13-02663

DEPT. NO.: B1

REPLY IN SUPPORT OF  
COUNTERMOTION FOR SANCTIONS  
AND TO COMPEL RESETTING OF  
30(B)(6) DEPOSITION OF HODGSON RUSS  
LLP

Plaintiff William A. Leonard ("Trustee"), by and through its counsel, the law firm of  
Garman Turner Gordon LLP, hereby submits his Reply (the "Reply") in support of his  
*Countermotion for Sanctions and to Compel Resetting of 30(B)(6) Deposition of Hodgson Russ*



1 *LLP* (the “Countermotion”).<sup>1</sup>

2  
3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 1. Trustee served the Subpoena in January 2017. While Defendants’ counsel  
5 inquired why the HR Subpoena was not issued until January at that time, Defendants waited *over*  
6 *seventh months*, after the parties had flown to Buffalo, New York, and after the Graber  
7 Deposition started to assert a claim that the HR Subpoena was late.

8 2. As Trustee’s counsel explained in January 2017 to Defendants, the HR Subpoena  
9 was not made until January for two critical reasons:

- 10 a. Trustee was never made aware of the extent of HR’s involvement, in large part,  
11 because HR was never disclosed as a party having information. This is critical  
12 because when the Initial Disclosures were made, Paul Morabito was a Defendant  
13 in the State Court Action and could have, and should have, disclosed HR.  
14 Defendant’s counsel inexplicably denies that Paul Morabito was ever a defendant.  
15 See Opposition at 6. When the Initial Disclosures were made, they were made on  
16 behalf of “Defendants above named,” the first Defendant named being “Paul  
17 Morabito, individually and as Trustee of the Arcadia Living Trust;” and  
18 Defendants’ counsel is listed as counsel for “Defendants Snowshoe Petroleum,  
19 Inc., Superpumper, Inc., Paul Morabito, individually and as Trustee of the  
20 Arcadia Living Trust Edward Bayuk, individually and as Trustee of the Edward  
21 William Bayuk Living Trust, and Salvatore Morabito.” Countermotion Ex. A-1.
- 22 b. Trustee requested documents from LMWF in September 2015, well before the  
23 original discovery cut off. Those documents were ultimately not produced until  
24 over a year later, in December 2016 because Defendants continued to challenge  
25 orders demanding the production. See Countermotion Ex. A-2 (the Privilege  
26 Order); Countermotion Ex. A-3 (the *Recommendation for Order*); and  
27 Countermotion Ex. A-4 (the *Confirming Order*). As a result of this delay, the

28 <sup>1</sup> Capitalized terms not otherwise defined herein shall have those meanings ascribed to them in the Countermotion.

1 parties specifically agreed that discovery was extended for purposes of additional  
2 information discovered as a result of the LMWF production and during the Vacco  
3 testimony.

4 3. Defendants' counsel's signature on the Sixth Discovery Stipulation, which  
5 acknowledges that the late production of the Vacco E-mails "caused the Trustee to issue a  
6 subpoena on Hodgson Russ seeking documents and a deposition of the person most  
7 knowledgeable of Hodgson Russ (the "Hodgson Deposition")" confirms through its plain  
8 language that the discovery cut-off would be extended, at that time to May 31, 2017, "for the  
9 purpose of conducting the . . . Hodgson Deposition. . ." Countermotion Ex. A-8 at 3 ¶ 10 and 4 ¶  
10 1.

11 4. Defendants' counsel's signature on the Seventh Discovery Stipulation extends the  
12 discovery cut-off until July 31, 2017 and repeats these factual assertions once again.  
13 Countermotion Ex. A-9 at 3 ¶ 9 and 3 ¶ 1.

14 5. Further, Defendants themselves disclosed HR after the discovery deadline. In  
15 goes without question that that if a party discloses a witness as having information after the  
16 discovery deadline, that witness can be deposed after the discovery deadlines.

17 6. Any allegations of sandbagging are flat out wrong. There was no agreement to  
18 limit the documents to be used in the Deposition. This is highlighted by the fact that the  
19 Subpoena to HR requesting documents was never withdrawn and HR did, in fact, respond to the  
20 Subpoena without objection. Furthermore, Trustee's counsel confirmed with HR, with a copy of  
21 Defendants' counsel, that it was seeking documents and was also waiving the privilege. If there  
22 was an agreement to limit the Deposition to certain documents, there would have been no need to  
23 continue to seek documents.

24 7. To be clear, the purpose of the January E-mail was to show documents that were  
25 discovered as a result of the late LMWF production that led to the HR Subpoena.

26 8. In any event, and for the avoidance of doubt, the only additional documents, other  
27 than those attached to the January E-mail, that are to be used at the Deposition are documents  
28 that came from the HR Production.

1           9.       Notably, Defendants failed to respond to Trustee’s point in the Countermotion  
2 that it is entirely unclear what limitations on the Deposition would even exist given the breadth  
3 of the e-mails attached to the January E-mail. This is because there was no limitation.

4           10.      Finally, Defendant’s position on the attorney-client privilege is disingenuous.  
5 Trustee sent the Privilege Waiver Letter, on which Defendants’ counsel was copied, and there  
6 was no objection and no “reservation of rights at that time.” Defendant then chose to raise an  
7 objection and advise HR, Morabito’s former counsel, that Morabito did not waive the privilege.  
8 HR is entitled to clarity on the waiver (which was provided by the Privilege Order, the  
9 *Recommendation for Order*, and the *Confirming Order*). The clarity was further provided by the  
10 Privilege Waiver Letter, without objection. Defendants’ counsel created a situation where HR  
11 was unable to respond to questions that touched on the privilege thereby effectively suspending  
12 the Deposition on that basis.

13           11.      Defendants chose, without any legal authority whatsoever, to suspend the  
14 Deposition only after unfavorable testimony started. Any argument that the HR Subpoena was  
15 untimely is not only wrong and belied by Defendants’ own agreements and disclosures, but has  
16 unquestionably been waived. Trustee is entitled to (1) an order continuing the discovery cut-off  
17 in the above-captioned matter for the sole purpose of conducting the HR Deposition as requested  
18 in the Countermotion, (2) an order clarifying that the attorney-client privilege is waived; and (3)  
19 dismissal of the Defendants’ Motion in its entirety; and (4) sanctions as requested in the  
20 Countermotion.

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**AFFIRMATION**  
**Pursuant to NRS 239B.030**

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 9th day of August, 2017.

GARMAN TURNER GORDON LLP

/s/ Teresa M. Pilatowicz  
GERALD E. GORDON, ESQ.  
TERESA M. PILATOWICZ, ESQ.  
MICHAEL R. ESPOSITO, ESQ.  
650 White Drive, Ste. 100  
Las Vegas, Nevada 89119  
Telephone 725-777-3000

*Attorneys for William A. Leonard, Trustee*

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of GARMAN TURNER GORDON LLP, and that on this  
3 date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **REPLY IN**  
4 **SUPPORT OF COUNTERMOTION FOR SANCTIONS AND TO COMPEL**  
5 **RESETTING OF 30(B)(6) DEPOSITION OF HODGSON RUSS LLP** on the parties as set  
6 forth below:

7  
8 XXX Placing an original or true copy thereof in a sealed envelope placed for collection  
9 and mailing in the United States Mail, Reno, Nevada, postage prepaid, following  
ordinary business practices

10 \_\_\_\_\_ Certified Mail, Return Receipt Requested

11 \_\_\_\_\_ Via Facsimile (Fax)

12 \_\_\_\_\_ Via E-Mail

13 \_\_\_\_\_ Placing an original or true copy thereof in a sealed envelope and causing the same  
14 to be personally Hand Delivered

15 \_\_\_\_\_ Federal Express (or other overnight delivery)

16 addressed as follows:

17 Barry Breslow  
18 Frank Gilmore  
19 ROBISON, BELAUSTEGUI, SHARP & LOW  
20 71 Washington Street  
Reno, NV 89503

21 Dated this 9<sup>th</sup> day of August, 2017.

22  
23 /s/ Ricky H. Ayala

24 An Employee of GARMAN TURNER  
25 GORDON LLP  
26  
27  
28

**CASE NO. CV13-02663**

**JH, INC. et al. vs. PAUL MORABITO et al.**

08/10/2017

DISCOVERY COMMISSIONER

WESLEY AYRES

M. Conway (Clerk)

RECORDED - JAVS

**HEARING:**

08/10/2017: Motion to Quash Subpoena, or in the Alternative for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ, LLP and Trustee's Countermotion for Sanctions and to Compel Resetting of 30(B)(6) Deposition of Hodgson Russ (HR) LLP.

**APPEARANCES:**

Teresa Pilatowicz, Esq. was present, telephonically, on behalf of the Plaintiff, William A. Leonard, Trustee of the Bankruptcy Estate of Paul Anthony Morabito.

Frank Gilmore, Esq. was present telephonically, on behalf of the Defendants Snowshoe Petroleum Inc., Superpumper, Inc., Edward Bayuk, individually and as Trustee of the Edward William Bayuk Living Trust and Salvatore Morabito.

Counsel Gilmore addressed the Court and argued in support of Defendant's Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP. Counsel discussed the Stipulation/Order in which the original discovery deadlines were reset with the parties agreeing to a close of discovery on March 31, 2016, the discussion between counsel regarding a limited extension of the close of discovery, the Vacco documents and deposition, and the redacted billing statements identifying Hodgson Russ LLP. Counsel Gilmore argued in support of the Motion to Quash Subpoena or limiting the scope of the HR deposition to the 16 emails (exhibit 5 of the Motion to Quash).

Counsel Pilatowicz addressed the Court and presented argument in Opposition to the Motion to Quash Subpoena. Counsel Pilatowicz argued that there are factually inaccurate objections as to the scope and timing of the Deposition. Counsel argued that she never agreed to any limitation on the topics for the Deposition of HR and that the Defendants never challenged the HR deposition. Counsel discussed Defendant's objection (based upon the grounds that there is no court order "explicitly waiving the attorney/client privilege with respect to Hodgson Russ' representation of Paul Morabito). Counsel argued that this objection ignores the findings of the Privilege Order, Recommendation for Order and Confirming Order.

Counsel Gilmore responded and further elaborated regarding the mandatory met and confer, further discussed exhibit 5 of the Motion to Quash and indicated that Defendants did not oppose the document subpoena but argued that the deposition and scope of deposition is at issue.

Further argument presented by Counsel Gilmore in support of Motion to Quash Subpoena, or in the Alternative for a Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ, LLP.

Further argument presented by Counsel Pilatowicz who argued in support of the Countermotion for Sanctions and to Compel Resetting of 30(B)(6) Deposition of Hodgson Russ (HR) LLP.

Court thanked the parties for the arguments presented, advised the parties that it had reviewed all briefs and confirmed the upcoming trial date of October 9, 2017.

**COURT ORDERED:** Matter taken UNDER ADVISEMENT. Recommendation to follow.

1 CODE NO. 1945  
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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF WASHOE

8 \* \* \*

9 WILLIAM A. LEONARD, Trustee for the Bankruptcy  
10 Estate of Paul Anthony Morabito,

11 Plaintiff,

Case No. CV13-02663

12 vs.

Dept. No. B1

13 SUPERPUMPER, INC., an Arizona corporation,  
14 et al.,

Defendants.  
15 \_\_\_\_\_/

16 **RECOMMENDATION FOR ORDER**

17 Presently before the Court is a dispute over an NRCP 30(b)(6) deposition of Hodgson Russ  
18 LLP ("HR"). On July 18, 2017, a *Motion to Quash Subpoena, or, in the Alternative, for a Protective*  
19 *Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP* was filed by Defendants  
20 Superpumper, Inc., Edward Bayuk, individually and as Trustee of the Edward William Bayuk Living  
21 Trust, Salvatore Morabito, and Snowshoe Petroleum, Inc. On July 24, 2017, Plaintiff William A.  
22 Leonard, as Trustee for the Bankruptcy Estate of Paul Anthony Morabito,<sup>1</sup> filed his (1) *Opposition to*  
23 *Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from*  
24 *Seeking Discovery from Hodgson Russ LLP; and (2) Countermotion for Sanctions and to Compel*  
25 *Resetting of 30(b)(6) Deposition of Hodgson Russ LLP*. Defendants filed their *Reply in Support of*

26 <sup>1</sup> In this decision, the term "Mr. Morabito" refers to Paul A. Morabito.



1 *Motion to Quash Subpoena, or, in the Alternative, for a Protective Order Precluding Trustee from*  
2 *Seeking Discovery from Hodgson Russ LLP, and Opposition to Motion for Sanctions* on August 3,  
3 2017, and the motion to quash was submitted for decision on that same date. Plaintiff's *Reply in*  
4 *Support of Countermotion for Sanctions and to Compel Resetting of 30(b)(6) Deposition of Hodgson*  
5 *Russ LLP* was filed on August 9, 2017, and the countermotion was submitted on that same date. In  
6 addition, counsel for both sides participated in a telephonic hearing on these matters with the  
7 Discovery Commissioner on August 10, 2017.

8 On or about January 3, 2017, Plaintiff caused a subpoena duces tecum to be served on HR.  
9 Defendants seek an order quashing that subpoena on the basis that it was issued more than eight  
10 months after the close of discovery. They also contend that good cause does not exist to extend the  
11 discovery deadline for this purpose, since Plaintiff could have obtained information from HR prior to  
12 the close of discovery.<sup>2</sup>

13 The record reflects that on January 30, 2017, the parties entered into a stipulation to  
14 continue the discovery deadline to May 31, 2017, for the purpose of conducting the depositions of  
15 Dennis Vacco, Esq., HR, and another nonparty who is not pertinent to this discovery dispute. In  
16 explaining the basis for their agreement with regard to Mr. Vacco and HR, the parties recited various  
17 facts, including the following:

18 1. WHEREAS on September 29, 2015, the Trustee caused a subpoena (the  
19 "Subpoena") to be issued to Dennis Vacco ("Vacco") requesting the production of  
20 documents on or before October 13, 2015, and scheduling the deposition of Vacco  
for October 20, 2015.

21 <sup>2</sup> Plaintiff argues that Defendants lack standing to bring a motion to quash the HR subpoena, and that their  
22 motion is untimely. However, courts generally focus on the substance of a motion rather than its title. See, e.g., BCCA,  
23 Inc. v. United States, 954 F.2d 1429, 1431-32 (8th Cir. 1992) ("the substance of a motion rather than the form of a motion  
24 is controlling"); Ex Parte Lewter, 726 So.2d 603, (Ala. 2009) ("[t]he substance of a motion, not what a party has called it,  
25 determines the nature of the motion"). Defendants' motion makes clear that they are proceeding under NRCP 26(c), which  
26 certainly permits a party to oppose another party's efforts to obtain discovery from a nonparty in violation of the discovery  
deadline. See Lucent Techs., Inc. v. Gateway, Inc., Civil No. 07cv2000-H (CAB), 2008 WL 183637, at \* (S.D. Cal. Jan. 17,  
2008) (rejecting argument that party lacked standing to move to quash untimely subpoena); see also Joseph v. Linehaul  
Logistics, Inc., No. CV 11-114-M-JCL, 2012 WL 3779202, at \* (D. Mont. Aug. 31, 2012) (subpoenas are subject to same  
deadlines as other forms of discovery, and party may seek protective order to preclude another party from obtaining  
discovery from a non-party through untimely subpoena); U & I Corp. v. Advanced Med. Design, Inc., 251 F.R.D. 667, 673  
(M.D. Fla. 2008) (defendant showed good cause to quash untimely subpoenas under Rule 26(c)). While a motion for  
protective order also must be timely filed, Defendants have explained that the basis for their motion was not known until  
July 12, 2017, when Plaintiff began deposing HR's first NRCP 30(b)(6) designee. Under these circumstances, the Court  
finds that Defendants' motion is not precluded or untimely.

1           2. WHEREAS on or about October 15, 2015, Vacco produced approximately  
2           200 pages of documents in response to the Subpoena.

3           . . . .  
4           6. WHEREAS on or about February 23, 2016, the Trustee's counsel was  
5           informed there were as many as thirteen banker's boxes of potentially responsive  
6           documents in Vacco's possession that had not been previously produced (the  
7           "Additional Documents").

8           . . . .  
9           10. WHEREAS the Additional Documents [from Mr. Vacco] were ultimately  
10          produced on or about October 13, 2016. On or about December 8, 2016, Vacco  
11          further produced additional documents responsive to the original document request  
12          (the "Supplemental Disclosure"). The Supplemental Disclosure caused the Trustee to  
13          issue a subpoena on Hodgson Russ seeking documents and a deposition of the  
14          person most knowledgeable of Hodgson Russ (the "Hodgson Deposition").

15          11. WHEREAS multiple extensions have been stipulated to and filed since the  
16          Discovery Cut-Off and the current deadline to complete outstanding discovery relating  
17          to the Additional Documents and Supplemental Disclosure is February 1, 2017.

18          12. WHEREAS the Trustee scheduled Vacco's deposition to be completed on  
19          January 27, 2017 but, due to Vacco's unavailability, the Trustee has been unable to  
20          complete Vacco's deposition.

21          13. WHEREAS the Trustee scheduled the Hodgson Deposition to be  
22          completed on January 30, 2017 but, in an effort to coordinate and limit travel for the  
23          Parties to Buffalo, has coordinated with Defendants to continue the Hodgson  
24          Deposition to be completed at the same time as the Vacco Deposition.

25          This stipulation was approved by the Court on February 3, 2017. On March 7, 2017, HR produced  
26          approximately 9,000 pages of documents in response to the HR subpoena, without objection.

          Thereafter, in another stipulation, the parties stated that they had agreed to conduct Mr. Vacco's  
deposition on July 10, 2017, and to conduct the HR deposition on July 12, 2017. That stipulation  
was approved by the Court on May 26, 2017.

          The deposition of Mr. Vacco was taken on July 10-11, 2017. On July 12, 2017, Plaintiff  
commenced the deposition of HR's first NRCP 30(b)(6) designee, Garry M. Graber, Esq. When  
Plaintiff's counsel asked Mr. Graber to describe his first conversation with Mr. Morabito, Defendants'  
counsel objected. Although he did not instruct Mr. Graber not to answer the question, he interposed  
a standing objection to "any questions asked which attempt to invade the attorney/client privilege  
which I believe has not been affirmatively waived by a court of law, so that rather than suspend the  
deposition, have that issue litigated and then come back, I'm simply going to assert that objection."  
Counsel explained that "even in the court orders which have waived the privilege, Mr. Morabito's

1 privilege, for example, with respect to the Lippes Mathias firm, there was no waiver of the work  
2 product privilege.” He stated that “to the extent there was work product created for the benefit of Mr.  
3 Morabito, I would also assert that we believe that privilege has not been waived and has never been  
4 waived and cannot be waived.” In addition, counsel objected “to the extent that the subject matter of  
5 this deposition exceeds the 18 emails that I was provided in January,” on the ground that discovery  
6 had closed prior to service of the HR subpoena. After other counsel made statements regarding this  
7 matter, Defendants’ counsel conferred with HR’s designee. Defendants then suspended the HR  
8 deposition based upon the objection that Plaintiff was exceeding the scope of the examination that  
9 counsel had agreed upon, and based upon concerns over applicability of the attorney-client privilege  
10 with regard to HR and Mr. Morabito.

11         These facts show that Defendants agreed on two occasions to permit HR’s NRCP 30(b)(6)  
12 deposition after the discovery deadline. Moreover, both of these stipulations were approved by the  
13 Court, and HR has produced documents in response to the subpoena. Under these circumstances,  
14 the doctrines of estoppel and waiver preclude Defendants from arguing that Plaintiff’s subpoena to  
15 HR should be quashed on the basis that it was untimely. Whether or not Plaintiff knew or should  
16 have known about HR’s involvement in the alleged fraudulent transactions prior to earlier discovery  
17 deadlines, Defendants expressly agreed to permit HR’s NRCP 30(b)(6) deposition to occur with full  
18 knowledge that those deadlines had passed. Regardless of whether Plaintiff could have obtained  
19 information about HR’s involvement before the discovery deadline, he is permitted to proceed with  
20 HR’s deposition pursuant to the parties’ stipulations and the Court’s orders.

21         Alternatively, Defendants argue that the scope of the HR deposition should be limited “to only  
22 those emails which were agreed to in January when counsel met and conferred.” Defendants state  
23 that they decided to forego motion practice over the HR subpoena based upon the representation by  
24 Plaintiff’s counsel that the HR deposition would be limited to sixteen emails she provided to their  
25 counsel on January 24, 2017. Defendants argue that they “are entitled to strict reliance on an  
26 agreement among counsel as to the limitations of a deposition after a meet and confer.”

1 The Court does not question the veracity of Defendants' belief that an agreement was  
2 reached with Plaintiff's counsel regarding the scope of the HR deposition. Nevertheless, DCR 16  
3 expressly provides as follows:

4 No agreement or stipulation between the parties in a cause or their attorneys, in  
5 respect to proceedings therein, will be regarded unless the same shall, by consent,  
6 be entered in the minutes in the form of an order, or unless the same shall be in  
writing subscribed by the party against whom the same shall be alleged, or by his  
attorney.

7 Notwithstanding their belief, Defendants have not provided the Court with a written agreement,  
8 signed by Plaintiff's counsel, in which Plaintiff agreed to limit the scope of the HR deposition. The  
9 record does not reflect entry of an order to that effect. The stipulation and orders entered with  
10 regard to the HR deposition demonstrate only that the parties agreed to extend the discovery  
11 deadline so that Plaintiff could conduct its NRCP 30(b)(6) deposition of HR, without any stated  
12 limitation. Further, Plaintiff did not withdraw or otherwise modify the HR subpoena.<sup>3</sup> Thus, the Court  
13 cannot enforce the agreement that Defendants believe was reached with Plaintiff regarding the  
14 scope of the HR deposition.<sup>4</sup>

15 Defendant emphasizes statements made by Plaintiff's counsel in an email sent to  
16 Defendants' counsel on January 24, 2017:

17 Attached please find the emails that I intend to discuss at the deposition of Hodgson  
18 Russ. I intend to provide Hodgson Russ with the notice of waiver of privilege  
tomorrow.

19 Sixteen emails involving HR that had been produced by Mr. Vacco in December 2016 were attached  
20 to that email. Defendants state that "[a]s far as Defendants' counsel was concerned, the

21 <sup>3</sup> In fact, Plaintiff served Defendants with amended deposition notices regarding HR's NRCP 30(b)(6) in March  
22 and April 2017, and those notices included the same descriptions of topics to be addressed at the deposition as the  
23 original deposition notice. Defendants essentially contend that those notices could be ignored based upon the unwritten  
agreement between counsel to limit the scope of this deposition. However, those amended notices should have alerted  
Defendants to the possibility that Plaintiff did not share their belief regarding limitations on the scope of this deposition.

24 <sup>4</sup> This point effectively moots Defendants' argument that Plaintiff should not be permitted to examine HR on topic  
25 areas which Plaintiff inexcusably failed to explore prior to the close of discovery. The Court appreciates that in earlier  
26 stipulations to extend the discovery deadline, the parties agreed that the extension applied only to the deposition of Mr.  
Vacco and "additional discovery [that] is required based on new information contained in or discovered from the Additional  
Documents or Continued Vacco Deposition." Whether Plaintiff had information prior to the close of discovery that was  
sufficient to alert him to the possible involvement of HR in the alleged fraudulent transactions is a debatable point.  
However, the Court need not resolve that issue to resolve the pending motions. For reasons explained in the text, the  
Court is precluded from finding that Plaintiff agreed to limit the scope of the HR deposition.

1 representation from Trustee's counsel about the mails that she 'intended to discuss at the deposition  
2 of Hodgson Russ' was a confirmation that the subpoena and deposition notice had been voluntarily  
3 limited and that any deposition would be proceedings on that basis."

4 But to the extent that Defendants are arguing that this email proves the existence of an  
5 agreement to limit the scope of the HR deposition, the Court cannot agree. First, the email does not  
6 purport to set forth any limitation. It simply identifies documents that Plaintiff's counsel intends to  
7 discuss at the HR deposition, without stating that the examination will be limited to those documents.  
8 Second, Plaintiff's counsel has stated that these documents were sent to Defendants' counsel in  
9 response to his request to see the specific documents produced by Mr. Vacco in December 2016  
10 that led to issuance of the HR subpoena. Defendants disagree with this explanation of why the  
11 emails were sent to him, but Plaintiff's explanation remains plausible.<sup>5</sup> Third, when this email was  
12 sent, Plaintiff had not yet received documents from HR in response to the subpoena. Plaintiff  
13 contends that its counsel would not have agreed to limit the scope of the HR deposition to sixteen  
14 emails before reviewing the documents to be produced by the deponent, and this point is  
15 persuasive.<sup>6</sup> Fourth, this is precisely the kind of situation that DCR 16 was intended to address—a  
16 dispute between parties, or their counsel, about whether an agreement was reached, or about the  
17 terms of an unwritten agreement. Without a signed, written agreement to limit the scope of the HR  
18 deposition, the Court is precluded from finding that such an agreement was entered into between  
19 the parties. See Humana, Inc. v. Nguyen, 102 Nev. 507, 509, 728 P.2d 816, 817 (1986) ("assuming  
20 arguendo that there was an actual agreement, it was neither reduced to a signed writing nor entered  
21 by consent as an order, so the trial court could not properly have considered it" under DCR 16); see  
22 also Resnick v. Valente, 97 Nev. 615, 616-17, 637 P.2d 1205, 1206 (1981) ("[b]y requiring that all

23 <sup>5</sup> Put differently, the Court has been presented with two reasonable explanations for why the emails were sent to  
24 Defendants' counsel. Without DCR 16, the Court would be in the difficult position of trying to determine which side's  
25 explanation is correct. DCR 16 avoids that result by placing the onus of executing a clear agreement on the party who  
26 wishes to enforce that agreement.

<sup>6</sup> In his reply brief, Plaintiff states that "[i]n any event, and for the avoidance of doubt, the only additional  
documents, other than those attached to the January E-mail, that are to be used at the Deposition are documents that  
came from the HR Production" in March 2017.

1 settlements either be reduced to a signed writing or be entered in the court minutes following a  
2 stipulation, the court has an efficient method for determining genuine settlements and enforcing  
3 them," so this requirement "does not thwart the policy in favor of settling disputes; instead, it  
4 enhances the reliability of actual settlements").

5 In the countermotion, Plaintiff seeks the imposition of sanctions against Defendants arising  
6 out of their decision to suspend the HR deposition, and an award of expenses incurred in connection  
7 with the motion and countermotion. Plaintiff also seeks an order further continuing the discovery  
8 deadline to permit HR's NRCP 30(b)(6) deposition. Finally, he seeks an order confirming that  
9 Defendants may not assert any attorney-client privilege as to the topics identified in the HR  
10 subpoena.

11 Shortly after commencement of the HR deposition, Defendants' counsel made a statement in  
12 which he made clear that he was not instructing his client not to answer questions, but that he  
13 wanted to state certain objections for the record:

14 I am not going to instruct the witness not to answer questions which I believe would  
15 otherwise be attorney/client privilege, would be seeking attorney/client privileged  
16 information. However, I am going to make a standing objection that any questions  
17 asked which attempt to invade the attorney/client privilege which I believe has not  
been affirmatively waived by a court of law, so that rather than suspend the  
deposition, have that issue litigated and then come back, I'm simply going to assert  
that objection.

18 Defendants' counsel also stated his belief that Plaintiff had agreed to limit the scope of the  
19 deposition to the emails sent to Defendants' counsel on January 24, 2017. He therefore asserted  
20 another objection to the extent that the scope of the examination went beyond the matter contained  
21 in those emails. In addition, HR's counsel made clear that he was not going to direct his client not to  
22 answer any proper question on the basis of either the attorney-client privilege or the work-product  
23 doctrine.

24 After Plaintiff's counsel stated her client's position on these matters, Defendants' counsel  
25 briefly conferred with his client, Salvatore Morabito, while HR's NRCP 30(b)(6) designee conferred  
26 with HR's counsel. When they returned, Defendants' counsel stated that the deposition would be

1 suspended on the grounds that Plaintiff intended to examine HR's designees about documents in  
2 addition to the sixteen emails sent to him in January, and because of concerns over the attorney-  
3 client privilege:

4           So because defendants are not adequately prepared and have not had the  
5 opportunity to review the full scope of the testimony and the documents that plaintiff's  
6 counsel now intends to pursue, defendants feel like they are forced to suspend the  
deposition so that they can go back and assert any protections, scope related or  
otherwise, before the depositions can be reconvened.

7           Secondarily, off the record counsel have discussed and agreed that there will  
8 be no request to reconvene the Hodgson Russ depositions until there is either a  
satisfactory stipulation between the parties with respect to the scope of the  
attorney/client privilege or there is a court order definitively outlining the scope of the  
attorney/client privilege.

9           It was my representation to Hodgson Russ counsel that obviously the privilege  
10 is my client's privilege to maintain or to waive, at least that's their position. The  
11 trustee's position is that the trustee owns the privilege and can be waived or  
maintained, but I wanted to make it clear that the onus would be upon my office and  
my clients to litigate and assert any privilege that was related to the representation of  
Hodgson Russ and Paul Morabito.

12  
13 Defendants' counsel then had his client confirm that he agreed with these statements, and that he  
14 was instructing counsel to suspend the deposition on those grounds.

15           Notwithstanding statements made at the HR deposition, Defendants have not presented any  
16 argument concerning the attorney-client privilege in their motion, nor do they seek any relief in that  
17 regard. In their opposition to Plaintiff's countermotion, Defendants make clear that they made  
18 privilege-related objections at the HR deposition "for the record to preserve the objections pending  
19 appeal." They also confirm that "Defendants do not seek a protective order on the basis of the  
20 attorney-client privilege, and the Defendants did not suspend the deposition on that basis."<sup>7</sup>

21 Therefore, the Court finds that the HR deposition must proceed in accordance with all applicable  
22 court decisions addressing Plaintiff's right to seek information that otherwise would be protected

23  
24 <sup>7</sup> The latter point is supported by Defendants' counsel's initial statement that he would not instruct the HR  
25 designee not to answer a question based upon the attorney-client privilege. However, toward the end of the examination,  
26 counsel asked his client to confirm that "your instruction remains that we are to suspend the deposition until such time as  
the issue related to the scope of the attorney/client privilege and to revisit the issue related to the meet and confer that  
occurred in January, it's still your position and your instruction that we should suspend the depositions today." The client's  
confirmation of that statement suggests that the decision to suspend the deposition was based, in part, on concerns about  
the extent to which Defendants could assert one or more privileges during the examination.

1 from disclosure by an evidentiary privilege. If Defendants wish to assert a standing objection to  
2 preserve the issue for appeal, they may do so.<sup>8</sup>

3 With regard to Plaintiff's request for sanctions, the Court finds that Defendants did not have a  
4 legitimate basis for suspending the HR deposition on July 12, 2017. At a minimum, even if  
5 Defendants believed that Plaintiff was not entitled to ask questions based upon documents other  
6 than the emails disclosed to their counsel on January 24, 2017, Defendants should have permitted  
7 Plaintiff's counsel to question the HR designee about those emails.<sup>9</sup> Moreover, while the Court  
8 appreciates Defendants' belief that their counsel had an agreement to limit the HR deposition to  
9 those emails, it cannot find that suspension of the deposition was permissible on that basis absent  
10 evidence sufficient to support a finding that such an agreement actually existed. In addition, to the  
11 extent that privilege issues might have formed part of the basis for Defendants' decision to suspend  
12 the deposition, the failure to raise any arguments based upon privilege issues in their motion, reply  
13 brief, or opposition to the countermotion effectively invalidates the decision to suspend the  
14 deposition on that basis.

15 Therefore, Plaintiff is entitled to an award of sanctions for all additional expenses incurred by  
16 Plaintiff as a result of Defendants' suspension of the deposition. Specifically, Plaintiff may recover  
17 the reasonable attorney's fees and the cost of the court reporter incurred for the July HR  
18 deposition.<sup>10</sup> In addition, Plaintiff may recover all reasonable travel costs associated with the  
19 rescheduled HR deposition.<sup>11</sup> Finally, Plaintiff is entitled to recover the reasonable expenses  
20 incurred in connection with this discovery dispute.

21 \_\_\_\_\_  
22 <sup>8</sup> To be clear, neither HR nor Defendants may disrupt Plaintiff's examination through the use of multiple  
objections or statements regarding the position of HR or Defendants in connection with privilege issues.

23 <sup>9</sup> The transcript of the deposition does not reveal any statement to that effect from Defendants' or HR's counsel.  
Rather, Plaintiff's counsel was informed that Defendants had decided to suspend the deposition.

24 <sup>10</sup> Plaintiff remains responsible for its own attorney's fees and court reporter costs associated with the  
25 rescheduled HR deposition, since it would have had to incur those expenses if the HR deposition had properly proceeded  
in July.

26 <sup>11</sup> Plaintiff is not entitled to recover travel expenses incurred in connection with the July deposition, since another  
deposition was taken during that trip on July 10 and 11, 2017.



1 ACCORDINGLY, Defendants' *Motion to Quash Subpoena, or, in the Alternative, for a*  
2 *Protective Order Precluding Trustee from Seeking Discovery from Hodgson Russ LLP* should be  
3 DENIED.

4 FURTHER, Plaintiff's *Countermotion for Sanctions and to Compel Resetting of 30(b)(6)*  
5 *Deposition of Hodgson Russ LLP* should be GRANTED in part, and DENIED in part.

6 IT SHOULD, THEREFORE, BE ORDERED that Plaintiff is entitled to proceed with the NRCP  
7 30(b)(6) deposition of Hodgson Russ LLP on the topics set forth in the subpoena previously served  
8 upon that nonparty; the Court presumes that the parties will be able to coordinate with each other  
9 and with Hodgson Russ LLP to schedule the deposition for an appropriate date and time.

10 IT SHOULD FURTHER BE ORDERED that the NRCP 30(b)(6) deposition of Hodgson Russ  
11 LLP must proceed in accordance with all applicable court decisions addressing Plaintiff's right to  
12 seek information that otherwise would be protected from disclosure by an evidentiary privilege.

13 IT SHOULD FURTHER BE ORDERED that Plaintiff is entitled to recover from Defendants,  
14 collectively, the reasonable attorney's fees and the cost of the court reporter incurred for the July  
15 deposition of Hodgson Russ LLP; these expenses must be paid within a reasonable time after  
16 Plaintiff provides Defendants with an itemized statement of these expenses.

17 IT SHOULD FURTHER BE ORDERED that Plaintiff may recover from Defendants,  
18 collectively, all reasonable travel costs associated with the rescheduled HR deposition; these  
19 expenses must be paid within a reasonable time after Plaintiff provides Defendants with an itemized  
20 statement of these expenses.

21 IT SHOULD FURTHER BE ORDERED that Defendants, collectively, pay to Plaintiff the sum  
22 of \$3,000, as and for the reasonable expenses incurred in connection with this discovery dispute.

23 DATED: This 17<sup>th</sup> day of August, 2016.

24  
25   
26 WESLEY M. AYRES  
DISCOVERY COMMISSIONER

**CERTIFICATE OF SERVICE**

CASE NO. CV13-02663

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 17<sup>th</sup> day of August, 2017, I electronically filed the **RECOMMENDATION FOR ORDER** with the Clerk of the Court by using the ECF system.

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

**Electronically filed with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:**

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BANKRUPTCY ESTATE OF PAUL ANTHONY MORABITO

MARK M. WEISENMILLER, ESQ. for WILLIAM A. LEONARD, TRUSTEE OF THE  
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FRANK C. GILMORE, ESQ. for SUPERPUMPER, INC. et al.

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IN THE SECOND JUDICIAL DISTRICT COURT OF  
THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE

WILLIAM A. LEONARD, Trustee for the  
Bankruptcy Estate of Paul Anthony  
Morabito,

Plaintiff,

vs.

SUPERPUMPER, INC., an Arizona  
corporation; EDWARD BAYUK,  
individually and as Trustee of the EDWARD  
WILLIAM BAYUK LIVING TRUST;  
SALVATORE MORABITO, and individual;  
and SNOWSHOE PETROLEUM, INC., a  
New York corporation,

Defendants.

CASE NO.: CV13-02663

DEPT. NO.: 1

MOTION FOR PARTIAL SUMMARY  
JUDGMENT

Plaintiff William A. Leonard, as Chapter 7 Trustee of the Bankruptcy Estate of Paul Anthony Morabito ("Plaintiff"), by and through his counsel, the law firm of Garman Turner Gordon LLP, hereby moves (the "Motion") this Court for partial summary judgment regarding the First Claim for Relief set forth in the Amended Complaint filed on May 15, 2015 (the "Complaint"). Specifically, Plaintiff requests summary judgment that the transfers described in

1 the Complaint (the “Transfers”) are actually fraudulent, and for a judgment on account thereof.  
2 Plaintiff acknowledges that limited genuine issues of material fact remain on the amount of  
3 actual damages as it relates to certain of the Transfers and therefore, requests that the time set for  
4 trial starting on October 9, 2017 in this matter be reserved for evidence on those issues.

5 This Motion is brought pursuant to the provisions of Nev. R. Civ. P. 56. The Motion is  
6 supported by the attached memorandum of points and authority, the *Statement of Undisputed*  
7 *Facts in Support of Motion for Partial Summary Judgment* (“SSOF”) filed concurrently  
8 herewith, the other papers and pleadings on file herein, of which Plaintiff requests this Court take  
9 judicial notice, and any oral argument the Court may permit at the hearing of this matter.

10 Dated this 17th day of August 2017.

11 GARMAN TURNER GORDON LLP

12  
13 /s/ Teresa M. Pilatowicz  
14 GERALD E. GORDON, ESQ.  
15 TERESA M. PILATOWICZ, ESQ.  
16 650 White Drive, Ste. 100  
17 Las Vegas, Nevada 89119  
18 Telephone 725-777-3000

19 *Special Counsel for Plaintiff*

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I.**

22 **SUMMARY OF THE ARGUMENT**

23 On September 13, 2010, the Honorable Brent T. Adams of the Second Judicial District  
24 Court announced an oral judgment in the amount of \$85,871,364.75 against Paul Morabito  
25 (“Morabito”) and in favor of the JH Inc. (“JH”), Jerry Herbst, and Berry Hinckley Industries  
26 (“BHI,” and together with JH and Jerry Herbst, the “Herbst Parties”). Within days after the  
27 announcement, Morabito shipped \$6,000,000 off shore and Morabito, his then-life partner,  
28 Edward Bayuk, individually and as trustee of the Edward William Bayuk Living Trust  
29 (“Bayuk”), his brother, Salvatore Morabito (“Sam”), Superpumper, Inc. (“Superpumper”), and

1 Snowshoe Petroleum, Inc. (“Snowshoe,” and together with Bayuk, Sam, and Superpumper, the  
2 “Defendants”) collectively engaged in a scheme to transfer all of Morabito’s assets such that by  
3 the time the final judgment in excess of \$144,000,000 was entered, the Herbst Parties would be  
4 left with nothing upon which they could collect. The scheme was ultimately successful. While  
5 Morabito continued to live his extravagant lifestyle with assets he had transferred to others, he  
6 retained no assets on which his creditors could execute their judgment. In June 2013, the Herbst  
7 Parties were forced to commence an involuntary bankruptcy proceeding (the “Bankruptcy Case”)  
8 against Morabito, and Plaintiff, appointed the trustee of Morabito’s bankruptcy estate (the  
9 “Estate”), is left to chase unlawful transfers to provide some recovery for the more than \$80  
10 million in claims on file in the Bankruptcy Case.

11 Plaintiff seeks to avoid and recover three sets of transfers through the Complaint: (1)  
12 Morabito’s interests in two real properties located in Laguna Beach, California (the “Real  
13 Property Transfers”), (2) Morabito’s 50% interest in Baruk Properties, LLC (the “Baruk  
14 Transfer”), and (3) Morabito’s 80% interest in Superpumper, Inc. (the “Superpumper Transfer”).

15 According to Morabito and Defendants, the Transfers were completed to separate  
16 Bayuk’s interest from Morabito’s, and in doing so, make it easier for Morabito’s assets to be  
17 executed upon by his creditors. Such position is belied by the facts that the Herbst Parties were  
18 ultimately unable to collect their Judgment because of the Transfers. Morabito’s and Defendants’  
19 intentions with respect to the Transfers, is obvious: to delay, hinder, and defraud the Herbst  
20 Parties’ collection efforts. Before the Transfers, the Herbst Parties had access to multiple assets  
21 and could have collected anywhere between \$9,000,000 and \$14,000,000 as a result thereof.  
22 After the Transfers, the Herbst Parties were only able to collect \$1,300,000 from the transferred  
23 assets.

24 That the Transfers were fraudulent is obvious when this Court considers the badges of  
25 fraud and Morabito’s actions in connection with and after the Transfers. Morabito transferred the  
26 assets to his brother and boyfriend. He did so without advising the Herbst Parties, who at the  
27 time had just been awarded an \$85 Million judgment. He made sure that he was left with  
28 nothing against which the Herbst Parties could collect, going so far as to exchange the limited

1 “value” he did receive for foreign assets to further avoid collection efforts. The alleged “value”  
2 received was non-existent as it was, in large part, illusory promissory notes that served no  
3 purpose other than to allow Morabito to continue his *status quo*, while keeping valuable assets  
4 from the Herbst Parties and frustrating their collection efforts. Finally, and perhaps most  
5 overwhelming, following the Transfers, Morabito continued to use the transferred assets for his  
6 own benefit by using them to settle claims against him, using them to bargain for business deals,  
7 and using them to attempt to secure financing for his benefit. Thus, the Transfers were actually  
8 fraudulent, as they meet the overwhelming majority of the badges of fraud set forth in the  
9 Uniform Fraudulent Transfer Act (“UFTA”), which Nevada has adopted and codified in Chapter  
10 112 of Nevada Revised Statutes (“NRS”).

11 Ultimately, Defendants’ actions caused the Herbst Parties to be left with little against  
12 which to collect except the Reno Property (as defined herein), albeit at a much lessor value than  
13 Morabito claimed. As a result, creditors of Morabito’s Estate were left *without* the same recovery  
14 that existed prior to the Transfers. There is no genuine issue of material fact that the Transfers  
15 occurred or that they were fraudulent. Likewise, with the sole exception of the actual value of  
16 the Reno Property and actual value of Superpumper, there is no genuine issue of material fact of  
17 the damages suffered as a result of the Transfers. Therefore, this Court can and should grant  
18 summary judgment finding actual fraud and awarding damages as set forth herein. The Court  
19 may then set a trial on the limited remaining issues of value of the Reno Property and  
20 Superpumper as of the time of the Transfers to determine the amount of a final judgment in favor  
21 of Plaintiff and against Defendants in this matter.

## 22 II. 23 STATEMENT OF RELEVANT FACTS

### 24 A. The Court Announces an \$85 Million Judgment Against Morabito.

25 1. In or about 2007, a dispute developed between JH, Inc. (“JH”), Jerry Herbst, and  
26 Berry Hinckley Industries (“BHI” and together with JH and Jerry Herbst, the “Herbst Parties”)  
27 on the one hand, and Morabito and Consolidated Nevada Corporation (“CNC”) on the other,  
28

1 regarding the sale of the BHI stock to JH. *See* SSOF ¶ 1.

2 2. On December 3, 2007, Morabito and CNC filed a lawsuit against the Herbst  
3 Parties captioned *Consolidated Nevada Corp., et al. v. JH, et al.* in the Second Judicial District  
4 Court (the “State Court”), Case No. CV07-02764 (together with all claims and counterclaims, the  
5 “State Court Action”). *See* SSOF ¶ 2.

6 3. The Herbst Parties filed numerous counterclaims in the State Court Action  
7 against Morabito and CNC, including fraud in the inducement, misrepresentation, and breach of  
8 contract relating to an Amended and Restated Stock Purchase Agreement (“ARSPA”). *See*  
9 SSOF ¶ 3.

10 4. Ultimately, Judge Brent Adams found that Morabito and CNC fraudulently  
11 induced the Herbst Parties to enter into the ARSPA and ruled in favor of the Herbst Parties  
12 against Morabito on other fraud-based claims. *See* SSOF ¶ 4.

13 5. Specifically, as to the fraud, Judge Adams found:

- 14 a. Clear and convincing evidence shows that there was no basis whatsoever for the  
15 contents of the working capital estimate other than Mr. Morabito’s decision to create  
16 it.  
17 b. There is not one piece of paper that has been produced in over 5,500 exhibits in this  
18 trial, to the Independent Accountants, during discovery or anywhere else, to support  
19 the exaggerated value of the company as set forth in the working capital estimate  
20 c. The Court finds by clear and convincing evidence that Mr. Morabito never for a  
21 single second had any intention to perform the services of construction manager.  
22 d. Mr. Morabito’s representation under the CMA were intentionally false.  
23 e. Mr. Morabito’s representations were made for the purpose of inducing the purchase  
24 of the development sites by JH.

25 *See* SSOF ¶ 5.

26 6. On September 13, 2010, the Court announced an oral judgment of \$85,871,364.75  
27 with further proceedings to take place regarding the amount of punitive damages (the “Oral  
28 Judgment”). *See* SSOF ¶ 6.

7. On October 12, 2010, the State Court entered its findings of fact and conclusions  
of law (the “FF&CL”) which set forth the legal and factual basis for a forthcoming written State

1 Court judgment, including fraud in the inducement. *See* SSOF ¶ 7.

2 8. On August 23, 2011, the State Court entered a final judgment awarding the Herbst  
3 Parties total damages in the amount of \$149,444,777.80 for actual fraud, representing both  
4 compensatory and punitive damages as well as an award of attorneys' fees and costs (the "Final  
5 Judgment"). *See* SSOF ¶ 8.

6 **B. Immediately After the Oral Judgment, Morabito Begins Planning to Transfer His**  
7 **Assets to Avoid Liability on the Eventual Final Judgment.**

8 9. Immediately after the Oral Judgment, Morabito (on behalf of himself and his  
9 trust, the Arcadia Living Trust ("Arcadia")), his boyfriend, Bayuk (on behalf of himself and the  
10 Edward William Bayuk Living Trust), his brother, Sam, Superpumper, and Snowshoe engaged in  
11 a series of transactions designed to hinder, delay, and defraud the Herbst Parties.

12 10. *Less than two days after the Oral Judgment*, Morabito engaged two separate law  
13 firms in New York to formulate a plan for divesting Morabito of his assets while retaining all of  
14 the benefits of his assets. Specifically, Morabito retained Dennis Vacco ("Vacco") at Lippes  
15 Mathias Wexler & Friedman ("LMWF"), and Sujata Yalamanchili ("Yalamanchili") and Garry  
16 Graber ("Graber") at the law firm of Hodgson Russ ("HR").

17 11. Graber testified as to the goals of his retention:

18 Q. And what were you asked to do for Morabito?

19 A. I was asked to consider whether there were ways in which he could  
20 evade the judgment through bankruptcy, or I shouldn't say evade the  
21 judgment. That's not correct. ***If there are ways he could protect himself***  
***against -- protect his assets and/or escape liability on account of the***  
***judgment.***

22 *See* SSOF ¶ 10. (emphasis added).

23 12. HR had several ideas. In an e-mail dated September 15, 2010 – just two days  
24 after the Oral Judgment – Yalamanchili wrote to Morabito:

25 I caught up with Garry (who is back in Buffalo today) on our conversation  
26 from yesterday.

27 Garry has a number of additional ideas, ***including a possible marital split***  
***between Paul and Edward pursuant to which Edward could retain some***



1           *of Paul's assets.* We need to better understand California domestic  
2 partner laws, first.

3           *See SSOF ¶ 11 (emphasis added).*

4           13. Morabito clarified his intent to protect all tangible assets, right down to his clothes  
5 and airline miles, with Graber:

6           Garry

7           I have a few questions.

8           Edward and I plan on changing our primary residence from Reno to  
9 Laguna Beach.

10          Change DMV, voter registration, cancel Nevada club memberships, burial  
11 plot, resign from State Board etc

12          Should Edward buy our household furniture etc from me for the Reno and  
13 Palm Springs houses that are not our primary? We have receipts from  
14 2006 for everything worth around \$225,000 new.

15          Also, what about my clothes? I was in the hospital for 5 months last year  
16 and came out 200 pounds lighter. I spent \$200,000 on a new wardrobe  
17 since November.

18          Finally, are my 2 million American Express airline miles something I can  
19 do something with or is that an asset, too?

20          (the "Graber E-mail"). *See SSOF ¶ 12.*

21          14. By September 20, 2010, Yalamanchili was advising her firm that she had agreed  
22 to "help [Morabito] with some of the asset protection strategies he will need." *See SSOF ¶ 13.*

23          15. To that end, and in discussing the "quick run-down of Paul's assets" with Graber,  
24 Yalamanchili made clear:

25          CoWest Co owns 100% of the stock of Superpumper, Inc., an Arizona  
26 corporation. This is a profitable business which owns and operates 11 gas  
27 stations an [sic] convenience stores in Arizona. Paul, Edward, and Sam all  
28 draw "healthy" salaries from this company (e.g. 250k to 500k). I would  
like to preserve this business and protect it from the Herbsts since it pays  
salaries to Edward, Sam and Paul and it is a strong, going business.

*See SSOF ¶ 14.*

          16. That same night, after what was clearly a heated call between Morabito and his  
counsel as to the Transfers and problems associated therewith, Graber wrote to Morabito:

1 And I apologize for my part in the exchange. I feel as though I am being  
2 asked under very rushed circumstances with very scant information to  
3 come up with a **foolproof strategy** in a complicated area of law in which  
4 “foolproof” is impossible to achieve and then being prevented from  
5 explaining the issues and obstacles involved.

6 See SSOF ¶ 15 (emphasis added).

7 17. Morabito is not a stupid man. After being advised that it was improper to transfer  
8 assets following a judgment to hinder, delay, and defraud a creditor, Morabito made clear his  
9 strategy for protecting the Transfers:

10 Dennis & Sujata

11 Garry asked what my rationale was to do this – and that I would be asked.

12 Judge Adams specifically exonerated Edward and Sam. I hold assets with  
13 them, and they had long standing options to own a majority of  
14 Superpumper, Inc.

15 We agreed amongst ourselves that I was best standing alone with my  
16 assets, and on advice of Counsel we sought independent, third party  
17 appraisers to do just that.

18 I have no doubt it will be challenged in court – and they may try and come  
19 up with their own appraisals. But in the end, the underlying “selling for  
20 value” will be allowed.

21 Snowshoe Petroleum, Inc. will be an Erie County, New York company.  
22 Edward is going to be a resident of Los Angeles and Orange County,  
23 California.

24 ***The Herbsts no longer have home court, good old boy advantage.***

25 See SSOF ¶ 16 (emphasis added).

26 18. Yalamanchili cautioned Morabito at that time:

27 You need to be very clear on what the law says, Paul. I don’t think it  
28 simply says you can transfer assets for value. I think Garry is trying to say  
that Fraud. Conveyance laws are complicated and they look at a lot of  
factors, including whether you have an intent to frustrate your creditors. I  
am not an expert in this area but I want to be very clear on what the law  
says.

See SSOF ¶ 17.

19. Morabito never even pretended that he was not trying to frustrate his creditors,  
responding:

Exactly. It allows sale. If you look at what we are doing, we end up in the exact same position with stand alone assets.

See SSOF ¶ 18.

20. Shockingly, despite his constant e-mails dictating exactly how his attorneys would transfer his assets to hinder the Herbst Parties' collection efforts, even challenging his attorneys when they advised as to the consequences of his actions, Morabito later claimed:

Q. So is it a fair assessment that you told [Vacco] split everything up, and then he just gave you documents to sign and that was your involvement in it?

Morabito: Effectively, I mean, I wasn't involved – I mean, I think I may have identified one – I – I mean, we didn't – I don't know any of the people involved. I never met any of the people involved. I wasn't involved in any of this process, so Mr. Vacco directed the whole thing.

See SSOF ¶ 19.

**C. Morabito Starts to Transfer His Assets to Avoid Collection.**

**1. The \$6,000,000 Sefton Trustees Transfer.**

21. On September 15, 2010, just *two days* after the Oral Judgment, Morabito transferred \$6 million (the "Off-Shore Funds") to an entity known as Sefton Trustees ("Sefton").

See SSOF ¶ 20.

22. Morabito confirmed that Sefton is an offshore account. See SSOF ¶ 21. However, he then claimed that, notwithstanding the Oral Judgment against him just days before, that (1) he transferred the Off-Shore Funds to Sefton to pay the debts owed by a prior boyfriend, Mr. Marsland, through no documentation regarding the debts or that Morabito has any exposure for the debts has ever been produced and (2) he has no recollection of making this \$6 million transfer to Sefton. See SSOF ¶ 22.

**2. Morabito Exchanges His Majority Interest in the Laguna Properties for Bayuk's Minority Interests in a Reno Property.**

23. Immediately prior to the Oral Judgment, Morabito and Bayuk, through their respective trusts, owned three real properties – (1) 371 El Camino del Mar, Laguna Beach, California (the "El Camino Property"), (2) 370 Los Olivos, Laguna Beach, California (the "Los

1 Olivos Property” and, together with the El Camino Property, the “Laguna Properties”), and (3)  
2 8355 Panorama Drive, Reno, Nevada (the “Reno Property,” and together with the Laguna  
3 Properties, the “Real Properties”). See SSOF ¶ 24.

4 24. Specifically, Morabito<sup>1</sup> owned 70% of the Reno Property, 75% of the El Camino  
5 Property and 50% of the Los Olivos Property. Bayuk owned the remaining interests. See SSOF  
6 ¶ 25.

7 25. On September 27, 2010, *just two weeks* after the Oral Judgment, Morabito and  
8 Bayuk executed a *Purchase and Sale Agreement*, which was later amended on September 29,  
9 2010 (as amended, the “PSA”), for the transfer of the Real Properties. See SSOF ¶ 26.

10 26. Pursuant to the PSA, Morabito purported to sell his 75% and 50% interests in the  
11 Laguna Properties in exchange for Bayuk’s 30% interest in the Reno Property (the “Real  
12 Property Transfers”). The transaction included Morabito providing a \$150,000 credit to Bayuk  
13 for a theater system in the Reno Property and \$45,000 for excess water rights appurtenant to the  
14 Reno Property. See SSOF ¶ 27.

15 27. In other words, following the Real Property Transfers, Bayuk owned the Laguna  
16 Properties, and Morabito owned the Reno Property.

17 28. According to Morabito and Bayuk, the value of the Laguna Properties, after  
18 deduction for mortgages, was \$1,933,595. Specifically, the Los Olivos Property was valued<sup>2</sup> at  
19 \$854,954, and the El Camino Property was valued at \$1,078,641. See SSOF ¶ 28.

20 29. The valuation of the Reno Property is heavily disputed. According to the Debtor  
21 and Bayuk, the value of the Reno Property was \$4,300,000 as of September 30, 2010. See SSOF  
22 ¶ 29.

23 30. According to Plaintiff, the value of the Reno Property, as of September 30, 2010,  
24 was only \$2,000,000. The Reno Property was also subject to a \$1,028,864 mortgage. See SSOF  
25 ¶ 30.

26  
27 <sup>1</sup> For purposes of this Motion, Morabito and Arcadia are treated as one and the same, and Bayuk and the Bayuk  
Trust are treated as one and the same.

28 <sup>2</sup> This value is net of existing mortgages on the Laguna Properties.

1           31.     The differences in the Reno Property valuation are critical. By over-inflating the  
2 value of the Reno Property, Morabito gave the appearance that he was retaining more value than  
3 he actually was. This allowed the justification, at least on paper at the time, that Bayuk's  
4 retention of the Laguna Properties was equal in value to Morabito's retention of the Reno  
5 Property.

6           32.     Morabito sold the Reno Property in December 2012 (more than two years after  
7 these valuations) for only \$2,600,000. *See* SSOF ¶ 31.

8           33.     Along with the real property, Morabito also transferred all personal property at all  
9 of the real properties to Bayuk. Critically, Morabito purported to sell all of the personal property  
10 in the Reno Property, despite the fact that Morabito retained that real property, for a payment of  
11 \$29,380.00. This is the same personal property that, in the Graber e-mail just two weeks before,  
12 Morabito indicated was purchased for \$225,000. Confusingly, Morabito also testified in March  
13 2015 that, as of April 2012, he had furniture and assets in the Reno Property worth \$1 Million.  
14 Morabito claimed that he would periodically sell this property to Bayuk (long after the Transfers  
15 and the alleged sale) in exchange for his living expenses. *See* SSOF ¶ 32.

16           **3. Morabito Exchanges His 50% Equity Interest in Baruk Properties, LLC for an**  
17           **Illusory Promissory Note.**

18           34.     Immediately prior to the Oral Judgment, Morabito and Bayuk each owned 50% in  
19 a real estate holding company called Baruk Properties, LLC, a Nevada limited liability company  
20 ("Baruk"). *See* SSOF ¶ 33.

21           35.     Baruk owned four real properties: 1461 Glenneyre, Laguna Beach, CA ("1461  
22 Glenneyre"); 570 Glenneyre, Laguna Beach, CA ("570 Glenneyre"), 1254 Mary Fleming, Palm  
23 Springs, CA (the "Palm Springs Property"), and 49 Clayton, Sparks, NV (the "Sparks Property,"  
24 and collectively, the "Baruk Properties"). *See* SSOF ¶ 34.

25           36.     Morabito and Bayuk obtained appraisals: (1) valuing 1461 Glenneyre at  
26 \$1,400,000; (2) valuing 570 Glenneyre at \$2,500,000, or \$1,129,021 after deduction for the  
27 mortgage on property; and (3) valuing the Palm Springs Property at \$1,050,000, or \$705,079  
28 after deduction for the mortgage. *See* SSOF ¶ 35.

1           37.     The Sparks Property had a value of \$75,000 as of September 30, 2010. *See* SSOF  
2     ¶ 36.

3           38.     Thus, as of September 30, 2010, the collective value of the Baruk Properties, and  
4     as a result, of Baruk, was \$3,309,100. Consequently, Morabito's 50% interest was worth  
5     \$1,654,550.

6           39.     On October 1, 2010, *just two and half weeks* after the Oral Judgment, Morabito  
7     transferred his 50% membership interest in Baruk to Bayuk through the *Membership Interest*  
8     *Transfer Agreement* (the "Baruk Transfer"). *See* SSOF ¶ 37.

9           40.     In exchange Bayuk purportedly provided a promissory note in the amount of  
10    \$1,617,050 to Morabito (the "Baruk Note"). *See* SSOF ¶ 38.

11          41.     Immediately after the Baruk Transfer, on October 4, 2010, Bayuk merged Baruk  
12    Properties, a Nevada entity, into Snowshoe Properties, LLC, a California limited liability  
13    company ("Snowshoe Properties"),<sup>3</sup> and transferred the Baruk Properties to Snowshoe  
14    Properties. *See* SSOF ¶ 39.

15          42.     Immediately after that, Bayuk transferred the Palm Springs Property from  
16    Snowshoe Properties to the Bayuk Trust. *See* SSOF ¶ 40.

17          43.     The Baruk Note was almost immediately assigned (the "Woodland Assignment")  
18    by Morabito to Woodland Heights ("Woodland"), a Canadian entity owned by Morabito's father,  
19    purportedly in exchange for an interest in Woodland. *See* SSOF ¶ 41.

20          44.     Despite the Woodland Assignment, Morabito and Bayuk now contend that the  
21    Baruk Note was not transferred, and Bayuk cannot recall ever making any payments to  
22    Woodland. *See* SSOF ¶ 42.

23          45.     The terms of the Baruk Note required principal and interest payments over 360  
24    months in equal monthly installments of \$7,7204.04 accruing interest at 4%. *See* SSOF ¶ 43.

25          46.     However, Bayuk testified that he was erratic with paying. In fact, according the  
26    Bayuk, Bayuk would just "give [Morabito] money whenever he needs it. He's a friend." *See*  
27

28     

---

  
   <sup>3</sup> Snowshoe Properties is distinct from Snowshoe Petroleum.

SSOF ¶ 44.

47. Bayuk's and his agents' testimony regarding the Baruk Note has been contradictory:

- a. Bayuk testified that the Baruk Note was satisfied in full based on a loan ledger (the "First Ledger") and amortization schedule (the "Amortization Schedule") provided by his accountant, Stanton Bernstein ("Bernstein").
- b. According to the First ledger, \$735,724.75 was paid in 2012, \$531,600 was paid in 2013, \$579,362.62 was paid in 2014, and \$101,526.70 was paid through March 2015.
- c. Bayuk later testified that the First Ledger was wrong, and he produced another, wildly different ledger (the "Second Ledger").
- d. According the Second Ledger, \$567,009.26 was paid in 2010, \$273,412.88 was paid in 2011, \$826,232.49 was paid in 2012, and \$129,400.00 was paid in 2013.
- e. According to the Amortization Schedule, \$735,724.75 was paid in 2012 and \$1,029,510.57 was paid in 2013.
- f. In November 2011, Morabito instructed Vacco: "On this, I have the note that I sold my Dad. Cancel it, convert it back into a 50% share interest in Snowshoe Properties, LLC," proving not only that no payments could have been made prior to November 2011, but that the assignment to Woodland was just another sham.
- g. On May 23, 2012, Morabito submitted a Personal Financial Statement to Bank of America ("BofA") in connection with the BofA Settlement (defined herein) listing as an asset a "\$1,750,000 Note Receivable" due from Bayuk. Morabito acknowledged that according to the Personal Financial Statement, as of 2012, Bayuk owed him \$1.75 million under the Baruk Note, proving that no payment could have been made prior to 2012.

See SSOF ¶ 45.

**4. Morabito Transfers His 80% Interest in Superpumper, Inc. for a Small Cash Payment and Another Illusory Promissory Note.**

48. Immediately prior to the Oral Judgment, Morabito owned a 100% interest in Consolidated Western Corporation ("CWC"), which owned an 80% interest in Superpumper. See SSOF ¶ 46.

49. Prior the Oral Judgment, Morabito consistently represented that his interest in Superpumper was worth at least \$20,000,000:

- 1 a. In a May 2009 financial statement provided to Superpumper’s auditors, Gursey  
2 Schneider (“Gursey”) Morabito listed the value of his interest in Superpumper at  
\$20,000,000.
- 3 b. In March 2010, Morabito confirmed that the value his interest was still \$20,000,000,  
4 stating to Gursey: “Here is the last PFC done for me – and I can represent that  
5 nothing has materially changed.”
- 6 c. On March 10, 2010, Morabito sent an e-mail in connection with a proposed deal  
7 involving Superpumper and ExxonMobil stating that “My intention is to contribute  
my existing Arizona (11 stores) and Nevada (51% of the truck stop/casino) businesses  
at a FMV of approximately \$40 million.”
- 8 d. On May 20, 2010, Morabito delivered an e-mail to Vacco in connection with a  
9 proposal to place a binding bid for ExxonMobil Chicago stores, instructing: “Arrange  
10 paperwork for me to transfer into CCC 100% of the shares of Consolidated Western  
Corporation which owns 100% of Superpumper, Inc., at a FMV of \$30 million.”
- 11 e. In a Statement of Assets and Liabilities provided to Compass Bank (“Compass”),  
12 Superpumper’s Lender, on May 30, 2010, Morabito represented the value of  
Superpumper to be \$30,000,000.
- 13 f. On June 28, 2010, Morabito delivered another e-mail to employees and ExxonMobil  
14 regarding a potential deal that notes “The Arizona company, which I presently own  
15 100% of, has a FMV exceeding \$25 million; annual cash flow of \$5 million; and has  
no term debt, just an existing line of credit for \$3 million.”

16 See SSOF ¶ 47.

17 50. On September 28, 2010, *just two weeks* after the Oral Judgement, Morabito  
18 merged CWC into and Superpumper and then, on September 30, 2010, Morabito and Snowshoe,  
19 an entity created by Vacco for Bayuk and Sam, entered into a *Shareholder Interest Purchase*  
20 *Agreement* (the “Superpumper Agreement”) whereby Snowshoe allegedly purchased Morabito’s  
21 80% equity interest in Superpumper. See SSOF ¶ 48.

22 51. Snowshoe was established as a New York entity. See SSOF ¶ 49.

23 52. At around the same time, Compass prepared a summary of a request for a  
24 forbearance agreement. Compass’ report noted that: “Upon learning of the judgment, Mr.  
25 Morabito sold SPI, which was not included in the suit, to two minority shareholders. A business  
26 appraisal is still being finalized, final purchase price will be roughly \$10MM.” See SSOF ¶ 50.

27 53. Ultimately, Matrix Capital Markets Group, Inc. (“Matrix”) completed a valuation  
28 of Superpumper, and on October 13, 2010 (two weeks *after* the Superpumper Agreement),



1 provided its report to Vacco valuing 100% of the equity interest in Superpumper as of August  
2 31, 2010 at \$6,484,514, or \$5,187,611.20 for Paul Morabito's 80% interest (the "Matrix  
3 Valuation"). See SSOF ¶ 51.

4 54. The Matrix Valuation lacked credibility for a number of reasons, but particularly  
5 because it inexplicably adjusted nearly \$9 Million in affiliated accounts receivables due to  
6 Superpumper (the "Receivables") to zero, reducing the value of Superpumper, on paper at least,  
7 by at least \$6,500,000. See SSOF ¶ 52.

8 55. In reality, the value of Superpumper on September 30, 2010 was \$13,050,000,  
9 and Morabito's 80% interest was worth \$10,440,000. See SSOF ¶ 53.

10 56. LMWF, Morabito's counsel at the time of the Transfers, apparently sought to  
11 further reduce the valuation after the parties signed the Superpumper Agreement.

12 57. Specifically, despite the already reduced valuation because of the elimination of  
13 Receivables, LMWF further reduced the Matrix valuation by (1) \$1,682,000 for the "Compass  
14 Term Loan" (the "LMWF Compass Reduction") and (2) \$1,680,880 for a 35% "risk reduction"  
15 (the "LMWF Risk Reduction," and together with the LMWF Compass Reduction, the  
16 "Additional LMWF Reductions"). See SSOF ¶ 54.

17 58. Ultimately, as a result of the Matrix Valuation excluding the Receivables and the  
18 Additional LMWF Reductions, Morabito and Defendants' came up with a transfer valuation for  
19 Morabito's 80% interest in Superpumper of only \$2,497,307.

20 59. In exchange for the reduced value of Morabito's 80% interest, Defendants  
21 purportedly paid Morabito \$1,035,094 in cash, and \$1,462,213 through a term note from  
22 Snowshoe to Morabito (the "Superpumper Note"). See SSOF ¶ 55.

23 60. However, Morabito submitted a declaration to the Bankruptcy Court on July 1,  
24 2013 (the "Morabito Bankruptcy Declaration") contending that he sold his interest in CWC for  
25 "cash payments of approximately \$542,000 and a note of approximately \$933,694." Morabito  
26 further stated that "I had received partial payments on [the note] and the principal balance has  
27 been subsequently cancelled based on a post-closing reevaluation of the significant decrease in  
28 the fair market value of the business." See SSOF ¶ 56.

1           61.     While it is unclear what happened to the cash payment, regardless of the amount,  
2 it is without question that the Herbst Parties were never able to collect on it.

3           62.     Furthermore, as to the Superpumper Note, it is entirely unclear what the actual  
4 note ever was and what was, if anything, ever actually paid.

5           63.     First, The Superpumper Note was not executed until November 1, 2010, one  
6 month after the Superpumper Transfer. The Superpumper Note required monthly payments  
7 commencing on December 1, 2010 in the amount of \$19,986,71 for 84 months, with interest  
8 accruing at 4% per annum. *See* SSOF ¶ 57.

9           64.     The amount due under the Superpumper Note was reduced by \$939,000 to  
10 \$423,213 on February 1, 2011 (the “Superpumper Note Reduction”), leaving a successor note in  
11 the amount of \$423,213 (the “Successor Note”). *See* SSOF ¶ 58.

12           65.     The Superpumper Note Reduction, however, was another sham designed to  
13 ensure that Morabito held no assets on which the Herbst Parties could execute.

- 14           a.     In short, on or about August 13, 2010 (during trial), Superpumper obtained a term  
15 loan from Compass in the amount of \$3,000,000 (the “Compass Term Loan”).
- 16           b.     The Compass Term Loan was supposed to be used for operations but instead was  
17 withdrawn from Superpumper and distributed to Morabito, Bayuk, and Sam, each  
18 of whom received \$939,000 (the “Compass Loan Withdrawals”).
- 19           c.     The Compass Loan Withdrawals were made in order for Morabito, Bayuk, and  
20 Sam to invest in other companies:

21                     Sam:   The term loan was initiated in August of 2010. The  
22 reasons for that term loan is that it was guarantied by the  
23 Superpumper. Edward, Paul and I decided we were going  
24 to take that money, pre what happened in the judgment, and  
25 go invest it in another entity and use that money for equity  
26 for us to buy another business, probably in the same field,  
27 the convenience store area.

- 28           d.     While \$939,000 withdrawn by Morabito, Bayuk, and Sam (for a total of \$2,817,000)  
and was to be paid back by Morabito, Bayuk, and Sam, they were eliminated as assets  
of the company when valued by Matrix. At the same time, the same obligations are  
now being used to reduce the amount due to Morabito and otherwise reduce the value  
of the company.

*See* SSOF ¶ 59.

1           66. Defendants have been unable to produce any evidence of payments made on the  
2 Successor Note, though it provided for 84 monthly payments beginning on March 1, 2011. It is  
3 not clear whether the Successor Note was every actually paid

- 4           a. As late as October 12, 2012, Morabito's accountant, Stan Bernstein, noted that no  
5 payments had been made on the Superpumper Note through 2011, and interest was  
6 accrued.
- 7           b. Morabito could not say whether the Successor Note was paid.
- 8           c. Nor could Vacco: "Since my separation,<sup>4</sup> I don't know what happened to the debtor,  
9 how – how much of it's been paid, whether it's been paid, whether it's been paid in  
10 total or whether it's in default. I don't know."
- 11           d. Finally, as set forth in the Morabito Bankruptcy Declaration, the note was only in the  
12 amount of approximately \$933,694, and the principal balance was subsequently  
13 cancelled based on a post-closing reevaluation of the significant decrease in the fair  
14 market value of the business.

15 See SSOF ¶ 60.

16           67. After all of these machinations, Morabito ultimately received at most only  
17 \$542,000 in cash, based on his own Morabito Bankruptcy Declaration (which amount was still  
18 uncollectable by the Herbst Parties), for an interest that only a few months before he had valued  
19 at \$20 million or more.

20 **D. Creditors Are Left with Only One Tangible Asset Against Which They Can Collect**  
21 **After the Transfers.**

22           68. By the end of September, *just 16 days after entry of the Oral Judgment*, in  
23 addition to the \$6,000,000 Off-Share Funds Transfer to Sefton, Morabito had transferred: (1) all  
24 interests in the two Laguna Properties; (2) his 50% interest in Baruk LLC; and (3) his 80%  
25 interest in Superpumper, Inc., leaving him with only the Reno Property at an artificially inflated  
26 value to satisfy his creditors.

27 . . .

28 . . .

---

<sup>4</sup> Vacco testified that he terminated his relationship with Morabito prior to the involuntary Bankruptcy Case, which was commenced in June 2013. See Vacco Depo., p. 38, ll. 12-20.

69. The ability to collect before the Transfers, as opposed to what was left after the Transfers, is summarized as follows:

Before Transfers	After Transfers
80% Interest in CWC/Superpumper (\$10,440,000)	\$542,000 + \$423,213 ( <i>at most</i> ) sham Successor Note
70% Interest in the Reno Property (\$679,795.20)	100% Interest in Reno Property (\$971,136)
75% Interest in El Camino Property (\$808,981)	\$0.00
50% Interest in Los Olivos Property (\$427,477)	\$0.00
50% Interest in Baruk LLC (\$1,654,549.50)	\$1,617,050 sham Baruk Note
<b>Total Value: \$14,731,007.50</b>	<b>Total Value: \$3,553,399</b>

**E. Morabito Continues to Control the Transferred Properties.**

70. Following the Transfers, Morabito continued to utilize the transferred assets as if he still owned them.

71. This continued control makes clear that the intent of the Transfers was not to separate Morabito and Bayuk's interest. There was never any separation – everything remained very much intertwined, the only change being that the assets were now out of the Herbst Parties' reach.

72. In April 2011, Morabito sought to negotiate a sale on behalf of Snowshoe, and by bargaining with Superpumper. Specifically, Snowshoe sought to acquire Nella Oil Company, LLC and Flyers LLC (the "Nella Deal"). The proposal included the contribution of Snowshoe's 100% interest in Superpumper, "valued at \$10,000,000." Despite that the purchaser was to be Snowshoe, Morabito negotiated all of the terms of the Nella Deal and controlled the entire deal. For example:

- a. On April 5 and April 15, 2011, Morabito e-mailed Vacco regarding coordinating the Nella Deal, without including Bayuk or Sam. Morabito notes that the deal allowed "SPI to acquire Nella Oil Co" and indicates "attached is an initial \$65 million loan offer from Cerebus – they made it out to CWC but I am having it changed to Snowshoe Petroleum Inc..." Morabito makes his role clear: "I am expecting a letter of interest from Getty Realty on the real estate by Tuesday. My goal would be to submit a Letter of Intent to Nella Oil by Wednesday or Thursday. I will circulate the

1 first draft.

2 b. These communications continued through August 7, 2011.

3 c. Throughout the discussions, there were at multiple of proposed Letters of Intent, each  
4 negotiated and controlled by Morabito.

5 See SSOF ¶ 62.

6 73. In August 2011, Morabito retained Tim Haves, a real estate broker, on behalf of  
7 Superpumper Properties, LLC (“Superpumper Properties”), a company purportedly owned by  
8 Morabito.<sup>5</sup> Instead of having Mr. Haves paid of our Superpumper Properties, Vacco instructed  
9 Morabito, without copying Bayuk and Sam, to simply use Superpumper to make payment: “In  
10 order to protect [Tim Haves] from being reached in an enforcement action by the Herbst, I  
11 recommend that his agreement be with [Superpumper.] [Superpumper] will need to pay him  
12 \$58,000 without any corresponding reimbursement from [Superpumper Properties]. If he is paid  
13 from Flyer’s proceeds, [the Herbst Parties] will go after that money and the fact that he is not  
14 broker in NV will be revealed. He has consulted for [Superpumper] so it is logical that he be  
15 under contract for that entity.” See SSOF ¶ 63.

16 74. In November 2011, Morabito sought to use the assets of Snowshoe Properties (fka  
17 Baruk) that he allegedly transferred to Bayuk to settle a lawsuit against Morabito:

18 a. On April 11, 2011, BofA filed a lawsuit against Morabito in connection with a past  
19 due obligation due and owing to BofA by Morabito thereby commencing case no.  
CV11-01121 (the “BofA Lawsuit”).

20 b. In connection with the BofA Lawsuit, BofA inquired as to the ownership of 1461  
21 Glenneyre, and the Baruk Transfer:

22 David Maiorella of the Bank spoke with Mr. Morabito about this  
23 situation on October 31, and Mr. Maiorella *was advised by Mr.*  
24 *Morabito that this transfer represented nothing more than a*  
*Borrower name change, and that documentation exists*  
25 *substantiating that such was indeed the case.*

26 <sup>5</sup> Superpumper Properties LLC (“Superpumper”) was an entity for which Morabito purportedly paid Bayuk  
27 and Sam for their interests at the time of the Transfers. However, Bayuk stated, under oath, that “Edward  
28 Bayuk owned 25%, Salvatore Morabito owned 25% and Morabito owed [sic] 50% until approximately when  
the assets were sold in 2011 and the company was dissolved.” In any event, Morabito sought to, and did, sell  
Superpumper Properties prior to the Final Judgment again ensuring that the Herbst Parties collection efforts  
were frustrated.

(emphasis added).

- c. Morabito, more than a year after the alleged Baruk Transfer, asked Vacco: “As far as they are concerned it is a name change, correct?”
- d. Vacco responded: “Tough to sell if she pulls corporate records which is who the members of Snowshoe Properties, LLC.”
- e. In order to correct any potential concerns, on November 1, 2011, over a year after the Baruk Transfer, Morabito responded to Vacco:

On this, I have the note that I sold my Dad. [The Baruk Note] Cancel it, convert it back into a 50% share interest in Snowshoe Properties, LLC, and give me the right to trigger an option to split the assets and take 1461 Glenneyre and [Bayuk] ends up with 570 Glenneyre.

See SSOF ¶ 64.

75. In February 2012, Morabito, Vacco, and Timothy Haves, the same broker Vacco advised Morabito to pay out of Superpumper before, exchanged no less than five e-mails regarding a sale of 1461 Glenneyre. Bayuk was not even copied on any of them. See SSOF ¶ 65.

76. On May 8, 2012, Morabito instructed Vacco: The Glenneyre Street property should be in PARADERAS PROPERTIES LLC, Delaware, jointly owned by PM/RW,<sup>6</sup> and sold at \$2.75 million . . . \$1.75 million mortgage we are getting through Pacific Bank and \$1 million is cash equity. Though Bayuk purportedly owned the 1461 Glenneyre property in full at that point, he was not part of this proposed ownership. See SSOF ¶ 66.

77. In September 2012, in connection with a settlement of the BofA Lawsuit, which had nothing to do with Bayuk, Morabito caused a second deed of trust to be placed on 1461 Glenneyre. Vacco simply instructed Bayuk when and where to sign for Morabito:

Edward,

Attached please find various documents which need to be executed by you to fulfill the collateral for the note Paul agreed to in order to settle the BOA litigation. I have reviewed and approved all documents. Please execute these documents and return them to me

---

<sup>6</sup> RW is Raymond Whiteman (“Whiteman”).

via PDF before Friday and then overnight the originals to me.  
Please sign in blue ink.

See SSOF ¶ 67.

78. Also in September 2012, in connection with funding for Virsenet, an entity in which Bayuk and Morabito held joint interests, Bayuk stated to Morabito and various attorneys in an e-mail chain regarding funding and security, “Let’s just make this simple, ***I think Paul wants to*** put a second deed of trust in place on Mary Fleming House if so, than [sic] just let me sign for the second deed of trust.” See SSOF ¶ 68 (emphasis added).

79. On October 3, 2012, in an e-mail exchange between Morabito, Vacco, and Christian Lovelace (“Lovelace”), another LMWF attorney, Morabito discussed the terms of a \$5 million loan to Snowshoe Properties (in which Morabito supposedly held no interest). Vacco responded to Morabito:

As I understand your instructions below, Snowshoe Properties, LLC, will borrow \$5MM. Snowshoe will provide a FDT on 1461 Glenneyre and a SDT on 570 Glenneyre. The term will be for 36 months with no prepayment penalty. Are the monthly payments interest only or interest and principal. If interest and principal what is the amortization period, 3 years, 10, 15? What interest rate do you want to offer?

Of course, while Bayuk was on some earlier emails, he was not even copied on the e-mails discussing the substantive terms of the deal. See SSOF ¶ 70.

80. In March 2013, nearly three years after the Transfers, Morabito was still bargaining with Superpumper. For example, on an e-mail with Vacco, Morabito proposed a settlement with the Herbst Parties:

Morabito: “Why not offer them Superpumper – they would make \$2 million a year and could borrow \$3 million against it”

Vacco: “As to your proposal, do you mean you would transfer ownership of Superpumper to BHI or to use it as ‘collateral’ in exchange for a longer forbearance.

Morabito: We would transfer ownership to them lock, stock and barrel ... \$2 million is store level cashflow and no debt or PG’s.

Though Bayuk and Sam supposedly owned Superpumper at this point, neither was included in

1 these discussions. See SSOF ¶ 71.

2 81. In March 2014, Morabito caused Bayuk to transfer the Sparks Property to Desi  
3 Moreno to settle the case of *Moreno v. Morabito*. Bayuk was not named in the Moreno lawsuit  
4 and didn't even know what it was about. See SSOF ¶ 72

5 82. As of December 2016, Morabito continued living in the Palm Springs Property  
6 rent-free. See SSOF ¶ 73.

7 **F. Bayuk and Sam Funded Morabito's Extravagant Lifestyle, Making the Purported**  
8 **Promissory Notes Illusory.**

9 84. Both before and after the Transfers, Bayuk and Sam would pay his debts and  
10 other obligations:

11 a. According to Morabito, the process of Bayuk and Sam "lending" Morabito money  
12 whenever he needed started before 2010, and likely in 2009.

13 b. Morabito testified with respect to his financial entanglements with Bayuk since  
14 2009:

15 Q. You referenced a promissory note that is updated. When did that  
16 note first come into existence?

17 A. Well, it's just a ledger or whatever. He keeps a record of  
18 everything that he advances me.

19 Q. Is there a formal written promissory note?

20 A. I don't recall.

21 Q. Do you know who would have that information?

22 A. No.

23 Q. Who normally drafts promissory notes on your behalf?

24 A. I don't know if I ever had anyone draft any promissory notes on my  
25 behalf.

26 Q. Do you know what the balance of the money that Ed Bayuk has lent  
27 you is today?

28 A. No.

Q. Do you know if it is more or less than a million dollars?

A. I would presume more, but I'd be guessing.



1 Q. Where would that information be?  
2 A. With Mr. Bayuk or Mr. Hawkoette?  
3 Q. Are you aware of a specific ledger that Mr. Bayuk or Mr.  
4 Hawkoette keep regarding the money that Mr. Bayuk has lent you?  
5 A. I'm assuming they do.  
6 Q. And is that a continuing note that has existed since 2009?  
7 A. I don't specifically recall it it's a specific note that existed in 2009  
8 or another year or when it was.  
9 A. Do you recall if, at any time, you ever paid Mr. Bayuk in full?  
10 Q. I believe I've, at times, have paid him back, and then I borrowed  
11 more money since and...  
12 A. Are you aware of a time when there was a zero obligation owing?  
13 A. At one point, yes.  
14 Q. Do you know when that –  
15 A. I think just after my surgery, around that period of time, I got to a  
16 point where I went from – he owed me money, I owed him some  
17 money. Ever since then, I've always owed him money.  
18 Q. So when you say since your surgery, we're talking about since 2009  
19 or 2010.  
20 A. 2009, 2010, during that whole period.  
21 *See SSOF ¶ 74*  
22 85. Similarly, when asked about balances due to Sam since the beginning of 2010,  
23 Morabito confirmed, "I've been in debt to my brother my entire life, so I have no idea." *See*  
24 *SSOF ¶ 75*  
25 86. Following, the Transfers, Bayuk and Sam would continue to simply pay any  
26 amount requested by Morabito, undoubtedly from funds obtained through their operation of, or  
27 ownership of, the transferred assets. None of these transactions were treated as loans, but as  
28 Morabito exercising his entitlement to his own money and property. For example, on November  
11, 2011, Morabito emailed Vacco, stating:  
Dennis

1 Tell Sam he has to wire you \$1 million by the 21<sup>st</sup>.

2 Please get Trevor's commitment to sign – call Edward tomorrow  
3 and tell him to HOLD any payment to him until he signed. I  
4 guaranty he will delay this process. Edward will absolutely cut him  
5 off if he does but requiring him to sign is a huge risk. Speak to  
Edward and plan on personally driving over the Niagara to get his  
signature.

6 *See SSOF ¶ 76*

7 87. Likewise, Morabito would demand when and where to send funds, and Sam  
8 would immediately comply. For example, in a November 28, 2011 e-mail between Morabito,  
9 Sam, and Vacco, Morabito wrote: "Sam. Please wire \$560,000 to Lippes Mathias TODAY."  
10 Within two hours, Sam responded: "Ok Wire Instructions." *See SSOF ¶ 77.*

11 88. Morabito could not even guess how much he had received or borrowed from  
12 Bayuk since the Transfers:

13 Q. "So what is your best guess of how much you owed Mr. Bayuk  
14 on December 31, 2012?

15 A. "I would have – it would be a guess. It could be in the millions  
16 of dollars. I don't know."

17 Q. How much do you think you owed him on December 31, 2014.

18 A. It would be a guess but I'm sure – I'm sure I owed him a  
significant amount of money. I would think. I don't know."

19 *See SSOF ¶ 78.*

20 89. As of December 2015, Morabito was paying his approximately \$30,000 in  
21 monthly expenses through a combination of Bayuk and Sam lending him money. *See SSOF ¶*  
22 *79.*

23 90. For at least several years prior to 2016, Bayuk provided Morabito with a credit  
24 card that Morabito uses for groceries. *See SSOF ¶ 80*

25 91. As late as March 2016, when asked "what do you do for money right now,"  
26 Morabito testified, "My brother and Mr. Bayuk have been lending me money" and guessed that  
27 the amount he then owed to Bayuk was in excess of \$1,000,000. *See SSOF ¶ 81.*

28

1           92.     Morabito further testified that he had been in debt to his brother all of his life, and  
2     “If I’m out of money, I ask my brother if I can have some money.” *See id.*

3           93.     Bayuk testified that sometimes he removes money from Snowshoe Properties’  
4     (formerly Baruk) bank account to lend money to Morabito when he needed it. *See* SSOF ¶ 82.

5           94.     The true scenario of what actually happened is revealed clearly by Morabito in his  
6     own testimony.

7                   Q. [Bayuk is] lending you money to pay your monthly expense?

8                   A. He’s lending me *my – my money*, and what I do with it he has  
9     no knowledge of.

10           *See* SSOF ¶ 83.

11           95.     The arrangements make one thing clear: it didn’t matter whether Morabito was  
12     owed a note by Bayuk and Sam, or even whether Morabito owed money to Bayuk and Sam.  
13     Bayuk and Sam consistently funded Morabito’s extravagant lifestyle, and would continue to do  
14     so. Any notes between the two were nothing more than paper to be utilized when convenient.  
15     When notes are needed for loans, Morabito and Bayuk will claim they exist. When they do not  
16     need to them, they will disappear.

17           96.     For example, when alleged loans from Bayuk to Morabito needed to disappear to  
18     reduce known creditors in the Bankruptcy Case, Bayuk testified that he “[i]n consideration of the  
19     past friendship, loyalty, and successful past business ventures which Mr. Morabito and I have  
20     shared, I made a gift to Mr. Morabito in the amount of the debt to me and I have destroyed the  
21     promissory note” *See* SSOF ¶ 85.

22     **G.     As a Result of the Transfers, the Herbst Parties Cannot Collect on the Final  
23     Judgment and Ultimately Is Forced to File an Involuntary Bankruptcy.**

24           97.     In total, Morabito paid the Herbst Parties less than 5% of the total Final Judgment,  
25     with payments coming from three sources: (1) \$5,000,000 in payments made from the return of  
26     Offshore Funds from Sefton nearly two years after that transfer; (2) approximately \$1,300,000 in  
27     sale proceeds from the Reno Property; and (3) the assumption of certain liabilities by Morabito.

1 Par for the course, Morabito defaulted on many of the assumed liabilities, ultimately causing  
2 increased liabilities to the Herbst Parties. *See* SSOF ¶ 87.

3 98. As a result, and after Morabito defaulted on a Settlement Agreement and a  
4 Forbearance Agreement extended by the Herbst Parties, on June 20, 2013, the Herbst Parties  
5 filed an involuntary petition against him and CNC under chapter 7 of the Bankruptcy Code. *See*  
6 SSOF ¶ 88.

7 99. On December 17, 2012, the Bankruptcy Court entered an Order for Relief against  
8 Morabito, adjudicating him a chapter 7 debtor. *See* SSOF ¶ 89.

9 100. On January 22, 2015, Plaintiff was appointed the Trustee of Morabito's  
10 Bankruptcy Estate and, on May 15, 2015, was substituted in as Plaintiff for the Herbst Parties to  
11 prosecute this action for the benefit of all creditors of the Estate. *See* SSOF ¶ 90.

12 101. The fraudulent transfers involved in this Complaint are not the only fraudulent  
13 transfers of which the Trustee has complained.

14 a. At the same time as the Transfers, Morabito transferred his 90% interest in  
15 watchmyblock.com to Bayuk for \$1,000. Morabito valued his interest in  
watchmyblock.com at between \$1,800,000 and \$2,250,000 in 2009 and 2010.

16 b. In case no. 15-05046, pending before the Bankruptcy Court, the Trustee has sought  
17 avoidance of the transfer of Morabito's 60% interest in Virsenet to Bayuk in  
18 November 2012 for just \$6.00, after Morabito himself valued the entity at over \$220  
million.

19 *See* SSOF ¶ 90.

### 20 III. 21 LEGAL ARGUMENT

#### 22 A. Legal Standard.

23 The United States Supreme Court has explained that the "[s]ummary judgment procedure  
24 is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the  
25 [procedural process], which [is] designed 'to secure the just, speedy and inexpensive  
26  
27  
28

determination of every action.”<sup>7</sup> Summary judgment allows courts to avoid unnecessary trials where no material factual disputes exist.<sup>8</sup>

Summary judgment pursuant to Nev. R. Civ. P. 56(c) is appropriate where the “pleadings . . . show that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.”<sup>9</sup> The party moving for summary judgment “bears the initial burden of production to show the absence of a genuine issue of material fact.”<sup>10</sup>

However, once the moving party has met its burden, the opposing party may not rest upon mere allegations or denials in the pleadings but instead assumes a burden of production to set forth specific facts showing that there exists a genuine issue of material fact for trial.<sup>11</sup> Once the burden shifts, summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”<sup>12</sup>

**B. Each of the Transfers Was Made to Hinder, Delay, or Defraud.**

**1. Actually Fraudulent Transfers Under the Uniform Fraudulent Transfer Act.**

Fraudulent transfers are addressed and analyzed in NRS Chapter 112.<sup>13</sup> The UFTA is designed to prevent a debtor from defrauding creditors by placing the subject property beyond the creditors reach.<sup>14</sup> UFTA “is remedial and as such should be liberally construed.”<sup>15</sup> Thus,

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<sup>7</sup> See Celotex v. Catrett, 477 U.S. 317, 327 (1986); Wood v. Safeway, Inc., 121 Nev. 724, 731-32, 121 P.3d 1026, 1031 (2005) (adopting the summary judgment standard set forth in Celotex and other Supreme Court decisions).

<sup>8</sup> Northwest Motorcycle Ass’n v. U.S. Dept. of Agriculture, 18 F.3d 1468, 1471 (9th Cir. 1994); see also Celotex, 477 U.S. at 327.

<sup>9</sup> Bird v. Casa Royale West, 97 Nev. 67, 69, 624 P.2d 17, 18 (1981).

<sup>10</sup> See Celotex, 477 U.S. at 323; see also Cuzze v. University and Community College System of Nevada, 123 Nev. 598, 172 P.3d 131, 134 (2007); Wood, 121 Nev. at 731-32, 121 P.3d at 1031.

<sup>11</sup> Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also, Celotex, 477 U.S. at 331; Wood, 121 Nev. at 732, 121 P.3d at 1031; Maine v. Stewart, 109 Nev. 721, 726-27, 857 P.2d 755, 758-59 (1993).

<sup>12</sup> Sanborn v. Place Cty., 80 Fed. Appx. 566, 568 (9th Cir. 2007).

<sup>13</sup> Herup v. First Boston Fin., LLC, 123 Nev. 228, 231, 162 P.3d 870, 872 (2007).

<sup>14</sup> Id. at 232, 162 P.3d at 873.

<sup>15</sup> Cortez v. Vogt, 52 Cal. App. 4th 917, 937, 60 Cal.Rptr.2d 841, 853 (Cal. App. 1997); see also Landmark Community Bank, N.A. v. Klingelhut, 874 N.W.2d 446 (Minn. Ct. App. 2016), review denied, (Apr. 27, 2016) (stating that UFTA is remedial and meant to be construed broadly, applying Minnesota’s

1 courts must construe the UFTA consistent with its purpose of preventing and suppressing  
2 fraud.<sup>16</sup> NRS 112.250 directs the Court to apply and construe UFTA “to effectuate its general  
3 purposes to make uniform the law with respect to the subject of this chapter among states  
4 enacting it.”<sup>17</sup> Accordingly, it is appropriate for this Court to look to the application and  
5 construction of UFTA by other courts.<sup>18</sup>

6 A transfer may be set aside if it is made by a debtor “with actual intent to hinder, delay or  
7 defraud any creditor of the debtor.”<sup>19</sup> “Traditionally, the intent required for actual fraudulent  
8 transfers is established by circumstantial evidence, since it will be the rare case in which the  
9 debtor testifies under oath that he or she intended to defraud creditors.”<sup>20</sup> Intent may be  
10 established by circumstantial evidence or inferences drawn from a course of conduct.<sup>21</sup>  
11 Knowledge that a transaction will operate to the detriment of creditors is sufficient to establish  
12 actual intent.<sup>22</sup> If the debtor has a “motive of effecting the transaction to hinder a creditor,” then  
13 the transaction is intentionally fraudulent even if the debtor also has non-fraudulent motives.<sup>23</sup>

14 \_\_\_\_\_ (continued)

15 enactment of UFTA); Sigmon v. Goldman Sachs Mortg. Co., 539 B.R. 221 (S.D. N.Y. 2015) (same, applying  
16 Utah enactment of UFTA).

17 <sup>16</sup> See Schmidt v. HSC, Inc., 131 Haw. 497, 508, 319 P.3d 416, 427, 2014 WL 144533 (2014)  
(interpreting discovery rule under Hawai’i UFTA “consonant with the statutory purpose of preventing fraud”);  
18 Donell v. Kowell, 533 F.3d 762, 774 (9th Cir. 2008) (finding that the terms of [UFTA] are abstract in order to  
19 protect defrauded creditors, no matter what form a Ponzi scheme or other financial fraud might take) (citing  
20 Twyne’s Case, 76 Eng. Rep. 809, 815 (1601) (Star Chamber) (“ . . . all statutes made against fraud should be  
21 liberally and beneficially expounded to suppress the fraud”) (other citations omitted); Herup, 162 P.3d at 872.

22 <sup>17</sup> Herup, 123 Nev. at 237; 162 P.3d at 876 (quoting NRS 112.250)

23 <sup>18</sup> See, e.g., SportsCo Enter. v. Morris, 112 Nev. 625, 917 P.2d 934, 938 (Nev. 1996) (citing to cases  
24 from other jurisdictions to support interpretation of Nevada’s UFTA).

25 <sup>19</sup> NRS 112.180(1)(a); Herup, 123 Nev. at 231, 162 P.3d at 872.

26 <sup>20</sup> In re Nat’l Audit Def. Network, 367 B.R. 207, 219–20 (Bankr. D. Nev. 2007) (citing Dahar v. Jackson  
27 (In re Jackson), 318 B.R. 5, 13 (Bankr. D. N.H. 2004) (“Absent a rare admission or declaration against interest  
28 by the defendant, a plaintiff is unlikely to discover any direct proof of bad motives because often only the  
defendant knows his own motivation at the time of the transfer.”)).

29 <sup>21</sup> Mazer, 184 B.R. at 385.

30 <sup>22</sup> Hayes v. Palm Seedlings Partners–A (In re Agric. Research & Tech. Group, Inc.), 916 F.2d 528, 535  
31 (9th Cir. 1990) (quoting Coleman Am. Mov. Servs., Inc. v. First Nat’l Bank and Trust Co. (In re Am. Prop.,  
32 Inc.), 14 B.R. 637, 643 (Bankr. D. Kan. 1981)).

33 <sup>23</sup> In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig., No. 211ML02265MRPMANX, 2013 WL  
34 12148482, at \*5 (C.D. Cal. June 7, 2013) (citing Bertram v. WFI Stadium, Inc., 41 A.3d 1239, 1247, 2012 WL  
35 1427788 (D.C. 2012) (even if a debtor has at least one non-fraudulent motive for a transaction, the additional  
36 motive of effecting the transaction to hinder a creditor is a sufficient ground for an unassailable conclusion

1 Where the moving party proves fraudulent intent, the transfer is deemed fraudulent, *even if it is*  
2 *in exchange for valuable or full consideration.*<sup>24</sup>

3 In Nevada, the badges of fraud are:

- 4 (a) the transfer or obligation was to an insider;
- 5 (b) the debtor retained possession or control of the property transferred  
6 after the transfer;
- 7 (c) the transfer or obligation was disclosed or concealed;
- 8 (d) before the transfer was made or obligation was incurred, the debtor had  
9 been sued or threatened with suit;
- 10 (e) the transfer was of substantially all the debtor's assets;
- 11 (f) the debtor absconded;
- 12 (g) the debtor removed or concealed assets;
- 13 (h) the value of the consideration received by the debtor was reasonably  
14 equivalent to the value of the asset transferred or the amount of the  
15 obligation incurred;
- 16 (i) the debtor was insolvent or became insolvent shortly after the transfer  
17 was made or the obligation was incurred;
- 18 (j) the transfer occurred shortly before or shortly after a substantial debt  
19 was incurred; and
- 20 (k) the debtor transferred the essential assets of the business to a lienor  
21 who transferred the assets to an insider of the debtor.<sup>25</sup>

22 The Nevada Supreme Court has also recognized the following indicia of fraud:

23 lack of consideration for the conveyance, the transfer of the debtor's entire  
24 estate, relationship between transferor and transferee, the pendency or threat  
25 of litigation, secrecy or hurried transaction, insolvency or indebtedness of the  
26 transferor, departure from the usual method of business, the retention by the  
27 debtor of possession of the property, and the reservation of benefit to the  
28 transferor.<sup>26</sup>

\_\_\_\_\_ (continued)  
fraudulent intent.") (internal quotations omitted).

<sup>24</sup> In re Zeigler, 320 B.R. 362, 373 (Bankr. N.D. Ill. 2005) (applying Illinois enactment of UFTA).

<sup>25</sup> NRS 112.180(2).

<sup>26</sup> Sportscor Enterprises, 112 Nev. at 632, 917 P.2d at 938 (citations omitted).

1 “The presence of a single badge of fraud may spur mere suspicion; the confluence of  
2 several can constitute *conclusive evidence* of actual intent to defraud, absent ‘significantly clear’  
3 evidence of a legitimate supervening purpose.”<sup>27</sup> As few as three badges have been held to  
4 constitute clear and convincing evidence of actual fraudulent intent.<sup>28</sup> Where certain badges of  
5 fraud are present, plaintiff need not prove subjective intent.<sup>29</sup> Where the plaintiff establishes the  
6 existence of “certain indicia of badges of fraud, *the burden shifts* to the defendant to come  
7 forward with rebuttal evidence that a transfer was not made to defraud the creditor.”<sup>30</sup>

8 Here, Morabito’s intent is evident from both direct proof of his subjective intent to  
9 hinder, delay, or defraud the Herbst Parties and a confluence of at least nine of the eleven badges  
10 of fraud amounting to conclusive evidence of actual intent.

## 11 **2. Morabito’s Intent Is Apparent from His Own Statements.**

12 Here, Morabito’s intent is clear. Within just two days after Judge Adams announced an  
13 \$85 Million Oral Judgment against Morabito, Morabito was working out a cover story with his  
14

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15 <sup>27</sup> In re Acequia, Inc., 34 F.3d 800 (9th Cir. 1994) (emphasis added); see also S. New England Tel. Co.  
16 v. Sahara & Arden, Inc., No. 2:09-CV-00534-RCJPAL, 2010 WL 2035330, at \*4 (D. Nev. May 24, 2010)  
17 (“[a]lthough the ‘presence of a single factor, i.e. a badge of fraud, may cast suspicion on the transferor’s intent,  
18 the confluence of several in one transaction generally provides conclusive evidence of an actual intent to  
19 defraud.’”) (quoting Gilchinsky v. Nat’l Westminster Bank, 159 N.J. 463, 732 A.2d 482, 490 (N.J. 1999)); In  
20 re Nat’l Audit Def., 367 B.R. at 220 (“Although none of the badges standing alone will establish fraud, the  
21 existence of several of them will raise a presumption of fraud.” (internal quotation marks and citation omitted))

22 <sup>28</sup> See Blood v. Nofzinger, 162 Ohio App. 3d 545, 559, 834 N.E.2d 358 (6th Dist. Huron County 2005)  
23 (discussing Bank One v. Plaza East, Inc., 1997 WL 710664 (Ohio Ct. App. 10th Dist. Franklin County 1997));  
24 see also Merrill Lynch Business Financial Services, Inc. v. Kupperman, 2010 WL 2179181, \*25-26 (D.N.J.  
25 May 28, 2010) (a grant of summary judgment may be appropriate where four badges of fraud are shown under  
26 the UFTA); In re Polaroid Corp., 472 B.R. 22, 56-60 (Bankr. D. Minn. 2012) (granting motion for summary  
27 judgment under the UFTA based on six badges); First Keystone Consultants, Inc. v. Schlesinger Elec.  
28 Contractors, Inc., --- F.Supp.2d ---, 2012 WL 1711218, \*13-14 (E.D.N.Y. May 15, 2012) (granting summary  
judgment based on the existence of four badges of fraud under New York’s fraudulent transfer statute); In re  
SMTC Mfg. of Texas, 421 B.R. 251, 300 (W.D. Tex. 2009) (“Proof of four to five badges of fraud has been  
found sufficient in several reported cases.”).

<sup>29</sup> See In re Brace, No. 6:11-AP-02053-SY, 2017 WL 1025215, at \*6 (B.A.P. 9th Cir. Mar. 15, 2017) (“To  
require demonstrable certainty of a debtor’s knowledge would completely obviate the utility of consideration  
of circumstantial, and reliable, evidence” in favor of the impossibility of “seeing inside the debtor’s  
conscience”) (citing In re Beverly, Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, 235 (B.A.P. 9th Cir.  
2007), aff’d in part, dismissed in part, 551 F.3d 1092 (9th Cir. 2008)).

<sup>30</sup> Sportsco Enters., 112 Nev. at 632, 917 P.2d at 938 (emphasis added) (citing Territorial Sav. & Loan  
Ass’n v. Baird, 781 P.2d 452, 462 n. 18 (Utah Ct. App. 1989); see also Southern New England Telephone Co.  
v. Sahara & Arden, Inc., 2010 WL 2035330, \*4-12 (D. Nev. May 24, 2010) (applying the burden shifting  
analysis under NRS 112.180(1)(a) and granting summary judgment to creditor).



1 attorneys for transferring his assets. Within just two days after Judge Adams announced an \$85  
2 Million Oral Judgment, Morabito began a series of transactions which resulted in him being  
3 divested of his interest in the Laguna Properties, Baruk, and Superpumper by the end of the  
4 month, along with \$6 Million in cash and the other transfers that are the subject of actions and  
5 investigation in the Bankruptcy Case. In return, he received only a 30% interest in the Reno  
6 Property and assets that were worthless to his creditors from a collection standpoint. By the time  
7 the \$145 Million Final Judgment was entered, nothing other than the Reno Property was left that  
8 the Herbst Parties could reach.

9 As he explained to his attorneys, Morabito directed that these transactions occur in order  
10 to protect the assets from the Herbst Parties. *See* SSOF ¶¶ 10-18. He not only knew that the  
11 Transfers would operate to the detriment of the creditors, specifically the Herbst Parties, but  
12 relished the opportunity to hinder the Herbst Parties' collection efforts, telling Graber and  
13 Yalamanchili that "The Herbsts no longer have home court, good old boy advantage." *See* SSOF  
14 ¶ 18. A clearer case of intent to hinder, delay, or defraud is hard to imagine.

15 **3. The Presence of Nine Badges of Fraud Compel a Finding of Intent to Hinder,**  
16 **Delay, or Defraud the Herbst Parties.**

17 Here, the Transfers are accompanied by no less than *nine* badges of fraud, compelling a  
18 finding of actual intent to hinder, delay, or defraud.

19 **The transfer or obligation was to an insider (NRS 112.180(2)(a)).** The Transfers at  
20 issue in this case were made to insiders. Under UFTA, if the debtor is a natural person, insiders  
21 include: (1) a relative of the debtor or of a general partner of the debtor; (2) a partnership in  
22 which the debtor is a general partner; (3) a general partner in a partnership described in  
23 subparagraph (2); and (4) a corporation of which the debtor is a director, officer or person in  
24 control. NRS 112.150(7)(a).

25 However, "UFTA's definition of 'insider' is not intended to limit an insider to the four  
26 listed subjects. Instead, the drafters provided the list for purposes of exemplification."<sup>31</sup> The

27  
28 <sup>31</sup> In re Holloway, 955 F.2d 1008, 110 (5th Cir. 1992) (citing J. Michale Putman, M.S.P.A. Money  
Purchase Pension Plan v. Stephenson, 805 S.W. 2d 16, 18 (Tex. App. – Dallas, 1991)(analyzing identical

1 cases evaluating whether a transferee is a non-statutory insider have focused on two factors: (1)  
2 the closeness of the relationship between the transferee and the debtor, and (2) whether the  
3 transactions between them were conducted at arm's length.<sup>32</sup> “The true test of ‘insider’ status is  
4 whether one’s dealings with the debtor cannot accurately be characterized as arm’s-length.”<sup>33</sup>

5 Morabito’s Transfers were directly or indirectly made to two people: Bayuk and Sam.  
6 Sam is Morabito’s brother and therefore, a statutory insider. Bayuk was Morabito’s long-time  
7 business partner and domestic partner. Courts have consistently held that domestic partners,  
8 same-sex or otherwise, are, like spouses, insiders for the purposes of an avoidance analysis.<sup>34</sup>

9 There is no dispute that Morabito and Bayuk were long-time domestic partners. They  
10 were together for at least ten years, cohabitated, owned several properties together, and  
11 participated in several business partnerships. *See* SSOF ¶¶ 92-96. At the same time the Transfers  
12 were occurring (September 30, 2010), Morabito identified Bayuk as his “boyfriend and longtime  
13 companion.” *See* SSOF ¶ 95. Indeed, Morabito’s counsel even suggested one idea to protect  
14 Morabito’s assets from collection was a “domestic partner split.” *See* SSOF ¶ 11. Their joint  
15 counsel, Vacco, testified that Morabito and Bayuk remained together following the Transfers,  
16 and following the Transfers, they continued to engage in business together and their finances  
17 were entangled. *See* SSOF ¶ 96. None of their agreements bore the markers of an arms’ length

18 \_\_\_\_\_ (continued)

19 provision under Texas’ codified version of UFTA)); Landmark Cmty. Bank, N.A. v. Klingelutz, 874 N.W.2d  
20 446, 452, 2016 WL 363521 (Minn. Ct. App. 2016), review denied (Apr. 27, 2016) (finding that single-member  
LLC of spouse was an insider because the definition of “insider” is not limiting) (citing Citizens State Bank  
Norwood Young Am. v. Brown, 849 N.W.2d 55, 62–63 (Minn. 2014) (finding that former spouse was an  
insider))

21 <sup>32</sup> In re Emerson, *supra* at 707 (citing to In re Holloway, 955 F.2d 1008, 1011 (5th Cir. 1992)); In re  
22 Village at Lakeridge, LLC, 814 F.3d 993, 996 (9th Cir. 2016).

23 <sup>33</sup> In re Craig Systems Corp., 244 B.R. 529, 539 (Bankr. D. Mass. 2000).

24 <sup>34</sup> See Bloom v. Camp, 336 Ga. App. 891, 895, 785 S.E.2d 573, 578, adopted, (Ga. Super. May 24,  
2016) (finding same-sex partner to be an insider though same-sex marriages were not recognized in Georgia at  
the time of the transfer); In re Fisher, 296 F. App’x 494, 502, 2008 WL 4569946, at \*5 (6th Cir. 2008) (though  
finding no fraudulent transfer occurred, finding that opposite-sex domestic partner was an insider); In re  
25 Tanner, 145 B.R. 672, 678 (Bankr. W.D. Wash. 1992) (same-sex partner who had cohabitated with debtor was  
an insider) (citing Matter of Montanino, 15 B.R. 307 (Bankr. D. N.J. 1981) (parents of debtor’s live-in fiancé  
were insiders); In re Ribcke, 64 B.R. 663 (Bankr. D. Md. 1986) (parents of a debtor’s deceased wife were  
insiders); In re O’Connell, 119 B.R. 311 (Bankr. M.D. Fla. 1990) (a good friend who had made numerous  
informal loans to a debtor was an insider); In re Standard Stores, Inc., 124 B.R. 318 (Bankr. C.D. Cal. 1991) (a  
27 corporate debtor’s president’s ex-brother-in-law was an insider with respect to a transfer five years after  
28 divorce from debtor’s president’s sister).

1 transaction – they shared counsel, who was directed exclusively by Morabito, and the Transfers  
2 were rushed, occurring within weeks after Judge Adams announced his Oral Judgment. As such,  
3 the Transfers were made to insiders.

4 **The debtor retained possession or control of the property transferred after the**  
5 **transfer (NRS 112.180(2)(b)).** Morabito retained control of the transferred property following  
6 the Transfers in this case. Following the Transfers, Morabito, Bayuk, and Sam maintained the  
7 *status quo*. First, Sam and Bayuk continued to fund Morabito’s lavish \$30,000 a month lifestyle.  
8 *See* SSOF ¶¶ 76-79. Indeed, Bayuk testified that when Morabito needed money, he would  
9 sometimes take money from Snowshoe Properties (formerly Baruk LLC). *See* SSOF ¶ 82.  
10 When Morabito needed money, he simply asked his bookkeeper to direct Sam and Bayuk to send  
11 funds, and Sam and Bayuk complied without question. *See* SSOF ¶ 74, 76-77.

12 Further, after the Transfers, Morabito continued to negotiate deals using Superpumper  
13 and Snowshoe as if he owned them. *See* SSOF ¶¶ 62, 63, 71. He also continued to use the Baruk  
14 Properties to fund his settlements and obtain financing. *See* SSOF ¶¶ 64-70, 72-73 For  
15 example, Morabito negotiated the Nella Deal, which required the contribution of Snowshoe.  
16 *See* SSOF ¶ 62. He caused a lien to be placed on 1461 Glenneyre for the BofA Settlement, and  
17 he caused the Sparks Property to be transferred to settle the Moreno lawsuit. *See* SSOF ¶¶ 64,  
18 67, 72. He also sought to negotiate a \$5 million loan using Snowshoe Properties and the  
19 Glenneyre Properties as security. *See* SSOF ¶ 70. As late as December 2016, Morabito was  
20 residing, rent free, in the Palm Springs Property. *See* SSOF ¶ 73.

21 **The transfers were concealed (NRS 112.180(2)(c)) and the debtor removed or**  
22 **concealed assets (NRS 112.180(2)(g)).**<sup>35</sup> Judge Adams announced the Oral Judgment on  
23 September 13, 2010. By October 1, 2010, the Transfers were complete. Neither Morabito, his  
24 counsel, nor Defendants informed the Herbst Parties that the Transfers were occurring, despite  
25 the fact that Morabito and the Herbst Parties were in the midst of preparing for the punitive  
26 damages phase of the trial. *See* SSOF ¶ 86.

27  
28 <sup>35</sup> These badges of fraud are interrelated, and therefore are discussed together.

1 With respect to Baruk Transfers, both the name and location of the entity owning the  
2 Baruk Properties was changed. Baruk was a Nevada entity. *See* SSOF ¶ 33. After the Baruk  
3 Transfer, Bayuk incorporated Snowshoe Properties in California and merged Baruk with  
4 Snowshoe Properties. *See* SSOF ¶ 39. Bayuk thereafter completed a transfer of all the Baruk  
5 Properties to Snowshoe Properties. *See id.* By October 1, 2010, Bayuk had transferred the Palm  
6 Springs Property again, this time to the Bayuk Trust. *See* SSOF ¶ 40. Thereafter, the Baruk  
7 Note was purportedly immediately assigned to Woodland, a Canadian entity. *See* SSOF ¶ 86.  
8 Superpumper was transferred to Snowshoe, which was incorporated in New York. *See* SSOF ¶¶  
9 48-49. Thus, not only were Morabito's assets transferred within two weeks of the Oral  
10 Judgment, they were transferred in such a way as to make them difficult for the Herbst Parties to  
11 trace.

12 As Morabito made clear, removing and concealing assets in different jurisdictions was  
13 intentional to make sure that the assets were out of the reach of the Nevada courts, and so that  
14 "The Herbsts no longer have home court, good old boy advantage." *See* SSOF ¶ 16.

15 **Before the transfer was made or obligation was incurred, the debtor had been sued**  
16 **or threatened with suit (NRS 112.180(2(d)) and the transfer occurred shortly before or**  
17 **shortly after a substantial debt was incurred (NRS 112.180(d)(j)).** The presence of these  
18 related badges of fraud are the most obvious and compelling. Not only had Morabito been sued  
19 by the Herbst Parties, but Judge Adams had announced the \$85 million Oral Judgment against  
20 him on September 13, 2010. At the time of the Transfers, the punitive damages phase of the trial  
21 was just commencing. By the time final judgment was entered in the amount of  
22 \$149,444,777.80, the assets were gone. It is not even necessary to infer that the Oral Judgment  
23 prompted the transfers, because Morabito admitted it.

24 **The transfer was of substantially all the debtor's assets.** Within just days after Judge  
25 Adams announced the Oral Judgment, Morabito divested himself of almost all, if not all, of his  
26 assets: \$6 million of the Off-Shore Funds to Sefton, the Laguna Properties, the 50% interest in  
27 Baruk LLC, and the 80% interests in Superpumper. He even transferred his furnishings and  
28 personal property in the Reno Property, which he purported to retain, to Bayuk for a mere

1 \$30,000. See SSOF ¶ 32. Morabito was left with nothing in his possession upon which the  
2 Herbst Parties could collect.

3 **Morabito Received Less Than Reasonably Equivalent for the Transfers.**

4 Determination of “reasonably equivalent value” under the UFTA is a two-step process. A court  
5 first asks whether the debtor received any value, and only then examines whether the value is  
6 reasonably equivalent to what the debtor gave up. Only if a court determines that “some” value  
7 was received by the debtor in exchange for the transfers does the court move on to determine  
8 whether that value is “reasonably equivalent.” In determining “reasonable equivalence,” Nevada  
9 courts apply the “totality of the circumstances test.” The indicia of reasonable equivalence under  
10 the “totality of the circumstances test” are: (1) whether the value of what was transferred is  
11 equal to the value of what was received; (2) the market value of what was transferred and  
12 received; (3) whether the transaction took place at arm’s length; and (4) the good faith of the  
13 transferee.<sup>36</sup> “[R]easonable equivalence must be determined from the standpoint of creditors.”<sup>37</sup>  
14 Thus, consideration is “reasonably equivalent” if it leaves creditors in the substantially the same  
15 position as before the transfers.

16 Prior to the Transfers, Morabito’s creditors had the ability to execute on his 70% interest  
17 in the Reno Property, his 75% interest in the El Camino Property, his 50% interest in the Los  
18 Olivos Property, his 50% interest in Baruk, and his 80% interest in Superpumper. After the  
19 Transfers, Morabito was left with the Reno Property, a small amount of cash representing a  
20 fraction of the value of the interests transferred, and sham promissory notes. Though the exact  
21 amount of the value of the assets transferred is an issue for trial, there is no question that the  
22 value received by Morabito in exchange was not “reasonably equivalent.”

23 . . .

24  
25 . . .

26  
27 <sup>36</sup> In re Zeigler, 320 B.R. at 374–75.

28 <sup>37</sup> Bay Plastics Inc., 187 B.R. at 329 (citing In re Roosevelt, 176 B.R. 200 (B.A.P. 9th Cir. 1994)).

1 a. Morabito and Defendants Excluded the Sparks Property from the Valuation of  
2 Baruk, and on That Basis Alone, Reasonably Equivalent Value Was Not  
3 Transferred for Baruk.

4 Defendants concede that the Sparks Property was an asset of Baruk as of September 30,  
5 2010, when the Baruk Transfer occurred. See SSOF ¶ 34. Plaintiff has valued at \$75,000 as of  
6 September 30, 2010. See SSOF ¶ 36. There is no competing valuation or appraisal for the  
7 Sparks Property. In their rush to get Morabito's assets out of his name before entry of the Final  
8 Judgment, Morabito and Bayuk failed to include consideration for the Sparks Property in the  
9 Baruk Transfer. Therefore, at a minimum, Bayuk did not provide reasonably equivalent value to  
10 Morabito for his interest in Baruk.

11 b. Morabito Did Not Even Receive the Full Cash Payment in Exchange for  
12 Superpumper.

13 Defendants contend that the value of Morabito's interest in Superpumper was  
14 \$2,497,307. Even acknowledging that value (which Plaintiff disputes), sufficient value was not  
15 transferred. Instead of the \$1,035,094 cash payment and \$1,463,213 Superpumper Note that was  
16 required in the Superpumper Agreement, Morabito contends that he only received "cash  
17 payments of approximately \$542,000 and a note of approximately \$933,694," with the principal  
18 balance of the note subsequently cancelled based on a "post-closing reevaluation of the  
19 significant decrease in the fair market value of the business." See SSOF ¶ 56. Thus, by  
20 Morabito's own testimony, he only received, at most, \$1,475,694 in exchange for his interest in  
21 Superpumper. This amount is \$1,021,613 less than the even reduced value of Superpumper.

22 c. The Baruk Note and Superpumper Notes Were Illusory Promises that Ensured  
23 That, From a Creditor Standpoint, No Value Was Received.

24 A promise is illusory when it appears "so insubstantial as to impose no obligation at all  
25 on the promisor – who says, in effect, 'I will if I want to.'"<sup>38</sup> The Baruk Promissory Note and  
26 Superpumper Notes (the "Notes") were illusory, because the relationship between Morabito, on  
27 the one hand, and Bayuk on the Sam, were such that Bayuk's and Sam's obligations on the Notes  
28 were nothing more than "I will if I want to."

<sup>38</sup> Sateriale v. R.J. Reynolds Tobacco Co., 687 F.3d 1132, 1146 (9th Cir. 2012).

1 First, Bayuk and Sam clearly funded Morabito's extravagant lifestyle long before the  
2 Transfers and when neither had any obligation to do so. There was no indication that the funding  
3 would cease without the Notes. In fact, Bayuk and Sam continue to fund Morabito's lifestyle  
4 through today. *See* SSOF ¶¶ 74-85. In other words, the Notes served no purpose other than to  
5 feign value for Baruk and Superpumper. And the only purpose for transferring Baruk and  
6 Superpumper was to keep the Herbst Parties from collecting on those assets.

7 Second, while terms of the Baruk Note required: (1) monthly payments commencing on  
8 November 1, 2010 in the amount of \$7,720.02; (2) interest to accrue at the rate of 4%; and (3)  
9 late fees 4% of the payment due; and the terms of the Superpumper Note required (1) monthly  
10 payments commencing on December 1, 2010 in the amount of \$19,986.71; (2) interest to accrue  
11 at the rate of 4%; and (3) late fees 4% of the payment due, these terms were never complied with  
12 and never enforced. To be sure, there is ample inconsistent testimony regarding if, when, and  
13 how the Notes were paid; but it is undisputed that the terms of the Notes were meaningless to the  
14 parties.

15 As to the Bayuk Note, Bernstein contends that \$732,124.75 was paid in 2012, and that a  
16 total of \$1,029,510.27 was paid during 2013. *See* SSOF ¶ 47. This differs dramatically from the  
17 *two different ledgers* provided by Bayuk, showing payments being made from 2012 through  
18 2014 on the First Ledger and payments being made from September 28, 2010 through June 17,  
19 2013 on the Second Ledger. *See id.* Adding even more contradiction, on November 1, 2011,  
20 Morabito instructed Vacco to "Cancel [the Baruk Note], convert it back into a 50% share interest  
21 in Snowshoe Properties, LLC" meaning that no payments could have possibly been made on the  
22 Baruk Note pursuant to the Second Ledger, contrary to Bayuk's testimony. *See id.* Then, on  
23 May 23, 2012, Morabito submitted a financial statement to BofA, under the penalty of perjury,  
24 claiming that as of that date, \$1,750,000 was still due and owing, contrary to both the First and  
25 Second Ledgers. *See id.* Morabito and Bayuk's utter inability to even keep track of payments  
26 under the Baruk Note, if any, prove that it was illusory and made solely for the purpose of trying  
27 to show "value."

28

1 Like the Baruk Note, the Superpumper Note was also illusory, as there was no real  
2 obligation or prospect of payment. First, Morabito contends the amount of the note was  
3 “approximately \$933,694,” which was “further reduced based a post-closing evaluation.” See  
4 SSOF ¶ 56. Furthermore, if we go by Defendants’ story, after only three months, the amount  
5 due on the Superpumper Note was reduced from \$1,462,213 to \$492,937.30 as a result of the  
6 Superpumper Note Reduction. See SSOF ¶ 58. However, the reduction is purportedly a result of  
7 the \$939,000 Note due from Morabito to Superpumper as a result of his withdrawal from the  
8 Compass Loan, which notably, was ignored as a receivable in the Matrix Valuation. See SSOF ¶  
9 59. There was no intent by Morabito to pay the \$939,000 Note back so the Superpumper Note  
10 Reduction, as far as value to Morabito, was worthless. Furthermore, there has never been any  
11 evidence shown to prove that any payments were actually made on the Successor Note, or, in  
12 fact, on the \$939,000 Note that was assumed by Snowshoe. Furthermore, Defendants were  
13 unable to even testify that payments were actually made. In other words, Morabito received  
14 nothing on account of the Superpumper Note and likewise, his creditors realized absolutely no  
15 value on account of his exchange of the 80% interest in Superpumper to Defendants through the  
16 Superpumper Note.

17 Accordingly, Plaintiff is entitled to summary judgment that the Transfers were made by  
18 Morabito with actual intent to hinder, delay, or defraud his creditors.

19 **C. Plaintiff is Entitled to an Award of Avoidance of the Transfers and Return of the**  
20 **Property or the Value Thereof.**

21 NRS 112.210 provides a creditor is entitled to:

22 (a) Avoidance of the transfer or obligation to the extent necessary to satisfy  
the creditor’s claim;

23 (b) An attachment or garnishment against the asset transferred or other  
24 property of the transferee pursuant to NRS 31.010 to 31.460, inclusive.<sup>39</sup>

25 Plaintiff therefore seeks an avoidance of the Transfers to the extent necessary to satisfy  
26 the Bankruptcy Estate’s claim against Morabito pursuant to NRS 112.210(a). Plaintiff requires  
27

28 <sup>39</sup> NRS 112.210.



1 at least \$81,500,000, the current value of claims filed in the Bankruptcy Case, to satisfy claims  
2 against Morabito. The combined value of the property transferred is less than \$81,500,000.  
3 Therefore, Plaintiff is entitled to avoidance of the Transfers, such that all of the transferred assets  
4 are returned to the Estate, with a credit to Bayuk and Sam for their respective interests in the  
5 properties.

6 Alternatively, NRS 112.220(2) states that “to the extent a transfer is voidable in an action  
7 by a creditor [under NRS 112.210(a)], the creditor may recover judgment for the value of the  
8 asset transferred,” subject to adjustment as equities may require.

9 **1. Plaintiff is Entitled to a Return of Morabito’s Interest in the Laguna Properties,**  
10 **or, Alternatively, Monetary Judgment Against Bayuk and the Bayuk Trust**  
11 **Based on the Real Property Transfers in the Amount of \$1,263,458.**

12 Plaintiff is entitled to avoidance of the Real Property Transfers to the extent necessary to  
13 satisfy the Estate’s claim against Morabito pursuant to NRS 112.210(a). Therefore, Trustee  
14 seeks a return of the Laguna Properties to Morabito’s Estate. Alternatively, Plaintiff is entitled  
15 to a monetary judgment of the value of Morabito’s interest in the Laguna Properties. Morabito’s  
16 75% interest in El Camino Property was valued at \$808,981 at the time of the Transfers, and his  
17 50% interest in Los Olivos Property had a value of \$427,477 at the time of the Transfers, for a  
18 total interest in the Laguna Properties at the time of the Transfers of \$1,236,458. Therefore,  
19 Plaintiff requests a monetary judgment against Bayuk and the Bayuk Trust, in the minimum  
20 amount of \$1,263,458.

21 **2. Plaintiff is Entitled to Avoid the Baruk Transfer and Recover the Equity Interest**  
22 **in Baruk, or, Alternatively, Monetary Judgment Against Bayuk and the Bayuk**  
23 **Trust Based on the Baruk Transfer in the Amount of \$1,654,550.**

24 Plaintiff is entitled to avoidance of the Baruk Transfer to the extent necessary to satisfy  
25 the Bankruptcy Estate’s claim against Morabito pursuant to NRS 112.210(a). Plaintiff  
26 understands that, through Snowshoe Properties and the Baruk Trust, Bayuk still owns and  
27 controls Baruk and the Baruk Properties, other than the Sparks Property. Plaintiff seeks  
28 avoidance of the Baruk Transfer, such that the equity interest in Baruk, as it existed at the time of  
the Transfers, is returned to Morabito’s Estate.

1 Alternatively, Plaintiff is entitled to a monetary judgment against Bayuk and the Bayuk  
2 Trust based on the Baruk Transfer in the amount of \$1,654,550 under NRS 112.220(2). As  
3 evidenced by the valuations obtained by Morabito and Defendants, and the appraisal of the  
4 Sparks Property which was not valued by Defendants at the time of the Transfers, the total value  
5 of Baruk on September 30, 2010 was \$3,309,100. Morabito's 50% interest, therefore, was worth  
6 \$1,654,550. Bayuk did not provide any value in exchange for the Baruk Transfer as the Baruk  
7 Note was a sham. As a result, the Trustee is entitled to judgment against Bayuk and the Bayuk  
8 Trust in the amount of \$1,654,550.

9 **3. Plaintiff is Entitled to a Monetary Judgment Against Bayuk, Sam,**  
10 **Superpumper, and Snowshoe Based on the Superpumper Transfers in an**  
11 **Amount of at least \$1,985,307, with the Final Amount to Be Determined at Trial.**

12 Plaintiff is entitled to a judgment of the return of Morabito's 80% interest in  
13 Superpumper, or the value thereof. Plaintiff understands that Defendants sold Superpumper and  
14 therefore, Plaintiff is requests a judgment in the amount of the value of Morabito's interest at the  
15 time of the Transfers.<sup>40</sup>

16 Morabito exchanged his interest in Superpumper, in part, for the Superpumper Note. The  
17 Superpumper Note was illusory and provided no benefit to Morabito. As a result, no value was  
18 exchanged as a result of the Superpumper Note. Furthermore, Morabito testified that he only  
19 received \$542,000 in cash (not the \$1,035,094 set forth in the Superpumper Agreement).  
20 Plaintiff is therefore entitled to a monetary judgment against Defendants in the amount of, *at*  
21 *least*, \$1,985,307, the amount of the Superpumper Note and the difference between the cash that  
22 was supposed to be exchanged and the cash Morabito testified he received. Any remaining  
23 amount, based on the correct valuation of Superpumper, should be determined at trial.

---

24  
25  
26 <sup>40</sup> Superpumper's assets were sold to Supermesa Fuel & Merc, LLC a company owned by Jan Friederich  
27 in or about 2016, while the Complaint was pending. Jan Friederich has been designated as Defendants' expert  
28 in this case. As Jan Friederich was aware of the fraudulent transfer claims in this case, he did not take in good  
faith. Plaintiff reserves his right to seek recovery of Superpumper from Supermesa Fuel & Merc, LLC and Jan  
Friederich.

IV.  
CONCLUSION

Plaintiff respectfully requests that the Court grant Plaintiff summary judgment as follows:

1. The Transfers are fraudulent as being actually fraudulent pursuant to NRS 112.180(1)(a);

2. Avoiding the Real Property Transfers pursuant to NRS 112.210 such that the Laguna Properties are returned to the Bankruptcy Estate;

3. Alternatively, awarding judgment in favor of Plaintiff and against Bayuk and the Bayuk Trust as to the Real Properties pursuant to NRS 112.220(2) in amount the minimum amount of \$1,236,458;

4. Avoiding the Baruk Transfer pursuant to NRS 112.210 such that the Baruk Properties are restored to Baruk and the 50% interest in Baruk is returned to the Bankruptcy Estate;

5. Alternatively, awarding judgment in favor of Plaintiff and against Bayuk and the Bayuk Trust as to the Baruk Transfer pursuant to NRS 112.220(2) in the amount of \$1,654,550;

6. Awarding judgment in favor of Plaintiff and against Defendants, jointly and severally, as to the Superpumper Transfer pursuant to NRS 112.220(2) in the *minimum amount* of \$1,985,307;

7. Awarding judgment in favor of Plaintiff and against Defendants, jointly and severally, as to the Superpumper Transfer pursuant to NRS 112.220(2) in an additional amount to be determined at Trial following evidence as to the actual value of Morabito's 80% interest in Superpumper at the time of the Superpumper Transfer;

8. Setting the hearing on valuation of the Reno Property and Superpumper, to the extent necessary, at the time set for Trial; and

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9. Awarding such and further relief as to this Court is just and equitable under the facts of this case.

Dated this 17<sup>th</sup> day of August 2017.

GARMAN TURNER GORDON LLP

/s/ Teresa M. Pilatowicz  
GERALD E. GORDON, ESQ.  
TERESA M. PILATOWICZ, ESQ.  
650 White Drive, Ste. 100  
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Telephone 725-777-3000

*Special Counsel for Plaintiff*

**AFFIRMATION**  
**Pursuant to NRS 239B.030**

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

GARMAN TURNER GORDON LLP

/s/ Teresa Pilatowicz  
GERALD E. GORDON, ESQ.  
TERESA M. PILATOWICZ, ESQ.  
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Telephone 725-777-3000

*Special Counsel for Plaintiff*

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of GARMAN TURNER GORDON LLP, and that on this  
3 date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **MOTION**  
4 **FOR PARTIAL SUMMARY JUDGMENT** on the parties as set forth below:

5 \_\_\_\_\_ Placing an original or true copy thereof in a sealed envelope placed for collection  
6 and mailing in the United States Mail, Reno, Nevada, postage prepaid, following  
7 ordinary business practices

8 \_\_\_\_\_ Certified Mail, Return Receipt Requested

9 \_\_\_\_\_ Via Facsimile (Fax)

10 \_\_\_\_\_ Via E-Mail

11 XXX Placing an original or true copy thereof in a sealed envelope and causing the same  
12 to be personally Hand Delivered

13 \_\_\_\_\_ Federal Express (or other overnight delivery)

14 addressed as follows:

15 Frank Gilmore  
16 ROBISON, BELAUSTEGUI, SHARP & LOW  
17 71 Washington Street  
18 Reno, NV 89503

19 DATED this 17<sup>th</sup> day of August, 2017.

20 /s/ Ricky H. Ayala

21 An Employee of GARMAN TURNER  
22 GORDON LLP

1 **2200**  
2 GARMAN TURNER GORDON LLP  
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12 *Special Counsel to Plaintiff*

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**IN THE SECOND JUDICIAL DISTRICT COURT OF**

**THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE**

12 WILLIAM A. LEONARD, Trustee for the  
13 Bankruptcy Estate of Paul Anthony  
14 Morabito,

15 Plaintiff,

16 vs.

17 SUPERPUMPER, INC., an Arizona  
18 corporation; EDWARD BAYUK,  
19 individually and as Trustee of the EDWARD  
20 WILLIAM BAYUK LIVING TRUST;  
21 SALVATORE MORABITO, and individual;  
22 and SNOWSHOE PETROLEUM, INC., a  
23 New York corporation,

24 Defendants.

**CASE NO.: CV13-02663**

**DEPT. NO.: 1**

**STATEMENT OF UNDISPUTED FACTS IN  
SUPPORT OF MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

23 Plaintiff William A. Leonard, as Chapter 7 Trustee of the Bankruptcy Estate of Paul  
24 Anthony Morabito ("Plaintiff"), by and through his counsel, the law firm of Garman Turner  
25 Gordon LLP, submits this Separate Statement of Undisputed Facts in Support of his Motion or  
26 Partial Summary Judgment, filed concurrently herewith:  
27  
28

1     **A.     The Court Announces an \$85 Million Judgment Against Morabito.**

2             1.       In or about 2007, a dispute developed between JH, Inc. (“JH”), Jerry Herbst, and  
3     Berry Hinckley Industries (“BHI” and together with JH and Jerry Herbst, the “Herbst Parties”)  
4     on the one hand, and Morabito and Consolidated Nevada Corporation (“CNC”) on the other,  
5     regarding the sale of the BHI stock to JH. *See, Declaration of Timothy Herbst* (“Herbst  
6     Declaration”), attached as **Exhibit 1**, ¶ 1.

7             2.       On December 3, 2007, Morabito and CNC filed a lawsuit against the Herbst  
8     Parties captioned *Consolidated Nevada Corp., et al. v. JH, et al.* in the Second Judicial District  
9     Court (the “State Court”), Case No. CV07-02764 (together with all claims and counterclaims, the  
10    “State Court Action”). *Id.*, ¶ 2.

11            3.       The Herbst Parties filed numerous counterclaims in the State Court Action  
12    against Morabito and CNC, including fraud in the inducement, misrepresentation, and breach of  
13    contract relating to an Amended and Restated Stock Purchase Agreement (“ARSPA”). *Id.*, ¶ 3.

14            4.       Ultimately, Judge Brent Adams found that Morabito and CNC fraudulently  
15    induced the Herbst Parties to enter into the ARSPA and ruled in favor of the Herbst Parties  
16    against Morabito on other fraud-based claims. *See Findings of Fact and Conclusions of Law*,  
17    attached hereto as **Exhibit 2**.

18            5.       Specifically, as to the fraud, Judge Adams found:

- 19            a.       Clear and convincing evidence shows that there was no basis whatsoever for the  
20                    contents of the working capital estimate other than Mr. Morabito’s decision to create  
21                    it.  
22            b.       There is not one piece of paper that has been produced in over 5,500 exhibits in this  
23                    trial, to the Independent Accountants, during discovery or anywhere else, to support  
24                    the exaggerated value of the company as set forth in the working capital estimate  
25            c.       The Court finds by clear and convincing evidence that Mr. Morabito never for a  
26                    single second had any intention to perform the services of construction manager.  
27            d.       Mr. Morabito’s representation under the CMA were intentionally false.  
28            e.       Mr. Morabito’s representations were made for the purpose of inducing the purchase  
              of the development cites by JH.

*See id.*, ¶¶ 34, 35, 69, 70, 71.

1           6.     On September 13, 2010, the Court announced an oral judgment of  
2     \$85,871,364.75, with further proceedings to take place regarding the amount of punitive  
3     damages (the "Oral Judgment"). *See* Exhibit 1, ¶ 6.

4           7.     On October 12, 2010, the State Court entered its findings of fact and conclusions  
5     of law (the "FF&CL") which set forth the legal and factual basis for a forthcoming written State  
6     Court judgment, including fraud in the inducement. *See* Exhibit 2.

7           8.     On August 23, 2011, the State Court entered a final judgment awarding the Herbst  
8     Parties total damages in the amount of \$149,444,777.80 for actual fraud, representing both  
9     compensatory and punitive damages as well as an award of attorneys' fees and costs (the "Final  
10    Judgment"). *See Judgment*, attached hereto as **Exhibit 3**.

11    **B.     Immediately After the Oral Judgment, Morabito Begins Planning to Transfer His**  
12    **Assets to Avoid Liability on the Eventual Final Judgment.**

13           9.     *Less than two days after the Oral Judgment*, Morabito engaged two separate law  
14     firms in New York to formulate a plan for divesting Morabito of his assets while retaining all of  
15     the benefits of his assets. Specifically, Morabito retained Dennis Vacco ("Vacco") at Lippes  
16     Mathias Wexler & Friedman ("LMWF"), and Sujata Yalamanchili ("Yalamanchili") and Garry  
17     Graber ("Graber") at the law firm of Hodgson Russ ("HR").

18           10.    Graber testified as to the goals of his retention:

19                Q. And what were you asked to do for Morabito?

20                A. I was asked to consider whether there were ways in which he could  
21                evade the judgment through bankruptcy, or I shouldn't say evade the  
22                judgment. That's not correct. ***If there are ways he could protect himself***  
***against -- protect his assets and/or escape liability on account of the***  
***judgment.***

23    *See Deposition Transcript of Garry Graber*, attached hereto as **Exhibit 4**, p. 17, ll. 3-11  
24    (emphasis added).

25           11.    HR had several ideas. In an e-mail dated September 15, 2010 – just two days  
26    after the Oral Judgment – Yalamanchili wrote to Morabito:

27                I caught up with Garry (who is back in Buffalo today) on our conversation  
28                from yesterday.



1 Garry has a number of additional ideas, *including a possible marital split*  
2 *between Paul and Edward pursuant to which Edward could retain some*  
3 *of Paul's assets*. We need to better understand California domestic  
partner laws, first.

4 See **Exhibit 5**. (emphasis added).

5 12. Morabito clarified his intent to protect all tangible assets, right down to his clothes  
6 and airline miles, with Graber:

7 Garry

8 I have a few questions.

9 Edward and I plan on changing our primary residence from Reno to  
10 Laguna Beach.

11 Change DMV, voter registration, cancel Nevada club memberships, burial  
plot, resign from State Board etc

12 Should Edward buy our household furniture etc from me for the Reno and  
13 Palm Springs houses that are not our primary? We have receipts from  
2006 for everything worth around \$225,000 new.

14 Also, what about my clothes? I was in the hospital for 5 months last year  
15 and came out 200 pounds lighter. I spent \$200,000 on a new wardrobe  
since November.

16 Finally, are my 2 million American Express airline miles something I can  
17 do something with or is that an asset, too?

18 (the "Graber E-mail") See **Exhibit 6**.

19 13. By September 20, 2010, Yalamanchili was advising her firm that she had agreed  
20 to "help [Morabito] with some of the asset protection strategies he will need." See **Exhibit 7**.

21 14. To that end, and in discussing the "quick run-down of Paul's assets" with Graber,  
22 Yalamanchili made clear:

23 CoWest Co owns 100% of the stock of Superpumper, Inc., an Arizona  
24 corporation. This is a profitable business which owns and operates 11 gas  
25 stations an [sic] convenience stores in Arizona. Paul, Edward, and Sam all  
26 draw "healthy" salaries from this company (e.g. 250k to 500k). I would  
like to preserve this business and protect it from the Herbsts since it pays  
salaries to Edward, Sam and Paul and it is a strong, going business.

27 See **Exhibit 8**.

28 15. That same night, after what was clearly a heated call between Morabito and his

1 counsel as to the Transfers and problems associated therewith, Graber wrote to Morabito:

2 And I apologize for my part in the exchange. I feel as though I am being  
3 asked under very rushed circumstances with very scant information to  
4 come up with a *foolproof strategy* in a complicated area of law in which  
“foolproof” is impossible to achieve and then being prevented from  
explaining the issues and obstacles involved.

5 See **Exhibit 9.** (emphasis added).

6 16. Morabito is not a stupid man. After being advised that it was improper to transfer  
7 assets following a judgment to hinder, delay, and defraud a creditor, Morabito made clear his  
8 strategy for protecting the Transfers:

9 Dennis & Sujata

10 Garry asked what my rationale was to do this – and that I would be asked.

11 Judge Adams specifically exonerated Edward and Sam. I hold assets with  
12 them, and they had long standing options to own a majority of  
Superpumper, Inc.

13 We agreed amongst ourselves that I was best standing alone with my  
14 assets, and on advice of Counsel we sought independent, third party  
15 appraisers to do just that.

16 I have no doubt it will be challenged in court – and they may try and come  
17 up with their own appraisals. But in the end, the underlying “selling for  
value” will be allowed.

18 Snowshoe Petroleum, Inc. will be an Erie County, New York company.  
19 Edward is going to be a resident of Los Angeles and Orange County,  
California.

20 *The Herbsts no longer have home court, good old boy advantage.*

21 See **Exhibit 10.** (emphasis added)

22 17. Yalamanchili cautioned Morabito at that time:

23 You need to be very clear on what the law says, Paul. I don’t think it  
24 simply says you can transfer assets for value. I think Garry is trying to say  
25 that Fraud. Conveyance laws are complicated and they look at a lot of  
26 factors, including whether you have an intent to frustrate your creditors. I  
am not an expert in this area but I want to be very clear on what the law  
says.

27 See **Exhibit 11.**

28 18. Morabito never even pretended that he was not trying to frustrate his

creditors, responding:

Exactly. It allows sale. If you look at what we are doing, we end up in the exact same position with stand alone assets.

*See id.*

19. Shockingly, despite his constant e-mails dictating exactly how his attorneys would transfer his assets to hinder the Herbst Parties' collection efforts, even challenging his attorneys when they advised as to the consequences of his actions, Morabito later claimed:

Q. So is it a fair assessment that you told [Vacco] split everything up, and then he just gave you documents to sign and that was your involvement in it?

Morabito: Effectively, I mean, I wasn't involved – I mean, I think I may have identified one – I – I mean, we didn't – I don't know any of the people involved. I never met any of the people involved. I wasn't involved in any of this process, so Mr. Vacco directed the whole thing.

*See Exhibit 13*, p. 82, l. 22 - p. 83. l. 2

**C. Morabito Starts to Transfer His Assets to Avoid Collection.**

**1. The \$6,000,000 Sefton Trustees Transfer.**

20. On September 15, 2010, just *two days* after the Oral Judgment, Morabito transferred \$6 million (the "Off-Shore Funds") to an entity known as Sefton Trustees ("Sefton").

*See Exhibit 14.*

21. Morabito confirmed that Sefton is an offshore account. *See Exhibit 15*, p. 189, ll. 24-25.

22. However, he then claimed that, notwithstanding the Oral Judgment against him just days before, that (1) he transferred the Off-Shore Funds to Sefton to pay the debts owed by a prior boyfriend, Mr. Marsland, through no documentation regarding the debts or that Morabito has any exposure for the debts has ever been produced *See id.*, p. 190, ll. 9-12

23. Also, at times, he claims to have no recollection of making this \$6 million transfer to Sefton. *See Exhibit 16*, pp. 119-125

1           **2. Morabito Exchanges His Majority Interest in the Laguna Properties for Bayuk's**  
2           **Minority Interests in a Reno Property.**

3           24. Immediately prior to the Oral Judgment, Morabito and Bayuk, individually and  
4 through their respective trusts, owned three real properties – (1) 371 El Camino del Mar, Laguna  
5 Beach, California (the “El Camino Property”), (2) 370 Los Olivos, Laguna Beach, California  
6 (the “Los Olivos Property” and, together with the El Camino Property, the “Laguna Properties”),  
7 and (3) 8355 Panorama Drive, Reno, Nevada (the “Reno Property,” and together with the  
8 Laguna Properties, the “Real Properties”). *See Exhibit 17.*

9           25. Specifically, Morabito<sup>1</sup> owned 70% of the Reno Property, 75% of the El Camino  
10 Property and 50% of the Los Olivos Property. Bayuk owned the remaining interests. [Morabito  
11 *See id.*

12           26. On September 27, 2010, *just two weeks* after the Oral Judgment, Morabito and  
13 Bayuk executed a *Purchase and Sale Agreement*, which was later amended on September 29,  
14 2010 (as amended, the “PSA”), for the transfer of the Real Properties. *See id.; see also Exhibit*  
15 **18.**

16           27. Pursuant to the PSA, Morabito purported to sell his 75% and 50% interests in the  
17 Laguna Properties in exchange for Bayuk’s 30% interest in the Reno Property (the “Real  
18 Property Transfers”). The transaction included Morabito providing a \$150,000 credit to Bayuk  
19 for a theater system in the Reno Property and \$45,000 for excess water rights appurtenant to the  
20 Reno Property. *See id.*

21           28. According to Morabito and Bayuk, the value of the Laguna Properties, after  
22 deduction for mortgages, was \$1,933,595. Specifically, the Los Olivos Property was valued<sup>2</sup> at  
23 \$854,954, and the El Camino Property was valued at \$1,078,641. *See Exhibits 17-18; Exhibit*  
24 **12; Exhibit 36.**

25           29. The valuation of the Reno Property is disputed. According to the Debtor and  
26

27 <sup>1</sup> For purposes of this Motion, Morabito and Arcadia are treated as one and the same, and Bayuk and the  
28 Bayuk Trust are treated as one and the same.

<sup>2</sup> This value is net of existing mortgages on the Laguna Properties.

1 Bayuk, the value of the Reno Property was \$4,300,000 as of September 30, 2010. *See Exhibit*  
2 **19**; *see also* Exhibit 17.

3 30. According to Plaintiff, the value of the Reno Property, as of September 30, 2010,  
4 was only \$2,000,000. The Reno Property was also subject to a \$1,028,864 mortgage. *See*  
5 **Exhibit 20**.

6 31. Morabito sold the Reno Property in December 2012 (more than two years after  
7 these valuations) for only \$2,600,000. *See Exhibit 21* and **Exhibit 22**.

8 32. Along with the real property, Morabito also transferred all personal property at all  
9 of the real properties to Bayuk. Critically, Morabito purported to sell all of the personal property  
10 in the Reno Property, despite the fact that Morabito retained that real property, for a payment of  
11 \$29,380.00. *See Exhibit 23*. This is the same personal property that, in the Graber e-mail just  
12 two weeks before, Morabito indicated was purchased for \$225,000. *See Exhibit 6*. Confusingly,  
13 Morabito also testified that, as of April 2012, he had furniture and assets in the Reno Property  
14 worth \$1 Million. Morabito claimed that he would periodically sell this property to Bayuk (long  
15 after the Transfers and the alleged sale to Bayuk of the personal property) in exchange for his  
16 living expenses. *See Exhibit 44*, p. 64, l. 9 - p. 66, l. 18.

17 **3. Morabito Exchanges His 50% Equity Interest in Baruk Properties, LLC for an**  
18 **Illusory Promissory Note.**

19 33. Immediately prior to the Oral Judgment, Morabito and Bayuk, through their  
20 trusts, each owned 50% in a real estate holding company called Baruk Properties, LLC, a Nevada  
21 limited liability company ("Baruk"). *See Exhibit 24*.

22 34. Baruk owned four real properties: 1461 Glenneyre, Laguna Beach, CA ("1461  
23 Glenneyre"); 570 Glenneyre, Laguna Beach, CA ("570 Glenneyre"), 1254 Mary Fleming, Palm  
24 Springs, CA (the "Palm Springs Property"), and 49 Clayton, Sparks, NV (the "Sparks Property,"  
25 and collectively, the "Baruk Properties"). *See Exhibit 25*, interrogatory response no. 2.

26 35. Morabito and Bayuk obtained appraisals: (1) valuing 1461 Glenneyre at  
27 \$1,400,000; (2) valuing 570 Glenneyre at \$2,500,000, or \$1,129,021 after deduction for the  
28 mortgage on property; and (3) valuing the Palm Springs Property at \$1,050,000, or \$705,079

1 after deduction for the mortgage. *See Exhibits 26, 27, 28.*

2 36. The Sparks Property had a value of \$75,000 as of September 30, 2010. *See*  
3 Exhibit 20.

4 37. On October 1, 2010, *just two and half weeks* after the Oral Judgment, Morabito  
5 transferred his 50% membership interest in Baruk to Bayuk through the *Membership Interest*  
6 *Transfer Agreement* (the “Baruk Transfer”). *See Exhibit 29.*

7 38. In exchange Bayuk purportedly provided a promissory note in the amount of  
8 \$1,617,050 to Morabito (the “Baruk Note”). *See id.*; *see also Exhibit 30.*

9 39. Immediately after the Baruk Transfer, on October 4, 2010, Bayuk merged Baruk  
10 Properties, a Nevada entity, into Snowshoe Properties, LLC, a California limited liability  
11 company (“Snowshoe Properties”),<sup>3</sup> and transferred the Baruk Properties to Snowshoe  
12 Properties. *See Exhibits 31, 32; see also Exhibit 33*, p. 87, ll. 1-9; *see also Exhibit 59.*

13 40. Immediately after that, Bayuk transferred the Palm Springs Property from  
14 Snowshoe Properties to the Bayuk Trust. *See Exhibit 34.*

15 41. The Baruk Note was almost immediately assigned (the “Woodland Assignment”)  
16 by Morabito to Woodland Heights (“Woodland”), a Canadian entity owned by Morabito’s father,  
17 purportedly in exchange for an interest in Woodland. *See Exhibit 35.*

18 42. Despite the Woodland Assignment, Morabito and Bayuk now contend that the  
19 Baruk Note was not transferred, and Bayuk cannot recall ever making any payments to  
20 Woodland. *See Exhibit 33*, p. 130, ll. 2-7; *see also Exhibit 37*, pp. 182-188

21 43. The terms of the Baruk Note required principal and interest payments over 360  
22 months in equal monthly installments of \$7,7204.04 accruing interest at 4%. *See Exhibit 30.*

23 44. However, Bayuk testified that he was erratic with paying. *See Exhibit 33*, p. 110,  
24 l. 18.] In fact, according the Bayuk, Bayuk would just “give [Morabito] money whenever he  
25 needs it. He’s a friend.” *See id.*, p. 119, l. 13-18.

26 45. Bayuk’s and his agents’ testimony regarding the Baruk Note has been  
27

28 <sup>3</sup> Snowshoe Properties is distinct from Snowshoe Petroleum.

contradictory:

- a. Bayuk testified that the Baruk Note was satisfied in full based on a loan ledger (the “First Ledger”) and amortization schedule (the “Amortization Schedule”) provided by his accountant, Stanton Bernstein (“Bernstein”). See Exhibit 25, interrogatory response no. 8; see also **Exhibit 39** see also **Exhibit 40**.
- b. According to the First ledger, \$735,724.75 was paid in 2012, \$531,600 was paid in 2013, \$579,362.62 was paid in 2014, and \$101,526.70 was paid through March 2015. See Exhibit 39
- c. Bayuk later testified that the First Ledger was wrong, and he produced another, wildly different ledger (the “Second Ledger”). See **Exhibit 41**.
- d. According the Second Ledger, \$567,009.26 was paid in 2010, \$273,412.88 was paid in 2011, \$826,232.49 was paid in 2012, and \$129,400.00 was paid in 2013.
- e. According to the Amortization Schedule, \$735,724.75 was paid in 2012 and \$1,029,510.57 was paid in 2013. See Exhibit 40
- f. In November 2011, Morabito instructed Vacco: “On this, I have the note that I sold my Dad [the Woodland Assignment]. Cancel it, convert it back into a 50% share interest in Snowshoe Properties, LLC,” proving not only that no payments could have been made prior to November 2011, but that the assignment to Woodland was just another sham. See **Exhibit 42**
- g. On May 23, 2012, Morabito submitted a Personal Financial Statement to Bank of America (“BofA”) in connection with the BofA Settlement (defined herein) listing as an asset a “\$1,750,000 Note Receivable” due from Bayuk. See **Exhibit 43**, p. WL002781. Morabito acknowledged that according to the Personal Financial Statement, as of 2012, Bayuk owed him \$1.75 million under the Baruk Note, proving that no payment could have been made prior to 2012. See **Exhibit 44**, p. 60, 1. 11 – p. 61, 1.6.

**4. Morabito Transfers His 80% Interest in Superpumper, Inc. for a Small Cash Payment and Another Illusory Promissory Note.**

46. Immediately prior to the Oral Judgment, Morabito owned a 100% interest in Consolidated Western Corporation (“CWC”), which owned an 80% interest in Superpumper. See **Exhibit 45**.

47. Prior the Oral Judgment, Morabito consistently represented that his interest in Superpumper was worth at least \$20,000,000:

- a. In a May 2009 financial statement provided to Superpumper’s auditors, Gursej Schneider (“Gursej”) Morabito listed the value of his interest in Superpumper at \$20,000,000. See **Exhibit 46**.

- 1           b. In March 2010, Morabito confirmed that the value his interest was still \$20,000,000,  
2           stating to Gurse: “Here is the last PFC done for me – and I can represent that  
3           nothing has materially changed.” *See Exhibit 47.*
- 4           c. On March 10, 2010, Morabito sent an e-mail in connection with a proposed deal  
5           involving Superpumper and ExxonMobil stating that “My intention is to contribute  
6           my existing Arizona (11 stores) and Nevada (51% of the truck stop/casino) businesses  
7           at a FMV of approximately \$40 million.” *See Exhibit 48.*
- 8           d. On May 20, 2010, Morabito delivered an e-mail to Vacco in connection with a  
9           proposal to place a binding bid for ExxonMobil Chicago stores, instructing: “Arrange  
10          paperwork for me to transfer into CCC 100% of the shares of Consolidated Western  
11          Corporation which owns 100% of Superpumper, Inc., at a FMV of \$30 million.” *See*  
12          *Exhibit 49.*
- 13          e. In a Statement of Assets and Liabilities provided to Compass Bank (“Compass”),  
14          Superpumper’s Lender, on May 30, 2010, Morabito represented the value of  
15          Superpumper to be \$30,000,000 *See Exhibit 50.*
- 16          f. On June 28, 2010, Morabito delivered another e-mail to employees and ExxonMobil  
17          regarding a potential deal that notes “The Arizona company, which I presently own  
18          100% of, has a FMV exceeding \$25 million; annual cash flow of \$5 million; and has  
19          no term debt, just an existing line of credit for \$3 million.” *See Exhibit 51*

20           48. On September 28, 2010, *just two weeks* after the Oral Judgement, Morabito  
21          merged CWC into and Superpumper and then, on September 30, 2010, Morabito and Snowshoe,  
22          an entity created by Vacco for Bayuk and Sam, entered into a *Shareholder Interest Purchase*  
23          *Agreement* (the “Superpumper Agreement”) whereby Snowshoe allegedly purchased Morabito’s  
24          80% equity interest in Superpumper. *See Exhibit 52; see also Exhibit 45.*

25           49. Snowshoe was established as a New York entity. *See Exhibit 52.*

26           50. At around the same time, Compass prepared a summary of a request for a  
27          forbearance agreement. Compass’ report noted that: “Upon learning of the judgment, Mr.  
28          Morabito sold SPI, which was not included in the suit, to two minority shareholders. A business  
29          appraisal is still being finalized, final purchase price will be roughly \$10MM.” *See Exhibit 54,*  
30          *p. 6.*

31           51. Ultimately, Matrix Capital Markets Group, Inc. (“Matrix”) completed a valuation  
32          of Superpumper, and on October 13, 2010 (two weeks *after* the Superpumper Agreement),  
33          provided its report to Vacco valuing 100% of the equity interest in Superpumper as of August



1 31, 2010 at \$6,484,514, or \$5,187,611.20 for Paul Morbaito's 80% interest (the "Matrix  
2 Valuation"). See **Exhibit 55**

3 52. The Matrix Valuation lacked credibility for a number of reasons, but particularly  
4 because it inexplicably adjusted nearly \$9 Million in affiliated accounts receivables due to  
5 Superpumper (the "Receivables") to zero, reducing the value of Superpumper, on paper at least,  
6 by at least \$6,500,000. See Exhibit 55; see also **Exhibit 56**

7 53. In reality, the value of Superpumper on September 30, 2010 was \$13,050,000,  
8 and Morabito's 80% interest was worth \$10,440,000. See *id.*

9 54. Despite the already reduced valuation because of the elimination of Receivables,  
10 LMWF further reduced the Matrix valuation by (1) \$1,682,000 for the "Compass Term Loan"  
11 (the "LMWF Compass Reduction") and (2) \$1,680,880 for a 35% "risk reduction" (the "LMWF  
12 Risk Reduction," and together with the LMWF Compass Reduction, the "Additional LMWF  
13 Reductions") See **Exhibit 57**.

14 55. In exchange for the reduced value of Morabito's 80% interest, Defendants  
15 purportedly paid Morabito \$1,035,094 in cash, and \$1,462,213 through a term note from  
16 Snowshoe to Morabito (the "Superpumper Note"). See Exhibit 45, see also **Exhibit 60**.

17 56. However, Morabito submitted a declaration to the Bankruptcy Court on July 1,  
18 2013 (the "Morabito Bankruptcy Declaration") contending that he sold his interest in CWC for  
19 "cash payments of approximately \$542,000 and a note of approximately \$933,694." Morabito  
20 further stated that "I had received partial payments on [the note] and the principal balance has  
21 been subsequently cancelled based on a post-closing reevaluation of the significant decrease in  
22 the fair market value of the business." See **Exhibit 58**, ¶ 10.

23 57. The Superpumper Note was not executed until November 1, 2010, one month  
24 after the Superpumper Transfer. The Superpumper Note required monthly payments  
25 commencing on December 1, 2010 in the amount of \$19,986,71 for 84 months, with interest  
26 accruing at 4% per annum See Exhibit 60, Superpumper 000001-02.

27 58. The amount due under the Superpumper Note was reduced by \$939,000 to  
28 \$423,213 on February 1, 2011 (the "Superpumper Note Reduction"), leaving a successor note in

1 the amount of \$423,213 (the “Successor Note”). See Exhibit 60, Superpumper 000003-06.

2 59. The Superpumper Note Reduction, however, was another sham designed to  
3 ensure that Morabito held no assets on which the Herbst Parties could execute.

- 4 a. In short, on or about August 13, 2010 (during trial), Superpumper obtained a term  
5 loan from Compass in the amount of \$3,000,000 (the “Compass Term Loan”). See  
6 **Exhibit 61**.  
7 b. The Compass Term Loan was not used for operations but instead was withdrawn  
8 from Superpumper and distributed to Morabito, Bayuk, and Sam, each of whom  
9 received \$939,000 (the “Compass Loan Withdrawals”).  
c. The Compass Loan Withdrawals were made in order for Morabito, Bayuk, and  
Sam to invest in other companies:

10 Sam: The term loan was initiated in August of 2010. The  
11 reasons for that term loan is that it was guarantied by the  
12 Superpumper. Edward, Paul and I decided we were going  
13 to take that money, pre what happened in the judgment, and  
14 go invest it in another entity and use that money for equity  
for us to buy another business, probably in the same field,  
the convenience store area.

See **Exhibit 62**, p. 98, ll. 6-12.

- 15 d. While \$939,000 withdrawn by Morabito, Bayuk, and Sam (for a total of \$2,817,000)  
16 and was to be paid back by Morabito, Bayuk, and Sam, they were eliminated as assets  
17 of the company when valued by Matrix. At the same time, the same obligations are  
18 now being used to reduce the amount due to Morabito and otherwise reduce the value  
of the company.

19 60. Defendants have been unable to produce any evidence of payments made on the  
20 Successor Note, though it provided for 84 monthly payments beginning on March 1, 2011. It is  
21 unclear whether the Successor Note was every actually paid

- 22 a. As late as October 12, 2012, Morabito’s accountant, Stan Bernstein, noted that no  
23 payments had been made on the Superpumper Note through 2011, and interest was  
24 accrued. See **Exhibit 65**.  
25 b. Morabito could not say whether the Successor Note was paid. See **Exhibit 66**, p. 175,  
26 l. 21 – p. 176, l. 4.  
27 c. Nor could Vacco: “Since my separation,<sup>4</sup> I don’t know what happened to the debtor,  
28 how – how much of it’s been paid, whether it’s been paid, whether it’s been paid in

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<sup>4</sup> Vacco testified that he terminated his relationship with Morabito prior to the involuntary Bankruptcy Case, which was commenced in June 2013. See Vacco Depo., p. 38, ll. 12-20.

total or whether it's in default. I don't know." See **Exhibit 67**, p. 47, ll. 5-18.

- d. Finally, as set forth in the Morabito Bankruptcy Declaration, the note was only in the amount of approximately \$933,694, and the principal balance was subsequently cancelled based on a post-closing reevaluation of the significant decrease in the fair market value of the business See Exhibit 58.

**D. Morabito Continues to Control the Transferred Properties.**

61. Following the Transfers, Morabito continued to utilize the transferred assets as if he still owned them.

62. In April 2011, Morabito sought to negotiate a sale on behalf of Snowshoe, and by bargaining with Superpumper. Specifically, Snowshoe sought to acquire Nella Oil Company, LLC and Flyers LLC (the "Nella Deal"). The proposal included the contribution of Snowshoe's 100% interest in Superpumper, "valued at \$10,000,000." See **Exhibit 68**. Despite that the purchaser was to be Snowshoe, Morabito negotiated the terms of the Nella Deal and controlled the deal See *id.* For example:

- a. On April 5 and April 15, 2011, Morabito e-mailed Vacco regarding coordinating the Nella Deal, without including Bayuk or Sam. Morabito notes that the deal allowed "SPI to acquire Nella Oil Co" and indicates "attached is an initial \$65 million loan offer from Cerebus – they made it out to CWC but I am having it changed to Snowshoe Petroleum Inc..." Morabito makes his role clear: "I am expecting a letter of interest from Getty Realty on the real estate by Tuesday. My goal would be to submit a Letter of Intent to Nella Oil by Wednesday or Thursday. I will circulate the first draft. See **Exhibit 70**

- b. These communications continued through August 7, 2011. See **Exhibit 71**.

- c. Throughout the discussions, there were at multiple versions of proposed Letters of Intent, each negotiated and controlled by Morabito.<sup>5</sup>

63. In August 2011, Morabito retained Tim Haves, a real estate broker, on behalf of Superpumper Properties, LLC ("Superpumper Properties"), a company purportedly owned by Morabito.<sup>6</sup> Instead of having Mr. Haves paid of our Superpumper Properties, Vacco instructed

<sup>5</sup> Plaintiff intends to cite to additional deposition testimony of Vacco. However, at the time of filing, the transcript was unavailable. As a result, this SSOF will be supplemented when the information becomes available.

<sup>6</sup> Superpumper Properties LLC ("Superpumper") was an entity for which Morabito purportedly paid Bayuk and Sam for their interests at the time of the Transfers. However, Bayuk stated, under oath, that "Edward Bayuk owned 25%, Salvatore Morabito owned 25% and Morabito owed [sic] 50% until approximately when

1 Morabito, without copying Bayuk and Sam, to simply use Superpumper to make payment: “In  
2 order to protect [Tim Haves] from being reached in an enforcement action by the Herbst, I  
3 recommend that his agreement be with [Superpumper.] [Superpumper] will need to pay him  
4 \$58,000 without any corresponding reimbursement from [Superpumper Properties]. If he is paid  
5 from Flyer’s proceeds, [the Herbst Parties] will go after that money and the fact that he is not  
6 broker in NV will be revealed. He has consulted for [Superpumper] so it is logical that he be  
7 under contract for that entity.” See **Exhibit 72**.

8 64. In November 2011, Morabito sought to use the assets of Snowshoe Properties (fka  
9 Baruk) that he allegedly transferred to Bayuk to settle a lawsuit against Morabito:

10 a. On April 11, 2011, BofA filed a lawsuit against Morabito in connection with a past  
11 due obligation due and owing to BofA by Morabito thereby commencing case no.  
CV11-01121 in the State Court (the “BofA Lawsuit”). See **Exhibit 73**.

12 b. In connection with the BofA Lawsuit, BofA inquired as to the ownership of 1461  
13 Glenneyre, and the Baruk Transfer:

14 David Maiorella of the Bank spoke with Mr. Morabito about this  
15 situation on October 31, and Mr. Maiorella *was advised by Mr.*  
16 *Morabito that this transfer represented nothing more than a*  
*Borrower name change, and that documentation exists*  
17 *substantiating that such was indeed the case.*

18 See **Exhibit 42** (emphasis added).

19 c. Morabito, more than a year after the alleged Baruk Transfer, asked Vacco: “As far as  
they are concerned it is a name change, correct?”

20 d. Vacco responded: “Tough to sell if she pulls corporate records which is who the  
21 members of Snowshoe Properties, LLC.”

22 e. In order to correct any potential concerns, on November 1, 2011, over a year after the  
23 Baruk Transfer, Morabito responded to Vacco:

24 On this, I have the note that I sold my Dad. [The Baruk Note]  
25 Cancel it, convert it back into a 50% share interest in Snowshoe  
26 Properties, LLC, and give me the right to trigger an option to split  
the assets and take 1461 Glenneyre and [Bayuk] ends up with 570  
Glenneyre.

27 \_\_\_\_\_ (continued)  
the assets were sold in 2011 and the company was dissolved.” See **Exhibit 64**, Response to interrogatory no.  
28 9. In any event, Morabito sought to, and did, sell Superpumper Properties prior to the Final Judgment again  
ensuring that the Herbst Parties collection efforts were frustrated.

1 *See id.*

2 65. In February 2012, Morabito, Vacco, and Timothy Haves, the same broker Vacco  
3 advised Morabito to pay out of Superpumper before, exchanged no less than five e-mails  
4 regarding a sale of 1461 Glenneyre. Bayuk was not even copied on any of them. *See Exhibit 75*

5 66. On May 8, 2012, Morabito instructed Vacco: The Glenneyre Street property  
6 should be in PARADERAS PROPERTIES LLC, Delaware, jointly owned by PM/RW,<sup>7</sup> and sold  
7 at \$2.75 million . . . \$1.75 million mortgage we are getting through Pacific Bank and \$1 million  
8 is cash equity. *See Exhibit 76* [Lippes.PAM0000410]. Though Bayuk purportedly owned the  
9 1461 Glenneyre property in full at that point, he was not part of this proposed ownership.

10 67. In September 2012, in connection with a settlement of the BofA Lawsuit, which  
11 had nothing to do with Bayuk, Morabito caused a second deed of trust to be placed on 1461  
12 Glenneyre. *See Exhibit 73.*

13 68. Vacco simply instructed Bayuk when and where to sign for Morabito:

14 Edward,

15 Attached please find various documents which need to be executed  
16 by you to fulfill the collateral for the note Paul agreed to in order to  
17 settle the BOA litigation. I have reviewed and approved all  
18 documents. Please execute these documents and return them to me  
19 via PDF before Friday and then overnight the originals to me.  
Please sign in blue ink.

20 *See Exhibit 77.*

21 69. Also in September 2012, in connection with funding for Virsenet, an entity in  
22 which Bayuk and Morabito held joint interests, Bayuk stated to Morabito and various attorneys  
23 in an e-mail chain regarding funding and security, “Let’s just make this simple, ***I think Paul***  
24 ***wants to*** put a second deed of trust in place on Mary Fleming House if so, than [sic] just let me  
sign for the second deed of trust.” *See Exhibit 78* (emphasis added).

25 70. On October 3, 2012, in an e-mail exchange between Morabito, Vacco, and  
26 Christian Lovelace (“Lovelace”), another LMWF attorney, Morabito discussed the terms of a \$5

27

28 <sup>7</sup> RW is Raymond Whiteman (“Whiteman”).

1 million loan to Snowshoe Properties (in which Morabito supposedly held no interest). Vacco  
2 responded to Morabito:

3 As I understand your instructions below, Snowshoe Properties,  
4 LLC, will borrow \$5MM. Snowshoe will provide a FDT on 1461  
5 Glenneyre and a SDT on 570 Glenneyre. The term will be for 36  
6 months with no prepayment penalty. Are the monthly payments  
7 interest only or interest and principal. If interest and principal  
8 what is the amortization period, 3 years, 10, 15? What interest rate  
9 do you want to offer?

10 *See Exhibit 79.* Of course, while Bayuk was on some earlier e-mails, he was not even copied  
11 the e-mails discussing substantive terms of the deal.

12 71. In March 2013, nearly three years after the Transfers, Morabito was still  
13 bargaining with Superpumper. For example, on an e-mail with Vacco, Morabito proposed a  
14 settlement with the Herbst Parties:

15 Morabito: “Why not offer them Superpumper – they would make  
16 \$2 million a year and could borrow \$3 million against it”

17 Vacco: “As to your proposal, do you mean you would transfer  
18 ownership of Superpumper to BHI or to use it as ‘collateral’ in  
19 exchange for a longer forbearance.

20 Morabito: We would transfer ownership to them lock, stock and  
21 barrel ... \$2 million is store level cashflow and no debt or PG’s.

22 *See Exhibit 80.* Though Bayuk and Sam supposedly owned Superpumper at this point, neither  
23 was included in these discussions.

24 72. In March 2014, Morabito caused Bayuk to transfer the Sparks Property to Desi  
25 Moreno to settle the case of *Moreno v. Morabito*. Bayuk was not named in the Moreno lawsuit  
26 and didn’t even know what it was about. *See Exhibit 33*, p. 131, l. 15 – p. 133, l. 25; *see also*  
27 *Exhibit 25*, Response to interrogatory no. 2.

28 73. As of December 2016, Morabito continued living in the Palm Springs Property  
rent-free. *See Exhibit 16*, p. 80, l. 19.

1 **E. Bayuk and Sam Funded Morabito's Extravagant Lifestyle, Making the Purported**  
2 **Promissory Notes Illusory.**

3 74. Both before and after the Transfers, Bayuk and Sam would pay his debts and  
4 other obligations:

5 a. According to Morabito, the process of Bayuk and Sam "lending" Morabito money  
6 whenever he needed started before 2010, and likely in 2009. *See* Exhibit 13, p. 28, ll. 1-  
7 8.

8 b. Morabito testified with respect to his financial entanglements with Bayuk since  
9 2009:

10 Q. You referenced a promissory note that is updated. When did that  
11 note first come into existence?

12 A. Well, it's just a ledger or whatever. He keeps a record of  
13 everything that he advances me.

14 Q. Is there a formal written promissory note?

15 A. I don't recall.

16 Q. Do you know who would have that information?

17 A. No.

18 Q. Who normally drafts promissory notes on your behalf?

19 A. I don't know if I ever had anyone draft any promissory notes on my  
20 behalf.

21 Q. Do you know what the balance of the money that Ed Bayuk has lent  
22 you is today?

23 A. No.

24 Q. Do you know if it is more or less than a million dollars?

25 A. I would presume more, but I'd be guessing.

26 Q. Where would that information be?

27 A. With Mr. Bayuk or Mr. Hawkoette?

28 Q. Are you aware of a specific ledger that Mr. Bayuk or Mr.  
Hawkoette keep regarding the money that Mr. Bayuk has lent you?

A. I'm assuming they do.

Q. And is that a continuing note that has existed since 2009?

1 A. I don't specifically recall it it's a specific note that existed in 2009  
2 or another year or when it was.

3 A. Do you recall if, at any time, you ever paid Mr. Bayuk in full?

4 Q. I believe I've, at times, have paid him back, and then I borrowed  
5 more money since and...

6 A. Are you aware of a time when there was a zero obligation owing?

7 A. At one point, yes.

8 Q. Do you know when that –

9 A. I think just after my surgery, around that period of time, I got to a  
10 point where I went from – he owed me money, I owed him some  
11 money. Ever since then, I've always owed him money.

12 Q. So when you say since your surgery, we're talking about since 2009  
13 or 2010.

14 A. 2009, 2010, during that whole period.

15 *See id.*, p. 28, l. 9 – p. 30, l. 3.

16 75. Similarly, when asked about balances due to Sam since the beginning of 2010,  
17 Morabito confirmed, "I've been in debt to my brother my entire life, so I have no idea." *See id.*,  
18 p. 31, ll. 14-18.

19 76. Following, the Transfers, Bayuk and Sam would continue to simply pay any  
20 amount requested by Morabito, undoubtedly from funds obtained through their operation of, or  
21 ownership of, the transferred assets. None of these transactions were treated as loans, but as  
22 Morabito exercising his entitlement to his own money and property. For example, on November  
23 11, 2011, Morabito emailed Vacco, stating:

24 Dennis

25 Tell Sam he has to wire you \$1 million by the 21<sup>st</sup>.

26 Please get Trevor's commitment to sign – call Edward tomorrow  
27 and tell him to HOLD any payment to him until he signed. I  
28 guaranty he will delay this process. Edward will absolutely cut him  
off is he does but requiring him to sign is a huge risk. Speak to  
Edward and plan on personally driving over the Niagara to get his  
signature. (November 11, 2011)



1 *See Exhibit 82.*

2 77. Likewise, Morabito would demand when and where to send funds, and Sam  
3 would immediately comply. For example, in a November 28, 2011 e-mail between Morabito,  
4 Sam, and Vacco, Morabito wrote: “Sam. Please wire \$560,000 to Lippes Mathias TODAY.”  
5 Within two hours, Sam responded: “Ok Wire Instructions.” *See Exhibit 83.*

6 78. Morabito could not even guess how much he had received or borrowed from  
7 Bayuk since the Transfers:

8 Q. “So what is your best guess of how much you owed Mr. Bayuk  
9 on December 31, 2012?”

10 A. “ I would have – it would be a guess. It could be in the millions  
11 of dollars. I don’t know.”

12 Q. How much do you think you owed him on December 31, 2014.

13 A. It would be a guess but I’m sure – I’m sure I owed him a  
14 significant amount of money. I would think. I don’t know.”

15 *See Exhibit 15, p. 84, ll. 13-23.*

16 79. As of December 2015, Morabito was paying his approximately \$30,000 in  
17 monthly expenses through a combination of Mr. Bayuk and Sam lending money. *See Exhibit, p.*  
18 *87, l. 13 – p. 88, l. 17.*

19 80. For at least several years prior to 2016, Edward Bayuk provided Morabito with a  
20 credit card that Morabito uses for groceries. *See Exhibit 13, p. 34, l. 11 – p. 35, l. 9.*

21 81. As late as March 2016, when asked “what do you do for money right now,”  
22 Morabito testified, “My brother and Mr. Bayuk have been lending me money” and guessed that  
23 the amount he then owed to Bayuk was in excess of \$1,000,000. *See Exhibit 13, p. 27, l. 12 –*  
24 *31, l. 6. Morabito further testified that he had been in debt to his brother all of his life, and “If*  
25 *I’m out of money, I ask my brother if I can have some money.” See id., p. 31, l. 4 – p. 33, l. 19.*

26 82. Bayuk testified that sometimes he removes money from Snowshoe Properties  
27 (formerly Baruk) bank account to lend money to Morabito when he needed it. *See Exhibit 33, p.*  
28 *199, l. 12 – p. 200, l. 1.*

1           83.     The true scenario of what actually happened is revealed clearly by Morabito in his  
2 own testimony.

3                   Q. [Bayuk is] lending you money to pay your monthly expense?

4                   A. He's lending me *my – my money*, and what I do with it he has no knowledge  
5 of.

6           *See* Exhibit 16, p. 83, l. 11-13.

7           84.     When notes are needed for loans, they are created. When notes need to disappear,  
8 they will .

9           85.     For example, when alleged loans from Bayuk to Morabito needed to disappear to  
10 reduce known creditors in the Bankruptcy Case, Bayuk testified that he “[i]n consideration of the  
11 past friendship, loyalty, and successful past business ventures which Mr. Morabito and I have  
12 shared, I made a gift to Mr. Morabito in the amount of the debt to me and I have destroyed the  
13 promissory note” *See* Exhibit 84.

14   F.     **As a Result of the Transfers, the Herbst Parties Cannot Collect on the Final  
15 Judgment and Ultimately Is Forced to File an Involuntary Bankruptcy.**

16           86.     Neither Morabito, his counsel, nor Defendants informed the Herbst Parties that  
17 the Transfers were occurring, despite the fact that Morabito and the Herbst Parties were in the  
18 midst of preparing for the punitive damages phase of the trial. *See* Exhibit 1, ¶ 7; *see also*  
19 Exhibit 13 p. 72, ll. 7-9.

20           87.     In total, Morabito paid the Herbst Parties less than 5% of the total Final Judgment,  
21 with payments coming from three sources: (1) \$5,000,000 in payments made from the return of  
22 Offshore Funds from Sefton nearly two years after that transfer; (2) approximately \$1,300,000 in  
23 sale proceeds from the Reno Property; and (3) the assumption of certain liabilities by Morabito.  
24 Par for the course, Morabito defaulted on many of the assumed liabilities, ultimately causing  
25 increased liabilities to the Herbst Parties. *See* Exhibit 1, ¶ 8.

26           88.     As a result, and after Morabito defaulted on a Settlement Agreement and a  
27 Forbearance Agreement extended by the Herbst Parties, on June 20, 2013, the Herbst Parties  
28

1 filed an involuntary petition against him and CNC under chapter 7 of the Bankruptcy Code. *See*  
2 *id.* ¶ 9.

3 89. On December 17, 2012, the Bankruptcy Court entered an Order for Relief against  
4 Morabito, adjudicating him a chapter 7 debtor. *See Exhibit 86*

5 90. On January 22, 2015, Plaintiff was appointed the Trustee of Morabito's  
6 Bankruptcy Estate and, on May 15, 2015, was substituted in as Plaintiff for the Herbst Parties to  
7 prosecute this action for the benefit of all creditors of the Estate. *See Exhibits 87, 88*

8 91. The fraudulent transfers involved in this Complaint are not the only fraudulent  
9 transfers of which the Trustee has complained.

10 a. At the same time as the Transfers, Morabito transferred his 90% interest in  
11 watchmyblock.com to Bayuk for \$1,000. Morabito valued his interest in  
12 watchmyblock.com at between \$1,800,000 and \$2,250,000 in 2009 and 2010. *See*  
**Exhibit 89**, *see also* Exhibits 46-47, 50.

13 b. In case no. 15-05046, pending before the Bankruptcy Court, the Trustee has sought  
14 avoidance of the transfer of Morabito's 60% interest in Virsenet to Bayuk in  
15 November 2012 for just \$6.00, after Morabito himself valued the entity at over \$220  
million. *See Exhibit 90.*

16 **G. Morabito and Bayuk's History as Life and Business Partners.**

17 92. Bayuk was, at least at the time of the Transfers, Morabito's long-time business  
18 partner and boyfriend. According to Morabito, he and the Bayuk began dating in 1997-1998 and  
19 dated through at least 2009. *See Exhibit 13*, p. 47, ll. 4 – 12.

20 93. When asked when they stopped dating, Bayuk could not answer, instead stating:

21 I guess you should – sometime in – Well, we're still – I'm still best  
22 friends with all my boyfriends. When did I stop dating Paul? Good  
23 question. I have to think about it. Well, we shared houses, so the  
24 houses were owned tenant-in-common, When did I stop dating  
him? Maybe the question is, you should ask him when did he start  
dating someone else.

25 *See Exhibit 33*, p. 12, ll. 4-7.

26 94. Morabito testified that the relationship ended in 2009 or 2010, prior to the  
27 judgment in the underlying Herbst Litigation. *See Exhibit 13*, p. 47, l. 11 – p. 48, l. 11. Mr.  
28 Morabito's testimony, however, directly contradicts his other actions and statements.

95. First, the Fifth Amendment and Restatement of the Trust Agreement for the Arcadia Living Trust, dated Sept. 30, 2010 and executed by Paul Morabito, under “Family Information,” states “I live part-time with my boyfriend and longtime companion EDWARD WILLIAM BAYUK.” *See Exhibit 91.*

96. Vacco testified “they were domestic partners as of this date and for a long time after this date, meaning September 15 of 2010”... “Frankly, I don’t know, I mean, it’s possible that they are still domestic partners today.” See **Exhibit 69**, p. 173, l. 17 – p. 174, l. 8.

97. Between 1998 and the time of the Transfers, that had jointly owned, *at a minimum*, the Real Properties, Baruk LLC, Superpumper, Superpumper Properties, LLC, Big Wheel Lodging, LLC, Big Wheel Gaming, LLC, Big Wheel Hospitality, LLC, and Watchmyblock, LLC. *See Exhibit 64*, Response to interrogatory no. 6.

Dated this 17<sup>th</sup> day of August 2017.

GARMAN TURNER GORDON LLP

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*Special Counsel for Plaintiff*

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**AFFIRMATION**  
**Pursuant to NRS 239B.030**

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

GARMAN TURNER GORDON LLP

/s/ Teresa Pilatowicz  
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Telephone 725-777-3000

*Special Counsel for Plaintiff*

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of GARMAN TURNER GORDON LLP, and that on this  
3 date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **MOTION**  
4 **FOR PARTIAL SUMMARY JUDGMENT** on the parties as set forth below:

5 \_\_\_\_\_ Placing an original or true copy thereof in a sealed envelope placed for collection  
6 and mailing in the United States Mail, Reno, Nevada, postage prepaid, following  
7 ordinary business practices

8 \_\_\_\_\_ Certified Mail, Return Receipt Requested

9 \_\_\_\_\_ Via Facsimile (Fax)

10 \_\_\_\_\_ Via E-Mail

11 XXX Placing an original or true copy thereof in a sealed envelope and causing the same  
12 to be personally Hand Delivered

13 \_\_\_\_\_ Federal Express (or other overnight delivery)

14 addressed as follows:

15 Frank Gilmore  
16 ROBISON, BELAUSTEGUI, SHARP & LOW  
17 71 Washington Street  
18 Reno, NV 89503

19 DATED this 17<sup>th</sup> day of August, 2017.

20 /s/ Ricky H. Ayala

21 An Employee of GARMAN TURNER  
22 GORDON LLP

## INDEX OF EXHIBITS

<b>Exhibit</b>	<b>Description</b>	<b>Pages<sup>8</sup></b>
1	<i>Declaration of Timothy Herbst in Support of Separate Statement of Undisputed Facts In Support of Motion for Partial Summary Judgment</i>	4
2	<i>Finding of Facts &amp; Conclusions of Law</i>	17
3	<i>Judgment</i>	3
4	Cited Portions of Garry Graber Deposition Transcript	3
5	Email chain between Yalamanchili, Morabito and Vacco dated 9/15/10	2
6	Email chain between Graber and Morabito dated 9/23/10	3
7	Email chain between Yalamanchili and Eileen Crotty dated 9/20/10	4
8	Email chain between Yalamanchili and Graber dated 9/20/10	2
9	Email chain between Graber and Morabito dated 9/20/10	4
10	Email chain between Morabito, Vacco and Yalamanchili dated 9/20/10	3
11	Email chain between Yalamanchili and Graber dated 9/20/10	5
12	Defendants' Appraisal of Los Olivos Property	28
13	Cited Portions of Paul Morabito Deposition Transcript	16
14	Morabito BMO Bank Statement – September 2010 (Redacted)	3
15	Cited Portions of Morabito 341 Meeting (June 2015) Transcript	5
16	Cited Portions of Morabito 341 Meeting (December 2015) Transcript	25
17	<i>Purchase and Sale Agreement</i>	9
18	<i>First Amendment to Purchase and Sale Agreement</i>	3
19	Defendants' Appraisal of Reno Property	31
20	Plaintiff's Appraisal of Reno Property and Sparks Property	78
21	Reno Property - 2012 Declaration of Value	2

<sup>8</sup> Exhibit page counts are exclusive of exhibit slip sheets.

1	22	Reno Property - 2012 closing statement	2
2	23	Bill of Sale	5
3	24	Baruk Properties Operating Agreement	11
4	25	Bayuk Trust – Responses to Interrogatories	11
5	26	Defendants’ Appraisal of 1461 Glenneyre and 520 Glenneyre	51
6	27	Defendants’ Appraisal of Palm Springs Property	30
7	28	Defendants’ Appraisal of Mary Flemming Property	31
8	29	<i>Baruk Membership Transfer Agreement</i>	8
9	30	Baruk Note	4
10	31	Baruk Properties/Snowshoe Properties Certificate of Merger	2
11	32	Articles of Merger	11
12	33	Cited Portions of Edward Bayuk Deposition Transcript Bayuk Transcript Pg. 87; p. 31-33; P. 110; p. 120, p. 130-133, p. 175, p. 199-200	15
13	34	Grant Deed from Snowshoe to Bayuk Living Trust	2
14	35	<i>General Conveyance</i> – Woodland Heights	7
15	36	Defendants’ Appraisal of El Camino Property	27
16	37	Cited Portions of Morabito 341 Meeting (Vol V.) Transcript	3
17	38	Intentionally omitted	2
18	39	Bayuk First Ledger	3
19	40	Amortization Schedule	4
20	41	Bayuk Second Ledger	4
21	42	Email chain between Vacco and Morabito dated 11/10/11	4
22	43	Morabito Personal Financial Statement April 2012	7
23	44	Cited Portions of Morabito 341 Meeting (March 2015) Transcript	7
24	45	<i>Shareholder Interest Purchase Agreement</i>	6
25	46	Morabito Personal Financial Statement May 2009	2
26	47	Email chain between Naz Afshar and Darren Takemoto dated 3/10/10	3
27	48	Email chain between Paul Morabito and jon@aim13.com dated	2
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	3/10/10	
49	Email chain between Morabito, Vacco and Michael Pace dated 5/20/10	2
50	Morabito Personal Financial Statement May 2010	2
51	Email chain between Morabito and George Garner dated 6/28/10	2
52	Merger Documents – Consolidated Western Corporation and Superpumper	19
53	Intentionally omitted	2
54	BBVA Compass Report December 2010	31
55	Matrix Retention Agreement and Matric Valuation	37
56	Plaintiff's Superpumper Valuation	75
57	LMWF Reductions E-Mail	2
58	<i>Declaration of Paul A. Morabito in Support of Opposition to Motion of JH, Inc., Jerry Herbst, and Berry-Hinckley Industries for Order Prohibiting Debtor from Using, Acquiring Or Transferring Assets Pursuant to 11 U.S.C. §§ 105 and 303(f) Pending Appointment of Trustee</i>	5
59	Snowshoe Properties, LLC Formation Documents	2
60	SUPERPUMPER 000001-000010 – Superpumper Note and Successor Note	11
61	Compass Term Loan	9
62	Cited Portions of Salvatore Morabito Deposition Transcript	3
63	Intentionally omitted	2
64	Edward Bayuk's Answers to Plaintiff's First Set of Interrogatories	14
65	Email between Morabito and Stan Bernstein dated 10/12/12	2
66	Intentionally omitted	2
67	Cited Portions of Dennis Vacco (October 2015) Transcript	3
68	April 2011 Nella Oil Documents	8
69	Vacco – July 2017 Depo; P. 74; P. 171-174	7
70	Cited Portions of Dennis Vacco (July 2017) Transcript	3
71	Email chain between Vacco and Morabito dated 8/7/11	2

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72	Email chain between Vacco and Morabito dated 8/24/11	2
73	BofA and Morabito Settlement Agreement	9
74	Intentionally omitted	2
75	Email chain between Morabito, Paul Wells, and Vacco dated 2/10/12	5
76	Email chain between Morabito and Vacco dated 5/8/12	2
77	Email chain between Vacco and Bayuk dated 9/4/12	2
78	Email chain between Morabito and Bayuk dated 9/18/12	5
79	Email chain between Vacco and Morabito dated 10/3/12	3
80	Email chain between Morabito and Vacco dated 3/14/13	2
81	Intentionally Omitted	2
82	Email chain between Vacco and Morabito dated 11/11/11	2
83	Email chain between Vacco, Sam and Morabito dated 11/28/11	3
84-85	Intentionally Omitted	2
86	<i>Order for Relief</i> , as Amended	7
87	<i>Report of Undisputed Election – Appointment of Trustee</i>	3
88	Amended Stipulation and Order to Substitute a Party Pursuant to NRCP 17(a)	5
89	Membership Purchases, Agreement – Watch My Block	6
90	<i>Complaint for Fraudulent Transfer and Injunctive Relief</i>	38
91	<i>Fifth Amendment &amp; Restatement of Arcadia Living Trust</i>	40