

2013 WL 4715081 (Nev. Dist. Ct.) (Trial Motion, Memorandum and Affidavit)  
District Court of Nevada.  
Clark County

SAHARA PALM PLAZA, LLC, a Nevada Limited Liability Company, Plaintiff,

v.

BAGELS AND BEYOND LTD, a Nevada Corporation; Robert Levy, an individual; Milton Meshel, an individual;  
Doe Defendants I through X, inclusive; and Roe Corporate Defendants I through X, inclusive, Defendants.

No. 12A659199.  
May 6, 2013.

And All Related Actions.

Dept. No. I

Date of Hearing: May 9, 2013

Time of Hearing: 9:00 a.m.

**Reply Points and Authorities in Support of Plaintiff/Counter-Defendant and Counter-Defendant's Motion for Summary Judgment On Defendant/Counter-Defendant Milton Meshel's Counterclaim and Opposition to Counter-Motion for Summary Judgment**

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**I.**

**PRELIMINARY STATEMENT**

On April 29, 2013, Defendant/Counterclaimant MILTON MESHEL (hereinafter "MESHEL") filed his Opposition to Plaintiff/Counterdefendant SAHARA PALM PLAZA, LLC and Counterdefendant ALEXANDER JAVAHERI's (hereinafter "JAVAHERI") Motion for Summary Judgment on Defendant/Counterclaimant MESHEL's Counterclaim and a Countermotion for Summary Judgment and waited to serve the said Opposition to the Motion for Summary Judgment and Countermotion for Summary Judgment on Plaintiff/Counterdefendant SAHARA and Counter-defendant JAVAHERI on May 2, 2013, only seven (7) days prior to the hearing scheduled on Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI's Motion for Summary Judgment.

As will be set forth more fully below, Defendant/Counterclaimant MESHEL has failed to provide any admissible evidence to establish any genuine issues of material fact precluding summary judgment on his Counterclaim and that his pleading entitled Countermotion for Summary Judgment is not a countermotion and should not be considered by this Court because it also fails to provide any admissible evidence in support of the said Countermotion and because Defendant/Counterclaimant MESHEL failed to comply with the Supplemental Joint Case Conference Report in this matter requiring all dispositive motions to be filed no later than April 22, 2013.

Therefore, not only should Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI's Motion for Summary Judgment be granted but also Defendant/Counterclaimant MESHEL's Countermotion for Summary Judgment should not even be considered by this Court and Defendant/Counterclaimant MESHEL should be ordered to pay attorney's fees to

Plaintiff/Counter-defendant SAHARA and Counterdefendant JAVAHERI necessitated by having to respond to the so-called Countermotion for Summary Judgment.

## II.

### RELEVANT PROCEDURAL HISTORY OF ACTION

On March 30, 2012, Plaintiff/Counterdefendant SAHARA filed a Complaint in this matter alleging that Defendant/Counterclaimant BAGELS and BEYOND LTD, (hereinafter "BAGEL") had breached a commercial Lease Agreement by failing to pay rent and other monetary obligations under the said Lease Agreement. Plaintiff/Counterdefendant SAHARA further named Defendant/Cross-defendant ROBERT LEVY as a Defendant based on the fact that he was a Guarantor to the commercial Lease Agreement executed by Defendant/Counterclaimant BAGELS.

On or about April 30, 2012, Defendant/Crossdefendant ROBERT LEVY filed an Answer in Proper Person and alleged therein as an Eighth Affirmative Defense that:

**This answering Defendant's liability is based solely on the theory of being a guaranty for BAGELS AND BEYOND LTD. and Milton Meshel is the alter ego of BAGELS AND BEYOND LTD. Therefore, Milton Meshel, and not this answering Defendant should be found liable for the damages suffered by Plaintiff.**

On October 10, 2012, Plaintiff/Counterdefendant SAHARA filed a Motion for Leave to File Amended Complaint in which it sought to add an additional party, to-wit Defendant/Counterclaimant MESHEL, on a claim of alter ego that Defendant/Counterclaimant BAGELS was the alter ego of Defendant/Counterclaimant MESHEL and that Defendant/Counterclaimant MESHEL was therefore jointly and severally liable for any damages awarded against Defendant/Counterclaimant BAGELS in this action.

In Defendant/Counterclaimant BAGELS and Defendant/Counterclaimant MESHEL's Opposition to the Motion for Leave to File Amended Complaint they made the same arguments as contained in his so-called Countermotion for Summary Judgment. Accordingly, Plaintiff/Counter-defendant SAHARA and Counterdefendant JAVAHERI incorporate by reference its Reply Points and Authorities in Support of the Motion for Leave to File Amended Complaint filed on October 9, 2012.

Despite the arguments by both Defendant/Counterclaimant MESHEL and Defendant/Counterclaimant BAGELS in their opposition to the Motion for Leave to File Amended Complaint, this Honorable Court granted the said Motion and on December 17, 2012 Plaintiff/Counter-defendant SAHARA filed its verified Amended Complaint in this matter and alleged as verified facts the following:

**... Since the incorporation of Defendant BAGELS Defendant MESHEL was, and still is the sole and one hundred percent (100%) stockholder of Defendant BAGELS**

**30. At all times relevant to this action Defendant BAGELS has been influenced and governed by Defendant MESHEL so that the unity of interest and ownership of Defendant BAGELS is inseparable between Defendant BAGELS and Defendant MESHEL**

**31. This Unity of interest and ownership between Defendant BAGELS and Defendant MESHEL includes the following:**

**(i) The significant influence by Defendant MESHEL in governing Defendant BAGELS;**

**(ii) The commingling and/or unauthorized conversion of funds and property interest by Defendant MESHEL of Defendant BAGELS' funds and property;**

(iii) The undercapitalization of Defendant BAGELS and Defendant MESHEL for the purpose of Defendant BAGELS operating a restaurant;

(iv) Defendant MESHEL's treatment of Defendant BAGELS' corporate assets as Defendant MESHEL's own assets; and

(v) The failure by Defendant BAGELS to observe corporate formalities including conducting meetings, the failure by Defendant MESHEL to prepare minutes of corporate meetings conduct by Defendant MESHEL and the failure to obtain proper authorizations to conduct the business of Defendant BAGELS including, but not limited to, the unauthorized Employment Agreement entered into between Defendant MESHEL and/or his wife, Ricki Meshel, for Defendant BAGELS

**32. Based on the said influence by Defendant MESHEL of Defendant BAGELS, adherence to the fiction of a separate entity would sanction or promote injustice and would cause prejudice to Plaintiff SAHARA as well as other creditors of Defendant BAGELS.**

As a result of the filing of the Amended Complaint and the naming of Defendant/Counter-claimant MESHEL as a party to the litigation, the parties through their legal counsel conducted the Supplemental Early Case Conference in this matter on February 8, 2013 and thereafter filed a Supplemental Joint Case Conference Report which extended the close of discovery in this matter to April 22, 2013 and required the parties to file *all* dispositive motions no later than April 22, 2013. See, Supplement Joint Case Conference Report filed on March 4, 2013, Section VI(A).

On April 5, 2013, Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI filed the within Motion for Summary Judgment on Defendant/Counterclaimant MESHEL's Counter-claim and served the same on Defendant/Counterclaimant MESHEL on April 9, 2013 thereby requiring an opposition to the said motion be filed and served on Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI's legal counsel no later than April 26, 2013. Instead, Defendant/Counterclaimant MESHEL's Opposition to the Motion for Summary Judgment was not filed until April 29, 2013 and at that time he filed a Countermotion for Summary Judgment and the Opposition and Countermotion was not served on Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI's legal counsel until May 2, 2013.

While Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI's Motion for Summary Judgment only addressed the subject matter of Defendant/Counterclaimant MESHEL 's Counterclaim including his claims for **abuse** of process and **elder abuse**, Defendant/Counterclaimant MESHEL's Countermotion for Summary Judgment addresses the completely different subject matter of Defendant/Counterclaimant MESHEL's alleged alter ego liability under the Amended Complaint on file herein.

On April 29, 2013, Defendant/Counterclaimant MESHEL filed his Opposition to the within Motion for Summary Judgment and a Countermotion for Summary Judgment on the issue of the claim of alter ego of Defendant/Counterclaimant MESHEL. As set forth in the Affidavit of Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHER's legal counsel, the said Opposition and Countermotion for Summary Judgment was not served on the said legal counsel until May 2, 2013. A review of the Opposition and Countermotion for Summary Judgment reveals that there are no verified pleadings in support of the Opposition and Countermotion for Summary Judgment and no admissible evidence to contest either the within Motion for Summary Judgment or support Defendant/Counterclaimant MESHEL's Countermotion for Summary Judgment. Instead, the "Statement of Facts" contained in the Opposition and Countermotion for Summary Judgment contains unverified and conclusory statements which are wholly inconsistent with the sworn deposition testimony of Defendant/Crossdefendant ROBERT LEVY. Therefore, the said pleading represents nothing less than an attempt to raise and fabricate sham issues to avoid summary judgment and to seek summary judgment when there are clearly material issues of fact regarding the alter ego claim against Defendant/Counterclaimant MESHEL.

### III.

#### LEGAL ARGUMENT

**A. Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI having met their burden of proving there are no genuine issues of material fact as to Defendant/Counterclaimant MESHEL's Counterclaim, and Defendant/Counter-claimant MESHEL failing altogether to come forward with admissible evidence in the form of affidavits and depositions, this Court has no alternative but to grant the within Motion for Summary Judgment.**

As this Court well knows, initially, the moving party on a motion for summary judgment bears the burden of proving there is no genuine issue of material fact. *Leisek v. Brightwood Corp.*, 278 P.3d 895, 898 (9<sup>th</sup> Cir. 2002). In the present action, Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI met their burden by showing that the said parties did not participate in the preparation and prosecution of the Labor Commission action and did not convert any monies belonging to either Defendant/Counterclaimant MESHEL or Defendant/Counterclaimant BAGELS and did so by the Affidavit of Counterdefendant JAVAHERI in support of the Motion for Summary Judgment and the deposition testimony of Defendant/Crossdefendant ROBERT LEVY.

As this Court further knows, after Plaintiff/Counterdefendant SAHARA and Counter-defendant JAVAHERI met their burden of proving that there were no genuine issues of material fact, the burden shifted to Defendant/Counterclaimant MESHEL to produce admissible evidence that a genuine issue of material fact remains for trial on Defendant/Counterclaimant MESHEL's Counter-claim. *Id.* Such admissible evidence is required under [NRC 56\(e\)](#) and must be in the form of verified documents such as verified affidavits, depositions, etc. and the non-moving party "...may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.*

This burden upon Defendant/Counterclaimant MESHEL to avoid the entry of summary judgment is not a light one and required Defendant/Counterclaimant MESHEL to come forward with evidence on each element of his "prima facie" case. *Schwartz v. United States*. 234 F.3 428, 436 (9<sup>th</sup> Cir. 2000); and *In re Oracle Corp Sec. Litig.*, 627 F.3 376, 387 (9<sup>th</sup> Cir. 2010). A party opposing summary judgment may not defeat summary judgment by mere bald assertions. *FTC v. Stefanchik*, 559 F.3d 924, 929 (9<sup>th</sup> Cir. 2009).

Rather, the party opposing summary judgment such as Defendant/Counterclaimant MESHEL must transcend the pleadings and come forward with documentation admissible in evidence in the form of "specific facts" to show the existence of a genuine issue/dispute of material fact. [FRCP 56\(c\)\(1\)\(A\)](#) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

A non-moving party such as Defendant/Counterclaimant MESHEL may not assume that the allegations and assertions in its pleadings will be taken as true. A mere pleading cannot create a genuine issue/dispute of fact. A party must come forward with "affirmative evidence" in the form of affidavits and depositions, etc., that set forth "specific" facts showing that there is a genuine issue/dispute of material fact for trial. [FRCP 56\(e\)](#) and *Farakhan v. Gregoir*, 590 F.3d 989,1001-02 (9<sup>th</sup> Cir. 2010).

The purpose of [Rule 56](#) is to enable a party who believes there is no genuine issue as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues. *Lujah v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990); and *Berger v. City of Seattle*, 569 F.3d 1029 (9<sup>th</sup> Cir. 2009). In the present action, and as set forth above, even though Plaintiff/Counterdefendant SAHARA filed a verified Complaint, Defendant/Counterclaimant MESHEL's Answer and Counterclaim were unverified and no verified pleadings exist to contest the within Motion for Summary Judgment or support the Countermotion for Summary Judgment.

Based on Defendants/Counterclaimant MESHEL's failure altogether to meet his burden of producing admissible evidence that there is a genuine issue/dispute of material fact as it relates to his Counterclaim, this Court on that ground alone has no other alternative but to grant the within Motion for Summary Judgment and dismiss Defendant/Counterclaimant MESHEL's Counterclaim. As will be set forth more fully below, this argument is also dispositive of Defendant/Counter-claimant MESHEL's Counter-motion for Summary Judgment which must be denied because it is not supported by any verified pleadings.

**B. There are no genuine issues of material fact regarding abuse of process relating to the Labor Commission action as abuse of process pertains solely to judicial proceedings and not administrative proceedings.**

In the within Motion for Summary Judgment, Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI cited *Restatement of Torts, 2d*, §682 and cases from the state of California and Washington for the proposition that a claim for abuse of process pertains only to judicial proceedings and not administrative proceedings. *Rusheen v. Cohen*, 39 Cal.Rptr.3d 516, 128 P.3d 713, 718 (2006); *Barquis v. Merchants Collection Association of Oakland, Inc.*, 101 Cal.Rptr. 745,496 P.2d 823 (1972); and *Hough v. Stockridge*, 152 Wash.App. 328, 216 P.3d 1077 (2009).

In response, Defendant/Counterclaimant MESHEL in his Opposition and Counter-motion for Summary Judgment relies on cases from Michigan and Rhodes Island and Black's Law Dictionary, Fifth Edition which are clearly distinguishable from the case at bar and involve, in most part, litigation and not administrative proceedings.

*Restatement of Torts, 2d* §682 clearly states that abuse of process pertains only to "... one who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed..." Likewise, in *Rusheen* the court therein stated that "... [T]he essence of the tort [is]... misuse of the power of the court..." *Id.* at 718.

While *Black's Law Dictionary*, Fifth Edition is not controlling authority on abuse of process, it is clear that the definition of "process" in *Black's Law Dictionary* encompasses only litigation and not administrative proceedings as "process" is defined as "proceeding in any action or prosecution" or "the use of a pleading to coerce payment" which clearly suggests litigation and not administrative proceedings.

Further, all of the cases cited by Defendant/Counterclaimant MESHEL involved litigation proceedings and not administrative proceedings except for *Hillside Associates v. Stravato*, 642 A.2d 664 (R.I. 1994) wherein the cases involved the following: *Spellens v. Spellens*, 49 Cal.2d 210, 317 P.2d 613, 625 (1957) (during the course of divorce litigation husband maliciously commenced an action to obtain property to coerce wife to drop her main action); *Harmon v. Carco Carriage Corporation*, 320 Ark. 322 (895 S.W.2d 938 (1995) (whether a lessor who filed criminal charges against a lessee for which the lessee was acquitted committed an abuse of process by pursuing subsequent civil litigation against the lessee); *Younger v. Solomon*, 38 Cal.App.3d 289, 113 Cal.Rptr. 113 (1974) (whether there was an abuse of process by the improper use of an interrogatory in litigation disclosed and published in an attempt to injure cross-complainant's reputation); *Vodrey v. Goden*, 864 F.2d 28 (4<sup>th</sup> Cir. 1988) (finding defendants liable for tort of abuse of process in bringing criminal trespass proceedings against plaintiff in attempt to secure advantage in collateral litigation); *Poduska v. Ward*, 895 F.2d 854 (1<sup>st</sup> Cir. 1990) (commencement of litigation amounted to abuse of process). 664. In the present action, there has been no proof of a subsequent wrongful act on the part of Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI after the filing of a Labor Commission action which was filed solely by Defendant/Crossdefendant ROBERT LEVY.

Further, in the present action, there were no hearings or testimony produced at hearings in the Labor Commission action and the Labor Commission action was decided on paperwork submitted to the Labor Commission.

Conversely, in *Hillside*, the court therein distinguished the said litigation from the present action wherein it held:

**...We caution, however that only quasi-judicial contested administrative determinations or proceedings that establish the legal rights, duties or privileges of a party after a hearing and that embodies sufficient attributes of judicial proceedings**

may generate causes of action for malicious prosecution or for **abuse** of process. Specifically, such administrative proceedings should include at least (1) notice to the parties in interest, (2) the presentation of evidence and/or testimony under oath, and (3) a timely recorded decision by duly appointed or elected officials.

*Id.* at 669.

Based on the fact that the Labor Commission action was an administrative and not a judicial proceeding, Defendant/Counterclaimant MESHEL cannot pursue an **abuse** of process claim against Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI and therefore any claim for **abuse** of process based on the Labor Commission action and any claim for **elder abuse** based on the Labor Commission action must be dismissed by this Honorable Court.

**C. There are no genuine issues of material fact as to the two essential elements of **abuse** of process and therefore Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI are entitled to judgment as a matter of law and any claims of **abuse** of process including **elder abuse** for the filing of the Labor Commission action.**

Defendant/Counterclaimant MESHEL's Counterclaim alleges, in part, **abuse** of process and **elder abuse** in the filing and prosecution of the Labor Commission action by Defendant/Cross-defendant ROBERT LEVY against Defendant/Counterclaimant BAGEL and/or Defendant/Counterclaimant MESHEL, *See*, Defendant/Counterclaimant MESHEL's Counterclaim, Paragraphs 33, 38, 40, 44, 52 and 56. Defendant/Counterclaimant MESHEL further alleged that Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI conspired with Defendants/Crossdefendants to commit **elder abuse** by filing the claim in the within action of alter ego against Defendant/Counterclaimant MESHEL. *See*, Defendant/Counterclaimant MESHEL's Counterclaim, Paragraph 57.

These are the only allegations against Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI as it relates to **abuse** of process and **elder abuse** except for the allegation that Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI converted monies, assets or properties of Defendant/Counter-claimant BAGELS. *Sec*, Defendant/Counterclaimant MESHEL's Counterclaim, Paragraph 60. Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI will address the issue of conversion of money, assets or property of Defendant/Counterclaimant BAGELS in the argument following the within argument.

The two (2) essential elements of **abuse** of process are (1) an ulterior purpose, and (2) a wilful act in use of process not proper in the regular conduct of proceeding. *Bull v. McCuskey*, 96 Nev. 706, 709, 615 P.2s 957 (1980). In the present action, the only admissible evidence presented in support of or in opposition to the within Motion for Summary Judgment is the deposition testimony of Defendant/Crossdefendant ROBERT LEVY who testified that there was no ulterior purpose on the part of Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI in the filing of the Labor Commission action in that the said parties never spoke to Defendant/Crossdefendant ROBERT LEVY to file the Labor Commission action. This is an undisputed fact and is the only admissible evidence on the element of "ulterior purpose" in the filing of the Labor Commission action.

Secondly, even up through the present date which is less than thirty (30) days from the scheduled date of trial Defendant/Counterclaimant MESHEL has failed to produce any admissible evidence that subsequent to the filing of the Labor Commission action Plaintiff/Counterdefendant SAHARA and/or Counterdefendant JAVAHERI did any wilful act in use of the Labor Commission action not proper in the regular conduct of that proceeding. Simply stated, there is no admissible evidence to show a wilful act on behalf of Plaintiff/Counterdefendant SAHARA and Counter-defendant JAVAHERI not proper in the conduct of the Labor Commission action proceeding. Instead, the only alleged wrongful conduct precedes the filing of the Labor Commission action on February 16, 2012.

The rambling, unverified assertions by Defendant/Counterclaimant MESHEL in his Opposition and Countermotion talks about **abuse** of process and/or **elder abuse** either prior or up to the date of the filing of the Labor Commission action. *See*, Defendant/

Counterclaimant MESHEL's Opposition and Countermotion for Summary Judgment, p. 5, Ins. 15-16 and Ins. 22-24, p. 6, Ins. 2, 9 and 19, p. 7, In. 1 and p. 8, Ins. 10-12. There are no verified or unverified pleadings filed by Defendant/Counterclaimant MESHEL in the within litigation evidencing any **abuse** of process or **elder abuse** subsequent to the filing of the Labor Commission action on February 16, 2012 and therefore the **abuse** of process based on the Labor Commission action and **elder abuse** based on the filing of the Labor Commission action must be dismissed by this Court.

Further, while Defendant/Counterclaimant MESHEL would have this Court believe that the naming of Defendant/Counterdefendant MESHEL as a party to this action based on the theory of alter ego was an **abuse** of process or **elder abuse**, no such cause of action exists and such a claim would have to be based on a claim of malicious prosecution which cannot be pursued by Defendant/Counterclaimant MESHEL without a favorable termination of this action. *Dutt v. Kremp*, 11 Nev. 367 894 P.2d 354.

Clearly, Plaintiff/Counterdefendant SAHARA had every right to amend its Complaint pursuant to **NRCP 15** to name Defendant/Counterclaimant MESHEL as an additional party especially in light of Defendant/Crossdefendant ROBERT LEVY's affirmative defense in his Answer alleging that Defendant/Counterclaimant MESHEL was the alter ego of Defendant/Counter-claimant BAGELS. Therefore, it is now most cavalier of Defendant/Counterclaimant MESHEL to suggest that this was a civil case for summary adjudication against Defendant/Counterclaimant BAGELS when it is the understanding of Plaintiff/Counterdefendant SAHARA and Counter-defendant JAVAHERI that Defendant/Counterclaimant BAGELS is now defunct and there is strong evidence to establish the alter ego liability of Defendant/Counterclaimant MESHEL.

**D. Defendant/Counterclaimant MESHEL has no standing to allege **elder abuse** for alleged conversion of assets owned by Defendant/Counterclaimant BAGELS and therefore Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI are entitled to judgment on the said claim as a matter of law.**

As this Court will note, while the within argument was part of the within Motion for Summary Judgment, Defendant/Counterclaimant MESHEL did not address the issue either factually or legally and his failure to file any such written opposition may be considered as an admission that the Motion for Summary Judgment on this issue is meritorious and a consent to granting the same.

As set forth above, Defendant/Counterclaimant MESHEL in his Counterclaim alleged that he suffered damages as a result of the alleged conversion of monies, assets and property of Defendant/Counterclaimant BAGELS. See, Defendant/Counterclaimant MESHEL's Counterclaim, Paragraph 60. As set forth in the within Motion for Summary Judgment, the obvious fallacy of this claim is that the alleged converted assets were owned by Defendant/Counterclaimant BAGELS and not Defendant/Counterclaimant MESHEL, that it is only Defendant/Counterclaimant BAGELS who has the right to recover such assets and that no such claim for damages was made by Defendant/Counterclaimant BAGELS against Plaintiff/Counterdefendant SAHARA and/or Counter-defendant JAVAHERI in its Counterclaims, Crossclaims and Third-Party Complaints.

Under these circumstances, the said claim for conversion of the assets can be made only by the "real party in interest" - i.e., Defendant/Counterclaimant BAGELS — and because Defendant/Counterclaimant BAGELS was given an opportunity to make such a claim and failed to do so, the said claim by Defendant/Counter claimant MESHEL should be dismissed. **NRCP 17**; *Painter v. Anderson*, 96 Nev. 941, 620 P.2d 1254 (1980); and *Szilagyi v. Testa*, 99 Nev. 834, 673 P.2d 495 (1983).

**There are no genuine issues of material fact on the issues of **abuse** of process and **elder abuse** against Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI and therefore any claims of conspiracy to commit **abuse** of process and conspiracy to commit **elder abuse** must be dismissed by the Court.**

For all of the above reasons, there are no genuine issues of material fact as to the claims for **abuse** of process and **elder abuse** based on the Labor Commission action, the filing of the Amended Complaint and the alleged conversion of assets owned by

Defendant/Counterclaimant BAGELS as opposed to Defendant/Counterclaimant MESHEL. Therefore, it is axiomatic that if no wrong was committed based on claims of **abuse** of process and **elder abuse** there can be no rightful claims for conspiracy to commit **abuse** of process and conspiracy to commit **elder abuse**.

A civil conspiracy in and of itself does not give rise to a cause of action unless a civil wrong has been committed resulting in damage. *Doctors Company v. Superior Court*, 49 Cal.3d 39, 260 Cal. Rptr. 183 (1983); *Estate of Hernandez v. Flavia*, 187 Ariz. 506, 930 P.2d 1309 (1987); and *Okun v. Superior Court of Los Angeles County*, 175 Cal. Rptr. 157, 6229 P.2d 1369 (1981).

Based on the fact that Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI are entitled to judgment as a matter of law on the issues of **abuse** of process and **elder abuse**, this Court has no other alternative but to dismiss the additional claims for relief of conspiracy to commit **abuse** of process and conspiracy to commit **elder abuse**.

**F. Defendant/Counterclaimant MESHEL's Countermotion for Summary Judgment is not supported by verified admissible evidence and should therefore not be considered by the Court.**

As set forth above, [NRCPC 56\(c\)](#) requires the filing of verified and admissible evidence to support a motion for summary judgment. Defendant/Counterclaimant MESHEL's Countermotion for Summary Judgment is not supported by verified admissible evidence and therefore should not be considered by the Court. Further, the unverified assertions of Defendant/Counterclaimant MESHEL in his Countermotion for Summary Judgment are refuted by the sworn testimony of Defendant/Crossdefendant ROBERT LEVY and therefore there are genuine issues of material fact which preclude granting the Countermotion for Summary Judgment. *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 662 P.2d 610 (1983).

Defendant/Counterclaimant MESHEL's failure to produce admissible evidence in support of his Countermotion for Summary Judgment is grounds alone to deny the Countermotion for Summary Judgment. *Henry Prods., Inc. v. Tarmu*, 114 Nev. 1017, 967 P.2d 444 (1998). Further, the unverified assertions of Defendant/Counterclaimant MESHEL are disputed by the sworn testimony of Defendant/Crossdefendant ROBERT LEVY.

Defendant/Counterclaimant MESHEL makes the unverified assertion that he had no access to the cash register and computer of Defendant/Counterclaimant BAGELS and that he was not paid any money out of the business and none of his personal expenses were paid out of the business. In contrast, Defendant/Crossdefendant ROBERT LEVY testified during his deposition otherwise. See, excerpts of Volume 1 of deposition of Defendant/Crossdefendant ROBERT LEVY attached hereto as Exhibit "1," p. 31, Ins. 5-16; p. 43, Ins. 19-25; p. 44, Ins. 1-4; and Volume 2, 3 134, Ins. 7-17; p. 135, Ins. 18-22; p. 136, In. 25; and p. 137, Ins. 1-4.

Defendant/Counterclaimant MESHEL further makes the unverified assertion that the business of Defendant/Counterclaimant BAGELS was not undercapitalized which is directly refuted by the sworn testimony of Defendant/Crossdefendant ROBERT LEVY during his deposition. See, excerpts of Volume 1 of deposition of Defendant/Crossdefendant ROBERT LEVY attached hereto as Exhibit "1," p. 136, Ins. 2-8. Defendant/Counterclaimant MESHEL makes the unverified assertion that he did not have access to any of the funds of Defendant/Counterclaimant BAGELS and the said assertion was refuted by Defendant/Crossdefendant ROBERT LEVY at the time of his deposition. See, excerpts of Volume 1 of deposition of Defendant/Crossdefendant ROBERT LEVY attached hereto as Exhibit "1," p. 31, Ins. 5-16; p. 43, Ins. 19-25; p. 44, Ins. 1-4.

Defendant/Counterclaimant MESHEL makes the unverified assertion that he did not have access to the business of Defendant/Counterclaimant BAGELS and this assertion was also refuted by the sworn testimony of Defendant/Crossdefendant ROBERT LEVY. Further, Defendant/Counter-claimant MESHEL makes the unverified assertion that he maintained the corporate formalities of Defendant/Counterdefendant BAGELS which was also refuted by the sworn testimony of Defendant/Crossdefendant ROBERT LEVY. See, excerpts of Volume 1 deposition of Defendant/Crossdefendant ROBERT LEVY attached hereto as Exhibit "1," p. 50, Ins. 22-24 and p. 51, Ins. 13-24.



Further, Defendant/Counterclaimant MESHEL makes the unverified assertion that he did not treat the corporate assets of Defendant/Counterclaimant BAGELS as his own assets which once again was refuted by the sworn testimony of Defendant/Crossdefendant ROBERT LEVY. *See*, excerpts of Volume 1 of deposition of Defendant/Crossdefendant ROBERT LEVY, p. 52, Ins. 1-21; p. 53, Ins. 5-7; and Volume 2, p. 134, Ins. 23-25 and p. 135, Ins. 1-4.

As this Court well knows, summary judgment is inappropriate when there are genuine issues of material fact and because the sworn testimony of Defendant/Crossdefendant ROBERT LEVY is in direct contrast and refutation of Defendant/Counterclaimant MESHEL's unverified assertions, this Court has no other alternative but to deny Defendant/Counterclaimant MESHEL's Countermotion for Summary Judgment.

**G. Plaintiff/Counterdefendant MESHEL's so-called Countermotion for Summary Judgment is not a countermotion and should therefore not even be considered by the Court.**

As set forth above, on February 8, 2013 legal counsel for the parties to this action conducted a Supplemental Early Case Conference and as a result of that Conference filed a Supplemental Joint Case Conference Report agreeing that discovery would be completed in this matter no later than April 22, 2013 and all dispositive motions had to be filed no later than April 22, 2013.

Instead, Defendant/Counterclaimant MESHEL waited until eleven (11) days prior to Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI's hearing on their Motions for Summary Judgment to file his Countermotion for Summary Judgment and waited an additional three (3) days to serve the same on Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI legal counsel, only seven (7) days prior to the hearing on May 9, 2013.

The so-called Countermotion for Summary Judgment is not a countermotion as it is not related to the same subject matter as Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI's Motion for Summary Judgment. Plaintiff/Counterdefendant SAHARA and Counter-defendant JAVAHERI's Motion for Summary Judgment pertains only to Defendant/Counter-claimant MESHEL's Counterclaim and the claims contained therein styled **abuse** of process and **elder abuse**. Accordingly, Defendant/Counterclaimant MESHEL's so-called Countermotion for Summary Judgment is not a countermotion as **EDCR 2.20(f)** clearly defines a countermotion as a motion related to the same subject matter as the motion before the court. Under these circumstances, Defendant/Counterclaimant MESHEL was required to file his dispositive motion no later than April 22, 2013 and his failure to do so means that the Court should not even consider Defendant/Counter-claimant MESHEL's so-called Countermotion for Summary Judgment.

Instead of Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI having to file an opposition to a late filed dispositive motion, Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI should be preparing for trial and should therefore be compensated for having to respond to what is clearly not a countermotion.

It can be further argued that the Opposition to the within Motion for Summary Judgment should not be considered by the Court as the Opposition was not served on Plaintiff/Counter-claimant SAHARA and Counterdefendant JAVAHERI's legal counsel until May 2, 2013 thereby requiring Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI to expedite the filing of the Opposition so that it could be considered by this Court.

**H. This Court should award Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI attorney's fees necessitated in responding to Defendant/Counterclaimant MESHEL's Countermotion for Summary Judgment.**

As Defendant/Counterclaimant MESHEL, who is a retired attorney, and his present legal counsel should know, **NRCP 11** recognizes that the signing of pleadings is a certification by a party and his attorney that to the best of their knowledge claims and other legal contentions are warranted by existing law. **NRCP 11(b)(2)**.

Under the facts of this case Defendant/Counterclaimant MESHEL and his legal counsel knew or should have known that the Counter-motion for Summary Judgment filed by Defendant/Counter-claimant MESHEL had to be filed no later than April 22, 2013 and not seven (7) days thereafter so as to avoid the burden placed on Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI and the Court as a result of the filing of the so-called Counter-motion for Summary Judgment.

Therefore, Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI should be awarded attorney's fees necessitated by the filing of a response to the Counter-motion for Summary Judgment especially when Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI should be preparing for trial and not responding to a frivolous and unwarranted Counter-motion for Summary Judgment.

#### IV.

#### CONCLUSION

Based on the foregoing arguments, Plaintiff/Counterdefendant SAHARA and Counter-defendant JAVAHERI's Motion for Summary Judgment should be granted in its entirety and Defendant/Counterclaimant's Counterclaim be dismissed with prejudice. Further, because Plaintiff/Counterdefendant SAHARA and Counterdefendant JAVAHERI were compelled to respond to the Counter-motion for Summary Judgment filed by Defendant/Counterclaimant MESHEL which should never have been filed they should also be awarded liberal attorney's fees for having to do the same.

DATED this 6<sup>th</sup> day of May, 2013.

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By

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