

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK J. GARDBERG, ESQ., IN HIS
CAPACITY AS RECEIVER FOR, AND
ACTING ON BEHALF OF, FLAMINGO-
PECOS SURGERY CENTER, LLC, A
NEVADA LIMITED LIABILITY
COMPANY,

Appellant,

vs.

WILLIAM D. SMITH M.D., AN
INDIVIDUAL; AND SHELDON
FREEDMAN, M.D., AN INDIVIDUAL,

Respondents.

MARK J. GARDBERG, ESQ., IN HIS
CAPACITY AS RECEIVER FOR, AND
ACTING ON BEHALF OF, FLAMINGO-
PECOS SURGERY CENTER, LLC, A
NEVADA LIMITED LIABILITY
COMPANY,

Appellant,

vs.

WILLIAM D. SMITH M.D., AN
INDIVIDUAL; AND SHELDON
FREEDMAN, M.D., AN INDIVIDUAL,

Respondents.

No. 83556

Electronically Filed
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Elizabeth A. Brown
Clerk of Supreme Court

No. 83805

APPELLANT’S RESPONSE TO ORDER TO SHOW CAUSE

Appellant Mark J. Gardberg, Esq., in his capacity as receiver for, and acting on behalf of, Flamingo-Pecos Surgery Center, LLC, a Nevada Limited Liability Company (“Appellant”) hereby responds to this Honorable Court’s January 6, 2022 Order to Show Cause (“Order”) as follows:

PROCEDURAL BACKGROUND

1. On October 10, 2017, Appellant filed his Second Amended Complaint (the “SAC”), listing as defendants the following individuals: William Smith, MD (“Dr. Smith”); Pankaj Bhatnagar, MD (“Dr. Bhatnagar”); Marjorie Belsky, MD (“Dr. Belsky”); Sheldon Freedman, MD (“Dr. Freedman”); Mathew Ng, MD (“Dr. Ng”); and Daniel Burkhead, MD (“Dr. Burkhead”). *See* attached hereto as **Exhibit “A”** a copy of the SAC (without internal exhibits attached).

2. The SAC listed nine (9) causes of action against each defendant: (i) grossly negligent hiring; (ii) grossly negligent supervision; (iii) grossly negligent retention; (iv) breaches of defendants’ fiduciary duty of care to Flamingo; (v) breaches of defendants’ fiduciary duty of loyalty to Flamingo; (vi) breaches of the operating agreement; (vii) waste; (viii) breaches of NRS Chapter 86; and (ix) imposition of constructive trust.¹

3. Following motion practice, the District Court on November 29, 2017 dismissed without prejudice Appellant’s first, second, third and eighth causes of action. *See* attached hereto as **Exhibit “B”** a copy of the District Court’s November 29, 2017 Court Minutes.²

¹ We note that the SAC included a typographical error insofar as it contained two “fourth” causes of action.

² Please see footnote no. 1 for clarity (the numbering was off by one).

4. As a result, only the fourth, fifth, sixth, seventh and ninth causes of action set forth in the SAC remained pending (the “Remaining Claims”) against each defendant.³

5. On October 10, 2019, following a settlement, a stipulation and order was entered, dismissing with prejudice all claims against Dr. Burkhead. *See* Stipulation and Order attached hereto as **Exhibit “C”**.

6. Appellant eventually also settled his claims with Drs. Belsky, Bhatnagar and Ng, leaving only Drs. Smith and Freedman as the remaining defendants. On December 24, 2019, a stipulation and order was entered dismissing with prejudice all claims asserted by Appellant against them. *See* Stipulation and Order attached hereto as **Exhibit “D”**.

7. In March 2021, Drs. Smith and Freedman each moved for summary judgment, seeking the dismissal of the Remaining Claims.

8. On August 16, 2021, the District Court granted Drs. Smith’s and Freedman’s respective summary judgment motion, dismissing the Remaining Claims. The orders are attached hereto as **Exhibit “E”**.

///

³ Please see footnote nos. 1 and 2 for clarity.

9. Appellant timely appealed to this Honorable Court at docket no. 83556.⁴

10. Thereafter, on October 20, 2021, the District Court granted Drs. Smith and Freedman's application for attorneys' fees.

11. Appellant timely appealed from the District Court's order granting attorneys' fees at docket no. 83805.

12. On December 10, 2021, this Court *sua sponte* consolidated the appeals at docket nos. 83556 and 83805.

13. On January 6, 2022, this Honorable Court issued the Order, asking Appellant to show cause why the consolidated appeals should not be dismissed for want of jurisdiction.

14. This Court pointed out that Appellant failed to identify "any written, file-stamped orders" of the District Court that resolved causes of action asserted in the SAC that were not subject to, or resolved by the disposition of, Drs. Smith's and Freedman's respective summary judgment motion.

ARGUMENT

15. In Nevada, it is well-settled that "a final judgment is one that disposes of all the issues presented in the case, and leaves nothing for the future consideration

⁴ Undersigned counsel acknowledges that he failed to complete adequately and fully the required responses to Item 23 of the docketing statement related to docket no. 83566.

of the court, except for post-judgment issues such as attorney's fees and costs." *Lee v. GNLV Corp.*, 996 P.2d 416, 417 (Nev. 2000); *see also* NRAP 3A(b)(1). "A post-judgment order awarding attorney's fees and/or costs may be appealed as a special order made after final judgment" pursuant to NRAP 3A(b)(8).

16. Instantly, this Honorable Court has jurisdiction to entertain this consolidated appeal. Prior to the District Court's grant of Drs. Smith's and Freedman's summary judgment motion seeking the dismissal of the Remaining Claims, the court had dismissed the first, second, third, and eighth causes of action pleaded in the SAC.

17. Additionally, prior to the disposition of Drs. Smith's and Freedman's summary judgment motion, Appellant settled all claims asserted against Drs. Belsky, Bhatnagar, Burkhead, and Ng and the claims were dismissed with prejudice. Thus, when the District Court granted Drs. Smith's and Freedman's summary judgment motions and dismissed the Remaining Claims, no other claims asserted in the SAC remained pending before the court. Thus, because no claims remained pending, the orders granting summary judgment were final and appealable.

18. With respect to the appeal at docket no. 83805, this Honorable Court has jurisdiction over it, because it involves a special order—here an order granting Drs. Smith and Freedman's application for attorney's fees—made after final judgment. *See GNLV Corp., supra; see also* NRAP 3A(b)(8).

CONCLUSION

WHEREFORE, in light of the foregoing, Appellant respectfully submits that this Honorable Court has jurisdiction to permit this consolidated appeal to proceed with the submission of briefs and appearance at oral argument.

Dated February 7, 2022.

Respectfully submitted,

IQBAL LAW PLLC

A handwritten signature in black ink, appearing to read 'Mohamed A. Iqbal, Jr.', is written over a horizontal line.

MOHAMED A. IQBAL, JR.

Nevada Bar No. 10623

101 Convention Center Drive, Suite 1175

Las Vegas, NV 89109

Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that I am an employee of IQBAL LAW PLLC and that on February 7, 2022, I caused a true and correct copy of the **APPELLANT’S RESPONSE TO ORDER TO SHOW CAUSE** to be served as follows:

___ By placing the same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

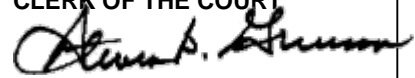
___ Pursuant to NEFCR 9, to be sent via facsimile; and/or

X Pursuant to NEFCR 9, by transmitting via the Court’s electronic filing services by the document(s) listed above to the Counsel set forth on the service list.

/s/ Marie-Claire Alsanjakli
An Employee of IQBAL LAW PLLC

EXHIBIT A

EXHIBIT A



SACOM

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*Attorneys for Mark J. Gardberg, Esq., in his capacity as Receiver for,
and acting on behalf of, Flamingo-Pecos Surgery Center LLC*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

MARK J. GARDBERG, ESQ., in his capacity as Receiver for, and acting on behalf of, FLAMINGO-PECOS SURGERY CENTER, LLC a Nevada limited liability company; Plaintiff, vs. William Smith MD, Pankaj Bhatanagar MD, Marjorie Belsky MD, Sheldon Freedman MD, Mathew Ng MD, Daniel Burkhead MD, Manager MD, DOE MANAGERS, DIRECTORS AND OFFICERS 1-25, ROE BUSINESS ENTITIES 1-25; Defendants.	Case No.: A-17-750926-B Dept. No.: XV SECOND AMENDED COMPLAINT (Exempt from Arbitration – exceeds \$50,000)
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COMES NOW Plaintiff Mark J. Gardberg, Esq., in his capacity as Receiver for, and acting
on behalf of, Flamingo-Pecos Surgery Center, LLC (“Plaintiff”), and hereby alleges in this Second
Amended Complaint (“SAC”):

PROCEDURAL HISTORY

A. The Appointment of the Receiver by the Court in Case No. A-16-733627

1. On December 31, 2014, Flamingo-Pecos Surgery Center, LLC (“Flamingo”) filed a
petition for reorganization in the U.S. Bankruptcy Court for the District of Nevada 2014 (*In re:*
Flamingo-Pecos Surgery Center, LLC dba Surgery Center of Southern Nevada, Case No. BK-S-
18480-ABL).

2. Two months prior to filing its petition, Flamingo abandoned a leasehold consisting of an
ambulatory surgery center located in the Southwest area of Las Vegas – after accruing several

1 hundreds of thousands of dollars in unpaid rent, operating expenses, and other fees and costs, owed
2 to the landlord, Patriot-Reading Associates LLC, a Delaware limited liability company (“Patriot”).

3 3. In the bankruptcy case, the Trustee subsequently moved to dismiss, noting that Flamingo
4 filed merely to avoid being sued “and to burden the Trustee with protecting [Flamingo] assets and
5 records.” The Bankruptcy Court granted the Trustee’s motion and dismissed Flamingo’s
6 bankruptcy case on September 4, 2015.

7 4. Throughout its tenancy at Patriot’s property, and prior to, during, and after its failed
8 bankruptcy, Flamingo was under the control of certain officers, directors and managers, who are
9 now defendants in this instant action.

10 5. On March 23, 2016, Patriot sued Flamingo for breach of contract in case no. A-16-733627,
11 *Patriot-Reading Associates LLC v. Flamingo-Pecos Surgery Center LLC*. Flamingo made no
12 effort to satisfy its obligation to Patriot or to defend itself in the breach of contract action.

13 6. Flamingo, under the control of the defendants in this instant action, sold essentially all its
14 tangible assets at auction after Patriot’s complaint was filed in March of 2016 and before the Court
15 entered its Judgment (as defined in paragraph 8, *infra*) in May of 2016.

16 7. Default was entered against Flamingo on April 28, 2016.

17 8. A default judgment was entered on May 20, 2016 against Flamingo and in favor of Patriot,
18 in the amount \$706,631.17 (the “Judgment”).

19 9. Flamingo failed to appear in the breach of contract action despite service of process and
20 multiple notices.

21 10. Patriot moved for the appointment of a receiver over Flamingo to, among other things: (i)
22 secure its assets, including impending restitution from a related criminal matter; (ii) pursue such
23 other and further claims as may be warranted based on the embezzlement or any other improper
24 distribution or taking of Defendant’s assets; and (iii) pay Flamingo’s lawful debts, including the
25 Judgment owed to Patriot.

26 11. The Court granted Patriot’s Petition for the Appointment of Receiver following a hearing
27 held on August 10, 2016, and issued an Order Granting Patriot-Reading Associates LLC’s Petition
28

1 for the Appointment of Receiver (the “Receivership Order”), which was entered on or about
2 September 13, 2016. Timothy R. Mulliner was appointed as the receiver (the “Receiver” or “Initial
3 Receiver”).¹

4 12. Flamingo and the defendants to this instant action failed to appear, and failed to oppose
5 Patriot’s petition, move for reconsideration of Patriot’s petition, or appeal the Receivership Order.

6 13. The Receivership Order found, among other facts and legal conclusions, that: (i) Flamingo
7 “made no attempt to preserve its assets, pursue such claims and causes of action as may be
8 warranted, or pay any of its lawful debts, including the Judgment”; (ii) there was a material risk
9 that the value of Flamingo’s assets would be dissipated and/or lose further value; and (iii) pursuant
10 to NRS 32.010, appointment of a receiver was necessary to carry into effect and aid the execution
11 of the Judgment previously entered in favor of Patriot and against Flamingo.

12 14. The Receivership Order held that the Receiver *shall*:

13 (1) Take immediate possession of the Receivership Property (including, without
14 limitation, any accounts held in Flamingo’s name), to hold and manage the
15 Receivership Property to preserve it from loss, removal, material injury,
16 destruction, substantial waste, and loss of income;

17 (2) Determine, subject to the terms of this Order, which if any of Flamingo’s
18 accounts payable should be paid, in full or in part, so that there might be an orderly
19 liquidation of the Receivership Property and payment of claims of and debts against
20 Flamingo, including the Judgment;

21 (3) ***Pursue Flamingo’s claims and causes of actions against third parties,***
22 ***including but not limited to Flamingo’s directors and officers;*** and

23 (4) Pursue Flamingo’s claims against personal property seized as part of criminal
24 forfeiture proceedings against Flamingo’s former employee/office manager Robert
25 W. Barnes. For the avoidance of doubt, the Receiver shall not be obligated to bring
26 any such claims or actions as contemplated by this Section A and/or the other
27 Sections of this Order, and the Receiver in his discretion may determine the extent
28 to which, if at all, any such claims or actions may be beneficial to the effectuation
of the terms of this Order.

Section A of the Receivership Order, pp. 2-3 of 14, ll. 20-26:2-11 (Emphasis
added).

¹ Where the reference is the position of “Receiver”, as appointed, empowered and
authorized by the Receivership Order, Mr. Mulliner is cited as the “Receiver”; where the reference
is to Mr. Mulliner’s specific tenure as the “Receiver”, he is cited as the “Initial Receiver”.

1 15. The Receiver is also “authorized and empowered” by the Receivership Order to, among
2 other things:

3 (5) Take any and all steps the Receiver deems necessary to receive and collect any
4 of Flamingo’s accounts, and, in connection therewith, issue demands and institute,
5 continue, or otherwise resolve all proper legal actions on behalf of and to preserve
the Receivership Property and the Receivership Estate;

6 [. . .]

7 (7) Bring and prosecute all proper actions for the collection of debts owed to
8 Flamingo, and for the protection and recovery of the Receivership Property.

9 Sections B(5) and B(7) of the Receivership Order, p. 4 of 13, ll. 7-10:15-16.

10 16. Among other actions, the Initial Receiver filed a complaint against the criminal office
11 manager for Flamingo, Robert J. Barnes (“Barnes”) on or about May 2, 2017, in case no. A-17-
12 754867.

13 17. The Initial Receiver also filed the initial complaint in this matter against defendants on or
14 about February 12, 2017.

15 18. Mark J. Gardberg (the “Receiver”) replaced the Initial Receiver pursuant to the Honorable
16 Nancy Allf’s order entered on or about July 21, 2017 in A-16-733627-B, which amended the
17 Receivership Order.

18 **B. The Proceedings in this Instant Action**

19 19. No answer has been filed in this matter; instead, three motions to dismiss were filed: Dr.
20 Matthew Ng and Dr. Pankaj Bhatnagar’s Motion to Dismiss, Defendant Daniel Burkhead’s Motion
21 to Dismiss Complaint, and Defendant Sheldon J. Freedman’s Motion to Dismiss Pursuant to NRC
22 12(b)(5) and 12(b)(6) and for Attorneys’ Fees Pursuant to NRS 18.020 (collectively, the “Motions
23 to Dismiss”).

24 20. The Receiver caused the First Amended Complaint to be filed on September 18, 2017. The
25 First Amended Complaint replaced in its entirety the original February 2017 complaint.

26 21. This SAC replaces in its entirety the First Amended Complaint.

1 22. On September 26, 2017, the Court held a hearing on the Motions to Dismiss, and found
2 good cause to order supplemental briefing. The various defendants' supplemental motions to
3 dismiss are due on October 24, 2017; Plaintiff's opposition is due on November 7, 2017; and the
4 replies in support of the supplemental motions to dismiss are due on November 21, 2017.

5 23. A hearing based on the supplemental briefing is calendared for November 29, 2017.

6 **THE PARTIES**

7 24. Plaintiff Mark J. Gardberg, Esq., in his capacity as Receiver for, and acting on behalf of,
8 Flamingo-Pecos Surgery Center, LLC, a Nevada limited liability company, is a Nevada resident
9 located and conducting business in Clark County, Nevada. Flamingo was organized and founded
10 on or about January 9, 2002, subsequently merged with Hualapai Surgery Center LLC on or about
11 October 12, 2011, and conducted business in Clark County, Nevada.

12 25. Defendant William Smith MD ("Defendant Smith") is an individual who resides and/or
13 does business in Clark County, Nevada. At all times described herein, Defendant Smith was a
14 manager, director and/or officer of Flamingo and owed certain duties to Flamingo.

15 26. Defendant Pankaj Bhatnagar MD ("Defendant Bhatnagar") is an individual who resides
16 and/or does business in Clark County, Nevada. At all times described herein, Defendant
17 Bhatnagar was a manager, director and/or officer of Flamingo and owed certain duties to
18 Flamingo.

19 27. Defendant Marjorie Belsky MD ("Defendant Belsky") is an individual who resides and/or
20 does business in Clark County, Nevada. At all times described herein, Defendant Belsky was a
21 manager, director and/or officer of Flamingo and owed certain duties to Flamingo.

22 28. Defendant Sheldon Freedman MD ("Defendant Freedman") is an individual who resides
23 and/or does business in Clark County, Nevada. At all times described herein, Defendant Freedman
24 was a manager, director and/or officer of Flamingo and owed certain duties to Flamingo.

25 29. Defendant Mathew Ng MD ("Defendant Ng") is an individual who resides and/or does
26 business in Clark County, Nevada. At all times described herein, Defendant Ng was a manager,
27 director and/or officer of Flamingo and owed certain duties to Flamingo.

1 30. Defendant Daniel Burkhead MD (“Defendant Burkhead”) is an individual who resides
2 and/or does business in Clark County, Nevada. At all times described herein, Defendant Burkhead
3 was a manager, director and/or officer of Flamingo and owed certain duties to Flamingo.

4 31. Defendants Smith, Bhatanagar, Belsky, Freedman, Ng, Burkhead, Manager MD, Doe
5 Defendants, and Roe Business Entities 1 through 100 are referenced individually and collectively
6 as the “Defendants.”

7 32. A certain Defendant Manager MD (“Defendant Manager MD”) is an individual who
8 resides and does business in Clark County, Nevada. At all times described herein, Defendant
9 Manager MD was a manager, director and/or officer of Flamingo and owed certain duties to
10 Flamingo; Defendant Manager MD is currently in bankruptcy and shall be named as a defendant
11 to this action once Defendant Manager MD’s bankruptcy is no longer pending.

12 33. Certain doe defendant managers, directors and officers (the “Doe D&O Defendants”) are
13 individuals who reside and do business in Clark County, Nevada. The true names of the Doe D&O
14 Defendants 1 through 25 are presently unknown to Plaintiff, who therefore sues said defendants
15 by such fictitious names. Plaintiff is informed and believes, and therefore alleges, that each of the
16 Doe D&O Defendants are legally responsible for the events referred to herein. This SAC will be
17 amended to include them when their true names and capacities become known.

18 34. The true names and capacities of defendants Roe Business Entities 1 through 100 are
19 presently unknown to Plaintiff, who therefore sues said defendants by such fictitious names.
20 Plaintiff is informed and believes, and therefore alleges, that each of the defendants designated as
21 Roe Business Entities 1 through 100 are legally responsible for the events referred to herein. This
22 SAC will be amended to include them when their true names and capacities become known.

23 **JURISDICTION & VENUE**

24 35. This Court has jurisdiction because the amount in controversy exceeds \$50,000, and
25 because the parties are residents of and/or conduct business in Clark County, Nevada.

26 36. Venue in Clark County is proper because the defendants are residents of and/or conduct
27 business in Clark County, and because the acts described herein occurred there.

SUMMARY OF ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

37. The Receiver, an individual, pursues Defendants on behalf of Flamingo because Defendants individually and collectively damaged Flamingo through a series of actions and inactions occurring over the course of several years. As such, this action was effectuated to preserve, protect, and recover Flamingo's assets and property from a group of individuals who irreparably harmed Flamingo: *i.e.*, Defendants – Flamingo's own directors, officers, and managers charged with running, overseeing and growing its business.

38. The Receiver is authorized, empowered, and specifically tasked with prosecuting this suit (*e.g.*, see Section B(7) of the Receivership Order, p. 4 of 13, ll. 15-17: "Bring and prosecute all proper actions for the collection of debts owed to Flamingo, and for the protection and recovery of the Receivership Property." As defined therein, Receivership Property includes: "Flamingo and its assets, including all accounts, books, records, ***contract rights, restitution rights, claims and causes*** of action, and such other further assets to which Flamingo might be entitled"; Receivership Order, p. 2 of 13, ll. 12-15 (emphasis added)).

39. As alleged in further and specific detail within this SAC, the injury to Flamingo and the damages sought from Defendants by this SAC are not *per se* the damages, actions and injury caused by the criminal office manager Barnes; rather, the injury to Flamingo and the damages sought from Defendants stem from Defendants' breaches of their fiduciary duties, breaches of the entity's operating agreement, and gross negligence, willful misconduct, and reckless/intentional disregard, in allowing and enabling Barnes to steal from Flamingo over a span of several years and to such an extent that Flamingo was rendered insolvent and went out of business.

40. The injury to Flamingo and the damages sought arise from Defendants' own misconduct and breaches—Defendants' own failures in hiring and supervising Barnes, Defendants' own failures to audit, review, or even check Flamingo's finances and accounts, Defendants' own failures to pursue or recover embezzled amounts, Defendants' own failures to pursue, preserve and collect Flamingo's receivables, and Defendants' own failures to assert Flamingo's interests and right to restitution when Barnes' criminal matter was adjudicated.

1 41. Defendants failed to exercise business judgment during Flamingo’s demise and, moreover,
2 Defendants intentionally acted and failed to act in direct breach of their duties of loyalty and duties
3 of care to Flamingo and (when dissolution was inevitable) its creditors.

4 42. Indeed, Defendants perceived the deteriorating health of Flamingo, observed its deepening
5 insolvency and failures to pay creditors, and were cognizant of Flamingo’s mounting debt and
6 financial troubles. Rather than adhering to their obligations to Flamingo, which would have
7 involved efforts to satisfy Flamingo’s creditors, and because Defendants perceived no personal
8 benefit from meeting such obligations, they ignored those obligations, did nothing, committed
9 waste, and did not care, as Flamingo slid from a profitable enterprise employing 90 people and
10 treating scores of Nevada residents, to a gutted, insolvent shell that shuttered all three of its
11 locations.

12 43. Defendants’ actions and inactions were not the product of careful evaluation, or reasonable
13 decisions, or even the thinnest guise of business judgment; instead, they were the product of glaring
14 omissions and ignorance, gross negligence, willful misconduct, and reckless/intentional disregard,
15 and staggering breaches of their fiduciary duties of care and of loyalty.

16 44. Defendants were part of 27 practicing surgeons constituting insiders of Flamingo – a small
17 limited liability company which was robbed over several years by an unsupervised, do-it-all office
18 manager Barnes. The office manager stole millions from Flamingo over several years and yet
19 Defendants were, apparently, too “busy” to notice.

20 45. Individually and collectively, Defendants, with gross negligence, willful misconduct, and
21 reckless/intentional disregard, and in breach of their respective fiduciary duties to Flamingo:

- 22 a. hired an embezzler, Barnes, into an unsupervised position with the power to destroy
23 Flamingo and shut down all of Flamingo’s business at three locations;
- 24 b. chose not to put a system in place to monitor said embezzler, enabling him to engage
25 in criminal conduct with complete impunity for “at least three to five years”;
- 26 c. failed to monitor and supervise that embezzler, who left obvious and brazen warning
27 signs (including, for example, middle-of-the-night withdrawals of \$25,000 and \$30,000
28 from Flamingo’s corporate card to feed a gambling problem, forging documents, and
tying Flamingo to “economically unfeasible agreements”); and

- d. failed to terminate, seek recourse from, or pursue that embezzler or ***complicit banking institutions***, even after learning he stole millions from Flamingo while Defendants – who owed duties to Flamingo – ***did nothing***.

46. Not only did Defendants fail to supervise Barnes or timely uncover his multi-layered looting, Defendants failed to immediately fire Barnes upon discovery – instead, they ***allowed the criminal to remain in his position for up to a year after discovery***.

47. Defendants took none of the steps one would reasonably take after discovering a criminal enterprise threatening one's own business. Defendants failed to:

- a. ***block*** Barnes from Flamingo's finances, or even supervise him; Barnes maintained his unsupervised access to and dominance over Flamingo's financial accounts, receivables, physical files, and even computer systems; Barnes "sabotaged" Flamingo's computer systems when he eventually left, and absconded with Flamingo's computer system, emptied his office, and took all the files;
- b. conduct an audit or investigation into the extent of Barnes' criminal acts and Flamingo's damages, despite Barnes being the "poison pill" that destroyed Flamingo's business – ***years*** later, Defendants still had no clue how much Barnes stole;
- c. pursue a civil action against Barnes;
- d. attempt to recover Flamingo's funds and assets; or
- e. move with haste or urgency – indeed, it took Defendants six (6) months ***after Barnes absconded*** to approach the FBI.

48. Moreover, Defendants intentionally prevented others from satisfying their fiduciary duties to Flamingo: directors screamed at managing member Tadlock to leave Barnes alone when he attempted to get Barnes to attend meetings and discuss Barnes' embezzlement; hindered Tadlock's efforts to investigate Barnes; ignored the fact that Barnes did not show up to meetings; and engaged in extensive and widespread obstruction.

49. The federal government sought for Barnes, and Barnes was given, a prison sentence based on, among other things, Barnes' embezzlement and theft from Flamingo.

50. Defendants separately failed to protect, preserve or pursue millions of dollars in Flamingo's receivables. These receivables continued to wither away to nothing – a textbook example of waste.

51. This waste – of millions of dollars owed to Flamingo – is made even worse by the fact that Defendants were put on notice and knew they should have pursued the receivables.

1 52. Indeed, Defendant Smith was questioned by incredulous counsel during a Rule 341
2 meeting in February of 2015 as to why Defendants were not taking basic steps to collect on the
3 receivables, at no cost (by, for example, hiring a collections' agency that worked for a percentage
4 recovered). Defendants did nothing to save, preserve and protect Flamingo's assets, even after
5 such notice. Flamingo's millions in receivables withered to nothing.

6 53. That Rule 341 meeting was triggered by Defendants' ill-fated shove of Flamingo into a
7 bankruptcy that was eventually dismissed. Of course, prior to the bankruptcy filing, Defendants
8 had allowed Flamingo to be destroyed and rendered an insolvent shell by Barnes' criminality over
9 several years, and by Defendants' own acts and failures to act.

10 54. Separately, when Barnes' federal criminal proceeding came to the forfeiture and restitution
11 stage, Defendants failed to submit any claims on behalf of Flamingo, the actual victim of Barnes'
12 criminal acts, despite knowing of Flamingo's insolvency and rights to the funds, and that its
13 creditors remained unpaid.

14 55. Accordingly, Flamingo is not listed as a recipient of assets forfeited by its larcenous former
15 office manager – funds that it alone is entitled to.

16 56. ***Even worse***, the Restitution List evidences Defendants' ***naked self-interest***:

17 Dr. Daniel Burkhead/Burkhead Irrevocable Trust was awarded \$39,587.89
18 Defendant Bhatnagar/Bhatnagar Family Trust was awarded \$81,187.89
19 Defendant Ng was awarded \$31,787.89
20 Dr. William Smith was awarded \$126,687.89
21 Dr. Sheldon Freedman was awarded \$61,287.89

22 57. As such, Defendants not only ignored and grossly failed to protect Flamingo's interests,
23 Defendants intentionally usurped those interests in favor of their own, by allowing the substitution
24 of their own personal self-interest over Flamingo's.

25 58. Defendants were personally enriched by their disregard of their affirmative duties to
26 Flamingo.

27 59. As such, Defendants were grossly negligent, and acted with willful misconduct and
28 reckless/intentional disregard, and separately breached the fiduciary duties (including the duty of

care and duty of loyalty) Defendants each owed to Flamingo as managers, directors, and/or officers:

- a. before, during and after Barnes' criminal activity, in allowing Flamingo to be looted by Barnes' criminal operation over several years and doing nothing to protect Flamingo's interests upon discovery of Barnes' criminality;
- b. by failing to pursue or preserve millions in receivables – for work Flamingo had already completed and was entitled to – and failing to stop their utter waste; and
- c. by failing to protect and pursue, or even register, Flamingo's interests in Barnes' restitution action – resulting in the rightful victim (Flamingo) receiving no award, and Defendants receiving personal, ill-gotten awards.

60. Defendants also violated, *inter alia*, the Nevada law against distributions of LLC funds where the LLC is insolvent (NRS 86.343), and several other provisions of Chapter 86 enacted to protect an LLC's creditors.

61. Moreover, Defendants' improper distributions constituted fraudulent transfers of corporate assets under Chapter 112.

62. Defendants are also liable for constructive fraud under Nevada law.

63. Separately, Defendants breached the Operating Agreement with Flamingo, to Flamingo's detriment, and must face the consequences of, and cannot be indemnified for, such Defendants' gross negligence and willful misconduct.

64. Defendants were also unjustly enriched by Defendants' actions and failures to act.

65. The quantity and quality of the evidence meets the standards for each of Plaintiff's causes of action – including those requiring heightened pleading standards. Indeed, this SAC is supported by critical directors and/or managing members' party admissions – under oath – in multiple Rule 341 meetings and Rule 2004 Examinations, and by an amended judgement issued by the U.S. District Court for the District of Nevada.

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION: BARNES' HIRING AND THE UNSUPERVISED YEARS OF CRIME – DESPITE OBVIOUS WARNING SIGNS

66. Defendants hired Barnes on or about October 5, 2006 to be Flamingo's office manager.

67. Managing member Charles H. Tadlock testified under oath that Barnes' hiring was a majority decision by the surgeons. See attached hereto as **Exhibit 1** a relevant portion of the

1 January 19, 2016 Charles H. Tadlock Rule 2004 Examination Transcript in *In re Charles H.*
2 *Tadlock and Mary E. Tadlock*, 15-13135-abl, at p. 19, ll. 11-17; p. 24, ll. 6-8.

3 68. Tadlock testified under oath that the “entire group” talked to Barnes about coming to work
4 for them, and everyone had an equal say. *Id.* at p. 24, ll. 3-5.

5 69. Barnes’ functions and responsibilities as Flamingo’s office manager extended to
6 Flamingo’s full financial workings, accounts and books.

7 70. Defendants failed to conduct the necessary due diligence regarding Barnes and, with gross
8 negligence, willful misconduct and reckless/intentional disregard, and in breach of their fiduciary
9 duties to Flamingo, hired Barnes and placed a criminal in a position to easily steal from Flamingo.

10 71. Defendants hired Barnes into a position where his submissions, correspondence and
11 communications with, and representations to Flamingo’s (a) vendors and creditors, including
12 Flamingo’s landlords; (b) accountant(s), financial officers, and/or the board of directors; (c)
13 patients, Medicare and Medicaid entities, and insurance companies, on invoices, accounts
14 receivable, and reimbursements; and (d) lenders and financial institutions holding Flamingo’s
15 accounts, would be unreviewed, unsupervised, unmonitored, unaudited, and/or unreconciled.

16 72. Defendants hired Barnes into a position where Flamingo’s accounts and funds would not
17 be reviewed, supervised, monitored, audited, reconciled or safeguarded in any reasonable manner.

18 73. Defendants conducted no spot checks or audits of Barnes’ work and performance following
19 Barnes’ hiring.

20 74. Defendants implemented no probationary, or trainee, period when Barnes was hired.

21 75. Defendants failed to appropriately train Barnes or review his work or performance
22 following Barnes’ hiring.

23 76. Defendants failed to establish a procedure to review, supervise, monitor, audit, and/or
24 reconcile Barnes’ performance as Flamingo’s office manager.

25 77. Defendants failed to appropriately review, supervise, monitor, audit, and/or reconcile
26 Barnes’ performance as Flamingo’s office manager – even when things were clearly amiss.

1 78. Each of the following dozens of paragraphs, independently and collectively, evidence
2 Defendants' gross negligence and reckless disregard and willful/intentional misconduct, and
3 breaches of Defendants' duties of loyalty and duties of care to Flamingo.

4 79. Barnes would withdraw cash from Flamingo's corporate credit card(s) – in the middle of
5 the night – in amounts of \$25,000 and \$30,000 at a time. *See* attached hereto as **Exhibit 2** a
6 relevant portion of the February 5, 2015 Rule 341 Examination Transcript, Dr. William Smith and
7 Counsel testifying for debtor in *In re Flamingo-Pecos Surgery Center dba Surgery Center of*
8 *Southern Nevada*, 14-18480-ABL, at p. 7, ll. 13-21.

9 80. Barnes later admitted that he obtained approximately \$515,000 in casino cash advances
10 using Flamingo's credit cards, for personal gambling. *See* attached hereto as **Exhibit 3** the Plea
11 Agreement Under Fed. R. Crim. P. 11(c)(1)(A) and (B) in *U.S. v. Robert W. Barnes*, 2:16-cr-
12 00090-APG-GWF, Document 6, at pp. 5-6, ll. 15-23, 1-3.

13 81. Barnes admitted that he used Flamingo's credit card to purchase a diamond and platinum
14 ring for \$38,000 in February 2013. *Id.*

15 82. Barnes admitted that during one five-month period in 2013, he used Flamingo's credit card
16 for concert tickets, hotels and expenses at Disneyland, expensive meals, and other personal
17 entertainment. *Id.*

18 83. Barnes admitted to embezzling funds from related entities, including Epiphany Surgical
19 Solutions and VIP Surgical Centers. *Id.* at p. 6, ll. 3-8.

20 84. Defendants did not act to prevent these blatantly illegal and inappropriate charges on
21 Flamingo's corporate cards for several years.

22 85. Barnes forged documents.

23 86. Barnes illegally and without authorization entered Flamingo into promissory notes and
24 lines of credit totaling \$1.7 million dollars – and absconded with the funds for personal use, while
25 Flamingo was eventually sued by J.P. Morgan Chase in Case No. A-14-700424, JP Morgan Chase
26 Bank NA vs. Flamingo-Pecos Surgery Center LLC, Eighth Judicial District Court, Dept. 24
27 (currently closed). *See* attached hereto as **Exhibit 4** the January 8, 2015 Omnibus Declaration of
28

1 William Smith, M.D. in Support of Debtor’s Interim Emergency Motions and Related Relief, Dkt.
2 13 in *In re Flamingo-Pecos Surgery Center dba Surgery Center of Southern Nevada*, 14-18480-
3 ABL, at pp. 3-4, ¶ 12.

4 87. Barnes issued false reports. Exhibit 1 at pp. 53-54, ll. 23-25, 1-2. Indeed, actual reports
5 directly from Flamingo’s banks were different from the reports Barnes showed to Defendants and
6 Flamingo’s other officers, directors and members. *Id.* at p. 30, ll. 3-5.

7 88. Barnes wrote checks to draw funds from accounts on which he had no authority and was
8 not named. *Id.* at p. 64, ll. 4-13. Defendants either did not review the checks drawing down
9 Flamingo’s funds or did not bother to inform themselves about why they were being issued.

10 89. Barnes brought suspicion on others to cover his tracks – for example, asserting to other
11 directors, officers and managers, that managing member Tadlock was getting more than his fair-
12 share. Barnes did this while Tadlock was out of pocket with multiple surgeries and was unaware
13 of Barnes’ slander. Defendants, however, did nothing to investigate Barnes’ charges and to inform
14 themselves of the true state of Flamingos’ financial woes. *Id.* at p. 32, ll. 8-23.

15 90. Defendants were aware of Barnes failing to pay Flamingo’s creditors – including landlords
16 – large sums of money, for multiple years. Such creditors were eventually owed hundreds of
17 thousands of dollars, while Barnes lied to the creditors about checks being in the mail, failed to
18 communicate and respond to urgent correspondence, and generally gave Flamingo’s creditors the
19 run around for several years. Yet Defendants did nothing.

20 91. Barnes was “not forthcoming” with the [financial] reports for ***18 months to two years***.
21 Exhibit 1 at p. 27, ll. 17-20. Defendants did nothing.

22 92. Barnes cancelled board of directors’ meetings repeatedly. *See* attached hereto as **Exhibit**
23 **5** a relevant portion of the July 15, 2015 Rule 341 Examination Transcript, Dr. William Smith
24 testifying for debtor in *In re Flamingo-Pecos Surgery Center dba Surgery Center of Southern*
25 *Nevada*, 14-18480-ABL, at p. 4, ll. 5-12. Again, Defendants did nothing.

26 93. In addition to the immediate and massive midnight heists from Flamingo’s corporate card,
27 Barnes tied Flamingo to “economically unfeasible agreements” – criminal enterprises at every
28

1 level, including with dirty sheets. Exhibit 2 at p. 6, ll. 3-5. Barnes profited from the cleaning of
2 Flamingo's dirty sheets. The scheme in sum: Flamingo got charged 3X or 4X the Las Vegas rate
3 to have the surgery center's sheets washed in Utah, and Barnes got a kickback.

4 94. Barnes' dirty sheets arrangement wasn't his only scheme related to Flamingo's vendors.
5 "There are lots of examples." *Id.* at p. 6, ll. 12-13.

6 95. Barnes reached similar illicit kick-back arrangements with various creditors of Flamingo,
7 stealing for himself discounts and rebates that should have inured to the benefit of Flamingo. *Id.*
8 at p. 6, l. 7. Defendants either failed to notice or failed to act, as they did nothing for several years.

9 96. Barnes hired multiple accounting firms during his tenure – as soon as the accountants
10 started having questions, he would **replace** the firm and tell Defendants – "oh, they're not doing a
11 good job. We needed to go to the next one." Barnes did this with at least three firms. *Id.* at p. 9,
12 ll. 15-21. Defendants continued to do nothing despite such blatant warning signs.

13 97. Defendant Smith testified under oath that Barnes' crime spree lasted for at least three to
14 five years (*Id.* at p. 9, ll. 13-14) – meaning that Defendants failed to check Flamingo's bank and
15 credit card accounts and statements, bills, invoices, receivables and accounting and tax documents,
16 for several years – an eternity, especially in the small business world, and among the small group
17 of shareholders.

18 98. Barnes admitted in subsequent criminal proceedings that he embezzled at least **\$1.3 million**
19 over many years. Defendant Smith testified to "millions" in stolen funds. Exhibit 2 at p. 9, l. 10.
20 Managing member Tadlock estimated **\$3.5 million**. See attached hereto as **Exhibit 6** a relevant
21 portion of the March 14, 2016 Charles H. Tadlock Rule 2004 Examination Transcript in *In re*
22 *Charles H. Tadlock and Mary E. Tadlock*, 15-13135-abl, at p. 103, ll. 12-20. Separately, Barnes
23 stole approximately \$300,000 to \$350,000 from Epiphany, the management company for
24 Flamingo and owned in majority part by Flamingo's managing member Tadlock.

25 99. During the many years of Barnes' crime spree, Defendants failed to supervise or monitor
26 Barnes' submissions, correspondence and communications with, and representations to
27 Flamingo's (a) vendors and creditors, including Flamingo's landlords; (b) accountant(s), financial
28

1 officers, and/or the board of directors; (c) patients, Medicare and Medicaid entities, and insurance
2 companies, on invoices, accounts receivable, and reimbursements; and (d) lenders and financial
3 institutions holding Flamingo's accounts.

4 100. Defendants did not audit or reconcile Barnes' work, despite his position and power to
5 destroy Flamingo's entire business. In fact, Barnes' theft and Defendants' actions and inactions
6 directly led to Flamingo's downfall and ill-fated bankruptcy; at Flamingo's Rule 341 Meeting,
7 Barnes was labeled the "poison pill", and the impact of his crime on Flamingo's business was
8 readily and unambiguously admitted. "So the surgery center was always profitable if there wasn't
9 somebody who was stealing millions of dollars." Exhibit 2 at p. 16, ll. 21-23. Despite his central
10 role, Defendants did nothing.

11 101. Defendants did not conduct any performance reviews or rate or examine Barnes' work and
12 conduct in his critical business functions.

13 102. Defendants did not audit or even review, with even the slightest care or effort, Flamingo's
14 financial reports during the several years of Barnes' crime spree to determine why so much money
15 was missing. And why no one – including Defendants and Flamingo's creditors – was getting
16 paid from a busy surgery center.

17 103. Defendants did not check on Flamingo's funds, or even review Flamingo's accounts and
18 statements, or Flamingo's contracts with vendors, creditors and lenders, with even the slightest
19 care or effort – as Barnes robbed Flamingo blind via concurrent, brazen schemes.

20 104. Barnes' conduct, and Defendants' acts and failures to act to prevent and/or end such
21 conduct, crippled Flamingo – forcing the layoffs of 90 employees, leaving just five (5) persons
22 still employed. Exhibit 4 at p. 4, ¶ 13.

23 105. Despite the warning signs, and despite Barnes' failure to perform basic functions for well
24 over a year (including but not limited to issuing financial reports), Defendants did not investigate,
25 audit, examine or perhaps even bother about such failures.

1 106. In response to questions from the U.S. Trustee at Flamingo's ill-fated bankruptcy, Dr.
2 Smith's only defense was: "most of the surgeons here are extremely busy, and we trusted him to
3 do the day-to-day management." Exhibit 2 at p. 10, ll. 12-14.

4 107. Indeed, Defendants allowed Barnes to remain on the board "until he was fired." Exhibit 5
5 at pp. 3-4:24-25, 1-4.

6 108. Barnes employed schemes, misrepresentations and outright lies to hide Flamingo's true
7 financial condition and Defendants failed to detect any of them. Defendants exercised zero
8 diligence and zero urgency and failed to engage in efforts to save Flamingo—their own business.
9 In fact, Defendants did the opposite, as "two-thirds of the doctors gave up." Exhibit 2 at p. 7, ll.
10 13-21.

11 109. Individually and collectively, Defendants were grossly negligent and acted with reckless
12 disregard and willful/intentional misconduct, and breached their fiduciary duties of loyalty and
13 duties of care to Flamingo, in hiring and failing to supervise, oversee and/or monitor Barnes for
14 many years during Barnes' crime spree.

15 110. Defendants' actions and failures to act allowed and encouraged a criminal to effectuate and
16 conduct his embezzlement and theft from Flamingo and resulted in substantial damages to and
17 against Flamingo.

18 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION: BARNES' NON-**
19 **TERMINATION AND LINGERING RETENTION – AND DEFENDANTS'**
20 **INACTIVITY AND INTENTIONAL MISCONDUCT – FOLLOWING DISCOVERY OF**
21 **BARNES' CRIMINALITY**

22 111. Upon the discovery of Barnes' embezzlement and theft, Defendants took none of the steps
23 one would expect to be taken in an existential emergency (one that caused all three of Flamingo's
24 locations to shut down based on Barnes' actions).

25 112. Defendants are wildly inconsistent as to basic facts about Barnes' crime spree. Dr. William
26 Smith under oath at a Rule 341 Meeting agreed with a puzzling and worrisome sequence of events:
27 Barnes' embezzlement was discovered in 2012, but he was not fired until 2013. Exhibit 5, at p. 5,
28 ll. 3-7. Separately, in a sworn declaration, Dr. Smith asserted that reports were received in June

1 or July of 2013 from Flamingo’s landlords and vendors that debts were going unpaid, and this led
2 to the board confronting Barnes, who “immediately resigned.” Exhibit 4, at p. 3, ¶ 9. In fact,
3 Flamingo’s landlord raised unpaid rent issues well before June 2013—in 2011 itself, and
4 repeatedly throughout 2012—as evidenced by multiple written agreements.

5 113. Flamingo negotiated a certain Delinquent Rent Letter Agreement with said landlord
6 beginning in 2011, and managing member Tadlock executed this agreement on January 3, 2012.

7 114. Flamingo subsequently received a demand letter from said landlord on July 6, 2012, and
8 on July 24, 2012, managing member Tadlock guarantied Flamingo’s performance via executing a
9 certain Amended Delinquent Rent Letter Agreement.

10 115. Tadlock, on behalf of Flamingo, also received an email on December 31, 2012 detailing
11 substantial past due rents and attaching a rent invoice.

12 116. Managing member Tadlock describes the discovery of Barnes’s embezzlement completely
13 differently – his office manager Tammy Schaefer discovered theft from an Epiphany account at
14 Bank of America in 2013 or 2014. Exhibit 1, pp. 43-44, ll. 12-25, 1-6. Tadlock believes Barnes
15 simply left, and “disappeared.” *Id.*, at p. 46, ll. 12-13. Barnes “took off” on a Saturday with “all
16 of the computers and all of the written stuff for Epiphany and [Flamingo].” *Id.*, at p. 49, ll. 11-18.

17 117. Defendants – Flamingo’s officers, managers and directors who owed obligations and duties
18 to Flamingo – are completely inconsistent about the central events and central character (the
19 “poison pill”) who destroyed their business and stole millions of dollars.

20 118. What is undisputed – is that Defendants were willfully blind to Barnes’ criminality for
21 several years, and that Defendants failed upon discovery to immediately stop Barnes and protect
22 Flamingo.

23 119. Barnes admits to conducting his outrageous heists from 2010 to 2013 – meaning
24 Defendants completely failed and slept on their basic obligations for many years. This constitutes
25 grossly, willfully and intentionally negligent conduct and, separately, a breach of Defendants’
26 fiduciary duties to Flamingo, of care and of loyalty.

1 120. Upon discovering Barnes' embezzlement and theft, Defendants individually and
2 collectively failed – for an unreasonably lengthy period of time – to remove Barnes from his
3 position as office manager, and to block Barnes' access to Flamingo's funds and assets, thereby:
4 (a) allowing Barnes to continue his crime spree; (b) failing to limit Flamingo's potential losses;
5 and (c) exacerbating Flamingo's actual losses.

6 121. Upon discovering Barnes' embezzlement and theft, Defendants individually and
7 collectively failed to: (a) demand that Barnes return Flamingo's funds and assets; (b) pursue
8 Barnes; and (c) file a civil complaint against Barnes, with such failures resulting in substantial
9 damages against Flamingo.

10 122. Upon discovering Barnes' embezzlement and theft, Defendants individually and
11 collectively failed to appropriately audit, investigate, and determine the extent of Barnes' crimes,
12 resulting in substantial damages against Flamingo.

13 123. Defendants failed to address Barnes' continued control of Flamingo's finances for several
14 months.

15 124. Defendants failed to implement and/or enforce IT protections and record retention
16 policies after they discovered Barnes' crimes.

17 125. Defendants failed to investigate Barnes' finances. Exhibit 1, pp. 74-75, ll. 24-25, 1-7.

18 126. Defendants failed to hire accountants to conduct an internal investigation into Flamingo's
19 losses.

20 127. Defendants failed to pursue Barnes to retrieve Flamingo's funds and other entities' funds.

21 128. After discovering Barnes' embezzlement and theft and until Barnes left, Defendants
22 allowed Barnes to further harm Flamingo. Dr. Smith testified that Barnes either destroyed or took
23 a lot of documents, including those related to board meetings. Exhibit 5, at p. 4, ll. 15-19.
24 Managing member Tadlock confirms that "Barnes walked off with almost everything, the
25 computers . . . [a]ll the financial records for Epiphany and for [Flamingo]." Exhibit 6, at p. 50, ll.
26 17-21.

1 129. Speaking in July of 2015, Dr. Smith admitted that Barnes “sabotaged a couple of computers
2 that had some information on [sic], so we have a hard time getting some of that down.” Exhibit 5,
3 at p. 4, ll. 19-22. Barnes inflicted upon Flamingo extensive and long-lasting damage on his way
4 out of the company, and the harm he caused was exacerbated by Defendants’ failures to protect
5 Flamingo.

6 130. Defendants individually and collectively failed to protect and preserve Flamingo’s assets,
7 funding and interests from Barnes’s criminality, and failed to take basic steps to protect and
8 preserve Flamingo after Barnes left the company.

9 131. After Barnes left Flamingo, and for the *six months* that followed, Defendants did not hire
10 anyone to investigate Barnes’ misconduct, leaving Flamingo in the dark as to the full extent of the
11 damage. *Id.*, at p. 6, ll. 9-15.

12 132. Indeed, it took Defendants six (6) months *after Barnes absconded* to take even such basic
13 steps as reporting his crimes to the FBI.

14 133. Not only did Defendants fail to take any actions to protect Flamingo’s interests, but certain
15 Defendants on the Board of Directors intentionally interfered with managing member Tadlock’s
16 efforts to investigate Barnes’ embezzlement. Tadlock claimed that directors screamed at him when
17 he attempted to get Barnes to attend meetings and discuss Flamingo’s finances (Exhibit 1, at p. 28,
18 ll. 2-15), and they “were shouting at [Tadlock] to leave [Barnes] alone” when Tadlock raised the
19 issue of Barnes’ performance. *Id.*, at p. 28, ll. 12-15.

20 134. Defendants who were board members hindered Tadlock’s efforts to investigate Barnes,
21 ignored the fact that Barnes did not show up to meetings, and engaged in general obstruction that
22 lasted for more than 18 months. *Id.*, at p. 28, ll. 3-19.

23 135. According to managing member Tadlock, the banks where Flamingo’s funds were held
24 allowed Barnes to write checks on accounts for which he had no authorization, and failed to take
25 basic security precautions – negligence that potentially left the banks liable for Flamingo’s losses.
26 Yet Defendants failed to pursue or even file a civil complaint against such institutions to hold them
27 responsible for allowing Flamingo’s funds to be stolen.

1 136. Indeed, it appears that Defendants failed to even work with the banks and their internal
2 fraud and/or recovery teams to identify Flamingo's losses and retrieve Flamingo's funds in lieu of
3 initiating civil litigation. Defendants' intentional (and grossly negligent) inaction compounded the
4 already-substantial damages to Flamingo caused by their other failures.

5 137. These actions and failures to act reflect Defendants' reckless indifference and "want of
6 even scant care." Here, Defendants acted with no rational basis.

7 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION: DEFENDANTS' GROSS**
8 **NEGLIGENCE, INTENTIONAL MISCONDUCT AND BREACHES OF FIDUCIARY**
9 **DUTY IN FAILING TO PURSUE MILLIONS OF DOLLARS IN RECEIVABLES OWED**
10 **TO FLAMINGO – RESULTED IN COMPLETE WASTE**

11 138. Defendants separately failed to protect, preserve or pursue, over several years, millions in
12 Flamingo's receivables for surgeries and medical treatment already provided by Flamingo.

13 139. Flamingo's receivables continued to wither away to nothing under Defendants' watch as
14 officers, directors and managers of Flamingo. Defendants' gross negligence, willful misconduct,
15 and reckless/intentional disregard for and breaches of their respective fiduciary duties to Flamingo
16 not only amounted to a textbook example of waste, but damaged Flamingo's ability to attract and
17 retain the qualified staff needed for Flamingo to remain viable.

18 140. This waste – of millions owed to Flamingo – was made even worse by the fact that
19 Defendants were put on notice and knew they should have pursued the receivables.

20 141. First, Defendants failed to pursue, preserve, and capture millions of dollars in receivables
21 when Barnes' criminality was discovered in 2012 or 2013.

22 142. Second, between the 2012/2013 discovery and Flamingo's Rule 341 Meeting on February
23 5, 2015 (after Defendants shoved Flamingo into its ill-fated bankruptcy) – a vast stretch of time
24 for a victimized small business – Defendants continued in their failure to pursue, preserve, and
25 capture the receivables.

26 143. Third, after the first Rule 341 Meeting (in February of 2015) and second Rule 341 Meeting
27 (in July of 2015) and despite being made aware of the importance of the receivables to Flamingo's
28

1 estate and creditors, Defendants continued in their failures to pursue, preserve, and capture the
2 receivables – until such amounts were rendered completely uncollectable.

3 144. The U.S. Trustee identified at Flamingo’s first Rule 341 Meeting on February 5, 2015, **\$2.9**
4 **million** listed as personal property; when she asked what made up this amount – receivables or
5 tangible cash, Dr. Smith testified that there was only a “small amount of money in the bank.”
6 Exhibit 2, at p. 15, ll. 2-7. Accordingly, a substantial portion of the \$2.9 million listed in the
7 schedules to Flamingo’s bankruptcy petition was comprised of Flamingo’s receivables.

8 145. As of that date in February 2015, Dr. Smith estimated that 20% of the receivables
9 (approximately \$500,000 to \$600,000) would be collectable with a “good collection team really
10 working it.” *Id.*, at ll. 15-19. Thus, Defendants’ failure to take any steps to preserve Flamingo’s
11 receivables between their 2012/2013 discovery of Barnes’ criminality and the February 5, 2015
12 questions under oath, resulted in a waste and abandonment of 80% of millions of dollars earned
13 and rightfully owed to Flamingo.

14 146. The U.S. Trustee further questioned Defendants’ collection efforts on Flamingo’s behalf:
15 “Has anyone started doing that or is that something you’re going to do?” Dr. Smith responded that
16 such efforts were “on hold” . . . “[u]ntil we get the funding.” *Id.*, at pp. 15-16, ll. 22-25, 1-2.

17 147. The U.S. Trustee then questioned whether Defendants had considered agencies that take a
18 percentage – and received a frank admission of Defendants’ gross negligence and breach of
19 fiduciary duty: “that is not our focus.” *Id.* at 17-18, ll. 22-25, 1-10.

20 148. Defendants’ ridiculous position that millions of dollars in receivables owed to Flamingo
21 were not the focus of Defendants, and that such efforts were on hold for cost reasons (***when***
22 ***collection models with zero upfront costs are readily available***), triggered another attorney to
23 jump in – counsel for one of Flamingo’s creditors (“Creditor’s counsel”). Creditor’s counsel
24 focused on Defendants, including but not limited to Defendant Smith, failing to take the simplest
25 steps to protect Flamingo’s (Debtor’s) estate:

26 Creditor’s counsel: [I]f there are assets out there, okay, a couple of million, that
27 could be worked by a ***collection company that might charge you X amount of***
28 ***dollars for what they collect, why wouldn’t you want to go ahead and start doing***
that now so that you can collect those assets –

1 Debtor's counsel: We're going to if we ever –
2 Creditor's counsel: But why should it be contingent? *Why can't you do that now*
3 is my question.
4 U.S. Trustee: *Yeah.*
5 Debtor's counsel: It's not contingent. It's just –
6 Creditor's counsel: Well, it is. Because what you're saying is [sic] that it should
7 be contingent upon whether the success of your plan. I mean, why if there are assets
8 out there right not, *why wouldn't you want to marshall [sic] those for the benefit*
9 *of the estate and the creditors --*
10 Debtors' counsel: We're going to.
11 Creditor's counsel: -- *when it doesn't cost any money?*

12 Exhibit 2, at pp. 20-21, ll. 6-25, 1-3 (emphasis added)

13 149. Defendant Smith responded by referencing a billing company that was doing that – “and
14 then because they were not get [sic] paid, they stopped doing that.” *Id.*, at p. 21, ll. 4-6. Defendant
15 Smith's admission here constitutes additional, separate, evidence of yet further gross negligence,
16 willful misconduct, and reckless/intentional disregard, and of Defendants' breaches of their
17 respective fiduciary duties to Flamingo. Defendants failed even the simplest of obligations – and
18 the immediate first step – *of hiring and maintaining* entities to preserve, pursue and collect
19 receivables belonging to Flamingo. And this failure continued for several years.

20 150. At the very least, the February 5, 2015 Rule 341 Meeting put Defendants on notice
21 regarding the pursuit of the remaining receivables, as both the U.S. Trustee and creditor's counsel
22 focused on the receivables and urged Defendants to prevent further waste

23 151. Remarkably, even after the first Rule 341 Meeting, *Defendants still did nothing* regarding
24 the remaining receivables—which withered away to nothing.

25 152. When asked six months later, during the July 15, 2015, second Rule 341 Meeting, what he
26 had personally done since the end of 2014 to try and recover the accounts receivable, Defendant
27 Smith admitted under oath: “I have personally done nothing.” Exhibit 5, at p. 8, ll. 6-10.

28 153. Despite notice and the urgings and the questioning from the U.S. Trustee and multiple
creditors' counsel, Defendants failed to preserve, pursue, and collect on the remaining receivables.

154. Defendants' intentional actions and inactions resulted in the utter waste of millions of
dollars of what Flamingo's assets—and independently constitute gross negligence, willful
misconduct, and reckless/intentional disregard, and breaches of Defendants' fiduciary duties.

155. Defendants are directly responsible for and caused Flamingo's loss of millions of dollars in receivables.

**ALLEGATIONS COMMON TO ALL CAUSES OF ACTION: DEFENDANTS'
INTENTIONAL FAILURE TO PROTECT FLAMINGO'S INTERESTS AND
DEFENDANTS' PERSONAL ENRICHMENT THROUGH BREACHES OF THEIR
FIDUCIARY DUTIES**

156. Barnes' criminal case in the U.S. District Court for the District of Nevada arrived at the restitution stage, where \$1.3 million dollars – which belonged to Flamingo and was stolen by Barnes – was subject to claims and would be apportioned into separate awards pursuant to court order. *See* attached hereto as **Exhibit 7** the March 28, 2017 Amended Judgment in a Criminal Case in *U.S. v. Robert W. Barnes*, 2:16-cr-00090-APG-GWF, Document 41, at pp. 14-15 (the "Restitution List").

157. Defendants failed to advocate for and protect Flamingo's interests at the restitution stage of Barnes' criminal case. Indeed, Flamingo appears nowhere on the Restitution List.

158. Despite having notice from the U.S. District Court for the District of Nevada of the Restitution List, Defendants failed to make any claims on behalf of Flamingo, even though Defendants knew Flamingo was the victim of Barnes' criminality, knew Flamingo was insolvent as a result, and knew that Flamingo's creditors remained unpaid.

159. Defendants' intentional actions and inactions here represent a failure to protect Flamingo's interests – but Defendants went even further, seeking to personally enrich themselves, their families, and their investments by further breaching of their fiduciary duties to Flamingo.

160. Defendants made claims (or at least allowed claims to be made) on their behalf, while taking no such steps on behalf of Flamingo. Accordingly, the Restitution List contains no claim for or even a mention of Flamingo – only Defendants' ***naked self-interest***:

Defendant Bhatnagar/Bhatnagar Family Trust was awarded \$81,187.89

Defendant Ng was awarded \$31,787.89

Dr. William Smith was awarded \$126,687.89

Dr. Sheldon Freedman was awarded \$61,287.89

Dr. Daniel Burkhead/Burkhead Irrevocable Trust was awarded \$39,587.89

Id. at 14-15.

1 161. The Restitution List identifies substantial sums awarded to, among others, the defendants
2 named in this action – at a time when Defendants knew such sums rightfully belonged to Flamingo
3 and that Flamingo was a gutted, post-failed-bankruptcy shell incapable of satisfying its obligations
4 to its creditors.

5 162. Not only did Defendants ignore and fail their obligations to pursue, protect and collect on
6 Flamingo's interests, Defendants *intentionally usurped those interests in favor of their own*
7 *personal interests*, by allowing the substitution of their own personal self-interest over Flamingo's.

8 163. Among other causes of action, Defendants' breaches of their duties of loyalty to Flamingo
9 are blatant and obvious here. Defendants' actions here also (a) justify, for the effectuation of
10 justice, a constructive trust cause of action; (b) constitute unjust enrichment under Nevada law;
11 and (c) separately breach multiple provisions of NRS Chapter 86, especially with respect to the
12 dissolution of a Nevada LLC and the protections afforded to creditors.

13 **FIRST CAUSE OF ACTION:**
14 **GROSSLY NEGLIGENT HIRING AGAINST ALL DEFENDANTS**

15 164. Plaintiff re-alleges each and every allegation set forth in Paragraphs 1 - 163 above, as if set
16 forth herein.

17 165. Defendants had a duty to Flamingo to: (a) conduct reasonable background check and due
18 diligence on Barnes prior to hiring Barnes; and (b) protect Flamingo from harm resulting from
19 Flamingo's employment of Barnes.

20 166. Defendants hired Barnes without conducting a reasonable background check and due
21 diligence to ensure he was fit for the position of Flamingo's office manager.

22 167. Defendants knew or should have known that Barnes had dangerous propensities and/or
23 would display, initiate and perpetuate criminality.

24 168. Defendants breached Defendants' duties to Flamingo with respect to hiring, including the
25 duty to protect Flamingo from the harm resulting from Flamingo's employment of Barnes.

26 169. Defendants' breaches of Defendants' duties to Flamingo in this regard resulted in
27 substantial damages to and against Flamingo, in an amount greater than \$50,000.

170. Defendants watched Flamingo sink into an insolvent death spiral and did nothing.

**SECOND CAUSE OF ACTION:
GROSSLY NEGLIGENT SUPERVISION AGAINST ALL DEFENDANTS**

171. Plaintiff re-alleges each and every allegation set forth in Paragraphs 1 - 170 above, as if set forth herein.

172. Defendants had a duty to Flamingo to supervise, train, and discipline Barnes during his employment as Flamingo's office manager, and to protect Flamingo from harm resulting from Flamingo's employment of Barnes.

173. Defendants failed to supervise, train or discipline Barnes during his employment, and failed to protect Flamingo from harm resulting from Flamingo's employment of Barnes – thereby breaching Defendants' duties to Flamingo.

174. Defendants' breaches of Defendants' duties to Flamingo in this regard resulted in substantial damages to and against Flamingo, in an amount greater than \$50,000.

**THIRD CAUSE OF ACTION:
GROSSLY NEGLIGENT RETENTION AGAINST ALL DEFENDANTS**

175. Plaintiff re-alleges each and every allegation set forth in Paragraphs 1 - 174 above, as if set forth herein.

176. Defendants had a duty to protect Flamingo regarding Barnes' continued employment as Flamingo's office manager, especially after Barnes' embezzlement and theft was discovered.

177. Defendants failed to remove Barnes and, with gross negligence, willful misconduct, and reckless/intentional disregard, retained Barnes as Flamingo's office manager, allowing Barnes to continue his embezzlement and theft – thereby breaching Defendants' duties to Flamingo and inflicting substantial harm upon Flamingo.

178. Defendants' breaches of Defendants' duties to Flamingo in this regard resulted in substantial damages to and against Flamingo, in an amount greater than \$50,000.

**FOURTH CAUSE OF ACTION:
DEFENDANTS' BREACHES OF DEFENDANTS' FIDUCIARY DUTY OF CARE TO
FLAMINGO**

1 179. Plaintiff re-alleges each and every allegation set forth in Paragraphs 1 - 178 above, as if set
2 forth herein.

3 180. As managers, directors and/or officers of Flamingo, Defendants had a fiduciary duty of
4 care to Flamingo.

5 181. As detailed in this SAC and evidenced by numerous and ongoing examples, for several
6 years, Defendants completely neglected this duty, before the discovery of Barnes' embezzlement
7 (when Defendants' failures allowed Barnes' theft to continue unabated), upon the discovery of
8 Barnes' embezzlement (when Defendants' failures exacerbated the harm inflicted upon Flamingo
9 by Barnes), and for multiple years following the discovery of Barnes' embezzlement (when
10 Defendants' failures resulted in lasting harm to Flamingo, which was ruined and went out of
11 business).

12 182. Defendants individually and collectively breached Defendants' fiduciary duty of care to
13 Flamingo by, among other things, failing to:

- 14 a. oversee, supervise, monitor and discipline Flamingo's office manager, who was
15 embezzling and stealing from Flamingo;
 - 16 b. supervise, care for, monitor or even review Flamingo's books, accounts, and finances
17 while Barnes was Flamingo's office manager;
 - 18 c. expeditiously remove Barnes from the position of Flamingo's office manager upon the
19 discovery of Barnes' embezzlement and theft;
 - 20 d. audit, investigate and/or determine the extent of Barnes' embezzlement and theft to
21 protect Flamingo's interests;
 - 22 e. pursue Barnes on behalf of Flamingo to recover Flamingo's assets, funding and
23 interests from Barnes;
 - 24 f. pursue third-parties, including banks holding Flamingo's funds, to recover Flamingo's
25 assets and funds;
 - 26 g. pursue and collect on millions of dollars in receivables owed to Flamingo;
- 27
28

- 1 h. take appropriate, reasonable and necessary steps to protect Flamingo's interests vis-à-
2 vis Barnes and certain Defendants; and
3 i. protect and pursue, or even register, Flamingo's interests in Barnes' restitution action
4 – resulting in the rightful victim (Flamingo) receiving no award, and Defendants
5 receiving personal, ill-gotten awards.

6 183. Defendants' breaches of the duty of care also included the failure to account for and
7 preserve Flamingo's funds and assets.

8 184. Defendants' individual and collective breaches of Defendants' fiduciary duty of care to
9 Flamingo resulted in substantial damages to and against Flamingo, in an amount greater than
10 \$50,000.

11 **FOURTH CAUSE OF ACTION: DEFENDANTS' BREACHES OF DEFENDANTS'**
12 **FIDUCIARY DUTY OF LOYALTY TO FLAMINGO**

13 185. Plaintiff re-alleges each and every allegation set forth in Paragraphs 1 - 184 above, as if set
14 forth herein.

15 186. As managers, directors and/or officers of Flamingo, Defendants had a fiduciary duty of
16 loyalty to Flamingo.

17 187. As detailed in this SAC and evidenced by numerous and ongoing examples, for several
18 years, Defendants completely neglected this duty, before, upon, and well after the discovery of
19 Barnes' embezzlement.

20 188. Defendants individually and collectively breached Defendants' fiduciary duty of loyalty to
21 Flamingo by, among other things, failing to submit any claims on Flamingo's behalf in Barnes'
22 criminal case's restitution proceedings, and – instead – intentionally usurping Flamingo's interests
23 in favor of their own, by allowing the improper substitution of Defendants' own personal self-
24 interest over Flamingo's, and receiving awards of funds rightfully belonged to Flamingo.

25 189. Defendants' individual and collective breaches of Defendants' fiduciary duty of loyalty to
26 Flamingo resulted in substantial damages to and against Flamingo, in an amount greater than
27 \$50,000.

1 **FIFTH CAUSE OF ACTION: DEFENDANTS' BREACHES OF THE OPERATING**
2 **AGREEMENT**

3 190. Plaintiff re-alleges each and every allegation set forth in Paragraphs 1 - 189 above, as if set
4 forth herein.

5 191. Defendants and Flamingo are parties to an existing, valid contract, the operating agreement.

6 192. Defendants breached the terms of the operating agreement.

7 193. Defendants' breaches of the operating agreement were unexcused.

8 194. All terms and conditions precedent to Defendants' duty to perform were fulfilled by
9 Flamingo or were excused.

10 195. As detailed in this SAC, Flamingo was severely and irrevocably damaged by Defendants'
11 breaches of the operating agreement, in an amount greater than \$50,000.

12 **SIXTH CAUSE OF ACTION: WASTE, AGAINST ALL DEFENDANTS**

13 196. Plaintiff re-alleges each and every allegation set forth in Paragraphs 1 - 195 above, as if
14 set forth herein.

15 197. As detailed in this SAC, among other things Defendants failed to pursue, preserve, and
16 collect on millions of dollars in receivables owed to Flamingo, and failed to protect other assets
17 and property of Flamingo.

18 198. In so doing, Defendants committed acts and permitted acts constituting waste of
19 Flamingo's property at a time when Defendants were rightfully in possession of Flamingo's
20 interests and property.

21 199. Defendants' acts caused permanent and lasting injury to the property and to Flamingo, to
22 the prejudice of Flamingo and Flamingo's creditors, in an amount greater than \$50,000.

23 200. Flamingo is entitled to treble damages under Nevada law, pursuant to NRS 40.150 and
24 *Price v. Ward*, 25 Nev. 203 (1899).

25 **SEVENTH CAUSE OF ACTION: DEFENDANTS' BREACHES OF NRS CHAPTER 86**

26 201. Plaintiff re-alleges each and every allegation set forth in Paragraphs 1 - 200 above, as if
27 set forth herein.

1 202. NRS Chapter 86 applies the formation, operation, and dissolution of Nevada limited
2 liability companies – and thus to Flamingo.

3 203. As detailed in this SAC, Defendants’ actions and inactions breached multiple provisions
4 of NRS Chapter 86, including without limitation: failure to maintain a registered agent (NRS
5 86.231), failure to hold in trust all the property and assets of a defaulting company (NRS 86.274),
6 failure to properly distribute profits and contributions, and making distributions improperly when
7 Flamingo was insolvent (NRS 86.343), and failure to properly dissolve Flamingo (NRS 86.521).

8 204. Defendants’ multiple breaches of NRS Chapter 86 caused substantial damages to Flamingo
9 and to Flamingo’s creditors, in an amount greater than \$50,000.

10 **EIGHTH CAUSE OF ACTION: IMPOSITION OF A CONSTRUCTIVE TRUST**
11 **AGAINST ALL DEFENDANTS**

12 205. Plaintiff re-alleges each and every allegation set forth in Paragraphs 1 - 204 above, as if
13 set forth herein.

14 206. A confidential, fiduciary relationship exists and existed between Flamingo and Defendants.

15 207. As detailed in this SAC, Defendants’ actions and inactions damaged Flamingo (e.g.,
16 Defendants ignored Flamingo’s rightful claims to the restitution amounts in Barnes’ criminal
17 proceeding and made claims (or allowed claims to be made on Defendants’ behalf) leading to
18 direct personal awards of funds, to the detriment of Flamingo.

19 208. Retention of legal title by Defendants to such personal awards and other property of
20 Flamingo, against Flamingo’s interests, would be inequitable under the circumstances.

21 209. The imposition and existence of a trust – where Defendants must submit all such personal
22 awards and property belonging to Flamingo – is essential to the effectuation of justice.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiff demands and prays for relief as follows:

- 25 a. For an award of compensatory damages in an amount far in excess of \$50,000;
26 b. For pre- and post-judgment interest, as applicable;
27 c. For an award of costs and reasonable attorneys’ fees;

- 1 d. For treble damages;
2 e. For the imposition of a constructive trust; and
3 f. For such other and further relief as the Court deems just and proper.

4 Dated this 10th day of October 2017.

5 Respectfully Submitted,

6 By: /s/ Todd E. Kennedy
7 Todd E. Kennedy (NSB# 6014)
8 BLACK & LOBELLO

9 *Attorneys for Mark J. Gardberg, Esq., in his*
10 *capacity as Receiver for, and acting on behalf of,*
11 *Flamingo-Pecos Surgery Center LLC*

12 **CERTIFICATE OF SERVICE**

13 I HEREBY CERTIFY that I am an employee of BLACK & LOBELLO, and that on this
14 10th day of October 2017, I caused to be served a true and correct copy of the foregoing: **SECOND**
15 **AMENDED COMPLAINT** in the following manner:

16 **(ELECTRONIC SERVICE)** Pursuant to Administrative Order 14-2, the above-
17 referenced document was electronically filed on the date hereof and served through the Notice of
18 Electronic Filing automatically generated by the Court's facilities to those parties listed on the
19 Court's Master Service List.

20 **For Mathew Ng:**

21 Erica Smit (ecsmit@hollandhart.com)
22 Robert Cassity (bcassity@hollandhart.com)
23 Valerie Larsen (vllarsen@hollandhart.com)
24 Marie Twist (matwist@hollandhart.com)
25 Bryce Kunimoto (bkunimoto@hollandhart.com)

26 **For Pankaj Bhatnagar:**

27 Marie Twist (matwist@hollandhart.com)
28 Bryce Kunimoto (bkunimoto@hollandhart.com)

For Sheldon Freedman:

Shirlee Lopan (slopan@bckltd.com)

For Daniel Burkhead:

Dylan Houston (dhouston@gordonrees.com)

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Jill House (jhouse@mullinerlaw.com)

Tim Mulliner (tmulliner@mullinerlaw.com)

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

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Marah Hinskey (mjh@ilawlv.com)

Mohamed Iqbal Jr. (mai@ilawlv.com)

By: /s/ Todd E. Kennedy
An employee of BLACK & LOBELLO

EXHIBIT B

EXHIBIT B

**DISTRICT COURT
CLARK COUNTY, NEVADA**

NRS Chapters 78-89

COURT MINUTES

November 29, 2017

A-17-750926-B Flamingo-Pecos Surgery Center LLC, Plaintiff(s)
vs.
William Smith, M.D., Defendant(s)

November 29, 2017 9:00 AM All Pending Motions

HEARD BY: Hardy, Joe **COURTROOM:** RJC Courtroom 03H

COURT CLERK: Kristin Duncan

RECORDER: Matt Yarbrough

PARTIES

PRESENT:	Cook, Marc P	Attorney for Defendant Sheldon Freedman, M.D.
	Houston, Dylan E.	Attorney for Defendant Daniel Burkhead, M.D.
	Kennedy, Todd E.	Attorney for Plaintiff and Receiver
	Kunimoto, Bryce K.	Attorney for Defendants Mathew Ng, M.D., Marjorie Belsky, M.D., and Pankaj Bhatnagar, M.D.

JOURNAL ENTRIES

- DEFENDANT SHELDON J. FREEDMAN'S MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5) AND 12(b)(6) AND FOR ATTORNEY'S FEES PURSUANT TO NRS 18.020...DEFENDANTS DR. MATTHEW NG AND DR. PANKAJ BHATNAGAR'S MOTION TO DISMISS...DEFENDANT DANIEL BURKHEAD M.D.'S MOTION TO DISMISS COMPLAINT...DEFENDANT DANIEL BURKHEAD M.D.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT...DEFENDANT DANIEL BURKHEAD M.D.'S JOINDER OT DEFENDANT SHELDON J. FREEDMAN'S MOTION TO DISMISS PURSUANT TO N.R.C.P. 12(b)(5) AND 12(b)(6) AND FOR ATTORNEY'S FEES PURSUANT TO NRS 18.020...DEFENDANT SHELDON J FREEDMAN M.D.'S JOINDER TO DEFENDANT DANIEL L BURKHEAD M.D.'S MOTION TO DISMISS COMPLAINT...DEFENDANT SHELDON J. FREEDMAN, M.D.'S JOINDER TO DEFENDANTS DR. MATTHEW NG AND DR. PANKAJ BHATNAGAR'S MOTION TO DISMISS...DEFENDANT DANIEL L. BURKHEAD, M.D.'S JOINDER TO MOTION TO DISMISS OF DEFENDANTS DR. MATTHEW NG AND DR. PANKAJ BHATNAGAR...DEFENDANT DANIEL BURKHEAD M.D.'S JOINDER TO DEFENDANTS DR. MATTHEW NG AND DR. PANKAJ BHATNAGAR'S MOTION TO DISMISS SECOND AMENDED COMPLAINT...DEFENDANT SHELDON J. FREEDMAN, M.D.'S JOINDER TO DEFENDANTS DR.

PRINT DATE: 12/13/2017

Page 1 of 2

Minutes Date: November 29, 2017

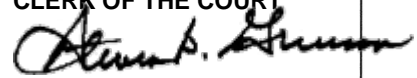
MATTHEW NG AND DR. PANKAJ BHATNAGAR'S MOTION TO DISMISS SECOND AMENDED COMPLAINT AND DR. MARJORIE BELSKY'S COUNTER-MOTION TO DISMISS...DEFENDANT SHELDON J. FREEDMAN, M.D.'S JOINDER TO DEFENDANT DANIEL BURKHEAD, M.D.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT...PANKAJ BHATNAGAR M.D. AND MATTHEW NG, M.D.'S JOINDER TO DANIEL BURKHEAD, M.D.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

The Court requested the parties address whether the Plaintiff's status remained revoked. Mr. Kunimoto argued in support of Dr. Belsky and Dr. Bhatanagar's respective Motions and Joinders, stating that the negligence claims, as well as any claims for negligent hiring, training, and supervision, must be dismissed pursuant to the economic loss doctrine. Additionally, Mr. Kunimoto argued that claims for negligence could not be brought against officers or directors of a corporation; NRS 78.138 cited. Mr. Cook joined Mr. Kunimoto's arguments on behalf of Dr. Freedman, stating that the Gardner case found that negligence claims could not be brought against the members of an LLC, unless the party bringing the claims could show that those members were acting outside of their capacity as it related to the LLC. Mr. Houston joined the arguments of Mr. Kunimoto and Mr. Cook on behalf of Dr. Burkhead. In response to the Court's query at the start of the hearing, Mr. Kennedy represented that Plaintiff's status remained revoked, and would not be reinstated until the Court ordered the reinstatement. Mr. Kennedy argued in opposition to the Motions and Joinders, stating that the Gardner case did not apply to the instant case, and that the claims had been pled sufficiently to defeat the Motion to Dismiss stage. COURT ORDERED all Motions and Joinders were hereby GRANTED IN PART / DENIED IN PART, FINDING and ORDERING the following: (1) the FIRST, SECOND, THIRD, and SEVENTH causes of action were hereby DISMISSED WITHOUT PREJUDICE; (2) the Court agreed with Defendants' arguments regarding the first, second, and third causes of action, that Defendants were not employers; therefore, the necessary elements of those claims had not been met; (3) the economic loss doctrine applied to the first, second, and third causes of action; (4) there was nothing to indicate that there was a private cause of action for the seventh cause of action; (5) the seventh cause of action was encompassed in the other causes of action; (6) the remainder of the requested relief was hereby DENIED WITHOUT PREJUDICE; (7) as pled in the Second Amended Complaint, there were claims upon which relief could be granted; and (8) a close reading of the AA Primo Builders case indicated that NRS 86.27(5) and NRS 86.505 permitted an LLC to sue and be sued, despite the revocation of their charter.

Defendants' counsel to prepare the Order and forward it to opposing counsel for approval as to form and content.

EXHIBIT C

EXHIBIT C



SAO

ROBERT E. SCHUMACHER, ESQ

Nevada State Bar No. 7504

DIONE C. WRENN, ESQ

Nevada State Bar No. 13285

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Attorney for Defendant

DANIEL L. BURKHEAD, M.D.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MARK J. GARDBERG, ESQ., in his capacity as
Receiver for, and acting on behalf of, FLAMINGO-
PECOS SURGERY CENTER, LLC a Nevada
limited liability company;

Plaintiff.

Vs.

WILLIAM SMITH MD, an individual; PANKAJ
BHATANAGAR MD, an individual; MARJORIE
BELSKY MD, an individual; SHELDON
FREEDMAN MD, an individual; MATHEW NG
MD, and individual; DANIEL BURKHEAD MD, an
individual; and DOE MANAGERS, DIRECTORS
AND OFFICERS 1-25, ROE BUSINESS ENTITIES
1-25;

Defendants.

CASE NO. A-17-750926-B
[consolidated with A-18-769693-C]
DEPT. NO.: XI

**STIPULATION AND ORDER TO
DISMISS DEFENDANT DANIEL
BURKHEAD, M.D. WITH
PREJUDICE**

Defendant DANIEL BURKHEAD, M.D. ("Dr. Burkhead") and Plaintiff MARK J.
GARDBERG, ESQ., in his capacity as Receiver for, and acting on behalf of, FLAMINGO-

10-07-19 P02:17 IN

1 PECOS SURGERY CENTER, LLC ("Plaintiff") (collectively, the "Parties"), by and through
2 their undersigned counsel, hereby stipulate that:

3 1. The Parties have entered into a settlement agreement in which they have settled
4 all claims between them in this case.

5 2. Pursuant to this Court's September 9, 2019 Order, the settlement between
6 Plaintiff and Dr. Burkhead was made in good faith for the purposes of N.R.S 17.245.

7 3. All claims in this matter asserted by Plaintiff as against Dr. Burkhead, only, are
8 dismissed in their entirety with prejudice, with each party to bear his own attorneys' fees and
9 costs.

10 **ORDER**

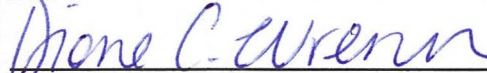
11 **IT IS HEREBY ORDERED ADJUDGED, AND DECREED** that all claims in this
12 matter asserted by Plaintiff as against Dr. Burkhead, only, are dismissed in their entirety with
13 prejudice, with each party to bear its own attorneys' fees and costs.

14 DATED this 8 day of October, 2019.

15 
16 THE HONORABLE ELIZABETH GONZALEZ
17 EIGHTH JUDICIAL DISTRICT COURT

18 Respectfully Submitted on October 7, 2019
19 by:


20 GORDON REES SCULLY MANSUKHANI,
21 LLP

22 
23 ROBERT E. SCHUMACHER, ESQ.
24 Nevada Bar No. 7504
DIONE C. WRENN, ESQ.
Nevada Bar No. 13285
300 South 4th Street, Suite 1550
Las Vegas, NV 89169

25 *Attorneys for Defendant*

Approved as to form and content on October
3, 2019 by:

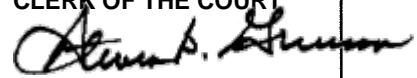
26 IQBAL LAW PLLC

27 
28 MOHAMED A. IQBAL, JR., ESQ.
Nevada Bar No. 10623
CHRISTOPHER MATHEWS, ESQ.
Nevada Bar No. 10674
101 Convention Center Dr., Suite 1175
Las Vegas, Nevada 89109

Attorneys for Plaintiff

EXHIBIT D

EXHIBIT D



SAO

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Robert J. Cassity, Esq.
Nevada Bar No. 9779
bcassity@hollandhart.com
HOLLAND & HART LLP
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Las Vegas, NV 89134
Phone: (702) 669-4600
Fax: (702) 669-4650

*Attorneys For Defendants Matthew Ng MD
incorrectly named Mathew Ng MD,
Pankaj Bhatnagar MD incorrectly named
Pankaj Bhatanagar MD, and Marjorie
Belsky MD*

DISTRICT COURT

CLARK COUNTY, NEVADA

MARK J. GARDBERG, ESQ., in his
capacity as Receiver for, and acting on behalf
of, FLAMINGO-PECOS SURGERY
CENTER, LLC, a Nevada limited liability
company;

Plaintiff,

v.

WILLIAM SMITH MD; PANKAJ
BHATANAGAR MD; MARJORIE
BELSKY MD; SHELDON FREEDMAN
MD; MATHEW NG MD; DANIEL
BURKHEAD MD; DOE MANAGERS,
DIRECTORS AND OFFICERS 1-25, ROE
BUSINESS ENTITIES 1-25;

Defendants.

MARK J. GARDBERG, ESQ., in his
capacity as Receiver for, and acting on behalf
of, FLAMINGO-PECOS SURGERY
CENTER, LLC, a Nevada limited liability
company;

Plaintiff,

vs.

Case No. A-17-750926-B
[consolidated with A-18-769693-C]
Dept. No. XI

**STIPULATION AND ORDER TO
DISMISS WITH PREJUDICE
MARJORIE BELSKY, MD, PANKAJ
BHATANAGAR MD, AND MATTHEW
NG, MD**

Electronic Filing Case

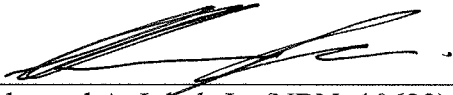
1 WILLIAM SMITH MD and MARJORIE
2 BELSKY MD;

3 Defendants.

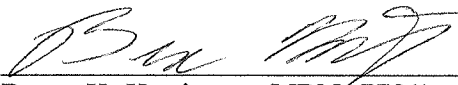
4
5 Plaintiff Mark J. Gardberg, Esq., in his capacity as Receiver for, and acting on behalf of,
6 Flamingo-Pecos Surgery Center, LLC ("Plaintiff"), and Defendants Marjorie Belsky, MD,
7 Pankaj Bhatnagar, MD, and Matthew Ng, MD (together, the "Ng Defendants"), by and through
8 their respective undersigned counsel, hereby stipulate and agree that all claims that have been or
9 could have been asserted by Plaintiff against the Ng Defendants in this action shall be dismissed,
10 with prejudice, with each party to bear his or her own attorneys' fees and costs.

11 DATED this 20th day of December 2019.

DATED this 20th day of December 2019.

12
13 
14 Mohamed A. Iqbal, Jr. (NBN: 10623)
15 IQBAL LAW
16 101 Convention Center Drive, Suite 1175
17 Las Vegas, NV 89109

18 *Counsel for Plaintiff Mark J. Gardberg, Esq.,
19 in his capacity as Receiver for, and acting
20 on behalf of, Flamingo-Pecos Surgery
21 Center, LLC*

22 
23 Bryce K. Kunimoto (NBN: 7781)
24 Robert J. Cassity (NBN: 9779)
25 HOLLAND & HART LLP
26 9555 Hillwood Drive, 2nd Floor
27 Las Vegas, NV 89134

28 *Counsel for Defendants Marjorie Belsky, MD,
Pankaj Bhatnagar, MD, and Matthew Ng, MD*

ORDER

Having reviewed the forgoing Stipulation, and good cause appearing,

IT IS HEREBY ORDERED that all claims that have been or could have been asserted
by Plaintiff against the Ng Defendants in this action are hereby DISMISSED, WITH
PREJUDICE, with each party to bear his or her own attorneys' fees and costs.

DATED this 23 day of December 2019.

26 
27 DISTRICT COURT JUDGE

EXHIBIT E

EXHIBIT E

Heather S. Lumin

CLERK OF THE COURT

OGSJ

MARC P. COOK

Nevada Bar No. 004574

GEORGE P. KELESIS

Nevada Bar No. 000069

COOK & KELESIS, LTD.

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Las Vegas, Nevada 89101

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Attorneys for Defendants Sheldon J. Freedman, M.D.

And William D. Smith, M.D.

DISTRICT COURT

CLARK COUNTY, NEVADA

MARK J. GARDBERG, ESQ., in his
capacity as Receiver for, and acting on
behalf of, FLAMINGO-PECOS SURGERY
CENTER, LLC a Nevada limited liability
company,

Plaintiff,

vs.

WILLIAM SMITH MD, an individual;
PANKAJ BHATANAGAR MD, an
individual; MAJORIE BELSKY MD, an
individual; SHELDON FREEDMAN MD,
an individual; MATHEW NG MD, an
individual; DANIEL BURKHEAD MD, an
individual; and DOE MANAGERS,
DIRECTORS, AND OFFICERS 1-25, ROE
BUSINESS ENTITIES 1-25;

Defendants.

CASE NO. A-17-750926-B
CONSOLIDATED WITH CASE NO.:
A-18-769693-C

DEPT. NO. XI

**ORDER GRANTING DEFENDANT
SHELDON FREEDMAN, MD'S
MOTION FOR SUMMARY
JUDGMENT**

Hearing Date: July 19, 2021
Hearing Time: CHAMBERS

This matter having come before the Court on Defendant, Sheldon Freedman, MD's Motion for Summary Judgment ("Motion") on July 19, 2021; the Court having decided the matter pursuant to Eighth Judicial District Court Administrative Order 21-04 without the necessity of oral argument; the Court having read and considered all pleadings and having entered a Findings of Fact and Conclusions of Law on August 5, 2021, the Court hereby determines that, Defendant is entitled to Judgment in his favor of the remaining causes of action as a matter of law.

1 Therefore:

2 IT IS ORDERED that Defendant's Motion for Summary Judgment is GRANTED.

3 Dated this _____ day of _____, 2021. Dated this 16th day of August, 2021


4 

5
6 DISTRICT COURT JUDGE

7 Submitted By:

8 COOK & KELESIS, LTD.

58B 099 AFEF 38AC
Elizabeth Gonzalez
District Court Judge

9 
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Nevada Bar No. 000069
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Las Vegas, Nevada 89101
13 Attorneys for Defendants Sheldon J.
Freedman, M.D. and William D. Smith, M.D.
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1 **CSERV**

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3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 Flamingo-Pecos Surgery Center
LLC, Plaintiff(s)

CASE NO: A-17-750926-B

7 vs.

DEPT. NO. Department 11

8
9 William Smith, M.D.,
Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

15 Service Date: 8/16/2021

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Heather S. Smith
CLERK OF THE COURT

1 **OGSJ**
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5 Nevada Bar No. 000069
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12 *Attorneys for Defendants Sheldon J. Freedman, M.D.*
13 *And William D. Smith, M.D.*

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DISTRICT COURT
CLARK COUNTY, NEVADA

11 MARK J. GARDBERG, ESQ., in his
12 capacity as Receiver for, and acting on
13 behalf of, FLAMINGO-PECOS SURGERY
14 CENTER, LLC a Nevada limited liability
15 company,

14 Plaintiff,
15 vs.

16 WILLIAM SMITH MD, an individual;
17 PANKAJ BHATANAGAR MD, an
18 individual; MAJORIE BELSKY MD, an
19 individual; SHELDON FREEDMAN MD,
20 an individual; MATHEW NG MD, an
21 individual; DANIEL BURKHEAD MD, an
22 individual; and DOE MANAGERS,
23 DIRECTORS, AND OFFICERS 1-25, ROE
24 BUSINESS ENTITIES 1-25;

21 Defendants.

CASE NO. A-17-750926-B
CONSOLIDATED WITH CASE NO.:
A-18-769693-C

DEPT. NO. XI

**ORDER GRANTING DEFENDANT
WILLIAM SMITH, MD'S MOTION
FOR SUMMARY JUDGMENT**

Hearing Date: July 19, 2021
Hearing Time: CHAMBERS

22 This matter having come before the Court on Defendant, William Smith, MD's Motion for
23 Summary Judgment ("Motion") on July 19, 2021; the Court having decided the matter pursuant to
24 Eighth Judicial District Court Administrative Order 21-04 without the necessity of oral argument;
25 the Court having read and considered all pleadings and having entered a Findings of Fact and
26 Conclusions of Law on August 5, 2021, the Court hereby determines that, Defendant is entitled to
27 Judgment in his favor of the remaining causes of action as a matter of law.
28

1 Therefore:

2 IT IS ORDERED that Defendant's Motion for Summary Judgment is GRANTED.

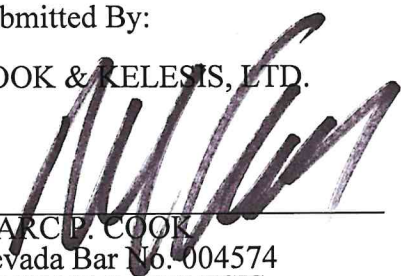
3 Dated this _____ day of _____, 2021. Dated this 16th day of August, 2021

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5
6 DISTRICT COURT JUDGE

7 Submitted By:

8 COOK & KELESIS, LTD.

119 AD2 60E5 F993
Elizabeth Gonzalez
District Court Judge

9 
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13 Attorneys for Defendants Sheldon J.
Freedman, M.D. and William D. Smith, M.D.
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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Flamingo-Pecos Surgery Center
7 LLC, Plaintiff(s)

CASE NO: A-17-750926-B

8 vs.

DEPT. NO. Department 11

9 William Smith, M.D.,
10 Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

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