IN THE SUPREME COURT OF THE STATE OF NEVADA

TAHICAN, LLC,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KATHLEEN E. DELANEY,

Respondents,

and

MAX JOLY, PATRICIA JOLY, JEAN FRANCOIS RIGOLLET, LE MACARON, LLC and BYDOO, LLC,

Real Parties in Interest.

Case No. 84352

Dist. Court Case No. A-16-734832-C

REAL PARTIES IN INTEREST MAX JOLY AND PATRICIA JOLY'S ANSWER TO PETITION FOR WRIT OF MANDAMUS PURSUANT TO NRAP 21

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

Real Parties in Interest Max Joly and Patricia Joly are individuals and have no parent corporation and is not a part of a publicly traded company.

Max Joly and Patricia Joly have been represented in this matter by the law firm of Jennings & Fulton, Ltd. No other firms are expected to appear on behalf of these Real Parties in Interest.

DATED: May 6th, 2022

JENNINGS & FULTON, LTD.

By: _____

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I. STATEMENT OF THE CASE AND FACTUAL BACKGROUND

This case arises from two (2) Le Macaron French pastry bakeries ("Bakeries") that were formerly located at 1300 W. Sunset Road, Henderson, Nevada 89014 ("Galleria Location") and 3355 S. Las Vegas Boulevard, Las Vegas, Nevada 89109 ("Venetian Location"). Max Joly ("Mr. Joly") and Bydoo, LLC ("Bydoo") were to each contribute $450,000.00 in capital into Le Macaron, LLC ("Le Macaron"), the entity formed to own and operate the Bakeries. Jean Francois Rigollet ("Mr. Rigollet") is the sole owner and manager of Bydoo. Mr. Joly contributed $450,000.00 and to date, Mr. Joly has not seen any financial records demonstrating Bydoo or Mr. Rigollet's alleged capital contribution into Le Macaron.

Mr. Rigollet and his business partner, Boris Jakubczack ("Boris"), drafted and executed all legal documents of Le Macaron, including the operating agreements. Prior to Le Macaron being operational and finalizing the franchisee documents with the franchisor, Mr. Joly, Patricia Joly ("Ms. Joly"), and Bydoo entered into the Operating Agreement of Le Macaron dated July 9, 2014 ("First Operating Agreement"). RP005-RP009. *See also* RP001 at ¶ 6. Article II of the First Operating Agreement identified ownership as follows: Bydoo 50%, Max Joly 25%, and Patricia

Joly 25%. RP009. However, Le Macaron never became operational with this ownership percentage. In fact, Ms. Joly could not be an owner due to visa related issues. RP002 at ¶ 8. The franchisor was specifically informed of this, as was Mr. Rigollet and Boris. RP032-RP039. *See also* RP002 at ¶ 9. Shares were never issued by Le Macaron, the only ownership identified is contained within each operating agreement.

During this time, Ms. Joly was diagnosed with cancer and surgeries were performed in June 2015 and September 2015, which resulted in an amputation. RP002 at ¶ 13. Boris and Mr. Rigollet were well aware of this modification to the ownership structure as Boris drafted the second operating agreement of Le Macaron, LLC ("Second Operating Agreement").

On March 20, 2015, Mr. Joly signed the Second Operating Agreement identifying ownership as follows: Max Joly 51% and Bydoo 49%. As only the First Operating Agreement and the Second Operating Agreement identified the amount of ownership, no transfer of shares document was executed because shares were not issued by anything other than the First Operating Agreement and the Second Operating Agreement. RP003 at ¶ 23. In June of 2015, Mr. Joly and Bydoo executed a subsequent operating agreement reducing Mr. Joly's ownership in Le Macaron to

50% and increasing Bydoo, LLC's ownership share to 50% ("Third Operating Agreement"). RP0040. Once again, no transfer of shares was executed as the various operating agreements were the only documents identifying ownership interests. RP002 at ¶ 24. Neither of the Bakeries were open and operational at the time of the Third Operating Agreement.

On September 29, 2015, Bydoo and Mr. Joly executed the LLC Membership Purchase Agreement wherein Bydoo agreed to pay Mr. Joly the principal sum of $360,000.00 secured by Bydoo's properties. RP068. Specifically, the LLC Membership Purchase Agreement ("Purchase Agreement") states that Mr. Joly, identified as the seller, owned a 50% interest in Le Macaron. *Id.* There was no dispute as to whether any transfer of shares took place between the Joly's, as shares of Le Macaron were never issued and the last operating agreement of Le Macaron, the Third Operating Agreement, identified the ownership percentages of Le Macaron as referenced in the Purchase Agreement.

Thus, the first two operating agreements were superseded by the Third Operating Agreement, the one relied upon and utilized at time of executing the Purchase Agreement. Moreover, the reduced purchase amount of $360,000.00 from Mr. Joly's $450,000.00 initial contribution was further contemplated in the Purchase

Agreement stating, "This depreciation is due and agrees (sic) by all parties because of the high deficit of the company at the time of the transaction. *Id.* at § 2. Mr. Joly did not have any involvement in the drafting of the LLC Membership Purchase Agreement and only recommended minor modifications. RP004 ¶ 28. Mr. Rigollet represented to Mr. Joly that payment would be secured by properties owned by Bydoo. To date, Mr. Joly has not received a single payment. *Id.* at ¶ 29. Subsequent to the execution of the Purchase Agreement and representation of Bydoo's assets, Mr. Joly discovered that Bydoo quitclaimed multiple properties to Petitioner Tahican, LLC ("Tahican"), divesting Bydoo of any assets.

At all relevant times Mr. Rigollet was the sole member of Bydoo. RP071-RP075. Mr. Rigollet was also the sole member of Tahican before transferring his interest to Boris. RP096-RP100. Despite owning 100% of Bydoo and Tahican, during discovery Mr. Joly discovered that on December 28, 2015, Mr. Rigollet and Boris entered into the "Agreement Between Jean-Francois Rigollet & Boris Jakubczack" ("Quitclaim Agreement") wherein six (6) residential properties would be transferred into Tahican. RP123. The purpose of the Quitclaim Agreement is identified as, "Because of cost of procedure between Jean-Francois Rigollet and the Franchisor Le Macaron French Pastries, Boris Jakubczack will be the owner and

manager of Tahican LLC in 2016." *Id.* The Quitclaim Agreement was entered into after the Purchase Agreement and after Bydoo was already in default under the Purchase Agreement.

Bydoo then quitclaimed residential properties to Tahican for no value. RP124-RP144. The Amendment to Tahican's Operating Agreement was finalized on March 1, 2016 transferring 100% of Mr. Rigollet's ownership in Tahican to Boris. RP145. Despite that Bydoo was not a party to nor received any benefit from the Quitclaim Agreement, Mr. Rigollet transferred all assets of Bydoo to Tahican, then transferred all ownership in Tahican to Boris divesting Bydoo of its assets.

Tahican then sold five (5) of the six (6) the residential properties to pay the legal fees of Le Macaron, Mr. Rigollet, and Bydoo, despite Tahican not being added as a named party in the district court ("District Court") matter until August 2018, when Mr. Joly filed the Second Amended Complaint. Mr. Rigollet has since executed three (3) separate "Purchase and Transfer of Interests Agreements" transferring Bydoo, Le Macaron, and Tahican's interests and liability in the District Court matter to himself. RP146-RP148.

As the basis of the Purchase Agreement was for payment to be secured by the Bydoo properties, including 2003 Smoketree Village Circle, Henderson, NV 89012

("Property"), after Bydoo defaulted under the Purchase Agreement and subsequently quitclaimed the Property to Tahican, on April 4, 2017, Mr. Joly filed the Notice of Pendency of Action and Lis Pendens in the District Court matter and recorded it with the Clark County Recorder's Office on April 5, 2017.

16 months after receiving the Notice of Lis Pendens, Defendants in the District Court matter filed a Motion to Expunge Lis Pendens ("First Motion to Expunge"). The District Court denied the First Motion to Expunge. As determined by the District Court in the November 27, 2018 Order ("First Motion to Expunge Order"), "The claims for fraudulent transfer between BYDOO LLC and TAHICAN LLC establish a valid legal basis for the Lis Pendens pursuant to NRS Chapter 14.010 under Nevada Law." RP154 at 3:15-17.

Nearly five (5) years after the District Court matter was filed and over three (3) years from the denial of the First Motion to Expunge, on January 21, 2022, Tahican filed a second Motion to Expunge Lis Pendens ("Second Motion to Expunge"). Pursuant to the March 8, 2022 Notice of Entry of Order Granting in Part and Denying in Part Tahican, LLC's Motion to Expunge Lis Pendens Pursuant to NRS 14.015 ("Second Motion to Expunge Order"), the District Court found that, "one of the remaining claims is a fraud claim that can tie to this property." RP161 at

3:15-17. The District Court further found that, "the Motion to Expunge Lis Pendens is denied because the Court believes that the lis pendens has appropriate status based on the fraudulent transfer claim, the fraud claim, or the slander of title claim in this case." *Id.* at 4:9-12.

Notably, the Lis Pendens stems from Mr. Joly's fraudulent transfer claim, which summary judgment has already been granted on. Specifically, the District Court ruled that, "Mr. Joly's Ninth Cause of Action for Fraudulent Transfer is Granted as Defendants fraudulently transferred Bydoo's properties in anticipation of and during pendency of this litigation." *See* December 14, 2021 Notice of Entry of Order ("Summary Judgment Order") RP198 at 25:1-4. Further, summary judgment has been ruled on Mr. Rigollet being the alter ego of Le Macaron, Bydoo, and Tahican, as Mr. Rigollet did not contest being the alter ego of any entity in the District Court matter. *Id.* at 24:18-22. Additionally, summary judgment was also granted in Mr. Joly's favor on Tahican's Counter-Claim for Slander of Title claim, but was dismissed as being moot from Tahican's fraudulent transfer of the Bydoo properties. *Id.* at 18:10-16 and 19:20-24. Notably, the District Court denied Tahican and the other defendants Motion for Reconsideration of the Summary Judgment Order. RP206-RP211.

It is clear that Mr. Rigollet and Tahican seek to sell the Property prior to trial. The District Court matter is currently set for a bench trial on a five-week stack to begin on May 23, 2022. Mr. Joly's Fraud claim and the entity defendants Rescission claim are the only remaining claims for trial. Tahican's Writ of Madamus is simply yet another exhaustive effort to evade payment to Mr. Joly under the Purchase Agreement. The District Court's orders are in complete accord with Nevada law. None of Petitioner's arguments demonstrate that the District Court abused its discretion. Petitioner has therefore failed to meet its burden in its Writ of Mandumus, which should be denied.

II. LEGAL ARGUMENT

A. Petitioner Does Not Satisfy the High Standard for Extraordinary Writ Review

Writs of mandamus, prohibition, and certiorari are extraordinary remedies, and the Nevada Supreme Court's decision whether to consider writ petitions is discretionary. *See Mineral County v. State, Dep't of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (A writ is "an extraordinary remedy that is reserved to the sound discretion of the issuing court."). A writ is available only where the district court manifestly abused its discretion. *Round Hill General Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981) (A writ "will not lie to control

discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously."); *see* NRS 34.160. The writ petitioner bears the burden to demonstrate that extraordinary relief is warranted. *See Pan v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark,* 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). Importantly, "writ relief is not available . . . when an adequate and speedy legal remedy exists." *Int'l Game Tech., Inc. v. District Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).

Petitioner's Writ of Mandamus does not satisfy the high standard for discretionary review. As discussed below, the District Court did not abuse its discretion in denying the First nor the Second Motion to Expunge. While Petitioner contends that Mr. Joly's claims have nothing to do with the Property, this simply misrepresents the claims at issue in this matter and issues summarily adjudicated by the District Court. The District Court has already granted summary judgment determining that the Bydoo properties, including the Property, were fraudulently transferred to Tahican. Moreover, issue of whether or not funds from the sale of the Bydoo properties should be paid to Mr. Joly will be determined by the trier of fact at trial. RP200 at 27:18-22. Petitioner waited nearly five (5) years to seek the requested extraordinary relief sought. The District Court's extensive prior rulings

not subject to the present Writ and Tahican's dilatory request with trial approaching belies its claimed need for urgent relief.

B. Mr. Joly's Notice of Lis Pendens Has Properly Been Recorded Under NRS 14.015 for Nearly Five (5) Years Due Fraudulent Transfers Summarily Adjudicated by the District Court

As a general proposition, lis pendens are not appropriate instruments for use in promoting recoveries in actions for personal or money judgments; rather, their office is to prevent the transfer or loss of real property which is the subject of dispute in the action that provides the basis for the lis pendens. *Levinson v. Eighth Jud. Dist. Ct. of State In & For Cty. of Clark*, 109 Nev. 747, 750, 857 P.2d 18, 20 (1993) citing *Evans v. Fulton Nat'l Mortgage Corp.,* 168 Ga.App. 600, 309 S.E.2d 884, 884–85 (1983); *see Wyatt v. Wehmueller,* 163 Ariz. 12, 12–13, 785 P.2d 581, 584 (App.1989), *granted in part, vacated in part,* 167 Ariz. 281, 806 P.2d 870 (1991). Although the doctrine of lis pendens may be applied to actions other than foreclosures, its use is restricted to avoid abuse. *Id.* at 751 citing *Kaapu v. Aloha Tower Dev. Corp.,* 72 Haw. 267, 814 P.2d 396, 397 (1991).

The Uniform Fraudulent Transfer ACT (UFTA), NRS Chapter 112, is designed to prevent a debtor from defrauding creditors by placing the subject property beyond the creditors' reach. *Herup v. First Boston Fin., LLC*, 123 Nev. 228,

232, 162 P.3d 870, 872 (2007). Three types of transfers may be set aside under the UFTA: (1) actual fraudulent transfers; (2) constructive fraudulent transfers; and (3) certain transfers by insolvent debtors. *Id.* at 233. An ”actual fraudulent transfer” is a transfer made or an obligation incurred by a debtor that is fraudulent as to a creditor, regardless of whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: with actual intent to hinder, delay or defraud any creditor of the debtor. *See* NRS 112.180(1)(a).

A transfer is “constructively fraudulent” if the debtor transfers the property without receiving a reasonably equivalent value in exchange for the transfer, and the debtor (1) was engaged in a transaction for which his remaining assets were unreasonably small in relation to the transaction or (2) reasonably should have believed that he would incur debts beyond his ability to pay. NRS 112.180(1)(b). A fraudulent transfer by an insolvent debtor occurs in two situations: (1) when the debtor makes the transfer without receiving a reasonably equivalent value in exchange for the transfer and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation, NRS 112.190(1); and (2) when an insolvent debtor makes a transfer on an antecedent debt to an insider who

had reason to believe the debtor was insolvent. NRS 112.190(2).

NRS 11.220(1) provides a complete defense for an action for avoidance under NRS 112.180(1)(a) and states: [a] transfer or obligation is not voidable under paragraph (a) of subsection 1 of NRS 112.180 against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or oblige. *Herup* at 234. In order to establish a good faith defense to a fraudulent transfer claim, the transferee must show objectively that he or she did not know or had no reason to know of the transferor's fraudulent purpose to delay, hinder, or defraud the transferor's creditors. *Id.* at 237. NRS 112.150(3) defines a claim as a right to payment, "whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." Pursuant to NRS 112.150(4), a creditor means a person who has a claim.

NRS 14.015(2) and (3), provides in pertinent part that:

> 2. Upon 15 days' notice, the party who recorded the notice of pendency of the action must appear at the hearing and, through affidavits and other evidence which the court may permit, establish to the satisfaction of the court that:

(a) The action is for the foreclosure of a mortgage upon the real property described in the notice or affects the title or possession of the real property described in the notice;
(b) The action was not brought in bad faith or for an improper motive;
(c) The party who recorded the notice will be able to perform any conditions precedent to the relief sought in the action insofar as it affects the title or possession of the real property; and
(d) The party who recorded the notice would be injured by any transfer of an interest in the property before the action is concluded.

3. In addition to the matters enumerated in subsection 2, the party who recorded the notice must establish to the satisfaction of the court either:

(a) That the party who recorded the notice is likely to prevail in the action; or
(b) That the party who recorded the notice has a fair chance of success on the merits in the action and the injury described in paragraph (d) of subsection 2 would be sufficiently serious that the hardship on him or her in the event of a transfer would be greater than the hardship on the defendant resulting from the notice of pendency, and that if the party who recorded the notice prevails he or she will be entitled to relief affecting the title or possession of the real property.

See NRS 14.015.

Mr. Joly has already prevailed on his Fraudulent Transfer claim, thus demonstrating that the Lis Pendens was necessary. Moreover, Tahican's Slander of Title claim was dismissed at moot. Moreover, Mr. Joly has already demonstrated that

the District Court matter affects the title or possession of the Property. It is undisputed that this is not a foreclosure action, but Mr. Joly has long asserted claims affecting the title or possession of the Property, as the Property was to secure payment under the Purchase Agreement. This Lis Pendens is not to seek post-judgment collection, as Mr. Joly currently has a judgment he can seek collection on. RP200 at 27:14-17.

In *Levinson v. Eighth Jud. Dist.,* the Nevada Supreme Court expressly acknowledged that, "lis pendens may apply to actions designed to avoid conveyances or transfers in fraud of creditors…". 109 Nev. 747, 752 (Nev. 1993). The Lis Pendens is just the type of exception to the general law as recognized by the *Levinson* court as determined by the District Court. The Lis Pendens satisfies NRS 14.015(2)(a) and should be upheld. The second requirement under NRS 14.015(2) required Mr. Joly to establish that the underlying District Court action was not brought in bad faith or for an improper motive. Surely it was not as he prevailed on summary judgment on all but one (1) claim.

The third requirement under NRS 14.015(2) required Mr. Joly to establish that he will be able to perform any conditions precedent to the relief sought in the action insofar as it affects the title or possession of the real property. Lastly, NRS 14.015(2)

required Mr. Joly to establish that he would be injured by any transfer of an interest in the property before the action is concluded.

Mr. Joly has already prevailed on his Fraudulent Transfer claim and Tahican's Slander of Title claim was dismissed at moot satisfying the remaining elements of NRS 14.015(2). The Nevada Supreme Court has ruled that a lis pendens is an inappropriate vehicle to recover personal or money judgments; instead, "[t]here must be some claim of entitlement to the real property affected by the lis pendens[.]" *Levinson v. Eighth Judicial District Court*, 109 Nev. 747, 752 (1993).

It was in this context that the Nevada Supreme Court announced the general proposition that "lis pendens are not appropriate instruments for use in promoting recoveries in actions for personal or money judgments; rather, their office is to prevent the transfer or loss of real property which is the subject of dispute in the action that provides the basis for the lis pendens." *Levinson*, 857 P.2d at 20. The Nevada Supreme Court pointed out the harm that may befall a party if a lis pendens is improperly utilized: "a lis pendens may cause substantial hardship to the property owner before relief can be obtained." *Id.* (quoting *Burger v. Superior Court of Santa Clara County*, 151 Cal.App.3d 1013 (1984)). *Burger* aptly noted that an "[o]verbroad definition of 'an action ... affecting the title or the right of possession

of real property' would invite abuse of lis pendens." *Id.*

Petitioner misrepresents the purpose of the Lis Pendens, it was not to secure any judgment. It stemmed from the fraudulent transfers that Mr. Joly has already prevailed on. Surely, a property fraudulent transferred that Mr. Joly is entitled to receive proceeds from constitutes a legal interest in the Property. While the issue of whether or not funds from the sale of the Bydoo properties should be paid to Mr. Joly will be determined by the Court at trial, the Lis Pendens should remain. Tahican's conduct does not warrant expunging the Lis Pendens, surely the Property will be sold.

VI. CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's orders denying the First and Second Motions to Expunge, and deny Petitioner's application for a Writ of Mandamus.

DATED: May 6th, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the Answer to Petition for Writ of Mandamus, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I further certify that this Answer to Petition for Writ of Mandamus complies with the formatting requirements of NRAP 32(a)(4) on 8 ½ by 11-inch paper, with double-spaced text, except quotations of more than two lines indented of more than two (2) lines are indented and single spaced. The pages in the brief preceding the statement of the case are lowercase Roman numerals, and pages in the brief beginning with the statement of the case are numbered under NRAP 32(a)(4).

I also certify that the typeface requirements of NRAP 32(a)(5) are met utilizing 14-point Times New Roman font. Further, the brief is set in a plain, roman style, with case names italicized.

Lastly, I certify that this brief complies with the page or type volume limitations of NRAP 21(d) because it contains approximately 4,538 words.

DATED: May 6th, 2022

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On May 6th, 2022, I caused to be served a true and correct copy of the foregoing **REAL PARTIES IN INTEREST MAX JOLY AND PATRICIA JOLY'S ANSWER TO PETITION FOR WRIT OF MANDAMUS PURSUANT TO NRAP 21** upon the following by the method indicated:

☒ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

Judge Kathleen Delaney
Department 25
Eighth Judicial District Court
Clark County, Nevada
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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