

IN THE SUPREME COURT OF THE STATE OF NEVADA

SCOTT CANARELLI, Beneficiary of
The Scott Lyle Graves Canarelli
Irrevocable Trust, dated February 24,
1998

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT of the State of Nevada, in and
for the County of Clark; and THE
HONORABLE JUDGE BELL, District
Judge,

Respondent,

and

LAWRENCE and HEIDI CANARELLI,
and FRANK MARTIN, Special
Administrator of the Estate of Edward C.
Lubbers, Former Trustees,

Real Party in Interest.

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Case No. 82299

District Court No. A-13-078912-T

**REAL PARTIES IN INTEREST'S
SUPPLEMENTAL APPENDIX IN
SUPPORT OF ANSWER TO
PETITION FOR WRIT OF
MANDAMUS OR PROHIBITION**

(Volume 1 of 1)

CAMPBELL & WILLIAMS
DONALD J. CAMPBELL, ESQ. (1216)
djc@cwlawlv.com
J. COLBY WILLIAMS, ESQ. (5549)
jcw@cwlawlv.com
PHILIP R. ERWIN, ESQ. (11563)
pre@cwlawlv.com
700 South Seventh Street
Las Vegas, Nevada 89101
Tel. (702) 382-5222

*Attorneys for Lawrence and Heidi
Canarelli, and Frank Martin, Special
Administrator of the Estate of Edward
C. Lubbers, Real Parties in Interest*

HAYES WAKAYAMA
LIANE K. WAKAYAMA, ESQ. (11313)
lkw@hwlawnv.com
4375 South Durango Drive, Suite 105
Las Vegas, Nevada 89147
Tel. (702) 656-0808

*Attorneys for Frank Martin, Special
Administrator of the Estate of
the Estate of Edward C. Lubbers,
Real Party in Interest*

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Campbell & Williams and that I did, on the 15th day of March, 2021, file a true and correct copy of the foregoing **Real Parties in Interest's Supplemental Petition in Support of Answer to Petition for Writ of Mandamus or Prohibition** with the Clerk of the Court through the Court's e-flex filing system, which will send notice electronically to the following:

SOLOMON DWIGGINS & FREER, LTD.

Dana Dwiggins, Esq.

ddwiggins@sdfnlaw.com

Craig D. Friedel, Esq.

cfriedel@sdfnlaw.com

9060 West Cheyenne Avenue

Las Vegas, Nevada 89129

LEWIS ROCA ROTHGERBER CHRISTIE LLP

Daniel F. Polsenberg, Esq.

dpolsenberg@lrrc.com

Abraham G. Smith, Esq.

asmith@lrrc.com

3993 Howard Hughes Parkway, Suite 600

Las Vegas, Nevada 89169

Attorneys for Petitioner Scott Canarelli

[Certificate continues on next page]

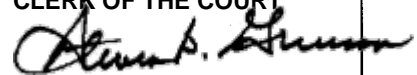
I further certify that a copy of the foregoing document will be served via U.S.

Mail, first class postage prepaid, to the following:

THE HONORABLE LINDA MARIE BELL
Chief Judge, Eighth Judicial District Court
Department VII
200 Lewis Avenue
Las Vegas, Nevada 89155

By /s/ John Y. Chong
An employee of Campbell & Williams

1



SUPP

Dana A. Dwiggins (#7049)
Tess E. Johnson (#13511)
SOLOMON DWIGGINS & FREER, LTD.
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483
Facsimile: (702) 853-5485
ddwiggins@sdfnvlaw.com
tjohnson@sdfnvlaw.com

Attorneys for Scott Canarelli

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of

THE SCOTT LYLE GRAVES
CANARELLI IRREVOCABLE TRUST,
dated February 24, 1998.

Case No.: P-13-078912-T
Dept. No.: XXVI/Probate

**SUPPLEMENT TO PETITION TO SURCHARGE TRUSTEE AND FORMER
TRUSTEES FOR BREACH OF FIDUCIARY DUTIES, CONSPIRACY AND AIDING
AND ABETTING; PETITION FOR BREACH OF FIDUCIARY DUTY FOR FAILURE
TO PROPERLY ACCOUNT; and PETITION FOR AN AWARD OF ATTORNEY
FEES, ACCOUNTANT FEES AND COSTS**

Pursuant to NRS 153.031, 163.050, 163.060, 163.110, 164.015, 164.030, 164.115 and 165.135, Scott Lyle Graves Canarelli ("Petitioner"), by and through his attorneys, the law firm of Solomon Dwiggins & Freer, Ltd., hereby submits the instant Supplement to the "Surcharge Petition" previously filed with this Court on June 27, 2017 to **assert additional claims evidence subsequently discovered** in this matter relating to breach of fiduciary duty, fraud, constructive fraud, fraudulent concealment and conspiracy and aiding and abetting of such claims.¹ Consequently, Petitioner requests the following relief from this Court as follows: (1) to surcharge Lawrence Canarelli and Heidi Canarelli, as Former Trustees of The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "Trust" or "SCIT"), and Edward Lubbers

¹ For the purposes of the instant Supplement, Petitioner will focus on the newly discovered evidence related to not only the claims previously asserted but also those additional claims set forth herein and the procedural history of this matter since the initial filing of Surcharge Petition.

1 (“Lubbers” or “Trustee”), ² for breach of fiduciary duty and fraud relating to not only the
2 valuation at the time of the sale, but also the timing of the sale, of all of the Trust’s interest in
3 certain limited liability companies and corporations; (2) to surcharge Lawrence Canarelli and
4 Heidi Canarelli, as Former Trustees of the Trust (collectively, “Canarellis” or “Former Trustees”),
5 for damages resulting from breach of fiduciary duty and aiding and abetting a breach of fiduciary
6 duty relating to the Purchase Agreement; (3) to surcharge Lubbers for damages resulting from
7 breach of fiduciary duty and aiding and abetting a breach of fiduciary duty relating to the
8 Purchase Agreement; (4) to surcharge the Canarellis and Lubbers (collectively, “Respondents”)
9 for damages resulting from their aiding and abetting and otherwise conspiring against Petitioner
10 to financially harm the Trust to the detriment of Petitioner and to the benefit of the remainder
11 family members; (5) to surcharge Respondents for fraud, fraudulent inducement, constructive
12 fraud and/or negligent misrepresentation relating to the determination of the “purchase price” and
13 misrepresentation of the “financials” that were provided to Western Valuation Advisors for the
14 purposes of determining the “fair market value” of the Purchase Price; (6) to surcharge
15 Respondents for fraud, fraudulent inducement, constructive fraud and/or negligent
16 misrepresentation relating to the timing of the sale; (7) damages resulting from the Canarellis and
17 Lubbers failure to timely account; (8) reimbursement of the legal fees and costs paid to date from
18 the Trust for legal services rendered to Respondents; (9) an award of attorney fees, accountant
19 fees and all costs incurred in pursuing this action and enforcing Petitioner’s rights as a beneficiary
20 of the Trust; and (10) punitive damages against Respondents.

21 While the Respondents “paid” the amount Petitioner contended was due and owing under
22 the express terms of the Purchase Agreement following the filing of the Surcharge Petition, the
23 underlying value of the sale of the Trust’s business interests (“Purchased Entities”) has always
24 been, and continues to be, a significant issue in this litigation. Similarly, the “timing” of the sale
25 is a significant issue in this litigation, as Respondents intentionally sold the Purchased Entities at
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27 ² As this Court has been informed, Lubbers passed away on April 2, 2018 following a battle
28 with lung cancer. Petitioner filed a Suggestion on Death with this Court on May 8, 2018, as
Respondents had yet to file one and/or substitute the real party in interest in his place and stead.

1 a time when the real estate market was coming out of recession and was on the rise so as to
2 financially harm Petitioner and the Trust.

3 Based on the evidence discovered in this matter subsequent to the filing of the Surcharge
4 Petition, Respondents acted in concert with one another and otherwise conspired to not only
5 breach their respective fiduciary obligations, but acted with intent to defraud and financially harm
6 Petitioner and his children and benefit the remainder of the Canarellis' family by: (1)
7 fraudulently misrepresenting the "purpose" of the sale; (2) intentionally making the Purchase
8 Agreement effective as of March 31, 2013, to financially harm Petitioner and his children; and (3)
9 intentionally selling the assets in 2013 when the real estate market was recovering from the
10 recession so as to financially harm Petitioner and his children.

11 I. STATEMENT OF ADDITIONAL RELEVANT FACTS

12 A. **Former Trustees' Termination of Distributions and Ultimate Resignation.**

13 1. In or about May 2012, the Former Trustees became hostile towards Petitioner and
14 stopped making distributions to Petitioner and/or his family on the ground that Larry and Heidi
15 were "not willing to continue financing [Petitioner's] existence" because "it is against everything
16 that [Larry and Heidi] think is good for [Petitioner]." (Emphasis added). Petitioner thereafter
17 engaged the law firm of Solomon Dwiggins & Freer, Ltd. ("SDF"). After weeks of negotiating
18 with the Independent Trustee (who was then "Lubbers" rather than Larry and Heidi who were still
19 the Family Trustees), the SCIT began directly paying "some" of Petitioner's monthly living
20 expenses. [REDACTED]
21 [REDACTED]

22 2. On or about May 31, 2013, the Former Trustees purportedly entered into an
23 agreement ("Purchase Agreement") without Petitioner's knowledge or consent for the sale of the
24 Trust's interest in the LLCs to SJA Acquisitions, LLC ("SJA")³ and its interest in the
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27 ³ SJA is a Nevada limited liability company established and directly or indirectly controlled
28 by Larry for the benefit of his remaining three children, to wit: Stacia Leigh Lemke, Jeffrey Larry
Graves Canarelli and Alyssa Lawren Graves Canarelli.

Corporations to the Siblings Trusts.⁴ Although the Purchase Agreement was executed on May 31, 2013, **after** Larry and Heidi's resignation as Family Trustees of the Trust, the Purchase Agreement's "effective date" is March 31, 2013, **two months prior to such resignation.**

3. Since October, 2017, Petitioner has requested through discovery supporting records from Respondents, the Siblings' Trusts, SJA and several of the purchased entities to determine the accuracy of the records provided to Mr. Nicolatus. However, to date Respondents have failed to adequately respond to Petitioner's NRCP 34 requests,⁵ instead deferring to the Purchased Entities. In response to the subpoenas Petitioner issued to the Purchased Entities, Larry, acting in his capacity as Family Trustee of the Siblings' Trusts and officer and director of the Purchased Entities, filed a motion to reopen the Bankruptcy of American West Development, Inc. ("AWDI") to hold Petitioner and his counsel in contempt. Such motion was filed despite the fact that the Purchased Entities had no relation whatsoever to the Bankruptcy of AWDI as previously submitted to this Court. Larry, as the Family Trustee of the SCIT, further attempted to stay the instant litigation. After over two (2) months of contentions litigation relating to the same, and tens of thousands of dollars spent in attorneys' fees, this Court and subsequently the Bankruptcy Court denied the relief sought by Larry in his many capacities.

4. Despite such relief being denied, the Purchased Entities have still refused to produce or otherwise respond to the subpoenas, thereby resulting in several motions to compel being filed by Petitioner and which are pending before the Discovery Commissioner.⁶ There is

⁴ Upon information and belief, the Siblings Trusts are mirror irrevocable trusts for the benefit of Petitioner's three siblings, to wit: the Jeffrey Larry Graves Canarelli Irrevocable Trust; the Stacia Leigh Lemke Irrevocable Trust; and the Alyssa Lawrence Graves Canarelli Irrevocable Trust (collectively "Sibling Trusts").

⁵ During an EDCR 2.34 conference on May 10, 2018, Respondents counsel represented that they would supplement their responses to Scott's written discovery by May 31, 2018.

⁶ See Motion to Compel the Siblings' Trusts to Respond to Scott Canarelli's Subpoenas Duces Tecum, filed on May 3, 2018; see also Motion to Compel SJA Acquisitions, LLC to Respond to Scott Canarelli's Subpoenas Duces Tecum, filed on May 3, 2018; Motion to Compel the Purchased Entities to Respond to Scott Canarelli's Subpoenas Duces Tecum, filed on May 3, 2018; Motion to Compel AWH Ventures, Inc. to Respond to Scott Canarelli's Subpoenas Duces Tecum, filed on May 3, 2018.

1 additionally a motion to compel pending before the Discovery Commissioner as it relates to the
2 inadequacy of the Canarellis discovery responses.⁷ Such hearings are currently scheduled for
3 June 6, 2018 and June 13, 2018, respectively. There is additionally a status check set before the
4 Discovery Commissioner on June 13, 2018, on discovery motions previously decided by the
5 Discovery Commissioner.

6 II. LEGAL ARGUMENT

7 A. **Legal Authority.**

8 5. Petitioner incorporates herein by reference the legal authority relating to
9 Respondents' fiduciary obligations and breach thereof as set forth in the Surcharge Petition.
10 In addition to such legal authority, Petitioner submits the following legal authority on fraud,
11 fraudulent concealment, aiding and abetting, conspiracy, constructive fraud, negligent
12 misrepresentation:

13 6. Fraud occurs when a person makes a false representation that the person
14 knowns or believes is false with an intent to induce another party to act or refrain from acting
15 in reliance upon the misrepresentation, causing damages.⁸ Further, where a party possesses
16 **an affirmative duty to speak, the omission of a material fact also constitutes a false**
17 **representation.**⁹ Likewise, "a presumption of fraud ... may rise in the case of a confidential

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21 ⁷ See Motion to Compel Lawrence and Heidi Canarelli's Responses to Scott Canarelli's
22 Request for Production of Documents filed on May 9, 2018.

23 ⁸ See, e.g., *Stansfield v. Starkey*, 220 Cal.App.3d 59, 72-73, 269 Cal. Rptr. 337 (1990);
Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992).

24 ⁹ *Quick v. Pearson*, 186 Cal. App. 4th 371, 381, 112 Cal. Rptr. 3d 62, 69 (2010). See also
25 *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420 (Nev. 2007) ("With respect to the false
26 representation element, the suppression or omission of a material fact which a party is bound in
27 good faith to disclose is equivalent to a false representation, since it constitutes an indirect
28 representation that such fact does not exist.") (citations and internal quotations omitted); *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 1486, 970 P.2d 98, 110 (1998), overruled in part on
other grounds, *GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001).

1 relationship from which an undue advantage was gained.”¹⁰

2 7. “To establish a prima facie case of fraudulent concealment under Nevada Law, a
3 plaintiff must offer proof that satisfies five elements: (1) the defendant concealed or suppressed a
4 material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the
5 defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff;
6 that is, the defendant concealed or suppressed the fact for the purpose of inducing the plaintiff to
7 act differently than she would have if she had known the fact; (4) the plaintiff was unaware of the
8 fact and would have acted differently if she had known of the concealed or suppressed fact; (5)
9 and, as a result of the concealment or suppression of the fact, the plaintiff sustained damages.”¹¹

10 8. “Constructive fraud is the breach of some legal or equitable duty which,
11 irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive
12 others or to violate confidence.”¹² “Constructive fraud usually arises from a breach of duty

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16 ¹⁰ *Solon v. Lichtenstein*, 39 Cal.2d 75, 82,244 P.2d 907,911 (Cal. 1952) (confidential
17 relationship raised a presumption of fraud and undue influence, and the burden was cast on
18 defendant to show fairness and good faith in all respects.) (internal citation omitted).

19 ¹¹ *Lasao v. Stearns Lending Co.*, 2:10-CV-01864-KJD, 2011 WL 3273923, at *6 (D. Nev.
20 July 29, 2011) (citing *Nevada Power Co. v. Monsanto Co.*, 891 F.Supp. 1406, 1415
21 (D.Nev.1995); see also Nevada Jury Instruction 9.03; *Blanchard v. Blanchard*, 108 Nev. 908, 839
22 P.2d 1320, 1322 (1992) (quoting *Epperson v. Roloff*, 102 Nev. 206, 719 P.2d 799, 803 (1986)(“A
23 defendant may also be found liable for misrepresentation even when the defendant does not make
24 an express misrepresentation, but instead makes a representation which is misleading because it
25 partially suppresses or conceals information.”); *Northern Nevada Mobile Home Brokers v.*
26 *Penrod*, 96 Nev. 394, 610 P.2d 724, 727 (1980) (**once party undertakes to give information, he**
27 **has a duty to speak the whole truth and not by concealments make his statements**
28 **untruthful and misleading**).

¹² *Executive Management, Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 841, 963 P.2d 465, 477
(1998) (Quoting *Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 529-30 (1982)); see also
California Civil Code Section 1573 (Constructive fraud is any breach of duty which, without an
actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under
him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,
in any such act or omission as the law specially declares to be fraudulent, without respect to
actual fraud).

1 where a relation of trust and confidence exists."¹³ A fiduciary's concealment of material facts
2 operates as a "constructive fraud, whether or not such failure to disclose was accompanied by
3 an actual intent to defraud."¹⁴ Even a negligent misrepresentation by a fiduciary may
4 constitute constructive fraud.¹⁵ Like fraud, when a "superior party obtains a possible benefit
5 through the alleged abuse of the confidential or fiduciary relationship, the aggrieved party is
6 entitled to a presumption that constructive fraud occurred."¹⁶

7 9. Negligent misrepresentation occurs when a person supplies false information
8 to another and such person relies on such false information, causing damages.¹⁷ "Negligent
9 misrepresentation is a species of fraud or deceit specifically requiring a positive assertion or
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13 ¹³ *Barrett v. Bank of America*, 183 Cal.App.3d 1362, 1369, 229 Cal. Rptr. 16, 20 (Cal. App.
14 4 Dist. 1986); See also *Executive Management, Ltd.*, 114 Nev. at 841, 963 P.2d at 477; *Bogovich*
15 *v. Embassy Club of Sedgefield, Inc.*, 712 S.E.2d 257, 2011 WL 1467568, 6 (N.C. Ct. App. 2011)
16 ("Constructive fraud differs from actual fraud in that it is based on a confidential relationship
17 rather than a specific misrepresentation.").

18 ¹⁴ *Vai v. Bank of America NTSA*, 56 Cal.2d 329, 342, 15 Cal. Rptr. 71 (Cal. 1961) (citations
19 omitted) (Party was unaware of fraud when agreement was entered into). See also *Bogovich*, ---
20 S.E.2d ---, 2011 WL 1467568, 6 (One difference between fraud and constructive fraud is that
21 intent to deceive is not an element of constructive fraud).

22 ¹⁵ *Salahutdin v. Valley of California, Inc.*, 24 Cal. App.4th 555, 562, 29 Cal. Rptr. 2d 463
23 (Cal. Ct. App. 1994) ("[A] careless misstatement may constitute constructive fraud even though
24 there is no fraudulent intent.") (citations omitted).

25 ¹⁶ *Bogovich*, 712 S.E.2d at 262.

26 ¹⁷ See *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 449, 956 P.2d 1382, 1387 (1998) (Citing
27 RESTATEMENT (SECOND) OF TORTS § 552 (1977)) ("One who, in the course of his business,
28 profession or employment, or in any other action in which he has a pecuniary interest, supplies
false information for the guidance of others in their business transactions, is subject to liability for
pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to
exercise reasonable care or competence in obtaining or communicating the information."); *Apollo*
Capital Fund, LLC v. Roth Capital Partners, LLC, 158 Cal. App.4th 226, 243, 70 Cal. Rptr. 3d
199, 213 (Cal. Ct. App. 2007) ("The elements of negligent misrepresentation are (1) the
misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it
to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable
reliance on the misrepresentation, and (5) resulting damage.").



1 assertion of fact."¹⁸ Negligent misrepresentation does not require knowledge of falsity as "a
2 defendant who makes false statements honestly believing that they are true, but without
3 reasonable ground for such belief, may be liable for negligent misrepresentation."¹⁹

4 10. "Aiding and abetting the breach of a fiduciary duty has four required elements: (1)
5 there must be a fiduciary relationship between two parties, (2) that the fiduciary breached, (3) the
6 defendant third party knowingly and substantially participated in or encouraged that breach, and
7 (4) the plaintiff suffered damage as a result of the breach."²⁰

8 11. In Nevada, the elements for a claim of civil conspiracy are: (1) a combination of
9 two or more persons; (2) who intend to accomplish an unlawful objective together; (3) for the
10 purpose of harming another; (4) an explicit or tacit agreement between the alleged conspirators to
11 perform the unlawful objective; (5) an intention to accomplish the unlawful objective; (6)
12 commission of an unlawful act in furtherance of the agreement; and (7) damages.²¹

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15 ¹⁸ *Wilson v. Century 21 Great Western Realty*, 15 Cal. App.4th 298, 306, 18 Cal.
16 Rptr.2d 779, 783 (Cal. App. 1 Dist. 1993) (internal citations and quotations omitted). *See also*
17 *Hatleberg v. Norwest Bank Wisconsin*, 700 N.W.2d 15, 26 (Wis. 2005) (Trustee committed
18 negligent misrepresentations by supplying false information for the guidance of others).

19 ¹⁹ *Wilson*, 15 Cal. App.4th at 306 (internal quotations omitted) citing *Bily v. Arthur*
20 *Young & Co.*, 3 Cal.4th 370, 407, 11 Cal. Rptr.2d 51, 834 P.2d 745 (Cal. 1992).

21 ²⁰ *Guilfoyle v. Olde Monmouth Stock Transfer Co., Inc.*, 130 Nev. Adv. Op. 78, 335
22 P.3d 190, 198 (2014); *In re Amerco Derivative Litig.*, 127 Nev. 196, 223–24, 252 P.3d 681, 700–
23 01 (2011) (citing *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del.2001)) (expressly adopting the
24 above four factor test applied by Delaware Courts).

25 ²¹ *Guilfoyle v. Olde Monmouth Stock Transfer Co., Inc.*, 130 Nev. Adv. Op. 78, 335
26 P.3d 190, 198 (2014) ("Actionable civil conspiracy arises where two or more persons undertake
27 some concerted action with the intent "to accomplish an unlawful objective for the purpose of
28 harming another," and damage results... Thus, a plaintiff must provide evidence of an explicit or
tacit agreement between the alleged conspirators."); *Consol. Generator-Nevada, Inc. v. Cummins*
Engine Co., Inc., 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998) (An actionable civil
conspiracy "consists of a combination of two or more persons who, by some concerted action,
intend to accomplish an unlawful objective for the purpose of harming another, and damage
results from the act or acts."); *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. Adv. Op. 15, 345
P.3d 1049, 1052 (2015) ("In Nevada... civil conspiracy liability may attach where two or more
persons undertake some concerted action with the intent to commit an unlawful objective, not
necessarily a tort.").

B. Respondents Breached Their Fiduciary Obligations, Aided and Abetted and Otherwise Conspired in a Breach of Fiduciary Duty and engaged in Fraud and Fraudulent Concealment by Entering into the Purchase Agreement.

12. The Purchase Agreement was clearly consummated by the Former Trustees as a retaliatory act upon their explicit statements that neither Larry nor Heidi wanted to “continue to finance” Petitioner’s existence because it was against their beliefs that a man should not be a stay at home father.

13. As previously set forth in the Surcharge Petition, Respondents breached their fiduciary duties by entering into the Purchase Agreement which caused the sale of the Trust’s business interests at the time the market was coming out of a recession. Larry himself acknowledged shortly before signing the Purchase Agreement that the profits of the companies were up by 250% from the prior year. Similarly, the business valuations performed by both Western Valuation Advisors and Houlihan Capital reference the fact that new home sales were increasing. In fact, based on the Houlihan Capital valuation, new home sales increased by eleven percent (11%) between March, 2013 and August, 2013, alone.

14. Notwithstanding the foregoing, the Canarellis attempt to avoid liability because of the “purported resignation” as Co-Family Trustees of the Trust and appointment of Lubbers as their successor, effective as of May 24, 2013, at 5:00 p.m. Such contention is demonstrably false, as the evidence uncovered thus far subsequent to the filing of the Surcharge Petition, unequivocally demonstrates that the sale was consummated during the period of time when the Canarellis were still serving as the Co-Trustees. The fact that the Canarellis “resigned” effective May 24, 2013, so as to allow Lubbers to execute the Purchase Agreement at Larry’s direction is nothing more than form over substance. The Canarellis not only breached their fiduciary duties to Petitioner prior to their resignation by deciding to sell the Purchased Entities and implementing the same, but further conspired to and otherwise aided and abetted Lubbers in his breach of fiduciary duty as a result of his execution of the Purchase Agreement.

15. Discovery disclosed by Respondents thus far include drafts of the purchase agreement and other related documents. These “drafts” specifically identified Larry as the Family Trustees of the SCIT and the signature blocks on such drafts anticipated Larry signing on behalf

1 of the SCIT, as the Seller, and the Siblings' Trust, as the Buyer. The "drafts" were drafted by
2 Lubbers, as the attorney for the Canarellis, in early April, 2013 (based on the evidence produced
3 by Respondents thus far).²² Similarly, "Exhibit A" was created as early as March, 2013 by
4 Robert Evans, agent of Larry and employee of the entities. The entity SJA, the entity created for
5 the purposes of purchasing the LLC interests from the SCIT, was also registered with the Nevada
6 Secretary of State in January, 2013.

7 16. Based on the foregoing evidence, the Canarellis were on both sides of the
8 transaction as the Family Trustee of the SCIT and the Family Trustee of the Siblings Trusts.
9 While the Canarellis may have been "replaced" as the Family Trustees by Lubbers seven (7) days
10 before the agreement was executed, such resignation was for the sole purpose of attempting to
11 avoid a blatant conflict of interest. Consequently, the Canarellis' contention that he and Heidi are
12 not liable to Petitioner because they were no longer trustees at the time of the sale ignores his
13 conduct during the relevant time period. The fact of the matter is that the sale was contemplated
14 in January, 2013, if not sooner, and completely orchestrated and finalized during the time in
15 which the Canarellis were still the Family Trustees.

16 17. While Lubbers may have "signed" on behalf of the SCIT, he had been the Family
17 Trustee for only seven (7) days and he subsequently admitted that he had no personal knowledge
18 of the transactions or assets of the SCIT, despite having served as the Independent Trustee for
19 several years. Indeed, the "file" of Lubbers produced in this litigation contains no financial
20 information of Purchased Entities whatsoever other than valuations and transactions listed on the
21 SCIT's financials.

22 18. Respondents' failure to disclose to Petitioner that Respondents were selling, and in
23 fact, executing the Purchase Agreement, all of the business interests in the Trust at such time to
24 the Siblings Trusts and an entity created by them constitutes fraud and/or fraudulent concealment.
25 Specifically, as Petitioners' fiduciary and Family Trustees of the SCIT, Respondents owed an
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28 ²² See e.g. RESP0086867 – RESP00086882 produced by Respondents on or about April 6,
2018, attached hereto as **Exhibit 1**.

1 affirmative duty to disclose the sale to Petitioner, namely the Purchase Agreement which was
2 a material fact. Respondents' concealment of the Purchase Agreement was intentional and, if
3 Petitioner would have been aware of the materials facts, would not have acquiesced in the
4 sale and otherwise would have objected to the sale. Respondents' concealment has caused
5 damage to the SCIT. Consequently, Respondents are jointly and severally liable for fraud,
6 fraudulent concealment, negligent misrepresentation, constructive fraud, breach of fiduciary
7 duty and conspiracy and otherwise aiding and abetting in the foregoing conduct. As a direct
8 and proximate result of Respondents' acts and omissions, the SCIT and Petitioner, as its grantor
9 and primary beneficiary, have suffered damages, the amount of which will be proven at an
10 evidentiary hearing.

11 19. Petitioner is informed and believes and thereon alleges that the acts, omissions and
12 conduct of Respondents, as set forth herein, were intentional, malicious, fraudulent, oppressive
13 and in violation of Petitioner's rights as the grantor and primary beneficiary of the SCIT and
14 Respondents' fiduciary obligations. As a result, Petitioner is entitled to an award of punitive
15 damages and to an award of attorney's fees and costs, to be borne personally by Respondents.

16 **C. Respondents Fraudulently Represented the Rationale for Entering into the Purchase**
17 **Agreement.**

18 20. The Respondents claim that they sold the interests because Petitioner needed
19 money and that the SCIT could not rely upon distributions from either the LLC or the
20 Corporations because of the Credit Agreement. Specifically, the Purchase Agreement states:

21 D. Pursuant to the Credit Agreement, **Seller . . . is precluded from receiving**
22 **any cash distributions from any of the LLC or the Corporations**, including any
23 distribution that would be attributable to Seller's ownership interest in the LLCs
24 and the Corporations . . .

25 H. Scott has indicated to the Trustee certain needs that he has for available funds
26 to provide for his family and certain concerns he has in regard to management of
27 Seller by the prior Family Trustee.

28 I. The trustee and the Independent Trustee **believe that the restriction on**
distributions currently effect under the Credit Agreement, and likely to be in
effect under a new credit agreement, **will make providing cash to Scott difficult**,
and to make cash available would risk a default under the Credit Agreement.

1 (Emphasis added).

2 21. The discovery produced thus far in this litigation, however, demonstrates that these
3 statements were false. Not only did the SCIT have the liquidity to meet Petitioner's distributions
4 requests, it also received approximately a total of \$1.55 million in distributions from one or more
5 of the Purchased Entities **before** the Purchase Agreement was executed on May 31, 2013.
6 Indeed, contrary to Respondents' representations in the Purchase Agreement, the Purchased
7 Entities routinely made distributions to the SCIT, as evidenced in the trial balances disclosed by
8 Respondents.

9 22. Specifically, discovery produced in the litigation thus far demonstrates that the
10 SCIT, in fact, had the ability to make distributions in the amount requested by Petitioner without
11 the need of selling any of the Purchased Entities and without jeopardizing the Credit Agreement.
12 Representations were made by Respondents' agent(s) that the Trust had the financial wherewithal
13 to invest substantial amounts in cash for the purposes of buying assets to be held in the Trust
14 completely unrelated to the Purchased Entities. Such representations were made on or about July
15 31, 2012, in regards to ranch property in Colorado that Petitioner wanted to purchase for in excess
16 of \$1.5 million by Robert Evans, Respondents' agent. Mr. Evans expressly stated:

17 I am fully aware of the financial situation of the Canarelli Family and Scott
18 Canarelli in particular. **Scott has the available resources to acquire the**
19 **property with cash.**

20 (Emphasis added).²³

21 [REDACTED]

22 [REDACTED]

23 Attached hereto as **Exhibit 2** is a true and correct copy of an email Mr. Evans sent and
disclosed by Petitioner as CAN002111-CAN02112.

24. Similarly, discovery in this matter has additionally disclosed that distributions from one or more of the Purchased Entities were made to the SCIT (and presumably the Siblings Trusts), despite Respondents' representations in the Purchase Agreement to the contrary. For example purposes only, despite Respondents' representation as to the restriction on distributions to the trusts, in April and May, 2013, one of the entities subject to the Purchase Agreement distributed approximately \$12 million to its members (the SCIT's share being approximately \$1.55 million).

25. Respondents' representation that the sale was necessary is false statement and constitutes not only a breach of fiduciary duty, aiding and abetting and conspiring to commit a breach of fiduciary duty and also fraud, but also constructive fraud and fraudulent concealment. Consequently, Respondents are jointly and severally liable for such conduct. As a direct and proximate result of Respondents' acts and omissions, Petitioner has suffered damages, the amount of which will be proven at an evidentiary hearing. Petitioner is informed and believes and thereon alleges that the acts, omissions and conduct of Respondents, as set forth herein, were intentional, malicious, fraudulent, oppressive and in violation of Petitioner's rights as the grantor and primary beneficiary of the SCIT and Respondents' fiduciary obligations. As a result, Petitioner is entitled to an award of punitive damages and to an award of attorney's fees and costs, to be born personally by Respondents.

D. Respondents Breached Their Fiduciary Obligations, Aided and Abetted in Such Breach and Otherwise Conspired and Committed Fraud, Constructive Fraud and/or Fraudulent Concealment by Making the Purchase Agreement Effective as Of March 31, 2013.

26. Respondents further intended to cause harm to Petitioner by intentionally making the Purchase Agreement effective as March 31, 2013, despite the fact that it was purportedly signed May 31, 2013. The reason for doing so was to preclude the SCIT from receiving distributions from the entities and to further benefit the Siblings Trust. Specifically, between the time period of March 31, 2013 and May 31, 2013, the SCIT received "in error" \$1,550,380.00 in

1 distributions from certain entities, including CanFam Holdings.²⁴ This, of course, only includes
2 distributions made “in error.” Since Respondents have refused to disclose the financials for the
3 Purchased Entities, Petitioner is unable to determine what, if any, additional distributions were
4 made to the Siblings Trust from the Purchased Entities during this time period that the SCIT
5 would have otherwise been entitled to “but for” Respondents intentionally selecting the effective
6 date as of March 31, 2013.

7 27. Such distributions not only demonstrate the falsity of Respondents’ contention but
8 further demonstrates the rationale for back dating the effective date of the agreement to March 31,
9 2013. Indeed, the Purchase Agreement had not yet even been finalized prior to the distributions
10 being made to the SCIT. Respondents, however, did not want Petitioner to receive any of the
11 benefits of the distributions and intentionally took action to defraud Petitioner by making the
12 “effective date” of the Purchase Agreement prior to the time such distributions were made so as to
13 allow these distributions to be reversed.²⁵

14 28. Respondents’ intentional decision to make the effective date of the Purchase
15 Agreement March 31, 2013, constitutes an intend to defraud Petitioner, a breach of fiduciary duty,
16 aiding and abetting and conspiring to commit a breach of fiduciary duty, fraud, constructive fraud
17 and fraudulent concealment. Consequently, Respondents are jointly and severally liable for such
18 conduct. As a direct and proximate result of Respondents’ acts and omissions, Petitioner has
19 suffered damages, the amount of which will be proven at an evidentiary hearing. Petitioner is
20 informed and believes and thereon alleges that the acts, omissions and conduct of Respondents, as
21 set forth herein, were intentional, malicious, fraudulent, oppressive and in violation of Petitioner’s
22 rights as the grantor and primary beneficiary of the SCIT and Respondents’ fiduciary obligations.

23
24 ²⁴ See **Exhibit 3**, attached hereto is the Detail General ledger for the SCIT for the period of
25 April 1, 2013 through June 31, 2013. Such ledger has a handwritten note stating, “these
26 transactions should not have occurred in Scoit [sic] these investments sold effective 3/31/13.”
(Emphasis added).

27 ²⁵ Respondents further caused the SCIT to make capital contributions to at least three (3)
28 different entities in April and May, 2013, despite the Purchase Agreement having an “effective
date” of March 31, 2013. These amounts approximated \$900,000.00.

1 As a result, Petitioner is entitled to an award of punitive damages and to an award of attorney's
2 fees and costs, to be born personally by Respondents.

3 **E. The Financial Information Relied Upon by Western Valuation Advisors is**
4 **Inconsistent with other Financial Information of the SCIT and the Purchased**
5 **Entities.**

6 29. Subsequent to Petitioner learning of the sale in or about July, 2013, a court
7 proceeding was commenced for the purposes of appointing an independent valuation of a third-
8 party analyst to determine the purchase price. The parties later stipulated that the SCIT would
9 retain Stephen Nicolatus of Western Valuation Advisors to conduct a valuation. Despite such
10 stipulation, however, both parties further stipulated to reserve their respective positions as to the
11 determination of the Trustees' actions.²⁶ Thereafter, on December 19, 2013, the parties and their
12 respective counsel met with Stephen Nicolatus of Western Valuation Advisors for the purposes of
13 performing a valuation of the sale of the SCIT's assets pursuant to the Purchase Agreement.
14 Respondents' counsel thereafter sent Mr. Nicolatus a letter identifying the preliminary
15 information that would be provided to Mr. Nicolatus in connection with the valuation.

16 30. After several months following Mr. Nicolatus' retention²⁷, Respondents finally
17 provided the information necessary for the Valuation, which predominantly included:

- 18 a. Real estate appraisals of the land, which was commissioned by the
19 bank in connection with renegotiation of the Term Loan;

20
21 ²⁶ See Stipulation and Order Appointing Valuation Expert and Clarifying Order, filed
22 December 2, 2013, p. 3:19-4:7 ("IT IS HEREBY STIPULATED AND AGREED that the
23 wording of the Order regarding the Trustee's agreement to provide the Beneficiary with
24 information and documentation concerning the Purchase Agreement, dated May 31, 2013,
25 contemplates the scope of information and documents that Edward Lubbers, Lawrence Canarelli
26 and Heidi Canarelli shall provide to Scott Canarelli concerning such purchase agreement, *but*
27 *does not establish the standard for the determination of the actions of such Trustees vis-à-vis*
28 *the Purchase Agreement, dated May 31, 2013*, as such standard will be determined at an
appropriate time in the future, if necessary, with *all parties reserving their respective positions*
and right to address the Court on this issue.") (Emphasis added).

²⁷ During this same time period, Larry, in his capacity as Family Trustee of the
Siblings Trusts, retained Houlihan for the purposes of valuing the assets.

- b. Trial Balances of the Purchased Entities for March 1, 2013 – March 31, 2013;
- c. Financial statements of the SCIT;
- d. Purchase Agreement;
- e. Tax returns for the SCIT;
- f. Organizational of the Purchased Entities;
- g. Management contracts for the Purchased Entities; and
- h. Various documents relating to the negotiation of Term Loan.

31. As a result of the limited information provided to him, Mr. Nicolatus submitted several questions to Respondents, which were predominantly responded to by Robert Evans. In preparing the Valuation Report, Mr. Nicolatus **relied on the accuracy** of the March Trial Balances for the Purchased Entities and made no determination as to their truth or accuracy. Specifically, Mr. Nicolatus stated:

In preparing this valuation, we have *used information provided by American West Development, Inc., its representatives, and other sources* referenced in the attached report. It *has been represented that the information is reasonably complete and accurate* and fairly presents the financial position, prospects and related facts of the entities subject to the Purchase Agreement. *It is beyond the scope of this report to ascertain the accuracy or reliability of the information provided*, and we offer no opinion as to such. All of the information made available to us was analyzed and reasonable attempts were made to find additional information which would be helpful in this study.²⁸

(Emphasis added).

32. Mr. Nicolatus' valuation was never contemplated to be binding on the parties and his report is explicit that Nicolatus ***relied on*** the American West entities to provide him information that was "reasonably complete and accurate." Despite Petitioner requesting supporting records from Respondents, the Siblings' Trusts, SJA and several of the purchased entities to determine the accuracy of the records provided to Mr. Nicolatus, to date, the only financial information disclosed relating to the Purchased Entities is a trial balance for 2012, 2013 and partial 2013. As referenced below, such trial balances completely contradict one another and

²⁸ See Valuation Ownership Interests Held by Scott Lyle Canarelli Irrevocable Trust Subject to Purchase Agreement as of March 31, 2013 ("Nicolatus Valuation"), as **Exhibit 12** to the Exhibits to Surcharge Petition, filed June 29, 2017, p. 2 (Emphasis added).

1 cannot be reconciled with the financial information of the Purchased Entities identified on the
2 Trust's financials, including tax returns, balance sheets, profit and loss statements, journal entries,
3 general ledgers, etc.

4 33. Notwithstanding, the limited financials disclosed by Respondents thus far in
5 discovery in connection with the accountings and the purchase price are fraught with
6 inconsistencies and otherwise cannot be reconciled. Specifically, Respondents produced trial
7 balances for the Purchased Entities for the period of January 1, 2012 through December 31, 2012
8 ("2012 PE Trial Balance"). Respondents further disclosed a trial balance for the SCIT ("SCIT
9

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14 34. Notwithstanding, the 2012 PE Trial Balance for AWH Ventures did not reconcile
15 with the 2012 SCIT Trial Balance; although such trial balances did for some of the other
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21 35. Further evidencing Respondents' manipulation of the financials to harm Petitioner
22 and the SCIT, and for example purposes only, the trial balances for AWH Ventures disclosed by
23 Respondents do not reconcile with one another. Specifically, Respondents disclosed trial
24 balances for the period of: (1) 2012 PE Trial Balances; (2) 2013 PE Trial Balances; and (3)
25

26
27 ²⁹ To demonstrate the same, and for example purposes only, the trial balances for Arizona
28 Land Investments, LLC and Model Renting 2009, LLC, which are encompassed within the 2012
PE Trial Balances, reconcile with the value of the SCIT's interest in such entities as reported on
the 2012 SCIT Compilation.

1 January 1, 2013 – May 31, 2013. The ending balance for December 31, 2012 for assets and
2 liabilities do not match either of the opening balances of the trial balances for January 1, 2013.

3
4
5
6 36. Mr. Nicolatus opined that the LLC Sale Interests were undervalued by
7 \$4,711,525.00 and that the Corporate Sale Interests were overvalued by \$1,873,678.00);
8 **however, such opinions were based upon the assumption of the accuracy of the March Trial**
9 **Balances.** The Corporate Interests that were determined by Mr. Nicolatus to be “overvalued”

10 While Mr. Nicolatus was
11 only provided the trial balance for AWH Ventures for March 1, 2013 through March 31, 2013, it
12 is not possible to reconcile such amount with either one of the three (3) trial balances referenced
13 above. Indeed, based on the trial balances disclosed, the Trust’s interest in AWH Ventures was
14 not over negative \$12 million. The foregoing evidence not only raises significant concern
15 regarding the veracity of the financials provided to Mr. Nicolatus, but further gives rise to claims
16 relating to breach of fiduciary duty, aiding and abetting and conspiring to commit a breach of
17 fiduciary duty, fraud, fraudulent concealment and constructive fraud.

18 37. Despite the foregoing inconsistencies, Respondents have utterly failed to produce
19 any of the following for the 35 Purchased Entities: Tax Returns; Audited or Unaudited Financial
20 Statements; Compilations; Profit and Loss Statements; Balance Sheets; General Ledgers; or
21 Journal Entries.³⁰ Petitioner asserts that the failure to produce such information is a direct result of
22 Respondents’ manipulation of the financial information submitted to Western Valuation Advisors
23 for the purposes of defrauding Petitioner as to the actual purchase price under the Purchase
24 Agreement.

25
26
27
28 ³⁰ Respondents contend it is not within their “possession, custody or control,” despite
Larry is also an officer and director of the Purchased Entities.



38. In further evidence of Respondents' fraud and manipulation of the financial information provided to Western Valuation Advisors, the trial balance for Canfam Holdings, LLC for March 1, 2013 – March 31, 2013, only identifies cash in the amount of \$365,327.00. As set forth above, however, the amounts distributed to the SCIT, alone, were \$1,550,380.00, representing thirteen percent (13%) of the total amount distributed. Based on such percentage, CanFam Holdings, LLC distributed approximately \$12 million between April 13, 2013 and May 23, 2013, despite only having \$365,327.00 in cash as of March 31, 2013. These inconsistencies relating to the financial information of the Trust and Purchased Entities (that are currently subject to discovery disputes) will be subject to expert testimony and disclosed in the ordinary course of this litigation, as part of Petitioner's damages.

39. As a direct and proximate result of Respondents' acts and omissions, Petitioner has suffered damages for which Respondents are jointly and severally liable, the amount of which will be proven at an evidentiary hearing. Petitioner is informed and believes and thereon alleges that the acts, omissions and conduct of Respondents, as set forth herein, were intentional, malicious, fraudulent, oppressive and in violation of Petitioner's rights as the grantor and primary beneficiary of the SCIT and Respondents' fiduciary obligations. As a result, Petitioner is entitled

1 to an award of punitive damages and to an award of attorney's fees and costs, to be born
2 personally by Respondents.

3 **F. The Inclusion of the AWH Ventures Receivable of the SCIT in the Value of the**
4 **Corporate Interests Constituted a Breach of Fiduciary Duty, Constructive Fraud,**
5 **Negligent Misrepresentation, Fraud and/or Fraudulent Concealment.**

6 40. In connection with the valuation performed by Western Valuation Advisors,
7 Respondents, directly or indirectly, instructed Mr. Nicolatus and Houlihan to include the AWH
8 Ventures receivable in excess of \$5 million with the combined value of the Corporate Interests.
9 As Mr. Nicolatus opined, based on the financial information provided to him, that the Corporate
10 Interests were overvalued in the Purchase Agreement, no adjustment was made with respect to the
11 same. However, in rendering such opinion and pursuant to Respondents' direction, the
12 "overvalue" determined by Mr. Nicolatus included a shortfall on the AWH Ventures receivable in
13 the amount of \$899,702.00. As this asset was not a business interest, the shortfall should not have
14 been included in such calculation. Such inclusion, however, resulted in further damage to
15 Petitioner in an amount of \$899,702.00, at a minimum. As the underlying source financial
16 information that was provided to Mr. Nicolatus has not yet been disclosed, Petitioner is unable to
17 determine whether there are amounts in addition to \$899,702.00 are owed to him. Indeed, there is
18 inconsistency between the 2012 SCIT Trial Balance and the 2012 PE Trial Balance as to the
19 outstanding amount of the receivable.³²

20 41. Respondents' included the AWH Ventures' receivable within the Corporate
21 Interests valuation in order to defraud Petitioner and such action otherwise constitutes a breach of
22 fiduciary duty, aiding and abetting, conspiracy, fraud, constructive fraud and negligent
23 misrepresentation. As a direct and proximate result of Respondents' acts and omissions,
24 Petitioner has suffered damages for which Respondents are jointly and severally liable, the
25 amount of which will be proven at an evidentiary hearing. Petitioner is informed and believes and
26 thereon alleges that the acts, omissions and conduct of Respondents, as set forth herein, were

27 ³² These inconsistencies relating to the financial information of the Trust and Purchased
28 Entities (that are currently subject to discovery disputes) will be subject to expert testimony and
disclosed in the ordinary course of this litigation, as part of Petitioner's damages.

1 intentional, malicious, fraudulent, oppressive and in violation of Petitioner's rights as the grantor
2 and primary beneficiary of the SCIT and Respondents' fiduciary obligations. As a result,
3 Petitioner is entitled to an award of punitive damages and to an award of attorney's fees and costs,
4 to be born personally by Respondents.

5 **G. Trustee and Former Trustees' Failure to Properly Account.**

6 42. As set forth in detail in the Surcharge Petition, Daniel Gerety, CPA was retained
7 by petitioner for the purposes of analyzing the financial information provided by Respondents,
8 including "audited financial statements" ("SCIT Financials").³³ Based on such information, Mr.
9 Gerety provided three (3) separate opinions over the course of fifteen (15) months, and in
10 summary, opined that there were too many discrepancies between the income tax returns,
11 financial statements and general ledgers, which made it impossible to reconstruct a full
12 Accounting and to reconcile the cash receipts and disbursements of the SCIT. In an effort to
13 resolve his concerns, Mr. Gerety directly communicated with Robert Evans. However, Mr.
14 Gerety was ultimately not provided with the requisite information and this litigation resulted.

15 43. On or about September 27, 2016, the Respondents submitted to Petitioner
16 "Accountings" of the Trust for the time period between 1998 and 2013. These new accountings
17 were compilations (rather than audited financial statements) of the SCIT and, upon information
18 and belief, appear to be based upon the 2012 PE Trial Balance and 2012 SCIT Trial Balance, in
19 part ("SCIT Compilations"). The SCIT Compilations, however, raised more questions than
20 answers. In several instances, the information reported on the SCIT Financials contradicted
21 information reported of the SCIT Compilations, including the receipts and disbursements. Other
22 examples of the contradictions between the 2012 SCIT Financials and 2012 SCIT Compilation,
23 include but are not limited to the following:

24
25 ³³ Such information included the trust agreements, statements of financial condition
26 of the SCIT for the period of 1997-2000, audited statements for the period of 2001-2012, certain
27 compiled financial statements for the periods ending June 30 and September 30, 2013, balance
28 sheets and income statements for the period 2009-2013, income tax returns for the SCIT for 1997-
2012 and income tax returns for the Protection Trust for 2009-2013 (collectively, "Account
Information").

- a. Differences in the beginning balances of related party loans;
- b. Differences in the ending balances of related party loans;
- c. Differences in the beginning values of the Colorado land holdings; and
- d. Differences in the ending values of the Colorado land holdings.

44. Additionally, while the SCIT Compilations purported to value the business interests based on "fair market value" rather than "book value," the SCIT Compilations demonstrated otherwise. Specifically, the 2012 SCIT Compilation identifies an "adjustment to

merely a difference between the beginning and ending balance of the value of the SCIT for 2012.

45. Petitioner subsequently received accountings for the time periods of 2014, 2015 and 2016. The 2015 and 2016 accountings were prepared subsequent of the filing of the Surcharge Petition. As the SCIT no longer held business interests as a result of the Purchase Agreement, the issues relations to such accountings primarily related to: (a) the underlining value of the entities subject to the Purchase Agreement; (b) the timing of the sale of the business interests; (c) loss investment use for deferred principal payments; (d) payment of Respondents' attorneys' fees; and (e) payment of Trustee fees.

46. The foregoing, these inconsistencies relating to the financial information of the Trust and Purchased Entities (that are currently subject to discovery disputes) will be subject to expert testimony and disclosed in the ordinary course of this litigation, as part of Petitioner's damages.

47. In preparing the SCIT Financials and SCIT Compilations, Respondents represented the valuate of the Trust's assets and transactions of the Trust. Such representations were false and such representations amount to not only a breach of fiduciary duty, aiding and abetting and conspiring to commit a breach of fiduciary duty but also fraud, constructive fraud and fraudulent concealment. Consequently, Respondents are jointly and severally liable for such conduct. As a direct and proximate result of Respondents' acts and omissions, Petitioner has suffered damages, the amount of which will be proven at an evidentiary hearing. Petitioner is informed and believes and thereon alleges that the acts, omissions and conduct of Respondents, as set forth herein, were intentional, malicious, fraudulent, oppressive and in violation of Petitioner's

1 rights as the grantor and primary beneficiary of the SCIT and Respondents' fiduciary obligations.
2 As a result, Petitioner is entitled to an award of punitive damages and to an award of attorney's
3 fees and costs, to be born personally by Respondents.

4 WHEREFORE, Petitioner requests that following an evidentiary hearing on this matter,
5 this Court make and enter the following orders:

6 (1) An award of actual damages in an amount to be proven at the time of hearing but
7 in any case, exceeding Fifteen Thousand Dollars (\$15,000.00);

8 (2) An award of punitive/exemplary damages in an amount exceeding Fifteen
9 Thousand Dollars (\$15,000.00);

10 (3) An award of attorneys' fees, costs, and account fees;

11 (4) Any and all declaratory relief appropriate under the circumstances; and

12 (5) For such other orders as the Court deems proper.

13 DATED this 18 day of May, 2018.

14 SOLOMON DWIGGINS & FREER, LTD.

15 By: Tess Johnson

16 DANA A. DWIGGINS, ESQ.

17 Nevada Bar No. 007049

18 TESS E. JOHNSON, ESQ.

19 Nevada Bar No. 13511

20 9060 West Cheyenne Avenue

21 Las Vegas, Nevada 89129

22 *Attorneys for Petitioner, Scott Canarelli*



VERIFICATION

Petitioner, SCOTT LYLE GRAVES CANARELLI, whose mailing address is 12 Highland Creek, Henderson, Nevada 899052, declares under penalties of perjury of the State of Nevada:

That he is the Petitioner who makes the foregoing **SUPPLEMENT TO PETITION TO SURCHARGE TRUSTEE AND FORMER TRUSTEES FOR BREACH OF FIDUCIARY DUTIES, CONSPIRACY AND AIDING AND ABETTING; PETITION FOR BREACH OF FIDUCIARY DUTY FOR FAILURE TO PROPERLY ACCOUNT; and PETITION FOR AN AWARD OF ATTORNEY FEES, ACCOUNTANT FEES AND COSTS** that he has read said petition and knows the contents thereof, and that the same is true of his own knowledge except for those matters stated on information and belief, and that as to such matters he believes it to be true.

DATED this 16th day of May, 2018.

SCOTT LYLE GRAVES CANARELLI

EXHIBIT 1

IN CAMERA

**Purchase Agreement (RESP0086867-
RESP0086882)**

EXHIBIT 1

AGREEMENT

This agreement ("Agreement") is entered into and effective this ____ day of _____, 2013 by and among the Scott Lyle Graves Canarelli Irrevocable Trust, Lawrence D. Canarelli, family trustee ("Seller") and SJA Acquisitions, LLC, a Nevada limited liability company ("LLC Purchaser"), Jeffrey Lawrence Graves Canarelli Irrevocable Trust, Lawrence D. Canarelli, family trustee, Stacia Leigh Lemke Irrevocable Trust, Lawrence D. Canarelli, family trustee and Alyssa Lawren Graves Canarelli Irrevocable Trust, Lawrence D. Canarelli, family trustee ("Corp Purchasers").

RECITALS

- A. Seller is the owner of minority interests in certain limited liability companies ("LLCs") and certain corporations ("Corporations") that comprise the Nevada home building operation commonly known as "American West". The LLCs and The Corporations are listed on Exhibit "A". Exhibit A also shows Seller's ownership interest in each LLC and each Corporation. The Corporations are each taxed as an S Corporation taxpayer.
- B. The LLCs, Corporations and Seller are borrowers under that certain Term Loan Credit Agreement dated as of December 31, 2009 with California Bank & Trust, Wells Fargo Bank, National Association and additional lenders ("Credit Agreement"). The LLCs and the Corporations, under the Credit Agreement, are included in the term, and are referred to as, members of the American West Group of Borrowers. Seller, along with the other owners of the LLCs and the Corporations, are borrowers under the Credit Agreement.
- C. Pursuant to the Credit Agreement, Seller, along with the other borrowers (including the LLCs and the Corporations) are jointly and severally liable for the amount due and owing, at any time, under the Credit Agreement.
- D. Pursuant to the Credit Agreement, Seller, along with the other borrowers (excluding Lawrence D. Canarelli and Heidi Canarelli), is precluded from receiving any cash distributions from any of the LLCs or the Corporations, including any distribution that would be attributable to Seller's ownership interests in the LLCs and the Corporations. Lawrence D. Canarelli and Heidi Canarelli are entitled to limited distributions.
- E. The Credit Agreement matures in October, 2013. The American West Group of Borrowers will not have sufficient cash at maturity to pay off the Credit Agreement. Discussions have begun with certain of the lenders for either an extension of the current Credit Agreement or a new credit agreement.
- F. It is anticipated that a new credit agreement or an extension to the current Credit Agreement will continue to: (1) require Seller to be jointly and severally liable for the full amount due, and (2) prohibit distributions from the LLCs or the Corporations to Seller.
- G. Scott Lyle Graves Canarelli ("Scott") is the grantor and beneficiary of Seller. Lawrence D. Canarelli ("Trustee") and Heidi Canarelli are the family trustees of the Seller, and under the terms of Seller's Trust Agreement, each has the ability to bind Seller, acting alone. Edward C. Lubbers is the Independent Trustee ("Independent Trustee").

H. Scott has indicated to the Independent Trustee certain needs that he has for available funds to provide for his family and certain concerns that he has in regard to management of Seller by Trustee.

I. The Trustee and the Independent Trustee believe that the restriction on distributions currently in effect under the Credit Agreement, and likely to be in effect under a new credit agreement, will make providing cash to Scott difficult, and to make cash available would risk a default under the Credit Agreement.

J. The Trustee and the Independent Trustee believe the unlimited joint and several liability of Seller creates an unacceptable level of risk for Seller, especially in light of the cash needs of Scott and the distribution restriction.

K. In order to avoid joint and several liability under the Credit Agreement, and to provide available funds to Scott, Seller desires to sell Seller's ownership interests in the: (1) LLCs to the LLC Purchaser, and (2) Corporations to the Corp Purchasers (to maintain S corporation tax status). Each such sale shall be pursuant to the terms and provisions of this Agreement.

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS

1. The above recitals are hereby incorporated into this Agreement and, by such incorporation, shall be considered terms and provisions of this Agreement. Exhibit A is hereby incorporated into this Agreement, along with all other exhibits referenced herein.
2. Seller shall sell all of its cash, and all of its ownership interests in the LLCs to the LLC Purchaser, and the LLC Purchaser shall purchase all of Seller's cash and all of the ownership interests of Seller in the LLCs (the "LLC Sale Interests") for the LLC Sale Interests Purchase Price, as defined in Section 3. Seller shall sell all of its ownership interests in the Corporations to the Corp Purchasers, and the Corp Purchasers shall purchase all of the ownership interests of Seller in the Corporations (the "Corporation Sale Interests") for the Corporation Sale Interests Purchase Price, as defined in Section 3.
3. The LLC Sale Interests Purchase Price shall be \$ _____. The Corporation Sale Interests Purchase Price shall be \$ _____.
4. The LLC Sale Interests Purchase Price shall be paid: (a) in cash, on a dollar for dollar basis for Seller's cash, and (b) the balance of the LLC Sale Interests Purchase Price by a promissory note ("LLC Note"), substantially in the form of Exhibit "B", which shall earn interest at the rate of ____% compounded annually, and payable in _____ monthly payments of principal and interest.
5. The Corporation Sale Interests Purchase Price shall be paid by a promissory note ("Corp Note"), substantially in the form of Exhibit "C", which shall earn interest at the rate of ____% compounded annually, and payable in _____ monthly payments of principal and interest.
6. The LLC Note and the Corp Note shall be personally guaranteed by Lawrence D. Canarelli and Heidi Canarelli, jointly and severally, by a guaranty substantially in the form of Exhibit "D" ("Guaranty").
7. In light of the familiarity of each of the parties with the LLCs, Corporations, LLC Sale Interests, Corporation Sale Interests, the Credit Agreement, power and authority of the individual parties

to enter into, and perform this Agreement, title to the real properties owned and the business of American West, all parties waive warranties and representations from each other. In addition, LLC Purchaser and Corp Purchasers agree to assume all obligations of Seller.

8. The LLC Purchaser and the Corp Purchasers, jointly and severally, agree to indemnify Seller against, and agree to hold Seller harmless from, any and all losses imposed on or suffered by Seller arising out of the current Credit Agreement, or any other obligation of Seller assumed by LLC Purchaser and/or Corp Purchasers.
9. The sales contemplated by this Agreement, and the Guaranty, are conditioned on obtaining advance approval from the lenders (or agent lender, as determined by the lenders) under the current Credit Agreement. It is anticipated that the lenders, in providing consent, will condition their consent, and Seller agrees that it will sell the LLC Sale Interests and the Corporation Sale Interests subject to reasonable conditions imposed by lenders. Seller agrees that the following conditions, if imposed, would be reasonable:
 - A. LLC Purchaser must become a borrower under the Credit Agreement or new credit agreement;
 - B. The LLC Note and the Corp Note will be subordinate to the Credit Agreement or new credit agreement;
 - C. No payment will be permitted on the LLC Note or the Corp Note in the event of an uncured default under the Credit Agreement or new credit agreement;
 - D. Seller, as payee of the LLC Note and Corp Note, shall not be permitted to enforce the Guaranty in the event of an uncured default under the Credit Agreement or new credit agreement.
10. The LLC Purchaser, in regard to the LLCs, and the Corp Purchasers, in regard to the Corporations, shall prepare and file all tax returns that may be necessary to file as a result of the sales contemplated by this Agreement.
11. Lawrence D. Canarelli is entering into this Agreement as Family trustee of Seller and Family Trustee of the Corp Purchasers pursuant to authorization provided in each of the Trusts, as required by NRS 163.060.
12. Miscellaneous.
 - A. Entire Agreement; Amendment. Any and all exhibits attached to this Agreement are incorporated into this Agreement by reference and made a part hereof. This Agreement, including all exhibits hereto, is the entire Agreement between the parties pertaining to all matters agreed upon or understood in connection with the joint venture. There are no oral promises conditions, representations, understandings, interpretations or terms of any kind as conditions or inducements to the execution hereof or in effect between the parties. No change or addition may be made to this Agreement except by a written agreement executed by the parties.
 - B. Further Assurances. The parties hereto shall execute, acknowledge and deliver such other instruments and documents as may be necessary or appropriate to carry out the full intent and purpose of this Agreement.
 - C. Applicable Law. This Agreement and the rights of the parties hereto shall be interpreted, governed and construed in accordance with the laws of the State of Nevada, and venue of any action shall be brought in the U.S. Federal District Court for Nevada, or the State Courts of Nevada, in Clark County.

D. Section Headings. The section headings in this Agreement are inserted only for convenience and reference and the parties intend that they shall be disregarded in interpreting the terms, covenants, conditions and provisions of this Agreement.

E. Severability. Wherever possible, each provision of this Agreement shall be interpreted in such manner as to be valid under applicable law, but if any provision shall be invalid or prohibited hereunder, such provision shall be ineffective to the extent of such prohibition or invalidation but shall not invalidate the remainder of such provision or the remaining provisions.

F. Waiver. Either of the parties shall have the right to excuse or waive performance by the other party of any obligation under this Agreement by a writing signed by the party so excusing or waiving. No delay in exercising any right or remedy shall constitute a waiver thereof, and no waiver by either party of the breach of any covenant of this Agreement shall be construed as a waiver of any preceding or succeeding breach of the same or any other covenant or condition of this Agreement.

G. Construction. As used in this Agreement, the masculine, feminine or neuter gender and the singular or plural numbers shall each be deemed to include the other whenever the context so requires. This Agreement shall be construed as a whole and in accordance with its fair meaning and without regard to any presumption or other rule requiring construction against the party causing this Agreement or any part of this Agreement to be drafted.

H. Counterparts. This Agreement may be signed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same Agreement.

THE NEXT PAGE IS THE SIGNATURE PAGE

In Witness Whereof the parties have executed this Agreement the date first set forth above.

SELLER:

Scott Lyle Graves Canarelli Irrevocable Trust,

By _____
Lawrence D. Canarelli, family trustee

LLC PURCHASER:

SJA Acquisitions, LLC, a Nevada limited liability company

By H&L Management, LLC, its Manager

By H&L Management, Inc., its Manager

By _____
Cheryl Corley, President

CORP PURCHASERS:

Jeffrey Lawrence Graves Canarelli Irrevocable Trust,

Stacia Leigh Lemke Irrevocable Trust,

Alyssa Lawren Graves Canarelli Irrevocable Trust,

By _____
Lawrence D. Canarelli, family trustee of each

EXHIBIT A
LLCs and Corporations
See attached

EXHIBIT B
PROMISSORY NOTE
(LLCs)

\$ _____ .00

Las Vegas, Nevada
_____, 2013

1. Principal Obligation and Interest. FOR VALUE RECEIVED, SJA Acquisitions, LLC, a Nevada limited liability company ("Borrower"), unconditionally promises to pay to Scott Lyle Graves Canarelli Irrevocable Trust, Lawrence D. Canarelli, family trustee (the "Lender"), or order at _____, Las Vegas, Nevada, or at such other place as the Lender may designate in writing, in currently available funds of the United States, the principal sum of _____ (\$ _____ .00), or so much thereof as may be advanced hereunder, together with interest on the unpaid principal at ____ % per annum.

The interest rate for this Note shall be calculated on the basis of the actual number of days elapsed over a 360 day year. Whenever there is a default by Borrower under this Note, the interest rate on the unpaid principal balance shall, at the option of the Lender, be at the Default Rate set forth below.

2. Payment Terms. Principal and interest shall be paid in _____ (____) monthly installments of _____ DOLLARS (____) each. The final monthly installment shall be in the amount of the then unpaid balance of principal and accrued interest. The first of the monthly installments shall be paid on _____, 2013, and subsequent payments shall be made on or before the first day of each following month.

All payments received hereunder shall be applied first to the payment of accrued interest and the balance applied to principal. Borrower will make payments required hereunder to the Lender's address indicated in Section 1 above, or at a different place if required by the Lender.

3. Prepayment. Borrower may prepay the entire principal balance at any time without penalty.

4. Guaranty. This Note is guaranteed by Lawrence D. Canarelli and Heidi Canarelli, jointly and severally.

5. Default and Acceleration. The principal unpaid balance, plus accrued interest, shall, at the option of the Lender or any holder of this Note, become due and payable without notice or demand upon Borrower's failure to pay any installment of principal or interest due on this Note. In the event that any amount due under this Note is reduced to judgment, or if Borrower fails to make any payment provided for in this Note when due and is not cured within ten (10) days after written notice is sent to Borrower of such default, the Lender, or any holder of this Note, may, at its option declare the unpaid balance of principal and the accrued unpaid interest due and payable although the time of maturity as expressed herein shall not have arrived, and, regardless whether the Lender so accelerates, the total of the unpaid balance of principal and the then accrued and unpaid interest (past due interest being compounded monthly on the last day of each calendar month to the fullest extent permitted by law) shall then begin accruing interest at the rate stated in Section 1 above, plus four percent (4.0%) per annum (the "Default Rate"), until such time as all past due payments and accrued interest are paid. At that time, the interest rate will revert to that rate provided in Section 1. Borrower acknowledges that the effect of this

Default Rate provision could operate to compound some of the interest obligations due, and Borrower hereby expressly consents to such compounding should it occur.

6. Attorneys' Fees and Costs. Should the indebtedness represented by this Note, or any part hereof, be collected at law, in equity, or in any bankruptcy, receivership or other court proceeding, or an attorney be retained by the Lender for collection, Borrower agrees to pay, in addition to the principal and interest due hereon, all reasonable attorneys' fees, plus all other costs and expenses of collection and enforcement, including any fees incurred in connection with such proceedings or collection of this Note and/or enforcement of the Lender's rights with respect to the administration, supervision, preservation or protection of, or realization upon, any property securing payment hereof, whether or not an action is filed in connection therewith.

7. Miscellaneous.

a. The failure of the Lender to act or to exercise any right or remedy shall not in any way affect or impair the obligations of Borrower to the Lender, or constitute a waiver by the Lender of, or otherwise affect any of, the Lender's rights under this Note, under any endorsement or guaranty of this Note or under any document or instrument evidencing any security for payment of this Note.

b. The invalidity or unenforceability of any one or more provisions of this Note shall in no way affect the other provisions.

c. Borrower waives presentment, demand for payment, dishonor, notice of dishonor, protest, notice of protest, notice of nonpayment and any other notice or formality and any right of offset.

d. All titles used in this Note are intended solely for convenience and reference; said titles shall not affect any terms, provisions, or meanings of this Note.

e. No waiver or modification of any of the terms or provisions of this Note shall be valid or binding unless set forth in a writing signed by a duly authorized officer of the Lender, and then only to the extent therein specifically set forth.

f. All rights and remedies provided to the Lender or the holder of this Note shall be cumulative and shall be in addition to all other rights and remedies provided at law or in equity and all such rights and remedies may be exercised singly, successively and/or concurrently.

g. Time is of the essence hereof. Interest not paid when due shall earn interest as principal.

h. The laws of the State of Nevada shall govern the validity, construction, performance and effect of this Note.

i. All notices given to or made upon Borrower shall be deemed to have been given or made when deposited in the U.S. Mail and addressed to Borrower at the address indicated below.

IN WITNESS WHEREOF, this Note has been executed effective the date and place above written.

SJA Acquisitions, LLC, a Nevada limited liability company

By H&L Management, LLC, its Manager

By H&L Management, Inc., its Manager

By _____
Cheryl Corley, President

EXHIBIT C

PROMISSORY NOTE

(Corps)

\$ _____ .00

Las Vegas, Nevada
_____, 2013

1. **Principal Obligation and Interest.** FOR VALUE RECEIVED, Jeffrey Lawrence Graves Canarelli Irrevocable Trust, Lawrence D. Canarelli, family trustee, Stacia Leigh Lemke Irrevocable Trust, Lawrence D. Canarelli, family trustee and Alyssa Lawren Graves Canarelli Irrevocable Trust, Lawrence D. Canarelli, family trustee ("Borrowers"), severally and unconditionally promise to pay to Scott Lyle Graves Canarelli Irrevocable Trust, Lawrence D. Canarelli, family trustee (the "Lender"), or order at _____, Las Vegas, Nevada, or at such other place as the Lender may designate in writing, in currently available funds of the United States, the principal sum of _____ (\$ _____ .00), or so much thereof as may be advanced hereunder, together with interest on the unpaid principal at ____% per annum.

The interest rate for this Note shall be calculated on the basis of the actual number of days elapsed over a 360 day year. Whenever there is a default by Borrower under this Note, the interest rate on the unpaid principal balance shall, at the option of the Lender, be at the Default Rate set forth below.

2. **Payment Terms.** Principal and interest shall be paid in _____ (____) monthly installments of _____ DOLLARS (____) each. The final monthly installment shall be in the amount of the then unpaid balance of principal and accrued interest. The first of the monthly installments shall be paid on _____, 2013, and subsequent payments shall be made on or before the first day of each following month.

All payments received hereunder shall be applied first to the payment of accrued interest and the balance applied to principal. Borrower will make payments required hereunder to the Lender's address indicated in Section 1 above, or at a different place if required by the Lender.

3. **Prepayment.** Borrower may prepay the entire principal balance at any time without penalty.

4. **Guaranty.** This Note is guaranteed by Lawrence D. Canarelli and Heidi Canarelli, jointly and severally.

5. **Default and Acceleration.** The principal unpaid balance, plus accrued interest, shall, at the option of the Lender or any holder of this Note, become due and payable without notice or demand upon Borrower's failure to pay any installment of principal or interest due on this Note. In the event that any amount due under this Note is reduced to judgment, or if Borrower fails to make any payment provided for in this Note when due and is not cured within ten (10) days after written notice is sent to Borrower of such default, the Lender, or any holder of this Note, may, at its option declare the unpaid balance of principal and the accrued unpaid interest due and payable although the

time of maturity as expressed herein shall not have arrived, and, regardless whether the Lender so accelerates, the total of the unpaid balance of principal and the then accrued and unpaid interest (past due interest being compounded monthly on the last day of each calendar month to the fullest extent permitted by law) shall then begin accruing interest at the rate stated in Section 1 above, plus four percent (4.0%) per annum (the "Default Rate"), until such time as all past due payments and accrued interest are paid. At that time, the interest rate will revert to that rate provided in Section 1. Borrower acknowledges that the effect of this Default Rate provision could operate to compound some of the interest obligations due, and Borrower hereby expressly consents to such compounding should it occur.

6. Attorneys' Fees and Costs. Should the indebtedness represented by this Note, or any part hereof, be collected at law, in equity, or in any bankruptcy, receivership or other court proceeding, or an attorney be retained by the Lender for collection, Borrower agrees to pay, in addition to the principal and interest due hereon, all reasonable attorneys' fees, plus all other costs and expenses of collection and enforcement, including any fees incurred in connection with such proceedings or collection of this Note and/or enforcement of the Lender's rights with respect to the administration, supervision, preservation or protection of, or realization upon, any property securing payment hereof, whether or not an action is filed in connection therewith.

7. Miscellaneous.

a. The failure of the Lender to act or to exercise any right or remedy shall not in any way affect or impair the obligations of Borrower to the Lender, or constitute a waiver by the Lender of, or otherwise affect any of, the Lender's rights under this Note, under any endorsement or guaranty of this Note or under any document or instrument evidencing any security for payment of this Note.

b. The invalidity or unenforceability of any one or more provisions of this Note shall in no way affect the other provisions.

c. Borrower waives presentment, demand for payment, dishonor, notice of dishonor, protest, notice of protest, notice of nonpayment and any other notice or formality and any right of offset.

d. All titles used in this Note are intended solely for convenience and reference; said titles shall not affect any terms, provisions, or meanings of this Note.

e. No waiver or modification of any of the terms or provisions of this Note shall be valid or binding unless set forth in a writing signed by a duly authorized officer of the Lender, and then only to the extent therein specifically set forth.

f. All rights and remedies provided to the Lender or the holder of this Note shall be cumulative and shall be in addition to all other rights and remedies provided at law or in equity and all such rights and remedies may be exercised singly, successively and/or concurrently.

g. Time is of the essence hereof. Interest not paid when due shall earn interest as principal.

h. The laws of the State of Nevada shall govern the validity, construction, performance and effect of this Note.

i. All notices given to or made upon Borrower shall be deemed to have been given or made when deposited in the U.S. Mail and addressed to Borrower at the address indicated below.

IN WITNESS WHEREOF, this Note has been executed effective the date and place above written.

Jeffrey Lawrence Graves Canarelli Irrevocable Trust,
Stacia Leigh Lemke Irrevocable Trust,
Alyssa Lawren Graves Canarelli Irrevocable Trust,

By _____
Lawrence D. Canarelli, family trustee of each

EXHIBIT D

PAYMENT GUARANTY

This Payment Guaranty ("Guaranty") is made as of _____, 2013, by Lawrence D. Canarelli and Heidi Canarelli, jointly and severally (the "Guarantor") in favor of the Scott Lyle Graves Canarelli Irrevocable Trust, Lawrence D. Canarelli, family trustee ("Lender").

Factual Background

- A. Guarantor agreed to execute this Guaranty to induce Lender to accept two (2) promissory notes (the "Notes"), one made by SJA Acquisitions, a Nevada limited liability company ("LLC Purchaser"), and one made by Jeffrey Lawrence Graves Canarelli Irrevocable Trust, Lawrence D. Canarelli, family trustee, Stacia Leigh Lemke Irrevocable Trust, Lawrence D. Canarelli, family trustee and Alyssa Lawren Graves Canarelli Irrevocable Trust, Lawrence D. Canarelli, family trustee ("Corp Purchasers"). LLC Purchaser and Corp Purchasers may be referred to as Borrowers or Borrower.
- B. The LLC Purchaser has executed a Note in the amount of _____ Dollars (\$_____) (the "LLC Note").
- C. The Corp Purchasers have executed a Note in the amount of _____ Dollars (\$_____) (the "Corp Note").
- D. Lender would not accept the Notes without this Guaranty, and each person constituting Guarantor, has received good and valuable consideration for its agreements set forth herein.

Guaranty

1. Guaranty of Notes. Guarantor unconditionally guarantees to Lender the full payment of each Note, and unconditionally agrees to pay Lender the full amount of each Note. This is a guaranty of payment, not of collection. If Borrower defaults in the payment when due of either Note or any part of it and such default is not cured within thirty (30) days after written demand, Guarantor shall in lawful money of the United States pay to Lender or order, on demand, all sums due and owing on the Note, including all interest, charges, fees and other sums, costs and expenses.

2. Rights of Lender. Guarantor authorizes Lender to perform any or all of the following acts at any time in its sole discretion, all without notice to Guarantor and without affecting Guarantor's obligations under the Guaranty:

(a) Lender may alter any terms of the Note or any part of it by agreement with Borrowers or one of them or pursuant to any other provision of either Note, including renewing, compromising, extending or accelerating, or otherwise changing the time for payment of, or increasing or decreasing the rate of interest on, the Note or any part of it.

(b) Lender may apply any payments or recoveries from Borrowers, Guarantor or any other source, to Borrower's obligations under Borrower's Note in such manner, order and priority as

Lender may elect, whether or not those obligations are guaranteed by this Guaranty or secured at the time of the application.

(c) Lender may release Borrowers or one of them of its liability for the Note or any part of it.

3. Guaranty to be Absolute. Guarantor expressly agrees that until each Note is paid and performed in full and each and every term, covenant and condition of this Guaranty is fully performed, Guarantor shall not be released by or because of:

(a) Any act or event which might otherwise discharge, reduce, limit or modify Guarantor's obligations under this Guaranty;

(b) Any waiver, extension, modification, forbearance, delay or other act or omission of Lender, or its failure to proceed promptly or otherwise as against either Borrower or Guarantor;

(c) Any action, omission or circumstance which might increase the likelihood that Guarantor may be called upon to perform under this Guaranty or which might affect the rights or remedies of Guarantor as against Borrowers or one of them; or

(d) Any dealings occurring at any time between Borrower or one of them and Lender, whether relating to the Notes or otherwise.

4. Guarantor's Waivers. Guarantor waives:

(a) All statutes of limitations as a defense to any action or proceeding brought against Guarantor by Lender to the fullest extent permitted by law;

(b) Any right it may have to require Lender to proceed against Borrowers or one of them, or pursue any other remedy in Lender's power to pursue;

(c) Any defense based on any claim that Guarantor's obligations exceed or are more burdensome than those of Borrowers;

(d) Any defense based on: (i) any legal disability of Borrowers or one of them, (ii) any release, discharge, modification, impairment or limitation of the liability of Borrowers to Lender from any cause, whether consented to by Lender or arising by operation of law or from any bankruptcy or other voluntary or involuntary proceeding, in or out of court, for the adjustment of debtor-creditor relationships ("Insolvency Proceeding") and (iii) any rejection or disaffirmance of either Note, or any part of either Note, or any security held for it, in any such Insolvency Proceedings;

(e) Any defense based on any action taken or omitted by Lender in any Insolvency Proceeding involving Borrowers or one of them, including any election to have Lender's claim allowed as being secured, partially secured or unsecured, any extension of credit by Lender to Borrowers in any Insolvency Proceeding, and the taking and holding by Lender of any security for any such extension of credit;

(f) All presentments, demands for performance, notices of nonperformance, protests, notices of protest, notices of dishonor, notices of acceptance of this Guaranty and of the existence,

creation, or incurring of new or additional indebtedness, and demands and notices of every kind except for any demand or notice by Lender to Guarantor expressly provided for in Section 1;

(g) Any defense based on or arising out of any defense that Borrowers may have to the payment or performance of either Note or any part of either Note.

5. Waivers of Subrogation and Other Rights.

(a) Upon a default by Borrower or one of them, Lender in its sole discretion, without prior notice to or consent of Guarantor, may elect to: (i) compromise or adjust either Note or any part of either Note or make any other accommodation with Borrowers or Guarantor, or (ii) exercise any other remedy against Borrowers or any security. No such action by Lender shall release or limit the liability of Guarantor, who shall remain liable under this Guaranty after the action, even if the effect of the action is to deprive Guarantor of any subrogation rights, rights of indemnity, or other rights to collect reimbursement from Borrower for any sums paid to Lender, whether contractual or arising by operation of law or otherwise.

(b) Regardless of whether Guarantor may have made any payments to Lender, Guarantor forever waives: (i) all rights of subrogation, all rights of indemnity, and any other rights to collect reimbursement from Borrowers for any sums paid to Lender, whether contractual or arising by operation of law (including the United States Bankruptcy Code or any successor or similar statute) or otherwise, and (ii) all rights to enforce any remedy that Lender may have against Borrowers.

6. Revival and Reinstatement. If Lender is required to pay, return or restore to Borrower or any other person any amounts previously paid on the Notes because of any Insolvency Proceeding of Borrowers, any stop notice or any other reason, the obligations of Guarantors shall be reinstated and revived and the rights of Lender shall continue with regard to such amounts, all as though they had never been paid.

7. Governing Law. This Guaranty shall be governed by, and construed in accordance with, the laws of the State of Nevada.

8. Costs and Expenses. If any lawsuit or arbitration is commenced which arises out of, or which relates to this Guaranty or the Notes, the prevailing party shall be entitled to recover from each other party such sums as the court or arbitrator may adjudge to be reasonable attorneys' fees (including allocated costs for services of in-house counsel) in the action or proceeding, in addition to costs and expenses otherwise allowed by law. In all other situations, including any Insolvency Proceeding, Guarantor agrees to pay all of Lender's costs and expenses, including attorneys' fees which may be incurred in any effort to collect or enforce the Note or any part of it or any term of this Guaranty. From the time(s) incurred until paid in full to Lender, all sums shall bear interest at the interest rate set forth in the Notes.

9. Integration; Modifications. This Guaranty (a) integrates all the terms and conditions mentioned in or incidental to this Guaranty, (b) supersedes all oral negotiations and prior writings with respect to its subject matter, and (c) is intended by Guarantor and Lender as the final expression of the agreement with respect to the terms and conditions set forth in this Guaranty and as the complete and exclusive statement of the terms agreed to by Guarantor and Lender. No representation, understanding, promise or condition shall be enforceable against any party unless it is contained in this Guaranty. This Guaranty may not be modified except in a writing signed by both Lender and Guarantor.

10. Miscellaneous. The death or legal incapacity of any Guarantor shall not terminate the obligations of such Guarantor or any other Guarantor under this Guaranty. The liability of all persons who are in any manner obligated under this Guaranty shall be joint and several. The illegality or unenforceability of one or more provisions of this Guaranty shall not affect any other provision. Any Guarantor who is married agrees that Lender may look to all of his or her community property and separate property to satisfy his or her obligations under this Guaranty. Time is of the essence in the performance of this Guaranty by Guarantor.

GUARANTOR:

Lawrence D. Canarelli

Heidi Canarelli

EXHIBIT 2

IN CAMERA

**Email from Bob Evans sent and
disclosed by Petitioner as CAN002111-
CAN02112**

EXHIBIT 2

From: Scott Canarelli [scanarelli@aol.com]
Sent: 3/12/2018 11:58:24 AM
To: Erin L. Hansen [ehansen@sdfnlaw.com]; Dana Dwiggin [ddwiggin@sdfnlaw.com]
CC: My iPhone [scanarelli@aol.com]
Subject: Fwd: Scott Canarelli

Sent from my iPhone

Begin forwarded message:

From: "Bob Evans" <BEvans@AmericanWesthomes.com>
Date: August 2, 2012 at 9:36:57 AM PDT
To: "Janson, Rick" <rick@porchlightgroup.com>
Cc: "Scott Canarelli" <SCanarelli@AmericanWesthomes.com>
Subject: RE: Scott Canarelli

I will follow up with Scott on this.

From: Janson, Rick [mailto:rick@porchlightgroup.com]
Sent: Wednesday, August 01, 2012 10:47 AM
To: Bob Evans
Subject: Re: Scott Canarelli

Thank you Bob. Let me see if there is anything else my sellers would like... His relationship to American West Homes is quite a solid letter of reference in and of itself.

I mentioned to Scott that I could get the owners on the phone for a discussion of the financials of running the center - typical costs and sources of revenue, etc. He hinted that someone else involved with his trust might want to be in on that phone call. Who would that be and when would that person be available for a conference call?

Thank you,
~ Rick Janson

On Tue, Jul 31, 2012 at 3:56 PM, Bob Evans <BEvans@americanwesthomes.com> wrote:

Hi Rick,

I can put this in writing if you like.

I am fully aware of the financial situation of the Canarelli Family and Scott Canarelli in particular. Scott has the available resources to acquire the property with cash.

Bob

From: Janson, Rick [mailto:rick@porchlightgroup.com]
Sent: Tuesday, July 31, 2012 3:50 PM
To: Bob Evans
Subject: Re: Scott Canarelli

Hi Bob ~

Thank you for writing.

Many of the interested buyers on this property have claimed to have some resources, and then two months into negotiations bailed as they couldn't get a loan, didn't have sufficient income, etc.

Scott and I spoke at length, and he appears to be very well qualified to purchase the property through his trust. I merely need something from you for my clients verifying that he could, indeed, purchase the property without the necessity of a bank loan.

Thank you,

~ Rick Janson

303.589.2320

On Tue, Jul 31, 2012 at 3:45 PM, Bob Evans <BEvans@americanwesthomes.com> wrote:

Hello Rick,

I just spoke with Scott Canarelli about a property he has been discussing with you. Scott mentioned that you needed a letter from a CPA? I am the Canarelli family in house CPA. Please advise me as to what you need.

You can contact me by e-mail or by phone at 702-736-6434 ext 231.

Bob

EXHIBIT 3

IN CAMERA

**SCIT General Ledger for April 1, 2013
to June 31, 2013**

EXHIBIT 3

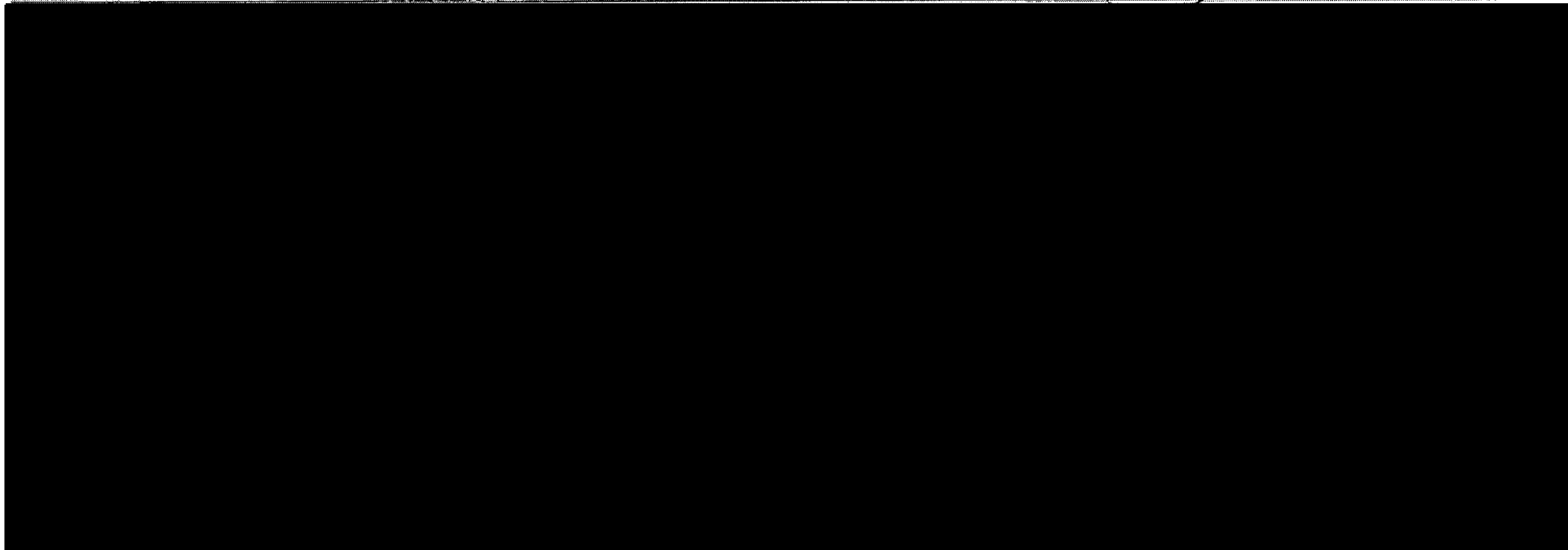
Date: Friday, June 21, 2013
 Time: 02:57PM
 User: JACKIE NARES

SCOTT L. GRAVES CANARELLI IRRV
GL Edit - Standard

Period: 08-13 As of: 6/21/2013 Ledger ID: ACTUAL

Page: 1 of 1
 Report: 01810.rpt
 Company: SCOT007

Tran Type	Company ID	Account	Subaccount	Account Description		Subaccount Description			
	Project	Activity	Reference Nbr	Tran Date	Tran Description	Qty	Debits	Credits	
Batch: 020029	Status: B	Auto Rev:	No	Cycle: 0	Nbr Cycles:	0	Jml Type: GJ	Per Entr: 06-13	Per Post: 05-13
								Control Total:	1,550,380.00



POSTED
 JUN 21 2013
 BY: J. NARES

date: Friday, June 21, 2013
time: 09:23 AM
user: JACKIE NARES

SCOTT L. GRAVES CANARELLI IRRV

Page: 1 of 19
Report: 01620.rpt
Company: SCOT007

Detail General Ledger - Standard
Periods: 04-13 Through 06-13 As of: 6/21/2013 Ledger ID: ACTUAL

for 01620 RPT Company PL ID# = 2 AND for 01620 EtcYd = '2013' AND for 01620 Month in '04' to '06' AND // for 01620 Period Postd >= '201304' AND

These TRANSACTIONS should
Not have occurred in SCOT
These investment sold effective 3/31/13

EXHIBIT 4

IN CAMERA

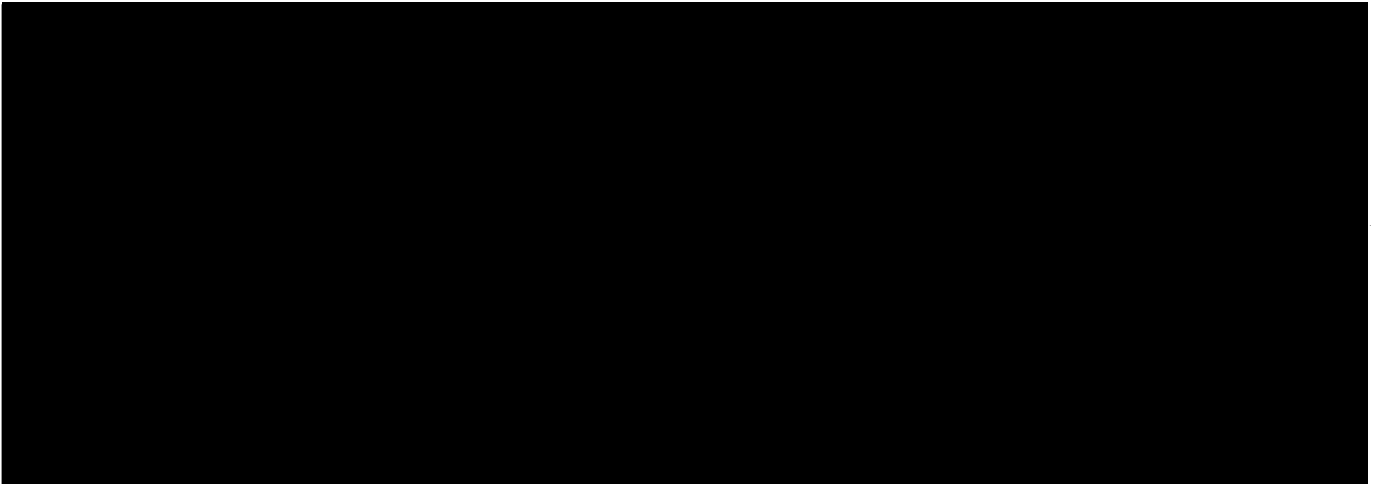
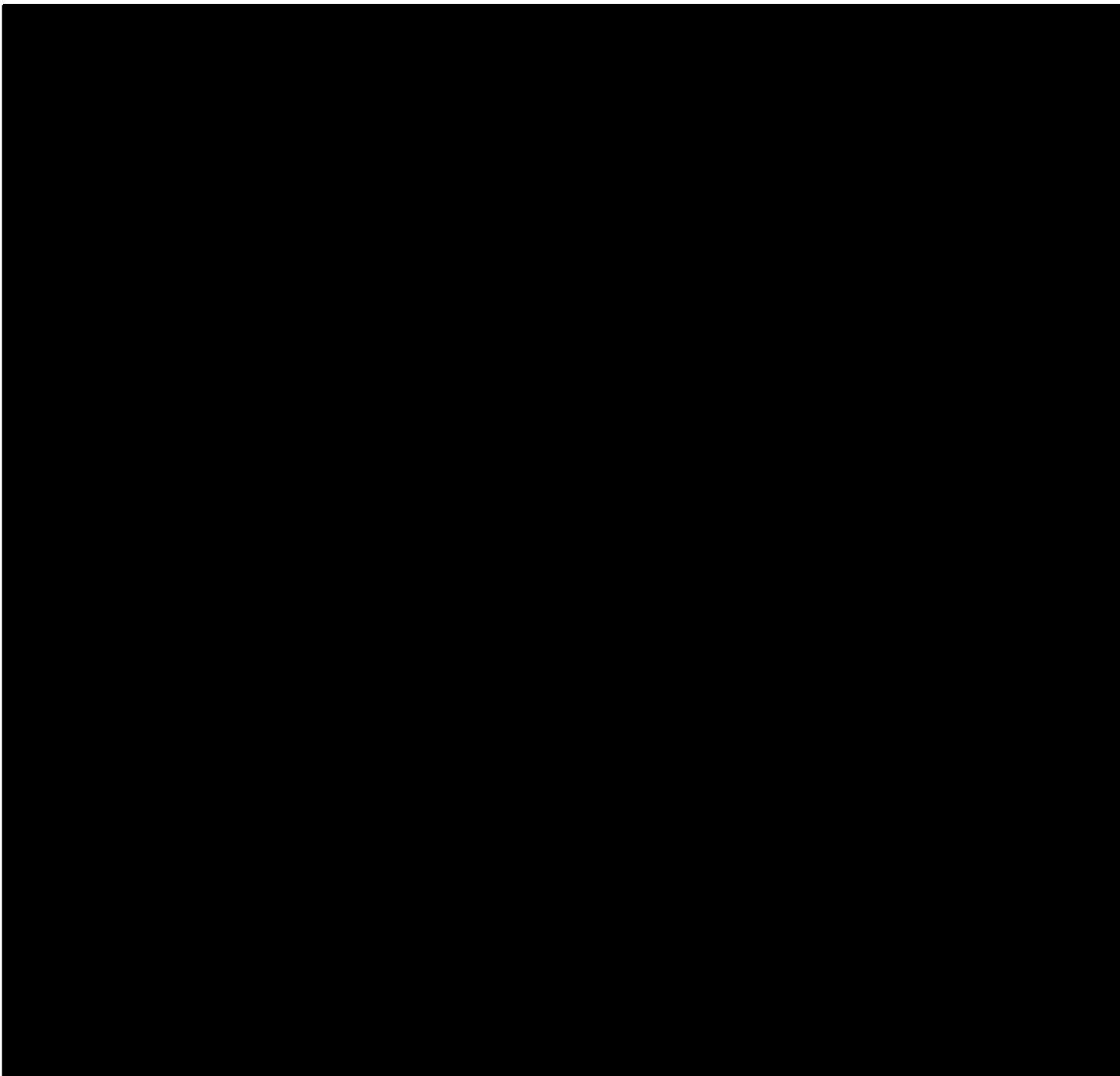
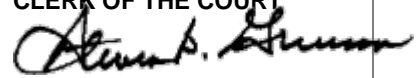


EXHIBIT 4



2



MDSM
J. Colby Williams, Esq. (NSB #5549)
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, NV 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540
jcw@campbellandwilliams.com

-and-

Elizabeth Brickfield, Esq. (NSB #6236)
Joel Z. Schwarz, Esq. (NSB #9181)
DICKINSON WRIGHT, PLLC
8363 W. Sunset Road, Suite 200
Las Vegas, Nevada 89113
Telephone: (702) 550-4400
Facsimile: (844) 670-6009
ebrickfield@dickinsonwright.com
jschwarz@dickinsonwright.com
Counsel for Respondents

**DISTRICT COURT
CLARK COUNTY, NEVADA**

In the Matter of:

SCOTT LYLE GRAVES
CANARELLI IRREVOCABLE
TRUST, dated February 24, 1998.

Case No: P-13-078912-T
Dept. No: 26

DATE OF HEARING:
TIME OF HEARING:

**MOTION TO DISMISS PETITIONER'S SUPPLEMENT TO PETITION TO
SURCHARGE TRUSTEE AND FORMER TRUSTEES FOR BREACH OF FIDUCIARY
DUTIES, CONSPIRACY AND AIDING AND ABETTING; PETITION FOR BREACH
OF FIDUCIARY DUTY FOR FAILURE TO PROPERTY ACCOUNT; and PETITION
FOR AN AWARD OF ATTORNEY FEES, ACCOUNTANT FEES AND COSTS**

Frank Martin, Special Administrator of The Estate of Edward C. Lubbers, successor-in-interest to Edward Lubbers ("Lubbers"), named in this matter individually and in his representative capacity as former Family Trustee and/or the Independent Trustee of the Scott Lyle Graves Canarelli Irrevocable Trust dated February 24, 1998 (the "Trust"), and Lawrence Canarelli ("Larry") and Heidi Canarelli ("Heidi," and together with Larry, the "Canarellis"), former Family Trustees of the Trust (collectively, "Respondents"), by and through their counsel, the law firms of Campbell & Williams and Dickinson Wright PLLC, hereby file this Motion to

1 Dismiss Petitioner Scott Canarelli's ("Scott") Supplement to Petition to Surcharge Trustee and
2 Former Trustees for Breach of Fiduciary Duties, Conspiracy and Aiding and Abetting; Petition
3 for Breach of Fiduciary Duty for Failure to Properly Account; and Petition for an Award of
4 Attorney Fees, Accountant Fees and Costs.¹

5 This Motion is based upon the following Memorandum of Points and Authorities, the
6 papers and pleadings already on file herein, and any oral argument the Court may permit at the
7 hearing of this matter.

8 DATED this 29th day of June 2018.

9 CAMPBELL & WILLIAMS
10 J. Colby Williams (NSB#5549)
11 700 S. Seventh Street
12 Las Vegas, NV 89101
13 Telephone: (702) 382-5222
14 Facsimile: (702) 382-0540
15 jcw@campbellandwilliams.com

16 and

17 DICKINSON WRIGHT, PLLC



18 Elizabeth Brickfield, Esq. (NSB #6236)
19 Joel Z. Schwarz, Esq. (NSB #9181)
20 8363 W. Sunset Road, Suite 200
21 Las Vegas, Nevada 89113
22 Telephone: (702) 550-4400
23 Facsimile: (844) 670-6009

24 *Counsel for Respondents*

25 ¹ Respondents are filing this Motion pursuant to NRCP 12(b)(5). As a result, Respondents' Objections to
26 Petitioner's Supplement to Petition to Surcharge do not need to be filed unless the Court denies this Motion. *See*
27 NRCP 12(a)(4); 5B Fed. Prac. & Proc. Civ. § 1346 (3d ed.) (interpreting Fed. R. Civ. P. 12(a)(4); *Talbot v. Sentinel*
28 *Ins. Co.*, 2012 WL 1068763, at *5 (D. Nev. Mar. 29, 2012). Therefore, Respondents expressly reserve their right to
file substantive Objections to Petitioner's Supplement in the event this Motion is denied. For the purposes of not
waiving the same, Respondents incorporate all defenses set forth in NRCP 12.

NOTICE OF MOTION

TO: ALL PARTIES and their Attorney of Record:

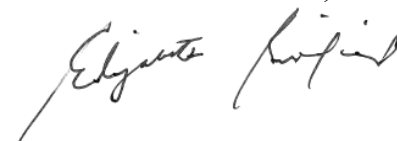
Please take notice that the foregoing Motion to Dismiss Petitioner Scott Canarelli's ("Scott") Supplement to Petition to Surcharge Trustee and Former Trustees for Breach of Fiduciary Duties, Conspiracy and Aiding and Abetting; Petition for Breach of Fiduciary Duty for Failure to Properly Account; and Petition for an Award of Attorney Fees, Accountant Fees and Costs will be heard before this Court in Courtroom 10D of the Regional Justice Center, 200 Lewis Avenue, Las Vegas, NV 89155, on the **16** day of **AUGUST**, 2018, at the hour of **9:30 AM**, or as soon thereafter as counsel may be heard.

Dated this 29th day of June, 2018.

CAMPBELL & WILLIAMS
J. Colby Williams (NSB#5549)
700 S. Seventh Street
Las Vegas, NV 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540
jcw@campbellandwilliams.com

and

DICKINSON WRIGHT, PLLC



Elizabeth Brickfield, Esq. (NSB #6236)
Joel Z. Schwarz, Esq. (NSB #9181)
8363 W. Sunset Road, Suite 200
Las Vegas, Nevada 89113
Telephone: (702) 550-4400
Facsimile: (844) 670-6009
ebrickfield@dickinsonwright.com
jschwarz@dickinsonwright.com
Counsel for Respondents

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Court should dismiss Petitioner's Supplement to Petition to Surcharge and the Errata
4 thereto for failure to state a claim upon which relief can be granted. Petitioner's Supplement was
5 filed nearly a year after the Petition to Surcharge was filed and contains entirely new fraud-based
6 claims that center on events that occurred more than four years ago. Although Petitioner claims
7 the Supplement is warranted based on newly discovered evidence, Petitioner's own allegations
8 demonstrate that Petitioner was aware of, or should have been aware of, the factual basis for his
9 claims years before the original Petition to Surcharge was filed. Petitioner's Supplement should
10 be dismissed because it fails to plead fraud with particularity and is otherwise substantively
11 deficient.

12 First, Petitioner's fraud claims should all be dismissed because they are not pled with
13 particularity as required by NRCP 9(b). Petitioner's Supplement consists of conclusory assertions
14 of fraud. However, Petitioner completely fails to identify the alleged misrepresentations at issue,
15 why they are allegedly false, the circumstances under which they were made, which Respondents
16 made which alleged misrepresentations, and the role or capacity of each Respondent in the
17 allegedly fraudulent conduct. Petitioner's generic assertions of fraud provide textbook examples
18 of the types of non-specific boilerplate allegations that courts routinely dismiss for failure to
19 comply with the heightened pleading standards required for fraud claims.

20 Second, as an independent basis to dismiss the Supplement, Petitioner has failed to state a
21 claim upon which relief can be granted. In general, Petitioner has failed to allege any
22 misrepresentation or fraudulent omission, that Respondents were aware of the alleged
23 misrepresentation, that Petitioner justifiably relied upon such misrepresentation, or that Petitioner
24 was damaged as a result of the misrepresentation. Because Petitioner's Supplement fails to
25 identify any actionable fraud, the Court should dismiss the Supplement without leave to amend.

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II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties

Larry and Heidi founded American West Home Building Group, a significant residential home building and land development group in Southern Nevada. (Objection to Petition to Surcharge ¶ 1.) They have four children: Scott, Stacia, Jeffrey and Alyssa. *Id.*

Over the years, the Canarellis employed sophisticated estate planners to assist them in gifting and transferring certain assets, including capital intensive and illiquid ownership interests in certain investment entities, to their children. *Id.* ¶ 2. These assets generally consisted of equity shares of Nevada limited-liability companies and Nevada corporations (the “Family Entities”). *Id.* ¶ 3. By design and necessity, the Family Entities held illiquid, long-term real property investments that often did not generate regular amounts of cash returns. *Id.* ¶ 4.

As part of the Canarellis’ business and estate planning, their heirs, including Petitioner Scott Canarelli (hereinafter “Petitioner” or “Scott”), created their own irrevocable trusts to hold the illiquid interests in the Family Entities gifted to them by their parents. *Id.* ¶ 5. Scott’s Trust was established on February 24, 1998. (Petition to Surcharge ¶ 1.) Petitioner settled the Trust with assets previously gifted to him by his parents, Larry and Heidi, for the benefit of Petitioner and his family. *Id.*

Scott appointed Larry and Heidi as the initial “Family Trustees.” *Id.* ¶ 3. In or about 2005, Lubbers, an attorney and Canarelli family adviser who had a close personal relationship with Scott for years, was appointed as the Independent Trustee. *Id.* In 2013, the Canarellis resigned as Family Trustees of the Trust and, as authorized by the Trust, jointly appointed Lubbers as their successor Family Trustee. (Objection to Petition to Surcharge ¶ 13.) Lubbers was appointed at Scott’s request. *Id.* At that time, Lubbers became the sole Family Trustee of the Trust. *See id.*

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1 **B. Scott's Petition to Surcharge²**

2 On June 27, 2017, Petitioner filed his Petition to Surcharge Trustee and Former Trustees
3 and for additional relief (the "Petition to Surcharge"). The Petition to Surcharge seeks to
4 surcharge Respondents for claimed losses and asserts civil claims for relief for: (1) breach of
5 fiduciary duty; (2) breach of contract; (3) constructive trust; (4) civil conspiracy; and (5)
6 attorneys' fees and costs. *See generally* (Petition to Surcharge.)

7 The dispute in this action relates to an agreement (the "Purchase Agreement") that was
8 entered into on or about May 31, 2013. *See generally* (Petition to Surcharge.) The Purchase
9 Agreement sold the Trust's interests in the Family Entities to (1) SJA Acquisitions, LLC ("SJA"),
10 a Nevada limited liability company; and (2) to irrevocable trusts established for the benefit of
11 Petitioner's three siblings (the "Siblings' Trusts"). *Id.* at 19. Petitioner alleges the express purpose
12 of the Purchase Agreement was to provide for Petitioner's cash needs. *Id.* ¶ 26.

13 Among other things, Petitioner alleges that his parents (who provided him with the Trust's
14 assets and were former trustees) and Lubbers breached their fiduciary duties and violated Nevada
15 law by selling the Trust's entire interests in the Family Entities. *Id.* ¶¶ 69-77. Petitioner alleges
16 that Respondents improperly served as fiduciaries of both the Trust and the Siblings' Trusts,
17 which purchased some of the Trust's assets. *Id.* ¶¶ 69-72. Petitioner alleges that this benefited the
18 purchasing entities to the detriment of the Trust because the sale occurred at a time when the
19 assets had a low value. *Id.* ¶ 75.

20 Petitioner further alleges that neither the Siblings' Trusts nor SJA Acquisitions made the
21 required annual principal payments for 2014 through April, 2017. *Id.* ¶ 82. Petitioner alleges that
22 he was informed that Lubbers agreed with his parents to "suspend" the principal payments that
23 were due, which somehow demonstrates breach of fiduciary duty and conspiracy to financially
24 harm Petitioner. *Id.* ¶ 83. According to Petitioner, the failure to make payments constitutes a
25 default, which compels the Trustee to take action to protect the interests of the Trust. *Id.* ¶ 88. In
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27 ² Respondents are citing to Scott's Petition to Surcharge solely to summarize the allegations made by Scott.
28 Respondents' vehemently dispute Scott's factual allegations and will demonstrate their falsity at the appropriate
 time.

1 addition, Petitioner claims he is entitled to a constructive trust to recoup any benefit realized by
2 SJA Acquisitions and the Siblings' Trusts, as well as any other entities "owned by Larry, Heidi,
3 and/or the Siblings Trust," from purchasing additional real property with funds that were
4 allegedly owed to the Trust. *Id.* ¶ 91-92.³

5 Next, Petitioner claims that his parents and Lubbers failed to provide accurate accountings
6 for the Trust. *Id.* ¶¶ 94-98. Essentially, Petitioner avers that it took Respondents too long to
7 provide accountings and that the accountings that were provided could not be reconciled with the
8 Trust's tax returns or prior audited financial statements. *Id.* ¶ 95.

9 Based on the alleged breaches of fiduciary duties, Petitioner asks the Court to enter an
10 order requiring Lubbers to disgorge any compensation he received as a trustee of the Trust. *Id.* ¶¶
11 111-112. And, Petitioner seeks an award of his attorneys' fees and costs. *Id.* ¶ 113-114.

12 **C. Scott's Supplement to Petition to Surcharge**

13 On May 18, 2018, nearly a year after the Petition to Surcharge was filed (and nearly five
14 years after Scott filed a Petition to Assume Jurisdiction Over the Trust), Petitioner filed a
15 Supplement to Petition to Surcharge without first obtaining leave of this Court. *See* (Supplement
16 to Petition to Surcharge.)⁴ Petitioner claims that he has discovered new evidence that supposedly
17 shows that Respondents acted in concert and conspired to defraud and financially harm Petitioner
18 by: (1) fraudulently misrepresenting the "purpose" of the sale; (2) intentionally making the
19 Purchase Agreement effective as of March 31, 2013, to financially harm Petitioner and his
20 children; and (3) intentionally selling the assets in 2013 when the real estate market was
21 recovering from the recession so as to financially harm Petitioner and his children. Based on these

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23 ³ At a hearing on May 30, 2018, the Court granted Respondents' Partial Summary Judgment on Petitioner's First
24 Prayer for Relief, which encompasses certain of the allegations set forth in this paragraph, on grounds the requests
sought therein were either satisfied or no longer necessary/able to be performed. *See* Hr'g Tr. dated May 30, 2018 at
50-54 (on file).

25 ⁴ NRCP 15(d) provides that the Court may allow a supplemental pleading only upon the motion of a party and
26 reasonable notice. Pursuant to NRCP 1 and NRS 155.180, the Nevada Rules of Civil Procedure apply to probate
27 proceedings. *See also* EDCR 2.01. Indeed, the Nevada Supreme Court has previously applied the Nevada Rules of
28 Civil Procedure in an action involving a petition to surcharge the trustee for breach of fiduciary duty. *In re Harrison
Living Tr.*, 121 Nev. 217, 218, 112 P.3d 1058, 1058-59 (2005). Because Petitioner did not obtain leave of the Court
as required by NRCP 15 before filing the Supplement, Respondents maintain their position that the Supplement is a
fugitive document.

1 three theories, the Supplement purports to add additional claims for (1) fraud; (2) fraudulent
2 inducement; (3) constructive fraud; and (4) negligent misrepresentation. *Id.* The Supplement
3 includes entirely new theories of damages and also seeks punitive damages.⁵ *Id.*

4 On May 25, 2018, Petitioner filed, again without leave of the Court, an Errata to
5 Supplement to Petition to Surcharge. The “Errata” purports to replace two paragraphs of the
6 Supplement to Petition to Surcharge with entirely new and different allegations.

7 **III. LEGAL STANDARD**

8 Pursuant to NRCP 12(b)(5), a pleading may be dismissed “for failure of the pleading to
9 state a claim upon which relief can be granted.” When considering a motion to dismiss, the
10 district court must construe the pleading “liberally and draw every fair inference in favor of the
11 plaintiff.” *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22, 62 P.3d 720, 734 (2003) (citing *Capital*
12 *Mortgage Holding v. Hahn*, 101 Nev. 314, 315, 705 P.2d 126, 126 (1985)). A pleading should be
13 dismissed “only if it appears beyond a doubt that it could prove no set of facts, which, if true,
14 would entitle it to relief.” *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d
15 670, 672 (2008) (citations omitted).

16 **IV. DISCUSSION**

17 Petitioner’s Supplement seeks to change the entire basis for the Petition to Surcharge by
18 adding entirely new fraud-based claims for relief. Specifically, Petitioner first seeks to add three
19 new fraud-based claims arising from the following: (1) Respondents’ alleged non-disclosure of
20 the Purchase Agreement, (Supplement ¶ 18); (2) recitals contained within the Purchase
21 Agreement itself that indicate the purpose of the Purchase Agreement was to make cash available
22 to Petitioner,⁶ *id.* ¶¶ 20, 25; and (3) the fact that the Purchase Agreement itself states that it is
23 being entered into on May 31, 2013, with an effective date of March 31, 2013, *id.* ¶¶ 26, 28 and
24 (Purchase Agreement at 1, Exhibit 4 to Petition to Surcharge). In addition, Petitioner seeks to add
25 two additional fraud-based claims that arise out of an independent valuation of the Trust’s assets

26 ⁵ To date, Petitioner has failed to supplement his NRCP 16.1 Disclosures with the computation of damages
27 associated with these newly-asserted claims.

28 ⁶ Notably, the Purchase Agreement identifies many reasons for the sale. (Purchase Agreement at 1-2, Exhibit 4 to
Petition to Surcharge).

1 that was completed by Western Valuation Advisers on or about December 31, 2014. (Supplement
2 ¶¶ 29–39, 40–41); (Valuation, Exhibit 12 to Petition to Surcharge).

3 The Court should dismiss all of Petitioner’s fraud-based claims for two independent
4 reasons. First, Petitioner’s Supplement fails to plead fraud with particularity as required by NRC
5 9(b). “The circumstances that must be detailed include averments to the time, the place, the
6 identity of the parties involved, and the nature of the fraud or mistake.” *Brown v. Kellar*, 97 Nev.
7 582, 583–84, 636 P.2d 874, 874 (1981) (citations omitted). In addition, if the lawsuit involves
8 multiple defendants, a plaintiff must also “identify the role of each defendant in the alleged
9 fraudulent scheme” and the capacity each acted in. *Oaktree Capital Mgmt., L.P. v. KPMG*, 963 F.
10 Supp. 2d 1064, 1074 (D. Nev. 2013) (citing *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir.
11 2007)); *Davenport v. GMAC Mortg.*, No. 56697, 2013 WL 5437119, at *3 (Nev. Sept. 25, 2013)
12 (unpublished) (relying on *Swartz*, 476 F.3d at 764-65); *Al-Fouzan v. Activecare, Inc.*, 2016 WL
13 1092495, at *4 (D. Utah Mar. 21, 2016) (dismissing fraud allegations where the plaintiff failed to
14 plead the capacity each defendant acted in).

15 The heightened pleading requirement for fraud cases serves several important purposes,
16 including: “(1) providing defendants with adequate notice so they are able to defend the charge
17 and deter plaintiffs from filing complaints as a pretext for the discovery of unknown wrongs; (2)
18 to protect those whose reputation would be harmed as a result of being subject to fraud charges;
19 and (3) to prohibit [] plaintiff[s] from unilaterally imposing upon the court, the parties and
20 society enormous social and economic costs absent some factual basis.” *Oaktree Capital Mgmt.,*
21 *L.P.*, 963 F. Supp. 2d at 1074 (citations and internal quotations omitted).

22 In addition, even accepting Petitioner’s sparse allegations as true for purposes of this
23 Motion only, Petitioner’s fraud claims fail as a matter of law. Respondents will address each of
24 the new fraud claims asserted by Petitioner *ad seriatim*.

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1 **A. The Supplement Fails to State a Viable Claim for Fraud Based on the Alleged**
2 **Concealment of the Purchase Agreement**

3 The Supplement first attempts to add a claim for fraudulent concealment or omission
4 based upon Respondents' alleged failure to disclose the Purchase Agreement to Petitioner.
5 (Supplement to Petition to Surcharge ¶¶ 12-19.) Specifically, Petitioner alleges, in pertinent part,
6 as follows:

7 Respondents' failure to disclose to Petitioner that Respondents were selling, and
8 in fact, executing the Purchase Agreement, all of the business interests in the
9 Trust at such time to the Siblings Trusts and an entity created by them constitutes
10 fraud and/or fraudulent concealment. Specifically, as Petitioners' fiduciary and
11 Family Trustees of the SCIT, Respondents owed an affirmative duty to disclose
12 the sale to Petitioner, namely the Purchase Agreement which was a material fact.
13 Respondents' concealment of the Purchase Agreement was intentional and, if
14 Petitioner would have been aware of the materials [sic] facts, would not have
15 acquiesced in the sale and otherwise would have objected to the sale.
16 Respondents' concealment has caused damage to the SCIT. Consequently,
17 Respondents are jointly and severally liable for fraud, fraudulent concealment,
18 negligent misrepresentation, constructive fraud, breach of fiduciary duty and
19 conspiracy and otherwise aiding and abetting in the foregoing conduct.

20 *Id.* ¶ 18. Petitioner claims that he has somehow been damaged from this alleged non-disclosure
21 and seeks compensatory and punitive damages. *Id.* ¶¶ 18-19.

22 As an initial matter, Petitioner has failed to plead his claim with particularity. Petitioner
23 has not alleged the time or place the disclosure allegedly should have occurred, the basis for the
24 alleged duty to disclose, how Petitioner justifiably relied on the lack of disclosure, the role each
25 Respondent had in the alleged fraud and in what capacity they were acting. *See Brown*, 97 Nev. at
26 583-84. As just one example, Petitioner never specifies what, if any, alleged role Heidi Canarelli
27 had in the Purchase Agreement transaction. Petitioner routinely refers to "Respondents" as a
28 group and fails to identify which Respondent and in what capacity, e.g. as Family Trustee of
29 Petitioner's Trust or some other capacity. Petitioner's claim should be dismissed for this reason
30 alone.

31 Moreover, even absent this procedural defect, Petitioner's claim fails as a matter of law.
32 Petitioner's fraud claim is based on the alleged non-disclosure of information. Because Petitioner
33 does not allege any affirmative misrepresentation, *see Barmettler v. Reno Air, Inc.*, 114 Nev. 441,

1 447, 956 P.2d 1382, 1386 (1998) (a claim of fraudulent or intentional misrepresentation requires a
2 defendant to make a false representation), this claim can only be analyzed as one of fraudulent
3 concealment, fraud by nondisclosure or constructive fraud.

4 A claim for fraudulent concealment or fraudulent non-disclosure involves the following
5 essential elements: (1) The defendant must have concealed or suppressed a material fact; (2) The
6 defendant must have been under a duty to disclose the fact to the plaintiff; (3) The defendant must
7 have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, that is,
8 he must have concealed or suppressed the fact for the purpose of inducing the plaintiff to act
9 differently than he would if he knew the fact; (4) The plaintiff must have been unaware of the fact
10 and would not have acted as he did if he had known of the concealed or suppressed fact; (5) And,
11 finally, as a result of the concealment or suppression of the fact, the plaintiff must have sustained
12 damages. *Nevada Power Co. v. Monsanto Co.*, 891 F. Supp. 1406, 1415 (D. Nev. 1995) (citing
13 Nevada Jury Instruction 9.03); *Phillips v. Homestake Consol. Placer Mines Co.*, 51 Nev. 226, 273
14 P. 657, 658 (1929).

15 Nevada law does not mandate any specific requirement for a trustee to seek prior
16 permission from the beneficiaries of the trust regarding every action taken within the scope of the
17 trustee's authority. NRS 164.700 et seq.; *see also* Restatement (Second) of Trusts § 173, comment
18 d (1959); *Matter of Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. 8, 390 P.3d 646, 650
19 (2017) (relying, in part, on the Restatement (Second) of Trusts). Moreover, even if such a default
20 rule existed, Scott has waived, by virtue of the Trust Agreement, any obligation the trustee
21 otherwise would have had to disclose the Purchase Agreement prior to the time of sale.

22 In accordance with the plain terms of the Trust Agreement, there is no tenable argument
23 that Respondents concealed or suppressed a material fact because the trustees had sole and
24 absolute discretion to enter into the Purchase Agreement. The Trust Agreement provides, in part,
25 that "where the Trustees are granted discretion, **their discretion shall be sole and absolute** and
26 any action taken or refrained from by them in good faith shall be binding and conclusive upon all
27 persons and corporations interested therein." (Trust Agreement at 6.01, Exhibit 1 to the Petition to
28 Surcharge, on file herein) (emphasis added). The Trust Agreement provides the trustees with

1 broad **discretionary** powers “with respect to any and all property” held by the Trust. *Id.* at Article
2 VII. Among other powers, the trustees have the **discretionary** power to “manage, control, sell at
3 public or private sale for cash or on credit, either with or without notice,” any or all of the Trust
4 property.⁷ *Id.* at Article VII(G). Indeed, the Trust Agreement provides that “[t]he Trustees may
5 freely act under all or any of the powers herein granted to it in all matters concerning the trust
6 estate. . . .” *Id.* at Article VII(X). And, with respect to Trust investments, the Grantor gave the
7 trustees “**sole discretion** in determining what constitutes acceptable risk and what constitutes
8 proper investment strategy.” *Id.* at Article VII (describing the trustees’ power with respect to
9 Trust investments) (emphasis added).

10 As a result of the plain terms of the Trust Agreement, Respondents had “**sole and**
11 **absolute**” discretion regarding the Trust’s investments and whether to sell any or all of Trust’s
12 assets. As such, the fact that Respondent Lubbers (or even Respondents Larry or Heidi during
13 their incumbency and capacity as Family Trustees) was selling assets held by the Trust and
14 executing the Purchase Agreement was not a material fact that was required to be
15 contemporaneously disclosed to Scott. Although Scott claims that he “would not have acquiesced
16 in the sale and otherwise would have objected to the sale,” (Supplement ¶ 18), there was simply
17 no requirement for Scott to acquiesce to the Purchase Agreement. Because Scott expressly
18 delegated to the trustee the sole and absolute power to manage investments and dispose of assets,
19 Scott cannot now assert a claim for fraud based on concealment or omission because no material
20 facts was concealed. *See Monsanto Co.*, 891 F. Supp. at 1415.

21 Moreover, Respondents did not have any duty to contemporaneously disclose the
22 Purchase Agreement to Scott. Pursuant to the express terms of the Trust Agreement, the trustees
23 were only required to “**furnish annually** to the current income beneficiary or beneficiaries a
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25 ⁷ The Trust Agreement expressly modifies the prudent person rule. (Trust Agreement at the last page of Article VII,
26 Exhibit 1 to the Petition to Surcharge, on file herein). As such, the terms of the Trust Agreement override the
27 Prudent Investor Act as permitted by Nevada law. *See* NRS 164.710. Specifically, pursuant to the Trust Agreement,
28 the Trustee is not prohibited from making any investment he or she deems appropriate. *Id.* “Accordingly, the
Trustees shall not be liable for any loss in value of an investment merely because of the nature of the investment or
the degree of risk presented by the investment. . . .” Instead, Petitioner is required to present “affirmative evidence”
that the trustee was negligent. *Id.* In this case, Petitioner has not and cannot present such evidence.

1 **complete inventory of the properties then comprising the trust estate**, together with an
2 accounting showing all receipts and disbursements of principal and income of the trust estate.”
3 (Trust Agreement at 6.15, Exhibit 1 to the Petition to Surcharge on file herein) (emphasis added).
4 By referring to the assets “**then** comprising the trust estate,” the Trust Agreement specifically
5 contemplates that Trust assets may be different from year to year. *Id.* (emphasis added). Thus,
6 Respondents were only obligated to provide Scott with a complete inventory of Trust property on
7 an annual basis.

8 In this case, neither Scott’s original Petition to Surcharge nor his Supplement articulates
9 the circumstances under which he allegedly learned about the Purchase Agreement. Instead,
10 Scott’s Petition to Surcharge merely alleges that “[i]t was not until months after the Purchase
11 Agreement was executed that Petitioner learned of its existence.” (Petition to Surcharge ¶ 27.)
12 However, Scott’s new self-serving allegations contradict his prior admissions. Scott’s September
13 30, 2013, Petition to Assume Jurisdiction Over the Trust specifically states that Scott learned
14 about the sale of the Trust’s assets “on or about June 18, 2013.” (Petition to Assume Jurisdiction
15 Over the Trust at 11 ¶ C.5, on file herein) Regardless, the Purchase Agreement was executed on
16 May 31, 2013. (Supplement to Petition to Surcharge ¶ 21.) Based on Scott’s own allegations, he
17 learned of the Purchase Agreement within eighteen days of its execution and well within the time
18 frame Scott established in the Trust Agreement for furnishing the **annual** inventory. And, even
19 after learning about the purchase, he waited months to take action by filing his Petition to Assume
20 Jurisdiction over the Trust and obtain a valuation as provided for in the Purchase Agreement.

21 To the extent Scott attempts to frame this claim as one for constructive fraud, his
22 allegations equally fail as a matter of law. “Constructive fraud is the breach of some legal or
23 equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its
24 tendency to deceive others or to violate confidence.” *Long v. Towne*, 98 Nev. 11, 13, 639 P.2d
25 528, 529–30 (1982) (citations omitted). “The elements of constructive fraud are the same as those
26 for actual fraud, except that the element of scienter is replaced by a fiduciary or confidential
27 relationship between the parties.” *Wilson v. Dantas*, 746 F.3d 530, 536 n.2 (2d Cir. 2014)
28 (quoting *Klembczyk v. Di Nardo*, 265 A.D.2d 934, 705 N.Y.S.2d 743, 744 (4th Dep’t 1999)); 37

1 Am. Jur. 2d Fraudulent Conveyances and Transfers § 7 (“Unlike actual fraud, constructive fraud
2 is essentially unconcerned with intent and instead focuses upon economic effect and involves an
3 analysis of objective factors.”); Black’s Law Dictionary (10th ed. 2014) (defining “constructive
4 fraud as “[u]nintentional deception or misrepresentation that causes injury to another). Just like
5 actual fraud, constructive fraud requires an affirmative misrepresentation or an omission under
6 circumstances where there was a duty to speak. *See Mackintosh v. Jack Matthews & Co.*, 109
7 Nev. 628, 635, 855 P.2d 549, 553 (1993).

8 Thus, any claim for constructive fraud fails for the same reason as the claim for actual
9 fraud. Scott simply cannot identify any improper concealment or omission of a material fact that
10 Respondents had a duty to disclose. Based on Scott’s own allegations, his fraud-based claims fail
11 as a matter of law.

12 **B. The Supplement Fails to State a Viable Claim for Fraud Based on the Alleged**
13 **Fraudulent Misrepresentation of the Rationale for Entering into the Purchase**
14 **Agreement**

15 Next, the Supplement alleges that certain recitals in the Purchase Agreement fraudulently
16 misrepresent the purpose of the Purchase Agreement. (Supplement ¶¶ 20-25.) Specifically,
17 Petitioner alleges the express purpose of the Purchase Agreement was to be able to provide funds
18 for Scott to meet his cash needs.⁸ Petitioner claims that such representations somehow constitute
19 fraud that caused harm to Petitioner. Petitioner’s claim is nonsensical and belied by Petitioner’s
20 own allegations. Because Petitioner alleges he was not aware of the Purchase Agreement at the
21 time it was entered into, it would be impossible for him to have relied on any statements in the
22 Purchase Agreement to his detriment. Petitioner’s allegations (even assuming their truth) do not
23 constitute fraud as a matter of law because Petitioner did not take, and was not entitled to take,
24 any actions based on such representations.

25 Under Nevada law, Petitioner has the burden to allege each of the following elements for a
26 claim of fraudulent misrepresentation: (1) a false representation made by Respondents; (2)
27 Respondents’ knowledge or belief that their representation was false or that Respondents had an

28 ⁸ Again, Petitioner ignores the fact the Purchase Agreement sets forth multiple reasons for the sale. (Purchase Agreement at 1-2, Exhibit 4 to Petition to Surcharge).

1 insufficient basis of information for making the representation; (3) Respondents intended to
2 induce Petitioner to act or refrain from acting upon the misrepresentation; and (4) damage to the
3 Petitioner as a result of relying on the misrepresentation. *Barmettler*, 114 Nev. at 447, 956 P.2d at
4 1386.

5 Here, Petitioner takes issue with the following three recitals from the Purchase
6 Agreement:

7 D. Pursuant to the Credit Agreement, Seller, along with the other borrowers
8 (excluding Lawrence D. Canarelli and Heidi Canarelli), is precluded from
9 receiving any cash distributions from any of the LLCs or the Corporations,
10 including any distribution that would be attributable to Seller's ownership
interests in the LLCs and the Corporations. Lawrence D. Canarelli and Heidi
Canarelli are entitled to limited distributions.

11 H. Scott has indicated to the Trustee certain needs that he has for available
12 funds to provide for his family and certain concerns that he has in regard to
management of Seller by the prior Family Trustee.

13 I. The Trustee and the Independent Trustee believe that the restriction on
14 distributions currently in effect under the Credit Agreement, and likely to be in
15 effect under a new credit agreement, will make providing cash to Scott difficult,
and to make cash available would risk a default under the Credit Agreement.

16 (Supplement ¶ 20) (citing Purchase Agreement at Recitals D, H. and I, Exhibit 4 to Petition to
17 Surcharge).

18 Although Petitioner claims these statements are false (a position which Respondents
19 vehemently dispute), Petitioner has not and cannot identify how he relied upon any such
20 statements or how he was damaged by such statements. Instead, Petitioner merely concludes in a
21 summary manner that he was damaged by "fraud." These conclusory allegations fail to satisfy the
22 particularity required by NRCP 9(b).

23 Moreover, Petitioner's allegations do not constitute fraud as a matter of law. By
24 Petitioner's own allegations, **he did not rely on the recitals in the Purchase Agreement.**
25 (Petition to Surcharge ¶ 27) If Petitioner did not even know about the Purchase Agreement until
26 after it was entered, he necessarily could not have relied upon its recitals to his detriment. *See*
27 *Blanchard v. Blanchard*, 108 Nev. 908, 911, 839 P.2d 1320, 1322 (1992) (justifiable reliance does
28 not exist when the plaintiff was unaware of the alleged fraud at the time he acted) (quoting *Lubbe*

1 v. *Barba*, 91 Nev. 596, 600, 540 P.2d 115, 118 (1975)). Lack of justifiable reliance bars a claim
2 for fraud. *See Collins v. Burns*, 103 Nev. 394, 397, 741 P.2d 819, 821 (1987) (citing *Pacific*
3 *Maxon, Inc. v. Wilson*, 96 Nev. 867, 870, 619 P.2d 816, 818 (1980)).

4 Moreover, as discussed in detail above, Scott gave the trustees of the Trust the sole and
5 absolute discretion to enter into the Purchase Agreement. As such, the recitals in the Purchase
6 Agreement did not and could not have harmed Petitioner in any way. Although Petitioner claims
7 his financial interests were harmed by entering into the Purchase Agreement, such allegations do
8 not constitute fraud, constructive or otherwise, as a matter of well-settled Nevada law.

9 C. **The Supplement Fails to State a Viable Claim for Fraud Based on the Effective Date**
10 **of the Purchase Agreement**

11 Petitioner next argues that “Respondents further intended to cause harm to Petitioner by
12 intentionally making the Purchase Agreement effective as March 31, 2013, despite the fact that it
13 was purportedly signed May 31, 2013.” (Supplement ¶¶ 26-28.) According to Petitioner, the
14 decision to make the effective date of the Purchase Agreement March 31, 2013, constitutes an
15 intent to defraud Petitioner. *Id.* ¶ 28.⁹ However, like the other fraud allegations, Petitioner has
16 failed to plead with the requisite particularity, including the time, place and role each Respondent
17 allegedly had in the fraud. The Supplement also fails to identify **any** misrepresentation or
18 justifiable reliance. In addition to failing to satisfy the requirements of NRCP 9(b), Petitioner’s
19 claim fails to state a claim upon which relief can be granted. *See* NRCP 12(b)(5).

20 First, Petitioner has failed to plead any fraudulent misrepresentation or omission. The first
21 page of the Purchase Agreement states: “This agreement . . . is entered into this 31 day of May,
22 2013, and effective March 31, 2013. . . .” (Purchase Agreement at 1, Exhibit 4 to Petition to
23 Surcharge.) Petitioner does not allege that the Purchase Agreement was not actually entered into
24 on May 31, 2013. And, the Purchase Agreement **expressly** states that it is effective March 31,
25 2013. Thus, Petitioner’s claim fails as a matter of law because Petitioner cannot identify **any**

26 _____
27 ⁹ As an aside, the purpose of the “effective date” was to identify an initial asset valuation date. (Objection to Petition
28 to Surcharge ¶ 56, on file herein). The effective date had no impact upon the legal rights and duties of the parties
who entered into the Purchase Agreement. Indeed, it is common for asset purchase agreements to include an
execution date and an effective date.

1 misrepresentation or omission, let alone a fraudulent one. Petitioner's claim should be dismissed
2 for this reason alone.

3 Second, Petitioner has not and cannot plead justifiable reliance. As discussed above, the
4 trustees had the sole and absolute discretion to sell the Trust's assets by entering into the Purchase
5 Agreement. *See* (Trust Agreement at 6.01, Article VII(G), (X), Exhibit 1 to the Petition to
6 Surcharge, on file herein). This discretion necessarily included the terms upon which the assets
7 would be sold. *Id.* at Article VII(R) (giving the trustees the power "[t]o do all such acts, take all
8 such proceedings and exercise all such rights and privilege, although neither specifically
9 hereinabove mentioned nor conferred upon it by law, with relation to such property as if the
10 absolute owner thereof and in connection therewith to enter into any covenants or agreements
11 binding the trust estate."). Because the trustee had sole and absolute discretion to sell the Trust's
12 assets on terms he saw fit, Scott did not and could not have justifiably relied upon the effective
13 date of the Purchase Agreement. Although Scott may challenge Respondent's decision, the fraud
14 claim is frivolous because there simply is no misrepresentation or omission at issue.

15 Moreover, Petitioner's allegations are entirely illogical. The first page of the Purchase
16 Agreement expressly identifies that the Purchase Agreement is entered into as of May 31, 2013,
17 with an effective date of March 31, 2013. (Purchase Agreement at 1, Exhibit 4 to Petition to
18 Surcharge.) The number "31" and the month of "May" are handwritten on the Purchase
19 Agreement. If Respondents had truly intended to misrepresent the Purchase Agreement to
20 Petitioner, they could have simply made the actual date and the effective date identical.
21 Petitioner's attempt to characterize these express statements as "fraud" demonstrates Petitioner's
22 fundamental misunderstanding of what constitutes fraud under Nevada law.

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1 **D. The Supplement Fails to State a Viable Claim for Fraud Based on Information Sent**
2 **to Western Valuation Advisors**

3 Petitioner next claims that he was defrauded because the financial information relied upon
4 by Western Valuation Advisors is inconsistent with other financial information Petitioner
5 received during discovery. (Supplement ¶¶ 29-39.) However, aside from Petitioner's conclusion
6 of fraud, Petitioner has not identified a single misrepresentation that was made to Western
7 Valuation Advisors, when the misrepresentation occurred, which party allegedly made the
8 misrepresentation, in what capacity such party was acting, or why the representation was
9 allegedly false. Instead, Petitioner merely alleges that there are "discrepancies" in financial
10 documents that have been disclosed relating to the Purchased Entities. *Id.* ¶ 32. Petitioner does not
11 even allege that the documents containing the purported discrepancies were relied upon by
12 Western Valuation Advisors. Petitioner's inability to reconcile certain financial information falls
13 woefully short of pleading actionable fraud based on alleged misrepresentations of financial
14 information. Because Petitioner has not identified any misrepresentation made to Western
15 Valuation Advisors, his fraud claim fails as a matter of settled Nevada law.

16 Petitioner alleges that in late 2013, a court proceeding was commenced for the purpose of
17 appointing an independent expert to evaluate the purchase price under the Purchase Agreement.
18 (Supplement ¶ 29.) The parties later stipulated that the Trust would retain Stephen Nicolatus of
19 Western Valuation Advisors to conduct a valuation. *Id.* Petitioner alleges that "[d]espite such
20 stipulation, however, both parties further stipulated to reserve their respective positions as to the
21 determination of the Trustees' actions." *Id.* Petitioner claims that Mr. Nicolatus's valuation was
22 never contemplated to be binding on the parties. *Id.* ¶ 31.

23 Petitioner generally alleges that information *Petitioner received* during discovery is
24 contradictory and inconsistent. *Id.* ¶¶ 32-35. Specifically, Petitioner alleges that during discovery
25 he requested information in order to determine the accuracy of the records provided to Mr.
26 Nicolatus. *Id.* ¶ 32. Petitioner then asserts that he received a trial balance for 2012, 2013 and
27 partial 2013. *Id.* Petitioner claims (incorrectly) that these documents contradict one another and
28 that they cannot be reconciled with other financial information. *Id.* ¶ 32-33. Based on the

1 purported discrepancies, Petitioner alleges that Respondents perpetrated some unknown fraud. *Id.*
2 ¶ 38.

3 As a threshold matter, Petitioner's claim should be dismissed because it does not even
4 attempt to comply with the particularity requirements of NRCP 9(b). Pursuant to NRCP 9(b), an
5 allegation of fraud must state the specific content of the false representations at issue. *Risinger v.*
6 *SOC LLC*, 936 F. Supp. 2d 1235, 1242 (D. Nev. 2013) (citing *Sanford v. MemberWorks, Inc.*, 625
7 F.3d 550, 558 (9th Cir. 2010)); *W. Highland Mortg. Fund I, LLC v. Tahoe Reg'l Planning*
8 *Agency*, 993 F. Supp. 2d 1288, 1293 (D. Nev. 2014) (concluding a fraud claim is deficient where
9 it failed to identify the substance of the alleged fraud). And, Petitioner is required to plead the
10 time, the place, the identity of the parties involved, and the nature of the alleged fraud. *Brown*, 97
11 Nev. at 583-84, 636 P.2d at 874.

12 Here, Petitioner does not identify **any** false information that was provided to, and relied
13 upon by, Western Valuation Advisors. Petitioner does not explain who provided the information,
14 why the information was allegedly false, or what impact the alleged misrepresentation had on the
15 valuation. In other words, Petitioner is merely speculating that fraud must have occurred because
16 Petitioner himself cannot confirm the accuracy of the Western Financial Advisors valuation based
17 on certain trial balances that were produced during discovery. Importantly, Petitioner does not
18 even allege that Western Financial Advisors relied upon these trial balances in conducting its
19 valuation. Petitioner's allegations are grossly deficient to state a claim for fraud under NRCP
20 9(b).

21 More importantly, Petitioner's fraud claim fails as a matter of law. It is axiomatic that a
22 claim for fraud requires Petitioner to identify a false representation. *See Barmettler*, 114 Nev. at
23 447, 956 P.2d at 1386. Here, Petitioner concludes that Respondents have engaged in "fraud" with
24 respect to the financial information provided to Western Valuation Advisors. (Supplement to
25 Petition to Surcharge ¶¶ 38). However, Petitioner has not alleged that a single false statement was
26 provided to Western Valuation Advisors. Instead, Petitioner merely alleges that certain trial
27 balances **obtained by Petitioner** during discovery are irreconcilable and inconsistent.

28 ///

1 (Supplement to Petition to Surcharge ¶¶ 32 - 35). Petitioner does not even allege that the trial
2 balances at issue were ever provided to Western Valuation Advisors.

3 Petitioner has also failed to demonstrate that Western Valuation Advisors relied on any
4 alleged false statement in reaching the valuation. A claim for fraud fails as a matter of law absent
5 a showing of justifiable reliance. *See Collins*, 103 Nev. at 397, 741 P.2d at 821.

6 Furthermore, even assuming the trial balances at issue were provided to and relied upon
7 by Western Valuation Advisors, Petitioner has utterly failed to allege that any information is false
8 or why such information is false. Petitioner's inability to reconcile financial statements does not
9 support a conclusion that some unidentified financial information provided to Western Valuation
10 Advisors is somehow false or fraudulent.

11 It should also be noted that the Supplement does not allege that Western Valuation
12 Advisors was unable to reconcile the financial information. To the contrary, the fact that Western
13 Valuation Advisors ultimately rendered a report demonstrates that it was satisfied with the
14 information that was provided. *See id.* ¶ 31.

15 Finally, Petitioner has gone to great lengths to argue that Mr. Nicolatus was a neutral
16 valuation expert and not Petitioner's expert. (Petitioner's Surreply to Reply in Support of Motion
17 for Judgment on the Pleadings at 6 – 8, on file herein) (arguing, at length, that Mr. Nicolatus is
18 not Scott's expert). If Mr. Nicolatus is not Scott's agent, Scott cannot maintain a claim of fraud
19 because he cannot demonstrate that he relied upon any misrepresentation made to Western
20 Valuation Advisors. *Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 829, 59 N.E.3d
21 485, *reargument denied*, 28 N.Y.3d 956, 60 N.E.3d 421 (2016) (concluding that fraud cannot be
22 demonstrated by showing the reliance of a third party, rather than the plaintiff); 37 C.J.S. Fraud §
23 59. Thus, in the event Scott prevails on his position that Mr. Nicolatus is a neutral third party and
24 he continues to challenge the valuation prepared by Western Valuation Advisors, his fraud claim
25 necessarily fails and must be dismissed for this reason alone. *See* (Supplement ¶¶ 29-39)
26 (challenging Mr. Nicolatus's valuation).

27 Aside from the above, Petitioner also improperly relies upon (and blatantly misrepresents)
28 an attorney-client communication that was inadvertently disclosed by Respondents. (Supplement

¶ 37) (citing Exhibit 4). On June 5, 2018, Respondents informed Petitioner that this document is clearly an attorney-client privileged communication and asked Petitioner's counsel to confirm that all copies have been destroyed. (June 5, 2018, Letter, **Exhibit 1**). However, Petitioner's counsel, has claimed Respondents waived any privilege associated with this document. (June 18, 2018, Letter, **Exhibit 2**.) Respondents' adamantly dispute Petitioner's position, which will likely be an issue for the Court to resolve.

In short, Petitioner's fraud claim is untenable. Petitioner's allegations fall far short of the requirement to plead fraud with particularity. *See* NRCP 9(b). And, the claim is substantively deficient for failing to allege that any false information was provided or relied upon to Petitioner's detriment. Petitioner simply alleges that he cannot reconcile the financial statements. Petitioner's failure to plead the precise misrepresentations that occurred, that Respondents knew the representations were false, or that Petitioner allegedly relied on such misrepresentation is fatal to his claim. *See Brown*, 97 Nev. at 583–84, 636 P.2d at 874.

E. The Supplement Fails to State a Viable Claim for Fraud or Negligent Misrepresentation Based on the Inclusion of the AWH Ventures Receivable of the Trust in the Value of the Corporate Interests

Petitioner next alleges that he was somehow defrauded by Respondents because Western Valuation Advisors included the "AWH Ventures receivable in excess of \$5 million with the combined value of the Corporate Interests." (Supplement ¶¶ 40-41). According to Petitioner, Respondents either directly or indirectly instructed Mr. Nicolatus to include this receivable in his valuation. *Id.* ¶ 40. Petitioner believes that the receivable should not have been included in the calculation. *Id.* And, Petitioner alleges that the inclusion of the receivable somehow constitutes fraud (actual or constructive) and negligent misrepresentation. *Id.* ¶ 41. Again, however, Petitioner's allegations fall woefully short of an actionable claim for fraud or negligent misrepresentation.

First, Petitioner has not even come close to pleading an actionable claim for fraud. Petitioner has not alleged any misrepresentation or fraudulent omission. To the contrary, Petitioner expressly alleges that Mr. Nicolatus was retained to provide an **independent** valuation.

1 *Id.* ¶ 29. Notwithstanding Petitioner’s allegation that Respondents directed Mr. Nicolatus to
2 include the receivable, *id.* ¶ 40, it was Mr. Nicolatus who ultimately determined to include the \$5
3 million receivable in his valuation report, *id.* ¶¶ 29, 31. Furthermore, the Purchase Agreement
4 clearly identifies this receivable as being purchased by the Siblings’ Trusts (and no other parties).
5 (Purchase Agreement at Exhibit A, Exhibit 4 to Petition to Surcharge). And, contrary to NRCP
6 9(b), Petitioner fails to allege the precise person who allegedly directed Mr. Nicolatus and the
7 circumstances under which this occurred.

8 Furthermore, Petitioner admits that he was aware Mr. Nicolatus included the \$5 million
9 receivable in his valuation. *Id.* ¶ 40-41. The fact that Petitioner disagrees with Mr. Nicolatus
10 regarding whether the receivable should be included does not demonstrate that any false
11 representation was ever made. Petitioner does not and cannot allege that Respondents somehow
12 hid or obscured the basis for Mr. Nicolatus’s report.

13 In addition to failing to allege any false representation, Petitioner also failed to allege
14 justifiable reliance. *See Collins*, 103 Nev. at 397, 741 P.2d at 821. Absent such an allegation,
15 Petitioner’s claim fails as a matter of law.

16 In addition to the fraud-based claims, any claim for negligent misrepresentation also fails
17 as a matter of law. To plead a viable claim for negligent misrepresentation, Petitioner must allege
18 the following: (1) Respondents, in the course of an action in which they had a pecuniary interest,
19 failed to exercise reasonable care or competence in obtaining or communicating information to
20 Petitioner; (2) Petitioner justifiably relied on this information; and (3) Petitioner suffered damages
21 as a result. *Barmettler*, 114 Nev. at 449, 956 P.2d at 1387 (citing Restatement (Second) of Torts
22 552). “In Nevada, negligent misrepresentation and fraudulent misrepresentation both require that
23 the defendant supply ‘false information,’ or make a “false representation.” *Guilfoyle v. Olde*
24 *Monmouth Stock Transfer Co.*, 130 Nev. Adv. Op. 78, 335 P.3d 190, 197 (2014) (citations
25 omitted). In addition, “[b]oth causes of action require a showing that damages resulted from the
26 tortious misrepresentations.” *Foster v. Dingwall*, 126 Nev. 56, 71, 227 P.3d 1042, 1052 (2010)
27 (citation omitted).

28 ///

1 In the case *sub judice*, Petitioner's negligent misrepresentation claim fails for the same
2 reason as his fraud claims. Petitioner simply cannot show any false representation, justifiable
3 reliance, or damages. As discussed above, there is no misrepresentation in the valuation report.
4 Mr. Nicolatus expressly made the decision to include the receivable as part of the valuation.
5 Petitioner's disagreement with that decision does not mean that the report was somehow procured
6 through fraud. Thus, there are no damages resulting from any alleged reliance on an alleged
7 misrepresentation.

8 **F. The Supplement Fails to State a Viable Claim for Fraud or Negligent**
9 **Misrepresentation Based on the Preparation of the Trust's Financials and**
10 **Compilations**

11 Finally, Petitioner alleges that Respondents defrauded him by misrepresenting the value of
12 the Trust's assets and transactions in the Trust's financials and compilations. (Supplement ¶ 47.)
13 Although Petitioner alleges fraud, Petitioner made no effort whatsoever to plead his claim with
14 particularity as required by NRCP 9(b). Petitioner does not even identify the specific document
15 that contains a misrepresentation, let alone that Respondents knew the representation was false,
16 that Petitioner relied on the misrepresentation, or that Petitioner was damaged as a result of such
17 reliance.

18 Petitioner alleges that on or about September 27, 2016, "Respondents" submitted
19 "accountings" of the Trust for the time period between 1998 and 2013. (Supplement ¶ 43.)
20 Petitioner again fails to identify which "Respondents" submitted these accountings to Petitioner.
21 Petitioner claims that these new accountings were actually compilations as opposed to audited
22 financial statements. *Id.* Petitioner claims that the information in the "compilations" cannot be
23 reconciled with the Trust's audited financial statements, including the following: "a. Differences
24 in the beginning balances of related party loans; b. Differences in the ending balances of related
25 party loans; c. Differences in the beginning values of the Colorado land holdings; and d.
26 Differences in the ending values of the Colorado land holdings." *Id.*

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28 ///

1 Petitioner alleges that he subsequently received accountings for the time periods of 2014,
2 2015, and 2016. *Id.* ¶ 45. Petitioner then identifies four issues he is raising with respect to these
3 accountings, none of which allege any misrepresentations or fraudulent omissions. *Id.*

4 Based on these allegations, Petitioner concludes that Respondents made false
5 representations in preparing the Trust's compilations and audited financial statements. *Id.* ¶ 47.
6 Petitioner boldly claims that such false statements were fraudulent and that he suffered damages
7 as a result of such statements. *Id.*

8 Petitioner's vague allegations of fraud are insufficient to state an actionable claim. As
9 discussed throughout this brief, allegations of fraud must be plead with particularity. *See* NRC
10 9(b). To meet this requirement, "[t]he plaintiff must set forth what is false or misleading about a
11 statement, and why it is false. In other words, the plaintiff must set forth an explanation as to why
12 the statement or omission complained of was false or misleading. *Yourish v. California Amplifier*,
13 191 F.3d 983, 993 (9th Cir. 1999).

14 In this case, Petitioner has generally alleged that misrepresentations were made
15 somewhere in the "compilations" of the Trust for 1998-2013 or somewhere in the audited
16 financial statements for 2014, 2015, and 2016. Petitioner makes absolutely no attempt to identify
17 the precise statement that was false, how it was false, or that Respondents knew the statement was
18 false. Petitioner also fails to allege that he justifiably relied on any alleged false statement and
19 how such reliance allegedly damaged Petitioner.

20 Petitioner cannot generally point to **nineteen years** of financial statements and conclude
21 without explanation that some unknown representations in those financial statement are false and
22 fraudulent for some unknown reasons. "[A] pleader's general assertion of his opponent's 'fraud'
23 or 'fraudulent conduct' or some other conclusory variant serves no informative function for either
24 the district court or the defendant and therefore is insufficient under Rule 9(b) to raise an issue as
25 to fraud without something more by way of supporting particulars." 5A Fed. Prac. & Proc. Civ. §
26 1298 (3d ed.). Simply put, Petitioner has failed to properly allege facts that, if true, would
27 establish a claim for fraud.

28 ///

Petitioner's claim is equally defective with respect to negligent misrepresentation. Specifically, Petitioner has failed to put Respondents on notice regarding the misrepresentation that was allegedly made. *See* NRCP 8(a) (requiring a pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief."). Based on the allegations in the Supplement, Respondents have no idea what false representations were allegedly made in **nineteen years** of financial statements or why such statements are allegedly false. Indeed, Petitioner merely alleges that he will disclose "these inconsistencies relating to the financial information" during "the ordinary course of litigation." (Supplement ¶ 46). This is insufficient to provide Respondents with notice of the claim for relief. Petitioner's claim also utterly fails to allege justifiable reliance and how Petitioner was allegedly damaged as a result of such reliance. *See Barmettler*, 114 Nev. at 449, 956 P.2d at 1387.

V. CONCLUSION

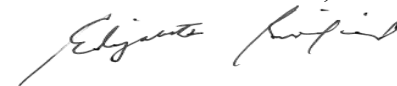
Based on all the foregoing, Respondents respectfully request that the Court dismiss Petitioner's Supplement and Errata thereto for failure to state a claim upon which relief can be granted.

DATED this 29th day of June 2018.

CAMPBELL & WILLIAMS
J. Colby Williams (NSB#5549)
700 S. Seventh Street
Las Vegas, NV 89101
jcw@campbellandwilliams.com

and

DICKINSON WRIGHT, PLLC



Elizabeth Brickfield, Esq. (NSB #6236)
Joel Z. Schwarz, Esq. (NSB #9181)
8363 W. Sunset Road, Suite 200
Las Vegas, Nevada 89113
Telephone: (702) 550-4400
Facsimile: (844) 670-6009
ebrickfield@dickinsonwright.com
jschwarz@dickinsonwright.com
Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June, 2018 I caused a true and correct copy of the foregoing **MOTION TO DISMISS PETITIONER'S SUPPLEMENT TO PETITION TO SURCHARGE TRUSTEE AND FORMER TRUSTEES FOR BREACH OF FIDUCIARY DUTIES, CONSPIRACY AND AIDING AND ABETTING; PETITION FOR BREACH OF FIDUCIARY DUTY FOR FAILURE TO PROPERTY ACCOUNT; and PETITION FOR AN AWARD OF ATTORNEY FEES, ACCOUNTANT FEES AND COSTS** to be served through the Eighth Judicial District Court's electronic filing system, to the following parties:

Dana Dwiggins, Esq.
Alexander LeVeque, Esq.
Tess Johnson, Esq.
SOLOMON DWIGGINS & FREER, LTD
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
ddwiggins@sdfnvlaw.com
aleveque@sdfnvlaw.com
tjohnson@sdfnvlaw.com
Counsel for Scott Canarelli



An employee of Dickinson Wright PLLC

Exhibit “1”

Exhibit “1”

June 5, 2018

VIA E-MAIL and U.S. Mail

ddwiggins@sdfnvlaw.com

tjohnson@sdfnvlaw.com

Dana Dwiggins, Esq.
Tess Johnson, Esq.
Solomon Dwiggins & Freer, Ltd.
9060 West Cheyenne Avenue
Las Vegas, NV 89129

Re: Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the "Trust")
District Court Case No. P-13-078912-T

Dear Counsel:

In reviewing your recently-filed Supplement to Petition and the Errata thereto, we see that you have attached as an exhibit document Bates No. **RESP013284-RESP013288**. This document is clearly an attorney-client privileged and attorney work product-protected document which was inadvertently produced by Respondents. By **Friday, June 8, 2018**, please:

(1) Confirm your agreement that the document is privileged and that you will enter into a stipulation to redact all references to the document from your pleading and seal the exhibit in the already-filed pleading; and

(2) Return the document to us and confirm that all copies in your possession have been destroyed.

Separately, in reviewing documents for Respondents' supplemental disclosure of today's date, we have identified detailed billings from your firm to Scott which were provided to Mr. Lubbers. We have not reviewed these documents, copies of which are being sent to you on a second separate FTP link. Please review the documents and advise us of your position regarding the documents at your earliest convenience.

Lastly, in response to your letter dated June 1, 2018, the Documents Bates Nos. RESP0087114-RESP0087115 were inaccurately designated as responsive to certain requests for production to Lubbers. As we advised you on May 10, 2018, those documents are not responsive and, in addition, are communications with counsel during the course of litigation. As such, they have been removed from Lubbers' most recent supplemental responses. Moreover, as we previously discussed, the parties in this matter are not seeking, and accordingly have not been logging, communications with their counsel during the course of the litigation. Thus, there is no need for Respondents to provide the records or amend their privilege log.

Dana Dwiggins, Esq.
Tess Johnson, Esq.
June 5, 2018
Page 2

Thank you for your prompt attention to this matter.

Sincerely,



Elizabeth Brickfield

JZS:lms

cc: Joel Z. Schwarz, Esq.
J. Colby Williams, Esq.
Jennifer Braster, Esq.

Exhibit “2”

Exhibit “2”



SOLOMON | DWIGGINS | FREER^{LTD}

TRUST AND ESTATE ATTORNEYS

Mark A. Solomon
Dana A. Dwiggin
Alan D. Freer
Brian K. Steadman
Steven E. Hollingworth
Brian P. Eagan
Jeffrey P. Luszeck
Alexander G. LeVeque

Cheyenne West Professional Centre
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129

Telephone: 702.853.5483
Facsimile: 702.853.5485

Ross E. Evans
Jordanna L. Evans
Joshua M. Hood
Craig D. Friedel
Tess E. Johnson
Justin W. Wilson

Direct Dial (702) 589-3505
ddwiggin@sdfnlaw.com

June 18, 2018

Via EMAIL ONLY

Elizabeth Brickfield, Esq.
Joel Z. Schwarz, Esq.
Dickinson Wright
8636 West Sunset Road, Suite 200
Las Vegas, Nevada 89113
Email: ebrickfield@dicksonwright.com
jschwarz@dickinsonwright.com

Re: *Scott Lyle Graves Canarelli Irrevocable Trust*, Case No. P-13-078912-T

Dear Ms. Brickfield and Mr. Schwarz,

This letter is in response to your June 12, 2018 letter, wherein you restate your demand that I “immediately confirm the privileged nature of this document” and return the records to your office. Having reviewed RESP013284-RESP013288 yet again, I disagree with your contention that these records are protected. Notwithstanding your unsupported claims, even if a privilege ever applied to these documents, which we assert it did not, such protection has been waived.

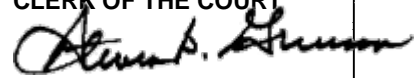
As a result of the dispute as to RESP013284-RESP013288, I will instruct my office to sequester the document until a determination is made as to the privileged nature of these records. At this time, I request that you advise as to your availability to conduct a meet and confer **by Monday June 25, 2018**, pursuant to the ESI Protocol.

Sincerely,

Dana A. Dwiggin

cc: client
Colby Williams, Esq., Philip R. Erwin, Esq., *via email only*

3



1 **OPP**

2 Dana A. Dwiggins (#7049)
3 Jeffrey P. Luszeck (#9619)
4 Tess E. Johnson (#13511)
5 Craig D. Friedel (#13873)
6 SOLOMON DWIGGINS & FREER, LTD.
7 9060 West Cheyenne Avenue
8 Las Vegas, Nevada 89129
9 Telephone: (702) 853-5483
10 Facsimile: (702) 853-5485
11 ddwiggins@sdfnlaw.com
12 jluszeck@sdfnlaw.com
13 tjohnson@sdfnlaw.com

14 *Attorneys for Scott Canarelli*

15 **DISTRICT COURT**
16 **CLARK COUNTY, NEVADA**

17 In the Matter of

Case No.: P-13-078912-T
Dept. No.: XXVI/Probate

18 THE SCOTT LYLE GRAVES
19 CANARELLI IRREVOCABLE TRUST,
20 dated February 24, 1998.

Hearing Date: August 16, 2018
Hearing Time: 9:30 a.m.

21 **OPPOSITION TO MOTION TO DISMISS PETITIONER'S SUPPLEMENT TO**
22 **PETITION TO SURCHARGE TRUSTEE AND FORMER TRUSTEES FOR BREACH OF**
23 **FIDUCIARY DUTIES, CONSPIRACY AND AIDING AND ABETTING; PETITION FOR**
24 **BREACH OF FIDUCIARY DUTY FOR FAILURE TO PROPERLY ACCOUNT; and**
25 **PETITION FOR AN AWARD OF ATTORNEYS' FEES, ACCOUNTANT FEES & COSTS**

26 Petitioner, Scott Canarelli ("Petitioner"), grantor and beneficiary of The Scott Lyle Graves
27 Canarelli Irrevocable Trust, dated February 24, 1998 (the "SCIT" or "the Trust"), by and through
28 his Counsel, the law firm of Solomon Dwiggins & Freer, Ltd., hereby files his Opposition to
Respondents' *Motion to Dismiss Petitioner's Supplement to Petition to Surcharge Trustee and
Former Trustees for Breach of Fiduciary Duties, Conspiracy and Aiding and Abetting; Petition
for Breach of Fiduciary Duty for Failure to Properly Account; and Petition for an Award of
Attorney's Fees, Accountant Fees and Costs* ("Motion to Dismiss").

1 This Opposition is made and based on the Memorandum of Points and Authorities set
2 forth herein, all of the papers and pleadings already on file with the Court, and any oral argument
3 that the Court may entertain at the time of hearing.

4 DATED this 31 day of July, 2018.

5 SOLOMON DWIGGINS & FREER, LTD.

6
7 By: 

8 Dana A. Dwiggin, Esq., Bar No. 007049
9 Jeffrey P. Luszeck, Esq., Bar No. 9619
10 Craig D. Friedel, Esq., Bar No. 13873
11 9060 West Cheyenne Avenue
12 Las Vegas, Nevada 89129

Attorneys for Scott Canarelli

13 MEMORANDUM OF POINTS AND AUTHORITIES

14 I. INTRODUCTION

15 Respondents erroneously assert that the Supplemental Surcharge Petition must be
16 dismissed in its entirety because its fraud related claims fail as a matter of law and are not plead
17 with particularity. As a preliminary matter, the Motion to Dismiss does not address the breach of
18 fiduciary duty, aiding and abetting, and conspiracy claims asserted in the Supplemental Surcharge
19 Petition nor, as outlined in each section below, does it individually address many of the various
20 types of fraud alleged as to each underlying wrongdoing. Accordingly, Respondents' Motion to
21 Dismiss the Supplemental Surcharge Petition in its entirety fails as a matter of law because it only
22 addresses a small subset of the claims alleged therein.

23 With regard to the merits, Respondents have failed to meet their burden of demonstrating
24 that "it appears beyond a doubt that [Petitioner] could prove no set of facts, which, if true, would
25 entitle him to relief." *See, e.g., Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28,
26 181 P.3d 670, 672 (2008). Indeed, as set forth in Sections IV(A) -(D) herein, Petitioner has
27 delineated how each element of such claim has been properly alleged by Petitioner and relied
28 upon the combined 63 pages of the Surcharge Petition and Supplemental Surcharge Petition,

1 along with hundreds of pages of exhibits incorporated therein. As to each claim specifically
2 addressed in the Motion to Dismiss, Petitioner also responds, in part, by providing a sentence that
3 generally avers the time, place, identity of the parties involved and the nature of the claim.

4 In an effort to circumvent this reality, however, the Motion to Dismiss sets up straw men
5 arguments by mispresenting the nature of the claim alleged by Petitioner and/or conclusory
6 stating that an element has not been alleged when, in fact, it demonstrably was in the
7 Supplemental Surcharge Petition. Respondents also repeatedly attempt to persuade this Court that
8 certain allegations are not true, when this Court is obligated under the motion to dismiss standards
9 to assume the truth of such allegations.

10 Notwithstanding, to the extent that this Court nonetheless determines that a particular
11 claim was not pled with particularity, Petitioner should be permitted to conduct further discovery
12 in lieu of dismissal, because the facts required to pled with more particularity are peculiarly
13 within the Respondents' knowledge as set forth *infra* at Section IV(E). Ironically, Respondents
14 have repeatedly blocked Petitioner's efforts for over seven (7) months since this litigation
15 commenced, alone, to obtain complete and accurate financial information for the Purchased
16 Entities. The only financial information of the Purchased Entities Respondents provided to
17 Stephen Nicolatus were trial balances; however, such financial information, alone, does not
18 accurately disclose the financial affairs of the company. Despite such aggressive stonewalling,
19 Respondents' Motion to Dismiss can be summarized in simple terms:

20 "Petitioner cannot satisfy the heightened pleading standard for the
21 various fraud claims because the necessary information to prove
22 such claims and damages are within the exclusive control of
23 Respondents. So long as Respondents continually refuse to provide
24 such information, or only partially do so in response to a Court order
25 compelling them to do so, Respondents cannot be held liable."

26 For the reasons set forth herein, this Court should deny the Motion to Dismiss in its entirety.

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1 **II. STATEMENT OF FACTS**

2 Petitioner fully incorporates herein by reference all allegations, facts, and exhibits
3 contained in the Petition to Surcharge filed on June 27, 2017 ("Surcharge Petition"), Reply
4 thereto filed September 15, 2017 ("Reply"), Supplement to Surcharge Petition filed May 18, 2018
5 ("Supplemental Surcharge Petition"), Errata thereto ("Errata") and Objection to Surcharge
6 Petition filed on August 9, 2018, which collectively constitute the substantive pleadings in this
7 matter.¹ Notwithstanding, for this Court's convenience, Petitioner provides the following brief
8 summary of relevant facts, as previously alleged:

9 **A. CREATION OF THE SCIT AND APPOINTMENT OF TRUSTEES**

10 On February 24, 1998, Petitioner established the SCIT as settlor. Lawrence Canarelli
11 ("Larry") and Heidi Canarelli ("Heidi") (collectively, the "Canarellis") were appointed as the
12 initial "Family Trustees" of the SCIT. *See* Surcharge Petition at ¶ 1. In or about 2005, Edward
13 Lubbers ("Lubbers"), Larry and Heidi's long-time attorney and confidant, was appointed in his
14 stead. *See id.* at ¶ 3. Upon information and belief, at that time Larry and Heidi were Lubbers'
15 primary clients and a substantial portion of his practice was devoted to assisting Larry and Heidi
16 and/or their business entities and trusts with their various legal needs. *See id.*

17 Pursuant to Articles 8.02 and 8.04 of the SCIT, the Canarellis purportedly resigned as
18 Family Trustees of the SCIT and jointly appointed Lubbers as their successor effective as of May
19 24, 2013, at 5:00 p.m. *See id.* at ¶ 17. Lubbers thereafter began serving and continued to serve as
20 both the Family Trustee (and the Independent Trustee) of the SCIT from May 24, 2013 until this
21 Court suspended him in such capacities on or about October 12, 2017 and appointed Premier
22 Trust.

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25 ¹ *See, e.g.,* NRCP 10(c) ("Statements in a pleading may be adopted by reference in a
26 different part of the same pleading or in another pleading or in any motion. A copy of any written
27 instrument which is an exhibit to a pleading is a part thereof for all purposes."); *L-7 Designs, Inc.*
28 *v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) ("A complaint is [also] deemed to include
any written instrument attached to it as an exhibit, materials incorporated in it by reference, and
documents that, although not incorporated by reference, are 'integral' to the complaint.").

1 **B. RESPONDENTS' CONCEALED THE SALE THE SCIT'S ASSETS,**
2 **MISREPRESENTED THE PURPOSE FOR ENTERING INTO THE**
3 **PURCHASE AGREEMENT AND MISREPRESENTED THE PURPOSE OF**
 MAKING THE EFFECTIVE DATE OF THE PURCHASE AGREEMENT
 MARCH 31, 2013.

4 On or about May 31, 2013, Respondents entered into an agreement ("Purchase
5 Agreement") for the sale of the SCIT's interest in the LLCs and the Corporations to: (i) SJA
6 Acquisitions, LLC ("SJA"), a Nevada limited liability company established and directly or
7 indirectly controlled by Larry² for the benefit of his remaining three children, to wit: Stacia Leigh
8 Lemke, Jeffrey Larry Graves Canarelli and Alyssa Lawren Graves Canarelli; and (ii) mirror
9 irrevocable trusts for the benefit of Petitioner's three siblings (collectively "Sibling Trusts").³

10 The various claims related to the Purchase Agreement revolve around three primary issues
11 and allegations. First, without Petitioner's knowledge or consent, Respondents decided to cause
12 financial harm to Petitioner by selling all of the SCIT's interests in corporations and limited-
13 liability companies that largely comprise the Nevada home building operation commonly known
14 as "American West" (collectively, the "Purchased Entities") under circumstances where
15 Respondents were not only under a duty to disclose the sale in their capacities as the Family
16 Trustees and/or Former Trustees, but during a time when the real estate market was recovering
17 from the recession and for an amount that did not represent an accurate value of the SCIT's
18 interest in the Purchased Entities.

19 Respondents falsely further represented that the rationale for entering into the Purchase
20 Agreement was the inability of the Purchased Entities to make requested distributions to the SCIT
21 due to the then existing (and contemplated new) Credit Agreement's provisions and the SCIT's
22 lack of liquidity.⁴ Notwithstanding such "rationale" that was expressly stated in the Purchase
23

24 ² Significantly, the Canarellis served as the Family Trustees of each of the Sibling Trusts
25 and, based upon information and belief, continue to serve as the Family Trustees of the Sibling
26 Trusts and manager, officer or director of SJA, Purchased Entities and other entities that
 compromise the "American West Group."

27 ³ See Surcharge Petition, at Ex. 4, Purchase Agreement.

28 ⁴ *Id.* at Recitals D and I.

1 Agreement, in reality: 1) the SCIT received approximately a total of \$1.55 million in distributions
2 from Canfam Holdings, LLC **shortly before** the Purchase Agreement was executed on or about
3 May 31, 2013, alone;⁵ and (2) Respondents' agent, Robert Evans ("Evans"), represented on July
4 31, 2012 that the SCIT had sufficient liquidity to purchase a \$1.5 million ranch property in
5 Colorado.⁶

6 Additionally, Respondents falsely represented that the purpose for making the effective
7 date of the Purchase Agreement retroactive from May 31, 2013 (when it was executed) to March
8 31, 2013 ("Effective Date") was to arbitrarily identify "an initial asset valuation date" and that the
9 Effective Date "had no impact upon the legal rights and duties of the parties who entered into the
10 Purchase Agreement."⁷ Despite the foregoing, Respondents were under a duty to disclose⁸ the
11 impact upon Petitioner and the SCIT in making the Purchase Agreement retroactive but
12 intentionally failed to do so. The true motive and impact of making the Effective Date retroactive
13 was to allow Respondents to cause additional financial harm to Petitioner by depriving him of
14 significant distributions made during such time.⁹

15 **C. RESPONDENTS COMMITTED VARIOUS FORMS OF FRAUD AS IT**
16 **RELATES TO PROVIDING FALSE OR MISLEADING FINANCIAL**
17 **INFORMATION TO THE THIRD PARTY EVALUATOR OF THE**
18 **PURCHASED ENTITIES.**

19 Subsequent to Petitioner learning of the sale in or about June 2013, a court proceeding was
20 commenced for the purposes of appointing an independent third-party analyst to determine the
21 Purchase Price in accordance with the terms of the Purchase Agreement. The Parties later
22 stipulated that the SCIT would retain Stephen Nicolatus of Western Valuation Advisors

23 ⁵ See Supplemental Surcharge at ¶ 21. Respondents subsequently reversed these
distributions, claiming that they were made in error before of the Effective Date.

24 ⁶ See Supplemental Surcharge Petition at 12:9-19.

25 ⁷ See Objection to Surcharge Petition at ¶ 56; Motion to Dismiss at footnote 9.

26 ⁸ See *infra* at 13:13-14:10.

27 ⁹ See Supplemental Surcharge Petition at ¶ 26.

1 (“Nicolatus” or “WVA”) to conduct the valuation of the Purchased Entities. From when the
2 Parties retained WVA on or around December 19, 2013 to the date the valuation of the Purchased
3 Entities by WVA was completed on or around December 31, 2014, Respondents, either directly
4 or indirectly through their agents, namely Evans provided all of the financial information related
5 to the SCIT and Purchased Entities to WVA, answered all questions posed by WVA, provided
6 certain instructions and made certain representations.¹⁰ As outlined in greater detail below,
7 Petitioner contends that such financial information contained numerous false representations and
8 were not otherwise accurate or complete; however, representations were made to WVA to the
9 contrary, resulting in a substantial reduction of the value of the Purchased Entities to Petitioner’s
10 detriment.

11 **D. RESPONDENTS MISREPRESENTED THE VALUE OF THE ASSETS**
12 **AND TRANSACTIONS OF THE SCIT IN THE “ACCOUNTINGS”.**

13 Daniel Gerety, CPA (“Gerety”) was retained by Petitioner for the purposes of analyzing
14 various financial information of the SCIT provided by Respondents between the time period of
15 1998 through 2013 (“SCIT Financials”). Based on such information, Gerety provided three (3)
16 separate opinions over the course of fifteen (15) months, and in summary, opined that there were
17 too many discrepancies between the income tax returns, financial statements and general ledgers,
18 which made it impossible to reconstruct a full Accounting for the purposes of reconciling the
19 opening and ending inventory, the cash receipts and disbursements of the SCIT. In an effort to
20 resolve his concerns, Gerety directly communicated with Evans over the course of several
21 months; however, Gerety was ultimately not provided with the requisite information and this
22 litigation resulted.

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24 ¹⁰ See Supplemental Surcharge Petition at ¶ 29 (indicating that WVA was retained in or
25 around December 19, 2013); *Id.* at ¶ 30 (“Respondents finally provided the information necessary
26 for the Valuation, which primarily included [list of specific financial documents provided]” *Id.* at
27 ¶ 31 (“As a result of the limited information provided to him, Mr. Nicolatus submitted several
28 questions to respondents, which were predominantly answered by Robert Evans”); *Id.* at ¶ 40
29 (“...in rendering such opinion and pursuant to Respondent’s direction, the ‘overvalue’ determined
30 by Mr. Nicolatus included a shortfall on the AWH receivable in the amount of \$899,702.00.”);
31 Surcharge Petition at Ex. 12 (WVA valuation of the purchased entities dated December 31, 2014).

Prior to the filing of the Surcharge Petition, however, on or about September 27, 2016, Respondents submitted to Petitioner "Accountings" of the SCIT for the time period between 1998 and 2013. These new accountings were compilations (rather than audited financial statements) of the SCIT ("SCIT Compilations"), and, upon information and belief, appear to be based upon the trial balances for the Purchased Entities for the period of January 1, 2012 through December 31, 2012 ("2012 PE Trial Balance") and trial balance for the SCIT for the same period ("2012 SCIT Trial Balance"). Petitioner has alleged that the SCIT Financials and SCIT Compilations contain so many discrepancies and lack supporting documentation, resulting in Respondents misrepresenting the value of the assets and transactions of the SCIT, including the value of each of the Purchased Entities subject to the Purchase Agreement.

E. SURCHARGE PETITION AND SUPPLEMENTAL SURCHARGE PETITION THERETO.

As a result of the partial discovery produced thus far by Respondents and the Purchased Entities, on or around May 18, 2018, Petitioner filed his Supplemental Surcharge Petition to primarily assert various claims of fraud, including fraudulent misrepresentation, negligent misrepresentation, constructive fraud, and fraudulent concealment, in addition to the claims for breach of fiduciary duty, conspiracy and aiding and abetting previously asserted in the Surcharge Petition. On June 29, 2018, Respondents filed a Motion to Dismiss the Supplemental Surcharge Petition and Errata thereto in its entirety, thereby necessitating the instant Opposition.

III. LEGAL STANDARD

Respondents erroneously assert that the Supplemental Surcharge Petition must be dismissed in its entirety because its fraud related claims are not pled with particularity and fail as a matter of law. In so contending, Respondents completely ignore the fact that: (1) such allegations place them on sufficient notice of Petitioner's claims; (2) Respondents are exclusively in possession, either directly or indirectly, of the information that would allow Petitioner to plead the claims with more specificity; and (3) Respondents have failed and otherwise refused to produce the financial information requested by Petitioner.

A. Standard for Motion to Dismiss.

Respondents' Motion to Dismiss under NRCP 12(b)(5) should not be granted unless "it appears beyond a doubt that Petitioner could prove no set of facts, which, if true, would entitle him to relief." *See, e.g., Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008). In undertaking such analysis, this Court must recognize all factual allegations in the Supplemental Surcharge Petition as true and draw all inferences in Petitioner's favor, *id.*, and "...the pleading of conclusions, either of law or fact, is sufficient so long as the pleading gives fair notice of the nature and basis of the claim." *Crucil v. Carson City*, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979). Importantly, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. *Jackson v. Carey*, 353 F.3d 750, 755 (9th Cir. 2003) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (U.S. 1974)).

B. Standard for Pleading Fraud with Particularity.

While it is true that with claims involving fraud, "the circumstances constituting fraud ... shall be stated with particularity," including "averments to the time, the place, the identity of the parties involved, and the nature of the fraud," averments as "to malice, intent, knowledge, and other conditions of mind of a person may be averred generally."¹¹ Thus, for example, as to a basic fraud claim, two of the four elements (*i.e.* that the defendant **knew** that the representation were false and **intended** to induce Petitioner to act in reliance thereon) can be alleged generally. Indeed, the heightened pleading requirements for fraud does not require a plaintiff to be omniscient¹² nor does it impose on the pleader a burden of highly detailed averments.¹³ Further,

¹¹ NRCP 9(b). *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9th Cir. 1994) (In rejecting the Second Circuits requirement of "strong inferences" of scienter, the court holds "that plaintiffs may aver scienter generally, just as the rule states—that is, simply by saying that scienter existed."); *Walling v. Beverly Enterprises*, 476 F.2d 393, 397 (9th Cir. 1973) ("Nor does Rule 9(b) require any particularity in connection with an averment of intent, knowledge or condition of the mind. It only requires the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations.").

¹² *BAC Home Loans Servicing LP v. Fall Oaks Farm LLC*, 848 F. Supp. 2d 818, 827 (S.D. Ohio 2012) ("When deciding whether there is fair notice or a lack of particularity, a court must consider the heightened standard of Rule 9(b) in light of the policy of simplified pleadings set

1 if the alleged fraud occurred over an extended period of time and the acts are numerous,
2 specificity requirements for pleading fraud are less stringently applied.¹⁴ Ultimately, **the**
3 **threshold test for pleading claim of fraud is whether the complaint gives defendants fair**
4 **notice of the misconduct asserted so that they can defend against the charge.**¹⁵ In the event a
5 court determines that a plaintiff failed to comply with NRCP 9(b), such failure does not *ipso facto*
6 divest a trial court of jurisdiction; rather, it only subjects the complaint to a motion for a more
7 definite statement, or at the very worst to dismissal with leave to amend."¹⁶

8
9 forth in Rule 8...Rule 9(b) therefore does not require a plaintiff to be omniscient, and **it is not**
10 **intended to prevent courts from reaching the truth behind a case.** Rather, the main purpose
11 behind Rule 9(b) is to provide notice of a plaintiff's claim to a defendant so that the defendant
12 may be able to prepare an informed responsive pleading.").

13 ¹³ *Deutsch v. Flannery*, 823 F.2d 1361, 1365 (9th Cir. 1987) ("In this circuit, a pleading
14 satisfies the particularity requirement 'if it identifies 'the circumstances constituting fraud so that
15 the defendant can prepare an adequate answer from the allegations.'"); *Brown v. Joiner Intern.*
16 *Inc.*, 523 F.Supp. 333 (S.D.Ga. 1981).

17 ¹⁴ *See U.S. ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051 (9th Cir. 2001)
18 ("Rule 9(b) may not require Lee to allege, **in detail, all facts supporting each and every**
19 **instance of false testing over a multi-year period.**") (emphasis added); *Cooper v. Pickett*, 137
20 F.3d 616, 627 (9th Cir.1997) (Where complaint asserting claims of improper revenue recognition
21 identified (i) some of the specific customers defrauded, (ii) the type of conduct at issue, (iii) the
22 general time frame in which the conduct occurred, and (iv) why the conduct was fraudulent, it
23 was "not fatal to the complaint that it [did] not describe in detail a single specific transaction ... by
24 customer, amount, and precise method."); *Anthony Distributors, Inc. v. Miller Brewing Co.*, 904
25 F.Supp. 1363 (M.D.Fla. 1995); *Fujisawa Pharmaceutical Co., Ltd. v. Kapoor*, 814 F.Supp. 720
26 (N.D.Ill. 1993); *Sunbird Air Services, Inc. v. Beech Aircraft Corp.*, 789 F.Supp. 364
27 (D.Kan.1992); *In re Catanella and E.F. Hutton and Co., Inc. Securities Litigation*, 583 F.Supp.
28 1388 (E.D.Pa. 1984).

22 ¹⁵ *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (quoting *Bly-Magee v.*
23 *California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (Allegations of fraud must be "specific enough to
24 give defendants notice of the particular misconduct ... so that they can defend against the charge
25 and not just deny that they have done anything wrong."); *Semegen v. Weidner*, 780 F.2d 727, 731
26 (9th Cir.1985) ("Rule 9(b) ensures that allegations of fraud are specific enough to give defendants
27 notice of the particular misconduct which is alleged to constitute the fraud charged so that they
28 can defend against the charge and not just deny that they have done anything wrong.").

26 ¹⁶ *See Britz v. Consol. Casinos Corp.*, 87 Nev. 441, 447, 488 P.2d 911, 916 (1971) (citing
27 *Sax v. Sax*, 294 F.2d 133 (5th Cir. 1961)); *United States v. United Healthcare Ins. Co.*, 848 F.3d
28 1161 (9th Cir. 2016) ("Dismissals for failing to plead fraud with particularity are functionally
equivalent to dismissals for failure to state a claim; leave to amend, therefore, should be granted
unless the pleading could not possibly be cured by the allegation of other facts.").

IV. LEGAL ARGUMENT

A. **Petitioner's Claims Relating to the Concealment of the Purchase Agreement are Pled with Sufficient Particularity to Provide Fair Notice to Respondents of the Alleged Misconduct so as to Allow Respondents to Defend such Claims.**

As an initial matter, Petitioner has asserted the following claims against Respondents related to the non-disclosure of the Purchase Agreement: (1) breach of fiduciary duty; (2) aiding and abetting; (3) conspiracy; (4) fraud; (5) fraudulent concealment; (6) constructive fraud; and (7) negligent misrepresentation. Notwithstanding, the Motion to Dismiss only contends that the allegations of fraud, fraudulent concealment and constructive fraud claims lack viability and, on the basis that, as to each: (1) the claim fails as a matter of law; and (2) Petitioner has not pled his claims with particularity. Said arguments fail for the reasons set forth herein and therefore this Court should deny the Motion to Dismiss. Respondents further are not entitled to dismissal as to all other claims not articulated for, or otherwise legally supported, in the Motion to Dismiss.

1. Fraud Allegations Related to Concealment of the Purchase Agreement are Pled with Particularity and, if Proven, Entitle Petitioner to Relief.

As it relates to the concealment of the Purchase Agreement, Respondents contend that Petitioner failed to "allege any affirmative misrepresentation,"¹⁷ a purported element under *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998), but rather only "alleged non-disclosure of information." See Motion to Dismiss, at 10:26-11:3. Respondents' contentions fail, however, because: (1) it misconstrues *Barmettler* by incorrectly suggesting it requires an "affirmative misrepresentation" when, by its own terms, it merely requires "a false representation made by the defendant," *id.*; (2) it conveniently ignores an important clarification the Nevada Supreme Court subsequently made in *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420 (Nev. 2007), namely that "[w]ith respect to the false representation element, the **suppression or omission of a material fact** which a party is bound in good faith to disclose is equivalent to a false representation, since it constitutes an indirect representation that such fact

¹⁷ See Motion to Dismiss at 10:28.

1 does not exist;”¹⁸ and (3) Petitioner expressly alleged that the “failure to disclose to Petitioner that
2 Respondents were selling... all of the business interests in the Trust at such time to the Siblings
3 Trusts and an entity created by them constitutes fraud...” and “Respondents owed an affirmative
4 duty to disclose the sale to Petitioner.” *See* Supplemental Surcharge Petition, at 10:22-11:1. Such
5 averments must be viewed as true under the motion to dismiss standard and constitute a “false
6 representation” under *Nelson*, thereby satisfying the “false representation” element of fraud.

7 The Surcharge Petition and Supplemental Surcharge Petition also pled fraudulent
8 misrepresentation with particularity¹⁹ by explaining that “Respondents” (defined as Heidi
9 Canarelli, Lawrence Canarelli, and Edward Lubbers, in their capacities as Trustees and/or Former
10 Trustees of the SCIT (identification of the parties involved)²⁰ each made false representations by
11 omission by failing to disclose to Petitioner that all of the SCIT’s interest in the Purchased
12 Entities were in the process of being sold (nature of the fraud)²¹ between the time the sale was
13 first contemplated “in January 2013, if not sooner,” through the time drafts of the Purchase
14 Agreement were circulated and the ultimate execution of the Purchase Agreement on May 31,
15
16

17 ¹⁸ *See also Quick v. Pearson*, 112 Cal. Rptr. 3d 62, 69 (2010), as modified (July 1, 2010);
18 Motion to Dismiss, at 14:4-7 (As admitted by Respondents in the Motion to Dismiss, “[j]ust like
19 actual fraud, constructive fraud requires an affirmative misrepresentation or omission under
20 circumstances under which there is a duty to speak” (emphasis added)).

21 ¹⁹ *See e.g., Swartz v. KPMG, LLC*, 476 F.3d 756, 764 (9th Cir. 2007) (the Ninth Circuit has
22 recognized that “there is no absolute requirement that where several defendants are sued in
23 connection with an alleged fraudulent scheme, the complaint must identify false statements made
24 by each and every defendant.”); *In re GlenFed, Inc. Sec. Litig.*, 60 F.3d 591 (9th Cir. 1995)
25 (Plaintiff may satisfy rule requiring that fraud be pled with particularity in corporate securities
26 fraud case through reliance upon presumption that allegedly false and misleading group published
27 information complained of is collective action of officers and directors).

28 ²⁰ *See* Supplemental Surcharge at 1:25-2:8 (defining “Respondents” as Heidi Canarelli,
Lawrence Canarelli, and Edward Lubbers in their capacities as trustees and/or former trustees of
the SCIT); ¶ 2 (“On or about May 31, 2013, the Former Trustees purportedly entered into an
agreement (“Purchase Agreement”); ¶ 17 (“While Lubbers may have “signed” on behalf of the
SCIT...”)).

²¹ *Id.* at 10:22-11:1.

2013 (averment to time).²² Indeed, the Supplemental Surcharge Petition provides significant detail regarding how the Canarellis were the Family Trustees of the SCIT up until resigning on May 24, 2013, at which point Lubbers became the subsequent Family Trustee thereof. Since the fraudulent omission(s) occurred during the respective times the Canarellis and Lubbers each served as the Family Trustees, it is appropriate to assert a claim of fraud against each of the “Respondents.” The fact that Petitioner did not allege specific statements made by Heidi is of no consequence. As a co-trustee, she may be liable for omissions that she was under a duty to disclose.²³ Said allegations provide Respondents with adequate notice to defend against the fraud claim asserted against each one of them, which is all that is required under law at this juncture.

2. Fraudulent Concealment Allegations Related to Concealment of the Purchase Agreement are Pled with Particularity and, if true, entitle Petitioner to relief.

a. *The Elements of Fraudulent Concealment are Properly Pled.*

Respondents erroneously claim that Petitioner could “prove no set of facts, which, if true, would entitle him to relief” under a claim of fraudulent concealment. To establish a prima facie case of fraudulent concealment under Nevada Law, “a plaintiff must offer proof that satisfies five elements: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a

²² See Supplemental Surcharge, at 10:14; Supplemental Surcharge at ¶ 2 (“On or about May 31, 2013, the Former Trustees purportedly entered into an agreement (“Purchase Agreement”)”)

²³ See e.g. *In re Estate of Chrisman*, 746 S.W.2d 131 (Mo.App.1988) (the court noted that a trustee is responsible for “omissions—breaches of trust—of his co-trustee to which he consented, or which by his own negligence he made possible for his co-trustee to commit.”); *Ramsey v. Boatmen's First Nat. Bank of Kansas City, N.A.*, 914 S.W.2d 384, 388 (Mo. Ct. App. 1996) (“A co-trustee does not escape liability by failure to participate in the administration of the trust.”); *In re Mueller's Tr.*, 28 Wis. 2d 26, 47, 135 N.W.2d 854, 865 (1965) (“having assumed the position of trustee, she was bound to perform the duties required of her, and cannot escape liability merely because she relied entirely on the co-trustee to actually run the show. Any other result would drive co-trustees into the weeds for safety's sake.”); *Rothenberg v. U.S.*, 233 F.Supp. 864 (D.Kan. 1964) (“It is the duty of each of the three trustees to participate in the administration of the trust.... [I]t is improper for one trustee to leave control to the other two.” (citing 2 SCOTT, TRUSTS SECTIONS 184, 224-224.6 (2d. ed. 1956))); see also BOGERT, THE LAW OF TRUSTS & TRUSTEES, § 862.

1 duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed
2 the fact with the intent to defraud the plaintiff; specifically, the defendant concealed or suppressed
3 the fact for the purpose of inducing the plaintiff to act differently than she would have if she had
4 known the fact; (4) the plaintiff was unaware of the fact and would have acted differently if she
5 had known of the concealed or suppressed fact; and (5) as a result of the concealment or
6 suppression of the fact, the plaintiff sustained damages.” *Nevada Power Co. v. Monsanto Co.*,
7 891 F.Supp. 1406, 1415 (D.Nev.1995). With regard to the duty to disclose, the Nevada Supreme
8 Court has held that once a party undertakes to give information, he has a duty to speak the whole
9 truth and not by concealments make his statements untruthful and misleading; e.g. accepting the
10 position of a trustee. *Northern Nevada Mobile Home Brokers v. Penrod*, 96 Nev. 394, 610 P.2d
11 724, 727 (1980). **“Whether these elements are present in a given case is ordinarily**
12 **a question of fact.”** *Epperson v. Roloff*, 102 Nev. 206, 211, 719 P.2d 799, 802 (Nev. 1986)
13 (emphasis added).

14 Petitioner has pled the necessary elements to establish a claim for fraudulent concealment,
15 to wit: (1) Respondents concealed and/or suppressed the material fact that for months they were
16 scheming to divest the SCIT of all of its interests in the Purchased Entities when the real estate
17 market was recovering from the recession while feigning to acquiesce in Petitioner’s demands for
18 monthly distributions;²⁴ (2) such concealment occurred during a period of time when Respondents
19 served as the Family Trustees and were under a duty to disclose the sale to Petitioner;²⁵ (3)
20 “Respondents’ concealment of the Purchase Agreement was intentional” so that Petitioner would
21 not have an opportunity to block the sale;²⁶ (4) “if Petitioner would have been aware of the
22 material facts, [he] would not have acquiesced in the sale and otherwise would have objected to
23

24 See Supplemental Surcharge at ¶ 18.

25 See Supplemental Surcharge Petition at ¶ 14-17.

the sale;”²⁷ and (5) “[a]s a direct and proximate result of Respondents’ acts and omissions [related to the concealment of the purchase agreement], the SCIT and Petitioner, as its grantor and primary beneficiary, have suffered damages, the amount of which will be proven at an evidentiary hearing” and are also entitled to punitive damages.²⁸ Assuming the truth of such allegations, as required by law for the purposes of a motion to dismiss, Petitioner is entitled to the relief requested thereby making dismissal of the Supplemental Surcharge Petition improper.

b. Petitioners Alleges a Viable Claim for Fraudulent Concealment Based on Respondents Fiduciary Duty to Disclose the Purchase Agreement Prior to Its Execution.

Respondents contend they were never under a duty to disclose and thus the allegations set forth the Supplemental Surcharge Petitioner fail to state a viable claim for fraudulent concealment. In so contending, Respondents: (1) fail to recognize their duty to seek court approval prior to the sale under NRS 163.060, which would require disclosure of the sale to all interested parties, including Petitioner; (2) erroneously contend that the duty of a trustee to disclose is limited solely to the furnishing of an annual accounting “pursuant to the terms of the SCIT;”²⁹ and (3) incorrectly argue that the Family Trustees had sole and absolute discretion to consummate the sale without Petitioner’s permission under Nevada law; therefore, nullifying their duty of disclosure as the Family Trustees.³⁰ In support of such contentions, **Respondents acknowledge** that “Petitioner’s fraud claim is based on the alleged non-disclosure of information” and, therefore, Petitioner’s claims “fail as a matter of law.”³¹ Each of Respondents’ contentions are contrary to the law relating to a fiduciary’s obligations. Non-disclosure, however, equates to

²⁷ See Supplemental Surcharge Petition, at 11:2-4. Moreover, as to elements 3 and 4, the intent of a party is generally a question of fact for the trier of fact. *Blanchard v. Blanchard*, 839 P.2d 1320, 1322 (Nev.1092), citing *Epperson v. Roloff*, 719, P.2d 799, 803 (Nev. 1986) (“The intent of a party is generally a question of fact for the trier of fact.”).

²⁸ See Supplemental Surcharge Petition, at 10:7-11:15.

²⁹ See Motion to Dismiss, at 12:21-13:7.

³⁰ See Motion to Dismiss, at 11:15-12:20.

³¹ See Motion to Dismiss, at 10:26-27

1 an “omission,” which, notwithstanding Respondents’ repeated misstate of the law, constitutes
2 fraud, fraudulent concealment and constructive fraud. Based on such acknowledgement, alone,
3 this Court should deny the Motion to Dismiss. *Respondents Failed to Disclose and Seek Court*
4 *Approval Of the Purchase Agreement as Required Under NRS 163.03.*

5 Respondents baldly contend that, as Former Trustees, they owed Petitioner absolutely no
6 duty to disclose the Purchase Agreement or otherwise obtain his “approval.” Such contentions
7 demonstrates Respondents’ complete lack of understanding of the role of a trustee and the duties
8 owed to Petitioner as a beneficiary. Specifically, N.R.S. 163.060 provides that “a trustee **shall**
9 **not as trustee of one trust sell property to itself as trustee of another trust except with the**
10 **approval of the court** having jurisdiction of the trust estate.” (Emphasis added). Similarly,
11 N.R.S. 163.050 provides that “no trustee may directly or indirectly buy or sell any property for
12 the trust from or to itself or an affiliate, or form or to a director, officer or employee of the trustee
13 or of an affiliate, or from or to a relative, employer, partner or other business associate of a
14 trustee, **except with the prior approval of the court** having jurisdiction of the trust estate.”³²

15 While such provisions allow provisions of a trust provide otherwise, the terms of the SCIT
16 are completely devoid of any provisions allowing sale under such circumstances. The standard,
17 general authority of a trustee to sell assets of the trust at a “private sale for cash or on credit” is
18 not sufficient to overcome the specific language of N.R.S. 163.050 and 163.060.³³ Such
19 provision **does not and cannot be construed as** authorizing Respondents to engage in selling
20 dealing, especially when the trustee’s powers under the term of the trust are not primarily being
21 exercised in the interests of the beneficiaries of the SCIT.

22 In light of the same, and contrary to Respondents’ contention in the Motion to Dismiss
23 otherwise, Respondents not only had the duty to disclose the Purchase Agreement to Petitioner
24 prior to executing the same, but were required to seek this Court’s approval prior to entering into
25

26 ³² Respondents previously contended in the Objection to Surcharge Petition that N.R.S.
27 163.060 does not apply because the Seller and Purchasers were not the same parties (see ¶¶ 54
and 58). The clear language of the statute, however, undermines such contention.

28 ³³ See Article VII, Section G of the SCIT attached as Exhibit 1 of the Surcharge Petition.

1 the Purchase Agreement. Accordingly, Respondents' contention that the **only** duty of disclosure
2 they owed to Petitioner as the Family Trustees was to "disclose" an annual accounting is entirely
3 misplaced. Respondents' failure to disclose the sale to Petitioner and to obtain this Court's
4 approval prior to entering into the Purchase Agreement amounts to "fraudulent concealment"
5 when the failure to disclose was intentional by Respondents. Accordingly, Respondents' Motion
6 to Dismiss should be denied in its entirety to the extent Respondents rely upon the misconception
7 that there was duty of disclosure owed to Petitioner.

8 *i. The Fiduciary Duty of Disclosure is Not Limited to the Provision of*
9 *an Accounting.*

10 Respondents' contention that the duty to disclose the Purchase Agreement to Petitioner
11 was satisfied by the "submission of an annual accounting" completely obviates the rudimentary
12 notions underlining a trustee's fiduciary obligations. "With respect to fraudulent concealment, a
13 duty to disclose arises from the relationship of the parties. A fiduciary relationship, for instance,
14 gives rise to a duty of disclosure." *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1486, 970 P.2d 98,
15 110 (Nev. 1998). "Nondisclosure will become the equivalent of fraudulent concealment when it
16 becomes the duty of a person to speak in order that the party with whom he is dealing may be
17 placed on an equal footing with him." *Id.* Indeed, as the RESTATEMENT (SECOND) OF TRUSTS §
18 173, cmt. d (1959), upon which Respondents rely, explains, "[i]n dealing with the beneficiary on
19 the trustee's own account, ... he is under a **duty to communicate to the beneficiary all material**
20 **facts** in connection with the transaction which the trustee knows or should know."³⁴ (Emphasis
21 added). It is without question that disclosure is a fundamental duty of a trustee because "[f]or the
22 beneficiary to be able to hold the trustee accountable for its administration of the trust, the
23 beneficiary must know of the trust, the beneficiary's interest in it, its property, and how that
24 property is **being** managed." BOGERT, THE LAW OF TRUSTS & TRUSTEES, § 962 (3d Ed. 2010). In
25 sum, Nevada law imposes a duty on a trustee of **"full and fair disclosure of all facts which**

26 ³⁴ See also *Couturier v. Am. Invsco Corp.*, 10 F. Supp. 3d 1143, 1156 (D. Nev. 2014) (A
27 duty to disclose arises "where the defendant alone has knowledge of material facts which are not
28 accessible to the plaintiff.").

materially affect the rights and interest” of a beneficiary.³⁵ Here, the sale of all of the SCIT’s assets undoubtedly constitutes a material fact which negatively affected Petitioner’s financial interest and thus he was entitled to full and fair disclosure of the same.

Moreover, noticeably absent from Respondents’ argument, is the undisputed fact that Respondents had not previously accounted to Petitioner, nor intended to absent a Court order. Indeed, Respondents ignored Petitioner’s demands for an accounting, resulting in Petitioner filing a petition with this Court in September 2013 for an accounting. It was only thereafter that the Respondents purportedly “attempted” to comply with their fiduciary obligations. Respondents failed to do so, however; specifically, each “financial document” provided by Respondents fell short of a “fiduciary accounting.” As this Court is well aware, the Surcharge Petition asserts claims against Respondents for their failure to render a proper fiduciary accounting that reconciles for the periods between 1998 and 2013.

Respondents also completely ignore the fact that the “2013 accounting” merely discloses the Purchase Price that Respondents attributed to the Purchase Agreement and not the accurate value of the entities sold. While Petitioner contends that the Purchase Price exceeds the value determined by Nicolatus for the reasons, in part set forth in the Supplemental Surcharge Petition (including inaccurate and unsupported financial information), Respondents, themselves, cannot dispute that the 2013 accounting does not reflect the “adjusted value” determined by Nicolatus based on the representations made by Respondents. Even in September 2016, over three years after the sale, Respondents submitted SCIT Compilations, including for 2013, that still did not reflect the “adjusted value.” Consequently, Respondents’ contention that the duty to disclose was satisfied by rendering an annual accounting is completely belied by the procedural history of this matter.

³⁵ *Golden Nugget, Inc. v. Ham*, 95 Nev. 45, 49, 589 P.2d 173, 175-176 (1979) (emphasis added); *See also Leaveitt v. Leisure Sports Incorporation*, 103 Nev. 81, 87, 103 P.2d 1221, 1224 (Nev. 1987) (stating that a “fiduciary relationship requires a duty of good faith, honesty, and **full disclosures**.”) (emphasis added and citations omitted); *Lasky, Haas, Cohler & Munter v. Superior Court*, 172 Cal.App. 3d 264, 280, 218 Cal.Rptr. 205, 214 (Cal. Ct. App. 1985) (recognizing that fiduciary duties of full disclosure extend to all trust records regarding the administration of the trust).

intentionally intended to benefit Petitioner's siblings to the detriment of the SCIT. Notably, for these reasons Respondents' contention that Petitioner learned of the sale a few weeks *after* the sale is not relevant. The Purchase Agreement had already been executed and the Sibling Trusts and SJA had partially performed. The damage was done and, as the current litigation demonstrates, the sale could not be unwound without litigation against Respondents.

Based on the foregoing, the allegations set forth in the Supplemental Surcharge Petition relating to Respondents failure to disclose the sale withstand the Motion to Dismiss. Petitioner is entitled to offer evidence to support his claims of fraudulent concealment, and, thus, the Motion to Dismiss should be denied.

3. The Constructive Fraud Allegations Relating to Concealment of the Purchase Agreement are Pled with Particularity and, if Assumed True, Entitle Petitioner to Relief.

"Constructive fraud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others or to violate confidence."³⁹ A fiduciary's concealment of material facts operates as a "constructive fraud, **whether or not such failure to disclose was accompanied by an actual intent to defraud.**"⁴⁰ Even a negligent misrepresentation by a fiduciary may

Petitioner's existence because it was against their beliefs that a man should not be a stay at home father."); ¶¶ 13-18 (further alleging that the Purchase Agreement was consummated by Respondents as a retaliatory act at a time the real estate market was coming out of the recession).

³⁹ *Executive Management, Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 841, 963 P.2d 465, 477 (1998) (quoting *Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 529-30 (1982)); *see also* California Civil Code § 1573 (Constructive fraud is any breach of duty which, without actual fraudulent intent, the person at fault gains an advantage, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or, in any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud). "Constructive fraud usually arises from a breach of duty where a relation of trust and confidence exists." *See Barrett v. Bank of America*, 183 Cal.App.3d 1362, 1369, 229 Cal. Rptr. 16, 20 (Cal. App. 4 Dist. 1986); *See also Executive Management, Ltd.*, 114 Nev. at 841, 963 P.2d at 477; *Bogovich v. Embassy Club of Sedgfield, Inc.*, --- S.E.2d---, 2011 WL 1467568, 6 (N.C. Ct. App. 2011) ("Constructive fraud differs from actual fraud in that it is based on a confidential relationship rather than a specific misrepresentation.").

⁴⁰ *Vai v. Bank of America NTSA*, 56 Cal.2d 329, 342, 15 Cal. Rptr. 71 (Cal. 1961) (citations omitted) (Party was unaware of fraud when agreement was entered into). *See also Bogovich*, ---

1 constitute constructive fraud.⁴¹ Similar to fraud, when a “superior party obtains a possible
2 benefit through the alleged abuse of the confidential or fiduciary relationship, the aggrieved
3 party is entitled to a presumption that constructive fraud occurred.”⁴² Consequently,
4 constructive fraud does not require a misrepresentation or an intent to deceive or defraud.
5 See fn 42-45.

6 Respondents contend that Petitioner’s “claim for constructive fraud fails for the same
7 reasons as the claim for actual fraud. Scott simply cannot identify any improper concealment
8 or omission of a material fact that Respondents had a duty to disclose.”⁴³ Similar to
9 Respondents misapplication of the law as it relates to Petitioner’s claim for fraud,
10 Respondents, as the Family Trustees, had the duty not only to disclose the sale but obtain
11 Court approval because **it materially affected his rights and interest** as more fully outlined
12 *supra* at Section IV(A)(2)(b)(i)-(iii). Accordingly, Petitioner has sufficient alleged with
13 particularity a claim for constructive fraud against Respondents, irrespective of their “intent”
14 or “representations.”

15 **B. Petitioner’s Claims Relating to the Purported Rationale for Respondents Entering**
16 **into the Purchase Agreement and Making the Effective Date Thereto Prior to Such**
17 **Execution are Pled with Sufficient Particularity.**⁴⁴

18 The Supplemental Surcharge Petition asserts the following claims against Respondents
19 related to expressly stated “rationale” for entering into the Purchase Agreement and making the
20 effective date retroactive: (1) breach of fiduciary duty; (2) aiding and abetting; (3) conspiracy; (4)

21 S.E.2d ----, at 6 (One difference between fraud and constructive fraud is that intent to deceive is
22 not an element of constructive fraud).

23 ⁴¹ *Salahutdin v. Valley of California, Inc.*, 24 Cal. App.4th 555, 562, 29 Cal. Rptr. 2d 463
24 (Cal. Ct. App. 1994) (“[A] careless misstatement may constitute constructive fraud even though
there is no fraudulent intent.”) (citations omitted).

25 ⁴² *Bogovich v. Embassy Club of Sedgefield, Inc.*, 712 S.E.2d 257, 262 (NC App. 2011).

26 ⁴³ Motion to Dismiss at 14:8-11.

27 ⁴⁴ See Supplemental Surcharge Petition, at 11:5-7, 13:19-21.

1 fraud; (5) fraudulent concealment; and (6) constructive fraud.
2 The Motion to Dismiss, however, only addresses the fraud claim⁴⁵ and relies upon the same basis
3 as with Petitioner's claims relating to Respondents' failure to disclose the Purchase Agreement.
4 For the reasons addressed herein, Respondents' contentions lack merit. Accordingly, the Motion
5 to Dismiss should be dismissed in its entirety as it relates to Petitioner's claims relating to the
6 reasons represented by Respondents in effectuating the sale.

7 1. Elements of Fraud.

8 The elements of fraud are as follows:

- 9
10 (1) A false representation made by the defendant;
11 (2) Defendant's knowledge or belief that its representation was false or that Defendant
12 has an insufficient basis of information for making the representation;
13 (3) Defendant intended to induce plaintiff to act or refrain from acting upon the
14 misrepresentation; and
15 (4) Damage to the plaintiff as a result of relying on the misrepresentation.

16 *Barmettler*, 114 Nev. at 447 (1998). It is well-established that whether a party has met the
17 elements of fraud, the intent and detrimental reliance elements are generally questions of fact.⁴⁶

18 2. Fraud Allegations Related to the Rationale for Entering Into the Purchase
19 Agreement, if Assumed True, Entitle Petitioner to Relief.

20 With regard to the first element of fraud, Respondents falsely represented in the Purchase
21 Agreement, among other things, that the Purchased Entities were sold because Petitioner needed
22 money and that the SCIT could not rely on distributions from either the LLC or Corporations
23

24 ⁴⁵ Respondents' failure to also address Petitioner's claims beyond that for "fraud" relating to
25 the "rationale" for entering into the Purchase Agreement allow Petitioner to proceed with such
26 claims.

27 ⁴⁶ *Blanchard v. Blanchard*, 108 Nev. 908, 911, 839 P.2d 1320, 1322 (1992); *Epperson v.*
28 *Roloff*, 102 Nev. 206, 211, 719 P.2d 799, 802 (1986) ("Whether these elements are present in a
given case is ordinarily a question of fact."); *JS Prod., Inc. v. Practical Goods Grp., Inc.*, No.
2:07-CV-00911-KJD, 2010 WL 3885320, at *2 (D. Nev. Sept. 30, 2010) ("An essential factual
issue in intentional misrepresentation is whether the action of the Defendant was with the intent to
induce another's reliance. The intent of a party is generally a question of fact for the trier of
fact."); *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 113 Nev. 346, 352, 934 P.2d 257, 261 (1997)
(reliance poses a question of fact).

1 because of the terms of the Credit Agreement (as it then existed and as it was contemplated in the
2 refinancing of such agreement). See Surcharge Petition, Ex. 4 at ¶¶ D and I. Additionally,
3 Respondents (particularly Lubbers and Larry as signatories to the Purchase Agreement) knew, or
4 should have known, that said representation was false as evidenced by, *inter alia*: (1) the SCIT
5 receiving approximately \$1.55 million in distributions from Canfam Holdings, LLC, one of the
6 Purchased Entities, **before** the Purchase Agreement was executed on May 31, 2013;⁴⁷ (2) the
7 historical distributions made to the SCIT and the Siblings Trusts; (3) the continuation of the
8 distributions from the Purchased Entities to the owners thereof; and (4) Evans' representation on
9 July 31, 2012, that the SCIT had sufficient liquidity to purchase a \$1.5 million dollar ranch
10 property in Colorado.⁴⁸

11 Respondents intended to induce Petitioner to refrain from acting upon such
12 misrepresentations by⁴⁹: (1) not attempting to invalidate the Purchase Agreement after it was
13 executed by falsely claiming that the sale was in his best interest, an arms-length transaction and
14 in good faith; and/or (2) representing that the SCIT would not be able to make distributions to
15 Petitioner and his family if the Purchase Agreement was invalidated.⁵⁰ Such representations

16 ⁴⁷ See Supplemental Surcharge at ¶ 21. Due the retroactivity of the Effective Date,
17 Respondents claimed that the roughly \$1.55 million distributed to the SCIT between March 31,
18 2013 and May 31, 2013 was made in error and thus reversed such distributions.

19 ⁴⁸ See Supplemental Surcharge at 12:9-19.

20 ⁴⁹ As noted at footnote 47, "[a]n essential factual issue in intentional misrepresentation is
21 whether the action of the Defendant was with the intent to induce another's reliance. The intent of
22 a party is generally a question of fact for the trier of fact." *JS Prod., Inc. v. Practical Goods Grp.,*
23 *Inc.*, No. 2:07-CV-00911-KJD, 2010 WL 3885320, at *2 (D. Nev. Sept. 30, 2010)).

24 ⁵⁰ *Id.* at 3:3-10 ("Respondents...acted with intent to defraud and financially harm Petitioner
25 and his children and benefits the remainder of the Canarelli's family by: (1) fraudulently
26 misrepresenting the 'purpose' of the sale"); *Id.* at 13:13-14 (in relation to the false rational for
27 entering into the purchase agreement and inducement, the "omissions and conduct of
28 Respondents, as set forth herein, were intentional..."); Objection to Surcharge Petition at ¶ 52
("The Transaction was entered into in good faith under entirely proper, arms-length terms..."); *Id.*
at ¶ 91 ("Respondents entered into the Transaction for Scott's best interest and protection...the
Respondents acted in accordance with the Trust Agreement and in the utmost good faith."); *Id.* at
2:1-3 (Respondents...have always acted consistent with their fiduciary obligations and in Scott's
best interests.")

1 undoubtedly rose to the level of implied threats, namely Petitioner's failure to "go along" with the
2 sale would preclude him from receiving monthly distributions that he temporarily needed to rely
3 upon because of the familial issues he was forced to address at such time.

4 Petitioner further relied upon the misrepresentations because he was forced to do so by the
5 lack of information and, had he known the truth, he would have sought to invalidate the Purchase
6 Agreement upon learning of its execution in or around June 2013.⁵¹ As stated in the
7 Supplemental Surcharge, it was not until after the Surcharge Petition was filed and discovery
8 ensued that Petitioner discovered that Respondents blatantly misrepresented the purpose of the
9 sale (e.g. the credit agreement appears not to bar distributions). See Supplemental Surcharge
10 Petition at 3:3-10. Consequently, the "false representation played a material and substantial part
11 in leading [Petitioner] to adopt his particular course" to not seek to invalidate the Purchase
12 Agreement in June 2013. *Blanchard*, 108 Nev. at 911.⁵²

13 Notwithstanding, Respondents contend that Petitioner could not have detrimentally relied
14 on the misrepresentation in the Purchase Agreement because he was not aware of the same until
15 after it was executed. The fatal flaw, however, with Respondents' logic is that it conveniently
16 refuses to recognize the damage that occurred *after* Petitioner became aware of the Purchase
17 Agreement and relied on the misrepresentations therein, as well as subsequently made, in
18 foregoing to immediately seek to invalidate it. For example, at the time Petitioner learned of the
19 sale, the third party appraiser had not yet been retained pursuant to the Purchase Agreement and,
20 therefore, the Purchase Price under the Purchase Agreement had not fully been determined.
21 Following the appointment of Nicolatus, Petitioner further detrimentally relied upon
22 Respondents' representations in foregoing any litigation to unwind the sale, in part, by: (1)

23
24 ⁵¹ Initial Petition to filed September 30, 2013 at 13:5-9 ("Petitioner continues to lack any
25 way of verifying whether this sale is prudent, advisable, and/or conducted for the reasons cited in
26 the Purchase Agreement...or designed to punish him or otherwise harm his financial interest.");
27 *Id.* at 14:1-2 ("...Petitioner is not in a position to be able to assess the propriety of the sale...").

28 ⁵² Respondents' citation to *Collins v. Burns*, 103 Nev. 394, 741 P.2d 819 (1987) is a blatant
misrepresentation. Specifically, Respondents claim that the Nevada Supreme Court in *Collins*
held that "[l]ack of justifiable reliance bars a claim for fraud," when in fact it held that "[l]ack of
justifiable reliance bars recovery in an action at law for damages for the tort of deceit."

1 Respondents' representations that the sale was in Petitioner's best interests; (2) the sale was fair
2 and reasonable; and (3) the financial information provided to Nicolatus was complete and
3 accurate.

4 With regard to particularity, the Surcharge Petition and Supplemental Surcharge Petition
5 allege that "Respondents" (identification of the Parties involved)⁵³ falsely represented, in the
6 actual Purchase Agreement (place),⁵⁴ the rationale for entering into the Purchase Agreement
7 which caused Petitioner not to immediately seek to invalidate the Purchase Agreement (nature of
8 the fraud/reliance)⁵⁵ at the time he became aware of the Purchase Agreement in or around June
9 2013 (avermment to time) and when he filed the Initial Petition in September 2013 (avermment to
10 time).⁵⁶ Such misrepresentations were relied upon by Petitioner and ultimately caused substantial
11 damages. Consequently, Respondents' Motion to Dismiss the fraud claim as it relates to purpose
12 of the sale should be denied. Petitioner has pled such claim with particularity and demonstrated
13 that, if the aforementioned allegations are assumed to be true, he would be entitled to relief.

14 3. The Fraud Allegations Related to the Rationale for Making the Effective Date
15 March 31, 2018, if Assumed True, Entitle Petitioner to Relief.

16 Respondents predominantly rely on the premise that the Purchase Agreement does not
17 "misrepresent" the Effective Date of the sale as a basis to dismiss Petitioner's fraud claims.
18 Specifically, Respondents contend that the Purchase Agreement expressly states it is effective
19 March 31, 2013 and, "in handwriting" it is signed on May 31, 2013; consequently, there is no
20 misrepresentation.⁵⁷ Respondents' contention, however, demonstrates a *complete lack of*

21 ⁵³ Supplemental Surcharge Petition at 1:25-2:8 (defining "Respondents" as Heidi Canarelli,
22 Lawrence Canarelli, and Edward Lubbers in their capacities as trustees and/or former trustees of
23 the SCIT); *Id.* at 11:18-20.

24 ⁵⁴ See Supplemental Surcharge Petition, at 11:17-12:3.

25 ⁵⁵ See *supra* at fns. 57-58.

26 ⁵⁶ See Initial Petition filed September 30, 2013 at C.5 (stating that Petitioner learned of the
27 existence of the Purchase Agreement "on or about June 18, 2013.").

28 ⁵⁷ See Motion to Dismiss, Section (C) at pp. 16-17; (e.g. "Petitioner does not allege that the
Purchase Agreement was not actually entered into on May 31, 2013. And, the Purchase



1 *understanding of Petitioner's claim.* Petitioner is not alleging that the Effective Date, itself, was
2 misrepresented. Rather, as it relates to the first element of fraud, Petitioner contends that
3 Respondents' **misrepresented the reason** Respondents made the Effective Date different than the
4 date of the Purchase Agreement was executed. Respondents specifically represented that the
5 March 31, 2013 date was to arbitrarily "identify an initial asset valuation date" and that "the
6 effective date had no impact upon the legal rights and duties of the parties who entered into the
7 Purchase Agreement."⁵⁸

8 Alternatively, as indicated *supra*, "[w]ith respect to the false representation element, the
9 **suppression or omission of a material fact** which a party is bound in good faith to disclose is
10 equivalent to a false representation, since it constitutes an indirect representation that such fact
11 does not exist."⁵⁹ In this regard, Respondents, as the Former Trustees, were under a duty to
12 disclose⁶⁰ the impact of making the Purchase Agreement retroactive to March 31, 2013. Based
13 upon the allegations set forth in the Supplemental Surcharge Petition, the retroactivity of the
14 Effective Date adversely affected the value of the Purchase Agreement and ultimately had a
15 material effect on the rights and interests of Petitioner as a beneficiary. Accordingly, Petitioner
16 has adequately pled this element of his claim for fraud.

17 Respondents were also fully aware at time the Purchase Agreement was executed that said
18 representations relating to the purpose of making the effective date retroactive were false and that

19
20 Agreement **expressly** states that it is effective March 31, 2013" (*id.* at p. 16, ll. 23-25) and "the
21 Purchase Agreement expressly identifies that the Purchase Agreement is entered into as of May
22 31, 2013, with an effective date of March 31, 2013. [exhibit omitted] The number "31" and the
23 month of "May" are handwritten . . . If Respondents had truly intended to misrepresent the
24 Purchase Agreement to Petitioner, they could have simply made the actual date and the effective
25 date identical" (*id.* at p. 17, ll. 15-20)).

26
27
28 ⁵⁸ See Objection to Surcharge Petition, at ¶ 56; Motion to Dismiss at p. 16, fn 9.

⁵⁹ See *Nelson*, 123 Nev. at 163, P.3d at 420; *Quick v. Pearson*, 112 Cal. Rptr. 3d 62, 69
(2010); Motion to Dismiss, at 14:4-7 (As admitted by Respondents, "[j]ust like actual fraud,
constructive fraud requires an affirmative misrepresentation **or omission** under circumstances
under which there is a duty to speak" (emphasis added)).

⁶⁰ See *supra* at 15:6-19:17.

1 the true motive and impact of making the effective date retroactive was to simultaneously allow
2 Respondents: (1) to reverse distributions made to the SCIT from Canfam Holdings, LLC between
3 March 31, 2013 and May 31, 2013 in the total amount of \$1,550,380.00;⁶¹ and (2) to maintain the
4 alleged authority to require the SCIT to make roughly \$900,00.00 in capital contributions to the
5 Purchased Entities during the same time period.⁶² Simply put, and contrary to Respondents'
6 representations, the retroactive "Effective Date" was imposed by Respondents not to "identify an
7 initial asset valuation date" (*see* Motion to Dismiss at fn 9), but rather to harm the SCIT and
8 provide a financial windfall to the Siblings Trusts.

9 The Supplemental Surcharge Petition similarly alleges that Respondents intended to
10 induce Petitioner to accept the representations that the retroactive Effective Date; namely, that it
11 did not impact Petitioner's rights and interest and otherwise made no substantive difference.⁶³ In
12 failing to disclose the actual purpose, Respondents intended to persuade Petitioner from seeking
13 to invalidate the Purchase Agreement. Indeed, as acknowledged by Respondents, Petitioner was
14 repeatedly informed that the Purchase Agreement benefitted Petitioner, namely: (1) the sale was
15 in the best interests of the SCIT; (2) the sale was conducted in good faith; (3) the sale was entirely
16 proper and fair to "all parties"; and (4) the sale was on entirely, proper arms-length terms.⁶⁴ Such
17 allegations unequivocally demonstrate that, aside from such representations being false,
18 Respondents made such representations to induce Petitioner from not unwinding the sale.

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 ⁶¹ See Supplemental Surcharge Petition, at ¶ 26.

23 ⁶² See, Supplemental Surcharge Petition, at fn 25.

24 ⁶³ *Id.* at 3:3-10 ("Respondents...acted with intent to defraud and financially harm Petitioner
25 and his children and benefits the remainder of the Canarellis' family by: ... (2) intentionally
26 making the purchase agreement effective as of March 31, 2013, to financially harm Petitioner and
27 his children").

28 ⁶⁴ See Objection to Surcharge Petition at ¶ 48, p. 3, ll. 17-19, and ¶ 52.

⁶⁵ See Supplemental Surcharge Petition at **Exhibit 4**.

1 making such representations is “a question of fact for the trier of fact” and may be pled
2 generally.⁶⁶ therefore, Respondents are not entitled to dismissal of this particular claim of fraud.

3 Petitioner was also **forced to rely** on the Respondents’ false representations that the
4 retroactive Effective Date had no impact, because Respondents failed to timely and completely
5 disclose all documents and material facts relating to the Purchase Agreement and to properly
6 account. Indeed, despite this Court’s Order entered October 24, 2013, compelling Respondents to
7 disclose all documents and information regarding the “advisability, necessity, fairness and
8 reasonableness of all aspects of the transaction and whether it was in the best interests of the
9 Irrevocable Trust,” Respondents intentionally limited its disclosures and only provided Petitioner
10 information Respondents deemed “necessary” for the purposes of Nicolatus valuing the
11 Purchased Entities (as set forth in more detail in Section III(C), *infra*). Respondents did so with
12 the intent of precluding Petitioner from unwinding the sale, as the Initial Petition asserted that
13 “Petitioner is not in a position to be able to assess the propriety of the sale of the Irrevocable
14 Trust’s interest in the LLCs and the Corporations under the Purchase Agreement or whether it
15 inured an actual benefit to the Irrevocable Trust or should have been effectuated.”⁶⁷
16 Consequently, Petitioner reserved his rights to unwind the sale upon receipt of full disclosure of
17 material information “to the determination of whether the transaction serves the best interests of
18 the Irrevocable Trust and Petitioner as required under both Nevada law and the Irrevocable

21 Respondents intentionally withheld information and otherwise controlled the information
22 provided to Nicolatus so as to cause Petitioner to refrain from unwinding the sale. Indeed, it was
23 not until Petitioner conducted discovery during the course of this litigation that he discovered that
24

25 ⁶⁶ *JS Prod., Inc. v. Practical Goods Grp., Inc.*, No. 2:07-CV-00911-KJD, 2010 WL
26 3885320, at *2 (D. Nev. Sept. 30, 2010)); NRCP 9(b) (“Malice, intent, knowledge, and other
27 condition of mind of a person may be averred generally.”)

28 ⁶⁷ See Initial Petition at ¶ D.9.

1 the Purchased Entities were distributing substantial amount of funds to the SCIT and Siblings
2 Trusts, despite the representations that such distributions were strictly prohibited.

3 These misrepresentations and/or omissions caused Petitioner to suffer damages and, as a
4 result of the same, Petitioner was induced to refrain from requesting the Court to unwind the sale
5 at such time, or seeking a declaration that the effective date of the Purchase Agreement should
6 have been May 31, 2013, at a minimum, but *most likely a date subsequent thereto*. In such case,
7 the SCIT would have enjoyed not only the benefit of its proportionate share of the in excess of
8 115 distributions made by the Purchased Entities to the Sibling Trusts and SJA Acquisitions to
9 date, but also the appreciation of the real estate and assets held therein.

10 As to particularity, the Surcharge Petition and Supplemental Surcharge Petition allege that
11 “Respondents” (identity of the parties involved); (1) falsely represented the rationale for making
12 the Effective Date retroactive under circumstances resulting in Petitioner being forced to rely on
13 such representations due to the lack of disclosure of pertinent information that would allow
14 Petitioner to determine the propriety of the sale, whether it inured an actual benefit of the trust or
15 was otherwise in the best interests of the SCIT and Petitioner, and whether the sale should have
16 been effectuated at all⁶⁸ (nature of fraud/averment to time); (2) failed to disclose one of the real
17 purposes (as known to Petitioner thus far) for making the Effective Date retroactive when
18 Respondents were under a duty to do so pursuant to the terms of the SCIT and Nevada law
19 (nature of the fraud/reliance) from June 2013 until when Respondents finally produced financial
20 information in January 2018 and July 2018, disclosing the distributions that were reversed from
21 the SCIT and the distributions the SCIT would have received subsequent thereto, respectively,
22 had the sale not been entered into (nature of the fraud/averment to time);⁶⁹ and (3) misrepresented
23 that the Purchase Agreement was entered into entirely in good faith and in the best interests of the
24 SCIT and otherwise constituted a proper arms-length transaction (nature of the fraud/averment to
25 time). See fn 70 herein.

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27 ⁶⁸ See Objection to Surcharge Petition at p. 3, ll. 17-19 and ¶ 56; Motion to Dismiss at fn 9.

28 ⁶⁹ See Supplemental Surcharge Petition at ¶ 21; see also fn 67 herein.

Consequently, Respondents' Motion to Dismiss the fraud claim as it relates to rationale for the making the Effective Date retroactive should be denied. Through the Surcharge Petition and related pleadings, including the Supplemental Surcharge Petition, Petitioner has pled with particularity claims for fraud and demonstrated that he would be entitled to relief if the aforementioned allegations are assumed to be true for the instant motion as is the standard on a motion to dismiss.

C. Petitioner Sufficient Pled That The Financial Information Relied Upon by Western Valuation Advisors is Inconsistent with other Financial Information of the SCIT and the Purchased Entities.

First and foremost, Petitioner asserted six (6) separate claims regarding Respondents' misrepresentations of financial information provided to Nicolatus, either by Respondents directly or indirectly through their agents, including Evans, to Nicolatus for the purposes of determining the value of the SCIT's interest in the Purchased Entities: (1) breach of fiduciary duty; (2) aiding and abetting; (3) conspiracy; (4) fraud; (5) constructive fraud; and (6) fraudulent concealment. See Supplemental Surcharge Petition, at ¶ 47. Notwithstanding, the Motion to Dismiss *only* seeks to dismiss the fraud claim⁷⁰ based upon Respondents' erroneous contention that it was not pled with particularity and, therefore, fails as a matter of law. Such arguments completely lack merit for the reasons set forth extensively herein. Similarly, Petitioner's remaining five (5) claims must stand since the Motion to Dismiss does not articulate any reason for the dismissal of the same.

Notwithstanding, and contrary to Respondents' contention, Petitioner pled each element of fraud in the Supplemental Surcharge Petition. Specifically, Petitioner alleges that Respondents, either directly or indirectly through Evans, made representations that the financial information provided to Nicolatus was "reasonably complete and accurate and fairly presents the financial position, prospects and related facts of the entities subject to the Purchase Agreement."⁷¹ Petitioner further alleges that Nicolatus did in fact rely on Respondents' misrepresentations as to

⁷⁰ Respondents also seek to dismiss a "negligent misrepresentations claim" with respect to Respondents' disclosure of the SCIT's financials, compilations, and or accountings; however, Petitioner did not assert such a claim relating to the financial information of the SCIT at this time.

⁷¹ See Supplemental Surcharge Petition at ¶ 31.

1 the completeness and accuracy of the financials.⁷² Contrary to Respondents' contention, the fact
2 that Nicolatus rendered a report does not demonstrate that he was "satisfied" with the information
3 provided to him.⁷³ In fact, the contrary is true. Nicolatus expressly states in his report that that
4 "[i]t is beyond the scope of this report to ascertain the accuracy or the reliability of the
5 information provided, and we offer no opinion as to such." See fn 75. It is for this reason that
6 the Supplemental Surcharge Petition does not allege that Nicolatus was unable to reconcile the
7 financial information. It was beyond the scope of his engagement and he made no attempts to
8 reconcile the same.

9 At the time Respondents and/or Evans provided the financial information to Nicolatus,
10 Respondents and/or Evans knew such information was not accurate, or he otherwise lacked
11 sufficient information to represent their accuracy. In seeking to dismiss Petitioner's claim for
12 fraud, Respondents, in a very convoluted manner, contend that Respondents could not have made
13 a false representation to Petitioner because "Petitioner received" and "Petitioner obtained"
14 financials during discovery and, therefore, Respondents never made a misrepresentation to
15 Petitioner. Therefore, according to Respondents, the fact that Petitioner contends the financials
16 received during discovery do not reconcile with the financials "Respondents provided" to
17 Nicolatus does not mean that the financial information is "false."⁷⁴ Ironically, Respondents also
18 contend in the same breath that "Petitioner himself cannot confirm the accuracy of Western
19 Financial [sic] Advisors valuation based on certain trial balances that were produced during
20 discovery" and, therefore, any claim of fraud is based on speculation. *Id.* at p. 19:15-17.

22 ⁷² *Id.* ("Mr. Nicolatus relied on the accuracy of the March Trial Balances for the Purchased
23 Entities and made no determination as to their truth or accuracy"). Despite such express
24 allegations, Respondents claim that "[i]mportantly Petitioner does not even allege that [WVA]
25 relied upon these trial balances in conducting its valuation." Motion to Dismiss at 19:17-19. This
26 is a blatant example of Respondents' litigation tactics used throughout the Motion to Dismiss,
where Respondents continually create red herrings by rearticulating Petitioner's allegations and
arguments in a manner favorable to them and then "knock them down."

27 ⁷³ See Motion to Dismiss at 20:11-14.

28 ⁷⁴ See Motion to Dismiss at p. 18, l. 23:28 and p. 19, ll. 12-17.

1 The Errata to the Supplement provides specific examples of Respondents'
2 misrepresentations as reflected in the financial documents, including providing examples of
3 discrepancies. Respondents, however, would like to convince this Court that Petitioner is
4 required to specify each inconsistency, the date, the dollar amount, the entity involved and explain
5 the exact reason the inconsistency constitutes a "false representation." In so contending,
6 Respondents completely ignore the fact that Petitioner's claims of fraud as it relates to the
7 financials require not only expert testimony, but, more importantly, require Respondents to
8 produce all of the financial records for each entity for 2012 and 2013 (until such time as the Court
9 orders an additional time period post 2013). These financial records include the following
10 quarterly reports: financial statements, whether audited or unaudited, compilations, trial
11 balances; and detailed: general ledgers, journal entries, profit and loss statements, balance sheets
12 and income statements. Discrepancies in financial records cannot be reconciled in piecemeal.
13 All of the financial information must be provided for each entity, irrespective of whether
14 Respondents "believe" it is somewhat duplicative.

15 Notwithstanding, the allegations set forth in the Supplemental Surcharge Petition provide
16 particularity, namely: between December 19, 2013 (initial meeting with WVA) to December 31,
17 2014 (the date of the WVA valuation) (avermment as to time); Respondents and/or their agents,
18 including Evans (identity of the parties involved); made false representations related to the
19 accuracy and completeness of the financial information for the Purchased Entities provided to
20 WVA and disclosed to Petitioner (nature of the fraud). Respondents also falsely represented that
21 the AWH Ventures Receivable should be included in the combined value of the Corporate
22 Interest when it actually should have been treated as stand-alone receivable such that Petitioner
23 would be entitled to, at a minimum, an additional \$899,702.00; however, Respondents and/or
24 Evans instructed Nicolatus to include it within the "Corporate Interests." Such instruction was
25 provided, despite the fact that the AWH Receivable is not a corporate entity and never should
26 have been *combined* with the valuation of the Corporate Interests.

27 As a result of such instruction, however, Respondents intentionally caused the SCIT to be
28 underpaid a minimum of almost \$900,000.00, as a result of the fact that the Corporate Interests

1 were collectively “overvalued” by almost \$2.8 million, including taking into account the under
2 value of the AWH Venture receivable. For the reasons set forth herein, *infra*, these amounts
3 cannot be accurately determined as a result of Respondents consistent refusal to produce the same
4 for almost eight (8) months until the Discovery Commissioner ordered them to do so. To date,
5 Petitioner has only received a small portion of the financials to which the Court ordered to be
6 produced (although Respondents are in the “process of doing so”).

7 Respondents also knew or should have known that the foregoing representations as to
8 accuracy of the financials were not true, especially in light of the fact the Evans oversees or
9 personally handles all of the finances of the entire “American West Group,” including each of
10 multiple entities thereunder, the various Canarelli family trusts (including the Sibling Trusts and
11 previously the SCIT) and the Canarellis’ personal finances.⁷⁵ Respondents additionally intended
12 to induce **both Nicolatus** to utilize false or known inaccurate information set forth in the
13 financials in its valuing the SCIT’s interest in the Purchased Entities and **Petitioner** to accept the
14 ultimate value determined by Nicolatus.⁷⁶

15 Moreover, and irrespective of the fact that Nicolatus was a “neutral” valuation expert
16 appointed by the Court pursuant to the stipulation for the Parties, Nicolatus need not be
17 Petitioner’s “agent” for Petitioner to have relied upon the misrepresentations that the financial
18 information provided to Nicolatus was complete and accurate. As the Restatement (Second) of
19 Torts § 533 explains, “the maker of a fraudulent misrepresentation is subject to liability for
20 pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation,
21 **although not made directly to the other, is made to a third person and the maker intends or**
22 **has reason to expect that its terms will be repeated or its substance communicated to the**
23
24
25

26 ⁷⁵ *Id.* at 19:21-22 (“Petitioner...alleges that the acts, omissions, and conduct of Respondents,
as set forth herein [related the misrepresentations to WVA] were intentional....”).

27 ⁷⁶ *Id.* at 19:23-20:2; 21:1-4.
28

1 other, and that it will influence his [or her] conduct in the transaction or type of transaction
2 involved.”⁷⁷

3 Respondents’ reliance upon *Pasternack v. Lab. Corp. of Am. Holdings*, 59 N.E.3d 485,
4 *reargument denied* 60 N.E.3d 421 (N.Y. 2016) not only undermines the foregoing legal authority
5 but it undermines their own contention. This is not a case where only Nicolatus relied upon the
6 information Respondents provided in connection with his retention by Lubbers on behalf of the
7 SCIT pursuant to the this Court’s Order. Noticeably absent from Respondents’ argument is the
8 fact that the financial information provided to Nicolatus was simultaneously provided to
9 Petitioner and his counsel, resulting in the representation of the accuracy being made to **both**
10 Nicolatus and Petitioner and **both** Nicolatus and Petitioner relying upon the same. By definition,
11 if Nicolatus relied upon the representations as to the financials accuracies, so did Petitioner. At
12 the time, Petitioner had no reason not to rely on the accuracy of the information provided to
13 Nicolatus. In fact, Respondents were fully aware that the financial information provided to
14 Nicolatus would be communicated to Petitioner and that it would influence his conduct with
15 regard to the sale of the SCIT’s interest in the Purchased Entities. As a result, Respondents can be

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17 ⁷⁷ See also *Tessier v. Rockefeller*, 33 A.3d 1118, 1125 (N.H. 2011) (allowing a
18 fraudulent misrepresentation claim based on a misrepresentation communicated through a third
19 party to survive a motion to dismiss when the plaintiff pled that the alleged misrepresentation as
20 communicated to her and she relied on it); *Diallo v. Am. InterContinental Univ., Inc.*, 687 S.E.2d
21 278, 280 (Ga.App. 2009) (“the misrepresentation need not be to the plaintiff, but may be to
22 someone on whom the plaintiff relies.”); *Potts v. UAP-GA CHEM, Inc.*, 567 S.E.2d 316 (Ga.
23 App. 2002) (where an employer falsely told an employee’s treating physician that the employee
24 had not been exposed to toxic chemicals and the physician thereafter lessened the toxic chemical
25 antidote, leading to the employee’s death, the reliance element of the estate’s fraud claim against
26 the employer was shown because a jury could find that the physician’s reliance on the employer’s
27 false statement was reasonable and that the employee had relied on the physician for treatment);
28 37 C.J.S. Fraud § 59 (“Representations made to a third person with the intent that they be shown
or communicated to the complainant may properly be relied on by the latter.... The
misrepresentation upon which a fraud claim is based may also be made to someone on whom the
plaintiff relies.”); *McCarthy v. Barnett Bank of Polk County*, 88-311-CIV-T-17(B), 1990 WL
175343 (M.D. Fla. 1990) (“Defendants claim Plaintiffs fail to allege reliance because most
Plaintiffs failed to have direct contact with Defendants. It is immaterial whether a
misrepresentation reaches a representee in a direct or circuitous manner, representee still has a
right to rely on the statement.”).

1 held liable for the misrepresentations made to Nicolatus in connection with the financials
2 Respondents provided to him and damages resulting therefrom. Consequently, Petitioner's
3 allegations provide fair notice of the fraud claims asserted and if such allegations are true, would
4 entitle Petitioner to relief. Therefore, this Court should deny the Motion to Dismiss.

5 **D. Petitioner Alleged a Viable Claim for Fraud Arising from the Former Trustees'**
6 **Failure to Properly Account.**

7 Petitioner has asserted the following claims regarding Respondents' misrepresentations
8 pertaining to the value of the SCIT's assets and transactions of the same: (1) breach of fiduciary
9 duty; (2) aiding and abetting; (3) conspiracy; (4) fraud; (5) constructive fraud; and (6) fraudulent
10 concealment. See Supplemental Surcharge Petition, at ¶ 47. Notwithstanding, the Motion to
11 Dismiss only seeks to dismiss the fraud claim,⁷⁸ Respondents' contend that NRCP 9(b) requires
12 that each and every document and false representation contained in the 19 years of accountings be
13 specifically identified along with an explanation of why each is false.

14 The falsity requirement in a fraud claim is satisfied by "pointing to inconsistent
15 contemporaneous statements or information (such as internal reports) which were made by or
16 available to the defendants." See *Yourish v. California Amplifier*, 191 F.3d 983, 993 (9th Cir.
17 1999). This is precisely what Petitioners alleged. Specifically, Petitioner alleges that,
18 commencing in or around November 2013, Respondents provided financial information for the
19 SCIT to Gerety, including tax returns, audited financial statements, general ledgers and/or trial
20 balances. After analyzing the same, Gerety was not able to reconcile the audited financial
21 statements to the tax returns or other financial documents. As a result, Gerety sent
22 correspondence through counsel to Respondents on May 14, 2014, June 22, 2015 and September
23 10, 2015, identifying said discrepancies and requesting additional information.⁷⁹ Respondents'

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25 ⁷⁸ Respondents also seek to dismiss a negligent misrepresentations claim; however,
26 Petitioner did not assert such claim with respect to Trust financials, compilations, and or
accountings at this time.

27 ⁷⁹ Copies of such letters were attached as **Exhibits 14, 15 and 16** to the Surcharge Petition
28 and, therefore, are incorporated by reference and considered appropriate to defeat a Motion to
Dismiss.

1 argument fails, however, because, despite the contention that Petitioner made “absolutely no
2 attempt” to identify the false representations, Petitioner specifically alleged that: (1) in preparing
3 the SCIT financials and SCIT compilations, Respondents misrepresented the value of the assets
4 and transactions of the SCIT; (2) there were unexplained cash outflows totaling \$25,286,877; (3)
5 there were unexplained cash inflows totaling \$7,381,419; (4) there were discrepancies between
6 the income tax and financial statements between 1998 and 2001 and falsely reporting the SCIT as
7 a complex trust as opposed to a grantor trust; and (5) the information on the 2012 PE Trial
8 Balance and 2012 SCIT Trial Balance was inconsistent with the audited financial statements
9 provided to Mr. Gerety in November 2013 because they showed, among other things, differences
10 between the: (i) the beginning balances of related party loans, (ii) ending balances of related party
11 loans, (iii) beginning values of the Colorado Land Holdings, and (iv) ending values of the
12 Colorado Land Holdings.⁸⁰ The foregoing inconsistencies more than satisfy NRCP 9(b)
13 particularity requirements as it relates to the fraud element of identifying false statements and the
14 reasons such statements are false.

15 Similarly, the remaining elements of a fraud claim relating the SCIT financials are alleged
16 and with particularity; specifically: (a) Respondents knew or should have known that the
17 financials provided to Petitioner and his counsel either contained misrepresentations or omitted
18 material information that impacted the underlining value of the assets of the SCIT and the
19 transactions related thereto; (b) Respondents intended to induce Petitioner to rely on the false
20 information as evidenced by Evans’ repeated assertions to Gerety that the SCIT financials “all
21 reconciles,” “trust us,” and other similar statements; (c) Petitioner was forced to rely on
22 Respondents’ representations as a result of Evans’ failure to provide financial information related
23 to the entities held by the SCIT during the respective time periods of the accounting; and (d)
24 Petitioner is damaged by incurring unnecessary professional fees and otherwise precluding Gerety
25
26

27 ⁸⁰ See, e.g., Surcharge Petition at ¶¶ 44-53 ¶¶ and 94-98 and Supplemental Surcharge
28 Petition, thereto at ¶¶ 42-47.

1 from ultimately reconciling the SCIT financials and/or calculation of damages relating to the
2 inaccuracies in the accountings.⁸¹

3 In terms of particularity, from November 2013 to date (time),⁸² Respondents, who have
4 been the trustees of the SCIT for the duration of its existence with corresponding duties to
5 account (identity of the parties involved), provided “accountings” and other financial information
6 related to the SCIT which contain numerous false representations regarding the value of SCIT
7 assets and transactions, as partially identified in Gerety’s reports (nature of claim). The foregoing
8 give respondents more than “fair notice” of the claim brought against them and if true would
9 entitle Petitioner to relief. Accordingly, dismissal would be improper.

10 **E. To the Extent That the Court Finds a Lack of Particularity, if any, Such Facts are**
11 **Peculiarly within the Defendant’s Knowledge and, Therefore, Petitioner Should Be**
12 **Permitted to Conduct *Rocker* Discovery and Amend.**

13 The Nevada Supreme Court has “recognized an exception to NRCP 9(b)’s heightened
14 pleading requirements.” *Rocker v. KPMG LLP*, 148 P.3d 703, 708 (Nev. 2006) (internal
15 quotations omitted) (abrogated on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 181
16 P.3d 670 (2008)). Specifically, the Nevada Supreme Court has held that where the facts
17 necessary for pleading with particularity are “peculiarly within the defendant’s knowledge or are
18 readily obtainable by him,” a relaxed pleading standard may be applied because the plaintiff could
19 not be expected to have personal knowledge of the relevant facts. *Id.* This exception “strikes a
20 reasonable balance between NRCP 9(b)’s stringent requirements for pleading fraud and a
21 plaintiff’s inability to allege the full factual basis concerning fraud because information and
22 documents are solely in the defendant’s possession and cannot be secured without formal, legal
23 discovery.” *Id.* at 1194, 148 P.3d at 709.

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25 ⁸¹ See Surcharge Petition at ¶ 61, p. 20; Supplemental Surcharge Petition, at 22:25-23:3.

26 ⁸² See Surcharge Petition at ¶ 44, p. 15:6-7 (“Subsequent to this Court’s hearing on
27 November 2013, the Trustee provided Petitioner with certain financial information related to the
28 SCIT”); *Id.* at ¶¶ 44-62 (describing other dates financial information was provided pertaining to
the SCIT including “accountings” for the period of 1998-2013 on September 27, 2016).

1 *Rocker* discovery is permitted if the Plaintiff: (1) pleads sufficient facts to support a
2 strong inference of fraud; (2) avers that a relaxed pleading standard is appropriate; and (3) shows
3 that fraud could not be pled with more particularity because the required information is in the
4 defendant's possession. *Id.* at 1195, 148 P.3d at 709. Although, as set forth *supra*, Petitioner
5 believes that he has complied with the more stringent pleading requirements set forth in NRCP
6 9(b), if this Court finds otherwise, Petitioner respectfully requests that this Court allow him to
7 conduct *Rocker* discovery because the requisite elements are met.

8 Petitioner has not only pled sufficient facts in the Surcharge Petition to support a strong
9 inference of fraud for the reasons set forth herein extensively, but the relaxed pleading
10 requirement is necessary and warranted at this time so that Petitioner can obtain discovery in
11 order to identify additional averments regarding his fraud claims.

12 Respondents' also have failed to timely produce all of the relevant financial information
13 necessary for Petitioner to elaborate of the allegations set forth in the Supplemental Surcharge
14 Petitioner. Indeed, the Surcharge Petition and Supplemental Surcharge Petition both allege that
15 Respondents produced limited information and refused to include financial information including,
16 but not limited to, the audited financial statements for the Purchased Entities by claiming that
17 such information was not in their possession or control. *See* Supplemental Surcharge Petition, at
18 ¶¶ 26, 31 and 33. Incredulously, when Petitioner sought to obtain the financial information
19 directly from the Purchased Entities, the Purchased Entities objected to Petitioner's requests by
20 pointing their proverbial finger back at Respondents. Accordingly, Petitioner was forced to file a
21 series of motions to compel (*see* Supplemental Surcharge Petition, at 4:4-5:5), which were largely
22 granted. To date, however, Respondents and the Purchased Entities have not fully and timely
23 complied with the Discovery Commissioner's recommendations. While Respondents are in the
24 process of "compiling the same," it has now been seven (7) months since Petitioner initially made
25 the requests for such information.

26 Petitioner **only** first received a financial document of the Purchased Entities not previously
27 provided to Nicolatus on July 6, 2018. Respondents have repeatedly engaged in gamesmanship
28 and played hot potato by alleging the Respondents were not in "possession, custody and control"

1 in their capacities as Former Trustees. When Petitioner thereafter sought the information from the
2 Purchased Entities, it was contended that Respondents previously produced the documentation.
3 This game was played for several months before the Discovery Commissioner granted
4 Petitioner's motion to compel. Despite the same, the Purchased Entities claimed "confusion" and
5 failed to produce a majority of the information ordered to so (e.g. only producing a single
6 consolidated audited financial statement rather than quarterly unaudited financial statements,
7 compilations, or nonconsolidated financial statements).

8 Despite Respondents repeatedly stonewalling Petitioner to avoid producing financial
9 information to which Petitioner is clearly entitled to for the purposes of determining not only the
10 actual purchase price as of the Effective Date, but also the purchase price at a time subsequent
11 thereto -- namely, a time period when the real market was not on a continuous rise and only
12 starting to recover from the -- the accuracy of the financial information provided to Nicolatus.

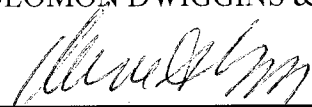
13 Petitioner has satisfied the *Rocker* elements in the event this Court finds that one or more
14 of the fraud-related claims were not pled with sufficient particularity; consequently, Petitioner
15 should be permitted to conduct additional discovery and this Court should deny the Motion to
16 Dismiss.

17 **V. CONCLUSION**

18 Based on the foregoing, Petitioner respectfully request that the Motion to Dismiss be
19 denied in its entirety.

20 DATED this 31 day of July, 2018.

SOLOMON DWIGGINS & FREER, LTD.


Dana A. Dwiggins, Esq., Bar No. 007049
Jeffrey P. Luszeck, Esq., Bar No. 9619
Craig D. Friedel, Esq., Bar No. 13873
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129

Attorneys for Scott Canarelli

CERTIFICATE OF SERVICE

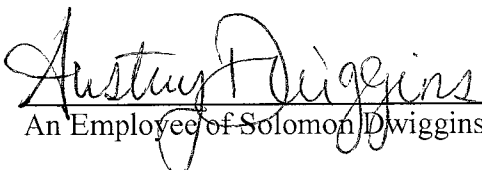
PURSUANT to NRCP 5(b), I HEREBY CERTIFY that on July 31, 2018, I served a true and correct copy of the **OPPOSITION TO MOTION TO DISMISS PETITIONER'S SUPPLEMENTAL SURCHARGE TO SURCHARGE PETITION TRUSTEE AND FORMER TRUSTEES FOR BREACH OF FIDUCIARY DUTIES, CONSPIRACY AND AIDING AND ABETTING; PETITION FOR BREACH OF FIDUCIARY DUTY FOR FAILURE TO PROPERLY ACCOUNT; and PETITION FOR AN AWARD OF ATTORNEYS FEES, ACCOUNTANT FEES AND COSTS** to the following in the manner set forth below: **Via:**

<input type="checkbox"/>	Hand Delivery
<input type="checkbox"/>	U.S. Mail, Postage Prepaid
<input type="checkbox"/>	Certified Mail, Receipt No.: _____
<input type="checkbox"/>	Return Receipt Request
<input checked="" type="checkbox"/>	E-Service through the Odyssey eFileNV/Nevada E-File and Serve System, as follows:

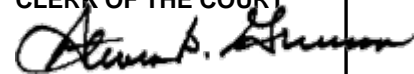
J. Colby Williams, Esq.
Campbell & Williams
700 S. Seventh Street
Las Vegas, NV 89101
Email: jcw@campbellandwilliams.com

Elizabeth Brickfield, Esq.
Var E. Lordahl, Esq.
Dickinson Wright, PLLC
8363 W. Sunset Road, Suite 200
Las Vegas, NV 89113
Email: ebrickfield@dickinsonwright.com
vlordahl@dickinsonwright.com

Naylor & Braster
1050 Indigo Dr #112,
Las Vegas, NV 89145
Email: jbraster@nblawnv.com
asharples@nblawnv.com


An Employee of Solomon Diggins & Freer, Ltd.

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1 **SAO**
2 **CAMPBELL & WILLIAMS**
3 **J. COLBY WILLIAMS, ESQ. (5549)**
4 icw@cwlawlv.com
5 **PHILIP R. ERWIN, ESQ. (11563)**
6 pre@cwlawlv.com
7 700 South Seventh Street
8 Las Vegas, Nevada 89101
9 Telephone: (702) 382-5222
10 Facsimile: (702) 382-0540

11 **DICKINSON WRIGHT, PLLC**
12 Elizabeth Brickfield, Esq. (6236)
13 ebrickfield@dickinsonwright.com
14 Joel Z. Schwarz, Esq. (9181)
15 jschwarz@dickinsonwright.com
16 8363 West Sunset Road, Suite 200
17 Las Vegas, Nevada 89113
18 Telephone: (702) 550-4400
19 Facsimile: (844) 670-6009

20 *Attorneys for Lawrence and*
21 *Heidi Canarelli, and Frank Martin,*
22 *Special Administrator of the Estate of*
23 *Edward C. Lubbers, Former Trustees*
24 *("Respondents")*

25 **DISTRICT COURT**
26 **CLARK COUNTY, NEVADA**

27 In the Matter of:

Case No.: P-13-078912-T
Dept. No.: 26

THE SCOTT LYLES GRAVES
CANARELLI IRREVOCABLE
TRUST dated February 24, 1998.

STIPULATION AND ORDER TO CONTINUE AUGUST 16, 2018 HEARING

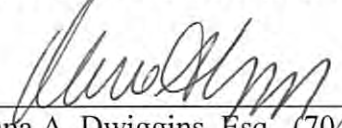
Petitioner Scott Canarelli, by and through his counsel, the law firm Solomon Dwiggins & Freer, Ltd.; and Respondents Lawrence Canarelli, Heidi Canarelli, and Frank Martin, Special Administrator of the Estate of Edward C. Lubbers, by and through their counsel, the law firms Campbell & Williams and Dickinson Wright, PLLC, hereby stipulate and agree as follows:

1. That the hearing on Respondents' Motion to Dismiss Petitioner's Supplement to Petition to Surcharge Trustee and Former Trustees for Breach of Fiduciary Duties, Conspiracy and Aiding and Abetting; Petition for Breach of Fiduciary Duty for Failing to Properly Account; and Petition for an Award of Attorney's Fees, Accountant Fees and Costs, currently scheduled to be heard on August 16, 2018 at 9:30 a.m. before the Honorable Gloria Sturman, be continued to be heard on September 6, 2018 or as soon thereafter as counsel can be heard.

IT IS SO STIPULATED.

Dated this 14th day of August, 2018.


SOLOMON DWIGGINS & FREER, LTD


Dana A. Dwiggins, Esq. (7049)
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483
Facsimile: (702) 853-5495

Counsel for Petitioner

Dated this 14th day of August, 2018.

CAMPBELL & WILLIAMS


J. Colby Williams, Esq. (5549)
700 S. Seventh Street
Las Vegas, NV 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540

DICKINSON WRIGHT, PLLC
Elizabeth Brickfield, Esq. (6236)
Joel Z. Schwarz, Esq. (9181)
8363 W. Sunset Road, Suite 200
Las Vegas, Nevada 89113
Telephone: (702) 550-4400
Facsimile: (844) 670-6009

Counsel for Respondents

ORDER

Based upon the foregoing Stipulation between the parties:


IT IS HEREBY ORDERED that the hearing on Respondents' Motion to Dismiss Petitioner's Supplement to Petition to Surcharge Trustee and Former Trustees for Breach of Fiduciary Duties, Conspiracy and Aiding and Abetting; Petition for Breach of Fiduciary Duty for Failing to Properly Account; and Petition for an Award of Attorney's Fees, Accountant Fees and Costs, currently scheduled to be heard on August 16, 2018 at 9:30 a.m., shall be continued to Sept. 6th, 2018, at 9:30 a.m./p.m.

DATED this 16th day of August, 2018.


DISTRICT COURT JUDGE

Respectfully submitted by:

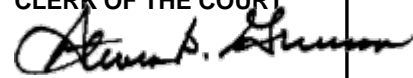
CAMPBELL & WILLIAMS


J. Colby Williams, Esq. (5549)
700 S. Seventh Street
Las Vegas, NV 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540

DICKINSON WRIGHT, PLLC
Elizabeth Brickfield, Esq. (NSB 6236)
8363 W. Sunset Road, Suite 200
Las Vegas, Nevada 89113
Telephone: (702) 550-4400
Facsimile: (844) 670-6009

Counsel for Respondents

5



1 **SAO**
2 **CAMPBELL & WILLIAMS**
3 **J. COLBY WILLIAMS, ESQ. (5549)**
4 jcw@cwlawlv.com
5 **PHILIP R. ERWIN, ESQ. (11563)**
6 pre@cwlawlv.com
7 700 South Seventh Street
8 Las Vegas, Nevada 89101
9 Telephone: (702) 382-5222
10 Facsimile: (702) 382-0540

11 **DICKINSON WRIGHT, PLLC**
12 **Elizabeth Brickfield, Esq. (6236)**
13 ebrickfield@dickinsonwright.com
14 **Joel Z. Schwarz, Esq. (9181)**
15 jschwarz@dickinsonwright.com
16 8363 West Sunset Road, Suite 200
17 Las Vegas, Nevada 89113
18 Telephone: (702) 550-4400
19 Facsimile: (844) 670-6009

20 *Attorneys for Lawrence and*
21 *Heidi Canarelli, and Frank Martin,*
22 *Special Administrator of the Estate of*
23 *Edward C. Lubbers, Former Trustees*
24 *("Respondents")*

25 **DISTRICT COURT**
26 **CLARK COUNTY, NEVADA**

27 In the Matter of:

Case No.: P-13-078912-T
Dept. No.: 26

THE SCOTT LYLES GRAVES
CANARELLI IRREVOCABLE
TRUST dated February 24, 1998.

STIPULATION AND ORDER TO CONTINUE SEPTEMBER 6, 2018 HEARING

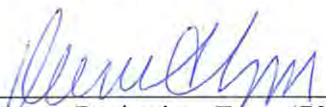
Petitioner Scott Canarelli, by and through his counsel, the law firm Solomon Dwiggin
& Freer, Ltd.; and Respondents Lawrence Canarelli, Heidi Canarelli, and Frank Martin,
Special Administrator of the Estate of Edward C. Lubbers, by and through their counsel, the
law firms Campbell & Williams and Dickinson Wright, PLLC, hereby stipulate and agree as
follows:

1 1. That the hearing on Respondents' Motion to Dismiss Petitioner's Supplement to
2 Petition to Surcharge Trustee and Former Trustees for Breach of Fiduciary Duties, Conspiracy
3 and Aiding and Abetting; Petition for Breach of Fiduciary Duty for Failing to Properly
4 Account; and Petition for an Award of Attorney's Fees, Accountant Fees and Costs, currently
5 scheduled to be heard on September 6, 2018 at 9:30 a.m. before the Honorable Gloria
6 Sturman, be taken off-calendar. The parties will coordinate with the Court to re-notice this
7 matter at an appropriate date in the future.

8 IT IS SO STIPULATED.

9 Dated this 5 day of September, 2018.

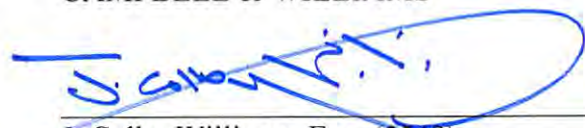
10 SOLOMON DWIGGINS & FREER, LTD

11 
12 Dana A. Dwiggins, Esq. (7049)
13 9060 West Cheyenne Avenue
14 Las Vegas, Nevada 89129
15 Telephone: (702) 853-5483
16 Facsimile: (702) 853-5495

17 *Counsel for Petitioner*

18 Dated this 5th day of September, 2018.

19 CAMPBELL & WILLIAMS

20 
21 J. Colby Williams, Esq. (5549)
22 700 S. Seventh Street
23 Las Vegas, NV 89101
24 Telephone: (702) 382-5222
25 Facsimile: (702) 382-0540

26 DICKINSON WRIGHT, PLLC
27 Elizabeth Brickfield, Esq. (6236)
Joel Z. Schwarz, Esq. (9181)
8363 W. Sunset Road, Suite 200
Las Vegas, Nevada 89113
Telephone: (702) 550-4400
Facsimile: (844) 670-6009

Counsel for Respondents

ORDER

Based upon the foregoing Stipulation between the parties:

IT IS HEREBY ORDERED that the hearing on Respondents' Motion to Dismiss Petitioner's Supplement to Petition to Surcharge Trustee and Former Trustees for Breach of Fiduciary Duties, Conspiracy and Aiding and Abetting; Petition for Breach of Fiduciary Duty for Failing to Properly Account; and Petition for an Award of Attorney's Fees, Accountant Fees and Costs, currently scheduled to be heard on September 6, 2018 at 9:30 a.m., shall be taken off calendar. The parties shall coordinate with the Court to re-notice this matter at an appropriate date in the future.


DATED this 13th day of September, 2018.


DISTRICT COURT JUDGE

gd

Respectfully submitted by:

CAMPBELL & WILLIAMS

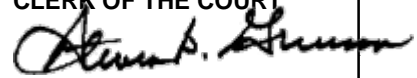

J. Colby Williams, Esq. (5549)

700 S. Seventh Street
Las Vegas, NV 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540

DICKINSON WRIGHT, PLLC
Elizabeth Brickfield, Esq. (NSB 6236)
8363 W. Sunset Road, Suite 200
Las Vegas, Nevada 89113
Telephone: (702) 550-4400
Facsimile: (844) 670-6009

Counsel for Respondents

6



1 **SAO**
2 Dana A. Dwiggins (#7049)
3 Jeffrey P. Luszeck (#9619)
4 Tess E. Johnson (#13511)
5 SOLOMON DWIGGINS & FREER, LTD.
6 9060 West Cheyenne Avenue
7 Las Vegas, Nevada 89129
8 Telephone: (702) 853-5483
9 Facsimile: (702) 853-5485
10 ddwiggins@sdfnlaw.com
11 jluszeck@sdfnlaw.com
12 tjohnson@sdfnlaw.com

13 *Attorneys for Scott Canarelli*

14 **DISTRICT COURT**
15 **CLARK COUNTY, NEVADA**

16 In the Matter of the

Case No.: P-13-078912-T
Dept. No.: XXVI/Probate

17 THE SCOTT LYLE GRAVES
18 CANARELLI IRREVOCABLE TRUST,
19 dated February 24, 1998.

20 **STIPULATION AND ORDER TO SEAL DOCUMENTS PREVIOUSLY FILED WITH**
21 **THE COURT**

22 Petitioner Scott Lyle Graves Canarelli ("Petitioner"), by and through his counsel, the law
23 firm of Solomon Dwiggins & Freer, Ltd. and Respondents Frank Martin, Special Administrator of
24 the Estate of Edward C. Lubbers, as former Family Trustee and/or the Independent Trustee of the
25 Scott Lyle Graves Canarelli Irrevocable Trust dated February 24, 1998 (the "Trust"), and Lawrence
26 Canarelli and Heidi Canarelli, Former Family Trustees of the Trust (collectively, "Respondents"),
27 by and through their counsel, the law firms of Campbell & Williams and Dickinson Wright PLLC
28 and hereby stipulate as follows:

1. Pursuant to Rules SRCR 3(4)(a) and (h) of the Nevada Rules for Sealing and
Redacting Court Records, Nevada permits the court to seal or redact when it "is permitted or
required by federal or state law," or when it is justified or required by another "compelling
circumstance."

2. On August 29, 2018, the Parties appeared before the Discovery Commissioner for a hearing on several matters including a motion to determine whether certain documents disclosed by Respondents (the "Disputed Documents") are protected by the attorney/client privilege or the work product doctrine and, therefore, may be clawed back by Respondents as they contend the Disputed Documents were inadvertently produced.

3. Prior to the filing of such motion, Petitioner referenced the Disputed Documents in certain filings before this Court, both directly in briefing and as exhibits.

4. During the August 20 hearing, the Discovery Commissioner ruled, in part, that some of the content contained within the Disputed Documents was not protected but nonetheless should be deemed confidential at this time.

5. As a matter of good faith and in order to comply with the Discovery Commissioner's confidential designation of the Disputed Documents, the Parties hereby request an order from this Court directing the Clerk to seal the following documents previously filed with this Court: (1) the Supplement to Petition to Surcharge Trustee and Former Trustees for Breach of Fiduciary Duties, Conspiracy and Aiding and Abetting; Petition for Breach of Fiduciary Duty for Failure to Properly Account; and Petition for an Award of Attorneys' Fees, Accountant Fees and Costs, filed May 18, 2018 ("Supplement to the Surcharge Petition"); (2) the Motion for Determination of Privilege Designation for RESP013284-RESP013288 and RESP78899-RESP78900, filed July 13, 2018 ("Motion for Determination"); (3) the Opposition to Motion to Dismiss Petitioner's Supplement to Petition to Surcharge Trustee and Former Trustees for Breach of Fiduciary Duties, Conspiracy and Aiding and Abetting; Petition for Breach of Fiduciary Duty for Failure to Properly Account; and Petition for an Award of Attorneys' Fees, Accountant Fees & Costs, filed July 31, 2018 ("Opposition to Motion to Dismiss"); and (4) the Reply to Opposition to Motion for Determination of Privilege Designation for RESP013284-RESP013288 and RESP78899-RESP78900; and Opposition to Countermotion for Remediation of Improperly Disclosed Attorney-client Privileged and Work Product Protected Materials, filed August 24, 2018 ("Reply to Motion for Determination") (collectively the "Filed Documents").

6. The Parties further agree that, after the Filed Documents are sealed, such

documents should be refiled with the redactions agreed to by the Parties.

DATED this 21 day of September, 2018.

DATED this 20th day of September,
2018.

By: 

Dana A. Dwiggins, Esq., Bar No. 7049
Jeffrey P. Luszeck, Esq., Bar No. 9619
Tess E. Johnson, Esq., Bar No. 13511
SOLOMON DWIGGINS & FREER, LTD.
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone No: (702) 853-5483

By: 

J. Colby Williams, Esq., Bar No. 5549
Philip R. Erwin, Esq., Bar No. 11563
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, Nevada 89101

Counsel for Petitioner Scott Canarelli

and

Elizabeth Brickfield, Esq., Bar No.
6326
Joel Z. Schwarz, Esq., Bar No. 9181
Var E. Lordahl, Esq., Bar No. 12028
DICKINSON WRIGHT, PLLC
8363 W. Sunset Road, Suite 200
Las Vegas, NV 89113

*Counsel for Respondents Lawrence and
Heidi Canarelli, and Frank Martin,
Special Administrator of the Estate of
Edward C. Lubbers*

ORDER

GOOD CAUSE BEING FOUND, IT IS HEREBY ORDERED that the Supplement to
the Surcharge Petition filed on May 18, 2018 shall be SEALED.

IT IS FURTHER HEREBY ORDERED that Petitioner shall file a redacted copy of the
Supplement to the Surcharge Petition, with redactions as agreed to by Respondents.

IT IS FURTHER HEREBY ORDERED that the Motion for Determination filed on July
13, 2018 shall be SEALED.

IT IS FURTHER HEREBY ORDERED that Petitioner shall file a redacted copy of the
Motion for Determination, with redactions as agreed to by Respondents.

IT IS FURTHER HEREBY ORDERED that the Opposition to Motion to Dismiss shall
be SEALED.

IT IS FURTHER HEREBY ORDERED that Petitioner shall file a redacted copy of the Opposition to Motion to Dismiss, with redactions as agreed to by Respondents.

IT IS FURTHER HEREBY ORDERED that the Reply to Motion for Determination shall be SEALED.

IT IS FURTHER HEREBY ORDERED that Petitioner shall file a redacted copy of the Reply to Motion for Determination, with redactions as agreed to by Respondents.

Dated this 26 day of September, 2018.

DISTRICT COURT JUDGE

Respectfully Submitted By:

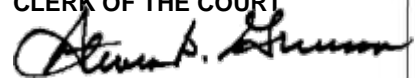
SOLOMON DWIGGINS & FREER, LTD.

By:

Dana A. Duggins, Esq., Bar No. 7049
Jeffrey P. Luszeck, Esq., Bar No. 9619
Tess E. Johnson, Esq., Bar No. 13511
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone No: (702) 853-5483

Counsel for Petitioner Scott Canarelli

7



ORDR

CAMPBELL & WILLIAMS
J. Colby Williams, Esq. (5549)
jcw@cwlawlv.com
Philip R. Erwin, Esq. (11563)
pre@cwlawlv.com
700 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540

*Attorneys for Lawrence and
Heidi Canarelli, and Frank Martin,
Special Administrator of the Estate of
Edward C. Lubbers, Former Trustees*

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of:

SCOTT LYLE GRAVES CANARELLI
IRREVOCABLE TRUST, dated February
24, 1998.

Case No: P-13-078912-T
Dept. No: XXVI

Date of Hearing: May 9, 2019
Time of Hearing: 1:30 pm

**ORDER GRANTING IN PART RESPONDENTS' MOTION TO STAY
PROCEEDINGS**

On May 9, 2019, this Court held a hearing on Respondents' Motion to Stay Proceedings Pending Their Forthcoming Petition for Writ of Prohibition or Mandamus on Order Shortening Time. Present at the hearing were: J. Colby Williams and Philip R. Erwin of the law firm Campbell & Williams, on behalf of Respondents; Liane K. Wakayama of the law firm Marquis Aurbach Coffing, on behalf of Frank Martin, Special Administrator of the Estate of Edward C. Lubbers; and Dana Dwiggins, Tess E. Johnson and Craig Friedel of the law firm Solomon Dwiggins Freer Ltd., on behalf of Petitioner Scott Canarelli. After considering the papers and pleadings on file herein and the argument of counsel at the time of hearing, and good cause appearing the Court rules as follows:

1. Respondents' Motion to Stay is GRANTED in part.

- 1 a. any discovery that relies on the “Disputed Documents”¹ and any
2 proceedings related to Petitioner’s Supplemental Petition filed on May 18,
3 2018 are stayed (subject to the valuation and accounting issues carved out
4 below);
5
6 b. the EDCR 2.34(e) relief granted by the Discovery Commissioner as part of
7 the DCRR entered on December 6, 2018 shall be continued until the
8 resolution of Respondents’ forthcoming Petition for Writ of Prohibition or
9 Mandamus;
10
11 c. during the pendency of this limited stay, Petitioner shall not notice any
12 depositions that may rely on the Disputed Documents unless it is necessary
13 for preservation of testimony (about which the parties will consult); nor
14 shall Petitioner’s potential witnesses be provided or otherwise rely upon the
15 Disputed Documents during the pendency of the limited stay.

16 2. Respondents’ Motion to Stay is otherwise DENIED. Subject to paragraph 3 below,
17 Petitioner may continue to engage in discovery regarding subjects unrelated to the Disputed
18 Documents including, for example, valuation and accounting issues. To the extent the parties
19 dispute the scope of the limited stay or seek exceptions thereto, they may seek appropriate relief
20 from the Court.
21

22 3. Pursuant to the request of Respondents’ counsel at the conclusion of the May 9
23 hearing, the Court hereby GRANTS a temporary stay of all discovery in this action for thirty (30)
24 days until June 10, 2019 to enable Respondents to seek a complete stay of proceedings from the

25 ///

26 ///

27 _____
28 ¹ The term “Disputed Documents” refers collectively to documents identified by Bates Nos.
RESP013284 – RESP013288 and RESP078899 – RESP078900.

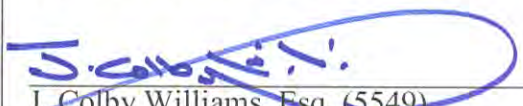
1 Nevada Supreme Court and to file its anticipated writ petition related to the Disputed Documents.

2 DATED this 31st day of May, 2019.

3
4
5 
DISTRICT COURT JUDGE

6 Submitted By:

7 CAMPBELL & WILLIAMS

8 
9 J. Colby Williams, Esq. (5549)
10 Philip R. Erwin, Esq. (11563)
11 700 South Seventh Street
12 Las Vegas, Nevada 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540

13 *Attorneys for Lawrence and*
14 *Heidi Canarelli, and Frank Martin,*
Special Administrator of the Estate of
Edward C. Lubbers, Former Trustees

15 MARQUIS AURBACH COFFING
16 Liane K. Wakayama, Esq. (11313)
17 lwakayam@maclaw.com
18 10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711

19 *Attorney for Frank Martin,*
20 *Special Administrator of the Estate of*
Edward C. Lubbers

Agreed as to Form:

SOLOMON DWIGGINS & FREER, LTD.

11 
Dana A. Dwiggins, Esq., (7049)
ddwiggins@sdfnvlaw.com
Tess E. Johnson, Esq., (13511)
tjohnson@sdfnvlaw.com
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483

Attorneys for Petitioner
Scott Canarelli

8

Heather S. Martin
CLERK OF THE COURT

1 **SAO**

Dana A. Dwiggins, Esq., Bar No. 7049

2 ddwiggins@sdfnlaw.com

Craig D. Friedel, Esq., Bar No. 13873

3 cfriedel@sdfnlaw.com

SOLOMON DWIGGINS & FREER, LTD.

4 9060 West Cheyenne Avenue

Las Vegas, Nevada 89129

5 Telephone: (702) 853-5483

Facsimile: (702) 853-5485

6 *Attorneys for Scott Canarelli*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

8 In the Matter of the

Case No.: P-13-078912-T

Dept. No.: VIII

9 THE SCOTT LYLE GRAVES

10 CANARELLI IRREVOCABLE TRUST,

dated February 24, 1998.

11 **STIPULATION AND ORDER REGARDING STAY PENDING FINAL RESOLUTION OF**
12 **JUDGE DISQUALIFICATION ISSUE**

13 Petitioner Scott Lyle Graves Canarelli, by and through his Counsel, the law firm of Solomon
14 Dwiggins & Freer, Ltd. ("Petitioner"); Respondents Frank Martin, Special Administrator of the
15 Estate of Edward C. Lubbers, as former Family Trustee and/or the Independent Trustee of the Scott
16 Lyle Graves Canarelli Irrevocable Trust dated February 24, 1998 (the "Lubbers Estate"), by and
17 through his Counsel, the law Firm of Hayes Wakayama; the Lubbers Estate, Lawrence Canarelli
18 and Heidi Canarelli, Former Family Trustees of the Trust, by and through their Counsel, the law
19 firm of Campbell & Williams (collectively, the "Respondents"), hereby acknowledge as follows:

20 a. On August 13, 2020, the Chief Judge Linda Bell entered an order disqualifying
21 Judge Sturman ("Order").¹ This matter was thereafter reassigned to the Honorable Jim Crockett on
22 September 15, 2020. On October 8, 2020, Petitioner filed a peremptory challenge and the case was
23 reassigned to Department 8.

25 b. Petitioner intends to promptly file a writ challenging the Order ("Writ"), and
26 Respondents intend to oppose the same (if the Nevada Supreme Court directs an answer thereto);

27 ¹ Decision and Order Granting Motion to Disqualify, on file herein, at 6:20-21.
28

1 c. Pursuant to NRAP 8(a)(1)(A), this Court may grant a stay of the above captioned
2 proceedings (“Proceedings”) pending such Writ.

3 d. For purposes of efficiency and judicial economy, the Parties desire to stay the entire
4 Proceedings pending the final resolution of the Writ and to reserve their right to re-calendar and file
5 certain motions after such final resolution.

6 Accordingly, the Parties hereby stipulate as follows:

7 1. The Proceedings shall be stayed in their entirety until the Writ is fully and finally
8 resolved.

9 2. By agreeing to such stay, the Parties are not waiving any rights associated with
10 Respondents’ previously-filed Motions (i) to Disqualify Solomon Dwiggins & Freer, Ltd, and (ii)
11 for Sanctions currently pending before this Court (“SDF Disqualification Motion”) or any motion
12 filed by Petitioner claiming that Respondents waived any privilege associated with the documents
13 the Nevada Supreme Court determined were privileged in *Canarelli v. Eighth Judicial Dist. Court*
14 *in & for County of Clark*, 136 Nev. Adv. Op. 29, 464 P.3d 114, 117 (2020) (“Waiver Motion”). In
15 particular, the time required to resolve Petitioner’s forthcoming Writ and SDF’s continued
16 participation as Petitioner’s counsel thereon shall not be used as or constitute a basis to oppose the
17 pending SDF Disqualification Motion or the potential Waiver Motion.

18 3. After the final resolution of the Writ, Respondents shall re-notice the hearing on the
19 SDF Disqualification Motion, Petitioner may file a Waiver Motion, and the parties agree to use
20
21
22
23
24
25
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28

1 their best efforts to agree on a briefing schedule with respect to such motions.

2 DATED this ____ day of October, 2020.

DATED this ____ day of October, 2020.

3 By: /s/ Craig Friedel
4 Dana A. Dwiggins, Esq., Bar No. 7049
5 Craig D. Friedel, Esq., Bar No. 13873
6 SOLOMON DWIGGINS & FREER, LTD.
7 9060 West Cheyenne Avenue
8 Las Vegas, Nevada 89129
9 *Counsel for Petitioner Scott Canarelli*

By: /s/ J. Colby Williams
J. Colby Williams, Esq., Bar No. 5549
Philip R. Erwin, Esq., Bar No. 11563
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, Nevada 89101
Counsel for Respondents Lawrence and Heidi Canarelli

8 DATED this ____ day of October, 2020.

9 By: /s/ Liane Wakayama
10 Liane Wakayama, Bar No. 11313
11 HAYES -WAKAYAMA
12 4735 South Durango Drive, Suite 105
13 Las Vegas, Nevada 89147
14 *Counsel for Frank Martin, Special
Administrator of Lubbers Estate*

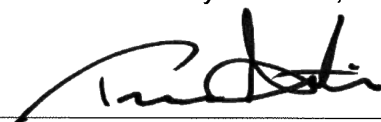
ORDER

15 **GOOD CAUSE BEING FOUND, IT IS HEREBY ORDERED** that the Proceedings shall
16 be stayed in their entirety until the Writ is fully and finally resolved.

17 **IT IS FURTHER ORDERED** that, by agreeing to such stay, the Parties are not waiving
18 any rights associated with the pending SDF Disqualification Motion or the potential Waiver
19 Motion. In particular, the time required to resolve Petitioner's forthcoming Writ and SDF's
20 continued participation as Petitioner's counsel thereon shall not be used as or constitute a basis to
21 oppose the pending SDF Disqualification Motion or the potential Waiver Motion.

22 **IT IS FURTHER ORDERED** that after the final resolution of the Writ, Respondents shall
23 re-notice the hearing on the SDF Disqualification Motion, Petitioner may file a Waiver Motion, and
24 the parties shall use their best efforts to agree on a briefing schedule with respect to such motions.

25 Dated this ____ day of October, 2020. Dated this 9th day of October, 2020

26 

27 DISTRICT COURT JUDGE

28 6FB 23F 22F8 F7D2
Trevor Atkin
District Court Judge

1 Respectfully Submitted By:

2 SOLOMON DWIGGINS & FREER, LTD.

3
4 By: /s/ Dana Dwiggins

Dana A. Dwiggins, Esq., Bar No. 7049

5 Craig D. Friedel, Esq., Bar No. 13873

6 9060 West Cheyenne Avenue

7 Las Vegas, Nevada 89129

Telephone No: (702) 853-5483

8 *Counsel for Petitioner Scott Canarelli*

From: Liane K Wakayama
To: Colby Williams; Craig Friedel; Phil Erwin
Cc: Terrie Maxfield; Erin L. Hansen; Dana Dwiggins; Julia Rodionova
Subject: RE: Canarelli, Motion to Disqualify SDF
Date: Thursday, October 8, 2020 2:49:58 PM
Attachments: [image001.png](#)
[image002.png](#)
[image005.png](#)
[image006.png](#)
[image009.png](#)
[image010.png](#)
[image013.png](#)
[image014.png](#)
[image027.png](#)
[image028.png](#)
[image031.png](#)
[image036.png](#)

Same, thank you.

From: Colby Williams <jcw@cwlawlv.com>
Sent: Thursday, October 8, 2020 2:08 PM
To: Craig Friedel <cfriedel@sdfnlaw.com>; Liane K Wakayama <lkw@hwlawnv.com>; Phil Erwin <pre@cwlawlv.com>
Cc: Terrie Maxfield <TMaxfield@sdfnlaw.com>; Erin L. Hansen <ehansen@sdfnlaw.com>; Dana Dwiggins <ddwiggins@sdfnlaw.com>; Julia Rodionova <julia@hwlawnv.com>
Subject: Re: Canarelli, Motion to Disqualify SDF

That's fine with me. You'll also need to change the department number by the caption. With those edits, you have muy authorization to file.

J. Colby Williams, Esq.
Campbell & Williams
Tel. 702.382.5222

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From: Craig Friedel <cfriedel@sdfnlaw.com>
Date: Thursday, October 8, 2020 at 2:01 PM
To: Colby Williams <jcw@cwlawlv.com>, Liane K Wakayama <lkw@hwlawnv.com>, Phil Erwin <pre@cwlawlv.com>
Cc: Terrie Maxfield <TMaxfield@sdfnlaw.com>, "Erin L. Hansen" <ehansen@sdfnlaw.com>, Dana Dwiggins <ddwiggins@sdfnlaw.com>, Julia Rodionova <julia@hwlawnv.com>, Terrie Maxfield <TMaxfield@sdfnlaw.com>

Subject: RE: Canarelli, Motion to Disqualify SDF

Resent-From: Proofpoint Essentials <do-not-reply@proofpointessentials.com>

Resent-To: Colby Williams <jcw@cwlawlv.com>

Resent-Date: Thursday, October 8, 2020 at 1:56 PM

Colby,

I am fine with that. See attached.

Please advise whether I have permission to file the stipulation with this change upon notification of the new department (so I can fill in the current blank).

Sincerely,

Craig D. Friedel

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TRUST AND ESTATE ATTORNEYS

Cheyenne West Professional Center | 9060 W. Cheyenne Avenue | Las Vegas, NV 89129

Direct: 702.589.3516 | Office: 702.853.5483 | Facsimile: 702.853.5485

Email: cfriedel@sdfnvlaw.com | Website: www.sdfnvlaw.com



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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 In the Matter of the Trust of: CASE NO: P-13-078912-T
7 Scott Lyle Graves Canarelli DEPT. NO. Department 8
8 Irrevocable Trust, dated February
9 24, 1998

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Stipulation and Order was served via the court's electronic eFile system
13 to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 10/9/2020

15 Amy Reams	areams@naylorandbrasterlaw.com
16 Jennifer Braster	jbraster@naylorandbrasterlaw.com
17 Dana Dwiggins	ddwiggins@sdfnlaw.com
18 Craig Friedel	cfriedel@sdfnlaw.com
19 Joshua Hood	jhood@sdfnlaw.com
20 Docket .	LV_LitDocket@dickinsonwright.com
21 Gretta McCall .	gmccall@sdfnlaw.com
22 Matt Wagner .	maw@cwlawlv.com
23 Terrie Maxfield	tmaxfield@sdfnlaw.com
24 Renee Guastafarro	rguastafarro@sdfnlaw.com
25 Andrew Sharples	asharples@naylorandbrasterlaw.com
26	
27	
28	

1	Joel Schwarz	jschwarz@dickinsonwright.com
2	Austrey Dwiggin	adwiggin@sdfnlaw.com
3	Elizabeth Brickfield	ebrickfield@dickinsonwright.com
4	Erin Hansen	ehansen@sdfnlaw.com
5	J. Colby Williams	jcw@cwlawlv.com
6	Phil Erwin	pre@cwlawlv.com
7	Justin Bustos	jbustos@dickinsonwright.com
8	Ken Ching	kching@dickinsonwright.com
9	John Chong	jyc@cwlawlv.com
10	Melissa Douglas	mdouglas@dlnevalaw.com
11	Elizabeth Brickfield	ebrickfield@dlnevalaw.com
12	Jacob Crawley	jcrawley@sdfnlaw.com
13	Roberto Campos	rcampos@sdfnlaw.com
14	Liane Wakayama	lkw@hwlawnv.com
15	Julia Rodionova	julia@hwlawnv.com
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